



Law Council
OF AUSTRALIA

Business Law Section

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
By email: info@alrc.gov.au

21 September 2015

Dear Ms Wynn,

Traditional rights and freedoms – Encroachments by Commonwealth laws (ALRC Interim Report 127)

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia (**Committee**) in response to the interim report of the Australian Law Reform Commission (**ALRC**) on the encroachment by Commonwealth laws on traditional, rights, freedoms and privileges that was published on 3 August 2015 (**Interim Report**).

Focus of these submissions

The principal focus of these submissions relates to those provisions of Commonwealth legislation which impose personal liability on company directors and officers, and in so doing, reverse the onus of proof.

Consideration of CAMAC report on personal liability for corporate fault

In considering whether it is appropriate for the onus of proof to be reversed in director liability provisions, the Committee urges the ALRC to consider the report by the Corporations and Markets Advisory Committee (**CAMAC**) on personal liability for corporate fault that was published on 8 September 2006.

One of the main concerns raised in that report was the tendency for legislation to reverse the burden of proof in relation to personal liability in consequence of corporate misconduct. At page 8 of the report, CAMAC concluded that it was:

'... 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.'

CAMAC's review considered provisions in various Commonwealth, State and Territory legislation. To the extent to which Commonwealth laws continue to impose personal

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liability for corporate fault and, in doing so, fall within the scope of the ALRC's current inquiry, the Committee recommends that the ALRC take into account the conclusions reached by CAMAC.

COAG Principles and Guidelines

Subsequent to the CAMAC report, the Council of Australian Governments (**COAG**) developed agreed principles for the assessment of directors' liability provisions (**COAG Principles**) and related guidelines (**COAG Guidelines**). That reform process resulted in the repeal or amendment of many of the provisions in Commonwealth legislation which reversed the burden of proof imposed on directors and other officers. Other provisions remain, however, including:

- section 8Y of the *Taxation Administration Act 1953* (Cth) (Section 8Y), which is discussed at [11.53] to [11.58] of the Interim Report;
- section 57 of the *Superannuation Guarantee (Administration) Act 1992* (Cth);
- sections 50 and 188 of the *Life Insurance Act 1995* (Cth);
- section 252 of the *Income Tax Assessment Act 1936* (Cth);
- sections 265-50 and 271-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth); and
- section 62 of the *Child Support (Registration and Collection) Act 1988* (Cth).

The Interim Report refers to the COAG Principles in connection with the ALRC's consideration of Section 8Y. Concerns raised by the Australian Institute of Company Directors (AICD) are noted in the Interim Report, including that the provision does not apply normal principles of justice and fairness, has not been sufficiently justified by the COAG approach and undermines the Rule of Law. The Committee strongly endorses those concerns and the AICD's submission that the legal burden on the defendant under Section 8Y should be removed.

Evidential burden of proof

The COAG Principles and Guidelines categorise liability provisions as being one of three types, depending on which party bears the evidential and legal burden of proof.

	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)

The COAG Principles and Guidelines establish Type 1 as the default position for directors' liability provisions. They also establish that Type 2 and 3 provisions may be appropriate in some instances, where supported by rigorous and transparent analysis and assessment which warrants the imposition of such liability from a public policy perspective.

The Committee understands that the imposition of the evidential burden on defendant directors or officers, of the kind used in the Type 2 provisions, is not a topic which the ALRC intends to examine within the scope of the current inquiry. Citing *R v DPP; Ex parte Kebilene* [2000] 2 AC 326, the Interim Report suggests (at [11.13]) that this may flow from the ALRC's view that reversal of the evidential burden of proof generally does not offend the presumption of innocence. The Interim Report also notes practical difficulties in considering particular provisions that reverse the evidential burden of proof.

The Committee instead supports the view that reversing the evidential burden of proof to place the burden on the accused can and does bear significant consequences. In particular, many provisions imposing liability on directors and officers in consequence of corporate misconduct include, as an element, that the director or officer did not take all reasonable steps to ensure that the corporation did not engage in the misconduct. Given the difficulties faced by individuals in proving this, the Committee suggests that such provisions do infringe on the presumption of innocence and, where contained in Commonwealth laws, fall within the scope of the current inquiry.

Provisions imposing strict or absolute liability

The Interim Report (at [14.22]) notes the concerns of the AICD that the imposition of criminal liability on company directors on a strict or absolute basis may foster a risk averse approach to business and stifle economic growth and innovation. Highlighting section 588G of the *Corporations Act 2001* (Cth) (Corporations Act) as an example, the AICD also submitted that 'where directors must make complex judgments or where the penalties applied as a result of a breach are significant,' strict or absolute liability should not be imposed.¹ The Committee strongly endorses these concerns and submissions.

Consistently with the AICD's submission, the Committee notes that section 588G is only one example of the imposition of strict liability on directors. Under section 197 of the Corporations Act, where a corporation incurs a liability while acting (or purporting to act) as a trustee, and subsequently cannot discharge all or part of that liability or is not entitled to be fully indemnified against the liability out of trust assets for particular reasons, section 197 imposes a strict liability on a director of the corporation to discharge the liability. By contrast with section 588G, section 197 may cause a director to be liable for all debts incurred by the corporate trustee, and is not limited to those liabilities incurred after insolvency. The consequences under section 197 may therefore be more severe.

To the extent to which the ALRC intends to address section 588G in its current inquiry, the Committee urges the ALRC also to consider other provisions, such as section 197, which also impose strict or absolute liability on directors, officers or other employees of a body corporate.

¹ Interim Report, [14.23], citing Australian Institute of Company Directors, Submission No 42 to the Australian Law Reform Commission, *Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, 27 February 2015, 1.

Scope for further consideration

If the current inquiry does not address the reversal of the evidential burden of proof by Commonwealth laws, the Committee suggests that a future inquiry by the ALRC might seek to identify Commonwealth laws that impose personal liability for corporate fault and to undertake a critical examination of those laws to determine whether imposition of personal liability for corporate fault is appropriately justified. In particular, the Committee anticipates that this would include an examination of the extent to which Commonwealth laws, in relation to directors, officers or other employees of a body corporate:

1. impose personal liability for corporate fault or wrongdoing;
 2. impose strict or absolute liability; and
 3. reverse or shift the legal or evidential burden of proof,
- as well as an examination of whether:
4. such provisions are justified, taking into account (as applicable):
 - a. the seriousness of the offence or contravention by the body corporate and the resulting penalties imposed;
 - b. the extent to which such individuals can directly control the relevant corporate conduct;
 - c. relevant principles of fairness to accused individuals;
 - d. difficulties of proof or assigning liability,
 - e. the effectiveness of enforcement against the body corporate alone;
 - f. the nature of the regulated community;
 - g. the extent to which similar offences in the same and other jurisdictions are also subject to such provisions;
 - h. the overall legislative and regulatory scheme and relevant policy objectives;
 - i. the centrality of the offence or contravention by the body corporate to that regulatory scheme; and
 - j. other compelling public policy reasons;
 5. such provisions align with the nationally-consistent and principles-based approach set out in the COAG Principles and Guidelines; and
 6. the kinds of areas where provisions imposing such liability or reversing the burden of proof are appropriate and what limitations, if any, there should be on making and enforcing such provisions.

The Committee would welcome the opportunity to discuss this submission further. In the first instance, please contact the Committee Chair, Bruce Cowley, on (07) 3119 6213, if you would like to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Keeves', with a long horizontal flourish extending to the right.

John Keeves, Chairman
Business Law Section