

Chapter 2

The reform agenda of the Council of Australian Governments

2.1 In 2008, Council of Australian Governments (COAG) launched the Directors' Liability Reform Project as part of its *National Partnership Agreement to Deliver a Seamless National Economy*. The project followed a series of reviews into personal liability on directors for corporate fault. This chapter provides a chronological overview of the respective reviews and key developments in relation to directors' liability. It also details the COAG reform agenda process and the timeline for directors' liability reform.

Senate Standing Committee on Legal and Constitutional Affairs—1989

2.2 In its November 1989 report titled *Company Directors' Duties*, the Senate Standing Committee on Legal and Constitutional Affairs detailed a trend towards imposing personal liability on directors for corporate fault.¹ In evidence to the committee, Professor Brent Fisse, then professor of law at Sydney University, noted that the present law provides 'for both individual and corporate liability but makes no attempt to achieve a well-balanced mix; the balance in fact achieved depends on the vicissitudes of prosecutorial discretion'.² The committee recommended further consideration of an appropriate balance of individual and corporate liability for corporate misconduct.³

Corporate Law Reform Program—1997

2.3 In 1997, a Corporate Law Economic Reform Program paper recognised a 'growing trend for legislatures to impose strict personal liability upon directors of corporations for breaches of statutory obligations by the corporation'.⁴ The paper noted the potential ramifications of this trend:

...if directors risk personal liability for breaches incurred by the corporation, irrespective of the directors' culpability, they may be

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- 1 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, p. 178.
 - 2 Professor Fisse cited in Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, pp 178–179.
 - 3 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties*, November 1989, recommendation 21(i), p. xv.
 - 4 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, p. 53, archive.treasury.gov.au/documents/283/PDF/full.pdf (accessed 10 October 2012).

increasingly reluctant to serve on boards or may become overly concerned with compliance issues and processes rather than wealth creation. Certainly, it would be an unfair and unnecessary burden on directors if they can potentially be made responsible for breaches by their corporation, even where they have taken all reasonable steps to prevent such breaches.⁵

2.4 The review body recommended consideration of the appropriateness of developing a standard or model *due diligence* defence for directors in cases where they are effectively subject to strict liability under statutes other than the Corporations Law.⁶

Australian Law Reform Commission—2002

2.5 In its 2002 report *Principled Regulation*, the Australian Law Reform Commission (ALRC) found that there had been an increasing trend towards provisions that 'deem directors and other senior corporate officers personally liable for a contravention where the body corporate has contravened the legislation and may also be held liable for such a contravention'. The ALRC concluded that:

This represents a departure from accessorial liability as proof of knowledge of or involvement *in the contravention* is not an essential element; generally, involvement *in the management* of the body corporate will be sufficient.⁷

2.6 The ALRC noted in this regard that the effect of section 8Y of the *Taxation Administration Act 1953* is to 'reverse the onus of proof' as an officer may escape liability if he or she can prove that he or she was not 'directly or indirectly knowingly concerned in, or party to' the relevant act or omission and did not 'aid, abet, counsel or procure the particular act or omission'.

2.7 The ALRC made a number of recommendations of which Recommendations 8-1, 8-2 and 8-4 were later considered by the 2008 Corporations and Markets Advisory Committee (CAMAC) as an integral part of a model provision it recommended. These three ALRC recommendations are as follows:

Recommendation 8-1—The Regulatory Contraventions Statute should provide that any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should define the individual who

5 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, pp 53–54, archive.treasury.gov.au/documents/283/PDF/full.pdf (accessed 10 October 2012).

6 Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, pp. 53-54, Corporate Law Economic Reform Program, *Directors' Duties and Corporate Governance*, Proposals for Reform: Paper No. 3, 1997, p. 54.

