THIRTY-NINTH PARLIAMENT

REPORT 92

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

DIRECTORS' LIABILITY REFORM BILL 2015

Presented by Kate Doust MLC (Chair)

April 2015

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**6. Uniform Legislation and Statutes Review Committee**

6.1 A *Uniform Legislation and Statutes Review Committee* is established.

6.2 The Committee consists of 4 Members.

6.3 The functions of the Committee are –

(a) to consider and report on Bills referred under Standing Order 126;

(b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;

(c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;

(d) to review the form and content of the statute book; and

(e) to consider and report on any matter referred by the Council.

6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia."

Members as at the time of this inquiry:

Hon Kate Doust MLC (Chair)	Hon Brian Ellis MLC (Deputy Chair)
Hon Mark Lewis MLC	Hon Amber-Jade Sanderson MLC

Staff as at the time of this inquiry:

Alex Hickman (Advisory Officer (Legal))	Samantha Parsons (Committee Clerk)

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

DIRECTORS' LIABILITY REFORM BILL 2015

EXECUTIVE SUMMARY

1 The Directors' Liability Reform Bill 2015 (**Bill**) proposes to amend legislation in Western Australia which imposes criminal liability on directors and other persons for offences committed by bodies corporate.

2 This is being undertaken to fulfil Western Australia's commitment under a reform project of the Council of Australian Governments (**COAG**) designed to harmonise and limit directors' liability for corporate fault. As part of this project, COAG developed a set of principles against which each Australian jurisdiction has audited its legislation.

3 One of the main policy considerations underpinning the COAG principles is that a director should not be liable for corporate fault merely on the grounds of having been a director of a body corporate which has committed an offence.

4 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law-making powers. It has recommended that a clause be inserted into the Bill to provide for a periodic review. This is on the basis that the Bill represents a significant change in the law regarding directors' liability. This warrants an assessment to be made of any impact of the Bill on corporate governance in Western Australia and parliamentary oversight of this assessment.

RECOMMENDATIONS

5 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that, during the Second Reading debate, the Attorney General advise the Legislative Council on the basis upon which the content of the audit process of Western Australian legislation against the Council of Australian Government's Principles and Guidelines governing personal liability for corporate fault forms part of the deliberative process of Cabinet to support a claim for public interest immunity from disclosure to the Parliament.

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Recommendation 2: The Committee recommends that the Government introduce an amendment to the Directors' Liability Reform Bill 2015 which will require the legislation to be reviewed within 4 years from the date of commencement and at the expiry of each 4 yearly interval after that anniversary, with a copy of each review to be tabled in both the Legislative Council and the Legislative Assembly.

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Recommendation 3: The Committee recommends that, subject to the implementation of Recommendation 2 above, the Directors' Liability Reform Bill 2015 be passed.

REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

IN RELATION TO THE

DIRECTORS' LIABILITY REFORM BILL 2015

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1 REFERENCE

1.1 On 25 February 2015 the Directors' Liability Reform Bill 2015 (**Bill**) was referred by the Hon Michael Mischin MLC, Attorney General to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**) pursuant to Standing Order 126 of the Legislative Council's Standing Orders.[1]

1.2 Standing Order 126(7) requires the Committee to report within 45 days of referral. Due to the Parliament being in recess at the conclusion of this period, the tabling date for the Bill is, in effect, the first sitting day after, being 21 April 2015.

2 INQUIRY PROCEDURE

2.1 The Committee called for submissions by contacting six stakeholders directly and also by way of an advertisement in *The West Australian* on Saturday, 7 March 2015. Submissions closed on Friday 20 March 2015, with two submissions received. All submissions are available on the Committee's website.[2]

2.2 The Committee held a hearing with the Department of the Attorney General (**Department**) on 16 March 2015. At this hearing Mr Andrew Marshall and Ms Sarah Burnside of the Department and Ms Rebecca Eldred of Parliamentary Counsel's Office briefed the Committee on the Bill. A copy of the transcript of the hearing is available on the Committee's website.[3]

2.3 In advance of this hearing, the Committee posed a number of written questions to the Department on the Bill.[4] The Department provided its responses on 16 March 2015.[5]

2.4 Details of stakeholders invited to make a submission and submissions received are contained in **Appendix 1**.

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1 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 February 2015, p24.

2 www.parliament.wa.gov.au/uni.

