Chapter 4

Concerns raised in evidence

4.1 All witnesses that gave evidence to the inquiry voiced their support for reform to corporate liability laws.[1] Some witnesses highlighted the fact that they had campaigned for reform to directors' liability for some years.[2] However, concerns were raised about specific provisions in the bill, the Council of Australian Governments (COAG) principles that underpin the reform and whether application of the principles across Commonwealth, state and territory legislation would result in harmonisation.[3] This chapter examines these concerns.

Support for the reform

4.2 By implementing the COAG directors' liability reform, the bill was recognised by witnesses as removing a barrier which has distracted corporate officers from core business and negatively impacted productivity and the economic performance of their companies. Mr Bruce Cowley of the Law Council of Australia stated that the reform will 'help to reduce red tape, remove uncertainty, and to an extent, provide more uniformity'.[4] Professor Robert Baxt of the Law Council of Australia held that the existence of different regulatory regimes across the Commonwealth, states and territories costs the Australian economy an estimated $16 billion a year.[5] Mr Peter Abraham, a member of Chartered Secretaries Australia (CSA) provided the committee with a director's perspective on the reform:

> After 14 years as company secretary of ASX top-20 companies with 10,000 employees and 350 sites across Australia—and much of that time in a dual role of general counsel—it is a relief to me to see that attempts are being made to rationalise the circumstances in which directors and other officers

1 Australian Institute of Company Directors, *Submission 1*; Chartered Secretaries Australia, *Submission 2*, p. 1; Confidential, *Submission 3*; Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 1.

2 Mr Bruce Cowley of the Australian Law Council informed the committee that the Law Council of Australia had 'been campaigning for reform in the area for many years'. *Committee Hansard*, 22 October 2012, p. 1. Similarly, Ms Judith Fox of CSA stated that CSA had 'participated since 2005 in consultations on proposed reformed personal liability for corporate fault, noting our reservations with derivate liability at every stage'. *Committee Hansard*, 22 October 2012, p. 9.

3 Australian Institute of Company Directors, *Submission 1*; Chartered Secretaries Australia, *Submission 2*, p. 1; Confidential, *Submission 3*.

4 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 1.

5 Professor Robert Baxt, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 7.

> can be found liable for criminal offences as a result of conduct by their employers.[6]

4.3 To emphasise the need for personal liability reform, Mr Cowley of the Law Council of Australia provided an overview of the current legislative landscape from the viewpoint of the director community:

> Within each state and territory there are quite often over 100 laws which impose personal liability on directors, and within each state there are different ways in which they have drafted those laws. There is no uniformity or consistency about how they have gone about drafting the laws, and every state has its own unique drafting style as well. So what we have found is this complete mishmash of laws across Australia—over 700 laws—which make directors personally liable for offences committed by companies, and in many, many cases reversing the onus of proof. So, you can understand as a company director, even if you are just carrying on business within one state it is hard enough to keep on top of what all those laws require of you, but where you have over 700 laws all potentially applying to you, if you are a director of a company which carries on business across the whole country, it can be something of a nightmare.[7]

Severity of proposed civil penalties

4.4 Specific concerns were raised by the Australian Institute of Company Directors (AICD) in relation to the civil penalties imposed by the bill. The AICD held that any benefit gained by changing the potential liability of individuals from criminal liability to civil liability as proposed in the bill—including to section 188 of the *Corporations Act 2001* and section 265-40 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*—is 'undone if the amount of the penalty imposed on the individual for a civil breach becomes more onerous than the current penalty for a criminal breach under the same provision'.[8] Noting that the civil penalty of $3,000 'far exceeds' the fine for the current criminal offence of $550,[9] the AICD held that:

> Again, such an increase appears to be inconsistent with the intent and purpose of the COAG reforms which is to alleviate directors from being "automatically" liable for the criminal conduct of the company and to boost the focus on corporate performance rather than compliance with overly burdensome liability laws.[10]

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6 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 10.

7 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 2.

8 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 10 and Attachment 2, p. 2.

9 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 26.

10 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 10.

