DIRECTORS' LIABILITY REFORM BILL 2022

Second Reading

Resumed from 23 November 2022.

HON TJORN SIBMA (North Metropolitan) [5.22 pm]: What an unstoppable legislative juggernaut we are witnessing today! My compliments to Parliamentary Secretary Hon Darren West for being entrusted with the passing of a bill that encompasses some pretty sound Liberal Party philosophy! Indeed, the Directors' Liability Reform Bill 2022—which I have the dubious pleasure of addressing in this chamber at this moment—also draws for its origins, at least at the state level, on the efforts of the previous Barnett Liberal government, which introduced a bill very similar to this back in 2015. It has been eight years; has it been worth the wait? The next 30 to 40 minutes will tell! That is to say two things: first of all, I am the opposition lead speaker on this matter of great import; and secondly, there is no need to wax lyrical here because, as a principle, this legislation is very overdue. I surmise Western Australia might be the recalcitrant jurisdiction in implementing this form of model legislation because it arose from the Council of Australian Governments back in 2008, and I will address that in some detail presently.

First and foremost, it is worthwhile dealing with what this bill is not. It does not seek to amend directors' duties as they are defined under the Corporations Act 2001. Indeed, I rely here on the excellent work of the Standing Committee on Uniform Legislation and Statutes Review—an excellent and worthy committee that I have been very lucky to avoid service on! However, I will not escape forever, and now I am absolutely obliged to read its excellent product. As much as we should focus on what this bill attempts to do, we should also focus on what this bill does not deal with. If anything, that might expedite the kind of tedious clause 1 debate that we sometimes have to have. My commitment to members is that I will not detain them here or derail the government's legislative agenda any longer than necessary. I can feel the enthusiasm!

I refer to the report tabled, I think, last week by the Standing Committee on Uniform Legislation and Statutes Review, *Directors' Liability Reform Bill 2022.* It states at paragraph 1.5 —

> The Bill, if passed, would not affect directors' general fiduciary duties that are owed to the corporate body under the *Corporations Act 2001* (Cth) or other laws. These include the duty to act in good faith in the interests of the body and not for improper purposes, duties of care and diligence and the duty to avoid conflicts of interest. It would affect only 'derivative' personal liability provisions that have been created in Western Australian statutes, where officers may be personally criminally liable for offences committed by the corporate body.

The report gets to the purpose of the Directors' Liability Reform Bill 2022 at paragraph 1.3 —

> to reduce and standardise offences in the Western Australian statute book which impose personal criminal liability on officers of bodies corporate for offences committed by those bodies corporate, where those officers have failed to take reasonable steps to prevent the body corporate's offending.

The phrase "reasonable steps" is a particularly laden one, and we might reflect on the full import of that later on.

I referred to the origins of this bill; it has as its genesis a bit of microeconomic reform that the Council of Australian Governments saw fit to get on with back in 2008. The Council of Australian Governments enunciated six reform principles that apply to this piece of legislation, and they are set out at paragraph 4.6 of the report —

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

The next is also an important term —

3. A 'designated officer' approach to liability is not suitable for general application.
4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:
   (a) there are compelling public policy reasons for doing so (e.g. in terms of the potential for significant public harm that might be caused by the particular corporate offending);
   (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and
   (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:
      i) the obligation on the corporation, and in turn the director, is clear;

ii) the director has the capacity to influence the conduct of the corporation in relation to the offending; and

iii) there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

5. Where principle 4 —

Which I have just outlined —

is satisfied and directors' liability is appropriate, directors could be liable where they:

(a) have encouraged or assisted in the commission of the offence; or

(b) have been negligent or reckless in relation to the corporation's offending.

6. In addition, in some instances, it may be appropriate to put directors to proof —

That should be "prove" —

that they have taken reasonable steps to prevent the corporations' offending if they are not to be personally liable.

To some degree that is a reversal of the onus of proof, but there seems to be some contingency placed around that, which I will ask the parliamentary secretary to elaborate on. What I am keen to grasp, potentially by way of a response in the second reading reply, is whether—I note the time that has elapsed between the expression of these COAG principles in 2008 and the introduction of a similar bill in 2015 that lapsed—any prosecutions or any case law relevant to the objects of this bill have been treated differently by virtue of the previous statutory regime being in place. I hope that is clear. For example, have there been issues with regard to directors' liabilities not being fully discharged that the state has prosecuted that have been dealt with under the current statute in the period between 2015 and today, the day on which we are dealing with this bill?