3 Ibid.

4 Email to Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 11 March 2015.

5 Letter from Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 16 March 2015.

2.5 The Committee wishes to thank all submitters and witnesses who made themselves available.

3 UNIFORM LEGISLATION

3.1 The Bill adopts the Complementary Commonwealth-State or Co-operative form of uniform legislation. This approach involves all jurisdictions passing legislation falling within their respective constitutional powers. It ensures flexibility as each jurisdiction is able to draft its own legislation to suit local conditions that is totally under its control, while still carrying into effect any nationally agreed policy.[6]

4 SUPPORTING DOCUMENTS

4.1 When the Bill was introduced into the Legislative Council on 25 February 2015 the Committee received the Second Reading Speech, the Explanatory Memorandum and the Bill.

4.2 Hon Michael Mischin MLC, Attorney General, provided the Committee with the following documentation and information pursuant to Ministerial Office Memorandum MM2007/01 on 13 March 2015:[7]

- National Partnership Agreement to Deliver a Seamless National Economy;
- Council of Australian Governments (**COAG**) Communiqué 29 November 2008;
- Personal Liability for Corporate Fault - Guidelines for applying the COAG Principles (**COAG Principles**);
- Seamless National Economy: Final Report on Performance;
- a statement as to any timetable for the implementation of the legislation;
- the Government's policy on the Bill;
- advantages and disadvantages to the State as a participant in the relevant scheme or agreement;
- relevant constitutional issues;
- an explanation as to whether and by what mechanism the State can opt out of the scheme; and

[6] Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 63, *Information Report: Scrutiny of Uniform Legislation*, 30 June 2011, p2.

[7] A copy is available on the Committee's website.

- the mechanisms by which the Bill, once enacted, can be amended.[8]

4.3 The Committee notes Standing Order 126(5) states:

> *(5) The Member in charge of a Bill referred to the Committee shall ensure that all documentation required by the Committee is provided to the Committee within 3 working days after referral under (4).*

4.4 It is unfortunate that the documentation referred to above was not forwarded to the Committee by the due date of 4 March 2015. The Committee relies upon Ministers and their agencies to provide the Committee with supporting documentation and information for bills in a timely manner. Delay in the provision of information to the Committee can hinder the Committee's inquiry into a bill and result in inconvenience to the Legislative Council.

5 BACKGROUND TO THE BILL

5.1 In September 2006 the Federal Government's Corporations and Markets Advisory Committee (**CAMAC**) delivered its report entitled 'Personal Liability for Corporate Fault', which identified two principal areas of concern, as follows:

> *a marked tendency in legislation across Australia to include provisions that impose personal criminal sanctions on individuals for corporate breach by reason of their office or role within the company (rather than their actual acts or omissions) unless they can establish an available defence; and*
>
> *considerable disparities in the terms of personal liability provisions, resulting in undue complexity and less clarity about requirements for compliance.*[9]

5.2 CAMAC elaborated later in its report as follows:

> *The Advisory Committee is 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*

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8 Letter from Hon Michael Mischin MLC, Attorney General, 13 March 2015.

9 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, p1,http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/personal_liability_for_corporate_fault.pdf (viewed 24 March 2015).

> *compared with the way in which other people are treated under the law.*
>
> *The Committee is also concerned about the marked difference in the form of statutory provisions that impose personal liability for corporate fault. Corporate officers may find themselves subject to a variety of standards of responsibility and available defences under statutes applying to different aspects of a company's operations in different parts of Australia.*[10]

5.3 CAMAC recommended a consistent and principled approach to the personal liability of directors across Australian jurisdictions.

5.4 COAG agreed to increased harmonisation of directors' liability at a meeting on 29 November 2008.[11] It initiated a reform project designed to harmonise the imposition of personal criminal liability for corporate fault across federal, state and territory legislation by reference to an agreed set of principles. These aimed to ensure that, where derivative liability[12] is considered appropriate, it is imposed in accordance with principles of good corporate governance and criminal justice and in a manner that will promote responsible entrepreneurialism and economic growth.[13]

5.5 The Commonwealth, States and Territories agreed to implement principles and guidelines developed as part of the reform project:

> *In relation to directors' liability reform, to ensure the operation of directors' liability is applied in a nationally consistent and principle-based manner in future legislation, COAG agreed to a set of Principles and Guidelines…*[14]

5.6 The COAG Principles are as follows:

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10 Corporations and Markets Advisory Committee, *Personal Liability for Corporate Fault*, September 2006, pp8-9. See also Queensland, Legislative Assembly, Legal Affairs and Community Safety Committee, Report 25, *Directors' Liability Reform Amendment Bill 2012*, March 2013, pp9-10. A summary of the report can also be found at Commonwealth, Senate, Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012*, October 2012, pp8-11, http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2010_13/liability/report/report_pdf.ashx (viewed 24 March 2015).