7 Australian Law Reform Commission, *Principled Regulation*, 2002, pp 316–317.

may be liable as an individual (by whatever name called and whether or not the individual is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation and includes an individual:

- (a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (b) who has the capacity to affect significantly the corporation's financial standing; or
- (c) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the individual in the proper performance of functions attaching to the individual's professional capacity or his or her business relationship with the directors or the corporation).⁸

Recommendation 8-2—The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include a fault element that the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.⁹

Recommendation 8-4—The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, any provision in legislation that deems an individual to be personally liable for the contravening conduct of a corporation should include as a threshold test for liability that:

- (a) the individual failed to take all reasonable steps to prevent the contravening conduct; and
- (d) the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct.¹⁰

Taskforce on Reducing the Regulatory Burdens on Business—January 2006

2.8 In its January 2006 report, the Taskforce on Reducing the Regulatory Burdens on Business highlighted the inconsistencies across jurisdictions in provisions imposing personal liability on company directors and officers for corporate fault. It recommended that COAG initiate reviews to identify reforms to achieve 'more

8 Australian Law Reform Commission, *Principled Regulation*, 2002, pp 324–325.

9 Australian Law Reform Commission, *Principled Regulation*, 2002, p. 329.

10 Australian Law Reform Commission, *Principled Regulation*, 2002, p. 335.

nationally consistent regulation of personal liability for company directors and officers'.¹¹

2.9 The Taskforce received evidence from companies that the personal liability attached to a number of directors' duties had led to a 'very conservative approach by some directors to the detriment of business development'.¹² In recommending that the Australian Government review the penalties for breaches of directors' duties, the Taskforce commented that:

While the Taskforce supports the deterrent value of penalties for breaches of regulatory obligations, it is important that the use of penalties strikes an appropriate balance between promoting good behaviour and ensuring business is willing to take sensible commercial risks. A risk-averse approach by business may limit their willingness to adopt innovative approaches in developing products and meeting new challenges. It would also be reflected in an overly cautious approach to compliance such as in product disclosure statements. This would undermine the overall efficiency and dynamism of the economy.¹³

Corporations and Markets Advisory Committee—September 2006

2.10 In September 2006, CAMAC reviewed the circumstances in which directors and other individuals involved in managing a company can incur personal criminal liability in consequence of misconduct by the company. It 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; and
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.¹⁴

2.11 CAMAC raised concerns regarding legislation which in effect deems an individual to be criminally responsible for a breach by a company of a statutory requirement. It emphasised the need to distinguish an individual's criminal liability for

11 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, Recommendation 5.28, p. 107, <http://www.regulationtaskforce.gov.au/> (accessed 10 October 2012).

12 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, p. 90.

13 Taskforce on Reducing Regulatory Burdens on Business, *Rethinking Regulation*, January 2006, p. 90.

14 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 1, www.camac.gov.au/.../Personal_Liability_for_Corporate_Fault.pdf (accessed 10 October 2012).

his/her own misconduct in a corporate context from an individual's criminal liability in consequence of misconduct by a company.

2.12 In raising concerns with the latter context, otherwise termed 'derivative liability', CAMAC noted that the 'usual pattern in these statutes is to hold the individual criminally liable in consequence of the corporate misconduct unless he or she can prove one or more of the defences set out in the legislation'. Derivative liability arises without the need to establish that 'these persons either breached the law through their own misconduct or were accessories to the misconduct of their corporation'.¹⁵ The CAMAC report highlighted concerns with:

...the practice in some statutes of treating directors or other corporate officers as personally 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 law.¹⁶

2.13 CAMAC held that as a general principle, 'individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct, that is, where they were accessories'.¹⁷

2.14 In highlighting the lack of legislative consistency across the Commonwealth, states and territories, CAMAC stated that the differences in legislative approach and the consequential lack of harmony result in a situation whereby:

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.¹⁸

2.15 CAMAC recommended a more consistent, principled approach to personal liability across Commonwealth, state and territory jurisdictions. It called for a more standardised approach and considered three models to that end. Recognising that a legislature may see the need to impose on relevant corporate personnel 'a more positive duty of care in regard to corporate conduct that may be derived from ordinary principles of accessory liability', CAMAC identified three criteria for assessing the

15 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, Discussion Paper, May 2005, p. 1.

