

ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-15767

Hon Kate Doust MLC
Chair
Standing Committee on Uniform Legislation and Statutes Review
Parliament House
PERTH WA 6000

Dear Ms Doust

DIRECTORS' LIABILITY REFORM BILL 2015

Thank you for your letter dated 2 April 2015 regarding the inquiry on the Directors' Liability Reform Bill 2015 (Bill) which is being conducted by the Standing Committee on Uniform Legislation and Statutes Review (Committee).

I understand that you previously wrote to the Director General of the Department of the Attorney General on this matter on 17 March 2015. Unfortunately the Director General did not receive the correspondence by email to her and the letter was addressed to 14 St George's Tce rather than 141 St George's Tce. As a consequence the Director General was unaware of the correspondence. I would also note the Department was not in a position to make a determination on the release of the material requested.

As the Department has previously advised, the audit document itself formed part of the deliberative processes of Cabinet. However, in the interests of assisting the Committee with its Inquiry, I am pleased to provide the following answers to the Committee's questions, noting that the audit was completed in the early stages of the process and that the amendments themselves were refined during drafting.

Firstly, the Committee asks how the audit process was undertaken.

The audit process adhered to the principles and guidelines as set out in *Personal Liability for Corporate Fault - Guidelines for applying the COAG Principles* (COAG Guidelines). I am advised that this process involved consideration of each Act that imposed liability on officers of bodies corporate, the offences in respect of which it was imposed, and the persons on whom it was imposed. I am further advised that the audit then considered whether the provision imposing liability ought to be excluded from the audit and whether, if it were not so excluded, liability was justified. Where liability was considered justified in light of the COAG Guidelines, reasons were provided in line with the COAG Guidelines, such as the potential for significant public harm, or public health and safety considerations. Where liability was not considered justified, the audit noted that the relevant offences did not meet the criteria in the COAG Guidelines. Finally, where it was determined that an offence merited officer liability, there was consideration of which type of liability was appropriate.

Secondly, the Committee asks how many items of legislation were included in the audit.

I advise that 84 Acts were considered during the course of the audit, some of which were then excluded as detailed below.

Thirdly, the Committee inquires as to the outcomes of the audit.

I am advised that an analysis of the audit's outcomes shows that overall it proposed that derivative liability be removed entirely from 21 Acts and also from 122 offence provisions in other Acts, that liability be re-categorised (ie from Type 3 to Type 1 liability) in respect of 167 offences, and that liability be retained in its current form in respect of 86 offences. These amendments were refined during the drafting process.

The Committee also asks whether any legislation was excluded from the audit, and requests a list of such legislation and details of the reasons for its exclusion.

The following legislation was excluded from the audit on the basis that it imposed accessorial liability only:

- *Armorial Bearings Protection Act 1979*
- *Civil Judgments Enforcement Act 2004*
- *Classification (Publications, Films and Computer Games) Enforcement Act 1996*
- *Criminal Property Confiscation Act 2000*
- *Dog Act 1976*
- *Education Service Providers (Full Fee Overseas Students) Registration Act 1991*
- *Evidence Act 1906*
- *Fisheries Adjustment Schemes Act 1987*
- *Higher Education Act 2004*
- *Human Reproductive Technology Act 1991*
- *Industrial Relations Act 1979*
- *Juries Act 1957*
- *Land Valuers Licensing Act 1978*
- *Motor Vehicle Dealers Act 1973*
- *Motor Vehicle Repairers Act 2003*
- *Petroleum Products Pricing Act 1983*
- *Plant Diseases Act 1914*
- *Settlement Agents Act 1981*
- *Trustee Companies Act 1987*
- *Unclaimed Money Act 1990*
- *Water Corporation Act 1995*

Some Acts were also excluded on this basis but it was subsequently determined that they in fact imposed a mixture of accessorial and derivative liability and therefore required amendment. These Acts were:

- *Aboriginal Heritage Act 1972*
- *Energy Operators (Powers) Act 1979*
- *Home Building Contracts Act 1991*
- *Radiation Safety Act 1975*
- *Retail Trading Hours Act 1987*
- *Retirement Villages Act 1992*

The *Stamp Act 1921* was also excluded from the audit on the basis that one of its provisions imposed accessorial liability, but the Bill does propose to amend the *Taxation Administration Act 2003*, which governs directors' liability in taxation Acts including the *Stamp Act 1921*.

Two Acts were excluded on the basis that they were to expire, and were in fact repealed on 1 September 2012. These were the *Companies (Co-operative) Act 1943* and the *Co-operative and Provident Societies Act 1903*.

The *Gas Corporation (Business Disposal) Act 1999* was excluded from the audit on the basis that the relevant provisions were transitional only and no longer operative. However it was determined to amend this Act in any event to remove these provisions in the interests of completeness.

In addition, the following legislation was excluded from the audit on the basis that it was to be repealed and replaced, but is in any event sought to be amended by the Bill in the interests of consistency throughout the statute book pending the passage of replacement legislation:

- *Fish Resources Management Act 1994*
- *Pearling Act 1990*
- *Rail Safety Act 2010*

The *Fair Trading Act 2010* was also initially excluded on the basis that amendments to such legislation needed to be effected collaboratively between jurisdictions. However, ultimately it was determined to amend this Act to include a standard liability provision to ensure consistency across the Western Australian statute book.

Some Acts were excluded from the audit on the basis that they had been exempted from the COAG directors' liability reform project altogether; there was no obligation under the project for jurisdictions to amend environmental legislation or legislation relating to occupational health and safety. These Acts were as follows:

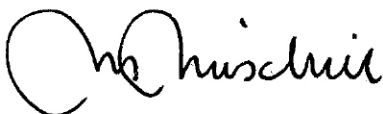
- *Occupational Safety and Health Act 1984*
- *Mines Safety and Inspection Act 1994*
- *Environmental Protection Act 1986*
- *Litter Act 1979*
- *Swan and Canning Rivers Management Act 2006*
- *Waterways Conservation Act 1976*

However, it was ultimately determined to amend environmental legislation in the interests of consistency across the statute book. These amendments were developed in consultation with the agencies that administer environmental legislation, and they maintain consistency with the COAG Principles while ensuring that, where appropriate, directors of bodies corporate which have committed serious environmental offences are still capable of being held accountable where they have failed to take all reasonable steps to prevent the offending.

It was also determined to amend the *Mines Safety and Inspection Act 1994* on the basis that this Act (unlike the *Occupational Safety and Health Act 1984*) is not proposed to be repealed and replaced by the Work Health and Safety Bill 2014.

I trust that this information has been of assistance to the Committee.

Yours sincerely



Hon. Michael Mischin MLC

ATTORNEY GENERAL; MINISTER FOR COMMERCE

14 APR 2015