11 Council of Australian Governments Meeting – Communiqué, Canberra, 29 November 2008, p10, https://www.coag.gov.au/node/294 (viewed 1 April 2015).

12 Derivative liability of directors is imposed where their company breaches a statutory requirement. This is to be distinguished from personal, direct liability, where the director has personally committed the offence themselves and accessorial liability, where the director has encouraged or assisted another to commit an offence and knew the essential facts that constitute the offence. See also Mr Andrew Marshall, Manager, Research and Analysis, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, pp1-2.

13 http://www.nortonrosefulbright.com/knowledge/publications/62630 (viewed 24 March 2015).

14 Council of Australian Governments Meeting – Communiqué, Canberra, 25 July 2012, p3, https://www.coag.gov.au/node/431 (viewed 1 April 2015).

1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.

2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

3. A 'designated officer' approach to liability is not suitable for general application.

4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

   (a) there are compelling public policy reasons for doing so (e.g. in terms of the potential for significant public harm that might be caused by the particular corporate offending);

   (b) liability of the corporation is not likely on its own to sufficiently promote compliance; and

   (c) it is reasonable in all the circumstances for the director to be liable having regard to factors including:

      i) the obligation on the corporation, and in tum the director, is clear;

      ii) the director has the capacity to influence the conduct of the corporation in relation to the offending; and

      iii) there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

5. Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

   (a) have encouraged or assisted in the commission of the offence; or

   (b) have been negligent or reckless in relation to the corporation's offending.

6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporations' offending if they are not to be personally liable.[15]

[15] https://www.coag.gov.au/node/434 (viewed 1 April 2015).

5.7 The COAG Principles also identified three types of directors' liability provisions, as follows:

> ***Type 1****: the director will be presumed to have taken all reasonable steps to prevent the body corporate committing the offence (and therefore not be liable) unless the prosecution proves that he or she failed to take all reasonable steps.*
>
> ***Type 2****: provides that a director will be taken to have committed the offence committed by the body corporate unless he or she leads evidence that suggests a reasonable possibility that he or she took all reasonable steps to prevent the commission of the offence by the body corporate. Once this evidence is adduced, the prosecution bears the onus of proving that the director did not take all reasonable steps.*
>
> ***Type 3****: requires the director to prove on the balance of probabilities that he or she took all reasonable steps.*[16]

5.8 Since the COAG Principles were adopted, each Government has proceeded to separately audit their own legislation against the COAG Principles.

5.9 In Western Australia, provisions in existing legislation which imposes derivative liability vary with respect to persons subject to liabilities, the nature of the conduct attracting liability and the defences available to directors.[17]

6 THE BILL

Overview

6.1 The aim of the Bill is to limit and standardise provisions imposing derivative liability on directors to ensure the nature of this liability is consistent across the statute book[18] and in line with the intent of the COAG Principles.

6.2 The Bill:

- is an amendment bill in that it amends *The Criminal Code* as well as 60 other items of Western Australian legislation 'to harmonise the provisions surrounding the imposition of personal liability for corporate fault';

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16 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 February 2015, p627 – Second Reading Speech.

17 See Mr Andrew Marshall, Manager, Research and Analysis, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, p2.

18 See Mr Andrew Marshall, Manager, Research and Analysis, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, p2.

- relates only to situations where a director is made liable because he or she has not taken all reasonable steps to prevent the body corporate committing the offence;

- in some instances, proposes to delete legislative provisions that impose purely accessorial liability, or that contain a mixture of accessorial liability and derivative liability, from the legislation it seeks to amend.[19]

6.3 In legislation where it has been considered necessary to retain derivative liability, the relevant provision has been deleted and replaced with a reference to standard provisions that have been inserted into *The Criminal Code* which reflect the three types of directors' liability provisions set out in paragraph 5.7.[20]

6.4 The broad range of entities treated as bodies corporate and captured by the Bill can be appreciated from a review of the legislation sought to be amended by the Bill. For instance:

