

Directors' Liability Reform Amendment Bill 2012

Report No. 25

Legal Affairs and Community Safety Committee

March 2013

Legal Affairs and Community Safety Committee

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Abbreviations

AICD	Australian Institute of Company Directors
Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Directors' Liability Reform Amendment Bill 2012
CAMAC	Corporations and Markets Advisory Committee
COAG	Council of Australian Governments
COAG Guidelines	means the guidelines developed by COAG to assist with the application of the Principles
COAG Principles	means the set of six principles agreed to by COAG under the <i>National Partnership Agreement to Deliver a Seamless National Economy</i>
COAG Principles and Guidelines	means the COAG Principles and COAG Guidelines
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
QLS	Queensland Law Society

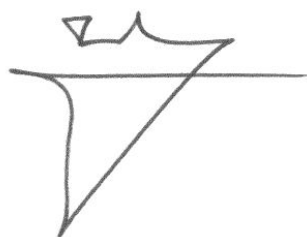
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Directors' Liability Reform Amendment Bill 2012 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this Report to the House.



Mr Ian Berry MP

Chair

March 2013

Recommendations

Recommendation 1

8

The Committee recommends the Directors' Liability Reform Amendment Bill 2012 be passed.

Recommendation 2

21

The Committee recommends the Attorney-General:

- (a) outline his response to the Committee's report – the details of the urgent review by departments of the Acts overlooked in the audit process; and
- (b) table the justification for inclusion of any executive liability provisions in those Acts similar to the information provided to the Committee in the *Assessment of Queensland legislation against COAG Guidelines*.

Recommendation 3

22

Subject to the results of the urgent review, the Committee recommends the Bill be amended accordingly to implement any required changes to the overlooked Acts in order to achieve the full effect of the COAG reform agenda.

Recommendation 4

22

The Committee recommends the Minister for Energy and Water Supply progress a review of section 85 of the *National Electricity Law* against the Principles and Guidelines, through the Standing Council on Energy and Resources, to ensure the provision is appropriately reviewed under the COAG reform agenda.

1 Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.¹

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Department of Police; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Directors' Liability Reform Amendment Bill 2012 (Bill) was introduced into the Legislative Assembly and referred to the Committee on 28 November 2012. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report by 15 March 2013.

1.2 Inquiry process

On 3 December 2012, the Committee wrote to the Department of Justice and Attorney-General (DJAG or the Department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The Committee received written advice from the Department including a detailed analysis of the applicable Queensland legislation which is being amended by the Bill and also received three submissions (see **Appendix A**).

1.3 Policy objectives of the Bill

The Bill delivers on the Government's promise to reduce red tape and promote Queensland as the best place to do business in Australia. Currently, under many laws throughout Queensland and the rest of Australia, company directors may be held liable for the actions taken by their company, even if the director had no knowledge of the act.

The unsatisfactory nature of this situation has been recognised by all Australian governments and this Bill is Queensland doing its part to reduce the number of provisions which impose this personal and criminal liability on directors and limit liability to those matters where there is adequate justification for the provision to remain.

The objectives of the Bill are therefore to:

- (a) reduce the number of provisions which impose personal and criminal liability on executive officers for corporate fault and only provide for this liability where there is adequate justification;

¹ *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- (b) reduce red tape and the regulatory burden placed upon Queensland business; and
- (c) achieve greater consistency of approach to the liability of executive officers of corporations with other Australian jurisdictions.²

1.4 Should the Bill be passed?

Standing Order 132(1) requires the Committee to recommend whether the Bill should be passed. The Committee has considered the policy intent of the Bill which will greatly reduce red tape and the regulatory burden on Queensland businesses and will simplify the provisions applying to executive officers of corporations across the whole of Queensland's statute book.

After examination of the Bill, consideration of the public submissions and the further information provided from the Department, the Committee is satisfied the Bill should be passed. The Committee has made further specific recommendations in relation to the Bill throughout this Report.

Recommendation 1

The Committee recommends the Directors' Liability Reform Amendment Bill 2012 be passed.

² *Explanatory Notes, Directors' Liability Reform Bill 2012, page 1.*

2 Background on directors' liability reform

2.1 Why reform is needed

Directors' liability legislation is being reformed across Australia due to the growing burden on company directors, the increasing number and complexity of provisions, the impact on businesses, productivity and economic growth, the need to improve the consistency between jurisdictions and to provide a more robust framework for including these provisions in legislation.

There are differences between Australian jurisdictions in the personal liability assumed by directors, which has resulted in "... *confusion and complexity for corporations operating across State boundaries in understanding their legal obligations and responsibilities.*"³ Current legislation impacts on business activity undertaken by directors and officers, and affects "... *entrepreneurialism and economic growth as directors adopt an overly cautious approach ...*".⁴ Minter Ellison Lawyers add:

*There is no doubt that these issues and the inherent uncertainty as to the scope of liability under existing legislation acts as a disincentive to those considering accepting an appointment, or considering whether to continue in their current position, as a director or officer of a company.*⁵

When the Attorney-General and Minister for Justice introduced the Bill, he acknowledged that there has been "... *a tendency in the past to provide for blanket directors liability to apply to offences under acts without adequate justification.*"⁶ The number of provisions that place increased burden on directors and officers for corporate offences has grown over the past decade:

*The explosion in the number of Commonwealth, State and Territory laws which impose personal liability on directors as a result of a statutory breach by a company has been one of the biggest issues of concern for company directors and officers in recent years.*⁷

2.2 National reform

Reform in the area of directors' liability has progressed slowly over a number of years.

In September 2006, the Corporations and Markets Advisory Committee (CAMAC), whose role is to provide independent advice to the Australian Government on issues that arise in corporations and financial markets law and practice, released its report entitled [Personal Liability for Corporate Fault](#). That report identified two principal areas of concern:

- a marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions) unless they can establish an available defence; and
- considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.⁸

³ *Explanatory Notes*, Directors' Liability Reform Amendment Bill 2012, page 2.

⁴ *Hansard*, 28 November 2012, page 2856.

⁵ Submission 2, Minter Ellison Lawyers, page 3.

⁶ *Hansard*, 28 November 2012, page 2855.

⁷ Submission 2, Minter Ellison Lawyers, page 2.

⁸ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, page 1.

CAMAC went on to raise a number of concerns in its report stating:

The Advisory Committee is concerned about the practice in some statutes of treating directors or other corporate officers as personally liable for misconduct by their company unless they can make out a relevant defence. Provisions of this kind are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law.

The Committee is also concerned about the marked difference in the form of statutory provisions that impose personal liability for corporate fault. Corporate officers may find themselves subject to a variety of standards of responsibility and available defences under statutes applying to different aspects of a company's operations in different parts of Australia.⁹

CAMAC itself noted in its report that the concerns identified were not new and made reference to a report by the Senate Standing Committee on Legal and Constitutional Affairs: *Company Directors' Duties* published in 1989, which noted a trend towards imposing personal liability on directors for corporate fault and recommended further consideration of the appropriate mix of individual and corporate liability for corporate misconduct.¹⁰

2.3 COAG Reform program

In November 2008, the Council of Australian Governments (COAG) agreed to reform directors' liability provisions and increase national harmonisation as part of the *National Partnership Agreement to Deliver a Seamless National Economy*.

One of 27 deregulation priorities committed to '*... a nationally-consistent and principles-based approach to the imposition of personal criminal liability for directors and other corporate officers as a consequence of a corporate offence*'.¹¹

COAG agreed on a set of six principles which are to be applied when imposing personal liability on directors and other corporate officials for corporate fault (COAG Principles). The COAG Principles are:

- Principle 1** - Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.
- Principle 2** - Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.
- Principle 3** - A "designated officer" approach to liability is not suitable for general application.
- Principle 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 (for example, 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:

⁹ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, pages 8 and 9.

