



Using technology to assist with environmental management — do directors have a duty?

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🌀 Protection of Environment Operations Act 1997 requirements

🌀 EPV v Devro-Teepak

Directors and managers of corporations will be very much aware that regulatory authorities have made the requirements of environment protection legislation, and licences issued pursuant to that legislation, progressively more stringent.

As the regulatory regime has become more stringent corporations have relied upon advances in pollution control technology to keep pace with the law.

Technological solutions often come at great cost: ‘the Australian [environment] market is \$8.6 billion a year’ — Environment Business Australia. However costly, these solutions are necessary at a time when community expectations, and regulatory requirements, are driving corporations to the point where their operations are required to have little or no impact upon the environment.

Technology has the advantage of assisting a corporation to maintain an excellent corporate profile. Technological solutions might be seen as a ‘silver bullet’ to pollution issues: if the technology performs as promised then directors and managers can turn their attention away from pollution control to address other, often more pressing, corporate demands.

There is no doubt that implementing appropriate technology can result in an improvement in environmental, as well as financial, performance. However the implementation of technology does not relieve directors and managers of their responsibility to actively manage the environmental affairs of their company. Indeed if the technology lulls

directors and managers into a false sense of security then the consequences can be serious.

The requirements of the legislation

In NSW the Protection of Environment Operations Act 1997 (‘the POEO Act’) provides that if a corporation contravenes the POEO Act then each person who is a director of the corporation, or who is concerned with the management of the corporation, is taken to have contravened the same provision unless the person satisfies the Court that:

- the person had no knowledge of the contravention by the corporation
- the person was not in a position to influence the relevant conduct of the corporation
- the person, if they were in a position to influence the conduct of the corporation, used all due diligence to prevent the contravention.

Other jurisdictions have similar provisions in the relevant environmental protection legislation.

It is important to note that many of these offences are ‘strict liability’ offences: that is, it is an offence which does not require any proof of intent — the mere breach of the law is generally enough to prove the offence.

Foreseeable environmental harm

Every day directors make decisions concerning a corporation’s business and its trade. Some of these decisions include whether a corporation’s performance is meeting the current requirements of the environmental licence or planning approval or indeed

Even though, they lack... expertise the director is still required to make appropriate decisions to avoid environmental harm.

whether appropriate technology can result in better performance without a breach of the licence or approval. The POEO Act effectively requires that the director or manager when making decisions addresses all relevant considerations and makes appropriate enquiries (ie. exercises due diligence).

A corporation may choose to modify or add to its operations or plant — for example, to increase production — in which case the environmental consequences of that conduct must be assessed.

Commonly a director does not have the expertise in environmental matters to foresee what environmental problems may arise when a company modifies or adds to its operations or plant.

To overcome this problem directors may engage an environmental consultant to implement appropriate technology to effect the modifications to the company's operations or plant. Even though an environmental consultant is engaged the director or manager must still make relevant inquiries to ensure the corporation is not exposed to potential liability.

EPA v Devro-Teepak

Recently Justice Bignold in *EPA v Devro-Teepak Pty Ltd* considered the liability of a company in circumstances where environmental harm may have been foreseen when implementing new pollution control equipment. Justice Bignold held that

the 'teething problems' arising from the implementation of a new waste treatment plant that caused environmental harm were readily foreseeable and found Devro guilty of an environmental offence.

The case concerned the accidental spillage of effluent from a new waste treatment plant. During operations (although at a time when the consultant was 'fine tuning' the plant), at approximately 12.30am, a balance tank overflowed and the effluent entered a creek through the stormwater drainage system. The effluent contained high BOD and high concentrations of ammonia and organic nitrogen that were well in excess of recommended ANZECC national guidelines for the protection of freshwater aquatic ecosystems.

At the time of the spillage the treatment plant was operational and a consultant was still engaged by Devro to train staff in the operation of the new plant. The training commenced just a few days before the spillage occurred. Indeed the spillage may have been prevented altogether if employees on duty at the time were better aware of the way the plant operated and how to manually control the treatment process.

