

# DETERMINING SECONDARY LIABILITY: IN SEARCH OF LEGISLATIVE COHERENCE

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*Australia is arguably in the midst of a legislative boom to improve recovery for creditors through the imposition of secondary liability. The aim is to overcome ‘sharp corporate practice’ by imposing liability on an outside party for the default of a primary debtor. However, recent reforms are noticeably dissimilar without apparent reason, and contribute to an incoherent approach to the law in this area. This paper makes the case for secondary liability laws which are consistent (as far as circumstances allow), intelligible, and informed by principle based on articulated policy objectives. This approach will produce benefits for both drafters and enforcers of the law.*

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## I INTRODUCTION

Australia is arguably in the midst of a legislative boom to improve recovery for creditors. There are two related motivations for the recent action. The first is a perennial issue with companies: as a separate legal entity, a limited liability company can be liquidated leaving creditors unpaid, without its shareholders bearing the financial burden of its debts.<sup>1</sup> The second is the apparently increasing use of corporate structures and intercorporate contracting to facilitate transactions that leave creditors, in particular employees and the government, exposed to considerable financial loss. Imposing secondary liability, where someone involved in some way in the company's undesirable behaviour can be made to recompense those losses, becomes an attractive proposition.

Recent years have seen a spate of enacted and drafted provisions that seek to impose liability on one party where there has been a default by another. In 2017, provisions were inserted into the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') to assist the workers of franchisees and subsidiary companies by imposing liability for their entitlements on responsible franchisors and holding companies.<sup>2</sup> In April 2019, legislation was enacted to amend the

<sup>1</sup> See John C Coffee Jr, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, for the statement attributed to Edward, First Baron Thurlow: 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?': at 386.

<sup>2</sup> *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) sch 1 item 17 ('*Protecting Vulnerable Workers Act*'), inserting *Fair Work Act 2009* (Cth) pt 4-1 div 4A ('*Fair Work Act*').

*Corporations Act 2001* (Cth) ('*Corporations Act*') to allow contribution orders to protect employee entitlements.<sup>3</sup> It followed a consultation paper dealing with corporate misuse of the Fair Entitlements Guarantee ('FEG').<sup>4</sup> The consultation paper explored options to address 'sharp corporate practices', such as 'utilising a corporate structure ... in ways that the employees are employed by an entity which does not appropriately provide for their employee entitlements'.<sup>5</sup> There was also consultation about amendments to the *Corporations Act* designed to combat illegal phoenix activity by imposing liability on officers and others with respect to creditor-defeating dispositions.<sup>6</sup> Dealing with non-compliance from another angle, federal Parliament has also passed laws to significantly overhaul and increase *Corporations Act* penalties.<sup>7</sup>

However, for reasons that are not explained in accompanying material, the formats of these three reforms differ noticeably from each other and from earlier pieces of legislation imposing secondary liability, creating what could be described as a 'wilderness of single instances'.<sup>8</sup> This paper stands back from the current legislative activity and questions the approach being taken by the federal government. It leaves aside the issue of whether new laws are presently needed, or whether current laws imposing liability on primary wrongdoers

<sup>3</sup> *Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019* (Cth) sch 1 item 20 ('*Strengthening Protections Act*'), inserting *Corporations Act 2001* (Cth) ss 588ZA–588ZB ('*Corporations Act*').

<sup>4</sup> Australian Government, *Reforms to Address Corporate Misuse of the Fair Entitlements Guarantee Scheme* (Consultation Paper, May 2017) 1 ('*FEG Consultation Paper*'). This is the federal government's safety net scheme for employees affected by the liquidation or bankruptcy of their employer: *Fair Entitlements Guarantee Act 2012* (Cth).

<sup>5</sup> *FEG Consultation Paper* (n 4) 4.

<sup>6</sup> *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2018* (Cth) ('*Combating Illegal Phoenixing Bill*'). There are also provisions to allow the Australian Securities and Investments Commission ('ASIC') or a court to void creditor-defeating dispositions: see below nn 44–51 and accompanying text. Consultations on the Bill were carried out in 2017–18: Senate Economics Legislation Committee, Parliament of Australia, *Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 [Provisions]* (Report, March 2019). Note that this Bill has now lapsed with the dissolving of the 45<sup>th</sup> Parliament before the May 2019 federal election. A further bill of the same name, with some minor differences in content and numbering, was introduced into the 46<sup>th</sup> Parliament in July 2019, however the second reading of this Bill was adjourned on 4 July. At the time of writing, the reintroduced Bill had not progressed further.

<sup>7</sup> *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) ('*Strengthening Corporate Penalties Act*'). These provisions include orders to relinquish the benefit obtained from certain criminal and civil penalty breaches: at sch 1 item 117, inserting *Corporations Act* (n 3) s 1317GAB.

<sup>8</sup> This expression was used in PJ Fitzgerald, 'Law and Logic' (1964) 39(5) *Notre Dame Lawyer* 570, 577.

are simply underenforced. It proceeds on the basis that the government has embarked upon a legislative program of imposing secondary liability as a solution to some of its present problems, and seeks to shed light on the best way to approach it.

Where there is a desire to prevent the corporate form from being abused, the practical solution may involve legislating for *ex ante* means of disrupting or discouraging the behaviour. The payment of a security bond by a company against the possibility that it may default on its tax obligations may achieve this.<sup>9</sup> Another form of *ex ante* disruption is labour hire licensing, to overcome the creation of labour hire companies by unscrupulous people leading to underpayment or non-payment of employee entitlements.<sup>10</sup> These means of thwarting non-payment are excluded from this discussion.

Despite these and other ways of dealing with creditor losses, there is a legitimate case to be made for imposing secondary liability where the company that is primarily liable defaults. Not all corporate failures are deliberate, and it is not appropriate to seek recovery from a party other than the company as a matter of course. Nonetheless, secondary liability removes the financial incentive towards 'remote' wrongdoing, where the primarily liable party was set up to fail so that some other party can gain. In consequence, it achieves a more level playing field in the marketplace, and it helps to protect the revenue of other vulnerable parties such as employees. Substance could be said to triumph over form. Secondary liability that imposes a genuine burden — for example, payment of another entity's wages or tax obligations — has the benefit of overcoming the 'cost of doing business' view of a small penalty through accessory liability.

There are those that dispute the view that corporate entities respond to incentives, including economic incentives such as secondary liability, to act legally and responsibly.<sup>11</sup> At the same time, it is important to recognise the

<sup>9</sup> *Taxation Administration Act 1953* (Cth) s 255-100 ('TAA').

<sup>10</sup> See, eg, *Labour Hire Licensing Act 2018* (Vic). Security of payment requirements, project bank accounts, statutory trusts, and credit insurance are other examples found in the building and construction industry: see J Murray, Department of Jobs and Small Business (Cth), *Review of Security of Payment Laws: Building Trust and Harmony* (Final Report, 22 December 2017). Another is a deed of cross guarantee between a holding company and its wholly owned subsidiary where there are mutual guarantee arrangements in exchange for relief for individual group companies from separate financial reporting arrangements: Australian Securities and Investments Commission, *ASIC Corporations (Wholly-Owned Companies) Instrument* (2016/785, 29 September 2016).

<sup>11</sup> See, eg, Paddy Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' (2010) 34(5) *Cambridge Journal of Economics* 837, 845:

legitimacy of allowing businesses to structure their corporate affairs across multiple related companies or economic groupings and through contractual arrangements. Not all creditors are equally vulnerable and in need of additional recovery mechanisms.<sup>12</sup> Governments are most unlikely to want to challenge the separate legal entity status of limited liability companies in any fundamental way. In addition, the present Coalition government has articulated a need to encourage innovation, and not penalise legitimate failure.<sup>13</sup> A proper balance is needed between liability imposition and the legitimate protection of shareholders and other corporate outsiders. Where, then, to draw the liability line?

Part II looks at the policy objectives underpinning legislation in the current context and the variables that make up secondary liability provisions. These objectives and variables are displayed in Part III, which investigates a variety of situations where secondary liability may be attributed to a party other than the primary debtor or wrongdoer. For want of a better title, this individual or company will be referred to as the ‘outside party’. Part IV considers coherence from the practical perspective: what it means, and what it can contribute to law reform in the present context. It argues for a coherent, principled approach to imposing secondary liability across the spectrum of relevant legislation. If the law is to treat a similar situation in a different way, there should be a reason for it. Part V provides the analysis, teasing out the principled bases upon which secondary liability for unpaid corporate debts might best be legislated, and exploring how in practice this might be achieved. Part VI concludes that where there is perceived to be a need for new laws imposing secondary liability to overcome sharp corporate practices, those provisions should be developed in a principled and coherent manner.

The no-obligation, no-responsibility, no-liability nature of corporate shares permits their owners — or their institutional representatives — to enjoy income rights without needing to worry about how the dividends are generated. They are not legally responsible for corporate malfeasance.

<sup>12</sup> Some creditors will self-protect from the risk of loss. Methods include obtaining security from the debtor company, obtaining a director’s personal guarantee, charging a premium on goods or services, or diversification.

<sup>13</sup> See, eg, Department of the Prime Minister and Cabinet, *National Innovation and Science Agenda* (Report, November 2015) 6 <<https://www.industry.gov.au/national-innovation-and-science-agenda-report>>, archived at <<https://perma.cc/EG88-W7ZU>>; Christopher Pyne, ‘Agenda to Transform the Australian Economy’ (Media Release, 7 December 2015) <<https://www.minister.industry.gov.au/ministers/pyne/media-releases/agenda-transform-australian-economy>>, archived at <<https://perma.cc/J7VF-4LUD>>.

## II POLICY OBJECTIVES AND VARIABLES

For the purpose of the present discussion, there are two relevant dimensions to legislation: what it is trying to achieve, and how it goes about it.

### A Policy Objectives

Some of the policy objectives of a government are stated in explanatory memoranda or media releases accompanying an exposure draft. In the current context, these objectives typically will include things like protecting the government's revenue, the entitlements of employees, or the rights of creditors generally.<sup>14</sup> Other aspects are often noted, such as the need to deter wrongdoing and provide a remedy for those who suffer financial loss.<sup>15</sup> Economic factors may be mentioned, such as the 'aim to promote a culture of entrepreneurship and innovation which will help drive business growth, local jobs and global success'.<sup>16</sup> These policy objectives may influence the way in which the legislation is interpreted.<sup>17</sup>

Even so, there are likely to be unstated policy objectives that underpin legislation. To the extent possible, governments are likely to want breaches that can be readily detected, and laws that are enforceable effectively and efficiently. Legislation needs to be balanced so that there is not significant political opposition to it, nor an outcry from the media or lobby groups representing business, community groups, or employees.<sup>18</sup> Unintended

<sup>14</sup> See, eg, Explanatory Memorandum, Insolvency (Tax Priorities) Legislation Amendment Bill 1993 (Cth) ch 3; Explanatory Memorandum, Corporations Law Amendment (Employee Entitlements) Bill 2000 (Cth) 3 [6]–[7], 5 [18]–[19]; Explanatory Memorandum, Corporations Amendment (Insolvency) Bill 2007 (Cth) 3 [2.4] ('Insolvency Bill Explanatory Memorandum').

<sup>15</sup> See, eg, Insolvency Bill Explanatory Memorandum (n 14) 3 [2.5]; Kelly O'Dwyer, 'Legislation to Combat Illegal Phoenix Activity Released for Consultation' (Media Release, 16 August 2018) <<http://kmo.ministers.treasury.gov.au/media-release/097-2018/>>, archived at <<https://perma.cc/496W-BRW3>>.

<sup>16</sup> Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (Cth) 3.

<sup>17</sup> 'In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (*whether or not that purpose or object is expressly stated in the Act*) is to be preferred to each other interpretation': *Acts Interpretation Act 1901* (Cth) s 15AA (emphasis added). This version was added by the *Acts Interpretation Amendment Act 2011* (Cth). See also Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 40–51 [2.8]–[2.15].

<sup>18</sup> See below n 61 and accompanying text for discussion of the Waterfront Dispute that in part contributed to the passage of *Corporations Act* (n 3) pt 5.8A, noted in Part III(A)(4) below.

collateral damage, such as an adverse effect on an innocent group of people or to the economy as a whole, should be avoided.

