DIRECTORS' LIABILITY REFORM BILL 2015

Introduction and First Reading

Bill introduced, on motion by **Hon Michael Mischin (Attorney General)**, and read a first time.

Second Reading

HON MICHAEL MISCHIN (North Metropolitan — Attorney General) [3.22 pm]: I move —

> That the bill be now read a second time.

Directors' liability reform is a Council of Australian Governments' reform project, and the Directors' Liability Reform Bill was drafted in line with the COAG principles, 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, in terms of the potential for significant public harm that might be caused by the particular corporate offending; liability of the corporation is not likely on its own to sufficiently promote compliance; and it is reasonable in all the circumstances for the director to be liable having regard to factors, including, firstly, that the obligation on the corporation, and in turn the director, is clear; secondly, 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 been negligent or reckless in relation to the corporation's offending. Sixth, in addition, in some instances it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.

The bill applies to officers of bodies corporate adopting the definition of "officer" set out in the Corporations Act 2001 of the commonwealth, although I will refer to "directors" for the sake of simplicity.

I turn to the nature of the liability. The bill is not concerned with the criminal liability of directors who have committed offences themselves, or with those who are accessories to offences committed by bodies corporate. The bill relates only to situations in which a director is made liable because he or she has not taken all reasonable steps to prevent the body corporate committing the offence. This type of liability is here referred to as derivative liability, and it is distinct from direct and accessorial liability. It must be emphasised that derivative liability is imposed on the basis of a director's failure to take all reasonable steps to prevent corporate offending. In other words, this bill does not propose to make any director liable simply on the grounds of having been a director of a body corporate that has committed an offence. The director is made liable because of his or her failure to take all reasonable steps to prevent the body corporate committing offences, not merely because of his or her legal relationship with the body corporate. As noted in the "Personal Liability for Corporate Fault: Guidelines for Applying the COAG Principles" —

> The Directors' Liability Provisions that are relevant to applying the COAG Principles are those that go beyond normal accessorial liability.
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> Generally speaking these are provisions which extend liability by also holding directors liable where they have been negligent in relation to the corporation's contravention. While different language is sometimes used, what is common about these provisions is that they provide that a director or other officer will be liable if they were "negligent", or failed to take "reasonable steps", or failed to exercise "due diligence", to avoid or prevent the corporation's contravention.

The phrase "all reasonable steps" is used in the bill and encourages a focus on concrete actions that a director ought to have taken to prevent a body corporate's offending. It is intended that, if in a particular situation it is established that there were no such steps, a director should be acquitted. This is particularly relevant in respect of type 3 offences whereby, as discussed shortly, the onus of proof lies on the director. It is not intended that a director should ever be placed in a position in which he or she will be convicted if he or she fails to prove that he or she took all reasonable steps, when such steps did not exist.

I draw the house's attention to the High Court case of Miller v Miller [2011] HCA 9, in which it fell to the court to consider section 8 of the Western Australian Criminal Code, which also uses this language of "all reasonable steps". Section 8(2) states that a person is not deemed to have committed an offence if before the commission of the offence, he or she withdrew from the prosecution of the unlawful purpose, communicated that withdrawal to each other person with whom the unlawful purpose was formed, and having so withdrawn, took all reasonable steps to prevent the commission of the offence. In that case, the majority of the High Court noted that

section 8(2)(c) of the code "does not require that there have been some steps available to her of the kind specified in that paragraph"—that is, paragraph 104, with emphasis on the words "have been". Similarly, the provisions proposed to be inserted into the Criminal Code are not intended to produce a result that a director would be convicted of failing to take all reasonable steps in a situation in which no reasonable steps could have been taken.

Turning to the amendments to the Criminal Code, the bill proposes to insert a new chapter VI into part I of the Criminal Code, which includes standard provisions reflecting three types of directors' liability identified by COAG. Under type 1, the director will be presumed to have taken all reasonable steps to prevent the body corporate committing the offence—and, therefore, not be liable—unless the prosecution proves that he or she failed to take all reasonable steps. This category is embodied in proposed section 44C of the Criminal Code, as set out in the bill. Type 2 provides that a director will be taken to have committed the offence committed by the body corporate unless he or she leads 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. Once this evidence is adduced, the prosecution bears the onus of proving that the director did not take all reasonable steps. This category is embodied in proposed section 44D of the Criminal Code, as set out in the bill. Type 3 requires the director to prove on the balance of probabilities that he or she took all reasonable steps. This category is embodied in proposed section 44E of the Criminal Code, as set out in the bill.