16 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 8.

17 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 6. Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 9.

18 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 6.

elements of any extended personal liability provision—practicality and fairness, suitability and enforceability.¹⁹ The criteria were applied in relation to the following three possible model provisions:

1. A model provision based on the ALRC's 2002 report

2.16 This model combines the ALRC recommendations (8-1, 8-2 and 8-4 listed above) in a provision similar to that in the *Environment Protection and Biodiversity Conservation Act 1999* and *Hazardous Waste (Regulation of Exports and Imports) Act 1989* that impose personal liability for corporate fault.

2. A model provision reflecting the predominant pattern in current state and territory provisions

2.17 This model was rejected by CAMAC on the grounds that it lacks any personal fault element. CAMAC held that this model places a 'considerable burden on any defendant, who has to prove a defence on the balance of probability'.²⁰

The model states that where a corporation contravenes relevant legislation, 'any director or other person who is concerned, or takes part, in the management of the corporation is also liable unless the person proves that he or she:

- was not in a position to influence the relevant conduct, or (if the person cannot prove this defence) that he or she
- exercised all due diligence to prevent the relevant conduct, or
- took all reasonable steps to prevent the relevant conduct.²¹

*3. A model provision based on section 144 of the Victorian Occupational Health and Safety Act 2004*²²

2.18 While CAMAC saw merit in the provision for setting out factors for a court to take into account in determining a person's guilt in consequence of corporate misconduct, it considered the provision 'too open-ended in the way it ties criminal liability to failure to take reasonable care'.²³

19 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, pp 43–44.

20 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 56.

21 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 54.

22 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 44.

23 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 58.

Where an offence committed by a body corporate is attributable to an officer of the body corporate failing to take reasonable care, that officer is also guilty of an offence.

In determining whether an officer of a body corporate is guilty of an offence, regard must be had to:

- what the officer knew about the matter concerned, and
- the extent of the officer's ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned, and
- whether the contravention by the body corporate is also attributable to an act or omission of any other person, and
- any other relevant matter.

'Officer' has the same meaning as in s 9 of the Corporations Act.²⁴

CAMAC recommended model

Where a corporation contravenes relevant provisions, the prosecution must prove the following physical and fault elements in any action against an individual based on that individual's position in the company in relation to that contravening conduct:

- the individual, by whatever name called, was a director or other officer of the corporation or otherwise took part, or was otherwise concerned, in the management of the corporation, and
- the individual was in a position to influence the conduct of the body corporate in relation to the contravening conduct, and
- the individual knew that, or was reckless or negligent as to whether, the contravening conduct would occur.

It is a defence if the individual took all reasonable steps to prevent the contravening conduct. The individual has an evidential burden to raise that defence, which the prosecution would then have to negate beyond reasonable doubt.²⁵

Treasury discussion paper (2007)

2.19 In March 2007, Treasury issued a discussion paper titled the *Review of Sanctions in Corporate Law*. This paper formed the basis for the review of civil and criminal sanctions in the *Corporations Act 2001* and the *Australian Securities and*

24 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 56.

25 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p. 53.

Investments Commission Act 2001 emanating from the Regulation Taskforce recommendation to review penalties for breaches of directors' duties.²⁶

Survey of directors–May 2008

2.20 Treasury, in conjunction with the Australian Institute of Company Directors (AICD), conducted a survey of 600 directors of S&P/ASX-200 companies to consider the impact of current laws on decision making by directors. The survey provided a sample of the views of Australia's estimated 2.1 million directors.²⁷ The survey revealed that director liability, and personal liability in particular, had a 'negative affect [sic] on board recruitment, retention and decision-making'. Further, 78 per cent of those surveyed believed that the risk of personal liability had caused them, or the board on which they sat, 'to occasionally or frequently take an overly cautious approach to business decision-making'. Of them, 64 per cent suggested that such an approach had 'inhibited an optimal business decision to a medium to high degree'.²⁸

