

MEDIA RELEASE

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States fail the reform test again, say directors

Most Australian states are continuing to fail badly when it comes to removing the excessive liability burden imposed on company directors, damaging business investment and job creation, according to the Boardroom Burden Report Card for 2010.

The report card (BBRC), developed by the Australian Institute of Company Directors, measures the 'business-friendliness' of legal regimes on a state-by-state basis. It rates them in terms of the content of laws imposing liability on directors, the number of those laws in operation in each state and territory and the procedural fairness with which they are administered.

The latest report card shows that only three – ACT, Tasmania and Victoria – received better than a 'pass' mark, while five failed. Only ACT achieved even a "credit" mark.

Queensland was again "bottom of the class" this year, with a mark of just 18 per cent. Western Australia, South Australia and New South Wales also did poorly, all falling well short of a pass, as they did in the last report card in 2009.

And while the overall number of provisions in State and Territory legislation imposing personal liability on directors fell when compared with 2009, it remained intolerably high at 708. Western Australia had the greatest number of laws with 139, followed closely by New South Wales with 134 and Queensland with 106.

"This latest report card clearly exposes the worst states to do business in Australia from a director liability perspective," Australian Institute of Company Directors Chief Executive, John Colvin, said.

"Any business looking to establish a headquarters or locate a new project in Australia, thereby expanding investment and jobs, should take this ranking into account."

"They should ask themselves: do we want to do business in a state that manages a mark of just 18 per cent or one that gets 70 out of 100? Mr Colvin said.

"The choice is obvious."

"So the report card comes with a important message for all governments, especially for those at the 'bottom of the class' – they must do the hard work of reforming liability legislation, because the director liability burden affects business decision-making and can have an impact on where companies invest and create new jobs."

"All state and territory governments should be looking to reform their director liability laws along the lines already agreed by the Ministerial Council for Corporations (MINCO) and the Council of Australian Governments (COAG)."

"However, to this point, progress on this reform appears to have been non-existent, which is very disappointing for the director and business community."

AUSTRALIAN INSTITUTE of COMPANY DIRECTORS

The results of the latest report card reinforce the message of a recent survey by the Australian Institute of Company Directors which showed that the burden of legal risk and regulatory compliance being confronted by Australian directors is having a detrimental impact on business decision-making, including the location of new investment projects and job creation.

“The states are simply failing the reform test on this issue, to the detriment of not just their states and territories but the whole Australian economy,” Mr Colvin said.

“Governments need to get on with reform or business will vote with its feet.”

Mr Colvin said that with 708 provisions in state and territory laws imposing personal liability on individual directors for corporate misconduct, the burden on directors had become too great, especially when it is considered that they are also dealing with Commonwealth legislation like the Corporations Act, the Trade Practices Act and the tax laws.

“These provisions mean that directors are liable simply because they are a director, even where they may not have had any personal involvement in a breach,” he said.

“In some states and under some legislation the onus of proof is reversed, removing the presumption of innocence, and there are very narrow legal defences and limited rights of appeal.”

The latest BBRC shows that Western Australia, Tasmania, Northern Territory, South Australia and Queensland all scored a “fail” on the measure assessing the substantive content of laws. This measure deducted marks where laws involved a reverse onus of proof and ‘deemed liability’ or had no business judgement rule defences and added back marks where other defences apply.

NSW and Queensland did very poorly on the measure of procedural fairness when directors are prosecuted under a director liability provision. This measure was based on the two most commonly prosecuted pieces of legislation in this area, the Environmental Protection Act and the Occupational Health and Safety Act in each state and territory.

The BBRC was based on research by Minter Ellison.

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The **Australian Institute of Company Directors** provides education, information and advocacy for company directors Australia wide, with offices in each state to cater for 27,800 members. Our members work in diverse corporations such as small-to-medium enterprises, the ASX200 corporations, public sector organisations, not-for-profit companies, large private companies and smaller private family concerns.

Boardroom Burden Report Card 2010

Rank	State/Territory	Substantive Measure Score out of 50	Weight Measure Score out of 30	Procedural Measure Score out of 20	Total	Revised 2009 Total Score
1	Australian Capital Territory	29.70	25	15	69.70	71.92
2	Tasmania	15.50	20	20	55.50	48.96
3	Victoria	27.10	10	15	52.10	52.21
4	Northern Territory	13.05	15	15	43.05	44.30
5	Western Australia	18.85	0	15	33.85	34.08
6	South Australia	8.15	10	15	33.15	26.97
7	New South Wales	25.35	0	5	30.35	31.08
8	Queensland	8.05	5	5	18.05	13.04