¹⁰ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, page 2.

¹¹ National Partnership Agreement to Deliver a Seamless National Economy, Implementation Plan, page 23.

- 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.

Principle 5 - Where principle 4 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.

Principle 6 - 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.¹²

Audits of legislation were conducted by jurisdictions applying the COAG Principles, however the COAG reform council (whose role is to review jurisdictions' performance in relation to agreed COAG reforms) held concerns about the consistency (or lack thereof) in approach by jurisdictions. COAG engaged the legal firm, Corrs Chambers Westgarth to examine the audits conducted to confirm whether the COAG Principles were applied consistently across jurisdictions.

In August 2011, Corrs Chambers Westgarth published its independent report entitled [Analysis of the application of COAG's directors' liability principles](#). This report found:

Although an attempt was made to apply the principles (either expressly or impliedly) it is not consistently clear from any of the Audits how the jurisdictions:

- *interpreted each principle; and*
- *applied the principles identified to the provisions in order to reach their recommendations.*

Because information was either not provided or general in nature, it is unclear from the Audits:

- *why some principles were applied and others were not; and*
- *whether the application of the principles (if any), was consistent with the drafting and intention of the principles.*

In particular, from the information provided it was clear that:

- *principles 2, 4 and 5 were consistently applied incorrectly; and*
- *the jurisdictions did not consider it necessary to expressly apply and either satisfy or discharge all 6 principles for each provision reviewed.*¹³

To assist with the application of the COAG Principles, a set of guidelines were developed to ensure jurisdictions consistently interpreted and applied the six principles when assessing and amending director's liability provisions (COAG Guidelines).¹⁴ The COAG Guidelines were tabled by the Attorney-General and Minister for Justice in his introductory speech and are available on the Parliament website.

¹² *Explanatory Notes, Directors' Liability Reform Amendment Bill 2012, page 2.*

¹³ Corrs Chambers Westgarth, *Analysis of the application of COAG's directors' liability principles*, August 2011, pages 36-37.

¹⁴ Personal liability for corporate fault – Guidelines for applying the COAG principles, www.coag.gov.au/node/434, page 1.

Following the development of the COAG Guidelines, jurisdictions subsequently agreed to re-audit their laws against the COAG Principles and the Guidelines and amend their individual laws. New milestones and timeframes were introduced by COAG with jurisdictions aiming to implement all or most of the audit outcomes by December 2012.¹⁵

2.4 Queensland reform

On 25 September 2012, the Premier, the Hon Campbell Newman MP stated:

... I understand that currently in Queensland alone there are over 3,800 offences for which a director can be held personally liable for acts undertaken by their company with or without the director's knowledge.

We see legislation that is working against the principle of a limited liability company and often it reverses the onus of proof.

In this respect, Directors are denied a presumption of innocence.

I am not saying that Directors who knowingly or recklessly commit illegal acts that lead to harm should not be subject to the full force of law, but my way of thinking is that you should have the same legal rights as other citizens.

Reforms in this area will look to reduce the liabilities imposed on directors by half and will mean a director will only be personally liable if they encourage or assist in the commission of an offence or they have been negligent regarding its commission.

We want to send out a signal to the rest of Australia, indeed to the world, that Queensland is open for business.

We are not about lowering standards, whether they be safety, or environmental, or employment, or social or whatever. It is possible to meet proper standards and still have an environment that is good for business.¹⁶

Around the same time, the Attorney-General, the Hon Jarrod Bleijie MP stated:

Consistency of approach to directors' liability across Australia is paramount.

Differences across the country have resulted in confusion and complexity for directors operating across State boundaries in understanding their legal obligations and responsibilities.

The Newman Government is determined to grow a four-pillar economy based on tourism, agriculture, resources and construction, and reducing regulation for business is just another way we can achieve this.¹⁷

The Bill was introduced into the Parliament in November 2012 and follows Queensland's audit in early 2012 of its director's liability provisions against the COAG Principles and Guidelines. In his introductory speech, the Attorney-General advised the audit identified "over 80 Acts and over 3800 provisions across the statute book for which directors or other corporate officers can be found to be automatically liable."

The Attorney-General went on to say that "[f]or the statutes amended by the bill, thousands of offences for which directors may be liable for corporate fault have been reduced or removed."¹⁸

¹⁵ National Partnership Agreement to Deliver a Seamless National Economy, Implementation Plan, page 24.

¹⁶ The Hon Campbell Newman MP, *Media Statement – Keynote Speech – AICD & UQ Business School Leader's Edge Luncheon*, 25 September 2012.

¹⁷ The Hon Jarrod Bleijie MP, *Media Statement – Government commits to red tape reductions and reforms*, 7 September 2012.

3. Examination of the Directors' Liability Reform Amendment Bill 2012

This Part sets out the Committee's examination of the Bill including an examination of the processes undertaken in preparing the Bill.

3.1 Consultation on the Bill

No general community consultation was undertaken on the Bill. The Explanatory Notes state the reason for the lack of consultation was due to the need to introduce the Bill into the Parliament by the end of 2012, in order to meet the COAG milestone.¹⁹

The Queensland Law Society (QLS) expressed concerns about this statement in the Explanatory Notes in its submission to the Committee. The QLS noted the Bill was announced by the Attorney-General on 7 September 2012 and believed that at least some targeted consultation may have been possible in the two and a half months between his announcement and the introduction of the Bill.²⁰ The QLS submitted:

*The Society is strongly of the view that broad consultation on legislation at an early stage is the key to good law.*²¹

The Australian Institute of Company Directors (AICD) raised several issues with the Bill which are outlined in further detail later in this Part. On the issue of consultation, the AICD stated:

*If the Bill had been open for consultation before being introduced into parliament, the Australian Institute of Company Directors would have been in a position to raise its concerns and to recommend substantial changes at a much earlier stage, unfortunately this did not occur.*²²

It is understood that after considering the matters raised in the submission by the AICD through the Committee's inquiry process, the Attorney-General met with the representatives from the AICD in February 2013 to discuss their concerns with the Bill. The Attorney-General subsequently advised the Committee that the Department is facilitating further consideration by relevant portfolio Ministers of the AICD's views (in relation to particular liability provisions) and that a further review will be progressed as a matter of urgency.²³

The Committee understands that the outcome of the further review may result in additional amendments, which will be progressed by the Attorney-General in Parliament at the Consideration in Detail stage of the Bill.

The Attorney-General agreed to keep the Committee informed of developments.

Committee Comment

The concerns raised by both the QLS and the AICD are noted. The Committee has stated in previous bill reports the importance of engaging with stakeholders early in the process and how the development of a bill can be greatly enhanced through public consultation and discussions with relevant stakeholders prior to its introduction into Parliament.²⁴

¹⁸ *Hansard*, 28 November 2012, page 2856.

¹⁹ *Explanatory Notes*, Directors' Liability Reform Amendment Bill 2012, page 7.

²⁰ Submission No. 3, Queensland Law Society, page 2.

²¹ Submission No. 3, Queensland Law Society, page 1.

²² Submission No. 1, Australian Institute of Company Directors, page 14.

²³ Letter dated 6 March 2013 from the Attorney-General and Minister for Justice to the Committee.

²⁴ Report No. 5, Legal Affairs and Community Safety Committee – Penalties and Sentences and Other Legislation Amendment Bill 2012, July 2012.

