In September 2006, the Corporations and Markets Advisory Committee (CAMAC) released a report on Personal Liability for Corporate Fault (the report). CAMAC reviewed circumstances in which directors or other individuals involved in managing companies can incur personal criminal liability as a result of a company’s misconduct. It reviewed legislation dealing with environmental protection (as well as occupational health and safety, hazardous goods and fair trading laws).

The report concluded that there are a broad range of statutory tests within and between jurisdictions for imposing personal liability for corporate misconduct. Liability may be based on:

- positional liability — an individual’s formal position in the company
- managerial liability — individuals who are concerned, or take part in, the company’s management
- designated officer liability — individuals who are designated as having organisational or operational responsibility for specific conduct dealt with in the legislation and
- participatory liability — individuals who promote, authorise, permit, instigate, suffer, acquiesce in, consent to, approve of, connive in or neglect to prevent, a breach by the company.

The positional and managerial approaches were found to dominate. However, CAMAC identified two principal areas of concern, the principle of liability without fault for corporate officers and the complexity and inconsistency of legislation. It found that, on the whole, legislation did not require proof by the prosecution of personal fault on the part of the individual being prosecuted.

As a result, it concluded that provisions of this kind are objectionable in principle and discriminate against corporate personnel. Although these provisions may be well-intentioned, CAMAC did not consider that the general abrogation of individuals’ rights was justified.

CAMAC said that while the provisions may be generally acceptable for small companies, they do not suit the realities and complexities of larger companies. This is especially true in the widely used board model, where there is a majority of non-executive or independent directors who are not involved in day-to-day company operations.

### Liability without fault

At common law, officers are generally not liable for environmental offences committed by their companies. However, all Australian jurisdictions have introduced legislation imposing liability on individuals for corporate environmental breaches, solely by virtue of their positions. Such liability, known as ‘derivative liability’, could potentially attach to directors, chief executives, receivers, liquidators and employees with management responsibilities.

**Camac concerned about potential for director and officer liability without fault, and complexity and inconsistency of laws**

**All jurisdictions have environmental legislation imposing liability on individuals for corporate breaches, solely by virtue of positions**

**Camac recommendations referred to government**
In Victoria, NSW, WA and the NT, if a company commits an environmental offence, each or every (depending on which jurisdiction you are in) person who is a director or is concerned in the management of the corporation is also guilty. These jurisdictions have therefore adopted a positional/managerial liability model.

In the ACT, if a company commits such an offence, a ‘prescribed officer’ is also guilty of the offence. A prescribed officer is defined as:

- a director of the corporation or other person (however described), responsible for the direction, management and control of the corporation or
- any other person who is concerned in, or takes part in, the management of the corporation and whose responsibilities include duties in relation to the matters giving rise to the offence.

The ACT therefore adopts a positional/managerial/designated officer liability model.

In Queensland, an executive officer of a corporation must ensure that the corporation complies with environmental legislation. If a corporation commits an environmental offence, ‘each of the executive officers’ of the company also commits an offence; namely the offence of failing to ensure that the corporation complies with the Act. An ‘executive officer’ is a person who is:

- a member of the governing body of the corporation or
- concerned with, or takes part in, the corporation’s management, whatever the person’s position is called and whether or not the person is a director of the corporation.

The Queensland legislation adopts a different method of imposing liability on corporate officers. Rather than a corporate officer being deemed to have committed the same offence as the corporation, the officer is taken to have committed the separate offence of failing to comply with the statutory duty to prevent the contravention. However, a positional/managerial liability model underpins the provision.

In SA and Tasmania, if a company commits an environmental offence, a person who is an ‘officer’ of the company is liable. Further, where a company commits an environmental offence, an officer who knowingly promoted or acquiesced in the contravention is also guilty of contravening that provision. An ‘officer’ in relation to a corporation, is defined to include:

- a director
- the CEO
- a receiver or manager of any property of the company or a liquidator of the company and
- an employee of the corporation with management responsibilities in respect of the matters to which the contravention or alleged contravention relates.

Both SA and Tasmania adopt a positional/designated officer/participatory liability model.

**Defences**

**No knowledge**

This defence has recently been repealed in Victoria and NSW (because it was considered to encourage officers to deliberately turn a blind eye to environmental offences). It is also not available in Tasmania, Queensland and SA. Where the defence remains, the legislation is drafted so as to discourage blind or wilful ignorance:

- ACT — the officer or employee of the body corporate could ‘not reasonably have been expected to be aware’ of the contravention
- NT — the defendant did not know, and ‘ought not reasonably be expected to have known’, that the offence was to be or was being committed and took all reasonable steps to prevent or stop the commission of the offence and
- WA — the person did not know, and ‘could not reasonably be expected to have known’, that the offence was being committed.

