

Corporate Alert

# Reforms to liability of directors and other officers under Queensland laws

## WHAT YOU NEED TO KNOW

- The *Directors' Liability Reform Amendment Act 2013* (Qld) is now in force.
- The Act reduces the number of directors' liability provisions in Queensland, but extends the range of persons potentially liable for the actions of a corporation.
- In the workplace health and safety context, the Act amends some industry-specific legislation such as the *Transport Rail Safety Act 2010* (Qld) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).
- Environmental laws remain unchanged.

## WHAT YOU NEED TO DO

- Review any amendments that have been made by the Act to Queensland legislation relevant to your business activities. A list of the 86 amended statutes is set out in table 2 below.
- Be fully aware of executive officer obligations under Queensland legislation and have, and implement, risk management systems in the areas of corporate governance, health, safety and environmental compliance.

The *Directors' Liability Reform Amendment Act 2013* (Qld) (**Act**) came into effect on 1 November 2013, amending 86 Queensland statutes (see Table 2) that subjected executive officers to criminal liability resulting from the relevant corporation's acts or omissions.

The purpose of the Act is to increase the consistency of approach to the liability of executive officers across Australian jurisdictions. This was in turn one of the 27 deregulation priorities under the Council of Australian Governments (**COAG**) National Partnership Agreement to deliver a Seamless National Economy 2008-09. To promote consistency, COAG agreed that jurisdictions would review their legislation with regard to specified principles and guidelines.

### What is the effect of the Act?

The Act reduces the number of statutory provisions in Queensland that impose personal and criminal liability on directors for offences committed by corporations. Of the approximately 3,800 directors' liability provisions in Queensland, some 260 offences have been retained across the

various statutes. The liability provisions that were retained included those where:

- the underlying offence had the potential for significant public harm;
- considerations of the size and nature of the penalty applying to the conduct made it appropriate;
- the executive officers could directly control the corporate conduct; and
- enforcement against the corporation alone was ineffective.

### Who is affected by the Act?

Despite the title of the Act, the range of persons potentially liable to criminal sanctions extends beyond directors to a broad category of "executive officers":

"**executive officer**, of a corporation, means a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer."

The Act is not concerned with offences that impose personal criminal liability on executive officers for their own acts. Rather, the Act addresses the role of executive officers in offences committed by corporations (so-called "executive officer liability"). If the conduct of executive officers also amounts to a personal offence under the Queensland Criminal Code (**Code**), they may face prosecution for their personal actions under the Code.

### What are the types of liability?

In the approximately 260 offences where executive officer liability was retained, the Act imposes one of two types of liability on executive officers (and in some circumstances, both types of liability will be imposed). The difference between the two types of liability is that the standard executive liability provision is based on a failure to take reasonable steps, whereas the deemed executive officer liability provision is similar to accessorial liability. Their features are summarised in Table 1.

Table 1: Overview of executive officer criminal liability regime following the Act

OFFENCES COMMITTED BY AN OFFICER	<p><b>Personal liability</b> – Offences by executive officers under the Criminal Code (Qld). The executive officer commits an offence when each element of the offence is proven beyond a reasonable doubt.</p>	
OFFENCES COMMITTED BY THE CORPORATION AND ITS EXECUTIVE OFFICERS	<p><b>Personal and executive liability</b> – Where a corporation commits an offence, and an executive officer's role in the corporation's offence also amounts to a breach of the Criminal Code, the executive officer could face both personal and executive liability.</p>	
OFFENCES COMMITTED BY THE CORPORATION	<p><b>Standard Executive Officer Liability</b> – Offences by the corporation for which executive officer held liable. The executive officer is taken to have committed the offence if he or she did not take <i>all reasonable steps to prevent</i> the commission of the offence by the corporation.</p>	<p><b>Deemed Executive Officer Liability</b> – Offences by the corporation for which executive officer held liable. The executive officer is taken to have committed the offence if the officer <i>authorised, permitted or was knowingly concerned</i> in the corporation's conduct.</p>

We note that the deemed executive officer liability is conditional rather than absolute. The upshot is that it will be for the Prosecution to prove that the executive officer authorised, permitted or was knowingly concerned in the corporation's conduct, rather than for the Defendant to prove this as a defence.

### The effect of the Act on environmental laws

The Act does not include amendments to the executive officer liability provisions in Queensland's environmental laws. The executive officer liability provisions in the *Environmental Protection Act 1994* (Qld) remain unchanged.

The reason for this was that one of the principles adopted by COAG for the review of executive officer liability provisions in legislation was that the imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where, amongst other things, there are compelling public policy reasons for doing so.

