

NSW ATTORNEY GENERAL'S DEPARTMENT SUBMISSION IN RESPONSE TO:

INDEPENDENT PRICING AND REGULATORY TRIBUNAL INVESTIGATION INTO THE BURDEN OF REGULATION IN NSW AND IMPROVING REGULATORY EFFICIENCY OTHER INDUSTRIES: DRAFT REPORT

CHAPTER 5: REDUCING UNNECESSARY REGULATORY BURDENS

5.18 Personal liability (for directors and officers of corporations)

The Tribunal's discussion and recommendations

The Department supports the Tribunal's discussion (at pages 168 to 170) of the forms of personal liability imposed by relevant legislation on directors/officers of corporations and the impact that this may have on corporations and individuals.

In the wake of recent corporate collapses and examples of director negligence and misconduct, the Department is focussing on whether laws adequately address corporate and director responsibility. For example, the Department has made submissions to the Commonwealth in relation to CAMAC's inquiry into long-tail liabilities. It is recognised, however, that increasing regulation may not result in better outcomes for the community. The Department has supported Commonwealth efforts to reduce the corporate regulatory burden where appropriate and is keen to co-operate with State efforts to reduce red tape.

The Department supports the Tribunal's recommendation (at page 171) for greater cross-jurisdictional harmonisation of personal liability for directors and other officers of corporations. A more consistent approach should assist corporations and their directors and managers to implement effective and cost-efficient compliance and risk management strategies. It should also lead to an environment of greater legal certainty and predictability for the individuals concerned.

The Department also supports the Tribunal's recommendation (at page 171) to consider the findings of CAMAC when it issues its final report on this topic, particularly with regard to recommendations on the adoption of a standard template for personal liability provisions.

In particular, the Department recommends that the Tribunal consider CAMAC's findings on whether a "responsible officer derivative liability template" is warranted in specific situations. Where a company is undertaking hazardous or potentially environmentally damaging activities for instance, it may be appropriate to impose a specific statutory duty on individuals within a corporation to ensure that the corporation complies with its statutory responsibilities.

Given the technical nature of these issues, it is suggested that the Tribunal include a more detailed discussion of the topic, with adequate explanation for its recommendations, when it publishes its final report.

5.22 Privacy

5.22.3 Sharing of personal and business information among State agencies

The Tribunal's discussion

The Department supports the Tribunal's findings (at page 188), and the Recommendation that follows, concerning strategies to identify further opportunities to share or streamline information among government agencies.

The Tribunal's recommendations

The Department would appreciate the opportunity to nominate a representative to participate in the proposed inter-agency working group.

5.22.5 Workplace Surveillance

The Tribunal's discussion

The Department has some concern with the discussion which concedes that there may be high compliance costs to businesses who may have to retrofit the required disclosure requirements to existing computer systems. The Department suggests that the Report include evidence of these substantial costs or that the criticism should be moderated.

The discussion also refers to workplace privacy reforms in Victoria, however the foundation for this analysis is unclear. To the Department's knowledge, although the Victorian Law Reform Commission (VLRC) has recently reported on workplace privacy (in October 2005) and the report includes a draft Bill, workplace privacy legislation is yet to be introduced in Victoria. Officer level contact with the Tribunal has confirmed that the draft Report will be amended to reflect this situation.

The Tribunal may wish to refer to the current SCAG officers' working group on workplace privacy, which has been given a direct mandate to consider workplace privacy issues, notwithstanding that the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSW LRC) may inquire into workplace privacy under their current privacy references.

The working group will consider the VLRC's recommendations, together with the NSW Workplace Surveillance Act as a basis for developing a nationally consistent approach to regulating workplace privacy. It will focus on the following practices:

- i. workplace surveillance (including email and Internet monitoring);
- ii. covert surveillance practices;
- iii. surveillance and monitoring outside of work;
- iv. genetic testing and the taking of bodily samples (for example, for drug and alcohol testing).

The Victorian Attorney-General has written to the ALRC to advise that SCAG is considering a set of workplace privacy principles developed by the VLRC, as a basis for nationally consistent workplace privacy laws.

The SCAG officers working group is liaising with both the NSW LRC and the ALRC with respect to their privacy references.

The Tribunal's recommendations

The Department does not support the recommendations made by the Tribunal with respect to workplace surveillance and the NSW LRC privacy reference.

Section 49 of the Workplace Surveillance Act provides for a review of the Act in these terms:

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

There is no special case made out in the Tribunal's discussion of the workplace surveillance issues for bringing the review forward. In fact, a review of the policy objectives after 5 years of operation (rather than 2) is far more likely to give a realistic picture of the true impact of the legislation.

The recommendation to provide further training or resources to help businesses understand their rights and responsibilities under the Act has the potential to be an unnecessary burden on the government.

The terms of the Act do not impose onerous obligations on businesses. Furthermore there was extensive consultation with key business stakeholders in the lead up to the legislation being introduced and commenced. The Department has produced a short guide to the Act which is available on its Lawlink website. The guide was made available to all identified stakeholders prior to commencement of the Act. Departmental officers have made themselves available for consultation on request. The Department is unaware of any significant unmet need for assistance in implementing the Act.

The terms of the NSW LRC's privacy reference, include consideration of:

- the desirability of privacy protection principles being uniform across Australia, and
- the desirability of a consistent legislative approach to privacy in the Privacy and Personal Information Protection Act 1998, the Health Records and Information Privacy Protection Act 2002, the State Records Act 1998, the Freedom of Information Act 1989 and the Local Government Act 1993.

The terms of reference also direct the NSW LRC to liaise with the ALRC with respect to its privacy reference. Because of this, the timing for completion of the reference in NSW is likely to be influenced by the duration of the ALRC reference. The ALRC has until March 2008 to report.

Further, the SCAG officers working group on workplace privacy has already been directed by Ministers to consider nationally consistent workplace surveillance laws. The recommendation that the NSW LRC consider these matters in the context of its privacy reference is unnecessary.

In view of these matters, the Department suggests that the Tribunal's recommendation with respect to the NSW LRC reference be reconsidered.

5.26 Trustee companies

The Tribunal's discussion and recommendation

The Department supports the Tribunal's discussion (at pages 201 to 202) of the need for greater national consistency in the regulation of trustee companies.

The Standing Committee of Attorneys General is currently in discussions with Commonwealth Treasury about a proposal for State and Territory Ministers to contract the Australian Prudential Regulation Authority to perform prudential supervision of trustee companies.