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MISCELLANEOUS ACTS AMENDMENT (DIRECTORS' LIABILITY) BILL 2011

Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [10.02 a.m.]: I move:

> That this bill be now agreed to in principle.

The bill will amend various Acts to reform the imposition of personal criminal liability on directors and executive officers for corporate misconduct. These amendments will ensure that New South Wales legislation imposing this type of liability accords with the set of principles agreed by the Council of Australian Governments [COAG] to guide the reform and harmonisation of directors' liability across Australian law. It will remove the imposition of directors' and executive officers' liability for certain offences and lower the level of liability that is imposed on directors and executive officers from deemed liability to accessorial liability for some Acts and offences. The bill also increases the level of liability that is imposed on directors for offences under one Act.

In 2006 the Commonwealth Government Taskforce on Reducing the Regulatory Burden on Business found that there are inconsistencies across jurisdictions in provisions applying personal liability for company directors and officers, creating complexity and uncertainty for individuals in these roles. The taskforce recommended that the Council of Australian Governments identify reforms to achieve more nationally consistent regulation. The Corporations and Markets Advisory Committee then published a report examining the use of derivative or deemed liability provisions imposing personal criminal liability on company directors as a consequence of their company breaching a law.

The Corporations and Markets Advisory Committee found that there was a need for a more consistent, as well as a more principled, approach to personal liability across Commonwealth, State and Territory jurisdictions. It noted that a more standardised approach would reduce complexity, aid understanding and assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned. The Corporations and Markets Advisory Committee recommended that the Commonwealth Government publish a policy concerning the principles for imposing criminal liability on individuals for corporate fault and take steps at an intergovernmental level to adopt similar principles.

In November 2008 the Council of Australian Governments agreed to increased harmonisation in the imposition of personal criminal liability for corporate fault across Australian law. The Ministerial Council for Corporations and the Council of Australian Governments agreed on a set of principles as the basis for reform in this area. Each jurisdiction reviewed its legislation to identify those existing offences for which directors' liability, or removal of that liability, is appropriate in accordance with the principles. In New South Wales each agency responsible for administering legislation containing provisions imposing this type of liability assessed their legislation against the revised principles and provided analysis and public policy justification for the imposition of personal liability under each Act. Each agency made recommendations about whether the liability imposed in the Act was in accordance with the principles or whether removal or reduction in the level of liability was appropriate.

The principles aim to ensure a nationally consistent and principled approach to the imposition of personal criminal liability for corporate offending. They set out the policy considerations that should be taken into account in determining when it might be appropriate to impose personal criminal liability for corporate misconduct. The principles agreed by the Council of Australian Governments include: first, where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance; second, the imposition of criminal

liability on a director for the misconduct of a corporation should be confined to situations where there are compelling public policy reasons for doing so, liability of the corporation is not likely on its own to sufficiently promote compliance and it is reasonable in all the circumstances for the director to be liable having regard to a range of factors; and, third, where directors' liability is appropriate, directors could be liable when they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation's offending. In some instances it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending.

The principles aim to produce reform on a national basis of legislation imposing personal liability for corporate fault which: maintains high standards of corporate governance; ensures an appropriate attitude to risk and a compliance culture; decreases the compliance burden on businesses due to the increased harmonisation in the imposition of this type of liability; removes liability for offences for which it is not appropriate that directors and executive officers be liable; and ensures the consistent treatment of directors and executive officers—criminal liability attaches to significant offences rather than all potential statutory breaches by a corporation.

A nationally consistent and principled approach to the imposition of personal liability for corporate fault across Australian jurisdictions will reduce the burden of compliance on businesses and reduce costs for consumers by removing costs from the economy that result from unfairly and inefficiently targeted regulation. An inconsistent approach to deemed liability provisions across different legislation and jurisdictions increases complexity and uncertainty, and can result in undue compliance costs being imposed on business. The principles are designed to ensure that the same behaviour attracts the same consequences in each Australian jurisdiction. The reform focuses only on provisions that impose personal liability for corporate fault. It does not target provisions that impose criminal sanctions on directors who have themselves breached the law and their own conduct amounts to a breach of directors' duties or other statutory obligations. The approach to these types of laws will not be affected. The reform also does not affect civil liability provisions.

The Council of Australian Governments also excluded occupational health and safety and environmental protection law from the reform proposal; however, I am sure there is more to come. The principles require that consideration be given to each offence to which directors' liability currently applies. For each offence, New South Wales agencies considered whether there are compelling public policy reasons justifying that liability, whether it is otherwise reasonable in all the circumstances and, if so, the gravity of the offence and appropriate corresponding level of liability. New South Wales agencies identified numerous offences under existing legislation that could be amended in light of these considerations. In many cases they indicated that the potential for directors to be liable should be removed from certain offences. In other cases, they indicated that the level of accessorial liability should be lowered.

The principles provide that there should be compelling public policy reasons for imposing directors' liability, including considerations such as the potential for public harm. The principles provide also that directors' liability should be imposed only where it is reasonable in all the circumstances for a director to be liable having regard to a set of factors, including that the director has the capacity to influence the conduct of the corporation in relation to the offending. Removal of personal liability therefore was identified as appropriate in circumstances where directors are removed from the daily operations of a corporation and not in a position to influence conduct relating to administrative offences. The principles provide also that where sufficient public policy justification exists for the imposition of liability on directors for corporate wrongdoing, the appropriate level of liability must then be determined. A number of offences currently provide deemed liability for directors for corporate wrongdoing but, given the gravity of the offence, are being amended so as to provide only for directors' liability where a director has knowingly authorised or permitted the contravention.

Finally, the bill increases also the level of liability for directors under one Act. The Electricity (Consumer Safety) Act 2004 regulates the sale and labelling of electrical articles, installation work, connection and maintenance of electrical installations. Offences under the Act concern sellers of such articles, providers of acquisition guarantees, persons undertaking work and owners or occupiers of premises as responsible persons for electrical installations, any of whom may be corporate entities. Electrical safety is a critical issue and the consequences of

offending behaviour can be of such a serious nature that corporate liability alone may be insufficient to effectively regulate this area. Failure to comply with the requirements of the legislation could have fatal consequences for members of the public and, therefore, it is consistent with the principles to impose a higher level of liability for these offences on public policy grounds. Therefore, the bill imposes deemed liability on directors for offences under this Act.