The timeframes required to meet the COAG milestones are acknowledged by the Committee, however the further ongoing review of the Bill highlights the importance of early engagement with key stakeholders. The release of an exposure draft of the legislation may have reduced concerns by stakeholders at an earlier stage.

While the Committee is pleased that the Attorney-General has taken additional steps to address the concerns of key stakeholders, it is noted that any further amendments which arise as a result of this review, will need to be drafted at short notice and will not be able to be scrutinised by the Committee.

Some level of targeted consultation, albeit for a short period, may have negated this eventuality.

3.2 Achievement of the Policy Objectives

The Bill contains 82 parts and one schedule, substantively amending 80 separate Acts of Parliament and making minor and consequential amendments to just over half of those Acts. The Committee does not address each of the individual Acts amended by the Bill in this Report, but addresses each of the policy objectives of the Bill and examines how those objectives are achieved.

3.2.1 Reduction of Executive Liability Provisions

The first objective of the Bill is to reduce, across the statute book, the number of provisions that hold executive officers personally and criminally liable for offences committed by their corporations, unless there is adequate justification to do so.²⁵

To achieve this reduction, all relevant agencies audited legislation within their portfolio area to:

- (a) identify all the directors' liability provisions and the individual offences for which executive officers could be criminally liable for offences committed by their corporations; and
- (b) assess each of those offences against the COAG Principles and Guidelines.

If it was determined that adequate justification existed, an assessment was carried out to determine an appropriate level of liability to attach to the offence. As advised by the Department, following the initial audit, the results were subjected to further critical analysis and further reductions in directors' liability were achieved.²⁶

Types of liability

In accordance with the Guidelines, there are three levels of liability which may attach to director of a company.

Standardised provisions are used throughout the Bill to apply the different liability provisions to offences in the individual Acts, where it is determined that adequate justification exists to maintain a level of liability. The Department's explanation of the three types of liability and the corresponding standard provisions are set out below.

Type 1 liability which is the least onerous, places the onus on the prosecution to prove that the director failed to take reasonable steps to prevent the commission of the offence. This is the default position unless Type 2 or 3 liability can be justified on a case-by-case basis.²⁷

²⁵ *Explanatory Notes*, Directors' Liability Reform Amendment Bill 2012, page 1.

²⁶ Letter from the Department to the Committee dated 10 December 2012, page 3.

²⁷ Letter from the Department to the Committee dated 10 December 2012, page 3.

Type 1: Executive liability (standard) provision

An executive officer of a corporation commits an offence if-

- (a) the corporation commits an offence against a stated executive liability provision; and*
- (b) the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.*

The maximum penalty for such contravention is the maximum penalty for an individual for the offence.

In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps, a court must have regard to-

- (a) whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence; and*
- (b) whether the officer was in a position to influence the corporation's conduct in relation to the offence; and*
- (c) any other relevant matter.²⁸*

Type 1 provisions consistent with COAG Principles?

The QLS queried whether the formulation used in Type 1 provisions was consistent with the COAG Principles, in particular Principle 5 which provides:

'[where] 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.'*

The QLS submitted:

As currently drafted in the Bill, even the 'Type 1' liability provisions, which require the prosecution to prove that a director did not take all reasonable steps to prevent corporate fault resulting in an offence, are more onerous than the position adopted under the COAG Principles.²⁹

In response, the Department provided:

Directors' liability is only imposed where the offence guards against a serious public harm. Type 1 liability is where the prosecution has both the evidential and legal onus of proving the elements of the offence against the executive officer.

Under the Bill, this may include proving the executive officer has failed to take all reasonable steps to prevent the corporate fault resulting in the offence. Where this requirement applies, it is because a higher standard than an absence of negligence or recklessness is appropriate.³⁰

Committee Comment

While it could appear that the approach taken in drafting Type 1 provisions is more onerous than COAG Principle 5 when examined in isolation, the Committee considers that having regard to the

²⁸ Explanatory Notes, Directors' Liability Reform Amendment Bill 2012, page 3.

²⁹ Submission No. 3, Queensland Law Society, page 4.

³⁰ Report of the Department of Justice and Attorney-General – 25 January 2013, page 9.

whole of the COAG Principles and Guidelines, the approach taken in the Bill is consistent. The use of phrase 'all reasonable steps' which appears in all three provisions is discussed in further detail below.

Type 2 liability deems the director liable for the corporation's criminal conduct. However, directors have a defence if they have taken reasonable steps to avoid the contravention. While directors bear the onus of bringing evidence to show that they did take reasonable steps, the prosecution is required to prove beyond reasonable doubt that either those reasonable steps were not taken, or other steps should have been taken.³¹

Type 2: Executive liability (evidential burden) provision

If a corporation commits an offence against a stated executive liability provision, each executive officer of the corporation is taken to have also committed an offence against the provision.

However, the executive officer is not taken to have also committed an offence if-

- (a) the officer satisfies the evidential burden of showing that-*
 - (i) the officer did not know, and could not reasonably have been expected to have known, of the corporation's conduct constituting its offence; or*
 - (ii) the officer took all reasonable steps to ensure the corporation did not engage in the conduct constituting its offence; and*
- (b) the officer having complied with paragraph (a), the prosecution does not prove the contrary beyond reasonable doubt.*

In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps, a court must have regard to whether the officer was in a position to influence the corporation's conduct in relation to the offence.³²

Type 3 liability deems a director criminally liable for a corporate breach, thereby reversing the onus of proof. This liability type requires directors to prove that they exercised due diligence, were not in a position to influence the corporation's conduct or took reasonable steps to prevent the commission of the offence by the corporation. Unlike a Type 2 liability, the prosecution is not required to disprove the application of the defence.³³

Type 3: Executive liability (persuasive burden) provision

If a corporation commits an offence against a stated executive liability provision, each executive officer of the corporation is taken to have also committed an offence against the provision.

However, it is a defence for the executive officer to prove that-

- (a) the officer did not know, and could not reasonably have been expected to have known, of the corporation's conduct constituting its offence; or*
- (b) the officer took all reasonable steps to ensure the corporation did not engage in the conduct constituting its offence.*

³¹ Letter from the Department to the Committee dated 10 December 2012, page 3.

³² *Explanatory Notes*, Directors' Liability Reform Amendment Bill 2012, page 3.

³³ Letter from the Department to the Committee dated 10 December 2012, page 3.

*In deciding whether things done or omitted to be done by the executive officer constitute reasonable steps, a court must have regard to whether the officer was in a position to influence the corporation's conduct in relation to the offence.*³⁴

The table below sets out the onus and standard of proof for the three types of directors' liability provisions.

Liability	Evidential onus	Legal onus
Type 1	Prosecution	Prosecution (beyond reasonable doubt)
Type 2	Defence (prima face evidence)	Prosecution (beyond reasonable doubt)
Type 3	Defence	Defence (balance of probabilities)

Source: *Personal Liability for Corporate Fault - Guidelines for applying the COAG Principles*

Issues relating to the reversal of the onus of proof in Types 2 & 3 Liability provisions are discussed at Part 4 – Fundamental Legislative Principles.

Accessorial Liability

The Bill also introduces the concept of an executive or deemed liability provision. While the three types of executive liability provisions above deal with imposing liability on executives for corporate fault, the deemed provision provides for the imposition of liability on executive members, directly for their own offending.

