



New South Wales

Miscellaneous Acts Amendment (Directors' Liability) Bill 2012

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

Two key concepts relating to corporations are as follows:

- A corporation has a separate identity from that of a director or manager of the corporation. Consequently, a director or manager is not criminally responsible for an offence committed by a corporation, unless separate provision for this exists.
- 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). This is referred to as *accessorial liability* in this explanatory note.

Individual Acts impose a more stringent liability (referred to as *executive liability* in this explanatory note) on a director or manager of a corporation for an offence committed by the corporation under the Act concerned. Three types of executive liability that create an offence on the part of the director or manager when a corporation commits an offence have been identified, as follows:

- **Type 1 executive liability.** This requires the prosecution to prove every element of the offence alleged to have been committed by the director or

manager, including the element (the *responsibility element*) that he or she failed to take all reasonable steps to prevent or stop the commission of the offence by the corporation. The taking of reasonable steps was often previously referred to as using due diligence.

- **Type 2 executive liability.** This provides that the responsibility element is to be presumed without the need for further proof, unless the director or manager adduces or points to evidence that suggests a reasonable possibility that there was no such failure to take reasonable steps.
- **Type 3 executive liability.** This provides that the responsibility element is to be presumed without the need for further proof, and the director or manager bears the burden of proving, on the balance of probabilities, that there was no such failure to take reasonable steps.

The object of this Bill is to amend certain Acts that impose executive liability, and to amend certain regulations made under those Acts, so as:

- (a) to change the type of liability that is imposed for certain offences under those Acts and regulations, from executive liability to accessorial liability, and
- (b) to change the type of executive liability that is imposed for certain offences under those Acts and regulations, from type 3 executive liability to type 1 executive liability, and
- (c) to include, in or near each provision creating an offence committed by a corporation that gives rise to executive liability, a note drawing attention to that liability, and
- (d) to include, where practicable, standard provisions for executive liability and accessorial liability, and
- (e) to make other minor or consequential amendments.

No provision for type 2 executive liability is contained in the Acts and regulations amended by the Bill.

No provision for type 3 executive liability is contained in the Acts and regulations amended by the Bill, except that the Bill continues current arrangements for some specified offences under the *Protection of the Environment Operations Act 1997*, under which a person who is a director or manager is taken to have contravened a provision contravened by a corporation, unless the person satisfies the court that the person:

- was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- used all due diligence to prevent the contravention by the corporation.

That Act also contains provision for type 1 executive liability and accessorial liability.

The Bill relates to a COAG agreement with respect to the harmonisation across Australian jurisdictions of legislation imposing executive liability.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Acts and Regulations

Schedule 1 amends the following Acts and Regulations to give effect to the object set out in the Overview above:

Animal Research Act 1985

Building and Construction Industry Long Service Payments Act 1986

Children and Young Persons (Care and Protection) Act 1998

Classification (Publications, Films and Computer Games) Enforcement Act 1995

Contaminated Land Management Act 1997

Conveyancers Licensing Act 2003

Drug Misuse and Trafficking Act 1985

Drug Misuse and Trafficking Regulation 2011

Duties Act 1997

Electricity (Consumer Safety) Act 2004

Environmentally Hazardous Chemicals Act 1985

Explosives Act 2003

Food Act 2003

Forestry Act 1916

Funeral Funds Act 1979

Gaming Machines Act 2001

Health Insurance Levies Act 1982

Heritage Act 1977

Jury Act 1977

Landlord and Tenant (Amendment) Act 1948

Liquor Act 2007

Loan Fund Companies Act 1976

Long Service Leave Act 1955

Long Service Leave (Metalliferous Mining Industry) Act 1963

Mining Act 1992

Motor Dealers Act 1974

Miscellaneous Acts Amendment (Directors' Liability) Bill 2012

Explanatory note

Motor Vehicle Repairs Act 1980

National Parks and Wildlife Act 1974

Native Vegetation Act 2003

Payroll Tax Act 2007

Pesticides Act 1999

Printing and Newspapers Act 1973

Property, Stock and Business Agents Act 2002

Protection of the Environment Operations Act 1997

Racing Administration Act 1998

Rural Workers Accommodation Act 1969

Security Industry Act 1997

Sydney Water Catchment Management Act 1998

Sydney Water Catchment Management Regulation 2008

Taxation Administration Act 1996

Threatened Species Conservation Act 1995

Unlawful Gambling Act 1998

Valuers Act 2003

Veterinary Practice Act 2003

Water Industry Competition Act 2006

Workplace Injury Management and Workers Compensation Act 1998