DIRECTORS' LIABILITY REFORM BILL 2022

Receipt and First Reading

Bill received from the Assembly; and, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, read a first time.

Second Reading

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [6.45 pm]: I move —

> That the bill be now read a second time.

The Directors' Liability Reform Bill 2022 will limit and standardise the provisions in the Western Australian statute book that impose personal criminal liability on officers of bodies corporate in a body corporate's offending in circumstances in which those officers have failed to take all reasonable steps to prevent the offending.

The bill has had a very long gestation. Directors' liability reform was one of 27 deregulation priorities under the National Partnership Agreement to Deliver a Seamless National Economy, a now-concluded project that was overseen by the Council of Australian Governments' National Federation Reform Council through the business reform council working group. On 29 November 2008, COAG agreed to increased harmonisation across Australian jurisdictions in the imposition of personal criminal liability on directors for corporate fault. There was a drive to reduce provisions that impose personal criminal liability on directors for corporate offending and harmonise these provisions using a principle-based approach. This was because, and I quote from the official guidelines produced by COAG —

> … there appeared to be an increasing tendency for such provisions to be introduced as a matter of course and without proper justification, and because of a concern that inconsistencies in the standards of personal responsibility both within and across jurisdictions were resulting in undue complexity and a lack of clarity about responsibilities and requirements for compliance.

COAG developed an agreed set of principles to guide this reform, which are as follows. First, when a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance. Second, directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire act. Third, a "designated officer" approach to liability is not suitable for general application. Fourth, the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations in which there are compelling public policy reasons for doing so—for example, 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: the obligation on the corporation and, in turn, the director is clear; the director has the capacity to influence the conduct of the corporation in relation to the offending; and there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation. Fifth, when the fourth principle is satisfied and directors' liability is appropriate, directors could be liable when they have encouraged or assisted in the commission of the offence or have been negligent or reckless in a corporation's offending. Sixth, in addition, in some circumstances 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.

In 2015, a version of this bill was introduced into Parliament by the previous Liberal–National government. However, that bill did not progress; indeed, it was never brought on for debate and it lapsed when Parliament was prorogued in 2017. The current bill is an updated version of that 2015 bill. Demonstrating the McGowan Labor government's commitment to bipartisan microeconomic reform, the bill's policy intent has been maintained and it is substantially the same as the 2015 bill.

I will briefly go through the bill's key policy underpinnings. The first point to note is that the bill's reforms will apply to "officers" as defined in the commonwealth Corporations Act 2001. The bill's title reflects the nomenclature used in the original COAG reform project and associated principles and guidelines, which referred to directors' liability. The bill will not operate as a standalone act with enduring force once it is passed, and the amendments it makes to the Criminal Code and other legislation make it clear that they apply to officers of bodies corporate rather than only directors.

I note that the bill's focus is purely on provisions that make officers personally criminally liable for offences committed by bodies corporate in circumstances in which the officers have not taken all reasonable steps to prevent the body corporate committing the offence. I will refer to this type of liability as derivative liability. The bill does not seek to delete or amend any provisions that make bodies corporate criminally liable, nor will it affect any provisions that make officers liable for offences they have committed directly. The bill will not affect situations in which officers are liable as accessories because they have been involved in a body corporate's offending.

The bill upholds the COAG principles by deleting provisions that impose a blanket derivative liability for all offences in an act. When it is considered that particular offences in an act merit derivative liability, the bill replaces the deleted provisions with a reference to one of the three standard derivative liability provisions proposed to be included at sections 39, 40 and 41 of the Criminal Code and specifically imposes liability when the underlying offences merit such liability. This is a departure from the present system, under which most pieces of legislation contain provisions that state that officers may be prosecuted in respect of every offence in the act.

Proposed section 42(2) of the Criminal Code included in the bill provides that the bill's amendments do not affect the liability of an officer, or any other person, under chapters II, LVII, LVIII and LIX of the Criminal Code. These chapters contain provisions relevant to what is commonly known as accessorial liability, such as sections 7, 562, 563A and 563B.

In some instances, the bill will delete legislative provisions that impose a mixture of accessorial liability and derivative liability. Once the bill is passed, officers who are accessories to offences committed by bodies corporate under those acts will be capable of being prosecuted using the relevant provisions contained in these chapters of the Criminal Code.

The bill will substantially reduce the number of provisions in Western Australia that reverse the onus of proof, requiring an officer to prove that they took reasonable steps to prevent the body corporate from committing particular offences. The bill retains a reversed onus of proof in respect of some particularly serious offences—for example, offences in the Medicines and Poisons Act 2014 that relate to the manufacture or supply of dangerous poisons. The bill will, of course, not prevent agencies from prosecuting bodies corporate that commit offences, or from prosecuting officers who were involved in the commission of offences. It will remove or standardise only the extra layer of liability that allows agencies to prosecute an officer when they have failed to take all reasonable steps to prevent the body corporate from committing the offence.