While this was not covered under the COAG Principles and Guidelines, the Department explained that in addition to the removal of directors' liability for corporate offending, there has been a strengthening of liability for directors involved in the commission of an offence.³⁵

The new executive (deemed) liability provision used throughout the Bill is:

Executive (deemed) liability provision

If a corporation commits an offence against a provision of an Act containing an executive (deemed) liability provision, each executive officer of the corporation is taken to have also committed the offence if-

- (a) the officer authorised or permitted the corporation's conduct constituting the offence;*
or
- (b) the officer was, directly or indirectly, knowingly concerned in the corporation's conduct.*

For any of the executive liability provisions above, an action may be commenced against the executive officer regardless of whether proceedings are commenced against the corporate entity. Further, the liability of an executive officer under a Type 1, 2 or 3 provision does not affect either the liability of the corporation for the offence, an executive officer under a deemed liability provision or any person under the *Criminal Code*, chapter 2.³⁶

³⁴ *Explanatory Notes*, Directors' Liability Reform Amendment Bill 2012, page 3.

³⁵ Letter from the Department to the Committee dated 10 December 2012, page 6.

³⁶ Letter from the Department to the Committee dated 10 December 2012, page 6.

Issues raised in Submissions

While all three submissions clearly supported the policy objectives being pursued by the Bill,³⁷ each of the submissions highlighted what they considered to be serious issues with the manner in which the Government went about implementing the reforms.

No significant reduction of offences

In reference to the Attorney-General's Media Release of in September 2012,³⁸ Minter Ellison submitted that despite the Government's earlier assurances that the reforms introduced by the Bill would reduce the number of offences by half, the Bill only reduces by two, the actual number of Acts that impose liability for the breach of director liability provisions.³⁹

Minter Ellison went on to state:

Furthermore, on our analysis, this means that the reversal of the usual onus of proof has been retained in well over 50 Acts in Queensland, comprising:

- *29 existing Acts containing directors' liability provisions which have not been amended; and*
- *27 Acts which will be amended to include new provision containing a reversal of the usual onus of proof.*

Out of approximately 100 Acts in Queensland which currently impose personal liability on company directors and officers. We submit very strongly that this is fundamentally wrong and inappropriate under our system of justice. It is certainly at odds with the expectations of COAG, the views of CAMAC and the reasonable expectations of company directors and officers that they be treated in the same way as all other citizens under the law.⁴⁰

The AICD also commented:

- *Of the 80 Acts amended, the Bill repeals only two director liability provisions;*
- *The Bill reverses the legal burden of proof in 21 Acts;*
- *The Bill fails to amend director liability provisions in 20 other Acts, the majority of which also reverse the legal burden of proof;*
- *The Bill reverses the evidentiary burden of proof in six Acts;*
- *In only 34 of the 80 Acts which are to be amended by the Bill, officers will be liable where they authorised, permitted or were knowingly concerned in the offence. In the remaining 46 Acts, a standard less than this is required for a director to be liable for a criminal offence;*
- *In seven Acts, three different types of liability provisions will apply to render directors liable for a corporation's offence; and*
- *In 33 Acts, two different types of liability provisions will apply to render directors liable for a corporation's offence.⁴¹*

³⁷ Submission No. 1, Australian Institute of Company Directors; Submission No. 2, Minter Ellison Lawyers; Submission No. 3, Queensland Law Society.

³⁸ The Hon Jarrod Bleijie MP, *Media Statement – Government commits to red tape reductions and reforms*, 7 September 2012.

³⁹ Submission No. 2, Minter Ellison Lawyers, page 4.

⁴⁰ Submission No. 2, Minter Ellison Lawyers, page 4.

⁴¹ Submission No. 1, Australian Institute of Company Directors, page 13.

The AICD considered the Bill failed to meet the objectives set out in the Explanatory Notes, in that it barely reduces the number of provisions which impose personal criminal liability on executive officers for corporate fault.⁴²

The Department responded to these issues stating that the Bill:

*...reduces the number of directors' liability provisions from approximately 3,800 offences to approximately 260 across the Acts amended, confined to the most serious offences, where the case for retaining such liability has been examined and assessed as justified; and in accordance with the objectives of the COAG reforms, achieves a significant reduction of directors' liability provisions, consistent with the national program of reduction;*⁴³

The Department considered that it was appropriate to retain directors' liability provisions in limited circumstances where the offending creates a risk of such significant harm that corporate liability is not sufficient.⁴⁴

Committee Comment

It appears that while the submissions are correct in stating the Bill only reduces by 2 the number of Acts of Parliament which impose directors' liability provisions, the submissions have not taken into account the substantial reduction in the number of individual provisions which impose liability on a director for corporate fault. A reduction from 3,800 to approximately 260 clearly demonstrates the Government's commitment to reducing executive liability provisions, consistent with the COAG reform agenda. Further, it must be recognised that blanket directors' liability has been removed from all the Acts amended by the Bill.

The 29 Acts remaining without amendment appear to include those Acts which are subject to COAG exemptions or which are subject to review in the near future. The issue of whether all appropriate Acts were considered is discussed further below.

It is agreed the Explanatory Notes did not set out in sufficient detail the justification for applying the relevant Type of Executive Liability for each of the assessed provisions. However, the Committee has had the benefit of receiving from the Department, a detailed analysis setting out the assessment of the liability provisions against the COAG Guidelines.⁴⁵ The analysis is available on the Committee's website.

The Committee is satisfied the executive liability provisions in the Bill have been robustly assessed against the COAG Principles and Guidelines and that appropriate justifications have been provided to determine what level of liability should, if any, remain for executive officers.

It is noted this Bill is a legislative starting point in this reform process. The Committee concurs with the Explanatory Notes, in that all Ministers may, in more fundamentally reviewing their portfolio legislation, consider opportunities for better targeting and streamlining offences to which executive officers' liability is appropriate and whether that liability should be imposed directly or indirectly as a result of corporate offending. After such reviews, any Minister may bring forward further amendments in this area which will further reduce the amount of executive liability provisions.

⁴² Submission No. 1, Australian Institute of Company Directors, page 13.

⁴³ Report of the Department of Justice and Attorney-General – 25 January 2013, page 1.

⁴⁴ Report of the Department of Justice and Attorney-General – 25 January 2013, page 6.

⁴⁵ Letter from the Department to the Committee dated 29 January 2013 and attachment - *Assessment of Queensland legislation against COAG Guidelines*.

Application of the COAG Principles

Following on from whether the Bill achieves its goals in relation to the reduction of executive liability provisions, Minter Ellison was concerned that the approach taken by the Government did not pay close attention to the COAG Principles guiding the reforms.

Minter Ellison was critical of the application of the COAG Principles submitting:

Principles 1 and 2 appear to have been given very little weight indeed. The premise behind Principle 1, namely that it may be sufficient to impose liability on a corporation for statutory breach to ensure statutory compliance rather than impose liability on both the corporation and its directors, appears to have been given little consideration. Furthermore, as noted earlier, after the reforms there will be only two fewer Acts imposing liability on directors and officers. This implies little other than lip service has been paid to a consideration of whether it is appropriate just to make the corporation liable as opposed to directors and whether a form of 'blanket' liability is appropriate at all.

Similarly, Principle 4 seems to have been substantively disregarded. The conclusion of the drafters seems to be that there are compelling public policy reasons why directors should be made liable for corporate breaches in all but two of the statutes in which those provisions appear, and that there are still some 1,900 provisions where there are compelling public policy reasons why such provisions should be retained.

While some weight seems to have been given to Principle 5, (which says that where there are compelling public policy reasons to make directors criminally liable for a corporate breach, that they should be regarded as liable only if they have encouraged or assisted in the commission of the offence or have been negligent or reckless), it has only been adopted in an ad hoc manner for relatively minor breaches and is only applied as the sole model in a minority of Acts.

