

Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [10.02 a.m.]: I move:

That this bill be now agreed to in principle.

The bill will amend various Acts to reform the imposition of personal criminal liability on directors and executive officers for corporate misconduct. These amendments will ensure that New South Wales legislation imposing this type of liability accords with the set of principles agreed by the Council of Australian Governments [COAG] to guide the reform and harmonisation of directors' liability across Australian law. It will remove the imposition of directors' and executive officers' liability for certain offences and lower the level of liability that is imposed on directors and executive officers from deemed liability to accessorial liability for some Acts and offences. The bill also increases the level of liability that is imposed on directors for offences under one Act.

In 2006 the Commonwealth Government Taskforce on Reducing the Regulatory Burden on Business found that there are inconsistencies across jurisdictions in provisions applying personal liability for company directors and officers, creating complexity and uncertainty for individuals in these roles. The taskforce recommended that the Council of Australian Governments identify reforms to achieve more nationally consistent regulation. The Corporations and Markets Advisory Committee then published a report examining the use of derivative or deemed liability provisions imposing personal criminal liability on company directors as a consequence of their company breaching a law.

The Corporations and Markets Advisory Committee found that there was a need for a more consistent, as well as a more principled, approach to personal liability across Commonwealth, State and Territory jurisdictions. It noted that a more standardised approach would reduce complexity, aid understanding and assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned. The Corporations and Markets Advisory Committee recommended that the Commonwealth Government publish a policy concerning the principles for imposing criminal liability on individuals for corporate fault and take steps at an intergovernmental level to adopt similar principles.

In November 2008 the Council of Australian Governments agreed to increased harmonisation in the imposition of personal criminal liability for corporate fault across Australian law. The Ministerial Council for Corporations and the Council of Australian Governments agreed on a set of principles as the basis for reform in this area. Each jurisdiction reviewed its legislation to identify those existing offences for which directors' liability, or removal of that liability, is appropriate in accordance with the principles. In New South Wales each agency responsible for administering legislation containing provisions imposing this type of liability assessed their legislation against the revised principles and provided analysis and public policy justification for the imposition of personal liability under each Act. Each agency made recommendations about whether the liability imposed in the Act was in accordance with the principles or whether removal or reduction in the level of liability was appropriate.

The principles aim to ensure a nationally consistent and principled approach to the imposition

of personal criminal liability for corporate offending. They set out the policy considerations that should be taken into account in determining when it might be appropriate to impose personal criminal liability for corporate misconduct. The principles agreed by the Council of Australian Governments include: first, where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance; second, the imposition of criminal liability on a director for the misconduct of a corporation should be confined to situations where there are compelling public policy reasons for doing so, liability of the corporation is not likely on its own to sufficiently promote compliance and it is reasonable in all the circumstances for the director to be liable having regard to a range of factors; and, third, where directors' liability is appropriate, directors could be liable when they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation's offending. In some instances it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending.

The principles aim to produce reform on a national basis of legislation imposing personal liability for corporate fault which: maintains high standards of corporate governance; ensures an appropriate attitude to risk and a compliance culture; decreases the compliance burden on businesses due to the increased harmonisation in the imposition of this type of liability; removes liability for offences for which it is not appropriate that directors and executive officers be liable; and ensures the consistent treatment of directors and executive officers—criminal liability attaches to significant offences rather than all potential statutory breaches by a corporation.

A nationally consistent and principled approach to the imposition of personal liability for corporate fault across Australian jurisdictions will reduce the burden of compliance on businesses and reduce costs for consumers by removing costs from the economy that result from unfairly and inefficiently targeted regulation. An inconsistent approach to deemed liability provisions across different legislation and jurisdictions increases complexity and uncertainty, and can result in undue compliance costs being imposed on business. The principles are designed to ensure that the same behaviour attracts the same consequences in each Australian jurisdiction. The reform focuses only on provisions that impose personal liability for corporate fault. It does not target provisions that impose criminal sanctions on directors who have themselves breached the law and their own conduct amounts to a breach of directors' duties or other statutory obligations. The approach to these types of laws will not be affected. The reform also does not affect civil liability provisions.

The Council of Australian Governments also excluded occupational health and safety and environmental protection law from the reform proposal; however, I am sure there is more to come. The principles require that consideration be given to each offence to which directors' liability currently applies. For each offence, New South Wales agencies considered whether there are compelling public policy reasons justifying that liability, whether it is otherwise reasonable in all the circumstances and, if so, the gravity of the offence and appropriate corresponding level of liability. New South Wales agencies identified numerous offences under existing legislation that could be amended in light of these considerations. In many cases they indicated that the potential for directors to be liable should be removed from certain offences. In other cases, they indicated that the level of accessorial liability should be lowered.

The principles provide that there should be compelling public policy reasons for imposing directors' liability, including considerations such as the potential for public harm. The

principles provide also that directors' liability should be imposed only where it is reasonable in all the circumstances for a director to be liable having regard to a set of factors, including that the director has the capacity to influence the conduct of the corporation in relation to the offending. Removal of personal liability therefore was identified as appropriate in circumstances where directors are removed from the daily operations of a corporation and not in a position to influence conduct relating to administrative offences. The principles provide also that where sufficient public policy justification exists for the imposition of liability on directors for corporate wrongdoing, the appropriate level of liability must then be determined. A number of offences currently provide deemed liability for directors for corporate wrongdoing but, given the gravity of the offence, are being amended so as to provide only for directors' liability where a director has knowingly authorised or permitted the contravention. Finally, the bill increases also the level of liability for directors under one Act. The Electricity (Consumer Safety) Act 2004 regulates the sale and labelling of electrical articles, installation work, and connection and maintenance of electrical installations. Offences under the Act concern sellers of such articles, providers of acquisition guarantees, persons undertaking work and owners or occupiers of premises as responsible persons for electrical installations, any of whom may be corporate entities. Electrical safety is a critical issue and the consequences of offending behaviour can be of such a serious nature that corporate liability alone may be insufficient to effectively regulate this area. Failure to comply with the requirements of the legislation could have fatal consequences for members of the public and, therefore, it is consistent with the principles to impose a higher level of liability for these offences on public policy grounds. Therefore, the bill imposes deemed liability on directors for offences under this Act.

As with other Acts that impose this type of liability, directors will be strictly liable for offences under the Act, subject to defences, in line with the potentially fatal consequences for contraventions of the legislation. This would permit liability to apply to those officers who have not taken reasonable steps or exercised due diligence to prevent commission of the offence. I foreshadow possible further reforms. The reform council has reported that some audits by jurisdictions for directors' liability were not comprehensive and jurisdictions broadly interpreted the principle of compelling public policy reasons to justify retention of different provisions. The reform council recommended that the Council of Australian Governments agree to new milestones aimed at achieving a more nationally consistent approach.

A national subcommittee, chaired by the New South Wales Department of Premier and Cabinet, has been formed to report back on this project. The subcommittee is formulating recommendations for a revised approach to improve consistency, which may lead to a second tranche of reforms at a later stage. The Miscellaneous Act Amendment (Directors' Liability) Bill 2011 amends a raft of New South Wales laws to ensure that personal liability for corporate fault in New South Wales is imposed in accordance with the principles agreed to by the Council of Australian Governments. The bill imposes an appropriate level of liability for offences that in each case is reasonable and justified. I commend the bill to the House.