A further set of objectives also exist, based on political, rather than policy, imperatives. In the name of 'signalling', legislation is sometimes passed principally to 'send a message' to a group of identified wrongdoers. It is possible that existing legislation is already sufficient to capture their activities but it is either underenforced or inadequate, such that the wrongdoing continues. The government of the day may want to be seen to be acting, perhaps to deflect political criticism, and introducing legislation is one of the cheapest and most public ways of achieving that. Once drafted, this sort of legislation may suffer from being too descriptive of a certain scenario, and in doing so, provides a convenient roadmap to avoidance. Or it may be a draconian criminal provision that manages to be completely unenforceable. Examples of these situations are provided in Part III.

### B *Variables*

Legislation comprises a set of variables, best illustrated in the present context by asking a series of related questions. Who is to be held liable and on what basis? Is it because of the formal nature of their relationship with the primarily liable party? Or because they have some degree of control over it? Or because they received a benefit from it? Or because a particular form of transaction took place? Or because of their own blameworthy behaviour, or their involvement in someone else's behaviour? Or because they are expected to have 'deep pockets' and the capacity to pay compensation, even though their fault might be minimal? The answers to these questions give rise to others. How is liability to be imposed? Will it depend upon the knowledge or awareness of a party, and if so, whose? Will that be assessed objectively, subjectively, through a combination of both, or will liability be determined through a more nuanced test of what is 'just and equitable'? How explicitly will fault be recognised?

Who is to receive compensation, and why? Is it because there is a particular vulnerability, such as employment, or government revenue, or a government-funded safety net scheme? Or because directors have to be discouraged from trading when the company is financially doomed, and compensation to creditors happens to be a secondary benefit? Who will have standing to enforce the law? Will liability be criminal, civil penalty, civil, or all of them, with multiple parties having standing to enforce? Will it be a purely administrative process, handled 'in-house' by a regulator? Will the victim be able to bring an action themselves? Or must they be represented by a liquidator?

The policy objectives (both stated and unstated) and the variables outlined above are all relevant in considering the secondary liability laws in Part III. Those laws are undoubtedly inconsistent. After setting out the advantages of coherent legislation in Part IV, one aspect of which is consistency, Part V will present the case that the present legislative inconsistency is not justified, and as a result, the laws considered are not coherent.

### III EXAMPLES OF SECONDARY LIABILITY

The formation of limited liability companies where there is no minimum equity capitalisation requirement creates the conditions where debts may remain unpaid upon the company's insolvency, despite the wealth of its shareholders.<sup>19</sup> Although in many instances this insolvency may be unintended and regretted by the company's controllers, there is also the potential for the company's creation and subsequent insolvency to be deliberately contrived, as a means of accruing and avoiding the payment of debts. While limited liability companies have widespread advantages for the economy through the encouragement of investment,<sup>20</sup> it is unsurprising that unpaid creditors want to find ways to look behind the form of the company as a separate legal entity to locate another party who can be made to pay the defaulting company's debts.<sup>21</sup> When the government is financially exposed to the loss, directly or indirectly, there is both the motive to impose secondary liability and the means to do so through the passage of legislation.

This part divides the examples of secondary liability into three groups: first, provisions which impose direct liability on the outside party for a company's debts; second, accessory liability where involvement by the outside

<sup>19</sup> It is the liability of shareholders which is limited, not that of the company: *Corporations Act* (n 3) s 516.

<sup>20</sup> Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30(2) *University of Toronto Law Journal* 117, 118; Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1996) 43–4.

<sup>21</sup> The paper does not consider the long-standing 'sham/façade' principle that allows the corporate veil to be pierced where the corporate form has been used to perpetrate a fraud: *Re Darby; Ex parte Brougham* [1911] 1 KB 95; or for the sole purpose of avoiding an existing legal obligation: *Gilford Motor Co Ltd v Horne* [1933] Ch 935; *Jones v Lipman* [1962] 1 WLR 832. This paper deliberately avoids using the expression 'piercing the corporate veil'. In *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, Lord Sumption JSC said, with respect to judicial veil piercing, that "[p]iercing the corporate veil" is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company': at 478–9 [16].

party in another's default is required; and third, provisions explicitly dealing with multi-company arrangements. In each case, the discussion starts with existing measures in that category before moving to consider the 'new' laws, being either those recently enacted or currently proposed.

### A Direct Liability for Unpaid Company Debts

This discussion looks at a range of statutory provisions that impose personal liability for a company's debt on a director or other person. In each case there is some degree of default that attracts the liability, but the default requirements are not consistent. Note here that the term director denotes those properly appointed to the position, as well as 'de facto'<sup>22</sup> and 'shadow' directors.<sup>23</sup> The latter are particularly significant in any discussion about control as a factor in liability, since shadow directors are found where 'the directors of the company ... are accustomed to act in accordance with [that] person's instructions or wishes.'<sup>24</sup>

#### 1 Director Penalty Notices

The first form of personal liability for a company's default is that of directors for certain unremitted corporate tax obligations. Directors are under an obligation to 'cause the company to comply with its obligation' to pay certain tax liabilities such as Pay-As-You-Go Withholding (or 'PAYG(W)') tax.<sup>25</sup> Directors become liable for a penalty, equal to the amount of the unpaid taxes, through the issuance of a director penalty notice ('DPN') if they do not cause the company to pay those tax obligations or the company is not wound up or placed into voluntary administration ('VA') within 21 days from the issuance of the notice.<sup>26</sup> The DPN regime was amended in 2012 to extend it to unpaid

<sup>22</sup> *Chameleon Mining NL v Murchison Metals Ltd* [2010] FCA 1129. See also *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 297, 321–6 [62]–[76] (Finn, Stone and Perram JJ). Resigning from the board but continuing to perform the 'top level of management functions' results in the person being held liable as a de facto director: *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565, 569, 571 (Madgwick J) (Federal Court).

<sup>23</sup> For a description of liability as a shadow director and some relevant cases and commentary, see Companies and Securities Advisory Committee, Parliament of Australia, *Corporate Groups* (Final Report, May 2000) 86 [2.145]–[2.147]. Since that time, shadow director liability has been considered in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 81 NSWLR 47.

<sup>24</sup> *Corporations Act* (n 3) s 9 (definition of 'director' para (b)(ii)).

<sup>25</sup> TAA (n 9) s 269-15(1).

<sup>26</sup> *Ibid* ss 269-15–269-30.

superannuation guarantee charge ('SGC') liabilities, and to limit the circumstances in which directors can discharge a DPN by placing their company into VA or liquidation.<sup>27</sup> The defaulting director has a very limited range of defences available,<sup>28</sup> such that a director who is inexperienced or overwhelmed by workload is caught in the same way as someone deliberately failing to remit the owed taxes. The company's unremitted goods and services tax ('GST') liabilities are slated to be included in the DPN regime as part of the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill ('Combating Illegal Phoenixing Bill'),<sup>29</sup> discussed further below.

## 2 *Insolvent Trading Liability*

The second provision facing directors as the outside party is insolvent trading liability under s 588G of the *Corporations Act*. Unlike the administrative DPN regime, there are both civil penalty and criminal forms of the action available,<sup>30</sup> with the latter requiring proof of dishonesty.<sup>31</sup> When a company incurs a debt and where there are reasonable grounds to suspect that the company is insolvent, a person who is a director at that time becomes personally liable for the debt if they failed to prevent the company incurring the debt and they were aware, or a reasonable person in their position would have been aware, of those reasonable grounds to suspect insolvency.<sup>32</sup> As with the DPN regime, limited defences are available.<sup>33</sup> In common with a DPN, there is a defence of 'reasonable steps': with insolvent trading, it is all reasonable steps to prevent the debt being incurred;<sup>34</sup> with the DPN, it is reasonable steps to ensure the tax is paid or the company is placed into external administration.<sup>35</sup> Both share a defence of reasonable absence from management for some good reason such as illness.<sup>36</sup> In the case of insolvent trading, there are further defences based

<sup>27</sup> *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth) sch 1 items 8, 37–57, amending TAA (n 9), which came into effect on 29 June 2012.

<sup>28</sup> See TAA (n 9) s 269–35.

<sup>29</sup> Combating Illegal Phoenixing Bill (n 6) sch 3.

<sup>30</sup> *Corporations Act* (n 3) ss 588G(2) (civil penalty), (3) (criminal). A liquidator can also recover through civil action commenced under s 588M(2). In limited circumstances, creditors themselves have a right of action: at s 588M(3).

<sup>31</sup> *Ibid* s 588(3)(d).

<sup>32</sup> *Ibid* ss 588G(1)–(2).

<sup>33</sup> *Ibid* s 588H.

<sup>34</sup> *Ibid* s 588H(5).

<sup>35</sup> TAA (n 9) s 269–35(2).

<sup>36</sup> *Corporations Act* (n 3) s 588H(4); *ibid* s 269–35(1).

upon a positive expectation of solvency based on reasonable grounds,<sup>37</sup> or reasonable reliance on information provided by a competent and reliable person upon which an actual expectation of solvency was based.<sup>38</sup> The defences are not available for criminal insolvent trading.<sup>39</sup>

In 2000, legislation amended s 588G to allow uncommercial transactions, as defined by s 588FB,<sup>40</sup> to be treated as the incurring of a debt for the purpose of insolvent trading liability.<sup>41</sup> The outside party who becomes subject to civil penalty and criminal liability is the director, because this is actionable as insolvent trading. The liquidator may, as before, claw back the proceeds of the uncommercial transaction from the other party to the deal as a voidable transaction,<sup>42</sup> but there is no accessory liability for insolvent trading to reach that other party.

### 3 *Combating Illegal Phoenixing Bill*

In 2018, the government proposed to amend the insolvent trading provisions again via the Combating Illegal Phoenixing Bill,<sup>43</sup> and in some respects, the pattern established by the 2000 legislation is followed. Liability is framed around ‘creditor-defeating dispositions’,<sup>44</sup> as a type of voidable transaction, in

<sup>37</sup> *Corporations Act* (n 3) s 588H(2).

<sup>38</sup> *Ibid* s 588H(3).

<sup>39</sup> *Ibid* s 588H(1).

<sup>40</sup> *Ibid* s 588FB(1):

A transaction of a company is an uncommercial transaction of the company if, and only if, it may be expected that a reasonable person in the company’s circumstances would not have entered into the transaction, having regard to:

- (a) the benefits (if any) to the company of entering into the transaction; and
- (b) the detriment to the company of entering into the transaction; and
- (c) the respective benefits to other parties to the transaction of entering into it; and
- (d) any other relevant matter.

<sup>41</sup> *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) sch 1 item 3 (*‘Employee Entitlements Amendment Act’*), inserting *Corporations Act* (n 3) s 588G(1A) item 7.

<sup>42</sup> *Corporations Act* (n 3) ss 588FE, 588FF, 588FH. Voidable transactions are transactions engaged in by the company in specified circumstances prior to insolvency that may be set aside by a liquidator. The funds recovered are then available for distribution to creditors as part of the winding up of the company.

<sup>43</sup> Note the lapsing of this Bill in 2019: see above n 6.

<sup>44</sup> These are defined to be dispositions that have the effect of:

- (a) preventing the property from becoming available for the benefit of the company’s creditors in the winding-up of the company; or
- (b) hindering, or significantly delaying, the process of making the property available for the benefit of the company’s creditors in the winding-up of the company:

addition to which there are both civil penalty and criminal liability provisions,<sup>45</sup> allowing for recovery via the imposition of a compensation order.<sup>46</sup> For the civil penalty version, the test is what the officer knows, or a reasonable person in the position of the officer would know, about the creditor-defeating disposition.<sup>47</sup> This is similar to the insolvent trading equivalent, which is ‘a like position in a company in the company’s circumstances’.<sup>48</sup>

However, there are a number of significant differences between the s 588G and s 588FB combination and the Combating Illegal Phoenixing Bill mechanism. First, the criminal and civil penalty provisions proscribe officers, not just directors, from engaging in creditor-defeating dispositions.<sup>49</sup> Second, the disposition may be voided by a court or by the Australian Securities and Investments Commission (‘ASIC’), either of ASIC’s own initiative or following a request by a liquidator,<sup>50</sup> where a person has received money or property as a result of the disposition.<sup>51</sup> ASIC’s involvement here is somewhat incongruous given ASIC’s official position that if creditors believe they have unpaid invoices, they should contact the liquidator and not ASIC.<sup>52</sup> Third, standalone criminal and civil penalty provisions cover persons, most likely advisors, who procure, incite, induce, or encourage creditor-defeating dispositions.<sup>53</sup> Fourth,

Combating Illegal Phoenixing Bill (n 6) sch 1 item 11, inserting *Corporations Act* (n 3) s 588FDB(1).