Further, the Guidelines published by COAG recognise that where an offence against legislation has the potential for significant public harm, such as serious damage to the environment or a serious risk to public health and safety, there are

compelling public policy reasons to justify retaining the executive officer liability provisions in the legislation.

#### **The effect of the Act on WHS laws**

The Act does not include amendments to the executive officer liability provisions in the *Work Health and Safety Act 2011 (Qld) (WHS Act)*, which is the safety legislation that applies to most workplaces in Queensland. Nor does it make any amendments to mining safety legislation, which is currently the subject of a separate review by the Queensland Government. However, the Act does make amendments to other industry specific safety legislation. For example, the executive officer liability provision is removed from the *Transport Rail Safety Act 2010 (Qld)*, although the executive officer liability provision in the WHS Act would still apply to many aspects of railway operations. Significant changes have also been made to the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*, where new standard and deemed

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executive officer liability provisions have replaced the previous executive liability provision.

#### **Observations**

The amendments made by the Act highlight the need for corporations and their executive officers to be fully aware of their obligations and to have, and implement, effective risk management systems in the areas of corporate governance, health and safety and environmental compliance. They also remind us of why it is important for businesses to adopt systems to help their executive officers to meet their individual obligations in an efficient and timely way.

While the changes have made it easier for executive officers to comply with their obligations in some respects, there is still a high standard of oversight and due diligence expected of executive officers by the law in these areas.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at [aus.marketing@ashurst.com](mailto:aus.marketing@ashurst.com).

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**Table 2: Summary of Queensland Legislation amended by the Act**

Animal Care and Protection Act 2001	Health Act 1937	Queensland Building Services Authority Act 1991
Biodiscovery Act 2004	Higher Education (General Provisions) Act 2008	Queensland Heritage Act 1992
Building Act 1975	Housing Act 2003	Racing Act 2002
Casino Control Act 1982	Industrial Relations Act 1999	Radiation Safety Act 1999
Charitable and Non-Profit Gaming Act 1999	Interactive Gambling (Player Protection) Act 1998	Residential Services (Accreditation) Act 2002
Child Employment Act 2006	Introduction Agents Act 2001	Residential Tenancies and Rooming Accommodation Act 2008
Clean Energy Act 2008	Invasion of Privacy Act 1971	Retirement Villages Act 1999
Commission for Children and Young People and Child Guardian Act 2000	Justices Act 1886	Second-hand Dealers and Pawnbrokers Act 2003
Community Services Act 2007	Keno Act 1996	Strategic Cropping Land Act 2011
Contract Cleaning Industry (Portable Long Service Leave) Act 2005	Land Act 1994	Surveyors Act 2003
Cooperatives Act 1997	Land Sales Act 1984	Taxation Administration Act 2001
Criminal Law (Sexual Offences) Act 1978	Legal Profession Act 2007	Tobacco and Other Smoking Products Act 1998
Disability Services Act 2006	Liquor Act 1992	Tourism Services Act 2003
Domestic Building Contracts Act 2000	Lotteries Act 1997	Tow Truck Act 1973
Drugs Misuse Act 1986	Manufactured Homes (Residential Parks) Act 2003	Trading (Allowable Hours) Act 1990
Education (Queensland College of Teachers) Act 2005	Mineral Resources Act 1989	Transport Operations (Marine Pollution) Act 1995
Electricity Act 1994	Motor Racing Events Act 1990	Transport Operations (Road Use Management) Act 1995
Emblems of Queensland Act 2005	Nuclear Facilities Prohibition Act 2007	Transport (Rail Safety) Act 2010
Explosives Act 1999	Offshore Minerals Act 1998	Transport Security (Counter-Terrorism) Act 2008
Family Services Act 1987	Pest Management Act 2001	Travel Agents Act 1988
Fire and Rescue Service Act 1990	Petroleum and Gas (Production and Safety) Act 2004	Vocational Education, Training and Employment Act 2000
Fisheries Act 1994	Pharmacy Business Ownership Act 2001	Wagering Act 1998
Food Act 2006	Place Names Act 1994	Waste Reduction and Recycling Act 2011
Foreign Ownership of Land Register Act 1988	Printing and Newspapers Act 1981	Water Act 2000
Funeral Benefit Business Act 1982	Private Employment Agents Act 2005	Water Fluoridation Act 2008
Gaming Machine Act 1991	Private Health Facilities Act 1999	Water Supply (Safety and Reliability) Act 2008
Geothermal Energy Act 2010	Property Agents and Motor Dealers Act 2000	Weapons Act 1990
Greenhouse Gas Storage Act 2009	Prostitution Act 1999	
Guide, Hearing and Assistance Dogs Act 2009	Public Health Act 2005	
	Public Health (Infection Control for Personal Appearance Services) Act 2003	