As with other Acts that impose this type of liability, directors will be strictly liable for offences under the Act, subject to defences, in line with the potentially fatal consequences for contraventions of the legislation. This would permit liability to apply to those officers who have not taken reasonable steps or exercised due diligence to prevent commission of the offence. I foreshadow possible further reforms. The reform council has reported that some audits by jurisdictions for directors' liability were not comprehensive and jurisdictions broadly interpreted the principle of compelling public policy reasons to justify retention of different provisions. The reform council recommended that the Council of Australian Governments agree to new milestones aimed at achieving a more nationally consistent approach. A national subcommittee, chaired by the New South Wales Department of Premier and Cabinet, has been formed to report back on this project. The subcommittee is formulating recommendations for a revised approach to improve consistency, which may lead to a second tranche of reforms at a later stage. The Miscellaneous Act Amendment (Directors' Liability) Bill 2011 amends a raft of New South Wales laws to ensure that personal liability for corporate fault in New South Wales is imposed in accordance with the principles agreed to by the Council of Australian Governments. The bill imposes an appropriate level of liability for offences that in each case is reasonable and justified. I commend the bill to the House.

Mr PAUL LYNCH (Liverpool) [10.16 a.m.]: I lead for the Opposition in the debate on the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011, the object of which is to amend certain Acts and regulations with respect to the imposition of personal liability on directors and other individuals for offences committed by corporations. The Opposition received the bill yesterday at 7.30 p.m. and, of course, a motion has just been moved to suspend standing orders to enable it to pass through all stages. The Opposition does not oppose the bill, and I cannot be any more effusive than that, given the shortness of time we have been allowed to consider it. The bill appears to result from a Council of Australian Governments agreement entered into by the previous Premier and agreed to by the previous Government. Indeed, it is clear from the Attorney General's agreement in principle speech that this bill results from a lengthy process to which the previous Government was committed and involved.

Of course, corporations are legal entities, not human entities. For regulations to be effective it is important that they are imposed upon individuals involved rather than just corporations. Considerable public discussion has occurred about directors' liability and, of course, some people have demanded that those perceived onerous responsibilities be altered—that is, that liabilities on individual directors be lowered. In turn, that is likely to increase the pool of talent for potential directors, and some people would argue that that is necessary for further economic growth in this country. A number of years ago the Federal Government initiated a review of responsibilities of directors through the auspices of the Council of Australian Governments. The objective was to provide better harmonisation of directors' liabilities throughout the country. As I stated, that was carried out through the Council of Australian Governments, and this legislation results from that process.

It is difficult to logically oppose harmonisation in this field with regard to directors' liabilities given the clear intrastate activities of a range of corporations. There is an argument that harmonisation does not work terribly well in every area of public policy, but the logic is fairly strong in this sector. The danger always is that there will be a race to the bottom. The bill attempts to make obligations in 35 separate sets of legislation consistent with that in other jurisdictions. The most common theme in the amendments is that to be guilty of an offence directors have to have knowingly authorised or permitted contravention of the Act or regulation, referred to as accessorial liability, and a less onerous approach for directors than deemed liability. However, as the Attorney General pointed out regarding electricity consumer safety, I believe there has been an increase in the onus placed on directors.

This process and thus this proposed legislation have been the subject of some criticism. The entire process has been condemned by some as not going far enough—for example, it does not include the civil liability of directors.

Criticism also has been made that the obligation on executive management—those who receive the large bonuses—is potentially less than that on other directors. I note the Attorney General's comments about further reforms down the track. I will be interested to see whether those criticisms are taken on board.

A further criticism of this type of legislation is that following the global financial crisis and clear failures in regulatory frameworks and ethical standards, this is the wrong time to reduce the standards imposed on the liabilities of directors. The response to that argument is that if such a debate is to occur, it should not occur in relation to this bill. Such a debate should take place within the Council of Australian Governments. The bill is the wrong vehicle to have such a debate, even though it is a matter of considerable importance. Further, one could hardly say that many of the changes proposed in this legislation go to the commanding heights of the economy. Many of the problems that have occurred around the world would not be adversely affected one way or the other by these types of changes because they are comparatively minor, although significant. Therefore, whilst the criticism is reasonable, this is not the vehicle for such a debate to occur.

A whole range of debates relate to this area. The Attorney General mentioned further reforms down the track; at the Federal level there is commentary about the possible creation of a distinct new office of trustee director, and there has been recent media coverage of the inadequate number of women directors on corporations. All those issues are part of the debate, of which this bill is a small but significant part. I seek confirmation from the Attorney General that this proposed legislation has to be adopted in order to access performance payments from the Council of Australian Governments. I am not being critical in saying that, but if that is the case it should be on the record. The Opposition does not oppose the bill.

Mr JONATHAN O'DEA (Davidson) [10.21 a.m.]: I speak on the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011. Various Acts currently impose on directors and other individuals concerned in the management of corporations personal liability, otherwise known as directors' liability, for certain offences committed by corporations. As previous speakers have outlined the two types of directors' liability—accessorial liability and deemed liability—I will not reiterate them in detail. However, I will reiterate the object of the bill:

> The object of this Bill is to amend certain Acts that impose directors' liability, and to amend certain regulations made under those Acts, so as to:
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> (a) change the type of directors' liability that is imposed for certain offences under those Acts and regulations, from accessorial liability to deemed liability, and
> (b) change the type of directors' liability that is imposed for certain offences under those Acts and regulations, from deemed liability to accessorial liability, and
> (c) remove the imposition of directors' liability in respect of certain offences, and
> (d) make minor amendments in connection with paragraph (c).
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> The Bill relates to a COAG agreement with respect to the harmonisation across Australian jurisdictions of legislation imposing directors' liability.

