

18 August 2017

The Hon. Natasha Kate Fyles MLA
Attorney-General and Minister for Justice, Minister for Health
Parliament House
DARWIN NT 0800

Dear Attorney-General

Director Liability in the Northern Territory

We are writing to you regarding reforms to legislation imposing personal criminal liability on directors for acts of corporations.

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD welcomes the Northern Territory Government's commitment to support Territory businesses and create more jobs. In particular, we welcome the Government's recently released Economic Development Framework, and the approval of the \$800 million Northern Gas Pipeline. These efforts will help the Northern Territory secure its own economic future.

However, to ensure the Territory continues to grow and attract new investment and board talent, one aspect of reform remains incomplete.

The AICD remains concerned that several Territorian legislative provisions still deem directors and other officers of a company liable for the criminal conduct of a corporation (**Directors' Liability Provisions**).

While the *Statute Law Amendment (Directors' Liability) Act 2015* represented a significant improvement in the director liability environment in the Territory, it was lacking in some areas, and inconsistent with the Council of Australian Governments' Principles for assessment of directors' liability provisions (**COAG Principles**) in this area.

The COAG Principles provided that a corporation is always liable for corporate breaches in the first instance, and the directors should not be liable unless they have personally assisted in the commission of an offence or been negligent or reckless in relation to the corporation's offending.

In the Territory, there are still over 50 statutes which impose personal liability on directors and officers for the statutory breaches of a corporation. By way of illustration, we enclose a list of examples in an Annexure to this letter.

Many of these provisions impose liability on “executive officers”. The term “executive officers” can include a wide range of persons, including non-executive directors.

The AICD recognises that Directors’ Liability Provisions are appropriate in some circumstances. That said, the AICD is concerned about several provisions which remain in Territory statutes, particularly those which are known as “Type 2” liability offences.

Type 2 offences impose criminal liability on a director for the statutory breach of a corporation by removing the fault element associated with the offence in the first instance, but instead providing an available defence. The director must establish one of those defences to avoid liability.

One example of this can be found in s 101(1) of the *Geothermal Energy Act*. In this Act, if a corporation commits an offence “each executive officer of the body corporate commits an offence”, subject to certain defences in s 101(2). This provision, and others like it, reverses the onus of proof, requiring directors to establish their innocence.

As outlined below, in many cases, the AICD believes these kinds of provisions can impact on business and investment, and can result in unjust outcomes.

Economic justification for reform

The AICD has long maintained that there are compelling economic and policy grounds for governments around Australia to remove or reduce Director Liability Provisions.

A regime which imposes unduly onerous Director Liability Provisions fosters an approach to business decision-making which is overly risk averse and compliance focussed, stifling economic growth and innovation.

Surveys we have conducted suggest that the continued presence of such liability provisions can have an impact on both director recruitment, retention, and crucially, on business decision-making, including the location of investment projects.

Acting to address unduly onerous Director Liability Provisions will send a strong message to directors and companies around the country that the Territory is ‘open for business.’

In addition, given that many other states have now enacted laws which seek to reduce or remove Director Liability Provisions, and some have not, there is a significant risk of inconsistency in the law as between states.

Inconsistent laws add to the cost of doing business. Businesses which operate across multiple jurisdictions ultimately wear the compliance costs associated with inconsistent laws, taking valuable capital away from investment. It is for these reasons that director liability reform was adopted as one of the key priorities in the National Partnership Agreement to Deliver a Seamless National Economy.

In an age where business is reliant on technology and the internet, the importance of a seamless national economy is more important than ever.

Reasons of legal principle

There are strong reasons of legal principle for several of the Territory's Director Liability Provisions to be reviewed, and reduced or removed.

Some Territory Director Liability Provisions automatically impose liability unless the director can successfully mount a defence. The effect of this is that a director is put in the unenviable position of establishing why he or she should not be criminally liable for an offence. In effect, these provisions reverse the onus of proof. Should they be unable to do so for reasons which do not reflect any fault or negligence on their part, an unjust outcome may well result.

Reversing the onus of proof for directors removes one of the most fundamental protections afforded by the common law, the presumption of innocence. The rationale for this long-standing principle was articulated by Professor Andrew Ashworth QC as follows:¹

The presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.

The AICD believes that the presumption of innocence should be maintained unless there is a compelling justification for its removal. Of course, it is entirely appropriate for laws to be put in place which deter or punish illegal conduct by directors or seek to achieve a specific policy goal. However, the use of accessorial liability provisions, the use of direct liability provisions with no reversal of the onus of proof, and the more frequent use of prosecutions where directors do intentionally disobey the law, are more effective approaches to achieving these public policy goals.

Next steps

The AICD believes that the election of a new Territory government represents an excellent opportunity to revisit the issue of director liability reform.

Accordingly, we would like arrange for a meeting with you and representatives from the AICD, in Darwin, to discuss how we might be able to progress reform with respect to this important issue. We are very keen to work with you to help achieve this important reform.

Previously, the AICD has worked with State and Territory Governments (including the Northern Territory government) and their officials to assist them in identifying legislation to be dealt with, and provided input as to any proposed legislation. We would be very happy to assist the Government in the development of any proposed legislative change.

¹ Andrew Ashworth, 'Four threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

**AUSTRALIAN INSTITUTE
of COMPANY DIRECTORS**

Considering the prior interest from the Territory in relation to director liability reform, we shall be in contact with your office to set up such a meeting. In this regard, please also feel free to our policy adviser working on this issue, Matt McGirr, on (02) 8248 2705 or mmcgirr@aicd.com.au, to arrange a suitable date and time.

We look forward to hearing from you.

Yours sincerely



RICHARD GILES FAICD

Chair, Northern Territory Committee



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