- Unincorporated scientific establishments (*Animal Welfare Act 2002*, clauses 8 and 9 of the Bill);

- Racing clubs (*Anzac Day Act 1960*, clauses 10 to 14 of the Bill);

- Corporations, as defined in the *Corporations Act 2001* (Cth) (*Architects Act 2004*, clauses 15 and 16 of the Bill);

- societies, bodies or associations collecting money or goods for charitable purposes (*Charitable Collections Act 1946*, clauses 28 to 30 of the Bill);

- builders, being a person who carries on, or 2 or more persons who together carry on, a business which consists of or includes the performing of home building work for others (*Home Building Contracts Act 1991*, clauses 71 and 72 of the Bill);

- a partnership on behalf of which a pawnbroker's licence or second-hand dealer's licence is held (*Pawnbrokers and Second-hand Dealers Act 1994*, clauses 103 and 104 of the Bill); and

- discretionary trusts (section 105(2) of the *Duties Act 2008* referred to in the table under clause 131 of the Bill).

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19 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 February 2015, pp627-628 – Second Reading Speech.

20 See Mr Andrew Marshall, Manager, Research and Analysis, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, pp2-3.

6.5 The Department gave some examples demonstrating type 1, 2 and 3 directors' liability at the hearing on 16 March 2015 as follows:

Type 1

As an example of Type 1 liability, one of the offences to which Type 1 liability is proposed to apply is section 5(1) of the Water Services Act 2012 which provides that 'a person must not provide a water service except under a licence'.

The Bill proposes to apply proposed section 44C of the Criminal Code to this offence, so that if an officer of a body corporate were charged with this offence as a result of the body corporate's commission of the offence, the prosecution would need to prove that the officer failed to take all reasonable steps to prevent the body corporate from providing a water service without a licence. In accordance with proposed section 44C(3) of the Criminal Code, in determining whether things done or omitted to be done by the officer constitute reasonable steps, a court must have regard to:

(a) what the officer knew, or ought to have known, about the commission of the offence by the body corporate; and

(b) whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and

(c) any other relevant matter.

Type 2

The Bill does not propose to apply Type 2 liability in respect of any offences, but section 44D is proposed to be included in the Criminal Code in the event that this type of liability is needed at a later stage. Regarding Type 2 liability, the COAG Guidelines provide as follows:

> *'Sometimes a statute will provide that a person is guilty of an offence if certain matters are proved by the prosecution, subject to one or more "defences". An accused who wishes to rely on the defence must produce at least enough evidence to suggest that there is a reasonable possibility that the defence applies. If they do this, then the defence is taken to apply and the accused is not convicted of the offence, unless*

the prosecution brings contrary evidence to prove (beyond reasonable doubt) that the defence does not, in fact, apply.

Some Directors' Liability Provisions take this form. In particular, Type 2 Directors' Liability provisions are those that deem the director to be criminally liable for a corporation's contravention of the Underlying Offence, but afford the director a defence if they have taken reasonable steps to avoid the contravention.

Type 2 provisions differ from Type 1 provisions in that, if the director wishes to rely on the "reasonable steps" defence, he or she bears the onus of bringing evidence to show that he or she did, in fact, take reasonable steps to avoid the contravention. (In a Criminal Code jurisdiction the onus of adducing that evidence is known as the evidential burden (see, for example, section 13.3 of the Criminal Code Act 1995 (Cth)). In a non-Code jurisdiction the evidence is referred to as the "prima facie" case. Once the director has brought that evidence, the prosecution then bears the legal burden of proving (beyond reasonable doubt) that those reasonable steps were not taken, or that there were other reasonable steps that should also have been taken (and the legal burden of proving (beyond reasonable doubt) that each of the other elements of the offence are proved).'

Type 3

As an example of Type 3 liability, one of the offences to which Type 3 liability is proposed to apply is section 49(2) of the Environmental Protection Act 1986. This section provides that:

(2) A person who intentionally or with criminal negligence——

(a) causes pollution; or

(b) allows pollution to be caused,

commits an offence.