It is worth taking a slight break there if not to reflect on the duties of directors, but then perhaps to focus more broadly or generically on their roles and responsibilities, even though it is not countenanced by this legislation. We do not want to inadvertently create an operating regime that acts as a disincentive to directors coming onto boards and individuals fulfilling their talent. Sometimes I think we get very risk averse in public discourse as well. We certainly do in a political context, but, quite obviously, at least in a corporate context, reward is where the risk resides. We have to continue to encourage directors to actually take risks, but obviously there are limits to the kinds of risk-taking that any responsible government, be it federal or state, should countenance.

I go back to some of those very lengthy COAG principles because they are of import here. COAG identified three types of directors' liability provisions and they are as follows. Type 1 provisions provide that the director will be presumed to have taken all reasonable steps to prevent the body corporate from committing the offence, and therefore they will not be liable, unless the prosecution proves that he or she failed to take all reasonable steps. Type 2 provisions provide that a director will be taken to have committed the offence committed by the body corporate, unless he or she presents evidence that suggests a reasonable possibility that he or she took all reasonable steps to prevent the commission of the offence by the body corporate; and once this evidence is adduced, the prosecution bears the onus of proving that the director did not take all reasonable steps. Type 3 provisions require the director to prove on the balance of probabilities that he or she took all reasonable steps.

I reflect again on the fact that some time has elapsed between the presentation of this iteration of the bill and the original bill in 2015. The Standing Committee on Uniform Legislation and Statutes Review has dealt with this issue twice—once when the original bill was read in in 2015 and obviously I have read in an aspect of the most recent report. That is not necessarily to admonish the government, but just for the satisfaction of ensuring that we are always focused on exemplary governance in this jurisdiction and, when possible, we align with the best efforts of other Australian jurisdictions, I am interested in the problematic issue with the long gestation of this second version of the bill. I find it very curious, in light of the fact that quite obviously there has been political uniformity on this particular matter. There are no politics at stake here, so why could this bill not have been presented in the first term of a McGowan government?

Hon Martin Pritchard: Or in 2015?

Hon TJORN SIBMA: Indeed, but we are now 15 years on from COAG. It is a point worth making. We do have these kinds of exchanges, particularly on a Thursday, and it can, on occasion, descend into whataboutism. Frankly, this is the seventh year of the McGowan government. Again, this is the low-hanging fruit of reform, and "reform" is a word that is used and abused too frequently. The question is: have issues been identified between 2015 and the present day that have delayed the chamber's consideration of this bill? Upon looking at the second reading speech, I note that the Attorney General more or less expressed the view that this bill is, in large part, unchanged from the previous version, which leads me to ask that question. If the differences between this bill and its previous version are largely peripheral or nugatory—they relate to issues of numbering, sequencing and potentially the

interplay with the introduction of the Work Health and Safety Act a couple of years ago, for example—fair enough. But the questions are: Why has it taken so long? Is this bill more or less the same as the bill presented some eight years ago? Where there are significant differences, what are those differences and how have they complicated the passage of this legislation?

As I identified previously, this is not the kind of issue that newspaper editors will spill a lot of ink over. I think we all agree that, in theory, this is a pretty sensible, pragmatic and overdue measure, so it was not necessarily my intention to attempt to take this into the committee stage, but I think we are obliged to go there now because this bill references the Swan and Canning Rivers Management Act, which will be amended by the bill that we have just dealt with but has not yet been assented to. I think there is a clause in this bill that will have to be deferred, if I understand that correctly.

Hon Matthew Swinbourn: Postponed.

Hon TJORN SIBMA: Postponed; sorry. I seek clarification by way of a response from the parliamentary secretary. My understanding is that that will need to be recommitted at some stage, presumably after the recently debated bill gets assented to, and it will come back to this chamber in the next parliamentary sitting week. I just want to clarify that.

Hon Sue Ellery: That is correct.

Hon TJORN SIBMA: Great; thank you. My humble request of the parliamentary secretary is that he take us through the substantial differences between the 2015 version and the 2023 iteration.