<sup>45</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) ss 588GAA(1)–(2).

<sup>46</sup> *Corporations Act* (n 3) ss 1317H (civil penalty breach), 588K (criminal breach).

<sup>47</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAA(2)(b).

<sup>48</sup> *Corporations Act* (n 3) s 588G(2)(b).

<sup>49</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAA.

<sup>50</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 18, inserting *Corporations Act* (n 3) ss 588FGAA(2)–(3).

<sup>51</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 18, inserting *Corporations Act* (n 3) s 588FGAA(1).

<sup>52</sup> See Australian Securities and Investments Commission, ‘Concerns about Illegal Phoenixing’ (Information Sheet 212, May 2019) <<https://asic.gov.au/about-asic/contact-us/how-to-complain/concerns-about-illegal-phoenix-activity/>>, archived at <<https://perma.cc/F6JN-L584>>: ‘If you are trying to get invoices paid by a company that is under external administration, you should contact the liquidator or administrator and provide relevant documentation.’

<sup>53</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) ss 588GAB(1)–(2).

the fault element for the proposed criminal provision is recklessness,<sup>54</sup> which is harsher than the requirement for criminal insolvent trading of dishonesty.<sup>55</sup>

However, the apparent harshness of the proposed provisions are somewhat mitigated, and therefore the effectiveness of the legislation undermined, by the fact that none of the liabilities are available with respect to dispositions for market value.<sup>56</sup> Proving that a transaction was below market value may be difficult when the disposition is of second-hand assets for which demand may be limited. In addition, civil penalty liability is qualified by the defences that apply to insolvent trading generally,<sup>57</sup> and the insolvent trading safe harbour carve-out, introduced into the *Corporations Act* in 2017,<sup>58</sup> applies.<sup>59</sup>

#### 4 Protecting Employee Entitlements

The 2000 amendments of the *Corporations Act* that saw the introduction of the s 588G and s 588FB link described above also saw the enactment of pt 5.8A, which includes s 596AB. Under s 596AB(1):

A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of:

- (a) preventing the recovery of the entitlements of employees of a company; or
- (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

The passage of the legislation in 2000 was accompanied by a second reading speech by the Hon Joe Hockey, Minister for Financial Services and Regula-

<sup>54</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAA(1) note 2.

<sup>55</sup> *Corporations Act* (n 3) s 588G(3)(d).

<sup>56</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAA(3)(b). Certain types of dispositions initiated by external administrators are also excluded: Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) ss 588GAA(3)(a), 588GAB(3)(a). The voidable transaction action is also unavailable in similar circumstances: Combating Illegal Phoenixing Bill (n 6) sch 1 item 18, inserting *Corporations Act* (n 3) s 588FGAA(4).

<sup>57</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 items 35–44, amending *Corporations Act* (n 3) s 588H.

<sup>58</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 items 27–34, amending *Corporations Act* (n 3) ss 588GA–588GB.

<sup>59</sup> *Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017* (Cth) sch 1 item 2, inserting *Corporations Act* (n 3) s 588GA. See also Helen Anderson, ‘Shelter from the Storm: Phoenix Activity and the Safe Harbour’ (2018) 41(3) *Melbourne University Law Review* 999.

tion, stating that '[i]n the wake of a number of high profile failures of corporate employers in late 1998 and 1999, the government examined a number of options for increasing the protection for employee entitlements'.<sup>60</sup> It is likely that the legislation was an emphatic response to public disquiet over corporate restructuring in relation to Patrick Stevedores, more commonly referred to as the Waterfront Dispute, even though the corporate restructuring at Patrick's appeared to be motivated by the desire to reduce the power of the Maritime Union of Australia rather than to actually deprive employees of their entitlements.<sup>61</sup> Nonetheless, the Coalition government used the opportunity to legislate.

The legislation appeared to be a very powerful response,<sup>62</sup> and as though to demonstrate this, the format of the liability provisions was significantly different to other duty-related provisions in the *Corporations Act*. It applied to persons, not just directors or officers, and it was a criminal provision.<sup>63</sup> However, this meant that establishing the offence required the very difficult task of proving the person's intent on a subjective basis, and beyond reasonable doubt. Its recovery mechanism was only available to liquidators, and, in limited circumstances, employees themselves.<sup>64</sup> There was no civil penalty equivalent even though deficiencies with the format of pt 5.8A were identified even before the legislation was passed.<sup>65</sup> The 2000 version of s 596AB contrasts with the directors' insolvent trading liability provisions, which not only allow ASIC explicitly to seek compensation for the company in relation to the

<sup>60</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 2000, 13723 (Joe Hockey).

<sup>61</sup> See generally David Noakes, 'Dogs on the Wharves: Corporate Groups and the Waterfront Dispute' (1999) 11(1) *Australian Journal of Corporate Law* 27; Peta Spender, 'Scenes from a Wharf: Containing the Morality of Corporate Law' in Fiona Macmillan (ed), *International Corporate Law* (Hart Publishing, 2000) vol 1, 37.

<sup>62</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 2000, 13724 (Joe Hockey). Joe Hockey noted that '[t]he government is serious about protecting employee entitlements'. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 14 March 2000, 14656 (Brendan Nelson). Brendan Nelson said that '[t]his is the first tranche of the government's meaningful response to this unacceptable situation'.

<sup>63</sup> *Employee Entitlements Amendment Act* (n 41) sch 1 items 5–6, inserting *Corporations Act* (n 3) s 596AB(1), sch 3 item 145 (s 596AB(1) penalty provision).

<sup>64</sup> *Employee Entitlements Amendment Act* (n 41) sch 1 item 5, inserting *Corporations Act* (n 3) ss 596AC(2)–(3), 596AF–596AI (regarding employees' rights to recover).

<sup>65</sup> Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (Melbourne University Press, 2014) 40 nn 53–60 and accompanying text.

civil penalty breach,<sup>66</sup> but also expressly gives a criminal court power to order compensation where there has been a conviction.<sup>67</sup> Given the 2000 version of s 596AB had never been successfully used,<sup>68</sup> pt 5.8A has been the subject of reform through the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019* ('*Strengthening Protections Act*').

The newly enacted sections amend the criminal liability provision,<sup>69</sup> as well as introducing a civil penalty version of the breach,<sup>70</sup> which also allows for accessory liability.<sup>71</sup> Criminal liability under the revised s 596AB is imposed on a person if they either intentionally or recklessly enter an agreement to avoid, prevent, or significantly reduce recoverable employee entitlements, or, as an officer of the company, intentionally or recklessly cause the company to enter such an agreement.<sup>72</sup> The new civil penalty provision is also divided into provisions dealing with persons entering transactions, and officers causing the company to enter the transaction, and in both cases is imposed based on what they know, or a reasonable person in their position would know.<sup>73</sup>

## 5 Discussion

One might have expected that the Combating Illegal Phoenixing Bill and the *Strengthening Protections Act* would be very similar in format. They are both products of Treasury appearing around the same time and in response to the same sorts of political and economic challenges surrounding the use of companies to defeat legitimate creditor expectations. Perhaps the input of the Department of Jobs and Small Business in the *Strengthening Protections Act*

<sup>66</sup> *Corporations Act* (n 3) s 588J. Note there is also a general power of ASIC to seek compensation for all civil penalty breaches: at s 1317J(1).

<sup>67</sup> *Ibid* s 588K.

<sup>68</sup> See *Re Australian Road Express Pty Ltd (recs and mgrs apptd) (in liq); Connelly v Commonwealth* [2018] FCA 1429, where Moshinsky J dismissed an application to strike out the Commonwealth's claims based on s 596AB.

<sup>69</sup> *Strengthening Protections Act* (n 3) sch 1 item 8, amending *Corporations Act* (n 3) s 596AB.

<sup>70</sup> *Strengthening Protections Act* (n 3) sch 1 item 11, amending *Corporations Act* (n 3) s 596AC.

<sup>71</sup> *Strengthening Protections Act* (n 3) sch 1 item 11, amending *Corporations Act* (n 3) ss 596AC(2), (4).

<sup>72</sup> *Strengthening Protections Act* (n 3) sch 1 item 8, amending *Corporations Act* (n 3) ss 596AB(1)–(1C).

<sup>73</sup> *Strengthening Protections Act* (n 3) sch 1 item 11, amending *Corporations Act* (n 3) ss 596AC(1), (3).

resulted in some of the disparity between the bills.<sup>74</sup> However, there are a number of differences for which there are no apparent reasons.

Like the Combating Illegal Phoenixing Bill, criminal liability under the *Strengthening Protections Act* is specified not to attach to certain types of legitimate transactions during external administration;<sup>75</sup> however, there is an additional specification that a person who wishes to rely on that exception bears the evidential burden of proving it.<sup>76</sup> This requirement was queried when the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill ('Strengthening Protections Bill')<sup>77</sup> was scrutinised in the Senate.<sup>78</sup> Also unlike civil penalty liability under the Combating Illegal Phoenixing Bill, there are no stated defences for breach of the new s 596AC civil penalty liability under the *Strengthening Protections Act*.

Moreover, the criminal culpability elements required for the revised s 596AB introduced by the *Strengthening Protections Act* are in a different format to those in the Combating Illegal Phoenixing Bill, with the former providing in separate sections for intentional or reckless conduct,<sup>79</sup> and the latter solely requiring proof of recklessness.<sup>80</sup> Under the *Criminal Code*, '[i]f recklessness is a fault element for a physical element of an offence, *proof of intention*, knowledge or recklessness will satisfy that fault element'.<sup>81</sup>

In addition, the Combating Illegal Phoenixing Bill contains a standalone provision for those typically considered accessories, allowing action purely against the procurer of the creditor-defeating disposition without needing to

<sup>74</sup> The Department of Jobs and Small Business was involved in the creation of the *FEG Consultation Paper* (n 4).

<sup>75</sup> *Strengthening Protections Act* (n 3) sch 1 item 8, amending *Corporations Act* (n 3) s 596AB(2B).

<sup>76</sup> *Strengthening Protections Act* (n 3) sch 1 item 8, amending *Corporations Act* (n 3) s 596AB(2B) note.

<sup>77</sup> Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 (Cth).

<sup>78</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 12 of 2018, 17 October 2018) 1–3 [1.1]–[1.11].

<sup>79</sup> *Strengthening Protections Act* (n 3) sch 1 item 8, amending *Corporations Act* (n 3) s 596AB.

<sup>80</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAA(1). Fault elements for an offence are set out in the *Criminal Code Act 1995* (Cth) div 5 ('*Criminal Code*'). Recklessness is defined in s 5.4. Since s 588GAA(1) talks about 'conduct that results', the recklessness requirement is that '(a) he or she is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk': *Criminal Code* (n 80) s 5.4(2).

<sup>81</sup> *Criminal Code* (n 80) s 5.4(4) (emphasis added).

bring action against the main perpetrator.<sup>82</sup> In contrast, the *Strengthening Protections Act* contains a more typical accessory liability provision.<sup>83</sup> These sorts of provisions are now considered.

