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Dear Professor Croucher,

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

The Australian Institute of Company Directors (AICD) is pleased to provide a submission in response to the Interim Report of the Australian Law Reform Commission (ALRC) titled *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Interim Report).

The 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 36,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

We confine our comments in this submission to the issues raised by Chapter 11 (Burden of Proof), Chapter 14 (Strict and Absolute Liability) and Chapter 9 (Retrospective Laws).

Summary

In summary, the key comments of the AICD are as follows:

- (a) We agree with the ALRC's recommendation, in regard to the reversal of the onus of proof, that director liability provisions for taxation offences be reviewed and strongly recommend that section 8Y of the Taxation Administration Act 1953 (C'th) be reviewed;
- (b) The reversal of the onus of proof is an issue which not only impacts on Commonwealth laws but equally on the laws of the States and Territories;
- (c) Strict liability offences (or elements of offences) should not apply in circumstances where directors must make complex judgments or where the penalties applied as a result of a breach are significant;
- (d) We are pleased that the Interim Report has recommended that the insolvent trading provisions in the Corporations Act be reviewed; and
- (e) Provisions in tax legislation which make new directors of a company personally liable for the misconduct of the company at a time when they were not a director should be removed or amended.

Introduction

The AICD appreciates the extensive work that the ALRC has undertaken to prepare the Interim Report. We are pleased that throughout the Interim Report the ALRC has shone a light on traditional rights and freedoms that have been eroded by legislation, commonly

without recognition, fanfare or compelling justification. We agree with the ALRC's statement that "the common law rights in the Terms of Reference should be treated with considerable respect in law making and should not lightly be encroached upon. Where a law does encroach on a traditional right or principle, the encroachments should be justified."¹

The ALRC's inquiry is particularly significant given this year witnesses the 800th anniversary of the Magna Carta which is a cornerstone in the Australian legal system. The questions addressed in the Interim Report surrounding individual rights and freedoms, especially the presumption of innocence, are fundamental to our legal system. It can be very easy for governments under political pressure, to ignore some of these fundamental rights in passing laws that they deem very important to protect citizens. Despite this, the AICD remains of the view that the presumption of innocence is a right which arguably, should never be surrendered.

While we understand that this inquiry relates only to Commonwealth laws, the matters raised in the Interim Report impact not only on Commonwealth laws but equally on the laws of the States and Territories. As such, we are of the view that the discussion in the Interim Report would benefit State and Territory Governments in their approach to law making.

1. Burden of Proof

1.1 Section 8Y of the Taxation Administration Act 1953 (C'th)

The AICD remains of the view that the presumption of innocence is fundamental to Australia's legal system. The Interim Report states that: "offences that reverse the legal burden of proof on an issue essential to culpability arguably provide the greatest interference with the presumption of innocence, and their necessity requires the strongest justification."² The ALRC identified that director liability for taxation offences, falls into this category.

We agree with the ALRC's recommendation that director liability provisions for taxation offences should be reviewed by the Federal Government and strongly recommend that in particular, section 8Y of the Taxation Administration Act 1953 (C'th) be reviewed.³

The Interim Report suggests that consideration be given as to whether "shifting the evidential burden only would be sufficient to balance the presumption of innocence with other legitimate objects pursued by these laws."⁴ In the case of section 8Y of the Taxation Administration Act 1953 (C'th) the AICD recommends that an accessorial liability

¹ Interim Report at pp 27-28

² Interim Report at p 337.

³ Section 8Y of the Taxation Administration Act 1953 (C'th) provides, in part, as follows: "(1) Where a corporation does or omits to do an act or thing the doing or omission of which constitutes a taxation offence, a person (by whatever name called and whether or not the person is an officer of the corporation) who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the taxation offence and is punishable accordingly. (2) In a prosecution of a person for a taxation offence by virtue of subsection (1), it is a defence if the *person proves* that the person: (a) did not aid, abet, counsel or procure the act or omission of the corporation concerned; and (b) was not in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the act or omission of the corporation. Note 1: A defendant bears a *legal burden* in relation to the matters in subsection (2), see section 13.4 of the *Criminal Code*."

⁴ Interim Report at p 338.

provision⁵, rather than a provision which reverses the evidential burden of proof, be inserted. Our reasons for this recommendation are set out below.