4.5 However, Chartered Secretaries Australia (CSA) supported the amendment to section 188, emphasising that the significant increase in the severity of the penalties for breach of the provision has provided for 'relief from criminal liability'.[11]

4.6 Mr Yisheng Ho from Treasury explained that the more significant civil penalty was imposed to ensure that an adequate deterrence mechanism was maintained. While the reform process is aimed at removing unjust personal criminal liability and providing for a robust regulatory regime in relation to criminal penalties, the types of offence under consideration including section 188 of the Corporations Act 'did not justify a criminal penalty'. At the same time, however, the types of offences covered by these provision need to be prevented so the 'middle ground' was to provide for a larger civil penalty. Mr Ho explained that this approach enables retention of the deterrence effect while removing the criminal nature of the offence.[12]

Retention of reverse onus of proof

4.7 The Law Council of Australia, CSA and the AICD were concerned with the retention of section 8Y of the *Taxation Administration Act 1953* in relation to the onus of proof which rests with the director. The AICD stated:

> 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.[13]

4.8 Similarly, Professor Baxt of the Law Council of Australia held that 'there is absolutely no justification at all' for the 'presumption of innocence which is so essentially part and parcel of our law to be resiled from in this fashion'.[14] Mr Cowley of the Law Council of Australia argued that the assumption behind the origins of the reversal of onus of proof is that 'all directors were the guiding hands of everything that happened in every company' but that:

> when you have a small company that is basically mum and dad, with them being the two directors and the shareholders and the key employees as well, then you can see a logic in that. But as soon as you get any bigger than that—as soon as a company is a larger size—there are people within the organisation who can commit offences that are totally unknown to the directors.[15]

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11 Chartered Secretaries Australia, *Submission 2*, p. 2.

12 Mr Yisheng Ho, Department of the Treasury, *Committee Hansard*, 22 October 2012, pp 15-16.

13 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

14 Professor Robert Baxt, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 3.

15 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 5.

4.9 Recognising that there are 'relatively few Commonwealth laws' which reverse the onus of proof, the Law Council of Australia argued in favour of the bill removing the reversal of the onus of proof in section 8Y because 'if the Commonwealth is prepared to make exceptions that makes it easier for the states to make exceptions as well'.[16]

4.10 CSA challenged the argument for retaining the provision as expressed in the EM, which is that the Australian Taxation Office (ATO) relies on the section to 'prosecute directors who repeatedly and seriously neglect their company's tax obligations'.[17] It stated a 'strong view' that if the legislation is aimed at repeated and serious neglect, then a 'reversal of the burden of proof on the whole pool of directors, rather than just the very small minority, is clearly inappropriate'. Furthermore, to prove such behaviour, the ATO should have 'amassed sufficient evidence to show that the directors in question were culpable in the commitment of the taxation offences of their corporations'.[18]

4.11 The AICD held that the effectiveness of the proposed amendments to section 444-15 of Schedule 1 to the Taxation Administration Act, paragraph 252(1)(j) of the *Income Tax Assessment Act 1936* and subsection 57(7) of the *Superannuation Guarantee (Administration) Act 1993* are undermined by the retention of section 8Y of the Taxation Administration Act.[19] The AICD recommended as an alternative that section 8Y be amended to become an accessorial liability provision which requires the prosecution to prove a director's involvement as an accessory to the corporation's taxation offence.[20] Similarly, CSA argued in favour of accessorial liability as appropriate and would 'relieve the great majority of directors who do not commit or aid and abet taxation offences from the threat of serious criminal prosecution where they are presumed to be guilty'.[21]

4.12 However, in an explanatory document released with the third tranche of the exposure draft of the bill, Treasury held that the section effectively operates as an accessorial liability provision:

> Section 8Y provides a defence to directors who can show, on the balance of probabilities, that they were not involved in the company's offending. As such, section 8Y operates, in substance, as an accessorial liability provision. It would not be feasible to shift the burden and require the prosecution to

16 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, pp 2–3.