I want to identify some issues of a terminological and potentially even a theoretical nature. I previously identified the passage "all reasonable steps" as a phrase laden with some import. It connotes a form of value judgement or subjectivity in determining what is reasonable and what is unreasonable. However, there is not a consistent utilisation of that full phrase throughout the bill. On some occasions, there is reference to "all reasonable steps" and on other occasions, it is just the truncated "reasonable steps". Does that imply potentially a lowered threshold to be applied or is that just an inadvertent consequence of the drafting process? If that could be addressed, and if there is a need to fix something, that would of course be welcome. I say that because obviously in the course of all of our lives, whether they are dedicated to a corporate enterprise activity or even just in terms of the way that we as individual members of Parliament discharge our responsibilities to this chamber, there is a very important distinction between an exhaustive fulfilment of duties and responsibilities and getting pretty close to the mark. This is not one of those occasions on which it is a distinction without a difference. I think a pretty clear distinction is being made here, with the potential of there being some very serious differences in application, particularly to certain individuals who have been directors of a corporation. I seek some clarification around that if at all possible. I referred to a 2015 committee report. It is the committee I have damned with faint praise. I am sure I will pay for that at some stage, the universe doing as it must.

Hon Donna Faragher: You will.

Hon TJORN SIBMA: I will—there you go. Proceeding at pace with a measure of certainty is not too bad; at least I know it is coming! That is all right.

That committee's first recommendation on the 2015 bill reads —

> … during the Second Reading debate, the Attorney General advise the Legislative Council on the basis upon which the content of the audit process of Western Australian legislation against the Council of Australian Government's Principles and Guidelines governing personal liability for corporate fault forms part of the deliberative process of Cabinet to support a claim for public interest immunity from disclosure to the Parliament.

I do not know whether that specific issue was germane to that 2015 iteration or whether it is an observation that might be equally and validly applied to this version—that is, the 2023 bill.

Really, that is it—sometimes you have to fulfil your commitments. With that, I rest my speech. I look forward to the parliamentary secretary's reply. If we need to traverse some matters that have been raised or have not been addressed, we can do that at clause 1. Other than that, let us deal with this in an orderly fashion.

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [5.41 pm] — in reply: Thank you, Deputy President.

Hon Tjorn Sibma: Take your time.

Hon MATTHEW SWINBOURN: I will make some points. I thank the honourable member for his contribution and gracious support of this bill. He raised a number of matters in his contribution to the second reading debate, which I will try to address to the extent that I can, noting that we must go into Committee of the Whole because of the matter that was flagged in the honourable member's speech on the need to postpone some clauses, which we can

only do in committee. I must admit that I did not quite get the full thrust of what the honourable member was saying on a couple of points. It was no fault of the Hon Tjorn Sibma; I was distracted by the messages I was receiving. If I do not cover something the member raised in his contribution, we can deal with it in committee. I might add that I will have to leave on urgent parliamentary business after the dinner break but the more than capable parliamentary secretary Hon Samantha Rowe will step into the breach and take charge of this incredibly important piece of legislation. I thank her in advance. Please do not show me up by being much better at it than I am!

The member raised some technical, perhaps complicated and important issues. With respect to the question about the number of prosecutions that may not have been able to proceed or commence because the bill was not yet in force, this bill is not intended to add offences or derivative liability provisions. Rather, it will standardise provisions and reduce the number of corporate events for which officers can be held liable. On that basis, prosecutions of officers could continue to occur under existing criminal provisions.

I am also pleased to note that members of the Standing Committee on Uniform Legislation and Statutes Review expressed their support for the bill, as outlined in the committee's 142nd report, which was tabled in this place on 14 February 2023. The chair of the committee is out on urgent parliamentary business, but the committee obviously worked very hard over the Christmas break and delivered that report in time for us to consider this bill. With regard to the committee's finding 2 in the report that no information was provided about the Biodiversity Conservation Act 2016 commencement provisions in the bill, I wish to advise the house of the following information. The bill will amend the Biodiversity Conservation Act 2016 and it will come into operation on a day fixed by proclamation. During the drafting of the bill, the agency that administers the BCA, the Department of Biodiversity, Conservation and Attractions, advised that this commencement arrangement is required to allow time for an amending regulation to apply derivative liability to offences in that act's regulations.

