

2 May 2017

The Hon. Matthew Groom MP  
Acting Attorney-General, Acting Minister for Justice, Minister for Energy, Minister for  
Environment and Parks, Minister for State Growth  
Parliament House  
HOBART Tasmania 7000

Dear Minister

### **Director Liability in Tasmania**

We are writing to you regarding reforms to legislation imposing personal criminal liability on directors for acts of corporations.

The Australian Institute of Company Directors (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 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD welcomes the Tasmanian Government's commitment to making Tasmania an attractive place for economic investment and job creation. In particular, our members are pleased with the government's commitment to delivering certainty and cutting red tape for business. One welcome example is the Government's recent announcement of a 90-day nature-based tourism simplification program, as part of the National Business Simplification Initiative. This exciting initiative will support investment and business in Tasmania.

However, to ensure Tasmania continues to grow and attract new investment and board talent, one vital aspect of reform remains outstanding.

Some time ago representatives of the AICD met with the Government to discuss the application of a nationally consistent and principles-based approach to the imposition of personal criminal liability for officers as a consequence of a corporate offence in state legislation.

Following those meetings, we wrote to the Government on 22 August 2014 highlighting the need for reform in this area. However, since the lapse of the *Directors' Liability (Miscellaneous Amendments) Bill 59 of 2012*, no legislation has been introduced into the Tasmanian Parliament which directly addresses this issue.

### **The economic case for reform**

A number of Tasmanian legislative provisions deem directors and other officers of a company 'automatically' liable for the criminal conduct of that company (**Directors' Liability Provisions**).

Such Directors' Liability Provisions include over 33 so-called 'Type 3' liability under the COAG Guidelines for applying the COAG-agreed principles for assessment of directors' liability provisions (**COAG Principles**) consistently and in accordance with the intentions of

COAG. Type 3 provisions deem a director guilty of a corporation's criminal offence unless the director can prove otherwise, thereby reversing the onus of proof.

The AICD has long maintained that there are compelling economic and policy grounds for governments around Australia to remove or reduce Director Liability Provisions.

A regime which imposes unduly onerous Director Liability Provisions fosters an approach to business decision-making which is overly risk averse and compliance focussed, stifling economic growth and innovation.

Surveys we have conducted suggest that the continued presence of such liability provisions can have an impact on both director recruitment, retention, and crucially, on business decision-making, including the location of investment projects.

Acting to address unduly onerous Director Liability Provisions will send a strong message to directors and companies around the country that Tasmania is 'open for business.'

In addition, given that many other states have now enacted laws which seek to reduce or remove Director Liability Provisions, and some have not, there is a significant risk of inconsistency in the law as between states.

Inconsistent laws add to the cost of doing business. Businesses which operate across multiple jurisdictions ultimately wear the compliance costs associated with inconsistent laws, taking valuable capital away from investment. It is for these reasons that director liability reform was adopted as one of the key priorities in the National Partnership Agreement to Deliver a Seamless National Economy.

In an age where business is reliant on technology and the internet, the importance of a seamless national economy is more important than ever.

### **Reasons of legal principle**

There are strong reasons of legal principle for many of Tasmania's Director Liability Provisions to be reduced or removed. As noted above, several Tasmanian Director Liability Provisions reverse the onus of proof (Type 3 liability). The effect of this is that a director is put in the unenviable position of establishing, on the balance of probabilities, why he or she should not be criminally liable for an offence.

Reversing the onus of proof for directors removes one of the most fundamental protections afforded by the common law, the presumption of innocence. The rationale for this long-standing principle was articulated by Professor Andrew Ashworth QC as follows:<sup>1</sup>

*The presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent.*

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<sup>1</sup> Andrew Ashworth, 'Four threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

The AICD believes that the presumption of innocence should be maintained. Of course, it is entirely appropriate for laws to be put in place which deter or punish illegal conduct by directors or seek to achieve a specific policy goal. However, the use of accessorial liability provisions, the use of direct liability provisions with no reversal of the onus of proof, and the more frequent use of prosecutions where directors do intentionally disobey the law, are more effective approaches to achieving these public policy goals.

**Next steps**

The AICD believes that 2017 represents an excellent opportunity for the Tasmanian Government to revisit the issue of director liability reform.

The AICD has previously completed a significant amount of work in identifying specific Director Liability Provisions within Tasmanian legislation.

The Commonwealth, Queensland, Victoria, New South Wales, South Australia, the ACT, and the Northern Territory have all repealed or amended many Director Liability Provisions. Unfortunately, however, Tasmania and Western Australia have not, to date, achieved any legislative reform with respect to this issue.

Accordingly, we would like arrange for a meeting with you and representatives from the AICD, in Hobart, to discuss how we might be able to progress reform with respect to this important issue. We are very keen to work with you to help achieve this important reform.

Previously, the AICD has worked with State Governments and their officials to assist them in identifying legislation to be dealt with, and provided input as to any proposed legislation. We would be very happy to assist the Government in the development of any proposed legislative change.

In light of the prior interest from the Tasmanian government, we shall be in contact with your office to set up such a meeting. In this regard, please also feel free to our policy adviser working on this issue, Matt McGirr, on (02) 8248 2705 or [mmcgirr@aicd.com.au](mailto:mmcgirr@aicd.com.au), to arrange a suitable date and time.

We look forward to hearing from you.

Yours sincerely



**ROD ROBERTS**  
President, Tasmanian Divisional Council



**LOUISE PETSCHLER**  
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