17 Explanatory Memorandum, Personal Liability for Corporate Fault Reform Bill 2012

18 Chartered Secretaries Australia, *Submission 2*, p. 2.

19 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

20 Australian Institute of Company Directors, *Submission 1*, Attachment 3, p. 2.

21 Chartered Secretaries Australia, *Submission 2*, p. 2.

> prove a director's involvement in the company's offence, especially as such information could be peculiarly within the knowledge of the director.[22]

4.13 Treasury further held that a director would be in a 'significantly better position to be able to adduce evidence that shows they were not involved in the company's offence rather than explicitly require the prosecution to establish their involvement'. Moreover, the ATO is reliant upon section 8Y to prosecute directors who 'repeatedly and serious neglect their company's tax obligations'. However:

> In this context, the ATO does not prosecute directors in relation to offences committed by companies as a matter of course. The ATO's public position on prosecutions (as set out in ATO Practice Statement Fraud Control and the Prosecution Process) notes that 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. [23]

4.14 Mr Peter McCray from the Department of Finance and Deregulation explained to the committee that during negotiations between jurisdictions regarding the application of the COAG principles, there was a strongly held view that the three provisions—type 1, type 2 and type 3, which reverses the onus of proof—should be retained to provide for greater flexibility. However, the underlying assumption which underpins the guidelines is that type 1 provisions would be the default and type 2 and type 3 the exceptions.[24]

4.15 Treasury explained that section 8Y had not been amended because the ability to demonstrate that a director was not involved in the offence is 'something that is peculiarly within the knowledge of the director'. Furthermore, it would be 'quite easy for a defendant to show in these circumstances' whereas in converting the offence into an accessorial provision 'there would be a significant increase in the administration costs and in the practicalities of administrating the section'.[25]

4.16 Treasury also noted that the retention of section 8Y is an 'important part of maintaining the public's confidence in the tax system'. Mr Bruce Paine explained the policy position more broadly:

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22 Explanatory document, Personal Liability for Corporate Fault Reform Bill 2012, Third tranche, 14 August 2012, http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-Liability-for-Corporate-Fault-Reform-Bill-Tranche-3 (accessed 17 October 2012).

23 Explanatory document, Personal Liability for Corporate Fault Reform Bill 2012, Third tranche, 14 August 2012, http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2012/Personal-Liability-for-Corporate-Fault-Reform-Bill-Tranche-3 (accessed 17 October 2012).

24 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 15.

25 Mr Yisheng Ho, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 16.

> Essentially, we are talking about fairness and equity between taxpayers. Another factor is avoiding excessive administration costs by the ATO if they had to prove things that are really within the power of directors to know. Part of fairness and equity is that it avoids higher taxes elsewhere, assuming parliaments are not going to reduce expenditure beyond what it is otherwise. If higher taxes had to be imposed elsewhere we think there are good arguments that it would distort the economy and impede economic growth to something lower than what it would otherwise be.[26]

Retention of derivative liability provisions—'principle 4'

4.17 The AICD acknowledged the policy rationale for removing provisions imposing criminal liability from individual directors while increasing the penalties for companies in respect of the same offence. It recognised that inserting notes under provisions to identify all of the contraventions within an Act for which a director can be liable for acts of the company 'highlights the extent of the provisions which impose personal criminal liability on directors'. However, the AICD claimed that it does not:

- reduce the number of onerous criminal liability provisions facing directors;
- improve or fix the underlying economic problem the reforms were designed to rectify;
- provide any incentive for directors to focus on corporate performance rather than on legislative conformance; or
- contribute to business investment, productivity, job creation or economic growth.[27]

4.18 COAG's principle 4 provides for the imposition of personal criminal liability on a director for company misconduct but specifies that there must be 'compelling public policy reasons for doing so'. The AICD was particularly concerned about principle 4 which it argued allowed criminal liability for corporate fault based on a 'wide interpretation of compelling public policy reasons'.[28] Furthermore, the AICD rejected provisions in the bill on the basis that they do not meet all the criteria of COAG principle 4 and upheld the view that section 19G of the *National Measurement Act 1960* and subsections 93D(6) and (7) and 93E(6) and (7) of the *Veterans' Entitlements Act 1986* should be repealed for this reason.[29] Similarly, the AICD supported the repeal of section 76A of the *Insurance Contracts Act 1984* under the bill but objected to the proposed insertion of section 11DA on the basis that it does not meet all the criteria of COAG principle 4:

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26 Mr Bruce Paine, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 16.

27 Australian Institute of Company Directors, *Submission 1*, Attachment 2, p. 2.

28 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 4.