Section 8Y of the Taxation Administration Act 1953 (C'th) is a derivative liability provision. The primary responsibility for the conduct being regulated is placed on the corporation. As the primary liability for the offence rests with the corporation, the liability of directors is derived from the corporation's offence. In other words, a director will attract personal liability as a result of the corporation's offence.

This issue was comprehensively canvassed by the Corporations and Markets Advisory Committee (CAMAC) in its 2006 report *Personal Liability for Corporate Fault* (CAMAC Report).

The CAMAC Report pointed out, that an important distinction needs to be drawn between:

- “an individual’s criminal liability for his or her own misconduct in a corporate context; and
- an individual’s criminal liability in consequence of misconduct by a company.”⁶

It is the second type of liability which was the focus of the COAG reforms referred to in our previous submission.⁷ The COAG reforms, in large part instigated by the CAMAC Report, were not designed to remove liability from directors who commit or are involved in criminal conduct. The purpose of the reforms was to alleviate directors from being “automatically” liable for the criminal conduct of the company, given that the acts of the corporation can be carried out by a large range of individuals without the director’s knowledge or involvement.

It is in this context where the AICD is of the view that directors should not be criminally liable for acts of the company, outside circumstances where they are accessories or they have knowingly authorised or recklessly permitted a contravention.⁸ In early 2011, the AICD developed a set of rigorous principles and a model provision which we recommended be used to achieve the intended outcome of the COAG director liability reforms.⁹

We also noted that the CAMAC Report recommended:

“as a general principle, individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct, that is, where they were accessories.”¹⁰

⁵ Alternatively, the legislature could insert the AICD model provision developed during the COAG director liability reforms pursuant to the *National Partnership Agreement to Deliver a Seamless Economy*. The AICD model provision is set out in AICD’s submission to Federal Treasury in response to the Personal Liability for Corporate Fault Reform Bill 2012 (C’tth) dated 30 March 2013. A copy of the submission is available at www.companydirectors.com.au.

⁶ CAMAC Report, *Personal Liability for Corporate Fault* 2006 at p 4.

⁷ AICD submission to the ALRC dated 25 February 2015.

⁸ We note that page 394 of the Interim Report takes an expansive view of AICD’s statement from its 25 February submission “that directors should not be criminally liable for acts of the company, outside circumstances where they are accessories or they have knowingly authorised or recklessly permitted a contravention.” This statement was made in the context of the COAG reforms which addressed personal liability for corporate fault. The statement was not intended to be a general statement about the criminal liability which should apply to directors for their own misconduct in a corporate context.

⁹ The principles and the model provision are available at www.companydirectors.com.au. See note 5 above.

¹⁰ CAMAC Report *Personal Liability for Corporate Fault* 2006 at p 9.

In summary, we are of the view that section 8Y of the Taxation Administration Act 1953 (C'th) should be reviewed or amended in accordance with these principles.

1.2 Arguments used to justify the reversal of the onus of proof

We are pleased that the Interim Report highlights the difference between the reversal of the legal burden of proof in elements of the offence and the availability of a defence.¹¹ In the AICD's conversations with governments around Australia, one of the arguments commonly advanced to justify the reversal of the onus of proof is that a defence is available to directors. If the provision creating the offence reverses the legal burden of proof, directors and others will still be denied the presumption of innocence even if a defence is available.

As CAMAC has stated: "the fact that a corporate officer may be able, in the circumstances of a particular case, to make out a relevant defence and thereby avoid conviction does not remove the seriousness of the risk to reputation and the apprehension, effort and expense to which he or she is subject by being exposed to criminal liability on a prima facie basis."¹²

The Interim Report also states that the "seriousness of the crime, it is sometimes suggested, justifies the placing of a legal burden on the accused."¹³ Again, this statement reflects our experience when advocating for the removal of these provisions by Commonwealth, State and Territory governments. The constant refrain from legislators and policy makers is that these provisions are justified because the offence is serious. We have continually pointed out that the most serious criminal offences, including murder, do not reverse the legal burden of proof. As the Interim Report makes clear, "the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, house-breaking, drug-smuggling, corruption...this list is unfortunately endless, and nothing would be left of the presumption of innocence, save perhaps, for its relic status as a doughty defender of rights in the most trivial of cases."¹⁴ We agree with this analysis.