COAG Directors' Liability reform project–November 2008

2.21 On 29 November 2008, COAG agreed to progress reform of personal criminal liability for corporate fault across Australian law.²⁹ The matter of directors' personal criminal liability was considered a serious economic concern to the extent that it was included as a reform stream as part of COAG's seamless national economy reforms aimed at promoting competition, boosting productivity, improving labour mobility, and reducing business compliance costs by removing unnecessary or inconsistent regulation.

2.22 Indeed, a survey of its company director members conducted in November 2010 by the AICD found that:

26 Treasury, *Review of Sanctions in Corporate Law*, Commonwealth of Australia, 2007, p. vii.

27 Australian Institute of Company Directors, 'Reforms still stuck at the starting line', *The Boardroom Report*, Vol. 10, Issue 2, 8 February 2012, p. 1, <http://www.google.com.au/url?sa=t&rct=j&q=coag%20directors%20liability%20reform%20700%20&source=web&cd=6&ved=0CEAQFjAF&url=http%3A%2F%2Fwww.companydirectors.com.au%2F~%2Fmedia%2F8F6EE3E75B254151BFECB494E4AE1BAE.ashx&ei=SE57UISHBq-XiQfri4DIDw&usg=AFQjCNEpl8fLLLvurDdyp55dLd17V-SjCA> (accessed 15 October 2012).

28 Australian Institute of Company Directors, 'AICD welcomes findings on director liability', *Company Director Magazine*, 1 February 2009, <http://www.companydirectors.com.au/Director-Resource-Centre/Publications/Company-Director-magazine/2000-to-2009-editions/2009/February/Inside-AICD-Director-liability-Feb-09> (accessed 15 October 2012).

29 Laws relating to workplace health and safety and environmental protection were excluded on the basis that they were subject to separate reform processes at the time. Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012, para 1.3.

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- 65 per cent said they felt the risk of personal liability had caused them or a board on which they sit to take an overly cautious approach to business decision-making frequently or occasionally;
 - more than 90 per cent of respondents said that the personal liability of directors had an impact on optimal business decision-making or outcomes. Of these respondents, 42.4 per cent noted that this impact was marginal while 6.7 per cent viewed the impact as severe; and
 - more than 90 per cent of respondents were moderately to seriously concerned about the lost time and opportunity costs for companies defending actions brought as a result of automatic personal liability for directors, and corporate legal expenses that would be incurred.³⁰

2.23 The COAG reform initiative commits all jurisdictions to establishing a nationally consistent and principled approach to the imposition of personal liability on directors and other corporate officers for corporate fraud. As part of the reform agenda, COAG endorsed a three-step approach to reforming derivative liability in Australia:

- (a) COAG endorsed principles to guide jurisdictions when imposing personal liability for corporate fault. The principles concern personal liability provisions that hold directors and other corporate officers criminally liable because an offence has been committed by the corporation. Guidelines were also developed to provide greater clarity and consistency in the way the COAG principles would apply.
- (b) All jurisdictions would undertake an audit of their legislation against these principles and recommend amendments to bring them into line with the principles. The outcomes of the respective audits by Commonwealth, states and territories were collectively reviewed to ensure that the principles had been applied appropriately.
- (c) Jurisdictions would commit to implementing the audit outcomes by introducing legislation to make any necessary amendments to their laws by the end of 2012, and to apply the COAG principles when drafting future legislation.³¹ COAG had set December 2012 as the deadline by which a legislative plan to implement agreed reforms and legislation would be introduced.³²

30 Australian Institute of Company Directors, *Impact of Legislation on Directors*, November 2010, p. 4, <http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2010/Liability-laws-damaging-the-economy-director-survey-reveals> (accessed 10 October 2012).

31 The Hon. Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Second Reading Speech, *House of Representatives Hansard*, 19 September 2012, p. 19.

