Handout for ENVM3103 / ENVM7123 lecture 7 on 22 April 2015

Due diligence

Many modern environmental laws attribute liability for offences committed by a corporation to the executive officers of the corporation. For example, the:

- *Environmental Protection Act* 1994 (Qld), section 493;
- *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (note also Part 2.5 of the Commonwealth *Criminal Code*);
- *Fisheries Act* 1994 (Qld), section 219A;
- *Sustainable Planning Act* 2009 (Qld), section 611;
- *Nature Conservation Act* 1992 (Qld), section 162;
- *Vegetation Management Act* 1999 (Qld), section 60A; and
- *Water Act* 2000 (Qld), section 828.

These sections all provide that it is a defence to a prosecution of an executive officer for such an offence to prove that the officer either took all reasonable steps to ensure that the corporation complied with the Act (commonly known as the "**due diligence**" defence), or, that the executive officer was not in a position to influence the conduct of the corporation in relation to the offence.

A good example of such provisions is contained in the *Environmental Protection Act* 1994 (Qld) (which most Queensland statutes mirror).

Sections 493 and the definition of "executive officer" in the *Environmental Protection Act* 1994 (Qld) are as follows:

PART 2—EXECUTIVE OFFICER LIABILITY

493 Executive officers must ensure corporation complies with Act

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

(2) If a corporation commits an offence against a provision of this Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure the corporation complies with this Act.

Maximum penalty—the penalty for the contravention of the provision by an individual.

…

(4) However, it is a defence for an executive officer to prove—

(a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer took all reasonable steps to ensure the corporation complied with the provision; or

(b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

SCHEDULE 3 – DICTIONARY

"executive officer", of a corporation, means—

(a) if the corporation is the Commonwealth or a State—a chief executive of a department of government or a person who is concerned with, or takes part in, the management of a department of government, whatever the person's position is called; or

(b) if the corporation is a local government—

(i) the chief executive officer of the local government; or

(ii) a person who is concerned with, or takes part in, the local government's management, whatever the person's position is called; or

(c) if paragraphs (a) and (b) do not apply—a person who is—

(i) a member of the governing body of the corporation; or

(ii) 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.

Some case law under other legislation sheds light on the meaning of "due diligence" and what must be proven to establish this defence. In *Universal Telecasters (Qld) Ltd v Guthrie* (1978) FLR 360, the Federal Court of Australia held that to establish due diligence under the *Trade Practices Act* 1974 (Cth):

1. The defence of due diligence requires both the establishment of a proper system and the provision of adequate supervision to ensure it is properly carried out.

2. The system must cover all material aspects and dimensions of the business.

3. The mere fact that a system proves inadequate to prevent a contravention does not necessarily establish that it is defective. Even the best systems may fail due to human error. Thus it is necessary to make a judgment about the system and the provision for supervision.

In the Canadian prosecution of Bata Shoes for pollution, *R v Bata Industries Ltd* (1992) 7 CELR (NS) 245, the court laid down the following factors to be used to evaluate the merits of an individual corporate director's reliance on the "due diligence" defence:

1. Whether the director ensured that a pollution prevention system was established, or helped to establish such a system.

2. Whether the director ensured that the system complied with the terms and practices of the relevant industry.

3. Whether the director ensured that the officers of the company reported back periodically to the Board of Directors on the operation of the system.

4. That any substantial non-compliance or environmental concerns were reported in a timely manner.

5. Whether the director was familiar with industry standards.

6. Whether the director immediately and personally reacted when he or she became aware that the system had failed.

The court said that, "Within this general profile and dependent upon the nature and structure of the corporate activity, one would hope to find remedial and contingency plans for spills, a system of ongoing environmental audit, training programs, sufficient authority to act, and other indices of pro-active environmental policy."