

PROPERTY



LEGAL UPDATE

SEPTEMBER 2006

CONTENTS	Increased liability of company directors for environmental contamination	01
	New Restrictions on Scope of Existing Use Rights	03
	Procedural aspects of rent review	04

Increased liability of company directors for environmental contamination

On 1 May 2006, the *Protection of the Environment Operations Amendment Act 2005 (NSW)* (Amendment Act) came into force. Under the provisions of this act, company directors can now be held personally liable for their company's environmental infringements irrespective of whether they are aware of those infringements.

Key message

Changes to certain environmental laws in New South Wales, and in Victoria leave company directors and managers exposed to potential liability, regardless of their knowledge of the nature of their company's works or the extent of possible contamination on the site in question.

The Amendment Act also substantially increases the penalties imposed on corporations and their directors for specific acts of environmental contamination.

Current legislative framework in NSW

The *Protection of the Environment Operations Act 1997* (Act) is the primary Act in New South Wales regulating environmental protection policies, licensing, notices and audits. The Act establishes a 3 tier regime for environmental contamination offences.

- » Tier 1 offences are categorised as offences requiring proof of wilfulness or negligence causing harm or likely harm to the environment. Typical examples of this activity include major substance leaks, spillages and ozone depleting emissions.
- » Tier 2 offences include all other offences not contained in Tier 1. These offences commonly include the emission of offensive odour from scheduled activities, the unlawful transport of waste or failure to comply with a duty to notify of certain pollution incidents. Tier 2 offences are assessed on a strict liability basis, meaning that the intent of the company or directors involved is irrelevant.
- » Tier 3 offences are not separate offences as such but are Tier 2 matters which can be dealt with by the Environment Protection Agency issuing a penalty notice.

Removal of the 'no knowledge' defence

The Amendment Act is significant in that it removes the 'no knowledge' defence previously available to directors or those concerned in the management of a corporation under section 169(1)(a) of the Act.

This defence was particularly relevant to large or medium scale corporations whose directors were unlikely to be aware of all possible contamination being caused as a result of their corporation's activity.

When introducing the Amendment Act, the NSW Government asserted that the 'no knowledge' defence undermines pollution control laws by encouraging directors and other managers to deliberately turn a blind eye to environmental offences committed by their companies.

Increased penalties

The Amendment Act also significantly increases the maximum penalties that can be imposed upon directors and managers of corporations found guilty of an offence under the Act.

Maximum penalties for corporations for Tier 1 offences have been increased from \$1m to \$2m for negligent acts and \$5m for wilful acts and from \$250,000 to \$1m for most Tier 2 offences.

Maximum penalties for directors or managers committing Tier 1 offences have increased from \$250,000 to \$500,000 for negligent acts and \$1m for wilful acts and from \$125,000 to \$250,000 for most Tier 2 offences. Individuals can also be liable for 4 years imprisonment for negligent Tier 1 offences and up to 7 years for wilful Tier 1 offences.

The availability of alternative sentencing has also increased with courts now able to order offenders to attend relevant training courses or to transfer funds to third parties in order to carry out remediation works.

Further Concerns

The Amendment Act clearly exposes directors and senior managers to a much greater risk of personal liability for environmental offences committed by their company.

The only real defence now available to individual directors and managers is that they had used 'all due diligence' before committing the actions that led to the particular environmental contamination. A major question exists as to the standard a company must reach before it can say that it has successfully conducted 'all due diligence'. It remains to be seen how courts will determine such a standard.

Changes to Victorian legislation

On 24 August 2006, the *Environment Protection (Amendment) Act 2006* (Victorian Amendment Act) was passed by the Victorian parliament. Like New South Wales' Amendment Act, the Victorian Amendment Act removes the 'no knowledge' defence under section 66B of the *Environment Protection Act 1970* (Vic).

Individuals are now exposed to the penalties under the Environment Protection Act, which can include fines of up to \$1,074,300 or 7 years imprisonment for the most serious breaches, regardless of their knowledge of the particular environmental infringement.

The Victorian government claims that the repeal of the 'no knowledge' defence will bring directors or people concerned in management into line with community expectations about how directors of corporations should discharge their duties.

What it means in practice

The changes in New South Wales and Victoria leave company directors and managers exposed to potentially considerable liability, regardless of their knowledge of the nature of their company's works or the extent of possible contamination on the site in question.

Now, more than ever, directors and management teams must adopt stringent environmental management standards. They must ensure that their companies take positive steps to ensure that their environmental policies are in full practical effect.