Justice Bignold held that the effluent spill was likely to cause significant harm to the aquatic environment of the creek. Devro was found guilty and fined \$60,000.

The directors and managers of Devro were not prosecuted by the EPA. However the case is relevant to director duties. The case illustrates that the directors of Devro had taken steps on the introduction of new technology which they thought were appropriate in the circumstances (there was evidence in this matter that representatives of the defendant believed the consultant was liable for the harm). However it appears that insufficient regard was had to the implementation of the new

technology and particularly whether untrained employees should be operating the new plant. It may have been appropriate in these circumstances for the company to engage an experienced operator of the waste treatment plant 'round the clock' whilst the employees were being trained. Certainly the expense of engaging the operator would be less than the amount of the fine issued by the Land and Environment Court.

The case also raises a question as to whether Devro's directors and managers should have made enquiries with the consultant to ascertain the potential 'teething problems' to arise from the new plant. If potential problems were identified prior to the implementation of the waste treatment plant the spillage may have been avoided or at least contained. The incident and conviction spoiled an otherwise 'excellent prior environmental record' of the company.

What should directors consider?

The decision of Justice Bignold read in conjunction with the provisions of the POEO Act has clarified, or perhaps even increased,

The [Devro] decision... has clarified, or perhaps even increased, the scope of considerations that must be addressed by a director at a time when a company is modifying or adding to its operations or plant.



the scope of considerations that must be addressed by a director at a time when a company is modifying or adding to its operations or plant. These considerations include:

- whether the modification or addition will cause excess emissions into the environment which breach EPA criteria, even

during the 'commissioning' of the plant

- have the directors and managers made all relevant enquiries to persons concerning the implementation of the new operations or plant, in particular, have all relevant enquiries been put to an environmental

consultant responsible for implementing a 'technological' solution that will have an environmental impact?

- is the information to be considered by the directors and managers adequate and appropriate for making informed decisions?



News and Views

e-Business — tips and traps

By **Andrew Chalet**, Phillips Fox

Business, and the way we conduct business, has been dramatically altered by the emergence of e-commerce. E-commerce is impacting upon existing business and consumer relationships and creating opportunities for new relationships, redefining distribution chains and challenging existing approaches to the protection and valuation of intellectual capital. To manage the legal implications of an e-business strategy effectively, an understanding of e-commerce business models, relationships and the law is essential.

Implementing your e-commerce strategy

In our experience, little consideration is given to the legal issues which impact on the development of proposed e-business strategies at the executive and board levels. This results in a lack of resources being committed to e-commerce projects.

With detailed understanding of specific industries, and an appreciation of the issues and challenges for conducting business over the Internet, you will be in an excellent position to assist in identifying the legal issues for an e-

commerce business strategy, as well as the planning, design and implementation of your e-commerce initiatives. Many, potentially fruitful, e-commerce initiatives are wasted because of the lack of attention to basic legal details.

Getting started

There are a number of specific legal issues to be considered in the planning, design and implementation of your e-commerce projects. Some of these issues require contractual arrangements to protect and support your ongoing Internet strategies.

Following are some of the issues to look out for, and a checklist of the legal considerations along the way.

Imagine it

When you are in the planning stages of your e-business there are some pertinent issues to consider, these include:

- confidentiality/ownership of intellectual property
- trade marks and domain names
- the brand — use the experts!
- regulatory issues — from the Trade Practices Act to on-line gambling/auctions
- jurisdictional issues.

Design it

The design phase of your e-business requires legal assessment of:

- website agreements/warranties and intellectual property
- security and backup/dependencies
- agent/supplier/customer contracts
- joint ventures.

Produce it

Broader business issues facing production are:

- structure — tax and control
- capital raising — friends
- shareholder agreements
- investment ready?

Launch it

Critical to the success of launching the e-business are a number of issues such as:

- distribution arrangements
- customer privacy/refunds, returns, etc.
- customer data — gathering and use of.

Grow it

You've gone live, your business is up and running and you want to increase business. Some legal implications surround:

- further capital raisings
- new 'partners'
- changing regulatory environment.

