

## Reform of directors' and managers' liability for environmental offences in NSW, 19 November 2012

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### In brief — Reforms being introduced in all Australian jurisdictions

Following the introduction of the Miscellaneous Acts Amendment (Directors Liability) Bill 2012 (NSW), directors and managers are no longer automatically taken to be criminally liable for an offence committed by a corporation under most environmental legislation in NSW, unless they are an accessory to a criminal offence. Similar reforms are progressively being made in all jurisdictions in Australia following guidelines received from the Council of Australian Governments.

### Former reverse burden of proof on directors and managers for environmental offences

A reverse onus of proof used to apply to directors and managers under most environmental legislation. Accordingly, by default, if a corporation had committed an offence, they had also personally committed an offence, unless they could prove their innocence by showing that they were not in a position to influence the corporation, or they had used all due diligence to prevent an offence from occurring. This resulted in undue complexity and a lack of clarity about what measures were required to be implemented by directors and managers.

### New directors' and managers' accessorial liability for environmental offences

The following new concepts have been introduced by the Bill:

- a director or manager of a corporation is not criminally responsible for an offence committed by a corporation, unless a separate statutory provision exists establishing liability, and
- a person (including a director or manager) can be prosecuted as an accessory to the commission of an offence by a corporation (for example, by aiding and abetting its commission). Most environmental legislation in NSW will now incorporate these concepts. For most offences, this will mean that a prosecuting authority will be required to prove that a director or manager has aided, abetted, induced, conspired in, or is knowingly concerned in the commission of an offence by a corporation.

### New directors' and managers' executive liability for environmental offences

Despite the above, changes have been made to particular acts imposing "executive liability" for directors and managers for certain offences committed by a corporation. "Executive liability" is tied to the concept of directors and managers being required to take "reasonable steps" (previously referred to as due diligence) to prevent these types of offences occurring. There are three types of executive liability:

- **Type 1 executive liability:** For this type of liability, a prosecuting authority must prove every element of the offence alleged, including that a director or manager failed to take all reasonable steps to stop the commission of the offence by the corporation (known as the "**responsibility element**"). The onus associated with the offence has therefore shifted from directors and managers to the prosecution. Type 1 executive liability has been introduced in the *Contaminated Land Management Act 1997* (NSW), the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) and in other legislation for certain types of offences.
- **Type 2 executive liability:** For this type of liability, the responsibility element is presumed without the need for further proof, unless a director or manager can show evidence that suggests

a reasonable possibility that there was no such failure to take reasonable steps. Type 2 executive liability has not yet been introduced by the Bill, but we expect it will be for some offences.

• **Type 3 executive liability:** This is the most serious type of liability. The responsibility element is presumed without the need for further proof, and the director or manager bears the onus of proving, on the balance of probabilities, that there was no failure to take reasonable steps to prevent or stop the commission of the offence by the corporation. Type 3 executive liability has not yet been introduced by the Bill, but former provisions in the POEO Act establishing similar liability have been preserved by the Bill for more serious environmental offences. Again, we expect to see more Type 3 executive liability offences in future.

### **Environmental legislation that will be amended**

Offences in the following legislation have been amended:

- *Contaminated Land Management Act 1997* (NSW)
- *Environmentally Hazardous Chemicals Act 1985* (NSW)
- *Forestry Act 1916* (NSW)
- *Heritage Act 1977* (NSW)
- *Mining Act 1992* (NSW)
- *National Parks and Wildlife Act 1974* (NSW)
- *Native Vegetation Act 2003* (NSW)
- *Pesticides Act 1999* (NSW)
- *Protection of the Environment Operations Act 1997* (NSW)
- *Sydney Water Catchment Management Act 1998* (NSW)
- *Threatened Species Conservation Act 1995* (NSW)
- *Water Industry Competition Act 2006* (NSW).

### **Directors and managers should be aware of legislative changes related to environmental offences**

Directors and managers should be aware of the following:

- There will now be differing grades of personal liability, and onuses of proof, for directors and managers under environmental legislation for offences that are also committed by corporations, depending upon the type of legislation that applies. As a result, directors and managers will need to pay closer attention to the legislative changes and differing types of liability.
- The introduction of accessorial liability offences is good news for directors and managers who will no longer have automatic liability for failing to perform due diligence.
- For Type 1 executive liability offences, a prosecuting authority will now bear the burden of proving the elements of the offence. We expect that this will result in changes in the way that matters are run in the Local Court and in the Land and Environment Court by prosecuting authorities, as more evidence will be required to be provided to directors and managers and to the court prior to such offences being established.
- More serious executive liability offences have been retained under the POEO Act (for example, failing to comply with a condition of an environmental protection licence). It is important for directors and managers therefore to be familiar with the more serious offences under the POEO Act and their potential personal liability under that Act.

For more information about planning and environment law, please see the website of Colin Biggers & Paisley or contact Maysaa Parrino ([mstp@cbp.com.au](mailto:mstp@cbp.com.au)) or Lucinda Morphett ([lzm@cbp.com.au](mailto:lzm@cbp.com.au)).