Justin Lethlean | Partner
Mark Donaldson | Solicitor

New Restrictions on Scope of Existing Use Rights

Important changes to 'existing use rights' in relation to the development and use of land in New South Wales were introduced by the *Environmental Planning and Assessment (Existing Uses) Regulation 2006 (2006 Regulation)* gazetted on 29 March 2006.

Key message

A recent change to the law in NSW has potential to impact adversely on the holders of existing use rights.

An existing use right permits a land owner to continue carrying out an activity on land which:

- » was lawfully commenced
- » has since become prohibited under a local environmental plan or other environmental planning instrument due to a change in the zoning of that land.

The provisions governing existing use rights are contained in the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act) and the Environmental Planning and Assessment Regulation 2000 (NSW) (2000 Regulation). The intent of these provisions is to balance:

- » the potential hardship which a land owner or occupier would suffer if they were required to immediately discontinue a lawfully commenced land use following a zoning change; against
- » the public interest in the adoption of the zoning changes.

Before the gazettal of the 2006 Regulation, it was possible (with development consent) to change an existing use to another prohibited use.

The 2006 Regulation amends the 2000 Regulation so that (among other things):

- » a land owner who has existing use rights may only apply to change the use of the land to an alternative use which is permissible under the current zoning

- » an existing use can no longer be changed to another prohibited use unless the zoning is also changed to permit that use.

This represents a significant restriction on the development potential (and arguably also a consequential reduction in value) of land which enjoys the benefit of existing use rights.

The changes to existing use rights introduced by the 2006 Regulation are retrospective and apply regardless of when the existing use commenced. The only concessions conferred by the savings and transitional provisions in the 2006 Regulation relate to:

- » applications for development consent in respect of an existing use lodged prior to 29 March 2006 (Current Application)
- » a development consent or complying development certificate issued in respect of a Current Application
- » certifications in respect of a Current Application (eg the issue of construction or occupation certificates).

It is understood that the changes to existing use rights arose from concerns expressed by some local councils that the New South Wales planning reforms (which require the preparation of new local environmental plans using standard zones) would result in:

- » some currently permissible existing land uses becoming prohibited uses
- » the creation of existing use rights in respect of the relevant land.

The concerns of the councils are to some extent also addressed by clause 14 of the Department of Planning's Standard Instrument for LEPs which sets out the template for the preparation of new local environmental plans in New South Wales. Under clause 14, councils are permitted to include as 'additional permitted uses' any existing land uses which would otherwise be prohibited under the new zoning. Any such additional permitted uses would be a permissible land use and would not attract existing use rights.

The changes introduced by the 2006 Regulation represent a significant erosion of the value of existing use rights. It is therefore of concern that the changes:

- » are retrospective in nature
- » were introduced without extensive industry consultation.

Robert Savage | Partner
Ben Everitt | Solicitor

Procedural aspects of rent review

In Callaghan v Merivale CBD Pty Limited (2006) NSW ConvR 56 the Court considered a tenant's claim against a landlord to recover overpaid rent resulting from a defective rent review notice.

Key message

It is important to pay attention to the start date for a rental review as well as the finishing point for the negotiations. A recent case in NSW had a rental review ruled out of order because the landlord started negotiations too early.

Further information

Melbourne
Justin Lethlean
Partner
T: +61 3 9640 4312
F: +61 3 9205 2055
E: justin.lethlean@middletons.com.au

Sydney
Robert Savage
Partner
T: +61 2 9513 2429
F: +61 2 9513 2399
E: robert.savage@middletons.com.au

The lease contained a rent review provision that included the following statements:

- » "At any time but not earlier than 120 days prior to each date specified in item 7(b) ... the [landlord] may by notice in writing to the [tenant] fix the annual rent at an amount which in the opinion of the [landlord] is the market rent of the Premises as at the review date."
- » Item 7(b) [date of review of rent] "on the third anniversary of the commencement date of this lease."

The landlord provided written notice of the annual rent review prior to the

commencement of the 120 days (Review Notice). The tenant disputed the increased rent review amount. However, because the tenant had given its dispute out of time, the tenant began paying the increased rent.

The Court held that because the Review Notice was given too early, the rent had not been fixed effectively. Accordingly, the tenant was entitled to recover the overpaid rent from the landlord. It was also noted that there was considerable doubt regarding the genuineness of the landlord's opinion regarding the nominated rent.

Robert Savage | Partner
Caroline Martin | Graduate