MISCELLANEOUS ACTS AMENDMENT (DIRECTORS' LIABILITY) BILL 2012

PROOF 17 OCTOBER 2012

Bill introduced on motion by Mr Greg Smith, read a first time and printed.

Second Reading

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [10.41 a.m.]: I move:

That this bill be now read a second time.

The purpose of this bill is to implement nationally consistent and principles-based reforms to the legislation governing the criminal responsibility of directors and officers for corporate offences. The bill implements a Council of Australian Governments [COAG] commitment under the Seamless National Economy Partnership Agreement. It continues to advance the Government's unrelenting goal of reducing unnecessary red tape, which imposes a brake on national economic activity.

Corporations are now the prevalent form of conducting business. A corporation is considered at law to have a separate identity from that of its shareholders, directors and managers. It follows that directors and officers are not automatically taken to be criminally liable for an offence committed by a corporation unless they personally were an accessory to the particular offence, for example by aiding and abetting it. However, provisions which impose personal criminal liability on directors and officers for corporate offences beyond normal principles of accessorial liability have proliferated over many years.

Of course, there are circumstances when it is right and proper that individual directors and officers should face criminal sanctions for offences committed by their corporations. Certainly where those individuals have personally aided and abetted, or been knowingly concerned, in the particular offence, no-one could reasonably argue that they should not be held to account. Further, where a corporation commits an offence as a result of any director breaching his or her fundamental duties as a director, then the director has no cause to complain if a prosecution is brought against him or her under the Commonwealth Corporations Act.

Further, there are circumstances where compelling public policy reasons justify the imposition of additional standards and obligations on directors under State legislation. We see this in areas like occupational health and safety and environmental legislation where public health and safety is potentially at stake. However, directors' liability provisions have been applied inconsistently and without clear justification. In many cases, such provisions have been applied as boiler-plate provisions, without any genuine consideration of whether they are necessary or appropriate in the circumstances. Often, a reverse burden of proof has applied, with directors and officers deemed to have committed the offence unless they can prove their innocence by showing that they took all reasonable steps to avoid the particular offence occurring. The result has been undue complexity, a lack of clarity about

responsibilities and unnecessary regulatory burden.

The issue came to particular national prominence in 2006 with reports by the Taskforce on Reducinq the Regulatory Burden on Business—the so-called banks review—and by the Corporations and Markets Advisory Committee [CAMAC]. These reports found that there was a need for a more consistent and more principled approach to personal liability for corporate offences across the Commonwealth, States and Territories. They noted that such an approach would reduce complexity, aid understanding, increase certainty and predictability, and assist efforts to promote effective corporate compliance and risk management.

In November 2008 the Council of Australian Governments committed to reforming directors' liability and adopted high level principles. With little progress having been made, in 2011 the Council of Australian Governments Business Regulation and Competition Working Group [BRCWG] established a committee chaired by New South Wales to expedite the reforms. The working group developed detailed guidelines setting out the circumstances in which more stringent directors' liability provisions should apply and the types of provisions that should apply in different circumstances. These guidelines were approved by the Council of Australian Governments on 25 July 2012. All jurisdictions are now in the process of implementing those guidelines through their own legislation.

On 27 July 2012 the Premier issued a memorandum—Premier's Memorandum No. 2012-09, which is available on the Department of Premier and Cabinet website. The memorandum attaches a copy of the guidelines and directs that, going forward, they are to be applied in the development and drafting of all new legislation in New South Wales. As well as applying the guidelines to future legislation, all existing New South Wales Acts have been audited against the guidelines. This audit was led by the Department of Premier and Cabinet, with the assistance of the law firm Allens. Each department responsible for the administration of each Act was consulted during this process. The bill now before the House will implement the outcomes of that audit.

The reforms contained in the bill will reduce the number of offences to which special directors' liability provisions apply from over 1,000 to around 150. Of those that remain, the bill also removes any reverse onus of legal proof, except in the case of a small number of core environmental offences where such provisions are justified by compelling public policy reasons. These amendments add to the reforms already implemented by the Government in 2011 in the Miscellaneous Acts Amendment (Directors' Liability) Act. I commend the bill to the House.

Debate adjourned on motion by Ms Cherie Burton and set down as an order of the day for a later hour.