### B Accessory Liability

Accessory liability<sup>84</sup> for another's statutory breach is not automatic.<sup>85</sup> The DPN regime does not provide for accessory liability at all. The particular piece of legislation imposing primary or secondary liability must add a provision that provides for the liability of the accessory. The *Treasury Laws Amendment (Strengthening Corporate and Financial Penalties) Act 2019* (Cth) has now added accessory liability for all civil penalty breaches.<sup>86</sup> The format of accessory liability is reasonably consistent across different pieces of legislation,<sup>87</sup> involving both conduct elements — through action or omission — and mental elements, such as being 'knowingly concerned' in the contravention.<sup>88</sup> The types of people that have been caught by accessory liability in the current context range from directors as accessories to breaches by the company, to outsiders such as a solicitor,<sup>89</sup> an external accountant,<sup>90</sup> a human resources

<sup>82</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAB.

<sup>83</sup> *Strengthening Protections Act* (n 3) sch 1 item 11, amending *Corporations Act* (n 3) ss 596AC(2), (4).

<sup>84</sup> See generally Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015).

<sup>85</sup> Accessory liability under the general law is different. For the liability of accessories to breaches of fiduciary duty for knowing receipt and knowing assistance, see, eg, *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC). This principle was adopted by the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140 [111] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

<sup>86</sup> *Strengthening Corporate Penalties Act* (n 7) sch 1 item 116, amending *Corporations Act* (n 3) s 1317E(4). The word 'involved' in that section picks up the usual concepts of accessory liability: Revised Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) 39 [1.111].

<sup>87</sup> See, eg, *Fair Work Act* (n 2) s 550(2), which is in similar terms to *Corporations Act* (n 3) s 79.

<sup>88</sup> See, eg, *Corporations Act* (n 3) s 79:

A person is involved in a contravention if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

<sup>89</sup> *Australian Securities and Investments Commission v Somerville* (2009) 77 NSWLR 110.

manager,<sup>91</sup> payroll staff,<sup>92</sup> parties in a supply chain,<sup>93</sup> and a head franchisor.<sup>94</sup> Tax laws also contain examples of criminal accessory liability, although the grounds for liability differ somewhat.<sup>95</sup>

This would appear to make accessory liability a useful method for determining secondary liability. However, the main problem with traditional accessory liability is that it relies on a breach of something by someone else. In the case of *Fair Work Act* breaches by a company for failure to pay wages and entitlements, the strict liability of the company makes the consequent accessory liability of its controller easy to prove,<sup>96</sup> and this is likely to explain its frequent use.<sup>97</sup>

However, where establishing the primary liability of the perpetrator is more complex, as in the case of breaches of directors' duties under the *Corporations Act*, cases against accessories are likely to be rare.<sup>98</sup> In the case of sham contracting under the *Fair Work Act*, the primary liability provision is particularly problematic. The employer is not liable if they '(a) did not know[,] and (b) was not reckless as to whether[,] the contract was a contract of

<sup>90</sup> See, eg, *Fair Work Ombudsman v Blue Impression Pty Ltd* (2017) 269 IR 92 (Federal Circuit Court), *affd EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* (2018) 282 IR 86 (Full Court of the Federal Court).

<sup>91</sup> See, eg, *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* (2010) 245 FLR 242 (Federal Magistrates Court).

<sup>92</sup> See, eg, *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd* [2016] FCCA 105.

<sup>93</sup> See, eg, *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456; *Fair Work Ombudsman v OzKorea Pty Ltd* [2018] FCCA 2350.

<sup>94</sup> See, eg, *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290 ('*Yogurberry*').

<sup>95</sup> See, eg, *TAA* (n 9) which determines that 'a person ... who is concerned in, or takes part in, the management of the corporation shall be deemed to have committed the [company's] taxation offence': at s 8Y(1).

<sup>96</sup> *Fair Work Act* (n 2) ss 45, 50. These are civil remedy provisions. The Act contains the 'contravention' element for the accessory, by providing that '[a] person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision': at s 550(1).

<sup>97</sup> As at 30 June 2017, the Fair Work Ombudsman had 101 matters before the courts: Fair Work Ombudsman and Registered Organisations Commission Entity, *Annual Report 2016-17* (Report, 27 September 2017) 21. See also Natalie James, 'An Adviser's Responsibility: The Fair Work Ombudsman's Approach to Accessorial Liability' (Speech, Australian Human Resources Institute, 27 July 2016) 3; Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78, 103.

<sup>98</sup> One of the few instances of ASIC bringing accessory liability action in relation to directors' duty breaches was the *Somerville* litigation: see above n 89.

employment rather than a contract for services.<sup>99</sup> An employer who obtains expert advice on the terms of labour hire contracts may therefore escape liability for sham contracting by arguing that they believed that the arrangements were legal; the advisor who contrived the arrangements will then not be liable as an accessory because there is no contravention of the Act in which, for example, they were knowingly concerned.

Even in the case of accessory liability for breaches of employee entitlements under the *Fair Work Act*, recovery from accessories on behalf of the employees has been limited. A statement in the Explanatory Memorandum to the Bill that preceded the Act excluded directors from being liable for orders to rectify unpaid or underpaid wages,<sup>100</sup> even though such an order was plainly available to the court according to the legislation.<sup>101</sup> Courts have worked around this apparent limitation on a compensation remedy in recent years by imposing joint liability on both an insolvent corporate employer and its director in some cases.<sup>102</sup> Nonetheless, there has been more reliance since 2009 on government employee entitlements safety net schemes than was necessary because of this legislative lapse;<sup>103</sup> a relatively small penalty<sup>104</sup> for the director as accessory to the liability of an insolvent corporate employer could be seen as ‘the cost of doing business’, where their intention is to shed extensive employee entitlements and tax liabilities from the business they own and control through their company.

These deficiencies with accessory liability make standalone provisions, such as the procuring section in the Combating Illegal Phoenixing Bill,<sup>105</sup> worth considering where secondary liability is being contemplated. Another is

<sup>99</sup> *Fair Work Act* (n 2) s 357(2).

<sup>100</sup> Explanatory Memorandum, *Fair Work Bill 2008* (Cth) 332 [2177]:

[W]hile a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

<sup>101</sup> *Fair Work Act* (n 2) s 545(2)(b). See also Helen Anderson and John Howe, ‘Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the *Fair Work Act*’ (2012) 36(2) *Melbourne University Law Review* 335.

<sup>102</sup> See, eg, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482; *Fair Work Ombudsman v No Land Tax Inc* [2017] FCCA 2471.

<sup>103</sup> *EEG Consultation Paper* (n 4) 2–3.

<sup>104</sup> Corporations are penalised a maximum of five times the penalty applicable to individuals: *Fair Work Act* (n 2) s 546(2)(b).

<sup>105</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 26, inserting *Corporations Act* (n 3) s 588GAB.

the ‘aiding and abetting liability’ provisions under the *Crimes (Taxation Offences) Act 1980* (Cth): liability for the ‘accessory’ does not build upon a contravention by the company, but rather being involved in transactions that make the company unable to pay their taxes.<sup>106</sup> Apart from widening the recovery net, a standalone provision has the advantage of sending a signal to both advisors and others who are involved in the primary breach or default by the company that they may be the sole target of enforcement action. An alternative, where the goal may be to reach ‘deep pockets’, is simply to step over the primarily liable person and impose liability directly on an outside entity, based on its control capacity, whether shareholding-based or otherwise. This is now considered.

### C Multi-Company Arrangements

This section will consider five different forms, either currently legislated or drafted, of secondary liability with respect to multi-company arrangements. The format of the provisions differs markedly, although they fall into two loose categories. The first can be described as the formal legal status approach: it comprises the insolvent trading liability of holding companies and statutory pooling, which is then compared to the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) (*‘Protecting Vulnerable Workers Act’*). The second is described as the broad connections approach, comprising state payroll tax liability, which is then compared to the *Strengthening Protections Act*.

#### 1 Insolvent Trading Liability of Holding Companies

The first example of the formal legal status approach is s 588V of the *Corporations Act*, introduced in 1992,<sup>107</sup> which imposes liability on holding companies for the insolvent trading of their subsidiaries. A company is a subsidiary if, in essence, the holding company<sup>108</sup> can control who makes up the subsidiary’s

<sup>106</sup> *Crimes (Taxation Offences) Act 1980* (Cth) ss 6–7. This Act was introduced in response to the ‘bottom of the harbour’ schemes of the 1970s: Arie Freiberg, ‘Abuse of the Corporate Form: Reflections from the Bottom of the Harbour’ (1987) 10(2) *University of New South Wales Law Journal* 67, 95. See also the complex standalone promoter penalty regime for tax exploitation schemes under TAA (n 9) div 290.

<sup>107</sup> *Corporate Law Reform Act 1992* (Cth) s 111, inserting *Corporations Act* (n 3) s 588V.

<sup>108</sup> *Corporations Act* (n 3) s 9 (definition of ‘holding company’): ‘holding company, in relation to a body corporate, means a body corporate of which the first body corporate is a subsidiary’.

board of directors.<sup>109</sup> It is not enough to have effective non-majority control,<sup>110</sup> such that (for example) the holding company could not force the appointment of the directors of the subsidiary through legal action if necessary.<sup>111</sup> This allows the holding company to dictate the subsidiary's actions by putting its candidates in charge of the company, but whether or not the holding company chooses to do so in practice does not affect the status of holding company and subsidiary.

Liability is imposed on the holding company where there are reasonable grounds to suspect insolvency on the part of the subsidiary, but there is no requirement that the holding company or its directors actually know of that insolvency.<sup>112</sup> In the absence of actual knowledge, liability can be imposed according to an objective test of awareness, where

having regard to the nature and extent of the corporation's control over the company's affairs and to any other relevant circumstances, it is reasonable to expect that ... a holding company in the corporation's circumstances would be [aware that there are reasonable grounds for suspecting that the subsidiary is insolvent, or would so become insolvent] ...<sup>113</sup>

There are defences available to the holding company which largely mirror those available to directors under s 588H, discussed above.<sup>114</sup> One is that '[i]t is a defence if it is proved that the [holding company] took all reasonable steps to prevent the [subsidiary] from incurring the debt.'<sup>115</sup> Another is available where

at the time when the debt was incurred, the [holding company], and each relevant director (if any), had reasonable grounds to expect, and did expect, that the [subsidiary] was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.<sup>116</sup>

<sup>109</sup> Control of the board's composition can be achieved in one of three ways: by holding more than one half of the company's voting share capital, as boards can generally be elected by such a vote; by controlling more than half the votes; or by controlling the composition of the board. In most cases, all three tests would be satisfied: *ibid* s 46.

<sup>110</sup> *Mount Edon Gold Mines (Aust) Ltd v Burmine Ltd* (1994) 11 WAR 291, 313 (White J).

<sup>111</sup> *Corporations Act* (n 3) s 47.

<sup>112</sup> *Ibid* s 588V(1)(c).

<sup>113</sup> *Ibid* s 588V(1)(d)(ii).

<sup>114</sup> *Ibid* s 588X. See above nn 33–8 and accompanying text.

<sup>115</sup> *Ibid* s 588X(5).

<sup>116</sup> *Ibid* s 588X(2).

This defence depends upon an actual expectation of solvency based upon reasonably held grounds. This is in contrast to the liability provision, which does not depend upon actual knowledge that the debt was incurred, still less actual involvement in it being incurred, combined with only an objective test of awareness of the subsidiary's insolvency. It should be noted here that while holding company insolvent trading liability looks to the strict legal status of the companies, a controlling entity could be considered a 'shadow' director,<sup>117</sup> and therefore liable under the directors' version of insolvent trading liability, considered above.<sup>118</sup>

## 2 Pooling

The second formal legal status set of provisions relate to the pooling of the assets of insolvent group companies. These were added to the *Corporations Act* as part of the 2007 legislative amendments to insolvency laws.<sup>119</sup> A court is only able to order the aggregation of assets of all companies within an insolvent group<sup>120</sup> and their distribution across group creditors, subject to the approval of eligible creditors.<sup>121</sup> Pooling has the advantage of saving a liquidator the time-consuming and therefore expensive process of disentangling intragroup transactions and loans.

The court has to be satisfied that making the order is 'just and equitable'.<sup>122</sup> The factors to which courts will have regard include: involvement of management in the affairs of other companies in the group; the conduct of the company towards the creditors of other companies in the group; the extent to which the circumstances that lead to the pooling were attributable to the acts or omissions of other group companies; the intermingling of the affairs of the

<sup>117</sup> See, eg, *Standard Chartered Bank of Australia Ltd v Antico [Nos 1 and 2]* (1995) 38 NSWLR 290, 327–8 (Hodgson J).