It is standard drafting practice to include commencement by proclamation clauses in a bill only if there is a compelling reason for not including a fixed commencement. In this case, the current provision in the BCA that provides for the application of derivative liability to offences in the regulations, section 237(2)(d), will be deleted by the bill. However, there is a regulation made expressly under section 237(2)(d) that will need to be amended as a consequence of this deletion—that is, regulation 153 of the Biodiversity Conservation Regulations 2018, "Liability of officers of body corporate for offence by body". The Parliamentary Counsel's Office advised that if the amendments to the BCA in division 9 of the bill commenced in advance of the consequential amendment to the regulations, there would be an express error on the statute book. Parliamentary counsel confirmed that this is an example of when a proclamation commencement is justified in the circumstances. I can further advise the house that the Department of Justice is actively engaging with DBCA in the development of the necessary amendments to the Biodiversity Conservation Regulations. The Department of Justice intends to proclaim part 3 division 9 of the bill in conjunction with those amendments as soon as practicable.

I have run out of notes from my advisers but I want to address some of the other issues raised by Hon Tjorn Sibma in his contribution to the second reading debate. He posed a somewhat rhetorical question about whether it has been worth the wait, raised some points about the long gestation period, and asked why it has taken so long and things of that kind. This is perhaps an example of legislation that is important but cannot be characterised as urgent. It is a piece of reform legislation. It was important to the previous Liberal–National government when it agreed to the COAG principles in 2008 and presented the 2015 bill, and it remains important to our government. But this reform cannot be described as paradigm shift and it is not urgent that we bring it about. That is perhaps the best explanation I can give. Obviously other things have happened in the last few years that have kicked some of these issues further down the road; for example, the imposition of the COVID pandemic on this process has probably delayed some of this small routine reform. That is probably the best answer that I can give in the circumstances, as is always the case when I stand in this place and talk about a bill. The opposition alliance has indicated its willingness to support the bill, and we appreciate that support.

I would like to make a more general point about the concept of the reversal of the onus of proof because that term is bandied around and some would say applies to the reform in this legislation. The lawyers of the world wish to re-characterise that reference as a rebuttable presumption rather than a reversal of the onus of proof. Typically, when the state prosecutes an individual or a corporation, the onus is on the state to make its case beyond reasonable doubt and an individual or corporation does not need to put on a positive defence. There are type 1, 2 and 3 offences. There is a cascading effect in which a situation is created whereby the onus that there is evidence that the offence has been committed is not reversed but things such as a person taking reasonable action means the onus falls on to the person, the officer, who might claim that as a defence for their conduct. Therefore, in those circumstances, if they can establish that they took those reasonable steps, it is not for the state to disprove; the state might argue against it but it is for that particular individual to prove it. It is a presumption that is rebuttable by putting on a proper case, rather than simply the idea that they are guilty until proven innocent. I think that is most people's understanding of the reversal of the onus of proof in those particular circumstances. Hopefully, it is a broader context than for

some of the other issues that Hon Tjorn Sibma might want to unpack during the committee stage in relation to those points.

Hon Tjorn Sibma raised some issues about all reasonable steps, but as I said, I missed the moment for that. He also raised some questions about the 2015 committee report and its first recommendation, which I am not familiar with off the top of my head. I know that some other issues might have arisen out of that report. My understanding is that they were addressed in the drafting of the new bill.

The honourable member asked about the differences between the 2015 bill and the 2022 bill. Most of the differences relate to the references to particular acts. For example, a lot of legislating happened between the two bills, so some things have changed in some acts. That process was undertaken by the Department of Justice, which has carriage of this bill, through its continuing consultation with respective agencies. We are in a unique position with this bill in that although the provisions in part 1 and part 2 probably fall squarely within the remit of the Department of Justice, it was up to individual agencies and the ministers responsible for all those other acts that fall under part 3 to identify the appropriate provisions that this reform will apply to. That consultation was ongoing from the 2015 version to the 2022 version of the bill. It was not simply the case of someone picking up the 2015 bill and updating the references to the acts; it was a case of checking whether they remained appropriate to include in this reform.

