




Personal Liability for Officers and Managers

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WLQ is a division of 

Officer and manager Liability



How high is the bar set?

What must a manager do

Checklist – the basic steps to avoiding liability

- 1) Make an assessment of which Acts apply to your business;
- 2) Understand the obligations that the Acts imposed upon the company and individuals;
- 3) Ensure adequate systems are in place so that the company does not contravene its obligations;
- 4) Take steps necessary to ensure that even if the company does breach its obligations they can avail themselves of a defence;
- 5) Clearly identify which directors are most likely to be exposed to personal liability and ensure that they are made aware of any potential risks; and
- 6) Take appropriate steps to ensure that directors and officers insurance policies provide maximum protection for all those exposed to personal liability.

Officer and manager Liability



What is the obligation

The executive officers of a corporation must ensure that the corporation complies with this Act. (WHSA)

If a corporation commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence.



Who is an executive officer?

- **Executive officer** – is a person who is **concerned with or takes part in** the corporation's management.

- It does not matter if the person is not a director or is not called executive officer.

- Includes non-officer management level

Caselaw



Inspector Gregory Maddaford v Graham Gerard Coleman & Anor [2004] NSWIRComm 317.

Coleman Case -

Initiation rite gone wrong

Culture of horseplay existed in workplace

Manager didn't know of specific initiation

Manager knew of culture on initiations

Caselaw



Morgan and Lambrou v Dominic De Silva (Civil Claims) [2007] VCAT 1685 (10 September 2007)

Applicant originally made an application against former employer for monies invested in company

Company went into liquidation and money was not recovered

Applicant brought this application against an individual director, that being the Respondent in this matter.

Employer company was found to have engaged in misleading and deceptive conduct, and was unconscionable in trade or commerce.

Therefore current Respondent, that being an individual director of the company, was held to be personally liable and ordered to pay money back to the Applicant in the sum of \$8,730.00

Caselaw



Current Case before the Fair Work Ombudsman

- FWO is currently prosecuting the former sole director of the retail company, Cleddon Australia, as the company is in liquidation.
- Alleged that the company underpaid employees in excess of \$40,000.00 and breached workplace rights for not keeping proper employment records.
- Due to the significant amount of money involved and the employer's failure to rectify the situation, the FWO is prosecuting the sole director personally.

Caselaw



***Houghton v Arms* [2006] HCA 59**

Mr Houghton was an employee of WSA Online Limited, a company engaged in web design.

Misleading comments made regarding credit card accessibility on a website designed for Mr Arms business

As a result of comments made, Mr Arms operated his business at a loss for 12 months and incurred a loss of \$58,000.00.

WSA held liable for loss

On Appeal to Full Court- WSA, Mr Houghton and another employee found jointly liable

On Appeal to High Court- appeal dismissed, Mr Houghton remained liable and cost order against him granted.

Caselaw



***CH Real Estate Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37**

Jainran entered into a contract to purchase commercial property from Boyana, a company controlled by Mr Sgro.

The Appellant, CH Real Estate, was the real estate company involved in the transaction

Jainran rescinded the contract for misrepresentations made by Boyana

Jainran proceeded against Boyana for a return of the deposit by reason of: a) a contractual entitlement on recession; or

b) damages under the TPA for misleading and deceptive conduct.

Jainran also proceeded against Mr Sgro, as the principal and sole director/shareholder and as the only source of instructions to solicitors and real estate agent.

Mr Sgro gave evidence that he did not know of the existence of the road widening affection

First instance: Jainran could rescind K and recover deposit due to misrepresentations which lead to the inducement of K.

Sgro also held personally liable because he was the "human embodiment" of the company and its actions were his actions

Court of Appeal: Appeal dismissed- Sgro remained personally liable

Caselaw



What does the Jainran decision mean for Employers?

Plaintiffs no longer have to prove that the maker of the representation- that being the officer, director, etc- knew that the statement was incorrect.

The risk of being held personally liable increases if a company does not have sufficient assets to meet an award for damages (ie the company is in liquidation) or where the company has a sole director who engaged in the conduct.

Caselaw



McMartin v. Newcastle Wallsend Coal Company Pty Limited & Ors [2004] NSWIRComm 202

The Newcastle Wallsend Coal Case

Mining company applies to do mini-wall mining

Included information on old mine workings

Plans from the old mine workings were obtained from DMR (only sheets 2 & 3)

DMR's plans 2 & 3 were wrong – old mine workings were 100 metres closer to the new proposed works

Caselaw



The Newcastle Wallsend Coal Case

Didn't look for sheet 1 – but if had – would have noticed discrepancies

In early November 1996, water appeared in the new works tunnel

On 13 November 1996 – water inrush into new tunnel from old mine workings

4 miners drowned

Caselaw



The Newcastle Wallsend Coal Case

Who was prosecuted –

Mining company

Mine managers x2 (original and current)

Under managers x 5

Surveyor (of the new works) x1

Caselaw



Critical Issues -

- DMR plans were not under defendants' control but that did not relieve the defendants of the obligation to ensure safety.
- DMR approved the works – but that did relieve the defendants of the obligation to ensure safety.

Critical Issues



Critical Issues -

- Do you participate in discussions and developments of a work procedures –Do they cover any activity containing risk?
- Do you set budgets for maintenance programs, marketing, safety or strategic directions-Do they cover any activity containing risk?
- Are you on a safety committee? Additional responsibility to think through risk.
- Cost saving measures can bring additional risk.

Defences



A Defence:

In NSW, Queensland and Tasmania, directors and persons concerned in the management of the corporation are deemed to be personally liable in relation to breaches of the OHS Act by their companies unless:

- a) they can establish that they exercised all due diligence; or
- b) that they were not in a position to influence the conduct of the corporation

Checklist



Able to Influence-but undertook Due Diligence and Unable to influence

- Am I part of decision making process ?
- Does my role have a particular responsibility?
- What is the boundary of my participation and role?

Defences



Evidence for establishing defences

- Minutes of meetings
- Expert reports and investigations reports
- Board minutes showing a consideration and weighing of risks
- Employment contracts: Contractual duties and responsibilities

Defences



Checklist –

Am I properly informed?

What information am I using?

Is it reliable?

Is there other information available to consider?

Have I tried hard enough to ensure I have all the information?

Defences



Checklist –

Do I have the expertise (myself or others) to deal with the risk assessment and controls?

If I need an expert who do I get?

Is the expert accredited?

Defences



Checklist –

When will I audit the system?

Do I know my audit is effective?

Do worker's know the audit system works?

Defences



Checklist –

Have I recorded the decision making actions

- what I did?
- how I did it?
- how I determined what I did was adequate?

Summary



- Very wide ranging potential for liability-State and Federal
- Audit business activity for risk Issues
- Audit risk issues -decision making process
- Establish a documented process to show "due diligence" and "reasonable steps"
- Maintain records showing due diligence conducted
- Conduct internal reviews following incidents giving rise to prosecutions
- Review personal employment contract duties and responsibilities
- Beware incrimination-some reports are not privileged

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