STANDING COMMITTEE ON
UNIFORM LEGISLATION AND STATUTES REVIEW

DIRECTORS' LIABILITY REFORM BILL 2015

TRANSCRIPT OF BRIEFING
HELD IN PERTH
MONDAY, 16 MARCH 2015

Members

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

Briefing commenced at 1.24 pm

Mr ANDREW MARSHALL
Manager, Research and Analysis, Department of the Attorney General, examined:

Ms SARAH BURNSIDE
Senior Policy Officer, Department of the Attorney General, examined:

Ms REBECCA ELDRED
Assistant Parliamentary Counsel, Parliamentary Counsel's Office, examined:

The CHAIR: Welcome to this afternoon's briefing. I thank you very much for coming along. We would have done this very formally but because you have provided some very good responses already to the questions that were sent to you, we are not going to ask you to take the oath or make an affirmation. We thought we would treat this as a fairly informal hearing, with some additional questions and answers so that we are quite clear in our own minds what this bill is about and what its intentions are. I will just introduce the committee members first and then I will ask you to introduce yourself as well for the purposes of Hansard. On my right I have Hon Brian Ellis; my name is Kate Doust; I have Hon Mark Lewis to my left; and I have Mr Alex Hickman, our research officer.

We started to go through your responses, and I do thank you very much because you have provided those in a fairly short period of time and there is some quite good detail there. There are probably a few questions that will flow on from what you have already provided. We understand that this bill has come out of COAG processes. If you would talk to us about what this bill will actually do and what its purpose is, how broad the changes are that it will make and why it is actually needed, maybe a little bit of background around that would be helpful.

Mr Marshall: I will do a bit of background, which hopefully sets the scene very briefly and then my learned colleagues here can answer the specific questions, because they have prepared the answers anyway, and bring in more detail. But essentially this is a commitment of COAG, as you are aware. It was developed in 2008 by the commonwealth government, and it is part of what they call the National Partnerships Agreement to Develop a Seamless Economy, which is a lovely name, and this included a whole raft of 36 separate reforms, most of which are around deregulation, and this is an example of a deregulation reform flowing from the national partnerships agreement. The process was that COAG agreed on a set of guidelines and principles, rather than being very specific. In relation to directors' liability reform, the communiqué, which was released as a result, basically said that it was to ensure the operation of directors' liability is applied in a nationally consistent and principle-based manner—I think that is important, particularly in the principle-based manner—in future legislation. COAG agreed on a set of principles and guidelines, noting that this reform was still under consideration. By that stage it was the Queensland government. By this stage I think there are only ourselves and, I think Rebecca was telling me, Tasmania, and the Northern Territory we do not know about. But Tasmania are in this process, as are we. Milestones were set by this original agreement, and they have just done a report relatively recently, last year, noting the progress on all these measures, and that is where it does say that they understood at that stage that the Attorney General here was implementing this legislation. The existing position, by way of background, is that currently there are a number of acts in WA which impose derivative liability on officers of body corporates, and by derivative liability, which is a very central concept in all of this, we mean the personal criminal liability of officers who have not taken reasonable steps to prevent a body corporate from committing an offence. It is distinct from personal liability of the director

and corporate liability of the body corporate, so it is a very specific form of liability. It is also different from accessorial liability, which is when officers are liable because they have been involved in offences committed by the body corporate such that they are accessories, so this is more, in a sense, active than just being an accessory and it is when you have done nothing to prevent. I think this is quite important from our point of view. There is a substantial variation between the existing acts which impose derivative liability within WA. Provisions vary with respect to persons subject to the liabilities, the nature of the conduct that attracts liability and the defences available to the directors. I have just got a couple of little examples, and then I will shut up and leave it to everybody else.