The Bill proposes to apply proposed section 44E of the Criminal Code to this offence, so that if an officer of a body corporate were

> *charged with this offence as a result of the body corporate's commission of the offence, that officer would need to prove that he or she took all reasonable steps to prevent the body corporate from intentionally or with criminal negligence causing pollution, or allowing pollution to be caused.*
>
> *In accordance with proposed section 44E(4) of the Criminal Code, in determining whether things done or omitted to be done by the officer constitute reasonable steps, a court must have regard to:*
>
> *(a) what the officer knew, or ought to have known, about the commission of the offence by the body corporate; and*
>
> *(b) whether the officer was in a position to influence the conduct of the body corporate in relation to the commission of the offence; and*
>
> *(c) any other relevant matter.*[21]

Structure

6.6 The Bill comprises three parts and 150 clauses.

6.7 Part 1 contains the short title and commencement clause.

6.8 Part 2:

- amends *The Criminal Code* by inserting a new Chapter VI containing a set of standard provisions that 'set out certain circumstances in which directors and other officers of a body corporate can incur criminal liability as a result of an offence by the body corporate';[22]
- adopts the definition of 'officer' set out in the *Corporations Act 2001* (Cth).[23]

6.9 Part 3 amends legislation that currently imposes personal criminal liability on directors for corporate fault, either by deleting the relevant provisions to remove this form of liability or by replacing the relevant provisions with provisions that incorporate the standard provisions in sections 44C or 44E of *The Criminal Code*.[24]

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21 Letter from Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 16 March 2015.

22 Directors' Liability Reform Bill 2015, *Explanatory Memorandum*, p1.

23 For the sake of consistency, references in this report to 'directors' covers officers for the purposes of the Bill.

24 Directors' Liability Reform Bill 2015, *Explanatory Memorandum*, p4.

Submissions on the Bill

6.10 The Governance Institute of Australia expressed support for the Bill, stating:

> *Governance Institute supports the principle that, where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself, and that personal criminal liability of a corporate officer for the misconduct of the corporation should be limited to situations where the officer knowingly encourages or assists the commission of the offence or is reckless in attending to their duties as a corporate officer, thus allowing the offence to occur (accessorial liability).*[25]

6.11 The Australian Institute of Company Directors expressed concern about the retention of some directors' liability provisions, including type 3 liability.[26]

Consultation on the drafting of the Bill

6.12 The Committee received evidence from the Department that consultation on the Bill involved consulting the agencies that administer the legislation proposed to be amended, as follows:

> ***The CHAIR:*** *I was just wondering, outside of the government departments and agencies that are impacted by this, who else did you consult with?*
>
> ***Ms Burnside:*** *Just with the agencies that administer the acts. I believe there was a broader COAG process that started in 2008. There was wide consultation at that level. Then it fell to each jurisdiction to amend its own acts.*
>
> ***The CHAIR:*** *Are there any local stakeholders that you could have consulted with?*
>
> ***Ms Burnside:*** *I am not sure.*
>
> ***Mr Marshall:*** *I do not think there are. Company directors are at the national level.*
>
> ***Ms Burnside:*** *I cannot think of any.*[27]

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25 Submission No 1 from Governance Institute of Australia, 20 March 2015, p1.

26 Submission No 2 from Australian Institute of Company Directors, 20 March 2015, pp5-6.

27 Ms Sarah Burnside, Senior Policy Officer, Department of the Attorney General and Mr Andrew Marshall, Manager, Research and Analysis, Department of Attorney General, *Transcript of Evidence*, 16 March 2015, p8.

6.13 In its submission, the Australian Institute of Company Directors stated:

> *If the Bill had been open for consultation before being introduced into parliament, the AICD would have been in a position to raise its recommended changes at a much earlier stage, unfortunately this did not occur.*[28]

6.14 The Committee recognises that consultation on proposed legislation is a decision of the Executive Government. However, it is of the view that, despite consultation having been undertaken as part of the COAG process, consultation on the Bill should have been undertaken with those impacted by the changes to the legislation proposed by the Bill.

Claim of public interest immunity

6.15 The Committee requested the following information from the Department to assist it in understanding the audit process conducted by the various agencies as envisaged by the COAG Principles:

> *Please describe:*
>
> - *how the audit process of Western Australian legislation against the COAG Principles and Guidelines governing personal liability for corporate fault was undertaken;*
> - *how many items of legislation were audited; and*
> - *the outcomes of this audit.*
>
> *Please provide a copy of any documentation which summarises the audit outcomes.*
>
> *Was any legislation left out of the scope of the audit? If so, please provide a list of such legislation and detail why it was left out.*[29]

6.16 In response, the Department asserted public interest immunity by stating:

> *The content of audit forms part of the deliberative process of Cabinet.*[30]

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28 Submission No 2 from the Australian Institute of Company Directors, 20 March 2015, p7.