<sup>118</sup> See above n 32 and accompanying text.

<sup>119</sup> See *Corporations Amendment (Insolvency) Act 2007* (Cth) sch 1 item 133, inserting *Corporations Act* (n 3) pt 5.6 div 8. It followed recommendations from the Corporations and Markets Advisory Committee ('CAMAC'): Corporations and Markets Advisory Committee, *Rehabilitating Large and Complex Enterprises in Financial Difficulties* (Report, October 2004) 96–7 [6.4.1]–[6.4.2] recommendations 40–1.

<sup>120</sup> *Corporations Act* (n 3) s 579E(1). Group is defined in s 579N, and picks up, via s 579E(1)(b)(i), the definition of 'related company' in s 50 of the Act, which in turn depends upon the s 46 definition of a 'subsidiary'.

<sup>121</sup> *Ibid* s 579E(10)(a).

<sup>122</sup> *Ibid* s 579E(1).

group companies; the advantages and disadvantages that pooling will have on the group companies; and any other relevant matter.<sup>123</sup>

This more flexible and nuanced approach of taking ‘just and equitable’ factors into account is in contrast to the lean drafting of the holding company insolvent trading provisions. Some of the pooling factors mimic the ‘laundry list’ tests of veil piercing utilised in the United States,<sup>124</sup> but it is otherwise unclear why this approach or these particular factors were chosen.<sup>125</sup> The outcome for the companies contributing to the pool is arguably fairer to them than in the case of insolvent trading because their own actual involvement is the determinative factor. On the other hand, it is clear that pooling results in the creditors of an insolvent company losing so that the creditors of another insolvent company can gain.

### 3 Protecting Vulnerable Workers Act

One of the suite of new secondary liability reforms came in 2017 from the *Protecting Vulnerable Workers Act*. It inserted new provisions into the *Fair Work Act*, imposing liability on responsible franchisors and holding companies for the underpayments by their franchisees or subsidiaries in specified circumstances.<sup>126</sup> The liability requirement for franchises — that the franchisors have a significant degree of influence or control over their business networks<sup>127</sup> — does not apply to holding companies.<sup>128</sup>

Under the *Protecting Vulnerable Workers Act*, liability for the underpayments by franchisees or subsidiaries is imposed where the responsible franchisor entity or holding company ‘knew or could reasonably be expected to have known that the contravention ... would occur’ or ‘at the time of the contravention [the responsible franchisor or holding company] knew or could reasonably be expected to have known that a contravention of the same or a

<sup>123</sup> Ibid s 579E(12).

<sup>124</sup> See, eg, Stephen M Bainbridge, ‘Abolishing Veil Piercing’ (2001) 26(3) *Journal of Corporation Law* 479, 509–11; Robert B Thompson, ‘Piercing the Corporate Veil: An Empirical Study’ (1991) 76(5) *Cornell Law Review* 1036, 1063.

<sup>125</sup> The factors are listed but their origins are not explained: Insolvency Bill Explanatory Memorandum (n 14) 71–2 [4.261]. In 1988, the Harmer Report was in favour of piercing the veil where the court was satisfied that it was just to do so: Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, 1988) vol 1, 146 [335].

<sup>126</sup> *Protecting Vulnerable Workers Act* (n 2) sch 1 item 17, inserting *Fair Work Act* (n 2) s 558B.

<sup>127</sup> *Protecting Vulnerable Workers Act* (n 2) sch 1 item 17, inserting *Fair Work Act* (n 2) s 558A(2)(b).

<sup>128</sup> The definitions of a subsidiary and a holding company are picked up from the *Corporations Act* (n 3): see above nn 108–11 and accompanying text.

similar character was likely to occur.<sup>129</sup> There is a defence to liability under s 558B(3) where the responsible franchisor entity or holding company took reasonable steps to prevent the contravention. In determining reasonable steps, the court may have regard to factors including ‘the extent to which the person had the ability to influence or control the contravening employer’s conduct’.<sup>130</sup>

This test appears to veer back towards the strictness of the holding company insolvent trading provision. The objective test of ‘could reasonably be expected to have known’ contrasts with the ‘just and equitable’ pooling factors which are unequivocally subjective. Likewise, the *Protecting Vulnerable Workers Act* in relation to the defence for holding companies uses ‘the ability to influence or control’ rather than evidence of actual control. It is only in relation to franchises that *actual* control is taken into account, and this is through the liability provision. Nonetheless, each of these formal legal status examples only impose a requirement to contribute on companies which are holding companies or, in the case of pooling, other related entities within the strictly defined group. This is in contrast to the next category of provisions.

#### 4 State Payroll Tax

The second loose category of multi-company liability provisions can be described as the broad connections approach. The liability for group payroll tax, which is a state responsibility, extends to groups arising from the common use of employees, of commonly controlled businesses, or arising from tracing of interests in corporations.<sup>131</sup> Once the group has been defined, the imposition of liability is then straightforward: for example, in Victoria, ‘[i]f a member of a group fails to pay an amount that the member is required to pay under this Act in respect of any period, every member of the group is liable jointly and severally to pay that amount to the Commissioner’.<sup>132</sup> This sort of provision has been raised as an option to address illegal phoenix activity in the past,<sup>133</sup> but has not been adopted at the federal level despite the concern

<sup>129</sup> *Protecting Vulnerable Workers Act* (n 2) sch 1 item 17, inserting *Fair Work Act* (n 2) ss 558B(1)(d), (2)(c).

<sup>130</sup> *Fair Work Act* (n 2) s 558B(4)(b).

<sup>131</sup> See, eg, *Payroll Tax Act 2007* (NSW) pt 5 div 2; *Payroll Tax Act 2007* (Vic) pt 5 (*‘Payroll Tax Act (Vic)’*). See especially at ss 71–3.

<sup>132</sup> *Payroll Tax Act* (Vic) (n 131) s 81(1).

<sup>133</sup> Treasury (Cth), ‘Action against Fraudulent Phoenix Activity’ (Proposals Paper, November 2009) 15–16 [4.2.4], noting the earlier recommendation by the Cole Royal Commission in 2003: *Royal Commission into the Building and Construction Industry* (Final Report, 2003) vol 8, 106 recommendation 101.

shown by the Australian Taxation Office ('ATO') over lost tax revenue as a result of fraud.<sup>134</sup>

## 5 Strengthening Protections Act

It is therefore interesting to note that a broad connections approach has been adopted in relation to multi-company liability in the *Strengthening Protections Act*. The consultation paper which preceded it sought comments on the adoption of contribution orders,<sup>135</sup> which require a solvent group company to contribute to the debts of an insolvent related company as part of the latter's winding up.<sup>136</sup> The *Strengthening Protections Act* itself goes further than the provisions suggested by the consultation paper. It allows for contribution orders with respect to employee entitlements unpaid in breach of s 596AB,<sup>137</sup> discussed above, and it includes as a contributing entity: both present and former group companies; controlling and controlled entities; entities that are consolidated for accounting purposes; entities that have represented to the public that they are related to one another; and two entities that 'are ... part of a collection of entities that ... functions ... as a single [economic group]'.<sup>138</sup>

Of particular note here are controlling and controlled entities. Section 50AA(1) of the *Corporations Act* provides that 'an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies'. In making this assessment about capacity, s 50AA(2) provides that

- (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
- (b) any practice or pattern of behaviour affecting the second entity's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).

<sup>134</sup> This has been evidenced particularly in relation to illegal phoenix activity: see 'Phoenix Taskforce', *Australian Government: Australian Taxation Office* (Web Page, 29 July 2019) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/>>, archived at <<https://perma.cc/RQ4P-5AQ4>>.

<sup>135</sup> *FEI Consultation Paper* (n 4) 15–17.

<sup>136</sup> *Corporations Act* (n 3) ss 50, 588ZA.

<sup>137</sup> *Strengthening Protections Act* (n 3) sch 1 item 20, inserting *Corporations Act* (n 3) s 588ZA.

<sup>138</sup> *Strengthening Protections Act* (n 3) sch 1 item 20, inserting *Corporations Act* (n 3) s 588ZA(6).

The *Corporations Act* thus recognises that entities other than holding companies may have the capacity to exercise effective control and make decisions.<sup>139</sup> It is not necessary for a company to hold the majority of shares in another company in order to exercise effective control, and a shareholding of 30% or 40% in a large company wields significant power and influence.<sup>140</sup>

As noted above, the pooling provision requires the pooling determination to be ‘just and equitable’. In the case of the *Strengthening Protections Act*, ‘just and equitable’ is a standalone requirement, with courts also looking at whether

the contributing entity has benefited, directly or indirectly, from work done by those employees; and ... that benefit exceeds the benefit that would be reasonable in the circumstances if the insolvent company and the contributing entity were dealing at arm’s length ...<sup>141</sup>

## 6 Discussion

This discussion has shown a variety of formats and scope for provisions imposing secondary liability with respect to multi-company arrangements. Two loose categories were identified: one adhering to the strict legal relationship between the two companies, and the other taking a much more pragmatic approach. A number of factors are relevant in these categories. The first is whether the relationship between the parties is formally recognised or an informal grouping. The second is whether the party to be held liable on a secondary basis is actually involved in the affairs of the company held primarily liable, or whether there is simply the potential or capacity for such involvement. The third (and related) factor is whether the court assesses secondary liability based on ‘just and equitable’ considerations, which would take into account the degree of blameworthiness of the party to be held liable. The *Strengthening Protections Act* then introduces the new notion of the benefit received by the outside party, although this may be an unstated factor in determining what is ‘just and equitable’.

The fact that the *Strengthening Protections Act* recognises informal corporate arrangements, including controlling and controlled entities, suggests a

<sup>139</sup> Status as controlled and controlling entity is relevant for consolidated accounting under the Australian Accounting Standards Board, *Consolidated Accounts* (AASB 1024, 26 May 1992), and for ch 2E of the *Corporations Act* (n 3), which deals with related party transactions.

<sup>140</sup> The percentage of ownership required to activate the protective takeover provisions of the *Corporations Act* (n 3) is 20%: at s 606(1).

<sup>141</sup> *Strengthening Protections Act* (n 3) sch 1 item 20, inserting *Corporations Act* (n 3) ss 588ZA(1)(d)–(e).

recognition that liability could be avoided through clever corporate structuring that sidesteps formal legal control arrangements. In light of this, it is curious that the legislation so recently enacted — the *Protecting Vulnerable Workers Act* — stopped at holding companies. This point will be considered further in Part V.

Despite the broad scope of accessory liability, considered above, one of the motivations for the *Protecting Vulnerable Workers Act* was a desire to go beyond accessory liability. The Explanatory Memorandum to the Protecting Vulnerable Workers Bill recognised that the existing accessory liability should cover knowing involvement in *Fair Work Act* contraventions, but pointed out that ‘turning a blind eye to contraventions is not an option under the new provisions’.<sup>142</sup> However, a successful case had already been brought against a head franchisor on the basis of accessory liability.<sup>143</sup>

That suggests that the *Protecting Vulnerable Workers Act* might have been principally a signalling exercise rather than filling a genuine legislative gap. Franchises had become notorious as a locus of underpayment of employee entitlements;<sup>144</sup> some franchises had responded that they were unprofitable and unsustainable unless workers were underpaid.<sup>145</sup> Imposing liability on the responsible franchisor seemed the appropriate response. What was absent

<sup>142</sup> Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) 6 [40] (‘Protecting Vulnerable Workers Bill Explanatory Memorandum’).

<sup>143</sup> *Yogurberry* (n 94).

