



Personal liability for directors and managers of corporations under Security of Payment reforms

Last week, we wrote about some of the amendments proposed to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) by virtue of the *Building and Construction Industry Security of Payment Amendment Bill 2018* (**the Amendment Bill**).

One of the key changes proposed by the Amendment Bill is for directors and “other individuals” involved in the management of the corporation to be held liable for contraventions of the Act.

A person will be involved in the management of a corporation when they are in a position to influence the conduct of the corporation in relation to the commission of the specific offence.

The rationale behind the proposed reform was outlined in the explanatory statement for the Amendment Bill as follows:

“Extending liability to pierce the corporate veil ensures that directors actively take appropriate steps to ensure compliance with the Act”.

Fair Trading will be responsible for prosecuting accessory and executive liability offences and it is also proposed for Fair Trading investigators to be provided with additional powers to assess compliance with the Act.

ACCESSORIAL LIABILITY

Accessorial liability will be apparent where a corporation commits an offence under the Act and it can be demonstrated that a director or an individual participates in any, or all of the following conduct:

1. Aids, abets, counsels or procures the commissioning of the corporate offence; or
2. Induces, whether by threats or promises or otherwise, the commission of the corporate offence; or
3. Conspires with others to effect the commission of the corporate offence; or
4. Is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

The “catch all” provision is problematic as it implies that a director or individual may be liable if they fail to do something (i.e. there is no requirement for a positive act being taken by that person in order for them to be liable).

EXECUTIVE LIABILITY

Executive liability is intended to apply to more serious offences, such as false or misleading supporting statements given by head contractors to principals, or a head contractor failing to hold retention money on trust.

An executive liability offence will be apparent where a corporation commits an executive liability offence and a director or an individual:

1. Knows or ought to have known that the executive liability offence would be or is being committed; and
2. Fails to take all reasonable steps to prevent or stop the commission of that offence.

The term “reasonable steps” is unsurprisingly broad and requires the director or individual to do the following in relation to the provisions of the Act which relate to executive liability:

1. Take action towards assessing a corporation’s compliance;
2. Ensure that regular professional assessments are undertaken;
3. Take action towards ensuring that a corporation’s employees, agents and contractors are provided with information, training, instruction and supervision;
4. Take action towards ensuring that there are adequate structures, work systems and processes in place; and
5. Take action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance.

The onus will be on Fair Trading to prove that the director or individual failed to take “reasonable steps”. An executive liability offence will carry a fine in the sum of \$11,000.00 for corporations and \$2,200.00 for individuals.

INCREASED POWERS TO FAIR TRADING

To assist Fair Trading with prosecuting contraventions of the Act, it is proposed for Fair Trading to be provided with a two year period (formerly 6 months) to commence proceedings for offences under the Act.

In addition, investigators have been provided with broader investigation powers, where they can investigate compliance with the Act generally, as opposed to compliance only with the provisions of the Act which relate to supporting statements.

Investigators will now also be able to:

1. Obtain information and records from corporations;
2. Enter any commercial premises at any time without a search warrant; and
3. Issue penalty notices for certain offences.

If a corporation fails to comply with a request for information and records, this will be a contravention of the Act and is also classed as an executive liability offence.

WHAT DOES THIS MEAN

Given the broad range of circumstances where the accessory and executive liability offences may apply, corporations will be required to implement stringent practices and procedures to ensure that contraventions of the Act do not occur, and particularly to meet the “reasonable steps” test which relates to executive liability offences.

This means regular training and supervision for all of the relevant stakeholders involved in a construction project, along with regular self-auditing.

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