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# AUSTRALIAN ENVIRONMENTAL COMPLIANCE AND BEST PRACTICE – LEGISLATION UPDATE

## Environmental compliance and best practice – making good business sense for corporations operating in the Australian regulatory framework

Best practice in negotiating and obtaining environmental approvals, and ensuring compliance in licensing and permitting is not simply about risk management – it delivers quantifiable financial returns and good governance.

Adoption of best practice ensures that every approval application or incident control will be standardized, mitigation-driven, and immediate. Embedded corporate preparedness is crucial to avoid the perception of complacency or reactivity.

Benchmarking a world-class environmental performance strategy:

- Ensures standard accountability across multiple jurisdictions
- Creates local operational efficiencies
- Ensures directors can meet legislative requirements for "reasonable steps" in addressing claims of executive liability

## The new offence of "Executive Liability" for environmental acts

In 2011, the Council of Australian Governments (**COAG**), consisting of every Premier and Chief Minister across Australia's federation, and the Commonwealth Government, agreed to commit to and implement a nationally consistent and principles-based approach to personal criminal liability for directors and corporate officers, for corporate-related offences (COAG Guidelines).

The first State law to be introduced in response was the *Miscellaneous Acts Amendment (Directors Liability) Act 2012*, in New South Wales. Other State jurisdictions are in the process of amending or introducing legislation in accordance with the COAG Guidelines.

## So, what can we expect?

The NSW legislation amends 12 separate laws (relating largely to environmental protection). In an effort to more clearly distinguish the actions of a corporation from the actions of a director or manager, the NSW Act introduces new categories of offences known as "executive liability", "accessorial liability" and "special liability". These confer personal liability for criminal offences and do not alter the responsibility of directors under the Commonwealth *Corporations Act 2001*.

To prove **executive liability**, the State must prove the director or manager:

- Knew or ought to have reasonably known that the offence would be or is being committed; and
- Failed to take all reasonable steps to prevent or stop the offence being committed.

The term "reasonable steps" is defined for each offence and requires evidence that:

- Employees are provided with sufficient and adequate training
- Plant and equipment are appropriate and of a sufficient standard; and
- There is a corporate culture that does not encourage or tolerate non-compliance with the provision that creates the executive liability, among other things.

"**Accessorial liability**" provides that directors and managers can also be prosecuted for offences committed by a corporation as if they acted as an accessory to the offence, in aiding or abetting the commission of an offence.

"**Special liability**" offences are restricted to those environmental acts regarded as having significant or serious consequence, including failing to comply with the conditions of an environmental licence, polluting waters and failing to notify of a pollution incident.

Under the NSW legislation, the defendant bears the burden of proving, on the balance of probabilities, that they were not in a position to influence the conduct of the corporation, and that they were diligent in taking all necessary steps to prevent the offence committed by the corporation.

## Preparing for the new regime

The COAG Guidelines, as embodied in the NSW legislation, considerably extend and better articulate the personal liability for company directors in Western Australia. To date, a certain degree of complacency is evident in dealing with the environmental regulators. Often, this is the case because of the general awareness of the lack of public resources available to seek compliance information or investigate environmental incidents. There is also a disconnect between many of the ageing environmental laws – on occasion, it is not clear to the regulator what or whom, under what law, it should be pursuing when considering an incident.

If the COAG Guidelines are adopted in line with the NSW legislation, this lack of clarity will be substantially reduced. It will be easier to pursue and prosecute both companies and their office holders. Environmental practices should not be left to operational or consultancy sources, but must be directly brought to the attention of the executive and directors.

Early review of processes and preparedness for environmental management is critical for any corporation engaged in environmental activities. Suitable training is often a given for employees – companies must now have regard to educating and disclosing to the executive and Board the corporate (and ultimately, individual) liability for environmental management.

## For further advice, please contact:

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