A number of changes were made after an analysis of the derivative liability provisions. The result was that some provisions have been removed in their entirety. I will take the honourable member to an explanation of some of the acts that will not be affected by this bill. The overall scheme of the bill is limited and will standardise provisions so that this additional layer of liability will apply only to offences that warrant it. Accordingly, it will remove officers' liability altogether from 21 acts. That is the reform that I am referring to. Where officers' liability will be retained, it will relate to fewer offences. The bill proposes to delete all provisions that impose blanket liability on officers for all offences in an act, with some exceptions. One exception is the Fair Trading Act 2010, because that act contains model legislation—the Australian Consumer Law—and requires consistency across jurisdictions. The offences for which liability will be retained are those that meet the Council of Australian Governments' principles. Another act is the Taxation Administration Act 2003 and in particular section 109, which imposes accessorial liability on officers and therefore was not included in COAG's original director liability reform commitment. It further ensures that Western Australia's tax legislation will remain consistent with measures at the commonwealth level to address illegal financing schemes and comply with federal tax requirements. The Fair Trading Act and the Taxation Amendment Act 2003 are examples of how the principles allowed us to not extend what we are doing.

The type 3 provisions are also used sparingly in accordance with the COAG principles, with the bill proposing to include such liability in 12 acts and only for particularly serious offences. A type 3 liability will be retained for 21 offences in the Food Act 2008, including the sale of food that is unsafe under section 15(1) and (2), and the sale of food that does not comply with a relevant requirement of the Food Standards Code under section 22(2). These offences are relevant to the core business of a body corporate operating under the Food Act 2008 and it is reasonable to expect an officer to be able to demonstrate that they have taken all reasonable steps to prevent the body corporate from committing them. Another example of type 3 liability being retained is for nine offences in the Tobacco Products Control Act 2006. These offences include breaches of section 31(1), which provides that a person must not display or broadcast a tobacco advertisement in a public place, and section 33(1), which provides that a person must not supply prizes in connection with the sale or promotion of tobacco products or smoking generally. These offences are an important aspect of the regulatory regime that governs the sale of tobacco products in Western Australia. Given the impacts of smoking on public health and the risk of exposing children to smoking, there are strong public policy reasons for requiring officers to demonstrate that they have taken all reasonable steps to prevent corporate offending in this area. Other examples are the Environmental Protection Act 1986 and the Medicines and Poisons Act 2014, in which type 3 liability will be retained for good public policy reasons. That is because the nature of those things go to public safety, for example, and we think that in those circumstances, officers of corporations should have a level of responsibility to take reasonable steps.

One other thing to raise and make Hon Tjorn Sibma aware of is that the bill does not propose to amend the Work Health and Safety Act 2020, because at the time that COAG considered the issue of directors' liability reform, it was acknowledged that the model work health and safety laws contained provisions that specifically dealt with the liability of officers and provided their own due diligence criteria. Western Australia has now adopted the model work health and safety laws through the operation of the Work Health and Safety Act 2020, which came into effect on 31 March 2022. This bill does not affect the obligations on officers arising from the Work Health and Safety Act. That perhaps makes sense for a bill that we passed at the end of 2020. People were aware of the COAG principles, so a conscious decision was made to not include the Work Health and Safety Act. As I said, these provisions are consistent with commonwealth model laws. I think the other examples I gave were the Fair Trading Act and the Tax Administration Act, which again are consistent with commonwealth laws. It is about maintaining that consistency.

Noting that we are getting close to the dinner adjournment, I will start to wrap up my comments so that once we come back, we will hopefully be in committee. The point that I would make is that the sorts of reforms we are

proposing here are ultimately about making sure that directors who are vested with responsibilities more readily appreciate those responsibilities, and that we see a greater level of compliance with those responsibilities by not making them different for every piece of law that we have. It is a consistency principle. That consistency will hopefully lead to more compliance. However, it is also about recognising that the form of derivative liability that has been imposed is not appropriate for officers in every circumstance. With those comments, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Sitting suspended from 6.00 to 7.00 pm

Committee

The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Samantha Rowe (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon TJORN SIBMA: I will just reflect on some ruminations I had during the dinner adjournment, which I used as preparation for this exchange. Today the Parliament had the opportunity of hosting a delegation from the German Bundestag—a very pluralistic parliamentary representative group. I had hoped that this bill might be a model in antipodean legislation. As I have expressed previously, it is certainly not the intention to slow this down but neither is it the intention to speed things up unduly. We should recline into the appropriate pace.