Section 35(4) of the Auction Sales Act we highlight as an example—1973—and provides that where a corporation is charged with an offence against that act, a person concerned in the management of the corporation may be charged with a like offence—so far so good. The act further provides that where the corporation is convicted of the offence, the person may also be convicted. That is where the problem lies. One of the defences available to that person is to prove that where the person was in a position to influence the conduct of the corporation in relation to the commission of the offence, he or she used all due diligence to prevent the commission of the offence by the corporation. I have emphasised "all due diligence". In contrast, section 76 of the Architects Act, which also provides that officers may be charged with an offence committed by the body corporate, provides that if an officer is charged with an offence, it is a defence for an officer to prove that the officer took all reasonable measures to prevent the commission of the offence that he or she could reasonably have been expected to have taken, having regard to the officer's function and all the circumstances. That is the second one. I have nearly finished. The third one is that section 118(1)(b)(ii) of the Environmental Protection Act 1986 provides where a directorial person concerned in the management of a body corporate is charged with an offence committed by a body corporate, one of the defences available to such a person is that he or she used "all diligence and reasonable precautions" to prevent the commission of that offence. So we have got different terminology in just three acts that we have chosen. These are just three acts. The idea of this bill, in a nutshell, is to limit and standardise these provisions so that where Western Australia imposes derivative liability in relation to an offence, the nature of this liability would be consistent across our statute book. That gives you a brief introduction to where we are at.

Ms Burnside: If it would be helpful, I have copies of those offences that Andrew quoted from, these sections of the Auction Sales Act and the Architects Act.

The CHAIR: Sure. It would be interesting if you were able to table that.

Mr Marshall: It gives a bit more background.

The CHAIR: How many pieces of legislation in Western Australia will actually be amended? I am looking at the legislation. Is it 60 pieces of legislation?

Hon MARK LEWIS: Sixty-two.

Ms Burnside: Sixty-one if we include the Criminal Code.

Mr Marshall: Yes, obviously the code is going to be amended, but 60 other pieces of legislation are going to be amended or were considered for amendment in this process.

The CHAIR: I would imagine that a lot of those amendments are around the tightening up of the language used or to provide assistance in the language used across those pieces of legislation to comply with this bill.

Ms Burnside: Can I answer that one?

The CHAIR: Sure.

Ms Burnside: The approach that was taken was rather than insert the standard provisions into each of the 60 acts, to insert standard provisions into the Criminal Code and then to apply those standard

provisions where relevant. So if you look through the bill, there will be some instances where it is proposed just to delete a derivative liability provision outright, but in the acts where it is considered that we need to retain derivative liability, there will be a deletion of existing provision and then its replacement with a reference to the code. So if you look at, say, page 8 of the bill, it does add in the Aboriginal Heritage Act, so deleting the existing provision and then inserting one that refers to the relevant Criminal Code provision, and applies it to particular offences in that act. So in that way the standard provisions are applied throughout the acts, the language is the same and the people who can be held liable are the same and the defences are the same.

The CHAIR: I am just curious. There are a number of pieces of legislation currently before either house that have not yet been passed. The Aboriginal Heritage Act, as I understand it, is in the Assembly. We have currently got the national rail safety legislation. It is still to go back into our house for debate. I am sure that if I went through the list, I would probably find one or two others that are on the list. This is about timing, I suppose. If this bill is passed before those pieces of legislation goes through the Parliament, how will you deal with the changes there that you will have to make—separate amendments or will you just manage them as they come through either chamber?

Ms Burnside: To go back to the reason for amending these, it was just so that we amend the statute book as it stands, because there was always the possibility that with one of the acts that are being amended the amendments may take longer than envisaged. There might be a period of months or even years between the standardisation of every other act and a couple of other acts being outliers. My understanding is that if our bill is passed beforehand—I cannot speak for what other departments will do in respect of their legislation—then amendments can be made to those bills for consistency, because the idea of this approach in the Criminal Code is that in future where someone is drafting a new bill and wants to include a directors' liability provision, they will refer to the code provisions and they can insert references to them.

Hon MARK LEWIS: On the flipside of that, if these bills before the house go through before this bill goes through, what then needs to be done?

Ms Burnside: My understanding is that then we would amend our bill to make sure it is amending the correct provisions of the act as amended.

Hon MARK LEWIS: I would have thought that you would have had to have some insertion in the bills that have just been passed, or deletions and insertions, so that that now act might have to come back as an amendment bill.