Proposed Criminal Code section 44F(1) provides that chapter VI does not affect the liability of a body corporate for any offence. Proposed section 44F(2) also specifically provides that chapter VI does 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 proposes to delete legislative provisions that impose purely accessorial liability, or that contain a mixture of accessorial liability and derivative liability, from the acts it seeks to amend. The relevant provisions are either replaced with one of the standard types of liability that I have already set out or deleted outright. This course of action is not intended to and will not prevent the prosecution of directors who are accessories to offences committed by bodies corporate, as proposed section 44F(2) makes clear.

Directors who actively collude in offences committed by bodies corporate—as distinct from directors who have failed to take all reasonable steps to prevent the body corporate's offending—can currently be prosecuted under chapters II, LVII, LVIII and LIX of the Criminal Code, and will continue to be capable of being prosecuted in this manner in future. The bill's deletion of accessorial liability provisions in other acts that it amends, and the reliance on the Criminal Code provisions, is in line with the intent of the COAG project on directors' liability. As stated in "Personal Liability for Corporate Fault: Guidelines for Applying the COAG Principles" —

> … as a matter of parsimony in the application of criminal sanctions, if a jurisdiction's criminal code already contains a generally-applicable complicity provision then it will usually be unnecessary and undesirable to introduce new specific complicity provisions in other statutes where those provisions do no more than duplicate the general provision.

Proposed section 44F(3) provides that an officer of a body corporate may be charged with, and convicted of, an offence in accordance with sections 44C, 44D or 44E whether or not the body corporate is charged with, or convicted of, the offence. Proposed section 44F(4) provides that if a director is charged with the body corporate's offence, he or she may raise a defence that would be available to the body corporate. If a director raises such a defence, he or she bears the onus of proving the defence, and the standard of proof required is the standard that the body corporate itself would bear. Proposed section 44F(5) provides that section 44F(4) does not limit any other defence available to the officer.

It is unusual within our legal system for a person to be in the position of establishing a defence available to another person, and this position results from the particular circumstances of derivative liability more generally: directors are made liable for offences committed by the body corporate, a separate legal person. The existence of this type of liability reflects a director's unique position, which stems from his or her legal relationship with the body corporate. In other words, a director is not a mere bystander to a body corporate's offending and it is reasonable to make a director liable for his or her failure to take all reasonable steps to prevent such offending. It is also considered reasonable to require a director to prove any defence that he or she asserts would be available to the body corporate, given that evidence about any defence available to a body corporate should be within a director's knowledge and that if a director is unable to access such evidence, the court has wide powers to order other parties to provide information relevant to a case.

Turning to amendments to other acts, overall, the bill proposes to amend 60 existing Western Australian acts to harmonise the provisions surrounding the imposition of personal liability for corporate fault. In two instances,

the bill introduces into existing legislation derivative liability for failure to take all reasonable steps. The bill proposes to delete accessorial liability provisions in the Mining Act 1978 and the Taxation Administration Act 2003, which governs liability under other tax legislation, and replace them with references to the standard directors' liability provisions to be included in the Criminal Code. It is considered that these changes are appropriate given the nature of the relevant legislation and that they help to achieve consistency throughout the statute book.

Overall, however, the bill seeks to limit and standardise provisions that impose personal criminal liability on directors for offences committed by bodies corporate in circumstances in which it is alleged that a director failed to take all reasonable steps. The default position is that directors' liability of this kind is unnecessary. Accordingly, the bill will remove derivative liability altogether from 22 acts. In an additional 18 acts, liability will be re-categorised from what we would term type 3 liability to type 1 liability.

When derivative liability is retained, it exists for fewer offences. The bill proposes to delete all provisions that impose blanket liability for all offences in an act, with the exception of the Fair Trading Act 2010, which will retain blanket liability, which is sought to be re-categorised from type 3 to type 1. The bill does not seek to impose type 2 liability for any offences, but this type of liability is embodied in proposed section 44D of the Criminal Code in the event that it is considered appropriate to apply it to offences in the future.

Type 3 provisions are used sparingly in accordance with the Council of Australian Governments principles, as the reversal of the onus of proof is a serious step and is relatively unusual in our criminal justice system. Currently, there are 36 acts in Western Australia that place the onus of proof on directors rather than the prosecution in the context of derivative liability, but the bill seeks to reduce this substantially. It proposes to include type 3 liability in six acts and for particularly serious offences.