29 Email to Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 11 March 2015.

30 Letter from Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 16 March 2015, attaching answers to written questions, p2.

6.17 A claim of public interest immunity against the disclosure of documents or other information to Parliament by the Executive is made in circumstances where, in the view of the Executive, its disclosure would be harmful to the public interest on a particular ground, in a particular way. Such a claim should be made by the responsible Minister.

6.18 While an assertion that documents or other information forms part of the deliberative process of Cabinet is recognised as one ground for a claim of public interest immunity[31] only documents which record or reveal the actual deliberations of cabinet are immune[32] and such a claim is not absolute.

6.19 Also, the claim is assessed by balancing the general desirability that documents of that kind should not be disclosed against the need to produce them in the public interest.[33] Such a balancing exercise can best be undertaken when there is some detail to support the basis of the claim, rather than its mere assertion, without more.

6.20 The assessment by Parliament of a claim of public interest immunity by the Executive is consistent with the nemo judux principle[34] and the fact that, when made in court, such claims are never accepted without being tested and adjudicated by the Court.

6.21 The Committee made further requests to the Department and the Attorney General, noting that it sought access to assist in understanding the audit process conducted by the various agencies as envisaged by the COAG Principles.[35]

6.22 Given the Committee's tight reporting deadline, the Committee makes the following recommendation:

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31 In *The Commonwealth v Northern Land Council* (1993) 176 CLR 604, the High Court held that:

> *The production to the court of documents recording cabinet deliberations should only be ordered in exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of such documents.*

32 *Commonwealth v Construction, Forestry, Mining and Energy Union* (2000) 171 ALR 379; *NTEIU v the Commonwealth* (2001) 111 FCR 583. See also *Secretary, Department of Infrastructure v Asher* (2007) VSCA 272.

33 See *Sankey v Whitlam* [1978] HCA 43; 142 CLR 1 at 43 per Gibbs ACJ.

34 *Nemo judex in causa sua* is a Latin phrase that means, literally, no-one should be a judge in their own cause.

35 Letter from Hon Kate Doust MLC to Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 17 March 2015. Letter from Hon Kate Doust MLC to Hon Michael Mischin MLC, Attorney General, 1 April 2015.

Recommendation 1: The Committee recommends that, during the Second Reading debate, the Attorney General advise the Legislative Council on the basis upon which the content of the audit process of Western Australian legislation against the Council of Australian Government's Principles and Guidelines governing personal liability for corporate fault forms part of the deliberative process of Cabinet to support a claim for public interest immunity from disclosure to the Parliament.

Parliamentary sovereignty and law-making powers of the Parliament

6.23 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law-making powers. The Bill has adopted a form of uniform legislation which ensures flexibility by enabling the Western Australian Parliament to have the final say regarding how it legislates to comply with the COAG Principles. This minimises any impact on parliamentary sovereignty and law-making powers.

6.24 Accordingly, with the exception of the matter raised below, the Committee is satisfied that the Bill has no impact upon the sovereignty and law-making powers of the Parliament of Western Australia.

Lack of a review clause

6.25 The Committee asked the Department whether there were 'any plans to review the operation and effectiveness of the application of the three tiers of directors' liability to the 60 items of legislation amended by the Bill'.[36] The Department stated that there were no such plans and that 'the operation of each of the 60 Acts proposed to be amended by the Bill is a matter for the agencies which administer those Acts.'[37]

6.26 The Committee sought further feedback from the Department as follows:

> ***The CHAIR****: The second question was in relation to the answer you provided to question 14, about the lack of a review mechanism, and we ask: is it a standard drafting practice to provide for a review of legislation, to ensure parliamentary accountability and oversight of the operation of legislation and the significance of the changes being made to the directors' liability by the bill? Could there not be an overall review of the impact of the changes provided for in the bill with each responsible department providing feedback to the reviewer and a report tabled in parliament?*

[36] Email to Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 11 March 2015.

[37] Letter from Ms Cheryl Gwilliam, Director General, Department of the Attorney General, 16 March 2015, p6.