By way of disclosure I indicate that in addition to running companies, I have been both an executive director and a non-executive director of companies, including a substantial business with over a $1 billion turnover. Having been a company director, I understand the risks and potential liabilities associated with that role. As I will refer to views put forward by the Australian Institute of Company Directors, I also disclose that I am a fellow of that organisation. I am pleased to note that the member for Vaucluse has come from the Australian Institute of Company Directors. She is a welcomed and positive addition to this Chamber. In welcoming the member to this Chamber and making known her association with that institute I have perhaps pre-empted the subject of her inaugural speech.

More than 700 State and Territory laws impose personal liability on individual directors for corporate misconduct. Directors are liable simply because they are directors, even though they may not have been personally involved in a breach. In some States, particularly in relation to occupational health and safety issues, the legislation reverses the onus of proof, removes the presumption of innocence and restricts the types of defences. A survey conducted by the Australian Institute of Company Directors emphasises the importance of

these reforms to the law. To the extent that the shadow Attorney General lessened the importance of the reforms in relation to economic activity, the survey findings show that they are important reforms. I am pleased that the Attorney General referred in his speech to a second tranche of reforms in relation to directors' liability.

Reform of corporate regulation, particularly laws that affect directors and the way they operate, is a significant issue for the business community and, ultimately, the Australian society because it affects the economy. It has been said that the laws in this area have stifled business investment and job creation. In that sense, they have been seen as anti-business and in urgent need of reform. I refer to the findings of the survey of directors conducted by the Australian Institute of Company Directors entitled "Liability laws damaging the economy". The results emphasise the serious detrimental impacts of key aspects of corporate performance on our economy and society that rely on business-generated wealth. The survey found in relation to business decision-making and strategic focus:

· More than 90 per cent of those surveyed said that personal liability of directors had any impact on optimal business decision-making or outcomes.
· Sixty five per cent said that this risk of personal liability caused them or their board to take an overly cautious approach to business decision-making, either frequently or occasionally. Seventeen per cent said this happened frequently and only 15 per cent said it had no impact.
· Seventy nine per cent said they are concerned that the time their board devotes to compliance with regulations detracts from them focussing on issues like enhancing corporate performance and productivity.
· More than 90 per cent said they are concerned about lost time and opportunity costs for companies defending actions brought as a result of automatic liability for directors under a wide range of legislation.

The survey also inquired into board recruitment and retention. The emphasis that is being placed on the recruitment of more women to boards is an admirable objective. However, many women would be scared off by the liability risks faced by directors. In relation to board recruitment and retention the survey found:

· Almost a third said they had personally declined an offer of a directorship primarily due to the risk of personal liability.
· More than 22 per cent said they had resigned from a position for that reason.
· Fifty seven per cent said they knew of other directors who had declined an offer of a directorship because of liability risk.
· Fifty two per cent knew of someone who had resigned from a board due to liability concerns.
· Almost three quarters of aspiring directors said the risk of personal liability had made them reconsider directorship as a career.

I will not outline the survey's findings in relation to the lack of business judgement defences. Those interested in the findings can source the survey through the Australian Institute of Company Directors. I refer to the policy updates in an article that appeared in the April 2011 Australian Institute of Company Directors magazine, *Company Director*. The article, which was written by Robert Elliott, the institute's General Manager, Policy and General Counsel, relates not only to this bill but also to broader issues that may be considered by the Attorney General and others on a second tranche of reforms. Mr Elliott, on behalf of the Australian Institute of Company Directors, wrote:

> The process of reform of Australia's onerous director liability legislation needs to be completely "re-booted" after the breakdown of the current approach.

He said that the Council of Australian Governments [COAG] Reform Council's annual progress report on reforms to deliver a seamless national economy highlighted the unfortunate reality that COAG's ambitions for reform of director liability have been an abject failure to date. Certainly, it reveals that principles underlying the process that have been agreed to by the Commonwealth, the States and the Territories through the Ministerial Council for Corporations [MINCO] were fundamentally flawed and allowed the States too much scope to avoid genuine reform. I am pleased that today there is bipartisan support for this legislation. Obviously, that is welcome. However the previous Government had the opportunity to introduce this legislation. It is pleasing that the Attorney Generally has been

quick off the mark at the beginning of this term of government to recognise the importance of this legislation and therefore bring it before the House in the first week of sitting. Mr Elliott of the Australian Institute of Company Directors commented further in his policy update:

> … the whole process needs to be reset, with a new and much more rigorous set of principles for reform and more effective financial "carrots and sticks" for the states and territories to ensure the reforms are actually delivered.
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> This is vital as the existing plethora of liability laws are stifling business, investment and job creation. They are anti-business and a drag on Australia's prosperity now and in the future.
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> When the principles recommended by MINCO in relation to directors' personal criminal Liability for corporate fault were released in December 2009, we said they were a deep disappointment and fell well short of the principles originally agreed to by COAG. We said they gave the states far too much "wriggle room" to avoid genuine reform by allowing them to retain the status quo via the loophole of "exceptional circumstances", especially so-called "compelling public policy reasons".
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> This left open the potential imposition of criminal liability on Australia's 2.1 million directors in a very wide range of circumstances.
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> As the COAG Reform Council report starkly reveals, that prediction proved true. The states have exploited the loopholes in the principles and have basically done nothing.

I am pleased to say that today New South Wales is doing something, and I am sure there is more to come. But governments must cooperate to deliver a new set of principles that will deliver real reform. As I listened to the inaugural speeches of the new members of this House I was moved to read my own inaugural speech, in which I indicated my bipartisan support for a then Labor-led government in relation to the COAG reform process. Pleasingly, the legislation now before us is an example of bipartisan support for a COAG initiative. I hope that in the course of this Parliament we will see a substantial push from both sides of the House for sensible, balanced and fair COAG-driven reforms, because we need to support not only the leadership of the Federal Labor Government in driving some of those reforms but also the efforts of various States in driving reforms. I particularly acknowledged that the former Victorian Labor Government did a good job in trying to drive some COAG reforms. I look forward to this Government driving reform, in conjunction with COAG but also between the States, and hope that that will be supported by those in this place who truly have the interests of this State at heart.