We remain of the view that the presumption of innocence is a fundamental right that should not be eroded. Arguably, the importance of the right should increase, not lessen, with the gravity of the offence.

1.3 State and Territory Provisions which reverse the onus of proof

While the focus of the Traditional Rights & Freedoms inquiry is on Commonwealth laws, we draw the attention of the ALRC to examples of provisions in State and Territory legislation which reverse the onus of proof for directors. Examples of such provisions are included in Attachment A. These examples show that the issues identified in the Interim Report are not unique to section 8Y of the Taxation Administration Act 1953 (C'th).

2. Strict & Absolute liability

The AICD is pleased that in its Interim Report, the ALRC has addressed laws that apply strict or absolute liability to any physical elements of a criminal offence.

¹¹ The Interim Report at 314 states: "It is possible to distinguish between the defining elements of an offence (its physical and mental – or "fault" – elements) and an exception, exemption, excuse, qualification or justification to it (often referred to as defences)."

¹² CAMAC *Personal Liability for Corporate Fault* 2006 at p 34.

¹³ Interim Report at p 335.

¹⁴ Interim Report at p 335 citing Sachs J in *State v Coetzee* [1997] 2 LRC 593 [220] Sachs J at 677

As stated previously, the AICD is particularly concerned about applying strict or absolute liability to offences, or elements of offences, where directors are required to make complex judgments or where the penalties involved for a breach are significant. CAMAC has also previously stated that strict liability “should not extend to areas where compliance requires the exercise of significant judgment or discretion.”¹⁵

For these reasons, we are pleased that the ALRC has recommended the review of the insolvent trading provisions in section 588G of the Corporations Act. To determine whether a company is insolvent as set out in section 588G(3)(b) of the Corporations Act, a director will likely be required to make a complex commercial judgment, often without access to full information and where the time to make a decision, or to obtain further information, is limited.

In summary, we are of the view that elements of commercial offences applying strict or absolute liability should be carefully considered. For example, strict liability should only be applied to offences, or elements of offences, in circumstances where:

- The infraction is minor in nature;
- The penalty for breaching the offence is small;
- There is no significant social stigma attaching to the breach; and
- Compliance does not require the exercise of significant judgment or discretion.

3. Retrospective Laws

We are pleased that the Interim Report refers to the legislative provisions inserted into the Taxation Administration Act 1953 (C'th) by the Tax Laws Amendment (2012 Measures No 2) Act 2012.

As explained in our previous submission, in 2012 these provisions amended the law to:

- make directors personally liable for the company's unpaid superannuation guarantee amounts and PAYG withholding amounts regardless of the directors' culpability; and
- make new directors personally liable for the actions of the company even when the person was not a director at the time of the company's breach.¹⁶

These laws are referred to in Chapter 9 of the Interim Report. While the measures impacting new directors are not the traditional type of retrospective law discussed in Chapter 9, they share many of the negative consequences that arise from laws that retrospectively change an individual's rights and obligations.

Retrospective laws deem conduct that was legal at the time it was carried out, illegal at a later time. The provisions contained in the Tax Laws Amendment (2012 Measures No 2) Act 2012 do not operate in such a way, however, they do make new directors personally liable for the misconduct of a company at a time when they were not yet a director. Essentially, the provisions apply liability for *present misconduct* to individuals *appointed in the future*. These provisions are an affront to the Rule of Law.

¹⁵ CAMAC Report *Personal Liability for Corporate Fault* at p 36.

¹⁶ The measures extended the law to make new directors liable for any superannuation guarantee charge or PAYG withholding amount that should have been paid by the company and which is overdue at the date of the director's appointment and which the company does not pay within 30 days of the director's appointment.