<sup>144</sup> See Fair Work Ombudsman, *A Report of the Fair Work Ombudsman’s Inquiry into 7-Eleven* (Report, April 2016). For cases brought by the Fair Work Ombudsman against 7-Eleven franchisees, see, eg, *Fair Work Ombudsman v Amritsaria Four Pty Ltd* [2016] FCCA 968; *Fair Work Ombudsman v JS Top Pty Ltd* [2017] FCCA 1689; *Fair Work Ombudsman v Viplus Pty Ltd* [2017] FCCA 1669; *Fair Work Ombudsman v Mai Pty Ltd* [2016] FCCA 1481; *Fair Work Ombudsman v Hiyi Pty Ltd* [2016] FCCA 1634; *Fair Work Ombudsman v Haider Pty Ltd* [2015] FCA 2113.

<sup>145</sup> See, eg, the allegation by Caltex service station franchisees that store owners were angry with Caltex, which

should be held accountable for a franchisee system that they claim encourages wage fraud. In March, 70 Caltex store owners, workers and their family members marched through ... Sydney’s business district chanting and brandishing placards denouncing management and accusing the company of running a franchise model that is unprofitable.

Mario Christodoulou, ‘Caltex Announces \$20m Compensation Fund but Admits No Liability for Underpaid Workers’, *The Sydney Morning Herald* (online, 1 May 2017) <<http://www.smh.com.au/business/retail/caltex-announces-20m-compensation-fund-but-admits-no-liability-for-underpaid-workers-20170430-gvw1ic.html>>, archived at <<https://perma.cc/N6QP-KVFZ>>.

from the Explanatory Memorandum was any specific commentary as to why holding companies were included in that piece of legislation.

This part has shown that there is a very wide variety of ways in which secondary liability has been, and can be, imposed. While there are occasions on which the same wording might be used, the provisions are undoubtedly inconsistent and arguably incoherent. Whether that should be an issue is considered in the next part.

#### IV COHERENCE

This part considers coherence: what it means and why it is important. It stays firmly in the realm of the practical value of coherence in the current context, touching only briefly upon the vast amount of literature that deals with the issue of coherence more abstractly.<sup>146</sup> One of the leading coherence scholars is Joseph Raz, who supported 'local coherence' — 'coherence of doctrine in specific fields'<sup>147</sup> — and argued:

Coherence conveys a specific good, the value of which is undeniable. What is incoherent is unintelligible, because it is self-contradictory, fragmented, disjointed. What is coherent is intelligible, makes sense, is well-expressed, with all its bits hanging together.<sup>148</sup>

It is uncontroversial to suggest that like cases should be decided alike. The High Court has pressed for coherence in the application of statutes, but omitted to articulate what coherence means in that context.<sup>149</sup> The focus of

<sup>146</sup> For a very small sample, see generally Jaap Hage, 'Law and Coherence' (2004) 17(1) *Ratio Juris* 87; Stefano Bertea, 'The Arguments from Coherence: Analysis and Evaluation' (2005) 25(3) *Oxford Journal of Legal Studies* 369; Amalia Amaya, 'Legal Justification by Optimal Coherence' (2011) 24(3) *Ratio Juris* 304; Stephen Pethick, 'On the Entanglement of Coherence' (2014) 27(1) *Ratio Juris* 116; Donald Feaver, 'The Coherence of Multilateral Regulation' (2006) 13 *Australian International Law Journal* 33; Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales Law Journal* 392; Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *University of New South Wales Law Journal* 961.

<sup>147</sup> Joseph Raz, 'The Relevance of Coherence' (1992) 72(2) *Boston University Law Review* 273, 310. This contrasts with 'global coherence', which he rejects as impossible to reconcile with 'value pluralism', and because 'they are attempts to idealize the law out of the concreteness of politics'.

<sup>148</sup> *Ibid* 276.

<sup>149</sup> Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1167.

this paper is different: not judicial coherence in the application of statutes,<sup>150</sup> or indeed the common law,<sup>151</sup> but legislative coherence in the *drafting* of statutes. This differs from uniform laws or harmonisation, where, for example, there is to be an identical statutory formulation dealing with a common matter across all states.<sup>152</sup> Coherence in the drafting of legislation means three things here: consistent or systematic rules in so far as the subject matter allows;<sup>153</sup> intelligible drafting in the sense of being clear and easy to apply;<sup>154</sup> and drafting informed by principle, based on properly reasoned and articulated policy objectives. Above all, the underlying principles must be carefully considered and widely supported; there is no value in consistent, intelligible laws that are not achieving agreed objectives.<sup>155</sup> Teubner maintains:

As the political system takes over responsibilities for defining goals, selecting normative means, prescribing concrete actions, and implementing programs, substantive law assumes increasing importance. It is the main instrument by

<sup>150</sup> See, eg, Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42(2) *Monash University Law Review* 360; John F Manning, 'Competing Presumptions about Statutory Coherence' (2006) 74(4) *Fordham Law Review* 2009.

<sup>151</sup> See, eg, Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 492–3; Elise Bant, 'Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367.

<sup>152</sup> See, eg, 'Occupational Health and Safety Harmonisation', *Australian Government: Attorney-General's Department* (Web Page) <<https://www.ag.gov.au/industrial-relations/workplace-relations-in-australia/Pages/occupational-health-and-safety-harmonisation.aspx>>, archived at <<https://perma.cc/LB34-PAWK>>.

<sup>153</sup> Philip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77(3) *Cambridge Law Journal* 630, 633. '[I]t is law's systematic quality which serves the core rule of law values of legal certainty, predictability, formal justice and equality, in the sense of the treatment of like cases alike.'

<sup>154</sup> However, there are limits to which intelligibility should dictate the format of legislation. On the tension between legal clarity and linguistic clarity, see especially Rabeea Assy, 'Can the Law Speak Directly to Its Subjects? The Limitation of Plain Language' (2011) 38(3) *Journal of Law and Society* 376. See generally Agnes Quartey Papaio, 'Drafting Conventions, Templates and Legislative Precedents, and Their Effects on the Drafting Process and the Drafter' (2013) 15(4) *European Journal of Law Reform* 371.

<sup>155</sup> '[C]oherence is not here an independent consideration, not something to be pursued for its own sake. It is a mere by-product of the consistent application of a sound moral doctrine': Raz (n 147) 311. See also John McGarry, 'The Possibility and Value of Coherence' (2013) 34(1) *Liverpool Law Review* 17, who argues for the validity of an incoherent, moral legal system over a coherent, immoral one: at 20.

which the state modifies market-determined patterns and structures of behavior.<sup>156</sup>

This is not to suggest that imposing liability beyond the corporate actor is not a complex process. The agreed objectives may well be the result of compromise,<sup>157</sup> and politics may result in a sound policy being rejected by opposition parties. At the time of legislating, it may seem to legislators more imperative to address explicitly the individual circumstances that prompted the legislation rather than taking a more reflective approach. Undoubtedly, each law *will* reflect its unique context, but the common circumstances — in this case, designing recovery rules to deal with outside parties with respect to the primarily liable company's debts — should result in common elements being addressed in a common, policy-driven way. Through the skill of legislative drafters, principles derived from policy should guide the process and provide the missing link between 'the raw form of political will'<sup>158</sup> and the eventual, quite precise legislation.<sup>159</sup> This is not to be confused with 'principles-based drafting' or 'coherent-principles' drafting, where for example in the tax context, there was 'the conscious decision made in Australia and the UK to try to decrease the level of precision with which tax provisions are drafted, and instead to express operative rules in tax legislation as statements of general principle'.<sup>160</sup>

Coherent legislation — consistent, intelligible, and policy-based — is important for practical reasons.<sup>161</sup> Present liability rules are easier to comprehend, and future liability rules are predictable when new situations arise. Lessons are learnt about what works, and the government is spared the

<sup>156</sup> Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17(2) *Law and Society Review* 239, 254.

<sup>157</sup> See Maria Mousmouti, 'Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking' (2018) 9(3) *European Journal of Risk Regulation* 445, 446–7.

<sup>158</sup> Sales (n 153) 633.

<sup>159</sup> See also David A Marcelllo, 'The Ethics and Politics of Legislative Drafting' (1996) 70(6) *Tulane Law Review* 2437, who argues that legislative drafting is inherently political, and that drafters should minimise inappropriate political influences.

<sup>160</sup> Graeme S Cooper, 'Legislating Principles as a Remedy for Tax Complexity' [2010] (4) *British Tax Review* 334, 335.

<sup>161</sup> Sheehy and Feaver (n 146) 400–1:

[Regulatory coherence] is of considerable utility to policymakers, policy analysts, legislators, regulators and consultants such as lawyers. It enables policymakers to avoid basic problems arising from poor regulatory design including policy incoherence, systemic fragmentation and ultimately, regulatory failure.

difficulty of developing cognate laws from scratch. This allows for a quicker and cheaper legislative response to new problems. Coherence helps to avoid unintended consequences, including adverse effects on innocent parties or the economy more broadly. Tested rules based on agreed principles overcome legislative timidity, and would avoid repeats of well-worn objections. McGarry comments:

Justifying an area of law in contradictory ways seems instinctively wrong. In fact, one might argue that where there are contradictory rationales underlying a legal system they each seem less persuasive as rationales because of the inconsistency. ... In contrast, if a legal system is coherent, so that it hangs together in accordance with a single justificatory rationale, then it seems intuitively to confer a sense of legitimacy.<sup>162</sup>

Coherence should ensure that gaps which can be exploited have been identified and filled. Litigation becomes easier and cheaper where liability tests are well established, leading to greater regulator confidence about bringing actions. Finally, a coherent approach may help to curb political flourishes dealing with the scandal of the day, leaving incoherent legislation for courts, victims, and regulators to grapple with.

There are arguments against coherence too. Determining an agreed policy objective, as the basis for the development of the guiding principle, is one. Yet this does not explain the current incoherent approach, because it is the same legislature that has chosen to pursue secondary liability in recently enacted or draft legislation. Another reason to reject coherence is where it may result in less flexibility, but this objection is only valid where principles are expressed too narrowly or rigidly. Another fear is that to maintain coherence, courts may interpret laws too conservatively, or legislatures might be reluctant to update laws, where changing attitudes over time require a more liberal approach.<sup>163</sup> However, in my view, none of these present insurmountable obstacles, nor do they provide adequate justifications to reject the benefits of coherence.

## V ANALYSIS

Secondary liability intuitively makes sense as a device to discourage ‘sharp corporate practices’<sup>164</sup> by allowing corporate creditors to recover directly or

<sup>162</sup> McGarry (n 155) 21.

<sup>163</sup> McGarry (n 155) 21; Amaya (n 146) 312.

<sup>164</sup> *FEQ Consultation Paper* (n 4) 4.

indirectly from someone other than the company with which they have been dealing. It helps to deal with the idea that a small penalty under either corporations or labour legislation is simply the ‘cost of doing business.’<sup>165</sup> However, because it has the potential to undermine one of the essential rationales for incorporating a limited liability company — the protection of the company’s shareholders from its debts<sup>166</sup> — it must be used sparingly and appropriately. Balance is essential.

Part III showed that the federal and state governments have legislated for secondary liability in quite different ways in relation to relatively similar situations. Part IV argued that there are many good reasons to adopt a coherent approach to legislation. If this argument is accepted, then coherence requires that similar situations have similar outcomes. If there is to be a different approach to a particular situation, it should be justified by principle. This part has two aims — first, to comment further on some of the variables that are relevant to the imposition of secondary liability, in the process highlighting the arguably inappropriate inconsistency of the provisions discussed in Part III; and second, to show how consistency and coherence might be achieved.

The development of principles comes from working out how to operationalise the government’s objectives. An example is the protection of revenue as a vital government objective. From this might be derived a principle that ‘liability should be as wide as possible’. This is then implemented through variables of the kind discussed in Part II. In designating the liable party, rather than using the word ‘director’, the word ‘officer’ could be used; rather than confining certain kinds of liabilities to companies, their related economic groupings could be specified.

Two other examples can be given. If the government’s objective is to protect the entitlements of employees, the principle might become ‘have wide enforcement by those with an interest in employee rights’, which is then implemented through the answer to the question of who can bring enforcement action. This could then include employees themselves, trade unions, the Fair Work Ombudsman (‘FWO’), and the department administering the FEG.

<sup>165</sup> Recall the passage of the *Strengthening Corporate Penalties Act* (n 7) which has not only increased penalties but also allows for a court to order the relinquishment of benefits: *Corporations Act* (n 3) s 1317GAB. This may go some way to addressing the ‘cost of doing business’ argument.