The only Principle which seems to have been given any substantial weight at all is Principle 6, which was intended to be applied only in the most extreme sort of situation, after all of the other Principles had been considered and found to be inadequate. This Principle says that in some cases it might be appropriate to put the directors to proof that they took reasonable steps to prevent the commission of an offence. Not even this Principle goes so far as to mandate a reversal of the onus of proof, and yet the drafters of the Bill seem to have relied extensively on this Principle to allow them to impose extensive new provisions which reverse the onus of proof in 27 Acts, while leaving in place approximately 29 Acts which already contain provisions reversing the onus of proof.

We regard it as unfortunate that the drafters of the Bill paid such scant regard to the substance and spirit of the Principles and sought to use Principle 6, which was only intended for use where the most compelling of cases existed, as an opportunity to preserve the unfair status quo.⁴⁶

Committee Comment

It is difficult to accept the position put forward by Minter Ellison when the entirety of the reforms undertaken by the Department is looked at closely. Echoing the comments earlier, the Bill will reduce the number of executive liability provisions, across the statute book, from approximately 3,800 to 260.

⁴⁶ Submission No. 2, Minter Ellison Lawyers, page 6.

The Committee is satisfied with the critical analysis undertaken by the Department in justifying whether to retain the provisions and notes that no blanket directors' liability remains in any of the Acts amended by the Bill.

Not all Acts assessed

The AICD identified in its submission a number of provisions which it considered should be re-reviewed and repealed or amended. The AICD did not consider the Explanatory Notes sufficiently set out the reasons why a number of Acts were not included in the review conducted across all Portfolios.⁴⁷

In relation to the 20 Acts identified, the Department responded that nine Acts were either proposed for review or repeal; five Acts were either exempt or part of a national scheme; one Act identified did not contain directors' liability provisions and five Acts were inadvertently overlooked in the audit process.⁴⁸

Of the five Acts overlooked,⁴⁹ the Department advised that liaison would occur with the relevant Departments and that an urgent review of the Acts would take place.⁵⁰

The Committee sought further information from the Department on the status of the urgent review in early February 2013 asking (a) if the review had occurred; and (b) if it was likely that there will be amendments proposed to the Bill as a result of the review. The Attorney-General's response dated 6 March 2013 did not address these issues. No further information has been forthcoming at the time of writing this Report.

Committee Comment

It is accepted that the Acts already subject to review or repeal should not be subjected to further review under this process.

Similarly, Acts that are exempted under the COAG Occupational Health and Safety (OH&S) exemption should also not be subjected to review. However, it is noted that the four Acts which were identified by the AICD which fell within the COAG OH&S exemption, were not specifically identified in the Explanatory Notes as falling within the exemption category. More care should have been taken with the preparation of the Explanatory Notes to ensure all exempted Acts were covered off.

It is disappointing, however, that provisions in five Acts were overlooked by departments in auditing the legislation that falls within their portfolio administrative arrangements. Should amendments be required to these Acts, the Committee will not have the benefit of being able to review the relevant clauses or the assessment of the provisions against the COAG Guidelines.

Recommendation 2

The Committee recommends the Attorney-General:

- (a) outline in his response to the Committee's report – the details of the urgent review by departments of the Acts overlooked in the audit process; and
- (b) table the justification for inclusion of any executive liability provisions in those Acts similar to the information provided to the Committee in the *Assessment of Queensland legislation against COAG Guidelines*.

⁴⁷ Submission No. 1, Australian Institute of Company Directors, pages 12 & 13.

⁴⁸ Report of the Department of Justice and Attorney-General – 25 January 2013, pages 4-5.

⁴⁹ *Community Services Act 2007* (section 123); *Contract Cleaning Industry (Portable Long Service Leave) Act 2005* (sections 132, 133); *Family Services Act 1987* (section 29); *Foreign Ownership of Land Register Act 1988* (section 26); *Transport Security (Counter-Terrorism) Act 2008* (section 55).

⁵⁰ Report of the Department of Justice and Attorney-General – 25 January 2013, page 4.

Recommendation 3

Subject to the results of the urgent review, the Committee recommends the Bill be amended accordingly to implement any required changes to the overlooked Acts in order to achieve the full effect of the COAG reform agenda.

With respect to the *Electricity – National Scheme Queensland Act 1997*, the Committee notes the reason the Act was not included for review was that it is a national scheme law and unable to be unilaterally amended. The relevant provision which has not been reviewed is section 85 of the *National Electricity Law* as applied in Queensland through the above Act and is not actually a provision of a Queensland Act.

As the reforms being advanced by the Bill are also nationally agreed, the Committee considers that steps could be taken through the relevant Ministerial Council or through COAG to ensure the *National Electricity Law* as applied in Queensland and in other jurisdictions does not escape appropriate review.

Recommendation 4

The Committee recommends the Minister for Energy and Water Supply progress a review of section 85 of the *National Electricity Law* against the COAG Principles and Guidelines, through the Standing Council on Energy and Resources, to ensure the provision is appropriately reviewed under the COAG reform agenda.

Wording used in the standard provisions*'All reasonable steps'*

In relation to the provisions, the AICD submitted liability should be on the basis of the directors 'knowingly authorising' or 'recklessly permitting' the contravention and not on failing to take 'all reasonable steps' to ensure the corporation does not engage in conduct constituting the offence. The AICD considered the issue of whether a director took '*all reasonable steps*' is always determined with the benefit of hindsight, which directors do not have the benefit when dealing with issues in real time.⁵¹

Minter Ellison similarly submitted in relation to Type 1 provisions, that while the provisions do not reverse the onus of proof, the drafting of the provision works so unfairly that it places directors in a similar position. Specifically, Minter Ellison commented that the requirement to prove that directors did not take '*all reasonable steps*' to prevent the commission of the offence is a low bar for the prosecution to pass. Minter Ellison also highlighted there were no defences to these provisions.⁵²

The Department responded to these suggestions indicating that the phrasing '*all reasonable steps*' appears frequently in current directors' liability provisions, and is used extensively across the Queensland statute book. The Department considered it was appropriate as it reflected the appropriate standard for directors to meet in discharging their obligations, given the seriousness of offences that are the subject of directors' liability.⁵³

⁵¹ Submission No. 1, Australian Institute of Company Directors, pages 9 & 10.

⁵² Submission No. 2, Minter Ellison Lawyers, page 6.

⁵³ Report of the Department of Justice and Attorney-General – 25 January 2013, pages 3 & 7.

Further, the inclusion of the word 'reasonable' indicates that the steps are all those that are reasonable in the circumstances, and would not be all those that could be determined with the benefit of hindsight. The Department also noted that offences under Queensland statutes attract the operation of relevant defences under the Criminal Code.⁵⁴

Potentially misleading titles

The AICD also submitted that the description of both the Executive (deemed) liability provisions and the Type 3 – Executive liability (persuasive burden) provisions were misleading.

In relation to the Executive (deemed) liability provisions, the AICD stated:

*... the prosecution would be required to prove beyond a reasonable doubt that the executive officer authorized or permitted, or was knowingly concerned in, the corporation's conduct constituting the offence, before the executive officer would be found criminally liable. The label given to the provision is therefore misleading, is executive officers will not be "deemed" to have committed the corporation's offence, rather executive officers will only be liable if they have some involvement in the corporation's offence.*⁵⁵

In relation to the executive liability (persuasive burden) provisions, the AICD stated:

We are of the view that describing these provisions as shifting the "persuasive" burden is inaccurate and has the potential to be misleading. Type 3 provisions shift the legal burden of proof and therefore overturn the fundamental legal principle that a person is innocent until proven guilty.