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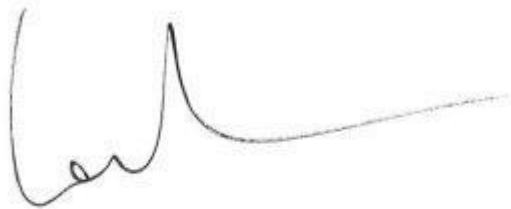
As the Interim Report points out: “One element of the rule of law is that laws are capable of being known in advance so that people subject to those laws can exercise choice and order their affairs accordingly.”¹⁷ Arguably, a person *not subject* to a law at a particular time should not bear liability for its breach by another person. As we have explained, it is not possible for an outsider to a company to order the company’s affairs, or exercise choice, in such a way as to avoid a company’s breach of the law. Despite this, an individual who joins the board *after* a corporation’s failure to pay the correct PAYG or superannuation guarantee charge becomes liable, through no fault of their own, for the corporate misconduct.

We are of the view that requiring new directors to ensure that the company pays the overdue amount within 30 days of their appointment in order to avoid personal liability, does not justify imposing liability for past corporate breaches on directors who were not present at the time. As we noted in our previous submission, the ‘illness’ defence¹⁸ recognises that there will be circumstances when a current director is not involved in the management of the company so should not be liable for conduct that occurred during that period. Unfortunately this same reasoning is not applied to new directors, who have no capacity to influence, or be involved in, the affairs of the company at a time prior to their appointment.

We recommend that the ALRC suggest these provisions be reviewed and amended as a priority.

We hope our comments will be of assistance to you. If you would like to discuss any aspect of our views, please contact us on (02) 8248 6600.

Yours sincerely



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¹⁷ Interim Report at p 249.

¹⁸ See Section 269-35 of Schedule 1 to the Taxation Administration Act 1953 (C’th).

Appendix A

Examples of provisions in State and Territory legislation that reverse the onus of proof

Act	Section
Dairy Act 2000 (Vic)	s 55C
Environment Protection Act 1970 (Vic)	s 66B
Fisheries Act 1995 (Vic)	s 120
Food Act 1984 (Vic)	s 51B
Guardianship and Administration Act 1986 (Vic)	s 81
Infringements Act 2006 (Vic)	s 91
Dangerous Goods (Road & Rail Transport) Act 2008 (NSW)	s 12
Employment Protection Act 1982 (No.2) (NSW)	s 22
Protection of the Environment Operations Act 1997 (NSW)	s 169
Workers Compensation Act 1987 (NSW)	s 145A
Exotic Diseases in Animals Act 1981 (QLD)	s 42
Marine Parks 2004 (QLD)	s 136
Mining and Quarrying Safety and Health Act 1999 (QLD)	s 241
Nature Conservation Act 1992 (QLD)	s 162
Plant Protection Act 1989 (QLD)	s 29A
Recreation Areas Management Act 2006 (QLD)	s 203
Stock Act 1915 (QLD)	s 45
Sustainable Planning Act 2009 (QLD)	s 611
Vegetation Management Act 1999 (QLD)	s 60A
Aboriginal Heritage Act 1988 (SA)	s 41(2)
Adelaide Dolphin Sanctuary Act 2005 (SA)	s 49
Agricultural and Veterinary Products (Control of Use) Act 2002 (SA)	s 34
Animal Welfare Act 1985 (SA)	s 38
Aquaculture Act 2001 (SA)	s 88

Authorised Betting Operations Act 2000 (SA)	s 84
Classification (Publications, Films and Computer Games) Act 1995 (SA)	s 86(4)
Dangerous Substances Act 1979 (SA)	s 41
Development Act 1993 (SA)	s 105(3)
Electricity Act 1996 (SA)	s 93
Environment Protection Act 1993 (SA)	s 129
Explosives Act 1936 (SA)	s 51A
Fisheries Management Act 2007 (SA)	s 120
Gaming Machines Act 1992 (SA)	s85(1) - (2)
Gas Act 1997 (SA)	s 89
Genetically Modified Crops Management Act 2004 (SA)	s 22
Health Practitioner Regulation National Law (South Australia) Act 2010 (SA)	s 72
Heritage Places Act 1993 (SA)	s 42(2)
Hydroponics Industry Control Act 2009 (SA)	s 31
Livestock Act 1997 (SA)	s 80
Marine Parks Act 2007 (SA)	s 56
Native Vegetation Act 1991 (SA)	s 39
Natural Resources Management Act 2004 (SA)	s 219
Primary Produce (Food Safety Schemes) Act 2004 (SA)	s 44
Waste Management and Pollution Control Act (NT)	s 91
Criminal Code (NT)	s 125D