I want to make it clear that an officer will not be liable in circumstances in which there are no reasonable steps that they could have taken to prevent a body corporate from committing a particular offence. In this context, I refer to the case of Miller v Miller [2011] HCA 9, in which the High Court considered section 8 of the Criminal Code, which also uses the language of "reasonable steps". In that case, the majority of the High Court noted that section 8(2)(c) "does not require that there have been some steps available ... of the kind specified in that paragraph." Similarly, the provisions that will be inserted into the Criminal Code by this bill are not intended to result in a situation in which an officer may be convicted of failing to take all reasonable steps when no reasonable steps could have been taken. In determining what amounts to reasonable steps, the court must consider the knowledge of the officer about the commission of the offence, whether the officer was in a position to influence the body corporate's conduct in relation to the offence, and any other relevant matter.

There are some differences between the bill that was introduced into Parliament in 2015 and the bill before us today. For instance, the numbering in the draft provisions of the Criminal Code has changed and the bill has been updated to reflect changes to the statute book. In terms of more substantive changes, I draw members' attention to the following. Firstly, the bill no longer proposes to amend the Mines Safety and Inspection Act 1994 on the basis that the relevant provisions have been repealed and replaced by the Work Health and Safety Act 2020, based on national model work health and safety laws.

Secondly, the 2015 bill proposed to amend section 109 of the Taxation Administration Act 2003, with consequent amendments to the Duties Act 2008, the Land Tax Assessment Act 2002, the Pay-roll Tax Assessment Act 2002 and the Stamp Act 1921. These amendments have been removed from the 2022 bill for two reasons. The first of these reasons is that section 109 of the Taxation Administration Act 2003 imposes accessorial liability and was therefore not included in the Council of Australian Governments' original director liability reform commitment. There was no agreement to remove or standardise accessorial liability provisions. The second reason is the importance of ensuring that Western Australia's tax legislation remains consistent with contemporary measures to address illegal phoenixing schemes and to ensure that bodies corporate comply with their tax requirements. I note that the equivalent provision in the commonwealth's Taxation Administration Act 1953, section 8Y, also remains in place following the commonwealth's implementation of the COAG reforms to officer liability.

Thirdly, the 2015 bill proposed to delete section 154(3) of the Mining Act 1978, which imposes accessorial liability on officers of bodies corporate. However, the 2022 bill does not propose to delete this section, given that the relevant section imposes accessorial liability only.

Fourthly, the 2015 bill previously proposed to remove derivative liability from the Emergency Management Act 2005. Following further consultation with the Department of Fire and Emergency Services, the 2022 bill provides that derivative liability will apply to particular offences in that act that warrant it. The bill was amended in the other place to include reference to a direction given under section 77O(1), a new section that was inserted by the Emergency Management Amendment (Temporary COVID-19 Provisions) Act 2022. Directions made under

section 77O(1) will be treated in the same way as those made under section 71(1) of the EMA in respect of the liability of officers for a failure by a body corporate to comply with a direction.

Finally, a review clause has been included that requires that the operation and effectiveness of the amendments made by the bill be reviewed after five years, with the resulting report to be tabled in Parliament.

The bill before the house takes a sensible and measured approach; that is, it does not strip derivative liability from Western Australian legislation altogether, so that officers are never held appropriately accountable for their failures to prevent bodies corporate from offending. Neither does it maintain the present approach, in which officers are, by and large, exposed to personal criminal liability in respect of every single offence that a body corporate might commit. The bill holds officers to account in appropriate circumstances. It ensures that when legislation looks to impose derivative liability, it does so not as a general blanket provision but rather with specific consideration of the seriousness of the offence and the extent of the liability that ought properly be imposed on an officer to act as a deterrent and protect the public. The bill steers a steady path through the statute book, substantially reducing the number of derivative liability provisions, and further confining those provisions that reverse the onus of proof, whilst leaving in place a sufficient layer of regulation to ensure that officers of bodies corporate take all reasonable steps to protect the public from corporate offending.

Pursuant to standing order 126(1), I advise that the bill is a uniform legislation bill. It is a bill that will ratify or give effect to a multilateral or intergovernmental agreement to which the government of the state is a party. On 29 November 2008, the Council of Australian Governments agreed to increased harmonisation in relation to directors' liability.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 1883.]

Debate adjourned and bill referred to the Standing Committee on Uniform Legislation and Statutes Review, pursuant to standing orders.

House adjourned at 6.56 pm