The Department responded that Type 3 liability provisions were referred to in some instances throughout the Bill as 'persuasive burden' provisions in instances where there was more than one liability type per Act being amended. The intention being to assist the reader.

The Department explained the particular phrase is a reference to the fact that the defendant carries the persuasive burden under this type of liability provision. In response to this issue, the Department stated it would raise the concern that the description is inaccurate and may be misleading with the Office of the Queensland Parliamentary Counsel (OQPC).⁵⁶

Committee Comment

In relation to the executive (deemed) liability provisions, it is clear to the Committee these provisions are not intended to be a fourth category of executive liability provision and that they have a different purpose in the Bill. The Committee accepts, however, as submitted by the AICD, that the description of the type of provision in the Explanatory Notes is not appropriate given the intent of the provision.

Unlike the Type 1-3 executive liability provisions, the formulation of the executive (deemed) liability provisions which appear in the Bill, do not specifically refer to the descriptive title and therefore the Committee considers that no amendment to the Bill appears necessary.

In relation to the executive liability (persuasive burden) provisions, the Committee similarly accepts that the description may be misleading. As clarification on alternate wording is being sought by the Department from the OQPC, the Committee is satisfied that the matter is being appropriately dealt with.

⁵⁴ Report of the Department of Justice and Attorney-General – 25 January 2013, page 3.

⁵⁵ Submission No. 1, Australian Institute of Company Directors, page 9.

⁵⁶ Report of the Department of Justice and Attorney-General – 25 January 2013, pages 3 & 4.

3.2.2 Reduction of red tape and opening up for business

The second objective of the Bill is to reduce red tape and the regulatory burden placed upon Queensland businesses. In this regard, the Explanatory Notes state:

The Bill reduces red tape and the regulatory burden placed upon Queensland business and addresses concerns expressed by the business community and legal profession about the number and complexity of provisions which impose personal liability on executive officers for corporate criminal fault. Business groups have suggested that laws of this nature are impacting negatively on entrepreneurialism and economic growth because directors are compelled to adopt an overly cautious approach, in turn curtailing competitiveness, innovation and profitability.⁵⁷

The Explanatory Notes echo the statement by the Premier when he announced the reforms in September 2012:

We want to send out a signal to the rest of Australia, indeed to the world, that Queensland is open for business.⁵⁸

All three submitters commented on the Bill's achievement or otherwise in this area.

The AICD's view was *'the various combinations of these different types of provisions will lead to enormous complexity and will make it almost impossible for any director or officer to understand his or her obligations under these laws.'* The AICD further contended *'We are strongly of the view that if the QLD Government intends to pass legislation that will be complied with, the law must be clear and capable of being understood. We are of the view that the amendments proposed fail to do this'⁵⁹*

Minter Ellison described the Bill as 'an opportunity lost' and stated it fell short of delivering what was expected and what is needed.⁶⁰ On the issue of complexity not being reduced by the Bill, Minter Ellison commented:

In particular the Bill: ... has not reduced the complexity of the directors' liability laws in Queensland (and via the complex matrix of liability provisions scattered throughout the 80 Acts which have been amended by the Bill, has probably actually increased the complexity).

The result will be a legislative regime that is not only a disincentive to those considering accepting an appointment as a director but also unnecessarily inconsistent in its approach and a significant burden to carrying on businesses in this state. Furthermore, the much-lauded NSW reforms mean that there is a significant risk that NSW will be regarded as more pro-business than Queensland and draw business opportunities away from this State.⁶¹

Finally, the QLS stated:

As the representative body of solicitors in Queensland, many of whom undertake corporate, commercial and other work for companies of all sizes, the Society is concerned that the current form of the Bill might lead to some companies concluding that it may be preferable to establish operations in other jurisdictions.

⁵⁷ Explanatory Notes, Directors' Liability Reform Amendment Bill 2012, page 1.

⁵⁸ The Hon Campbell Newman MP, *Media Statement – Keynote Speech – AICD &UQ Business School Leader's Edge Luncheon*, 25 September 2012.

⁵⁹ Submission No. 1, Australian Institute of Company Directors, page 8.

⁶⁰ Submission No. 2, Minter Ellison Lawyers, page 8.

⁶¹ Submission No. 2, Minter Ellison Lawyers, page 8.

Conversely, if Queensland were to take a similar approach to New South Wales, or go further, then such an initiative might encourage more companies to establish their operations in this state.⁶²

In response to these criticisms, the Department maintains that the Bill, with its significant reduction in directors' liability offences, will result with a corresponding reduction in red tape and regulatory burden placed on Queensland businesses.⁶³

Committee Comment

The Committee is satisfied the Bill meets the State's requirements under the COAG reform agenda even though the message received from submissions is clear that the Queensland business sector was looking for more in this Bill than it is delivering.

The argument that the Bill increases complexity in this area is rejected. The Bill significantly reduces the number of executive liability provisions across the entire spectrum of the law and introduces consistent plain English provisions that should be readily understood by the corporate world.

The Committee is confident that the Bill will provide executive officers with certainty in how executive liability is dealt with in Queensland and will reduce red tape in their day to day operations. The reduction in provisions will diminish the requirement for directors to adopt an overly cautious approach in conducting business and will provide a basis for economic growth, innovation and profitability throughout the State.

3.2.3 Greater consistency of approach

The final objective of the Bill is to achieve greater consistency of approach to the liability of executive officers of corporations with other Australian jurisdictions.

The Explanatory Notes state:

Increased consistency of approach to 'directors' liability' across Australian jurisdictions is a priority of the Council of Australian Governments (COAG). It is one of 27 deregulation priorities under the National Partnership Agreement to deliver a Seamless National Economy 2008-09. Jurisdictional differences in the imposition of personal liability on directors have resulted in confusion and complexity for corporations operating across State boundaries in understanding their legal obligations and responsibilities.⁶⁴

By applying the agreed COAG Principles to existing legislation and all future legislation, the COAG reforms will reduce much of the inconsistency across jurisdictions by removing a significant number of offences for which directors were only liable in Queensland. Similarly, unique offences that applied only in other States should be removed by those other States' in implementing their own bills, again leading to greater consistency amongst jurisdictions.

The AICD provided its own model provision for consideration in the Bill. As set out by the AICD in its submission:

the purpose of the model provision is to have each statute begin from the premise that a director will not be criminally liable for an act of the company. However, a director will be liable in circumstances where the director knowingly authorised or recklessly permitted the contravention. The onus of proof will be on the prosecution to prove that the directors knowingly authorised or recklessly permitted the contravention.⁶⁵

⁶² Submission No. 3, Queensland Law Society, page 5.

⁶³ Report of the Department of Justice and Attorney-General – 25 January 2013, page 1.

⁶⁴ Explanatory Notes, Directors' Liability Reform Bill 2012, page 2.

⁶⁵ Submission No. 1, Australian Institute of Company Directors, pages 7 & 8.

The model provision was not based on the COAG Principles, but the AICD's own set of recommended principles which they consider should be applied when assessing executive liability provisions. The Government is therefore unable to use the AICD model provision as it would not comply with the COAG agreed reform agenda.

Comparison with other States

Both the QLS and Minter Ellison made specific reference in submissions to the approach taken by NSW in conducting its reforms to executive liability.