29 Australian Institute of Company Directors, *Submission 1*, Attachment 2, pp 17 and 21.

> For example, the public policy issues sought to be addressed by the statute are not compelling (as defined in the principles) and there has been no suggestion that the objects of the Act cannot be adequately met by, nor has it been demonstrated that the objects of the Act have not been met by, effectively regulating the conduct and activities of the corporation or imposing liability solely on the corporation.[30]

4.19 CSA also voiced opposition to derivative liability in relation to directors. It noted that it was 'particularly unjust where the breach is caused by conduct outside of their control and they made reasonable efforts to ensure that appropriate compliance systems and processes were in place'. Moreover, CSA observed that derivative liability provisions often require directors to prove their innocence, which is a reverse of the burden of proof. As Ms Judith Fox told the committee: '[t]his can be the case even where civil liability rather than criminal liability is imposed on directors and other officers'.[31]

4.20 CSA did acknowledge that derivative liability provisions are justified in certain cases. As Mr Abraham explained:

> If directors have been negligent in ensuring that they have appropriate policies in place in corporations or if they have encouraged management within the organisation to cut corners or breach laws or whatever, without a doubt we are not trying to protect directors in those circumstances. If they have been reckless in how the company is operating or even worse, they have aided and abetted, then, clearly, they ought to be liable. But certainly that is going to be a minority.[32]

4.21 Mr Abraham argued that the compelling public policy reasons 'exception was being interpreted very liberally to avoid amending personal liability provisions'.[33] Mr Cowley of the Law Council of Australia held the view that the COAG principles 'do leave a bit of a door open in the sense that the states can form a view about the piece of legislation that it is so fundamental that the reversal of the onus of proof ought to remain'.[34] Similarly, the AICD expressed the view that the COAG principles were a disappointment and exceptions in the principles 'provided a woolly approach to defining what should be very exceptional circumstances and leaves open a potentially very wide range of situations where directors could be personally liable for the misconduct of a corporation'.[35]

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30 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 31.

31 Ms Judith Fox, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 9.

32 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 12.

33 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 10.

34 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 4.

35 Australian Institute of Company Directors, *Submission 1*, Attachment 1, p. 4.

4.22 The bill and wider program of reform seeks to remove regulatory burdens on directors and corporate officers that cannot be justified on public policy grounds and to achieve a more harmonised approach across all Australian jurisdictions on the imposition of criminal liability. In this regard, COAG principle 4 sets out specific justifications for the imposition of criminal liability while the bill amends provisions in Commonwealth laws to ensure that where the legislation imposes derivative liability, it is 'fair and principled, and is not imposed as a matter of course'.[36] Mr McCray from the Department of Finance and Deregulation explained to the committee the process in relation to the broader question of the circumstances in which personal criminal liability might apply:

> The broad framing is that there is a compelling public policy reason for personal criminal liability to apply and there are guidelines which are now public documents. These guidelines were prepared within BRCWG to guide decision-making in this area. The guidelines provided quite a range of concrete examples of the risk of significant public harm that might apply and might justify the imposition of personal criminal liability.
>
> If you think of that as the first gate that a policy judgement needs to get through before you come to the question of type 1, type 2 or type 3, you have already got quite a rigorous test to establish whether personal criminal liability might apply.
>
> Is there a compelling public policy reason based upon risk of significant public harm? If the answer is yes, then you turn to the question of type 1, type 2 and type 3 provisions.[37]

4.23 The NSW Department of Premier and Cabinet told the committee that following the state's reforms, the only provisions in NSW legislation for which type 3 liability will remain is in environmental legislation. As Mr Paul Miller explained:

> The types of provisions in the core environmental legislation are things like running a chemical plant without a licence to do so. Essentially, the provision says that if a corporation runs a chemical plant without a licence to do so then the directors will be liable like the company is liable, unless they can prove that they took reasonable steps to ensure that the company got a licence or that it was not operating a chemical plant.[38]

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36 Exposure Draft, Personal Liability for Corporate Fault Reform Bill 2012, First tranche, 27 January 2012, http://archive.treasury.gov.au/contentitem.asp?ContentID=2300 (accessed 24 October 2012).

37 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 15.

38 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 22.

A model provision?