<sup>166</sup> See the discussion of ‘owner shielding’ in John Armour et al, ‘What Is Corporate Law?’ in Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press, 3<sup>rd</sup> ed, 2017) 1, 9.

If the government's objective is to target advisors who counsel fraudulent schemes, then the principle becomes 'widen the net to include advisors', and this could be implemented by either standalone or traditional accessory liability provisions.

This is *not* to assert that — in any of these examples — the law should necessarily be changed that way, even though there is precedent for every one of these types of provision. Rather, it seeks to describe *how* a coherent set of laws can be developed. If the particular circumstances dictate that a certain principle is inappropriate, then deviation can be permitted. But the articulation of principles — connecting the government's broad objectives with the legislation that seeks to achieve those objectives — can be the mechanism by which coherent laws are achieved. Once given the government's imprimatur, they become firm guidelines for future legislation. Some of the variables identified in Part II and exemplified in Part III are now considered.

### A Important Variables and Present Inconsistencies

#### 1 Formal Status of the Outside Party to Be Held Liable

Governments are likely to want laws that send a clear message of deterrence, and are efficient and effective in terms of detection and enforcement. 'Bright line' rules are therefore likely to be attractive. To ensure a message of deterrence is received, it is helpful if the recipient knows that it is intended for them. Tests that look at externally visible indicators also assist with both detection and enforcement. For example, the status of a holding company can be ascertained by looking at shareholding, whereas the capacity to control is more difficult to determine, and actual control harder still.

Nonetheless, legislating to impose liability only on holding companies, for example, may well encourage those determined to abuse corporate structures towards arrangements which do not come within the holding/subsidiary requirements of s 46.<sup>167</sup> This makes the *Protecting Vulnerable Workers Act* provisions susceptible to abuse in a way that the *Strengthening Protections Act* is not. To the extent that the *Protecting Vulnerable Workers Act* was designed to act as a signalling exercise, that signal could have been sent more broadly. The *Strengthening Protections Act* has certainly done so in the wide definition of contribution group.

<sup>167</sup> See above nn 108–11 and accompanying text.

In both cases, employees are the target of the abuse, so it is difficult to see a justification for the narrower approach.<sup>168</sup> It can be possible to overcome contrived arrangements, for example, where a controlling entity holds 49% of the shares of another company and ‘calls the shots’, because ‘shadow director’ liability applies where one company is accustomed to act in accordance with the instructions or wishes of another company (or individual). This enlivens the director liability provisions in both corporate and taxation law discussed in Part III. However, because directors as liable parties are not included in the *Protecting Vulnerable Workers Act*, liability there could still be avoided by structuring shareholdings to avoid holding company status. Certainly, a controlling entity as a shadow director could face accessory liability for a civil remedy breach,<sup>169</sup> but this could already be achieved under existing provisions by virtue of the employer company’s default.

It would not be surprising to find that the reach of the law is at its widest where the government’s own revenue is at risk,<sup>170</sup> but this is only true with respect to some pieces of legislation. It is unclear why the federal government has not used, with regard to employment-related tax obligations, the same broad connections approach as the states do with payroll tax where economic groupings of companies are concerned.<sup>171</sup>

In terms of ease of detection and enforcement, the status of a formally appointed director is easier to ascertain than that of an officer, where ‘officer’ is defined to include ‘a person: (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or (ii) who has the capacity to affect significantly the corporation’s financial standing’.<sup>172</sup> Yet both the *Strengthening Protections Act* and the

<sup>168</sup> In the context of UK legislation dealing with ‘associated employers’ based on the equivalent of holding company status in Australia, Collins describes this as ‘an unsatisfactory result [flowing] from the unnecessary obsession with patterns of share ownership’: Hugh Collins, ‘Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53(6) *Modern Law Review* 731, 740. He labels some multi-company arrangements as ‘complex economic organisations’, which are ‘bound together by ties of ownership, contract and authority [which] may in reality comprise some form of team effort, which could easily be integrated within one capital unit, and may therefore be analysed from the point of view of institutional economics as quasi-firms’: at 734.

<sup>169</sup> *Fair Work Act* (n 2) s 550(2). See above Part III(B) for a general discussion of accessory liability.

<sup>170</sup> See the powers of the Commissioner of Taxation: *TAA* (n 9) pt 4-15. See also Sylvia Villios, ‘Tax Collection, Recovery and Enforcement Issues for Insolvent Entities’ (2016) 31(3) *Australian Tax Forum* 425.

<sup>171</sup> See above n 131 and accompanying text.

<sup>172</sup> *Corporations Act* (n 3) s 9 (definition of ‘officer’ para (b)).

Combating Illegal Phoenixing Bill have chosen to cover officers in liability provisions. This is sensible. A company's directors are also included in the definition of an officer.<sup>173</sup>

This is something to be considered by the government in reforming the DPN regime. The issuance of a DPN is done by the ATO, once it becomes aware that the relevant taxes and superannuation have not been remitted. The ATO then simply needs to search ASIC's records to determine the names of the defaulting company's directors. The names of officers are not listed with ASIC, nor are the connections of the defaulting company with others. But should an officer cross the path of those tasked with detection or enforcement, the provision is not available against them.<sup>174</sup> Reforming the DPN to date has focused on the amounts to be recovered, with superannuation included in 2012<sup>175</sup> — and now GST to be included<sup>176</sup> — rather than the party from whom recovery is sought. Where directors are impecunious, deliberately or otherwise, it would be beneficial to reach officers too. Broadening its reach could easily be justified by the important objective of protecting government revenue.

## 2 *The Identity of the Enforcer and Their Methods*

If the objective of a piece of legislation is to provide a quick and cheap method of imposing liability, then an administrative order is an appropriate method of enforcement. This is illustrated by the DPN regime described above. However, where information about a person's behaviour must be ascertained or the circumstances surrounding a transaction require considerable investigation, this narrow approach is arguably not justified. It was noted earlier that ASIC would be given administrative powers to void creditor-defeating dispositions under the Combating Illegal Phoenixing Bill.<sup>177</sup> This is presumably meant to assist ASIC with enforcement, saving it from the necessity of bringing court proceedings. However, ASIC cannot exercise that power if there is a reasonable possibility that market value consideration was given for the disposition.<sup>178</sup> This is quite different to the basis upon which a DPN can be issued, and a considerable amount of externally held information would have to be

<sup>173</sup> Ibid (definition of 'officer' para (a)).

<sup>174</sup> See TAA (n 9) s 269-15 (directors' obligations).

<sup>175</sup> See above n 27 and accompanying text.

<sup>176</sup> Combating Illegal Phoenixing Bill (n 6) sch 3.

<sup>177</sup> See above nn 50-1 and accompanying text.

<sup>178</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 items 17, 18, inserting *Corporations Act* (n 3) ss 588FG(9), 588FGAA(4). See also above n 56 and accompanying text.

gathered by ASIC before it exercises its creditor-defeating disposition avoidance power. This excites the suspicion that this power will rarely, if ever, be exercised, and the motivation for its inclusion is purely signalling. However, the signal is lost if the power is never used.

This brings the discussion to the types of court enforcement that should be considered. The present s 596AB shows that a purely criminal provision, coupled with a civil action available to a possibly under-resourced liquidator, is not effective, no matter how strongly the signal of government disapproval of the behaviour was initially sent. This may be a salutary lesson for those seeking to legislate ‘wage theft’ as a criminal provision.<sup>179</sup> This is not to suggest that there should not be a criminal version of an action where there is clear dishonesty or even recklessness; what is needed, however, for cases that cannot be proved to the criminal standard, is a civil penalty equivalent that allows ASIC to seek a compensation remedy on behalf of the affected party. Civil rights of recovery, considered further below, add to the armoury where a regulator is not interested in taking action.

The *Strengthening Protections Act* is noteworthy in terms of the parties who may apply to the court for an employee entitlements contribution order. Even though the provisions will be located in the *Corporations Act*, ASIC is not named; the only parties who may apply are the company’s liquidator, the Commissioner of Taxation, the FWO, and the Secretary of the Department administering the FEG.<sup>180</sup> When the Bill was passed by the Senate, trade unions were added to this list.<sup>181</sup> The omission of ASIC has not been explained.<sup>182</sup> What is beneficial here is the varied list of possible enforcers, rather than enforcement being confined to the liquidator and ASIC. Given the apparent objective is to ensure that *someone* brings an action (depending on who has the most motivation in particular circumstances), it would be useful to see rights of action given to employees themselves and their representatives, as occurs under the *Fair Work Act*.<sup>183</sup>

<sup>179</sup> See, eg, Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia* (Report, October 2018) 9.

<sup>180</sup> *Strengthening Protections Act* (n 3) sch 1 item 20, inserting *Corporations Act* (n 3) s 588ZB(1).

<sup>181</sup> Schedule of Amendments Made by the Senate, Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 (Cth). See, eg, *Corporations Act* (n 3) s 596AF(1A).

<sup>182</sup> See Explanatory Memorandum, Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 (Cth) 48 [3.49] (‘Strengthening Protections Bill Explanatory Memorandum’).

<sup>183</sup> *Fair Work Act* (n 2) s 539.

This same logic can be applied in the other direction with respect to enforcement of provisions under the *Fair Work Act*. Where the company itself has the right to sue, the liquidator may utilise those rights and recover on behalf of the company's creditors.<sup>184</sup> However, *Fair Work Act* rights to bring action are constrained by s 539 of that Act and include neither the employer company nor its external administrator, although the employee victim or their 'employee organisation' are covered. Liquidators are often the ones with closest access to what has taken place within defaulting companies. Provisions which rely upon complex circumstances being proven rely upon the information that liquidators provide.

### 3 Treatment of Accessories

Corporate arrangements that are designed to sidestep a particular company's legal liability may well be designed and even implemented by advisors.<sup>185</sup> This makes it likely that a government objective would be to deter the advisors, including through the imposition of liability.<sup>186</sup> In the case of illegal phoenix activity, this is clear from the Combating Illegal Phoenixing Bill, which has a powerful 'procuring' provision that does not rely upon the primary debtor or wrongdoer's own liability.<sup>187</sup> In addition, as Part III(B) explained, there are accessory liability provisions with respect to breaches of directors' duties and to strict liability *Fair Work Act* contraventions, both of which are useful against outside parties who meet the involvement requirements.

But there are significant gaps. It is curious that the DPN regime has not been amended to include accessory liability for advisors, nor does a DPN reach another corporate entity, such as a phoenix company, that is involved in the directors' default. Nor are the directors of holding companies personally liable for insolvent trading, even where their own actions and knowledge are the basis of the holding company's liability. These are missed opportunities for both recovery and deterrence.

The civil penalty provision under the *Strengthening Protections Act* does include an accessory liability provision, but it depends upon the establishment

<sup>184</sup> *Corporations Act* (n 3) s 477(2)(a).

<sup>185</sup> This was illustrated in the *Somerville* cases: see above n 89.

<sup>186</sup> See the comments about pre-insolvency advisors and their involvement in abuse of corporate structures: 'Illegal Phoenixing Activity', *Australian Securities and Investments Commission* (Web Page, 3 July 2018) <<https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/>>, archived at <<https://perma.cc/V939-W5EL>>.

<sup>187</sup> Explanatory Memorandum, Treasury Laws Amendment (Combating Illegal Phoenixing Bill) 2019 (Cth) 28–9 [2.80]–[2.82] ('Combating Illegal Phoenixing Bill Explanatory Memorandum'). Note that this is in the context of the 2019 Bill: see above n 6.

of liability of the primarily liable party.<sup>188</sup> On the other hand, the *Strengthening Protections Act* does impose both criminal and civil penalty liability on the other party in the contravening transaction,<sup>189</sup> whereas the other party to a creditor-defeating disposition under the Combating Illegal Phoenixing Bill is only subject to an order to void that disposition.<sup>190</sup> Once again, the reason for the discrepancies are not explained.