Speaking of pace, I raised the issue during my second reading contribution around the implementation of this form of model legislation in other Australian jurisdictions. I do not know whether I caught the parliamentary secretary to the Attorney General's answer as to whether Western Australia remains among the last, or perhaps the very last, jurisdiction to pass legislation such as this.

Hon SAMANTHA ROWE: Every other state has passed this legislation bar Tasmania.

Hon TJORN SIBMA: That is very worrying company. I might just express that as a bipartisan sentiment, which I intend to be met with acclaim. When did the last Australian jurisdiction implement this form of model legislation?

Hon SAMANTHA ROWE: It was the Northern Territory in 2015.

Hon TJORN SIBMA: Would it be possible for the parliamentary secretary to advise the house via me of the sequence in which other Australian states and territories introduced this legislation, if she had the answer to those previous two questions?

Hon Samantha Rowe: Do you mean the years?

Hon TJORN SIBMA: Yes.

Hon SAMANTHA ROWE: For New South Wales it was 2012; Victoria, 2013; South Australia, 2013; Queensland, 2013; Northern Territory, as I previously said, 2015; and ACT, 2013.

Hon TJORN SIBMA: I am not sure whether the legislation in those jurisdictions included a statutory review clause. Seeing as the bulk of this form of legislation seems to have been adopted in other Australian jurisdictions over 10 years ago, have any lessons been learnt from the operation of their respective acts that have in any way informed the drafting and composition of the bill to which we are giving our contemplation?

Hon SAMANTHA ROWE: My understanding is that each state took a slightly different approach. In its current drafting, the bill reflects several policy decisions about the interpretation of the Council of Australian Governments' principles and their adoption in Western Australia. They are all based on the same COAG principles.

Hon TJORN SIBMA: Nevertheless, a latter clause—I forget which one off the top of my head—has embedded in it a five-year statutory review clause. I would assume, but cannot know completely, that similar clauses may have applied in the New South Wales or Victorian legislation. If indeed that were the case, did those statutory review processes shine any light on the operation of the bill in those jurisdictions, whether it was meant that those acts were objects of the bill and whether that had any impact on director liability or the propensity for people to want to become directors and the like. If so, if the government was aware of that kind of review effort, did that influence in any way the substance of this bill?

Hon SAMANTHA ROWE: I am advised that we are not sure whether every state has a statutory review clause, but ours was added because the Standing Committee on Uniform Legislation and Statutes Review in 2015 requested that a review clause be put in.

Hon TJORN SIBMA: Yes, I note that, and I thank the parliamentary secretary. My understanding was that I think the committee, which has been mentioned in dispatches this evening —

Hon Donna Faragher: Far too many times!

Hon TJORN SIBMA: — far too many times, perhaps. I hope I do not end up on it! The committee recommended a four-year period, after which it would undertake a review. I think that the government has said five years, if my understanding is correct. Can the parliamentary secretary account for the reason the government has picked five over four?

Hon SAMANTHA ROWE: I cannot really tell the honourable member why we have picked five years over four. I think it might be because that is the standard time for review clauses. I cannot tell the member more than that.

Hon TJORN SIBMA: That is fine. I suppose the important thing is that we undertake a review when it is due and we attempt to learn from the application. This was addressed somewhat by parliamentary secretary Hon Matthew Swinbourn in his second reading reply speech. My area of focus was on what were the significant changes between the 2015 iteration of this bill and the bill that we have in front of us.

Can I just satisfy myself that I heard the parliamentary secretary correctly?

Hon Samantha Rowe: Thank you.

Hon TJORN SIBMA: Thank you. Aside from obviously the issues of numbering, which will always apply, and the date, my understanding is that the repealed and replaced provisions of the Work Health and Safety Act 2020 meant that the proposed amendments to the Mines Safety and Inspection Act 1994 were no longer required. Can I ascertain whether I have the correct understanding?

Hon Samantha Rowe: By way of interjection: was it the Mines Safety and Inspection Act that the member asked about?

Hon TJORN SIBMA: Yes, correct.

Hon SAMANTHA ROWE: I thank the honourable member. I am advised that the bill does not propose to amend the Mines Safety and Inspection Act 1994, as was proposed in the 2015 version of the bill, because the relevant provisions of that act have been deleted and replaced by the Work Health and Safety Act 2020. In the first part of the member's question, did he want me to go over things?