4.24 Chapter 2 noted CAMAC's consideration in its 2006 report of three possible model provisions as options to standardise the approach to personal liability across Commonwealth, state and territory jurisdictions.[39] CAMAC recommended a modified version of a model proposed by the Australian Law Reform Council.[40]

4.25 The AICD, CSA and the Law Council of Australia supported the introduction of a model provision such as that recommended by CAMAC and the AICD.[41] CSA held that the CAMAC model provision 'requires proof that an individual was in a position to influence the outcome and it puts the burden of proof on the prosecution, not the defence'.[42] Further, Ms Fox of CSA argued that a model provision would ensure harmonisation across legislation in all jurisdictions and urged the committee to recommend to COAG that it should embark on a second stage of reform to develop and agree on a model provision that could be applied nationwide.[43] Mr Abraham of CSA further clarified that a standard provision such as that proposed by the AICD could be applied to all legislation imposing criminal liability and that:

> Unless we achieve a concrete and tangible commitment for all Australian jurisdictions to lock in the principles that apply to the imposition of derivative liability for directors and officers, the complexity, inconsistency and lack of understanding about how to effect compliance will be further entrenched in our own patchwork legislative landscape.[44]

4.26 However, Treasury representatives informed the committee that the question of a single provision by way of a model law was 'looked at very substantively during the course of designing this reform'. Mr McCray of the Department of Finance and Deregulation explained that technical policy advice provided by the Parliamentary Counsel's Committee made it clear that it was 'not feasible to develop a model provision' that could achieve the degree of uniformity expected by CSA and other stakeholders. Mr McCray explained that:

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39 Corporations and Markets Advisory Committee, *Personal Liability for corporate fault*, September 2006, http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/Personal_Liability_for_Corporate_Fault.pdf (accessed 22 October 2012).

40 Corporations and Markets Advisory Committee, *Personal Liability for corporate fault*, September 2006, p. 53.

41 Australian Institute of Company Directors, *Submission 1, Attachment 1* (correspondence to Treasury dated 28 June 2012), p. 8.

42 Ms Judith Fox, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 9.

43 Ms Judith Fox, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, p. 9.

44 Mr Peter Abraham, Chartered Secretaries Australia, *Committee Hansard*, 22 October 2012, pp 10–11.

> This was essentially because of the nature in which the criminal law is captured in legislation. The law varies quite considerably across jurisdictions—in other words, jurisdictions coming to deal with reforms to personal criminal liability start from a different place and there are different starting points, so a model law would not achieve consistency. A model law, even if it were workable in practice, would take you away from consistency because of the different starting points.[45]

4.27 As a model provision would not achieve national consistency, an alternative approach by way of the application of principles and guidelines was pursued to achieve national consistency.

Harmonisation

4.28 In evidence to the committee, Mr Paul Miller of the New South Wales Department of Premier and Cabinet argued that complete harmonisation in the application of personal liability provisions throughout the all jurisdictions is not possible. As a representative on the BRCWG and chair of the BRCWG sub-committee, Mr Miller noted that the approach of the working group was to achieve 'consistency by ensuring that there is consistency in the underlying approach that is taken'. Mr Miller told the committee:

> So if a consistent principle is applied, the outcomes will be consistent even if there are differences because of the differences in the underlying offence or the difference in the regulatory regimes that apply. To answer your question directly, I do not think it is possible to achieve consistency in this area of law alone. I think you would need to try to harmonise the entire regulatory regime in order to do that and in my view the approach which has been taken to focus on principles and to achieve consistency through principles is the best way to get as much consistency as you can achieve in the absence of a uniform national law in a particular area.[46]

4.29 In terms of applying these 'consistent principles', Mr Miller drew the committee's attention to the importance of the negotiations at the centre of government through the BRCWG, rather than leaving the reforms to the portfolio agencies.[47] In his evidence to the committee, Mr Miller described the process through which the BRCWG was able to lead the process of reauditing state legislation to ensure compliance with the COAG principles:

> ...we started at the highest level and we worked our way down. We looked at the broad numbers and looked at whether, in terms of the reduction in

45 Mr Peter McCray, Department of Finance and Deregulation, *Committee Hansard*, 22 October 2012, p. 14.

46 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 23.

47 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 24.

