

Environment & Planning Alert

Changes to personal liability for environmental offences in NSW

December 2012

Outline

Important changes assented to on 26 November 2012 are set to reduce the overall liability of directors and managers for offences in NSW. These changes will be well received by directors and managers, who should become familiar with the new personal liability provisions and ensure that good corporate governance remains in place.

COAG agreement

At the Council of Australian Government's (COAG) meeting in July 2012, it was agreed that the 'Personal Liability for Corporate Fault – Guidelines for applying the COAG Principles' would be applied by all jurisdictions when reviewing existing laws and drafting new ones. The guidelines can be viewed [here](#).

The guidelines were developed to facilitate a consistent national approach to the imposition of personal criminal liability for directors and managers arising from a corporate offence. In short, the guidelines seek to ensure that directors and managers do not face an unduly high level of personal liability for their company's crime.

NSW response

The NSW Government announced in July 2012, that it would change various NSW laws to reduce the number of provisions imposing criminal liability on directors and managers for corporate offences.

To realise the changes, the *Miscellaneous Acts Amendment (Directors' Liability) Bill 2012* (NSW) was introduced into the NSW Parliament on 17 October 2012 and was passed without amendment on 20 November 2012.

The key guiding principles in the amending Act are that:

- A director or manager is not criminally liable for an offence committed by their company, unless a specific legislative provision creates that liability; and
- A director or manager may be prosecuted as an accessory to the commission of an offence by their company (eg. for aiding or abetting the company's offence) (**Accessory Liability**).

Overall, the changes reduce the number of offences to which personal liability applies from more than 1000 to around 150. Similar reforms are under way in other jurisdictions.

Which laws are affected?

More than 45 NSW laws (predominantly environmental) are to be amended, including the:

- *Building and Construction Industry Long Service Payments Act 1986*
- *Contaminated Land Management Act 1997* (**CLM Act**)
- *Conveyancers Licensing Act 2003*
- *Environmentally Hazardous Chemicals Act 1985*
- *Explosives Act 2003*

- *Forestry Act 1916*
- *Gaming Machines Act 2001*
- *Heritage Act 1977*
- *Landlord and Tenant (Amendment) Act 1948*
- *Liquor Act 2007*
- *Mining Act 1992*
- *National Parks and Wildlife Act 1974*
- *Native Vegetation Act 2003*
- *Pesticides Act 1999*
- *Protection of the Environment Operations Act 1997 (POEO Act)*
- *Sydney Water Catchment Management Act 1998*
- *Threatened Species Conservation Act 1995*
- *Unlawful Gambling Act 1998*
- *Valuers Act 2003*
- *Water Industry Competition Act 2006*
- *Workplace Injury Management and Workers Compensation Act 1998*

Types of personal liability

Various laws impose different types of personal liability on directors and managers for their company's offence, including:

- Type 1 liability: where the prosecutor has to prove every element of the offence, including that the director or manager failed to take all reasonable steps to prevent the offence (**Executive Liability**);
- Type 2 liability: where the director or manager is deemed criminally liable if their company commits an offence. However, if the individual produces evidence that they took reasonable steps to prevent the offence, the prosecutor must prove that those reasonable steps were not taken or that other steps should have been taken also (this type of liability is not adopted by the amending Act); and
- Type 3 liability: where the director or manager is deemed criminally liable if their company commits an offence (**Deemed Executive Liability**). However, if the individual can prove that they were not in a position to influence the conduct of the company or they used all due diligence to prevent the offence, they have a defence. Section 169 of the POEO Act, section 98 of the CLM Act and section 378F of the *Mining Act 1992* are examples of this kind of 'deeming provision'.

There has been a proliferation of Deemed Executive Liability under many environmental laws in NSW. These

provisions reverse the ordinary burden of criminal proof and 'deem' directors and managers liable for their company's crime. In our experience (where the prosecutor frames their charge and particulars with sufficient specificity), this requires the individual to establish their innocence, rather than the prosecutor being required to prove their guilt.

Given the high standard in 'deemed liability' defence provisions, it has been very difficult for directors and managers to successfully defend themselves against prosecution. The matter of *Inspector Jones v Sunny Ngai & Ors* [2007] NSWIRComm 203 is one of the rare instances in which a director successfully relied upon a 'deemed liability' defence. We are, however, not aware of a director or manager ever successfully using the defence of 'all due diligence' in an environmental prosecution in NSW.

There has been considerable public debate on the fairness of these types of provisions. Overall, the NSW Government considers such laws have resulted in 'undue complexity' and are an 'unnecessary regulatory burden' for directors and managers.

What are the overall changes?

The key overall changes are to amend various laws, so as to:

- Change the type of personal liability imposed for some offences to Accessorial Liability only, where a 'corporate offence' has been committed (eg. a new section 159 is introduced into the *Heritage Act 1977* for this purpose);
- Change the type of personal liability for some offences from Deemed Executive Liability to Executive Liability. In other words, to remove the 'deeming provisions' for those offences and require the prosecutor to prove every element of the offence (eg. section 98 of the CLM Act and section 378F of the *Mining Act 1992* are to be amended for this purpose); and
- In the case of the POEO Act only, retain Deemed Executive Liability for the most serious offences only, while changing other offences to Executive Liability and Accessorial Liability.