Hon Tjorn Sibma: I will ask them in sequence, if that is okay.

Hon SAMANTHA ROWE: That is great—absolutely.

Hon TJORN SIBMA: I am intending to go through them methodically just to check my understanding against what the parliamentary secretary says. My other understanding is that the 2015 version of the bill proposed amendments to the Taxation Administration Act 2003 and that they are no longer required. In fact, there might be a new version of that act that dates to 2006, if I heard the parliamentary secretary correctly.

Hon SAMANTHA ROWE: I am advised that the bill does not propose to amend the Taxation Administration Act 2003, so during re-engagement on the bill in 2019 the Department of Finance advised that the derivative liability provision in section 109 of the act is consistent with the corresponding provision in commonwealth legislation, so it must remain unamended to ensure that it remains effective in preventing directors from neglecting their companies' tax obligations and to support recent commonwealth measures introduced to combat illegal phoenixing activity.

Hon TJORN SIBMA: I thank the parliamentary secretary; that is excellent material. I believe that in the 2015 version of this bill there was a proposed amendment to remove derivative liability from the Emergency Management Act 2005, but that is no longer considered to be required. Is my understanding correct?

Hon SAMANTHA ROWE: I am advised that we are keeping it in because the State Emergency Management Committee is the agency that administers the Emergency Management Act 2005, and it has advised that liability is required for particularly serious offences in this act, noting that these offences relate to the safety of the public. The offences involve serious risk of significant public harm through the risk of catastrophic damage to the environment and to public safety. Therefore, the seriousness of the conduct involved and the policy behind the provisions being included is such that, with the exception of section 95, it is appropriate to impose type 3 liability as per the Council of Australian Governments' guidelines.

Hon TJORN SIBMA: I thank the parliamentary secretary. I found that last exchange very comprehensive. I just want to satisfy myself that we have exhaustively canvassed the substantial changes in the 2023 version of this bill compared with the 2015 one and that there is no other difference.

Hon SAMANTHA ROWE: I am advised that the policy of the current bill is substantively the same as for the 2015 bill. Substantial work has been done since 2022 to update the bill with references to relevant legislation that has commenced operation since 2015, and to accommodate statutes that are in the process of being amended or repealed.

Hon TJORN SIBMA: During the debate on clause 1, would the parliamentary secretary entertain some questions around clause 5?

Hon Samantha Rowe: Yes.

Hon TJORN SIBMA: I refer to a potential issue that was identified when the department briefed my colleague Hon Nick Goiran on this bill towards the end of last year. I am not a lawyer, blessedly or not, so I make no presumptions about the utilisation of legal language. In the bills that fall within my portfolio responsibility, I have always taken it upon myself to clarify, where I can, the policy intent of the legislation and to understand the terminology that is used. In my second reading contribution, I identified one issue that I find troubling—that is, the difference in the use of language. Clause 5 seeks to insert in the Criminal Code a new chapter 6, "Criminal liability of officers of bodies corporate". There was some discussion in the other place about the import of the utilisation of the word "officers" versus "directors". That is not my issue. My issue relates to the subheadings used in proposed sections 39, 40 and 41 of new chapter 6; I think it exhausts itself there.

Just for *Hansard*, proposed section 39 is headed "Officer liability for corporate offence: onus on prosecution to prove reasonable steps not taken", proposed section 40 is headed "Officer liability for corporate offence: onus on prosecution to prove reasonable steps not taken if evidence suggesting reasonable steps adduced" and proposed section 41 is headed "Officer liability for corporate offence: onus on officer to prove reasonable steps taken". What each of those headings has in common is the unqualified use of the term "reasonable steps". However, despite the heading of proposed section 40 saying "onus on prosecution to prove reasonable steps not taken if evidence suggesting reasonable steps adduced", proposed subsection (2) says —

> If a body corporate is guilty of an offence to which this section applies, an officer of the body corporate is also guilty of the offence unless the officer took all reasonable steps to prevent the commission of the offence by the body corporate.

Similar phraseology is used in the next proposed subsection. This is a consistent difference in proposed sections 39, 40 and 41. I want to be clear about what threshold the Attorney General is proposing here. What is his intent behind the use of the term "all reasonable steps" versus "reasonable steps"?