***Ms Eldred**: I think review clauses can be eminently useful in cases where there is a novel policy that is being dealt with in a new piece of legislation. In this particular case our view was that there is no fundamental change to the law; it is more a case of standardising the existing law. So I would suggest that in this particular case it is probably not necessary, given that there is nothing very new that we are dealing with and certainly each agency could keep an eye on what is happening with their provisions, but my understanding is that in actual practice these provisions are very rarely used to prosecute people. Departments like to have them there to signify that certain offences are important and that directors should be aware of making sure that their body corporate is complying with the law, but actual instances of prosecutions are quite low. So in terms of there being a review, I am not sure what that review would encompass, given that many of these provisions have existed for a long time without anything.*[38]

…

***Hon MARK LEWIS**: So would it not be useful to have a review in three years' time or whatever to see whether there are any unintended consequences of those changes across the various 60 acts of these definitions, if you like? What will be the problem with having a review to make sure that it is doing what it was supposed to do?*

***Ms Burnside**: I think the question of whether to have a review sort of falls between drafting and policy in terms of a question.*[39]

***Ms Eldred**: I am just not sure what the unintended consequences would be, to the extent that again, if anything, it is lessening liability. You could put one in there, but I just feel like we would be putting one in there just to put one in there. I am not convinced of what it would achieve.*

***The CHAIR**: We enable parliamentary scrutiny to apply so that we can actually see whether or not it has worked. That is quite often why we like to have review provisions in, so that inquiries can be*

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38 Ms Rebecca Eldred, Assistant Parliamentary Counsel, Parliamentary Counsel's Office, *Transcript of Evidence*, 16 March 2015, pp6-7.

39 Ms Sarah Burnside, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, p8.

> *conducted, reports tabled and we can see whether it is actually doing what it was meant to do.*[40]

6.27 Despite this evidence, the Committee notes the Department has stated that:

> *there will be cases where liability is currently a type three liability but in future, if the bill is passed, it will be a type one liability.*[41]

6.28 Also, the Bill provides for:

- the outright removal of some liability provisions from various legislation;[42] and
- a reduction of the instances where there is a reversal of the onus of proof imposed on directors from 36 Acts to six.[43]

6.29 It is the Committee's view that this represents a significant change in the law regarding directors' liability warranting the inclusion in the Bill of a clause providing for a periodic review. This is to enable an assessment to be made of any impact of the Bill on corporate governance in Western Australia and parliamentary oversight of this assessment.

6.30 Accordingly, the Committee makes the following recommendation.

Recommendation 2: The Committee recommends that the Government introduce an amendment to the Directors' Liability Reform Bill 2015 which will require the legislation to be reviewed within 4 years from the date of commencement and at the expiry of each 4 yearly interval after that anniversary, with a copy of each review to be tabled in both the Legislative Council and the Legislative Assembly.

7 CONCLUSION

7.1 The Committee finds that the Bill proposes to amend legislation imposing liability on directors in Western Australia to limit and standardise relevant provisions in accordance with the COAG Principles.

7.2 These proposed amendments represent a significant change to the law with respect to directors' liability and corporate governance in Western Australia.

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40 Ms Rebecca Eldred, Assistant Parliamentary Counsel, Parliamentary Counsel's Office, *Transcript of Evidence*, 16 March 2015, p8.

41 Ms Sarah Burnside, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 16 March 2015, p8.

42 Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 February 2015, p628 – Second Reading Speech.

43 Id.

7.3 The Committee has recommended the Bill be amended by providing for a periodic review to enable parliamentary oversight of the operation of the legislation.

Recommendation 3: The Committee recommends that, subject to the implementation of Recommendation 2 above, the Directors' Liability Reform Bill 2015 be passed.

Hon Brian Ellis MLC
Deputy Chair

21 April 2015

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION AND SUBMISSIONS RECEIVED

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STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION AND SUBMISSIONS RECEIVED

Stakeholders invited to provide a submission

1. Ms Cheryl Gwilliam, Director General, Department of the Attorney General
2. Mr Matthew Keogh, President, Law Society of Western Australia
3. Ms Kirsten Rose, State Manager, Western Australia, Australian Institute of Company Directors
4. Mr Gary Martin, Chief Executive Officer, Australian Institute of Management
5. Mr Barry Nunn, State Chair, Western Australia, Australian Shareholders' Association
6. Ms Leigh Grant, State Director, Western Australia, Governance Institute of Australia

Submissions received

1. Mr Tim Sheehy, Chief Executive, Governance Institute of Australia
2. Mr John Brogden, Managing Director, & Chief Executive Officer, Australian Institute of Company Directors