There was further comment by the Australian Institute of Company Directors that the review applied to only criminal liability. As has been rightly pointed out, the legislation before the House applies only to criminal liability and not to civil liability. It is arguable whether the reform should be extended to civil liability, and whether the principles should include the provision of a proper business judgement rule defence. Those issues can be looked at in the future in the context of a discussion of the second tranche of measures foreshadowed by the Attorney General.

In conclusion, I note that if the sorts of personal liabilities of directors that have existed had, in parallel, applied to those previously on the executive of government under the previous Labor regime—drawing an equivalent parallel between a company director overseeing a significant business entity and a Cabinet of Ministers overseeing a budget of more than $50 billion—then one might see that the directors' liability currently being reformed might have resulted in prosecutions against Cabinet Ministers of the previous Government. That may be a good parallel to draw, to emphasise how the previous legal regime of deemed liability on directors has been unreasonable in the past, and I welcome this bill and the reforms that it brings.

Debate adjourned on motion by Mr Hazzard and set down as an order of the day for a later hour.

MISCELLANEOUS ACTS AMENDMENT (DIRECTORS' LIABILITY) BILL 2011
Agreement in Principle

Debate resumed from an earlier hour.

Mr GREG APLIN (Albury) [12.07 p.m.]: I support the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011, which relates to a Council of Australian Governments agreement with respect to the harmonisation across Australian jurisdictions of legislation imposing directors' liability. On 29 November 2008 the Council of Australian Governments agreed that laws imposing personal criminal liability for corporate fault should be harmonised across Australia. The Council of Australian Governments agreed on a set of principles recommended by the Ministerial Council for Corporations to guide the reform.

The national principles include that a corporation should be held liable in the first instance when it contravenes a statutory requirement; that directors should not be liable for corporate fraud as a matter of course or by blanket imposition of liability across an entire act; and that there must be compelling public policy reasons for a director to be held personally liable for a company's wrongdoing, such as the potential for significant public harm. To summarise, there should be compelling public policy reasons for imposing directors' liability, including considerations such as the potential for public harm. There should be a general principle that 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.
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In some circumstances it may be appropriate to penalise a director if he or she were negligent or reckless in relation to the corporation's misconduct.

A review of all New South Wales legislation containing provisions imposing personal criminal liability for corporate fault was conducted to identify provisions which did not accord with the principles and which should be amended to align with the provisions. The Council of Australian Governments excluded occupational health and environmental protection laws. The Miscellaneous Acts Amendment (Directors' Liability) Bill 2011 was subsequently prepared to remove the imposition of directors' and executive officers' liability for certain offences, to lower the level of liability that is imposed on directors and executive officers from deemed liability to accessorial liability for certain offences, and to increase the level of liability that is imposed on directors and executive officers from accessorial liability to deemed liability for the Electricity (Consumer Safety) Act 2004.

The bill provides that, for a range of offences, if a corporation commits the offence the director or other individual is taken to have committed the offence if he or she knowingly authorised or permitted the offence. That is the accessorial liability. If the corporation commits an offence under the Electricity (Consumer Safety) Act 2004, or under regulations made under the Act, the director or other individual is taken to have committed the offence unless he or she establishes that the corporation committed the offence without his or her knowledge, he or she was not in a position to influence the conduct of the corporation in relation to its offence, or he or she was in such a position but used all due diligence to prevent the offence. That is the deemed liability. These amendments will reduce the complexity of laws that regulate when company executives can be held personally liable for the criminal misconduct of a corporation. Simplifying corporate fault laws will make it easier for companies and executives to understand and comply with their legal obligations. Retaining personal liability for corporate fault in limited circumstances will help to ensure that executive officers take their corporate governance obligations seriously.

The reform focuses only on provisions that impose personal liability for corporate fault. It does not target provisions that impose criminal sanctions on directors who have themselves breached the law and their own conduct amounts to a breach of a director's duties or other statutory obligations. In addition, the national principles will not protect directors and executives who deliberately engage in criminal behaviour. I commend the bill to the House.

Mr ROB STOKES (Pittwater) [12.14 p.m.]: I support the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011. This bill implements important reforms to ensure that directors are appropriately protected from prosecution for activities undertaken by the companies that they serve. This legislation goes to the fundamental purpose for which companies were developed; that is, to share and limit risk to create a climate wherein people feel safe investing so that the economy can grow. The creation of companies provided for the appointment of directors, who would form the controlling mind of the new legal entity. The

duties of directors were clearly defined and related to their role in acting responsibly, ethically and in the best interests of the company that they served. Those reforms are the basis of the unparalleled growth we have seen since the enlightenment. However, while the law changes slowly, the nature of commence and the commercial environment in which companies engage changes rapidly. Lord Justice Wilberforce once said:

> If I am faced with the alternative of forcing commercial circles to fall in with legal doctrine which has nothing but precedent to commend it, or altering the doctrine so as to conform with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times, enunciatory and good doctrine can seldom be divorced from sound practice.

The environment in which companies and directors operate has changed rapidly in recent years. Globalisation, the rise of institutional investors, the enormous and unparalleled expansion in regulation and privatisation of government assets and the duties of private directors to the public interest in respect of those once public assets have created a more challenging, more difficult and altogether more risky environment in which directors must operate. It speaks volumes of the increasing professionalism of directors that they have been able to adapt to these changes and challenges.

However, change is threatening one fundamental aspect of the nature of the company; that is, directors' liability for their actions and failure to act. The regulatory environment increasingly across the nation and the world is making it harder for directors to serve their companies and shareholders, which in turn makes companies and investors more timid, conservative and less likely to take on new ideas and to make decisions that will drive economic growth. To restore our economy and to make New South Wales number one again we must ensure balance so that directors remain liable for misfeasance or nonfeasance but also that everyone across Australia is sure about the nature of those duties and where that liability should reasonably end. That is the issue addressed in this legislation.