Hon SAMANTHA ROWE: I am advised that the headings are brief summaries of the proposed subsections, so the important words in the proposed subsections that the honourable member referred to are "all reasonable steps".

Hon TJORN SIBMA: My concern is that there is a clear difference in import, and it is a distinction with a serious difference. Nonlegal comparisons can be applied here. Can I clarify what the Attorney's intent is? Is it that this bill should set the threshold at "all reasonable steps" being taken?

Hon Samantha Rowe: Yes, that is correct.

Hon TJORN SIBMA: That is the clear intent of the Attorney General?

Hon Samantha Rowe: Correct.

Hon TJORN SIBMA: Thank you. In which case, what mischief would it cause if the headings of the proposed sections under proposed chapter 6 reflected very clearly that intent as well? What trouble would the addition of "all" before "reasonable steps" cause in the interpretation and application of proposed sections 39, 40 and 41?

Hon SAMANTHA ROWE: My advice is that it is very clear because "all reasonable steps" has to be taken into account in the proposed subsection. Headings are a drafting issue from Parliamentary Counsel's Office. It does not change the fact that all reasonable steps must be taken.

Hon TJORN SIBMA: This is probably indicative of the fact that on occasion drafters of legislation and the users of legislation, including legislators, take differing views on the precision and clarity of phrases utilised. If I, someone not as learned as the people who put this together and the Attorney in whose name this bill will go through, am to make a humble suggestion, perhaps if this is just an issue of drafting, some effort might be made to redraft that to absolutely, without question, demonstrate that the intent is to establish the threshold of being all reasonable steps, and we will not inadvertently open up a defence because we determined that the drafting was beyond remediation.

Hon SAMANTHA ROWE: I am advised that headings are not always fully comprehensive, and there is obviously a limit to what can be put into a heading, but just to be clear, the heading does not change the statutory interpretation. The statutory language is not ambiguous.

Hon TJORN SIBMA: Is it possible to take from case law either here or in another Australian jurisdiction how that threshold of all reasonable steps in relation to the role and functions of directors has actually been applied? I can in part sort of apprehend what might be intended here, but could the parliamentary secretary illustrate how this test might be applied in a real world example or perhaps a hypothetical example?

Hon SAMANTHA ROWE: I thank the honourable member for the question. I am advised that the proposed sections that provide guidance to a court relate to proposed section 39(3). Paragraphs (a), (b) and (c) spell out what constitutes reasonable steps that a court must give regard to.

Clause put and passed.

Clause 2: Commencement —

Hon TJORN SIBMA: I indicate that to facilitate the passage of this bill through the house I have no further questions on clauses in this bill, but I anticipate an amendment to be moved by the parliamentary secretary on one of the bills that will be affected.

Clause put and passed.

Clauses 3 to 142 put and passed.

Clauses 143 to 145 postponed until after consideration of clause 169, on motion by Hon Samantha Rowe (Parliamentary Secretary).

Hon SAMANTHA ROWE: By way of explanation for the postponement of those clauses, the bill proposes to standardise and reduce the number of derivative liability offences in the Swan and Canning Rivers Management Act 2006 by applying the bill's proposed new derivative liability provisions to the offence provisions in division 58. However, the SCRMA has just been amended in a way that has affected this bill. Members will recall that we have just considered and passed the Swan and Canning Rivers Amendment Bill 2022, which included a provision that has affected the table in division 58.

To ensure that the bill appropriately reflects the changes made by the Swan and Canning Rivers Amendment Bill 2022, Parliamentary Counsel has drafted an amendment to clause 2 with alternative commencement provisions to ensure that the correct offence provision is referred to, depending on which statute comes into operation first. Parliamentary Counsel has also drafted a related amendment to the bill to insert new clause 145A, which would delete a reference in the table in division 58 of the bill to an offence provision that will no longer be operative once the amendments to the SCRMA are in operation.

As a result of drafting convention, consideration of clauses 143 to 145 is postponed so as not to pre-empt the amendments to the SCRMA. Consideration of those clauses can occur once the Swan and Canning Rivers Amendment Bill 2022 receives royal assent.

Clauses 146 to 169 put and passed.

Progress reported and leave granted to sit again, on motion by Hon Samantha Rowe (Parliamentary Secretary).