32 COAG Reform Council, *Seamless National Economy Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 180.

COAG principles and guidelines

2.24 The six principles for the imposition of personal liability for corporate fault were endorsed by the Ministerial Council for Corporations (MINCO) in November 2009 and by COAG a month later. The Commonwealth, states and territories agreed to apply the principles to existing legislation as well as to new legislation. With over 700 different legislative provisions relating to personal criminal liability of directors and corporate officers across the Commonwealth, states and territories, the Assistant Treasurer and Minister Assisting for Deregulation, the Hon. David Bradbury MP stated that application of the principles is expected to:

- reduce, using five of the jurisdictions implementing this reform as an example, the number of underlying offences from 6,700 to 2,400—a reduction of over 60 per cent; and
- [almost] halve the number of Acts which include directors' liability provisions, from 287 to 148.³³

COAG principles

2.25 The six COAG principles are as follows:

- (a) Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
- (b) Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
- (c) A 'designated officer' approach to liability is not suitable for general application.
- (d) The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
 - 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);
 - liability of the corporation is not likely on its own to sufficiently promote compliance; and
 - it is reasonable in all the circumstances for the director to be liable having regard to factors including:
 - that the obligation on the corporation, and in turn the director, is clear;

33 The Hon. David Bradbury MP, Assistant Treasurer and Minister Assisting for Deregulation, 'Benefits and outcomes of the seamless national economic agenda', Regulatory reform conference, 27 September 2012, <http://assistant.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2012/009.htm&pageID=005&min=djba&Year=&DocType=> (accessed 15 October 2012).

- that the director has the capacity to influence the conduct of the corporation in relation to the offending; and
 - that there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.
- (e) Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:
- have encouraged or assisted in the commission of the offence; or
 - have been negligent or reckless in relation to the corporation's offending.
- (f) 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.

2.26 The Explanatory Memorandum (EM) notes that the reform project aims to 'harmonise the imposition of personal criminal liability for corporate fraud across Australian jurisdiction'. In its 2009-10 performance report, the COAG Reform Council highlighted the following 'significant' risk to the achievement of the output of the reform:

based on a preliminary review of the jurisdiction audits that have been finalised, the council is concerned that the directors' liability principles have been applied in a way that raises significant risks to the achievement of the principles-based approach of this reform.³⁴

2.27 Noting that the reform was being pursued to provide greater certainty for companies, their corporate officers and the public as to when a corporate officer may be personally criminally liable because of a company's misconduct, the COAG Reform Council emphasised that the application of a consistent set of principles for the imposition of the liability by the Commonwealth, states and territories should provide more certainty for companies. However, its initial review of the audits indicated that:

jurisdictions have broadly interpreted the threshold principle of 'compelling public policy reasons' to justify the retention of a significant number of different provisions, based on specific jurisdictional priorities and existing legislative schemes. In addition, it seems that, in some instances, this 'public policy' threshold is being considered as the preeminent principle, with less regard to whether—once this threshold has been met—the form of liability imposed is consistent with the other principles.³⁵

34 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10*, p. 203, <http://www.coagreformcouncil.gov.au/reports/competition.cfm> (accessed 10 October 2012).

35 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009-10*, p. 220.

2.28 In conclusion, the COAG Reform Council stated that it considers:

that it will not be possible to achieve a *nationally consistent* approach to directors' liability if the principles are applied in varying ways by each jurisdiction. It will not be possible to achieve a *principles-based approach* to directors' liability if there are instances where all of the principles are not applied in considering the retention, amendment or repeal of the relevant legislative provisions.³⁶

Centro case (June 2011)