Ms Burnside: That was considered with respect to the Aquatic Resources Management Bill, which has already got provisions in it, so that if it gets passed first, it can just stand alone and will not need to be amended.

The CHAIR: I do not think that one has even come into the parliament yet.

Hon MARK LEWIS: Second reading.

The CHAIR: It is in the LA.

Mr Marshall: I think it is the general problem of when do you do it because you are talking of 60 acts, and I am pretty sure that some of them will get amended in the not too distant future even if they are not on any notice paper at the moment.

The CHAIR: We noticed that under question 3 you said that there were two acts that are not proposed to be amended under this current bill, one of them being the Occupational Safety and Health Act 1984 and the other being the Prostitution Act 2000. Can you explain why they are not going to be amended? I know in the first case of the OSH act we are waiting to see if and when the government will introduce new legislation, but how does the directors' liability impact in that legislation?

Ms Burnside: The current Occupational Safety and Health Act contains a directors' liability provision, and it is my understanding that the green bill, the Work Health and Safety Bill, has a different approach to directors' liability and it is part of a different intergovernmental agreement, and so I think this is one of the situations where there are two separate intergovernmental agreements and there is no need for this process of the directors' liability reform to interfere with what is happening with that bill.

Hon MARK LEWIS: Because of the other intergovernmental agreement?

Ms Burnside: Yes.

The CHAIR: So there is no consistency across two different types of agreements in terms of language used.

Ms Burnside: I would have to have a look—I am sorry—because I have not had any involvement with the intergovernmental agreement for regulatory and operational reform in professional health and safety.

The CHAIR: Okay. The second one, of course, is the Prostitution Act. I suppose we were a bit intrigued there about how somebody could be a director and be liable in that case.

Ms Burnside: I think the act, as currently phrased, contains a directors' liability provision. I think it is fair to say that a number of acts in WA have them. I do not have any more information about why that clause is in that act, but it does have one.

Hon MARK LEWIS: Under question 8, I am a bit surprised that the directors' liability—this goes to the issue of relativities of offences, if you like, that are within the types—on type one, who has determined the relativities of what act goes into what type?

Ms Burnside: This is something that was worked out in consultation with the agencies that administer the acts, so which offences merit type one liability and which offences merit type three liability.

[1.40 pm]

Hon MARK LEWIS: I am just a bit amazed—you just have to pick this case of study—but if somebody puts a hose over the fence and supplies water without being a water service provider, then that is a criminal offence. That is nothing, probably, but I am just sort of determining how the relativities go in there so that the director is liable in this instance when it could be so minor an offence.

Mr Marshall: To some extent you have answered the question, because at a very generalist level the type three is the more serious one because of its impacts. I think that maybe something to guide you in terms of the type one, type two, type three. The impact of type one is clearly not going to be the same as the impact of a type three offence. I think that is a general rule of thumb. Sarah, do you want to add?

Ms Burnside: Just to say that this was one where we consulted with the agency that administers the Water Services Act, and they advised that the liability was necessary for this offence.

Hon MARK LEWIS: Would that offence have been a criminal act before this?

Ms Burnside: Yes. Sorry; maybe I have not been clear. The bill is not changing anything that is currently an offence, so all of the offences that are being amended currently exist and can currently be committed by bodies corporate and currently directors can be held liable. We are not adding in new offences or changing the actual offences. We are just changing whether a director can be made liable and if they can, imposing standard provisions so that they are all made liable in the same way.

Hon BRIAN ELLIS: That probably answers the question I was going to ask. You mentioned at the beginning the main differences in the terminology of the acts. I was just thinking, "What does that

literally mean?" If it is just terminology changes, does it actually weaken any acts or strengthen any acts? It really sounds like nothing is changing.

Hon MARK LEWIS: It is all like to like.

Ms Burnside: I do not think I would speak of weakening or strengthening. In the guidelines for applying the COAG principles, they refer specifically to different wording that is used and that some say that if a director has been negligent and that some say if a director has not exercised due diligence and some say reasonable steps or measures. It is just helpful to have all of them with the same terminology.