#### 4 *The Tests of Liability*

While a government objective may be to send a strong message of deterrence, particularly to protect the vulnerable, it is equally an objective that the law is crafted in such a way that regulators are willing to bring proceedings, and that it results in a fair outcome. As noted above, the previous version of s 596AB which requires proof of an intention — ascertained subjectively and to the criminal standard — has never led to a prosecution.

There are two trends in crafting liability provisions discernible from the examples in Part III. The first is the objective/subjective combination that sees the knowledge or awareness of a reasonable person placed into the circumstances in which the potential defendant finds themselves. The latter may involve the degree of control exercised, or the role played by the person, or the company's particular circumstances at the time something happened. Harshness may or may not be ameliorated by defences, although defences (if they exist) are likely to be limited.

However, in determining appropriate tests, the capacity for control is not the same as fault. A director of a company may have the capacity to control the company but may in fact not exercise it, leaving the task to other directors or to no-one at all. This neglect is a fault of its own kind because it amounts to a breach of the director's duty of care.<sup>191</sup> But where the capacity to control is in the hands of a holding company as a shareholder, there is no equivalent duty to become involved in the management of the subsidiary.

The second approach is the use of 'just and equitable'. This allows the court to throw a great deal more into the decision-making mix. It is likely to involve all of the factors that inform the first approach, but it has the advantage that it looks beyond the perspective of the wrongdoer. A 'just and equitable' ap-

<sup>188</sup> *Strengthening Protections Act* (n 3) sch 1 item 11, amending *Corporations Act* (n 3) s 596AC.

<sup>189</sup> *Strengthening Protections Act* (n 3) sch 1 items 8, 11, amending *Corporations Act* (n 3) ss 598AB(1), (1A) (criminal), 596AC(1) (civil penalty).

<sup>190</sup> Combating Illegal Phoenixing Bill (n 6) sch 1 item 13, inserting *Corporations Act* (n 3) s 588FE(6B).

<sup>191</sup> *Corporations Act* (n 3) s 180.

proach is useful in taking into account the effect of liability on innocent parties. These include the shareholders and creditors of the party held liable, who may have no connection whatsoever to any wrongdoing or neglect.

This analysis might lead to the conclusion that the first approach is the better one when imposing liability on individuals, and the latter is better where liability is imposed on companies. Some of the examples fit this pattern, including insolvent trading under s 588G and the Combating Illegal Phoenixing Bill as examples of the first, and payroll tax pooling and contribution orders under the *Strengthening Protections Act* as examples of the second. The defence of ‘reasonable steps’ under the *Protecting Vulnerable Workers Act* plays a similar role in allowing consideration of multiple factors.<sup>192</sup> But many do not follow the pattern, as a result of which the creditors and shareholders of holding companies held liable for insolvent trading by subsidiaries under s 588V bear that cost indirectly. A wider test seems appropriate in achieving fairness without increasing the complexity of determining the issue, given that the civil action by the liquidator is already before a court.

### B How to Achieve Coherence with Secondary Liability

The preceding section identified factors which are relevant in imposing secondary liability and showed the disparity between provisions dealing with similar situations. If it is accepted that these factors should be considered when new suggestions for secondary liability arise, and that the goal of coherence should inform legislative drafting, then a method of achieving this needs to be determined. This is not to suggest that identical provisions are enacted; rather, that legislators look to a set of guidelines,<sup>193</sup> informed by principles derived from a consideration of the factors set out above. A body such as the Australian Law Reform Commission,<sup>194</sup> or even a revived Corpo-

<sup>192</sup> *Protecting Vulnerable Workers Act* (n 2) sch 1 item 17, inserting *Fair Work Act* (n 2) ss 558B(3)–(5).

<sup>193</sup> These are not to be confused with general legislative drafting guidelines, such as the ones issued by the Department of the Prime Minister and Cabinet, or other information provided by the Office of Parliamentary Counsel or the Attorney-General’s Department: see, eg, Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2017).

<sup>194</sup> See Australian Law Reform Commission, *Corporate Plan 2018–22* (23 July 2018) 1:

The ALRC is an independent statutory agency for law reform, which is respected by government and the community as a centre of excellence. It sits within the Attorney-General’s portfolio and supports the Attorney-General and the Australian Government by providing evidenced-based research to inform government decisions about the development, reform and harmonisation of Australian laws and related processes.

rations and Markets Advisory Committee,<sup>195</sup> could be suitable to undertake this task.

An excellent example of the articulation of principles can be found in the self-explanatory *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.<sup>196</sup> The principle is stated, followed by a discussion which explains why the particular approach has been taken. Useful examples are then provided. The Guide, which operates with regard to federal government legislation, was developed from a variety of sources, including parliamentary committees and law reform bodies.<sup>197</sup> Conformity is not mandated; however, the Senate Standing Committee on the Scrutiny of Bills is advised where provisions deviate from the Guide, such that drafters are advised that ‘provisions that depart from the principles in this Guide should be carefully explained in the explanatory material’.<sup>198</sup>

Another example of guidance to achieving legislative coherence is the Australian Government Charging Framework.<sup>199</sup> This is a set of principles ‘to improve consistency of charging activities and help determine when it is appropriate to charge for a government activity’.<sup>200</sup> It applies to those entities ‘where the Finance Minister has made a “government policy order” that applies the Charging Framework to them’.<sup>201</sup>

Finally, legislative guidance could be achieved through legislation itself. An example concerns superannuation. It was a recommendation of the Financial System Inquiry in 2014 that the government ‘[s]eek broad political agreement for, and enshrine in legislation, the objectives of the superannuation system and report publicly on how policy proposals are consistent with achieving these objectives over the long term’.<sup>202</sup> In response, the Coalition Government

<sup>195</sup> CAMAC was set up in 1989 — as part of the legislative package that established a national scheme for corporations and financial markets — to provide a source of independent advice to the responsible minister on the administration of the relevant laws or changes to them: see ‘Welcome to CAMAC’, *Australian Government: Corporations and Markets Advisory Committee* (Web Page) <<http://www.camac.gov.au/>>, archived at <<https://perma.cc/M5D6-WL7A>>.

<sup>196</sup> Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011).

<sup>197</sup> *Ibid.* 6.

<sup>198</sup> *Ibid.*

<sup>199</sup> ‘Australian Government Charging Framework’, *Australian Government: Department of Finance* (Web Page, 15 May 2017) <<https://www.finance.gov.au/resource-management/charging-framework/>>, archived at <<https://perma.cc/BSJ5-MFMC>>.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.* See also *Public Governance, Performance and Accountability Act 2013* (Cth).

<sup>202</sup> *Financial System Inquiry* (Final Report, 28 November 2014) 95 recommendation 9.

introduced the Superannuation (Objective) Bill 2016 (Cth) to establish ‘a legislative framework to guide the development of future superannuation policy’, and to enshrine ‘primary ... and subsidiary objectives of the superannuation system in legislation.’<sup>203</sup> The legislation was passed through the House of Representatives in late 2016 but stalled in the Senate as Parliament reached the end of its 2016 sittings.<sup>204</sup> It was not revived in 2017.

At present, there is the Australian Government Guide to Regulation, issued by the Department of the Prime Minister and Cabinet, which ‘is intended to be read by every member of the Australian Public Service involved in policy making — from the most junior member of the policy team to the departmental secretary.’<sup>205</sup> It states that:

Regulation can have benefits, but businesses, community organisations and families pay the price of poor regulation.

...

Policy makers must seek practical solutions, balancing risk with the need for regulatory frameworks that support a stronger, more productive and diverse economy where innovation, investment and jobs are created.<sup>206</sup>

A regulation impact statement (‘RIS’) is required for every policy decision by every government agency.<sup>207</sup> The Guide is primarily geared towards reducing regulation overall, as it states that ‘[t]he most important policy option [is] the

<sup>203</sup> Explanatory Memorandum, Superannuation (Objective) Bill 2016 (Cth) 25 [2.1] (‘Superannuation (Objective) Bill Explanatory Memorandum’). The Superannuation (Objective) Bill 2016 (Cth) further requires that any new bills and regulations relating to superannuation must be accompanied by a statement of compatibility with the stated objectives: at cl 6. The Explanatory Memorandum clarifies that a

Bill or regulation will relate to superannuation if it amends a law that is relevant to superannuation, irrespective of whether the relevant instrument being amended predominantly relates to superannuation (such as the *Superannuation Guarantee (Administration) Act 1992*) or merely contains some provisions that deal with superannuation (such as the *Taxation Administration Regulations 1976* or the *Fair Work Act 2009*).

Superannuation (Objective) Bill Explanatory Memorandum (n 203) 30 [2.37].

<sup>204</sup> ‘Superannuation (Objective) Bill 2016’, *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5762](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5762)>, archived at <<https://perma.cc/KE4J-ASSN>>.

<sup>205</sup> Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (March 2014). This statement is found on the Title Page.

<sup>206</sup> *Ibid* i.

<sup>207</sup> *Ibid* 4, 8.

no-regulation option<sup>208</sup> and '[t]he cost burden of new regulation must be fully offset by reductions in existing regulatory burden.'<sup>209</sup> Nonetheless, the arguments put forward in this paper are consistent with the government's regulatory intentions, as the Guide requires '[p]olicy makers [to] consult with each other to avoid creating cumulative or overlapping regulatory burdens.'<sup>210</sup> Despite the highly prescriptive nature of the Guide, compliance with it appears to be somewhat tokenistic. In relation to the *Protecting Vulnerable Workers Act*, earlier reports on labour abuses were taken as the equivalent of an RIS.<sup>211</sup> There has been no RIS issued for the Combating Illegal Phoenixing Bill,<sup>212</sup> and a brief Strengthening Protections Bill RIS states bluntly that '[i]t will not impose costs on the majority of businesses, company directors and officers, and other persons who operate legitimately, as the behaviour of these entities and people is not within the scope of the reforms.'<sup>213</sup>

## VI CONCLUSION

This paper has examined a range of provisions imposing secondary liability on a variety of outside parties for two reasons: first, to discern what factors were important to the legislature; and second, to show that there is a lack of coherence in provisions which deal with fundamentally similar issues.

Coherence is useful for many reasons. Coherent legislation sends a clear and intelligible message to the regulated population. Tried and tested methods of achieving specific legislative objectives avoid unnecessary loopholes and unintended consequences, and allow for swift action by governments where a new but similar issue arises. Litigation is easier and cheaper if well-established principles are used, and this should lead to better enforcement. The current Australian Government Guide to Regulation, while consistent with the conclusions in this paper, does not go far enough to ensure that legislation is coherent.

Governments are likely to perceive the need to legislate further to address losses caused by corporate structuring and contracting. Current employment-

<sup>208</sup> Ibid 27.

<sup>209</sup> Ibid 2.

<sup>210</sup> Ibid. See especially the discussion on cross-agency consultation: at 44. See generally the discussion on consultation: at 39–45.

<sup>211</sup> Protecting Vulnerable Workers Bill Explanatory Memorandum (n 142) i.

<sup>212</sup> However, ch 1 of the explanatory memorandum to the Bill may serve the same purpose: see Combating Illegal Phoenixing Bill Explanatory Memorandum (n 187) 5–9.

<sup>213</sup> Strengthening Protections Bill Explanatory Memorandum (n 182) 3.

related challenges include regulating the gig economy, labour hire, supply chains, and modern slavery.<sup>214</sup> Illegal phoenix activity is arguably not addressed adequately by the Combating Illegal Phoenixing Bill, and Treasury's Black Economy Taskforce is currently consulting on tightening sham contracting provisions.<sup>215</sup> However, coherence involves more than consistency for its own sake. Legislative principles, based on properly articulated policy objectives, are the foundation of coherent secondary liability provisions. It is for the federal government to consider what these objectives and principles should be, and to set them down in a manner that both federal and state legislatures can refer to.

<sup>214</sup> See, eg, Attorney-General's Department (Cth), 'Modern Slavery in Supply Chains Reporting Requirement' (Consultation Paper, 16 August 2017); Victorian Government, 'Inquiry into the Victorian On-Demand Workforce' (Background Paper, 20 December 2018).

<sup>215</sup> Treasury (Cth), 'Improving Black Economy Enforcement and Offences' (Consultation Paper, 22 November 2018) 14–15 [3.7].