This bill specifically relates to a Council of Australian Governments agreement dealing with the national harmonisation of laws imposing and outlining directors' liabilities. On 20 November 2008 the Council of Australian Governments agreed that laws imposing personal criminal liability for corporate fault should be harmonised across Australia. This bill is the culmination of a long process of harmonisation dealing with the old companies codes, the Corporations Law and now the Corporations Act. The Council of Australian Governments negotiations resulted in agreement on a set of principles recommended by the Ministerial Council for Corporations, which has guided the reform process. Those national principles include that corporations should be held liable in the first instance when they contravene a requirement imposed by statute, that directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act and that there must be compelling public policy reasons, such as the potential for public harm, for a director to be held personally liable for a company's wrongdoing. This bill clarifies the law relating to actions that pierce the corporate veil and look behind the artificial person that is a company to the controlling mind of the company; that is, the individual directors and the board that controls the company's actions.

In summary, there should be a compelling public policy reason for imposing a director's liability, including considerations such as the potential for public harm resulting from a decision made by a director. There should be a general concept that individuals should not be penalised for misconduct perpetrated by a company, except where it can be shown that the individual director has personally assisted or been privy to that misconduct; that is, to use the common law phrase, where the director is an accessory to the decision made by the company. A review of all New South Wales legislation containing provisions imposing personal criminal liability for corporate fault was conducted to identify those provisions which did not accord with the principles and which therefore should be amended to bring them into alignment. The schedule to the bill achieves that end.

Previous speakers have referred to the reasons the Council of Australian Governments excluded occupational health and environment protection laws. They are important issues, but they must be the subject of separate consideration. The raison d'être for the introduction of the Miscellaneous Acts Amendment (Directors' Liability) Bill is to remove the imposition of directors' and executive officers' liability for certain offences, to lower the level of liability that

is imposed on directors and executive officers from deemed liability to accessorial liability for certain offences and to increase the level of liability imposed on directors and executive officers from accessorial liability to deemed liability for the Electricity (Consumer Safety) Act 2004. The bill provides specifically that if corporations commit offences under the Act or regulations made under the Act the director or other individual is taken to have committed the offence if he or she knowingly authorised or permitted the offence. That is the accessorial liability.

If the corporation commits an offence under the Act or under regulations made under the Act the director or individual is taken to have committed the offence unless he or she establishes that the corporation committed the offence without his or her knowledge, that he or she was not in a position to influence the conduct of the corporation in relation to its offence, or that he or she was in such as position but used all due diligence to prevent the offence from occurring.
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So it establishes those statutory defences that are available to directors in those circumstances.

These amendments will reduce the complexity of laws that regulate when company executives can be held personally liable for the criminal misconduct of the corporation they serve. Simplifying corporate fault laws will undoubtedly make it easier for company executives to understand and comply with their legal obligations in an increasingly difficult environment in which they operate. Retaining the personal liability for corporate fault in limited circumstances will also help to ensure that executive officers take their corporate governance obligations seriously. That is very important, to ensure that directors themselves are clear as to what their duties are and understand the importance of acting always in accordance with the duties imposed on them by the Act.

The reform focuses only on the provisions that impose personal liability for corporate fault. It does not target provisions that impose criminal sanctions on directors who have themselves breached the law and their own conduct amounts to a breach of directors' duties or other statutory obligations. Where a director has personally done something that breaches criminal law the existing law is not changed in relation to those things. Furthermore, the national principles will not protect directors and executives who deliberately engage in criminal behaviour.

These reforms will reduce the complexity of laws that regulate when company executives can be held personally liable for the criminal misconduct of the corporation they serve. Simplifying corporate fault laws is going to make it easier for companies and executives to understand their legal obligations and, in turn, reducing the complexity of compliance will, more likely than not, make it easier for companies to operate. It will result in time and cost savings for companies and could ultimately lead to savings for consumers and better outcomes for shareholders.

Mr CRAIG BAUMANN (Port Stephens) [12.21 p.m.]: I make a brief contribution on the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011. New South Wales is the engine room of the Australian economy, a national economy that needs harmonised laws to reduce the complexity and cost of doing business. The Government is pleased to support national initiatives that promote harmonisation of laws, which the bill does. As an initiative of the Council of Australian Governments, it will promote effective corporate compliance and risk management. This means savings for consumers and better outcomes for shareholders. It does not mean a get-out-of-jail-free card for directors, who will still face intense scrutiny from regulatory authorities and shareholders.

I have been a director of my own family company for nearly 25 years. More recently, with the retirement of a business partner, I have become the sole director. Obviously, in this job I do not have a lot of time to dedicate to my company. I have a very good general manager and good managers running that company, although they are not directors for the simple reason that as the sole shareholder I do not believe I should risk their future by appointing them directors. That is what this is all about. A directorship in New South Wales until now was not something that a normal person would want to do without realising the risks involved. Being a part of small business, particularly the building industry, it is becoming more and more apparent to me that the smaller subcontracting groups with which we trade—the carpenters,

the bricklayers, the concreters—have to really start looking at incorporating to survive in the business. That means that more people will be directors of companies. I am talking about people whose sole working activity is to put up wall frames and put on roof trusses with a couple of employees. They are not into spreadsheets or into understanding the whole legal process that applies to directors. They are not criminal in their ignorance; they are trying to do the best they can and, by most accounts, they are pushed towards what are now partnerships

I know a fair bit about being a director. I can see how this legislation will help to reduce some of the onerous responsibilities on directors. I am talking about directors who, through no fault of their own, can find their companies in difficult situations. It is worthwhile looking at the thinking behind this bill, which has been introduced by the Attorney General. Where a corporation contravenes a statutory requirement the corporation should be held liable in the first instance. The imposition of criminal liability on a director for the misconduct of a corporation should be confined to situations where, first, there are compelling public policy reasons for doing so; second, the liability of the corporation is not likely on its own to sufficiently promote compliance, and third, it is reasonable in all the circumstances for the director to be liable. There will be situations where directors are liable.