In these jurisdictions, there is an element of objectivity to the test, which prevents a wilful ‘head in the sand’ approach to environmental management. However, the defences are worded differently in all three jurisdictions, and in the Northern Territory, the defence is extended to a hybrid due diligence defence.

**Not in a position to influence**

In Victoria, WA, NSW and Queensland, there is a defence available for a corporate officer if they were not in a position to influence the conduct of the corporation in relation to the contravention. No such defence is available in Tasmania, SA, the ACT or NT.

The difficulty with this defence, for directors in particular, is that as board members, they can in theory influence any conduct of the company. Senior managers also have considerable influence. Examples of when this defence may be used by directors include where they are in a minority on the board in arguing that a more costly but effective system of environmental management should be implemented which other directors were not prepared to adopt, or at the relevant time they were on leave of absence, or suffering some other disability when a particular policy decision was taken and may not have been informed of that decision.
Due diligence

All jurisdictions have a form of due diligence defence available to corporate officers. However, different tests apply.

New South Wales and Victoria have the same statutory test, namely that the person ‘used all due diligence to prevent the contravention by the corporation’. Courts have rejected that a standard of perfection is required to make out the defence — while ‘all’ must have its proper connotation, similar stress must be given to ‘due’.

The defence is similar in WA, although the person must also have used all reasonable precautions to prevent the commission of the offence in addition to using all due diligence.

In Queensland, the corporate officer needs to have taken ‘all reasonable steps to ensure the corporation complied with the provision’.

In the ACT, the corporate officer needs to have ‘exercised due diligence to prevent the body corporate from doing the act or making the omission alleged to constitute the offence or an element of the offence committed by the corporation’. There is also a separate due diligence defence outside of the derivative liability provision. Section 153 of the Environment Protection Act 1997 (ACT) basically repeats the derivative liability due diligence defence, but sets out a number of matters a court may have regard to when deciding whether a defendant has exercised due diligence. It is not clear how s 153 fits in with the due diligence defence included in the derivative liability provision.

In the NT, the defence is made out if the defendant could not, by the exercise of reasonable diligence, have prevented the commission of the offence by the corporation.

In Tasmania and SA, the alleged contravention must not have resulted from any failure on the defendant’s part to take all reasonable and practical measures to prevent the contravention or contraventions of the same or similar nature. Without limiting this test, the defence includes the defence that the act or omission alleged to constitute the contravention was justified by the need to protect life, the environment or property in a situation of emergency and that the defendant was not guilty of any failure to take all reasonable and practicable measures to prevent or deal with such an emergency.

In Tasmania and SA, where an employer seeks to establish the defence by proving the establishment of proper workplace systems and procedures designed to prevent a contravention of the Act, that must be accompanied by proof that:

- proper systems and procedures were also in place whereby any such contravention or risk of such contravention of the Act that came to the knowledge of a person at any level in the workforce was required to be reported promptly to the governing body of the corporation or to the employer, or to a person or group with the right to report to the governing body or the employer and
- the governing body of the company or the employer actively and effectively promoted and enforced compliance with the Act and with all such systems and procedures within all relevant areas of the workforce.

If the corporate officer being prosecuted is not an employer, this additional provision will not apply.

From cases considering the due diligence defence in Australia and overseas in the sphere of environmental law, the following is a summary of the matters which courts have considered when determining whether a defence has been made out (bearing in mind that due diligence will depend on the circumstances of the case).

- Are precautions in place to prevent the specific and likely risks arising from operations, rather than merely general precautions taken in the ordinary course of business? This will be a question of fact, and will be decided objectively according to the standard of a reasonable person in the circumstances (especially in relation to activities requiring experience and acquired skill).
- Was a pollution prevention system in place, which was supervised, inspected and improved over time?
- Was a system in place, sufficient within the terms and practices of the relevant industry, to ensure compliance with environmental laws? Are staff required to report back periodically to the officers on the operation of the system? Are staff required to report any substantial non-compliances to officers in a timely manner?
- Do officers review environmental compliance reports? They are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel and other informed parties.
- Do the officers substantiate that staff are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders?
- Are the officers aware of industry standards dealing with similar environmental pollutants or risks (although standard practice does not set an immutable standard)?
Do the officers immediately and personally react when they have notice that the system has failed?

Are there remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act and other indices of a proactive environmental policy?