2.29 On 27 June 2011, the final decision in the Centro case provided new impetus for change to directors' liabilities.³⁷ In the case, the Federal Court found that six non-executive directors of the Centro Group were in breach of their statutory duty of care and diligence under the *Corporations Act 2001*. The case concerned the role and responsibilities of directors in relation to financial reporting. It found that Centro's financial statements failed to properly classify certain interest bearing liabilities as \$1.5 billion of current (short-term) liabilities were classified as non-current (long-term) liabilities and guarantees of US\$1.75 billion of an associate's short-term debt were not disclosed. Similarly, the 2007 accounts of Centro Real Estate failed to disclose \$500 million of short-term liabilities that had been classified as non-current.³⁸

2.30 Justice Middleton found that in approving the financial statements, each director failed to take all responsible steps required of them to exercise the care and diligence the law requires of them.³⁹

COAG guidelines

2.31 COAG engaged Corrs Chambers Westgarth to examine the audits conducted by all jurisdictions to ascertain where they accurately applied the COAG principles. In August 2011, Corrs Chambers Westgarth published an independent analysis of the application of COAG's principles by each jurisdiction and found that, among other things, many jurisdictions 'overwhelmingly relied on the Public Policy principle to justify the retention of the provisions reviewed' but that their audits did not explain the

36 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009–10*, p. 220.

37 ASIC v Healey & Ors [2011] FCA 717 (the Centro case)

38 Bryan Frith, 'Centro ruling reminds directors where their responsibilities lie', *The Australian*, 29 June 2011, <http://www.theaustralian.com.au/business/opinion/centro-ruling-reminds-directors-where-their-responsibilities-lie/story-e6frg9kx-1226083776840> (accessed 15 October 2012).

39 Australian Institute of Company Directors, 'Centro Case Summary. ASIC v Healey & Ors [2011] FCA 717', 27 June 2011; Grant Thornton, 'The Centro case: Where to from here?', www.granthornton.com.au/Publications/Newsletters/fr_1107.asp (accessed 14 October 2012); Group of 100, *The Centro Experience - A wake up call for Directors*, 2012, www.group100.com.au/.../g100-centro-experience-2012.pdf (accessed 15 October 2012).

public policy reasons relied upon or where they did provide reasons, establish a 'compelling or convincing basis for retaining the provision'.⁴⁰ The COAG Reform Council acknowledged the findings of the Corrs Chambers Westgarth report and recommended that COAG utilise the findings to advance the reform process.⁴¹

2.32 At the request of COAG, its Business Regulation and Competition Working Group (BRCWG) developed a set of supplementary guidelines to assist jurisdictions in auditing their legislation against the COAG principles. On 25 July 2012, COAG agreed to apply these guidelines when drafting future legislation.

2.33 In August 2011, following concerns raised by the COAG Reform Council in its performance reports, the Minister Assisting on Deregulation, Senator the Hon. Nick Sherry announced that all states and territories would be required to re-audit their laws against the COAG principles and the specific guidelines. Thereafter, they would have to amend their laws.⁴² New milestones and timeframes were introduced. COAG set the final milestone in the implementation plan to require jurisdictions to develop a 'legislative plan to implement agreed reforms and introduce legislation by December 2012'.⁴³ However, of the milestone, the Minister stated that:

The final milestone in the Seamless National Economy Implementation Plan will be to introduce legislation by December next year and I'm sure the States and Territories acknowledge that business expects them to have legislation passed by this time.⁴⁴

2.34 Four months later, the COAG Reform Council reiterated its concern that the intended reform may not be achieved:

The council remains concerned that the intended output of this reform—a nationally consistent and principled approach to the imposition of personal

40 Corrs Chambers Westgarth, *Analysis of the application of COAG's directors' liability principles*, August 2011, p. 37.

41 COAG Reform Council, *Seamless National Economy: Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 183, <http://www.coagreformcouncil.gov.au/reports/competition.cfm> (accessed 15 October 2012).

42 Senator the Hon. Nick Sherry and the Hon. David Bradbury MP, 'New Way Forward for Directors' Liability Reforms', *Media Release*, 19 August 2011, <http://archive.innovation.gov.au/ministersarchive2011/sherry/MediaReleases/Pages/NEWWAYFORWARDFORDIRECTORSLIABILITYREFORMS.html> (accessed 12 October 2012).