As members know, I have a building company. I often deal with people who were referred to in the previous debate as the white shoe brigade. I have met all types of developers, and some of them will not be protected at all by this legislation, but most honest directors will be. Where directors' liability is appropriate, directors could be liable when they have encouraged or assisted in the commission of the offence or have been negligent or reckless in relation to the corporation's offending. In some instances it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending. The focus is on provisions that impose personal liability for corporate fault. The bill does not affect provisions that impose criminal sanctions on directors who have themselves breached the law and whose conduct amounts to a breach of directors' duties or other statutory obligations. I believe the bill strikes the right balance between accountability and scrutiny and I am pleased to support it.

Mr DARYL MAGUIRE (Wagga Wagga) [12.26 p.m.]: I begin by congratulating you, Mr Assistant Speaker, on your elevation to the chair. I am delighted to make a contribution to this important bill, the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011. I understand this bill is a result of a Council of Australian Governments principle of bringing national consistency to this area of law and promoting effective corporate compliance and risk management. There are so many areas where the laws are not in sync. The transport industry has been highlighted by the Council of Australian Governments in its efforts to get the laws that affect companies across Australia into sync so that directors and operators understand their responsibilities, doing business between States is made easier, and costs are thereby reduced.

This bill will change various Acts that currently impose upon directors and other individuals concerned in the management of corporations personal liability for certain offences committed by corporations. Each of those Acts generally provides for one of the following types of directors' liability. If a corporation commits an offence under the Act or under regulations made under the Act the director or other individual is taken to have committed the offence if he or she knowingly authorised or permitted the offence. If a corporation commits an offence under the Act or regulations made under the Act the director or another individual is taken to have committed the offence unless he or she establishes that the corporation committed the offence without his or her knowledge or he or she was not in a position to influence the conduct of the corporation in relation to the offence or he or she was in such a position but used all due diligence to prevent the offence.

The object of this bill is to amend Acts that impose directors' liability and to amend certain regulations made under those Acts so as to change the type of directors' liability that is imposed for certain offences under the Act and regulations from accessorial liability to deemed liability; change the type of directors liability that is imposed for certain offences under these Acts and regulations from deemed liability to accessorial liability, and remove the imposition of directors' liability in respect of certain offences and to make minor amendments in connection with that removal.
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The bill relates to an agreement by the Council of Australian Governments with respect to

harmonisation across Australian jurisdictions and legislation imposing directors' liability. This legislation, important as it is, is long overdue. I was a director of a company before I came to this Parliament, as was the member for Port Stephens and I dare say many new members entering this Parliament after the 26 March election so I understand the responsibilities of being a director. Certain circumstances always arose where, for instance, a company would be purchased and an operating business taken over to carry on certain duties but without the knowledge or ability to change those procedures an accident may occur whereby the director becomes liable. That can result in enormous financial hardship for company directors and their families.

This bill is sensible and addresses concerns that have been raised with me, not only through the trucking industry, which is just one example that I have raised today. There are so many that require, under company structures, to have the provisions of the company in place. Companies were originally designed to share those responsibilities but with changes in New South Wales legislation sharing the responsibility was sheeted home to the director, which had enormous consequences. Therefore, I am delighted to support the bill and commend the Attorney General for bringing the bill to the Parliament so early in the term of the Liberal-Nationals, O Farrell-Stoner Government and I look forward to speaking on more bills that bring about positive outcomes for the people of this State.

Mr GEOFF PROVEST (Tweed) [12.32 p.m.]: I, too, congratulate you, Mr Assistant-Speaker, on your elevation to the Assistant-Speakership. I am sure you will do a fine job. I speak on the Miscellaneous Acts Amendment (Directors' Liability) Bill 2011. As stated previously, various Acts currently impose on directors and other individuals concerned in the management of corporations personal liability for certain offences committed by corporations and each of those Acts generally provide for one of the following types of directors to be liable, and they are listed; for example, if a corporation commits an offence under an Act the director or individual is taken to have committed the offence, he or she has knowingly authorised or permitted that offence to have occurred.

I have run my own company and been the company director of a small consulting business. I know that the effects of this bill are far ranging and that the bill will clarify the situation. It arises from an agreement by the Council of Australian Governments to harmonise legislation across the State. I have not been advised on whether the other States have adopted the agreement of the Council of Australian Governments but I understand the other States are moving down a similar path. With the influx of technology Australia is shrinking in terms of communication and directors maybe spread far and wide.

However, I highlight the far-reaching implications particularly with respect to my old profession as a club manager. There are just over 1,000 registered clubs throughout New South Wales and each has a board of directors, each governed by this type of legislation. Clubs NSW is a fine institution and over many years has instigated directors' information briefings and courses to make directors aware of their obligations. They are popularly elected and at times education is necessary because they take on the job out at the goodness of their hearts with no remuneration. This bill will go a long way towards clarifying the situation.

Each offence under New South Wales Acts which imposes this kind of liability has been assessed against a set of Council of Australian Governments agreed principles designed to ensure that the imposition of criminal liability on a director for corporate misconduct is justified and reasonable. Those offences lacking such justification or that are otherwise inappropriate for the imposition of personal liability will have that liability removed or reduced as appropriate. Although some of the Acts listed for an amendment deal with important areas of law, it is only the certain offences within these Acts which have been assessed as appropriate for reform that will be changed, while the remaining offences under the Act will be unchanged. I strongly support the bill.

The level of liability is also being amended for offences involving the sale of the MA15+ videogames and the public screening of MA15+ and R18+ films for similar reasons. I am sure the Government will convey this information to the relevant peak bodies, the Australian Institute of Company Directors and the clubs to inform people of their liabilities and the changes made by this legislation. With those few words, I state that once again I am 100 per cent for the Tweed.