> directors liability provisions, we were sort of coming out at the same area. It was quite a useful process in the sense that there were some jurisdictions that were outliers, where their numbers did not show that they had applied to the guidelines as rigorously as others, and that of itself led those jurisdictions to go back and reconsider their results. That was the first part of the process.
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> The second part was then to try to break down by portfolio area whether there was a consensus about the types of provisions that might justify a directors liability provision and the types that clearly do not. In portfolio areas where only one jurisdiction, for example, was seeking to apply directors liability, we could essentially query that jurisdiction and say: 'Well, none of us think that it's necessary, so why, applying the guidelines, do you think it's necessary in that area?'
>
> In terms of the next level down, we focused on some particular areas where there was consistency in the underlying offence but no consistency in the directors liability provisions. For example, all the states have legislation dealing with censorship and child protection provisions; so, in those areas where there was a disparity, it was easy to recognise the disparity and to talk through where we should land on that. Similarly, with some of the taxation legislation where we have provisions about protecting the state's revenue by making people pay their taxes, there was originally some disparity there about whether directors liability should apply.
>
> That process took about three to four months. By June, we were able to report back to the BRCWG that, in our view, all of the jurisdictions had genuinely and, I can say, in very good faith undertaken a rigorous assessment, consistent with the guidelines. That was essentially the report that the BRCWG then adopted and provided to COAG.[48]

4.30 Treasury emphasised that the reform process in general, and the bill specifically, 'does not envisage a one-size-fits all approach to directors' liability'. As Mr Paine explained:

> The guidelines envisage personal liability provisions which differ according to factors such as the availability of defences, the burden of proof and the level of involvement by director before liability is triggered. These factors reflect the policy decisions that may be made from time to time on the degree of involvement directors are expected to have in the actions of a company and the care that directors are expected to take in ensuring that their company complies with the law. Because of this there will always be a number of different provisions that impose personal liability for corporate fault.[49]

48 Mr Paul Miller, NSW Department of Premier and Cabinet, *Committee Hansard*, 22 October 2012, p. 21.

49 Mr Bruce Paine, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 14.

4.31 Mr Paine further noted that extensive discussions were conducted at officer level across all jurisdictions to ensure a 'degree of consistency' in the imposition of personal liability across Australia and 'consistency of approach across jurisdictions'. Of this process, he emphasised that:

> For example, all jurisdictions collectively reviewed their audits to identify any inconsistency and all jurisdictions reached consensus on the types of harm that justified the imposition of personal liability. That process does not guarantee identical legislation across all jurisdictions. However, with the passage of this bill and similar reforms being progressed by states and territories under the national partnership agreement, there will be improved consistency in the imposition of criminal liability for directors and corporate officers in the case of corporate fault.[50]

4.32 Moreover, Treasury emphasised that the passage of the bill in conjunction with the passage of similar bills across other jurisdictions should ensure that 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'.[51]

4.33 The committee believes that the arguments put by Treasury and the NSW Government counter criticism that the reform process has failed to harmonise personal liability provisions across jurisdictions. Mr Cowley of the Law Council of Australia argued that while the reform process was likely to result in the removal of many laws at federal and state level which reverse the onus of proof, 'one outcome that seemed unlikely to be achieved is uniformity of the laws across the country'. He continued:

> The Commonwealth and each of the states which have so far embarked on the reform process have all gone their own way. They have all developed their own new laws to take away the reversal of the onus of proof, but the laws are all being developed in different models by the Commonwealth and each of the relevant states. I fear that we have lost an opportunity to bring all the laws into line because, as I said, we have this complete mishmash of laws across the country.[52]

4.34 Similarly, the AICD claimed in its submission that harmonisation of director liability provisions across Commonwealth, state and territory legislation was unlikely because the 'liability provisions included in the Commonwealth legislation are different to those adopted by States which have passed legislation pursuant to these reforms (including NSW and South Australia)'.[53] CSA argued that the reform process was missing 'any attempt to establish a nationally consistent approach such as would be effected by the use of a model provision that would ensure harmonisation of

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50 Mr Bruce Paine, Department of the Treasury, *Committee Hansard*, 22 October 2012, p. 14.

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

52 Mr Bruce Cowley, Law Council of Australia, *Committee Hansard*, 22 October 2012, p. 3.

53 Australian Institute of Company Directors, *Submission 1*, Attachment 2, p. 2.

provisions imposing personal liability on directors and corporate officers for corporate fault'.[54]

54 Chartered Secretaries Australia, *Submission 2*, p. 3.