43 Paul McClintock AO, Chairman, COAG Reform Council, 'COAG's reform agenda and the Seamless National Economy', Address at AICD, 2 April 2012, <http://www.coagreformcouncil.gov.au/media/index.cfm#speeches> (accessed 15 October 2012).

44 Senator the Hon. Nick Sherry and the Hon. David Bradbury MP, 'New Way Forward for Directors' Liability Reforms', *Media Release*, 19 August 2011.

criminal liability of directors or other corporate officers for corporate fault—is at risk of not being achieved.⁴⁵

BRCWG collective review of audit reports—March 2012

2.35 In March 2012, a sub-committee of the BRCWG was formed which initiated a collective review of individual audit reports to ensure that all jurisdictions had applied the COAG principles and guidelines consistently. In June 2012, the final outcomes of the audits and collective review were reported to the BRCWG. The Treasury, which was part of the discussions for the Commonwealth, noted that the collective review had identified a number of areas where consensus between jurisdictions was required:

For example, the Principles contemplate that personal criminal liability for corporate fault may be appropriate in circumstances where an offence has the potential to cause serious public harm. A general consensus was reached as to the types of serious public harms for which the imposition of personal liability was justified. This consensus ensures that, after all jurisdictions amend their legislation to bring them into alignment with the Principles and Guidelines, personal criminal liability for corporate fault will only be imposed where an offence risks a serious public harm occurring, and will be imposed consistently across jurisdictions.⁴⁶

2.36 Similarly, consensus was reached in relation to the provision that a defendant would only be subjected to a burden of proof where justified under the COAG principles and guidelines. Furthermore, where there were areas of thematic overlap across jurisdictions such as laws that provide protection for vulnerable persons, 'subsequent discussions between jurisdictions ensured that the material differences between the ways in which jurisdictions had approached the auditing process or had interpreted the Principles or Guidelines were largely resolved'.⁴⁷ Nevertheless, Treasury noted that:

This does not mean that provisions that impose personal criminal liability for corporate fault will necessarily be identical across jurisdictions. Variations in the drafting of provisions that impose such liability may remain both within and between jurisdictions. However, the passage of this Bill, in conjunction with the passage of similar Bills in the States and Territories pursuant to the reform of directors' liability under the SNE NP, should ensure that across Australia, personal criminal liability for corporate fault is imposed in accordance with the COAG Principles and Guidelines and in a manner consistent with the principles of good corporate governance and criminal law.⁴⁸

45 COAG Reform Council, *Seamless National Economy: Report on Performance*, Report to the Council of Australian Governments, 23 December 2011, p. 186.

46 Department of Treasury, *Submission 4*, p. 4.

47 Department of Treasury, *Submission 4*, p. 4.

48 Department of Treasury, *Submission 4*, p. 4.

Implementation across the states and territories

2.37 In June 2012, all jurisdictions 'indicated that they will seek to introduce an omnibus Bill to implement all or most of the audit outcomes by December 2012'.⁴⁹

2.38 According to the COAG Reform Council, there are over 700 state and territory laws imposing personal liability on the 2.1 million Australian company directors.⁵⁰ In 2010, the AICD reported that Western Australia had the highest number of laws imposing personal liability on directors with 139 followed by NSW with 134 and Queensland with 106.⁵¹

2.39 On 31 July 2012, the NSW government released a Memorandum formally adopting the COAG guidelines as NSW policy and announced that it would implement the outcomes of its audit of existing NSW Acts against the guidelines by the end of 2012.⁵² The proposed amendments add to reforms already implemented by the NSW government in 2001 in the *Miscellaneous Acts Amendment (Directors' Liability) Act 2011*. The reforms are expected to reduce the number of NSW offences to which directors' liability provisions apply from over 1000 to less than 150.⁵³