Mr BRAD HAZZARD (Wakehurst—Minister for Planning and Infrastructure, and Minister Assisting the Premier on Infrastructure NSW) [12.36 p.m.]: I, too, acknowledge your promotion, Mr Assistant-Speaker. For many years you have done an excellent job in serving the Parliament and the people of Coffs Harbour and I know you will excel in your new role. On behalf of your constituents and the other members of Parliament I congratulate you on your appointment. The Miscellaneous Acts Amendment (Directors' Liability) Bill 2011 comes off the back of Federal initiatives. The Council of Australian Governments process identified that certain issues arise from excessive imposition on directors of corporate bodies. Right across Australia, but particularly in New South Wales, a focus is needed to ensure that business is freed up to get on with business. At the moment New South Wales has the lowest housing starts in 50 years and on most economic indicators the New South Wales economy is at the bottom of the pile, coming off the back of 16 years of a Labor Government. It is very problematic and challenging.

The Liberal and Nationals Government must send a very clear message that New South Wales is open for business, that New South Wales is going to do things differently, that we have a can-do culture to ensure that business feels a sense of empowerment. Therefore, it is incumbent upon us, as a Government, to take all steps to ensure that a can-do culture is developed in business, not the culture perpetuated by Labor, "Well, why should we do this?" One of the issues concerning businesses across this States for some time—and I understand through the Council of Australian Governments process that it was identified as a concern for companies in other parts of our great country—is the unnecessary imposition of liability on directors, and I stress "unnecessary". Of course there is a proper process in the Corporations Law recognising that directors generally do have appropriate responsibilities imposed upon them, but the issue is what is appropriate? I think we have lost that along the way. The Council of Australian Governments has acknowledged that also and it is time now to redress those shortcomings. This bill identifies that it is right across-the-board in terms of legislation that needs to be amended.
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I note that the Acts that require amendment in regard to directors' liability include the Wine Grapes Marketing Board (Reconstitution) Act 2003. With regard to that bill, I acknowledge the vignerons that do such good work here in New South Wales. Recently I visited the Hunter and spoke with vignerons in that area. Obviously the vignerons are concerned to ensure that their products are given every opportunity to compete right across the national and international stage. We need to make sure that the red tape that currently restricts our vignerons is removed, and I think this legislation is a good start. Other Acts that require amendment with regard to directors' liability include the Totaliser Act 1997, the Road Transport (General) Act 2005, the Rice Marketing Act 1983, the Retirement Villages Act 1999, the Residential Parks Act 1998—

Mr Greg Smith: That's a controversial one actually.

Mr BRAD HAZZARD: The Attorney General, and Minister for Justice notes that the Residential Parks Act 1998 is a controversial Act. The former Government failed miserably to address some of the major concerns of residents who live within residential parks across New South Wales. There were some pretty half-baked efforts over the 16-year period of the former Government. Other Acts that require amendments are the Racing Administration Act 1998, the Public Health (Swimming Pools and Spa Pools) Regulation 2000, the Public Health (Disposal of Bodies) Regulation 2002, the Public Health Act 1991, the Property, Stock and Business Agents Act 2002, the Private Health Facilities Act 2007, the Prices Regulation Act 1948, the Poultry Meat Industry Act 1986 and the Parramatta Park Trust Act 2001. I will not list all the Acts that are cited in the bill as requiring amendment. However, the bill cuts across many different walks of life and many business opportunities that New South Wales needs to explore.

It is with great enthusiasm that I, as the planning and infrastructure Minister, support this legislation. It can make a real difference to giving directors in these various pursuits and in private enterprise great encouragement to get on with the job. In introducing this legislation we are making sure there are some agreed principles which underpin the reform process that is going on. As I said earlier, it is on a national basis. Obviously, we will maintain the high standards of corporate governance and we will promote compliance culture. However, at the same time we will remove liability for offences for which it is not appropriate that directors and executive officers be liable.

The former Labor Government has been all too happy to bash business around the head. That has been the hallmark of Labor: to bash business. That is why we now see, as I said earlier, the lowest housing starts in 50 years and business confidence at an all-time low. It disturbed me greatly that three years ago one of our major building companies, AV Jennings, declared to its shareholders that it was no longer going to do business in New South Wales. Indeed, many of us grew up watching the AV Jennings advertisements on television and thinking that one day we may even buy a home from AV Jennings. The company indicated to its shareholders that it would continue doing business in Queensland, to our north, and in Victoria, to our south, but that it would no longer do business in New South Wales. That is a clear indication, from a company that should have been a hallmark company here in New South Wales, that there are problems. Add to that the fact that directors in New South Wales, throughout so many areas, have impositions of liability that are totally unreasonable.

The bill aims to correct the balance. Whilst ensuring that directors will continue to take their obligations seriously in their role of governance, the bill will at the same time remove the unreasonable and unjustifiable impositions of personal criminal liability on directors for offences that are committed by corporations. The fact that a government such as the Liberal-Nationals Government in New South Wales is prepared to move on this issue on day two of office indicates our seriousness about committing ourselves to getting on with supporting business in New South Wales.

Some might say that removing personal criminal liability is not something they support. I say to those people: You need to understand that this is about striking a balance. The tall poppy syndrome that tended to operate under 16 years of Labor was that it would strike down anyone who was capable of doing business and would make sure they did not get a fair go. Under the Liberal-Nationals Government, they will get a fair go. We will be out there saying, "Go for it! Go for New South Wales! Give us the jobs; give us the economy that New South Wales residents deserve." Labor tended to forget that if you get the economy moving by getting jobs going, and if you get the opportunities for business going, our budget increases. We get a substantial increase in the money that comes to New South Wales, money that provides for the teachers, nurses, police, road systems and train systems we need. If New South Wales had kept pace with what Victoria has done over the last few years we would have had substantially more money to be able to deliver more nurses, more teachers and more police than, unfortunately, Labor has delivered.

This bill is meritorious legislation. It strikes the right balance, and ensures that directors across the board will not be personally liable. It still imposes certain requirements on directors, but they are sensible requirements, rather than the restrictive, Labor-driven strangulation approach to business that the New South Wales Labor Party has felt it necessary to adopt in the last 16 years. I totally support the bill.

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [12.46 p.m.], in reply: Mr Temporary Speaker, I also congratulate you on your appointment. In recent months the House has been deprived of your wisdom and experience, after the odd hiccup. I am glad to see you are back in a position of power. I am sure we will benefit from your wisdom and experience.