Type 3 liability is sought to be imposed for three offences in the Stamp Act 1921 and six in the Taxation Administration Act 2003. One of the relevant offences is tax evasion, as set out in section 106(1) of the Taxation Administration Act 2003. This offence relates to matters which should be within directors' knowledge and about which they should be able to provide evidence to demonstrate that they have taken all reasonable steps to prevent the body corporate's offending.

Type 3 liability is sought to be retained for 21 offences in the Food Act 2008. These include 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 Australia New Zealand Food Standards Code, under section 22(2). These offences are directly relevant to the core business of a body corporate operating under the Food Act 2008 and it would be reasonable to expect a director to be able to demonstrate that he or she has taken all reasonable steps to prevent the body corporate's offending.

Type 3 liability is sought to be retained for seven offences in the Tobacco Products Control Act 2006. It is proposed, for instance, to retain type 3 liability for breaches of section 31(1), which provides that a person must not display or broadcast a tobacco advertisement in a public place; 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; and section 35(3), which states that a person must not provide a sponsorship in connection with the promotion of tobacco products. These offences are important aspects of the regulatory regime that governs the sale of tobacco products in Western Australia. Given the impacts of smoking on public health, there are strong public policy reasons for requiring directors to demonstrate that they have taken all reasonable steps to prevent corporate offending in this area.

Type 3 liability is sought to be retained for tier 1 and 2 offences in the Environmental Protection Act 1986, the state's peak environmental legislation. There are currently 41 such offences, including the offences under section 49(2), which makes it an offence either intentionally or with criminal negligence to cause pollution, or to allow pollution to be caused, and under section 111A(1), which concerns victimising informants. Given the seriousness of these offences, there are strong public policy reasons for requiring directors to demonstrate that they have taken all reasonable steps to prevent bodies corporate from committing these offences.

Type 3 liability is sought to be retained for 12 offences in the Medicines and Poisons Act 2014, including the offence in section 14(1) of unlawfully manufacturing or supplying a schedule 4 or schedule 8 poison, the offence in section 16(1) of unlawfully manufacturing or supplying a schedule 7 poison, the offence in section 18(1) of unlawfully supplying a strictly controlled substance, and the offence in section 21(3) of using fraudulent means to cause another person to prescribe or supply a poison. These are offences with very grave consequences and it is considered reasonable that directors of bodies corporate who operate under this act be aware of these matters and take all reasonable steps to avoid such offending on the body corporate's part.

It is important to be clear on the nature of the amendments sought to be made by this bill. The bill does not propose changes to offences themselves or to the penalties that may be imposed for those offences. The bill seeks to change the extra layer of derivative liability that sees directors made criminally liable for some offences committed by bodies corporate when the director has not been involved in the body corporate's offending but has failed to take all reasonable steps to prevent it. In many instances, the bill seeks to remove this additional layer. For example, the bill proposes to amend the Anzac Day Act 1960, but it will not affect any offence provisions or any of the penalties. The amendments will simply remove the current imposition of liability on every single member of a club's body or managing committee for offences committed by a club. For instance, section 4(4) of the Anzac Day Act currently provides —

> If any race meeting is held on Anzac Day in any year in contravention of the provisions of this section, the person or racing club by or on behalf of whom or which the race meeting was held, and each member of the managing body or committee of that racing club, commits an offence and is liable to a penalty not exceeding $400.

Following the amendments, this will read —

> If any race meeting is held on Anzac Day in any year in contravention of the provisions of this section, the person or racing club by or on behalf of whom or which the race meeting was held commits an offence and is liable to a penalty not exceeding $400.

Thus, the ability to prosecute clubs and the penalties that may be imposed will not change. What will change is the blanket imposition of liability on every single member of a club's managing body or committee. Likewise, throughout the bill, changes that are proposed to be made relate only to the imposition of liability on directors, not on the offence provisions themselves.

The bill represents a microeconomic reform that will achieve consistency across all Western Australian legislation regarding the criminal liability of directors or officers for offences committed by bodies corporate, as well as bringing Western Australia into line with other Australian jurisdictions.

In preparing this bill, it has been necessary to balance two competing public interests. Firstly, there is the need to reduce the regulatory burden on directors, thereby reducing disincentives to act as a director. Secondly, there is the importance of corporate compliance with legislation and the need to hold directors responsible when they have failed to ensure, so far as possible, that bodies corporate do not commit offences that are injurious to the public. I am satisfied that the bill strikes an appropriate balance between these two imperatives.

Pursuant to standing order 126(1), I advise that this bill is a uniform legislation bill. It is a bill that ratifies or gives effect to an intergovernmental or multilateral agreement to which the government of the state is a party.

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

[See paper 2594.]

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