2.40 NSW was the second jurisdiction to take steps to implement the directors' liability reforms after the ACT.⁵⁴

2.41 In Queensland, Premier the Hon. Campbell Newman stated that there are over 3800 offences for which a director can be held personally liable for acts undertaken by their company with or without their knowledge. Premier Newman noted that the reforms being considered 'will mean a director will only be personally liable if they

49 Department of Treasury, *Submission 4*, p. 3.

50 Paul McClintock AO, Chairman, COAG Reform Council, 'COAG's reform agenda and the Seamless National Economy', Address at AICD, 2 April 2012, <http://www.coagreformcouncil.gov.au/media/index.cfm#speeches> (accessed 15 October 2012).

51 Australian Institute of Company Directors, 'States fail to reform test again says directors', *Media Release*, 6 December 2010, <http://www.companymen.com.au/General/Header/Media/Media-Releases/2010/States-fail-the-reform-test-again-say-directors> (accessed 15 October 2012).

52 The Hon. Barry O'Farrell MP, 'M2012-09 Directors' Liability Reform', *Announcement*, 31 July 2012, http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-09_directors_liability_reform (accessed 15 October 2012).

53 The Hon. Barry O'Farrell MP, 'M2012-09 Directors' Liability Reform', *Announcement*, 31 July 2012.

54 Michaela Whitbourne and Mark Skulley, 'NSW backs COAG reforms', *Australian Financial Review*, 5 May 2011, p. 7, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F741069%22> (accessed 15 October 2012).

encourage or assist in the commission of an offence or they have been negligent regarding its commission'.⁵⁵ The Premier highlighted that the reforms would reduce the number of offences for which a director can be held personally liable would be cut by half.⁵⁶ Queensland Attorney-General, the Hon. Jarrod Bleijie announced that legislation addressing company directors liabilities would be introduced before the end of the year.⁵⁷ He highlighted that '[C]onsistency of approach to directors' liability across Australia is paramount'.⁵⁸

Exposure drafts of the bill

2.42 As part of the Commonwealth's fulfilment of its obligations to the COAG reform agenda, Treasury released three exposure drafts of the Personal Liability for Corporate Fraud Reform Bill 2011 (the bill being examined by this report) in January, June and August 2012 and engaged in a consultation from 27 January 2012 to 3 September 2012.

2.43 The bill includes many of the provisions originally contained in the exposure drafts and is largely an amalgamation of the three exposure draft bills. Treasury noted the following in relation to the consultation process:

The Commonwealth Treasury carefully considered the matters raised in the consultation process before advising the Government. Furthermore, the development of Commonwealth's revised audit outcomes and the Bill also had regard to the CRC Report and the analysis it commissioned from Corrs Chambers Westgarth on the application of the COAG Principles by each jurisdiction in relation to an initial audit of all Australian legislation.⁵⁹

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- 55 The Hon. Campbell Newman, Premier, Keynote Speech – AICD & UQ Business School Leader's Edge Luncheon, *Media Statement*, 25 September 2012, <http://statements.qld.gov.au/Statement/2012/9/25/keynote-speech--aicd--uq-business-school-leaders-edge-luncheon> (accessed 15 October 2012).
- 56 The Hon. Campbell Newman, Premier, Keynote Speech – AICD & UQ Business School Leader's Edge Luncheon, *Media Statement*, 25 September 2012.
- 57 The Hon. Campbell Newman, Premier and the Hon. Jarrod Bleijie, Attorney-General, 'Company director reforms a boost for business', *Joint statement*, 25 September 2012, <http://statements.qld.gov.au/Statement/2012/9/25/company-director-reforms-a-boost-for-business> (accessed 15 October 2012).
- 58 The Hon Jarrod Bleijie, Attorney-General, 'Government commits to red-tape reductions and reforms', *Media Statement*, 7 September 2012, <http://statements.qld.gov.au/Statement/Id/80432> (accessed 15 October 2012).
- 59 Department of the Treasury, *Submission 4*, p. 6.