I thank honourable members for their contributions to the debate. In particular I thank the member for Liverpool, who said the Opposition does not oppose the legislation, which we are pleased about because it is important Council of Australian Governments [COAG] legislation. In response to the member for Liverpool, these reforms are part of a COAG National Partnership Agreement under which there are reward payments to the States for achieving key milestones. One of these key milestones was for legislation implementing these reforms by December 2010. The Liberal-Nationals Government was not in office at that time. However, perhaps we can get some brownie points, because these milestones may be reviewed by COAG and there may be a second tranche of reforms at a later stage. I would have thought we would get a benefit from introducing this legislation. I think we may be the first State to have introduced such legislation, although the Australian Capital Territory may have already done so.

The Miscellaneous Acts Amendment (Directors' Liability) Bill 2011 implements a set of principles that aim to ensure that legislation imposing personal liability for corporate

misconduct promotes high standards of corporate governance, and ensures an appropriate attitude to risk and compliance culture, while also decreasing the compliance burden on businesses through greater harmonisation of laws in different jurisdictions and ensuring the consistent treatment of directors and executive officers.

I also thank the member for Davidson for his erudite contribution to the debate, the member for Pittwater similarly, and the members for Port Stephens, Albury, Wakehurst and Wagga Wagga for their contributions. All those members' contributions added to the knowledge of the Parliament, people reading *Hansard* and the public generally. In response to some of the matters raised during the debate, it is important that directors of companies be encouraged to be directors. With regard to many companies, including those serving charities, directors' liability can be a hardship for them.
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Often these people come in as community representatives; they are not legally trained, are not working in corporations and have not studied corporations law. Whilst it is important that they do have some understanding of the basic precepts, they should not be liable if something goes wrong with the company through the misconduct of someone else secretly when they did not have the tools or training to understand what they were getting themselves into. That can happen when one becomes a director after fault has occurred. It is important in many cases to take away these deeming provisions and sheet it home to those who are personally responsible by their own negligence or intentional acts or recklessness.

A number of court cases have reflected the importance of the offence of complicity by aiding and abetting, counselling or procuring persons and I have either had involvement in those cases or have relied on them in other court actions. The famous culpable driving case in the High Court of Australia of Giuseppe Giorgianni v The Queen [1985] HCA 29, reported at [1985] 156 CLR 473 is one that many criminal lawyers will know. In that instance a truck heavily laden with coal got out of control while descending a steep incline at Mount Ousley and collided with other vehicles, causing the deaths of five persons and serious injury to another. The truck was driven by a man called Renshaw, an employee of Giorgianni. The brakes of the coal truck failed as it was making the descent and as it continued down the road at an increasing speed the driver of a Volvo truck called Fraser deliberately placed his vehicle in its path in an attempt to stop its progress. The two vehicles collided, but the effect of the collision was to damage the steering of the coal truck, which then careered quite out of control into other cars, some of whose passengers were killed or injured.

In that case Mr Giorgianni, the man who went to the High Court, was also held to be liable because he had procured Mr Renshaw to drive the coal truck and he had not kept the truck in a safe condition. At that time manslaughter was a misdemeanour and Mr Giorgianni was held to be liable for manslaughter under section 351 of the Crimes Act, namely: "Any person who aids, abets, counsels, or procures, the commission of a misdemeanour ...". Even though the truck was owned by the company, the director was responsible for maintaining the roadworthy condition of the truck—that responsibility was sheeted home to him. That is what this legislation seeks to do: those who have aided or abetted or have been complicit in criminal activity in the name of the company are responsible. Perhaps the driver was not a director, but those directors who are not responsible in any way for the actions of the company so far as keeping things safe should not be liable because they are directors. However, in some cases they have to be responsible if there are only a couple of directors. In many cases in recent years people have been deemed to be liable even though they have had no responsibility for the acts causing the mischief.

The member for Wakehurst named some of the bills to which changes will result as a consequence of this legislation. The bill amends various State Acts and regulations to remove the imposition of directors' and executive officers' liability for certain offences; to lower the level of liability that is imposed on directors and executive officers from deemed liability to accessorial liability for certain offences; and to increase the level of liability that is imposed on directors and executive officers from accessorial liability to deemed liability for the Electricity (Consumer Safety) Act 2004. Schedule 1.8 of the bill referring to that Act states:

> **Section 45 Corporations**
>
> Omit section 45 (1). Insert instead:
>
> (1) If a corporation contravenes, whether by act or omission, any provision of

this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision unless the person satisfies the court that:

(a) the corporation contravened the provision without the knowledge of the person, or

(b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or

(c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation.

That is the one provision where they are shifting the onus back to deeming. It is very important for that type of matter and the dangers referred to earlier in this debate.

The bill only amends provisions that impose personal liability for corporate fault. It does not amend provisions that impose criminal sanctions on directors who have themselves breached the law and whose own conduct amounts to a breach of directors' duties or other statutory obligations. The effect of the bill is to reduce the number of offences by a company for which directors can be criminally responsible. Further, where directors' liability is retained a distinction is made between those offences where it is appropriate to leave it to the director to prove they exercised due diligence to prevent the contravention, and those where the prosecution must prove the director knowingly authorised or permitted the contravention.

The bill ensures the personal liability for corporate fault is only imposed on directors where this is appropriate and in accordance with the principles agreed by the Council of Australian Governments. It also ensures the level of directors' liability for each offence is reasonable and justified. The philosophy behind this bill and the decision of the Council of Australian Governments will probably have much more meat in its exercise when the Commonwealth amends the Corporations Code, which is where a lot of the mischief is currently located. We look forward to that because the corporate veil is important to business, charities and in running many other entities where people are required to act as directors. Such people should not be discouraged by being fearful of these other deeming provisions that cause liability. I commend the bill to the House.

Question—That this bill be now agreed to in principle—put and resolved in the affirmative.

Motion agreed to.

Bill agreed to in principle.

Passing of the Bill

Bill declared passed and transmitted to the Legislative Council with a message seeking its concurrence in the bill.