

Focus

Planning and  
Environment

## Onus of proof shifts for environmental offences

14 January 2013

Significant changes have been made to the potential criminal liability of directors and managers under key environmental legislation in NSW. The *Miscellaneous Acts Amendment (Directors' Liability) Act 2012 (Directors' Liability Act)* commenced on 11 January 2013 and shifts the onus of proof for many environmental offences so that the liability of directors and managers is no longer presumed.

Previously, there was a '*reverse onus of proof*' for offences under environmental legislation in NSW. Where a corporation committed an offence, directors and managers were also presumed to have committed the offence unless they were able to prove that they were not in a position to influence the conduct of the corporation in relation to its contravention, or that they had used all due diligence to prevent the contravention. The reverse onus of proof remains for the most serious environmental offences in the *Protection of the Environment Operations Act 1997 (PEO Act)*.

Now the prosecution is required to prove every element of the offence

The Directors' Liability Act makes most offences under environmental legislation in NSW '*executive liability offences*'. Now the prosecution (for example the Environmental Protection Authority) is required to prove every element of the offence, including that the director or manager failed to take all reasonable steps to prevent or stop the commission of that offence. 'Reasonable steps' includes taking action towards ensuring that professional assessments of compliance with relevant provisions are undertaken, towards training employees, towards ensuring that plant and systems are appropriate and towards maintaining a corporate culture that does not tolerate non-compliance.

The NSW Government considered that there were still compelling public policy reasons justifying the imposition of more stringent standards and obligations on directors and managers for the most serious environmental offences in the PEO Act. These offences attract '*special executive liability*'. Where a corporation breaches these provisions, the onus remains with the director or manager to prove that they were not in a position to influence the conduct of the corporation in relation to its contravention, or that they had used all due diligence to prevent the contravention.

The Directors' Liability Act also establishes an '*accessorial liability offence*' which is available to the prosecution where a director or manager actively aids and abets the corporation in a criminal offence. This offence is capable of being committed whether or not the offence is an executive liability offence or a special executive liability offence.

The retention of the more stringent standards and obligations for the most serious environmental offences under the PEO Act highlights the level of importance given by the NSW Government to environmental offences where public health and safety may be at stake.

Directors and managers should give consideration to the new executive liability offences, including the new statutory definition of '*reasonable steps*'. Good corporate governance remains essential and environmental risk management systems should be regularly reviewed, updated and implementation ensured.

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