Mr Marshall: You can just imagine a very busy civil litigation firm. They would have to deal with all these different terminologies and prosecute or otherwise according to: "Did they take the right precaution?" And the same with the prosecution; it would have to determine, "Did they take right precautions, did they take reasonable steps or did they exercise due diligence?" If they are dealing with three or four acts and matters all at the same time —

Hon BRIAN ELLIS: So everyone knows what you are talking about.

Mr Marshall: That is the objective.

Ms Eldred: I think you are correct in saying there is certainly no fundamental change to directors' liability as a general concept. With most of the different terminology, even though there are different words used, the different concepts are broadly similar, so there is no good reason for the words to be different, other than different pieces of legislation were drafted at different times, with different drafting practices and with instructions from different agencies, and so over time these differences emerged. The purpose of this exercise is to bring in some consistency to this concept, which is basically the same across all the acts that we are dealing with.

Hon MARK LEWIS: I understand the reasons for trying to get some consistency across the acts, and you have explained that, but you did not explain what the original driver was for this in terms of what was wrong. Was it that the tennis club treasurer was stealing the petty cash or was it some large corporate bodies which were inside trading? Where was the driver?

Ms Burnside: I think that the driver was just the COAG process.

Hon MARK LEWIS: What triggered that?

Ms Burnside: We have got on page 2 of the guidelines for applying the COAG principles, if I can just read from that because I think you have copies —

Hon MARK LEWIS: Yes, we have.

Ms Burnside: It says —

> The COAG Principles on Directors' Liability … were adopted … amid concerns that there appeared to be an increasing tendency for such provisions to be introduced as a matter of course and without proper justification, and because of a concern that inconsistencies in the standards of personal responsibility both within and across jurisdictions were resulting in undue complexity and a lack of clarity about responsibilities and requirements for compliance.

So there was a concern at the commonwealth level among all jurisdictions that there were all of these inconsistently worded provisions, some of which were sort of put into acts just as a matter of course; so "We are drafting an act and we will just stick a directors' liability provision in to apply liability for the offences in the act."

Hon MARK LEWIS: So it was not that there was a rash of treasurers tickling the till.

Ms Burnside: My understanding is that it was not so much about people doing the wrong thing. It was about, I think, a lack of clarity about when someone does the wrong thing.

Ms Eldred: Then again, there were too many provisions, and my understanding is that directors —

Hon MARK LEWIS: The red tape was —

Ms Eldred: Yes.

The CHAIR: We just had a couple of follow-up questions today, which have not been provided because they have only arisen since we have received your responses. But in relation to question 11, which was about clause 4 of the bill and the proposed new section 44, we noted that section 32(2) of the Interpretation Act 1984 provides that a heading to a section or clause is not taken to be part of the written law, and we have both the second reading speech and the explanatory memorandum to the bill explicitly making reference to the onus on the prosecution to prove reasonable steps were not taken. Accordingly, would it not provide greater certainty and ensure that the bill reflects what is stated in the second reading speech and the explanatory memorandum to provide an amendment to clause 4, proposed new section 44C of the bill, to include the wording in the first three lines of proposed new section 44D(3)?

Ms Burnside: Sorry; 44C or 44D?

The CHAIR: It is 44D(3).

Ms Burnside: Is this not about section 44C with the onus on the prosecution?

The CHAIR: The proposal would be that those first three lines that are under 44D(3)—to basically extract those and have them under 44C.

Ms Burnside: To say the prosecutor has the onus of proving—right. The reason that this approach was taken in 44C, where it does not expressly say the onus is on the prosecution—I can defer to parliamentary counsel if I am not being clear—is that because it is the standard provision, other Criminal Code provisions do not explicitly say the onus is on the prosecution, because it is just the standard position in our criminal system. So there is not any need to say it. Is that accurate?

Ms Eldred: It is a fundamental principle of criminal law that the prosecution bears the onus of proof. I apologise if I have not understood the question correctly. Was it the first three lines of 44D —

The CHAIR: Section 44D(3), and we are basically saying, would you exercise it and move it forward to 44C(2) just below that?