Largely, the changes remove the 'deeming provisions' in the majority of environmental laws, including those dealing with:

- Contaminated land;
- Environmentally hazardous chemicals;

- Explosives;
- Mining;
- Native vegetation;
- Pesticides; and
- Threatened species.

For instance, if a director or manager is to be prosecuted under the new provisions for:

- Failure to report contamination under the CLM Act;
- Clearing native vegetation without approval under the *Native Vegetation Act 2003*; or
- Using a restricted pesticide without authorisation under the *Pesticides Act 1999*,

the prosecutor bears the burden of proving the elements of the Executive Liability offence.

These overall changes will be welcomed by directors and managers, particularly given the trend towards increased prosecution of individuals for environmental offences in NSW since about 2007.

What are the pollution law changes?

The overall changes are not duplicated for some pollution laws under the POEO Act.

The POEO Act is the only law to retain the Deemed Executive Liability provisions (referred to in the amending Act as **Special Executive Liability**). This type of personal liability was retained because the NSW Government considered that 'deeming provisions' for certain environmental offences were justified by compelling public policy reasons.

Offences under the POEO Act are to be split into the following different kinds.

Special Executive Liability

Special Executive Liability is to apply to 19 offences under a new section 169(1A) of the POEO Act including:

- Tier 1 offences for the 'disposal of waste', 'leaks, spillages and other escapes' and the 'emission of ozone depleting substances'; and
- Tier 2 offences comprising the licensing of 'scheduled activities', compliance with licence conditions, providing information, 'water pollution', 'air pollution', 'land pollution', the 'transport of waste', the 'use of

land as a waste facility' and the 'notification of pollution incidents' (amended earlier in 2012 – see [here](#)).

The new Special Executive Liability provision provides that where a company commits an offence, a director or manager is taken to be liable for the same offence unless they can prove that they:

- Were not in a position to influence the conduct of the company; or
- Used all due diligence to prevent the offence by the company.

The existing individual penalties for Special Executive Liability remain unchanged.

Executive Liability

Executive Liability is to apply to 20 offences under a new section 169A of the POEO Act comprising specified Tier 2 offences, including 'noise pollution' and 'pollution incident response management plans' (**PIRMPs**).

The new Executive Liability provision provides that the prosecution bears the legal burden of proving the elements of the offence, being:

- The company commits an Executive Liability Offence;
- A director or manager of the company commits an offence where the person knows or ought reasonably to know that the Executive Liability Offence would or is being committed; and
- The person fails to take 'all reasonable steps' to prevent or stop the commission of the offence.

The existing individual penalties for Executive Liability remain unchanged.

Reasonable steps

The new Executive liability provision defines 'reasonable steps' to include (but is not limited to) the following kinds of action that is reasonable in all of the circumstances:

- **(Compliance)** Action towards assessing the corporation's compliance with the provision creating the Executive Liability offence and ensuring that the corporation arranged regular professional assessments of its compliance;
- **(Information, Training and Supervision)** Action towards ensuring the corporation's employees, agents and contractors are provided with information, training,

instruction and supervision appropriate to them to comply with the Executive Liability offence provision;

- **(Plant and Equipment)** Action towards ensuring that plant, equipment and other resources relevant to compliance with the Executive Liability offence provision are appropriate;
- **(Systems and Processes)** Action towards ensuring that the structures, work systems and other processes relevant to compliance with the Executive Liability offence provision are appropriate; and
- **(Corporate culture)** Action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the Executive Liability offence provision.

While the 'reasonable steps' definition tends to reflect 'good corporate governance', the noteworthy concept for directors and managers within the definition is taking 'action'.

Accessorial Liability

Accessorial liability is, under a new section 169B of the POEO Act, to apply to all offences capable of being committed by a company (**Corporate Offence**) including Special Executive Liability and Executive Liability offence provisions.

The new Accessorial Liability provision provides that the prosecution bears the legal burden of proving the elements of the offence, being:

- The company commits a Corporate Offence; and
- A director or manager of the company (among other things) aids, abets, counsels or procures the commission of the Corporate Offence, or is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the Corporate Offence.

What should you do?

Since about 2007, there has been a renewed emphasis on the prosecution of directors and managers for environmental offences in NSW. With regard to these changes, directors and managers should ensure that good corporate governance remains in place. Among other actions, to demonstrate 'all due diligence' and 'reasonable steps', directors and managers should:

- Be familiar with the changes to personal liability for environmental offences;
- Remain mindful, where applicable, of similar 'reasonable steps' set out in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth);
- Ensure that the company's environmental management and compliance systems are updated, as a minimum, to take into account the 'reasonable steps' relating to Executive Liability; and
- Consider reviewing D&O liability insurance policies and premiums to ensure they provide the appropriate level of cover for investigation and defence costs and (to the extent permitted by law) for fines and penalties for environmental offences. With the overall number of director and manager offences being reduced by the amending Act, there may be scope for a reduction in D&O insurance premiums depending on the activities of the company.

Written by:

Craig Tidemann
Special Counsel

+61 2 8248 3404

ctidemann@thomsonslawyers.com.au

Melinda Graham
Partner

+61 2 8248 3410

mgraham@thomsonslawyers.com.au

For further information on the topics in this alert, please [click here](#) to contact our national Environment & Planning team.