With a mind concentrated on likely risks and without negligence or fault, were reasonable precautions taken beforehand to prevent the incident, and has due diligence, in the form of appropriate and persistent effort to prevent the incident, been exercised?

If the incident is shown to not be foreseeable, or, if foreseeable, a risk ‘so remote that a reasonable person, careful of the safety of his neighbour would think it right to neglect it’, the defence will be made out. Perfection or the use of increased knowledge or experience embraced in hindsight should form no part of what is reasonable in the circumstances. Conduct after the incident does not lead to the conclusion that the failure to use it earlier was negligence, but it can show that a particular precaution was practicable. Further, while the fact that the ‘absence of a mishap’ does not entitle a person to ignore safeguards against dangers, it is equally true that years of experience without accidents may tend to confirm an assessment that the risks of harm are negligible.

Defence available to corporation

In Victoria, WA and the ACT, there is a defence available to an officer if it can be shown that the company would not have been found guilty of the offence because it would have been able to establish a defence. In the NT, the defence is worded slightly differently, and is made out if the company had, under the Act, a defence to the offence that the defendant is, apart from the derivative liability provision, to be taken to have committed.

This defence is of limited value in Victoria, where the main environmental offences are offences of absolute liability. For these offences, the only defences available are that the offence occurred in an emergency, or the relevant discharge was in compliance with a permit or licence issued under the Act.

In WA, the defence is of greater value. For serious offences, a company may use the defence of due diligence and reasonable precautions. It will therefore be sufficient for an individual to prove that the company used due diligence and reasonable precautions to defend a claim for personal liability. In some situations, the company can also rely on a defence if the offence was caused by accident or for the purpose of preventing danger.

In the ACT, the legislation distinguishes between:

a) ‘knowingly’, ‘recklessly’ or ‘negligently’ polluting the environment causing harm and
b) polluting the environment causing the harm.

Offences in (a) attract greater penalties than those in (b). In the ACT, the defence is therefore useful for offences referred to in (a), as the prosecutor must prove intent, recklessness or negligence. However, the defence is of little practical utility in relation to offences referred to in (b) as the offences carry strict liability.

There is no equivalent express defence available in Tasmania, SA, NSW or Queensland, although such a defence may be implied because the company must be guilty of the offence for the derivative liability provisions to apply.

In addition to the defences summarised above, there is a unique defence available in the NT, namely that the act or omission that constituted the offence took place without the defendant’s authority, permission or consent.

Complexity and inconsistency

From the analysis undertaken above, it is clear that CAMAC’s concerns about undue complexity and difficulties in understanding compliance requirements, is well founded in the context of environmental legislation. This is particularly so for companies that operate in more than one jurisdiction in Australia.

Reform needs?

In light of CAMAC’s concerns, the report concluded as follows.

• Liability for breach of a legal requirement by a company should fall in the first place on the company. Appropriately weighted monetary or other penalties can have an impact on shareholders and others who have a stake in the success of a company and may influence the behaviour of those individuals who control and manage the company, whether through their being held accountable by shareholders or otherwise.

• As a general principle, individuals should not be penalised for misconduct by a company except where it can be shown that they have personally assisted or been privy to that misconduct.

• In some circumstances, a legislature may judge it appropriate to go beyond accessorial liability and impose a duty on a specified individual to ensure that a company complies with a particular legislative requirement. However,
this should only operate when the duties of the individual are specific and relate to an operational area reasonably regarded as within that person’s actual control, rather than extending to situations which require the exercise of significant judgment or discretion. CAMAC proposed a model provision for the designated officer approach.

- It may be appropriate to impose on relevant corporate personnel a more positive duty of care than may be derived from ordinary principles of accessorial liability. In exceptional circumstances, the public interest in achieving compliance by a company may be seen as requiring officers to assume a more positive role within their spheres of influence and to risk personal liability where they have acted with reckless or negligent disregard of the company’s relevant conduct. CAMAC proposed a model provision for extended accessorial liability.

- A more principled, more consistent, approach to personal liability is required across jurisdictions. A more standardised approach would reduce complexity and compliance costs, aid understanding and aid understanding. It would assist efforts to promote effective corporate compliance and risk management, while providing more certainty and predictability for the individuals concerned.

**Next steps**

The report notes that the government has indicated that it will consider the report and make appropriate recommendations to the Ministerial Council for Corporations. Given that the issues raised in the report relate not only to federal, but state and territory, legislation, and a range of legislative topics, only one of which is environmental, any broad reform in environment law is likely to be some time coming.


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**Note**

1 State Pollution Control Commission v RV Kelly [1991] NSWLEC 75

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