Ms Eldred: Yes, I understand. In that case, yes, the answer would be what I just said, which is that it really is unnecessary to say that, because it is such a fundamental principle of the criminal law that the prosecution bears the onus of proof unless anything is said otherwise. So there is no chance of there being any ambiguity in this case.

[1.50 pm]

The CHAIR: So it would really just be stating the blatant obvious, wouldn't it?

Mr Marshall: It is in the code after all.

The CHAIR: We just ask these questions as we go through. 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? I may add that it would be an onerous task.

Ms Eldred: It certainly would be. 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 them in 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.

The CHAIR: Imagine this bill is passed. What will actually change on a day-to-day basis for people who are in this situation of being company directors? Is it that nothing will really change for them in how they go about their business; it is simply that the language used across the legislation has changed to be more consistent?

Ms Burnside: In some instances existing derivative liability provisions will be removed, so the bill is removing them from 22 acts. So a director operating under, say, the Litter Act will no longer be exposed to personal criminal liability for offences that their body corporate commits under the Litter Act. There will be some change in terms of what the act they might operate under provides. In other instances, a director who is currently subject to what we call a type three liability will now be subject to a type one liability, because the bill re-categorises some offences. For the most part, yes, the director will continue to need to ensure that their body corporate does not breach existing legislation, but it is not a new layer of liability being imposed on top.

Ms Eldred: I was just going to agree with Sarah on that point. To answer the question, on a day-to-day basis I do not know that in practice all that much will change. I think the theory behind removing these "blanket" provisions, which apply to just any offence in the entire act, and replacing those kinds of provisions with an offence provision that specifically sets out the offences which the relevant department sees as being the most important, in theory, that should turn the director's mind to those particular offences and the steps that one might need to take to prevent a body corporate breaching one of those provisions. I think that is the theory. On a day-to-day basis how much that will affect some of these actions, I am not sure.

The CHAIR: Have there been any concerns about changes to the legislation for many parties, or any complaint?

Ms Burnside: I am not sure. Do you mean in the public realm?

The CHAIR: Any of the organisations that might be peak bodies representing directors, I suppose.

Ms Burnside: Sorry, I have to look. On the website of the Australian Institute of Company Directors they followed the review process from the outset at COAG level and have released responses to various of the acts that have been introduced in the past by other jurisdictions. They have been concerned about the changes to liability. I do not think there has been much in the public realm from other parties.

Ms Eldred: In general, I would say that one of the overarching purposes of this bill is to reduce the burden on directors. Certainly it does not seek to increase liability. That is why so many of the provisions have been removed and why blanket provisions have been replaced by provisions relating to only a small specific number of offences. Certainly, it is seeking to address a concern that there was too much of this liability and actually reduce it.

Hon MARK LEWIS: Going back to the issue about review, I understand the whole thing about trying to normalise and standardise it, but I would have thought that when you are changing 60 acts there is obviously some complexity in that, and I think there might be some unintended consequences, and you mentioned one. I thought you said before that you were not changing the relativities between the types of offences, but you just said there are some which will change between type one and type three or type two or two back to one.

Ms Burnside: Sorry. When you were referring to the relativities of the offences, I thought you were referring to whether something is an offence in the first place and the penalty for the offence. 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.

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.

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 conducted, reports tabled and we can see whether it is actually doing what it was meant to do. 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.

[2.00 pm]

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.

The CHAIR: That is okay. We were just wondering.

I think because you did such a great job answering all those questions for us earlier, we have had a short session because I think we are quite satisfied with the information you provided. We are not due to provide this report to the house until 21 April, so if there is anything else that comes up prior to that date, we will be in contact with you if we need to seek some further information from you. But we certainly thank you for the information you have provided today. Now, I would expect that the transcript will be provided to you from today's hearing, so if there is anything you need to correct, please do so and send it back in. Thank you very much for your time today. We greatly appreciate what you have been able to provide to us this afternoon.

Briefing concluded at 2.01 pm

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