The QLS stated:

...the Society understands that the corresponding legislation in New South Wales, the Miscellaneous Acts Amendment (Directors' Liability) Act 2012 (NSW), will, with one exception, result in the removal of 'Type 3' provisions from all of the statutes that it amends.⁶⁶

Minter Ellison submitted:

Through the passage of the Miscellaneous Acts Amendment (Directors' Liability) Act No. 2 2011 (NSW) and more recently, through the Miscellaneous Acts Amendment (Directors' Liability) Act 2012 (NSW), there are now only six statutes remaining in that State which still reverse the onus of proof. The NSW reforms have also resulted in the number of provisions imposing personal liability on company directors in NSW legislation being reduced from more than 1,000 to about 150.

The NSW reforms have drawn widespread support from the business community. For example, the NSW approach was welcomed by the Australian Institute of Company Directors. The AICD's Chief Executive Officer and Managing Director, Mr John Colvin congratulated the NSW Government for 'restoring the presumption of innocence until proven guilty in this legislation, which is fundamental to a functioning democracy' and said he was... pleased to see NSW taking significant strides and leading the way on this important area of reform.

In our submission, the NSW provisions seem well thought out and deal with directors fairly and equitably, making them liable only when their conduct falls below an acceptable standard. We urge the Committee to consider whether a model similar to that adopted in NSW ought also to be adopted in Queensland.⁶⁷

The Department advised that the NSW approach, unlike Queensland's model, is not directly reflective of the three types of liability contemplated by the COAG Guidelines. The Department considered the NSW model sets a lower level of liability for directors as it does not contemplate the reversal of the onus of proof. The Queensland legislation reflects the three Types of liability in the COAG Guidelines. Queensland's scheme provides a tiered model of directors' liability, providing appropriate responses to escalating levels of public harm.⁶⁸

Committee Comment

The Committee is satisfied that the Queensland proposal is consistent with the COAG Principles and Guidelines and will therefore contribute to the achievement of greater consistency of approach to the liability of executive officers of corporations with other Australian jurisdictions.

The Committee notes the Department's advice that it is not possible to achieve complete consistency nationally where the underlying legislative schemes and specific offences differ from one jurisdiction

⁶⁶ Submission No. 3, Queensland Law Society, page 5.

⁶⁷ Submission No. 2, Minter Ellison Lawyers, page 7.

⁶⁸ Report of the Department of Justice and Attorney-General – 25 January 2013, page 8.

to the next. It is for this reason that model provisions are unworkable and that the COAG Principles and Guidelines have been produced to allow jurisdictions to achieve greater consistency when there are (sometimes very) different starting points.

The Bill is considered to be faithful to the COAG Principles and puts Queensland in the right direction along the path of executive liability reform.

4 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill. The Committee brings the following to the attention of the Legislative Assembly.

4.1 Rights and liberties of individuals - Reversal of the onus of proof

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals. Section 4(3)(d) provides:

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation— does not reverse the onus of proof in criminal proceedings without adequate justification.

The Explanatory Notes state clearly that the Type 2 and Type 3 executive liability provisions used in the Bill reverse the onus of proof on executive officers of companies and therefore infringe the fundamental legislative principles set out in the *Legislative Standards Act 1992*.

All three submissions raised serious concerns with the reversal of the onus of proof in Type 2 & 3 provisions. The AICD stated that it had:

...significant concerns that a number of the proposed amendments to QLD legislation insert or retain Type 3 director liability provisions under the COAG Guidelines. These provisions render directors automatically liable for the corporation's criminal offence unless the director can establish a defence. The director bears the legal burden of proving the defence.

In other words, these provisions reverse the fundamental legal principle that a person is innocent until proven guilty and are contrary to recognised principles of criminal law. The Australian Institute of Company Directors is of the view that the normal principles of justice and fairness that apply to all other citizens prosecuted for criminal offences should also apply to directors.⁶⁹

Based on the information provided in the Explanatory Notes, the AICD was concerned that appropriate justification was not provided to warrant the reversal of the onus of proof throughout the provisions contained in the Bill.

The Explanatory Notes do not sufficiently demonstrate that where director liability provisions have been retained or inserted, there is a compelling public policy reason for doing so, and why the QLD Government is of the view that the liability of the corporation on its own is not likely to promote compliance.

Further, and more importantly, no sufficient justification has been provided as to why it is appropriate to undermine the Rule of Law (a fundamental pillar of our democratic society) by deciding to retain or insert Type 3 provisions.⁷⁰

⁶⁹ Submission No. 1, Australian Institute of Company Directors, pages 11 & 12.

⁷⁰ Submission No. 1, Australian Institute of Company Directors, page 12.

Minter Ellison expressed similar concerns in its submission citing the CAMAC report⁷¹ from 2006. Minter Ellison considered that it was unnecessary for the Bill to contain provisions which reverse the onus of proof stating:

*The majority of the Queensland Acts imposing personal liability on directors and officers as a result of a statutory breach by a company contain a reversal of the usual onus of proof. We argue strongly that those provisions should be removed or amended to restore the usual position, namely that the prosecution must bear the onus of proof to establish culpability on the part of the director or officer beyond reasonable doubt, because, as CAMAC said, provisions of this kind 'are objectionable in principle and unfairly discriminate against corporate personnel compared with the way in which other people are treated under the law.'*⁷²

The QLS acknowledged in its submission that legislation may infringe the fundamental legislative principles set out in section 4 of the LSA where there is adequate justification for doing so. However, the QLS raised concerns that:

..the information released in relation to the Bill to date (including the Explanatory Notes) does not outline in any detail why some offences merit 'Type 3' provisions while others merit 'Type 2' or 'Type 1' provisions. The only information provided in the Explanatory Notes in this regard is that 'Types 2 and 3 liabilities have been reserved for offences the commission of which creates a risk of significant public harm ... or are considered essential to protect State revenue collection'.

Given the large number and wide variety of statutes amended by the Bill, the Society is strongly of the view that this issue needs to be explored further in relation to each statute that is to be amended, particularly those where it is intended to retain or impose 'Type 2' or 'Type 3' provisions.

*The Society encourages the Committee to recommend that statutes that are presently proposed under the Bill to have or retain 'Type 2' or 'Type 3' provisions should have those provisions removed or, at a minimum, downgraded to 'Type 1' provisions.*⁷³

The Department responded to the various concerns raised in submissions stating:

The Department of Justice and Attorney-General has not been able to identify an offence that has Type 3 liability where that liability did not previously apply. Queensland's statute book currently holds approximately 3,800 offences for which directors are automatically criminally liable (operating with a reversal of the onus of proof). This number has been reduced in the Bill to approximately 260 offences, approximately half of which remain as Type 3 liability. This liability has been justified against the COAG Principles and Guidelines in each of the instances that it is proposed for retention.

The explanatory notes describe the policy objectives and reasons for the directors' liability reforms, including detailed discussion of the COAG Principles and Guidelines and how they have been applied to meet the Bill's stated objectives.

*The Department of Justice and Attorney-General is preparing further justification material for the Committee, in accordance with the COAG guidelines, about each offence retained. Due to its volume, this material was not appropriate for inclusion in explanatory notes.*⁷⁴

⁷¹ Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, page 8.

⁷² Submission No. 2, Minter Ellison Lawyers, page 5.

⁷³ Submission No. 3, Queensland Law Society, page 3.

⁷⁴ Report of the Department of Justice and Attorney-General – 25 January 2013, page 2 .

In addition, the Explanatory Notes state that the Type 2 & 3 liabilities have been:

...reserved for offences the commission of which creates a risk of significant public harm (particularly, to life, public health and the environment) or are considered essential to protect State revenue collection. Offences in the following categories of harm have been designated with Types 2 and 3 liabilities: animal cruelty; child protection; fire and building safety; public health and safety (in areas including nuclear facilities; water supply, waste services and disposal, food safety; pest management and radiation sources); electricity generation and supply; transport of dangerous goods; marine pollution; environmental and heritage protection; and unauthorised mining activities.

Committee Comment

The former Scrutiny of Legislation Committee generally opposed or did not endorse a reversal of the onus of proof.⁷⁵ They did however acknowledge that *reverse onus provisions are a natural extension of the basic common law principle that the burden of proving or negating a state of affairs should rest on the person who has superior or peculiar knowledge of the essential facts.*⁷⁶

Justification for the reversal is therefore sometimes found in situations where the matter the subject of proof by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult or very expensive for the State to prove. Section 4(3)(d) of the *Legislative Standards Act* permits a reversal of the onus of proof provided that there is *adequate justification* for it.

The Committee considers that although the Explanatory Notes did not go into detail about the justification for each individual provision in reversing the onus of proof, the additional material provided to the Committee i.e. the *Assessment of Queensland legislation against COAG Guidelines* showed that appropriate analysis was carried out. The Committee is satisfied that the serious nature of the categories of harm designated with Types 2 & 3 liability provisions is appropriate, and coupled with the detailed analysis against the COAG Guidelines provides adequate justification for reversing the onus of proof in the Types 2 & 3 provisions.

4.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the bill.

The notes contain scant information about the fundamental legislative principle issues involved in the Bill which were discussed above. Further detail released at the time the Bill was introduced may have allayed some of the concerns raised in submissions. It is acknowledged that the release of the further document⁷⁷ setting out the basis for the Department's justification for including the relevant provisions in the Bill, contained additional information relating to the fundamental legislative principles issues.

The Explanatory Notes appear to contain the information required by Part 4 and sufficient background information and commentary to facilitate understanding of the Bill's aims and origins.

⁷⁵ *Alert Digest* 2002/4, page 27.

⁷⁶ *Alert Digest* 2002/6, pages 21-22.

⁷⁷ Letter from the Department to the Committee dated 29 January 2013 and attachment - *Assessment of Queensland legislation against COAG Guidelines*.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
001	Australian Institute of Company Directors
002	Minter Ellison Lawyers
003	Queensland Law Society



LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

DIRECTORS' LIABILITY REFORM AMENDMENT BILL 2012

13 March 2013

Statement of Reservation

The Opposition wishes to notify the committee of its reservations about aspects of the Report of the Legal Affairs and Community Safety Committee's Inquiry into the *Directors' Liability Reform Amendment Bill 2012*.

I note that no general community consultation was undertaken on the Bill. I am cognisant of the fact that there was a requirement to introduce legislation by the end of 2012 in order to comply with the COAG agreement milestone, and this is the reason given in the explanatory notes for the failure to consult. However, at its meeting held on 23 July 2012, the Council of Australian Governments (COAG) agreed to a set of principles and guidelines for the imposition of personal criminal liability on directors and other officers (directors) as a consequence of corporate offences.

COAG agreed that future legislation will comply with the principles, and also that all jurisdictions will review the existing directors' liability provisions in their legislation. If necessary, these existing provisions will be repealed or amended to make them consistent with the COAG principles.

As the Queensland Law Society pointed out in its submission to the Inquiry, *'the Bill was announced by the Honourable Attorney-General and Minister for Justice on 7 September 2012. The Society believes that at least some targeted consultation may have been possible in the two and a half months between this announcement and the introduction of the Bill'*. This occurred on 28 November 2012.

Failure to adequately consult with stakeholders before introduction has been a feature of Bills introduced by the Honourable Jarrod Bleijie, Attorney-General and Minister for Justice. In fact, consultation on his Bills is more honoured in the breach than the observance.

As a result of this failure to consult, stakeholders have raised a large number of concerns about the Bill in its present form. The Department of Justice and Attorney-General has now undertaken to liaise with other Departments, and that an urgent review of the Acts would be undertaken.

It is my understanding that the Attorney-General will introduce any necessary amendments to the Bill during Consideration in Detail. This is a process normally utilised to make small changes which may arise during consultation on the Bill. Because of the possible scope of these amendments, I urge the Attorney-General to ensure that the proposed amendments, or at least a draft of those amendments, are circulated well in advance of debate of this Bill

to ensure stakeholders can be adequately apprised of the contents and make further submissions thereon.

Due to the fact that there is no clear indication at this stage of the scope of the Bill that will be debated, and whether it will vary greatly from the Bill introduced, the Opposition reserves it right to comment on all aspects of the Bill during the parliamentary debate.

Yours sincerely

A handwritten signature in black ink, appearing to be 'B. Byrne', is enclosed within a thin black rectangular border. The signature is stylized and includes a long horizontal line extending to the right.

Bill Byrne MP
Member for Rockhampton

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE
DIRECTORS' LIABILITY REFORM AMENDMENT BILL 2012

14 March 2013

Statement of Reservation

I wish to place on record my reservations with the Directors' Liability Reform Amendment Bill 2012.

The former Government and the current Government have been progressing the COAG agreed reforms on Directors' Liability for a number of years. The Bill does not contain new policy; it is, in effect, the final stage of a long drawn out process that has had bi-partisan support at both a State and National level.

In September 2012, both the Premier and the Attorney-General announced that Queensland would be introducing its own legislation into the Parliament to give effect to the COAG reforms for Queenslanders. The COAG milestone was to introduce legislation before the end of 2012.

As pointed out by the Queensland Law Society:

"The Society is strongly of the view that broad consultation on legislation at an early stage is the key to good law."¹

The Explanatory Notes circulated with the Bill state: No general community consultation was undertaken on the Bill.

It is unacceptable that greater consultation was not conducted between September and November 2012, by the Department prior to the Bill being introduced into the Parliament.

Through the Committee's inquiry process, we have seen two professional representative bodies and a well-respected top-tier law firm raise significant concerns with the Bill. The Committee accepted some of those concerns and did not accept some others. However, it has been identified that a number of Acts were simply overlooked which may lead to amendments to the Bill and the Committee has quite rightly asked the Attorney-General to outline what actions he has taken to review the overlooked Acts and table his responses in Parliament.

It appears that the Australian Institute of Company Directors (AICD) is also progressing further talks with the Attorney-General to outline its greater concerns with the Bill. I can

¹ Submission No. 3, Queensland Law Society, page 1.

only think that if the Attorney-General had opened his doors at an earlier stage, the concerns of the AICD could have been dealt with earlier and addressed in the Bill.

While I appreciate the Attorney-General's offer to keep the Committee informed of any further developments, the Committee has had to report on the Bill by 15 March 2013, to discharge its duties, based on the information before the Committee.

What we may see now, are further amendments to the Bill that have not been considered by the Committee.

I fully understand that there are strict timeframes imposed on the Government to meet COAG timelines, the Committee itself regularly receives strict timeframes within which we must undertake our own inquiries. However, I consider that it is not acceptable for the Government, with all the resources available to it, to simply not seek the views from its key stakeholders in the development stages of important legislation such as the Directors' Liability Reform Amendment Bill 2012.

While I accept that the Bill, as drafted, should be passed to give effect to the COAG reform program, I urge the Government to ensure that any further amendments receive proper review, prior to being introduced into the Parliament. Further, I urge the Government to ensure that proper consultation is carried out with stakeholders, in the future, to avoid similar issues occurring as has occurred with this Bill.

Mr Peter Wellington MP
Deputy Chair

A handwritten signature in black ink that reads "Peter Wellington". The signature is written in a cursive, flowing style.

14 March 2013