



NSW EPA concedes more protection for individuals subject to “special executive liability”

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AT A GLANCE

- Individuals may be compelled to attend an interview as part of an Environmental Protection Authority (**the EPA**) investigation concerning a potential breach of the **Protection of Environmental Operations Act 1997 (the POEO Act)**.
- During this process, Individuals can seek to invoke the protection of Section 212(3) of the POEO Act, which provides that any information or answers given in the interview cannot be later used against that individual in criminal prosecutions.
- Prior to *Fordham v EPA*, it was unclear whether the protection of s.212 (3) could be relied on with respect to breach of an offence under the POEO Act, which attracted “*special executive liability*” (i.e. an executive of a corporation can be deemed to be personally liable if a corporation is found to have breached the POEO Act, and a separate prosecution pursued, even if the corporation itself is not prosecuted).
- As a result of *Fordham v EPA*, the EPA has clarified that individuals may rely on the protection of s.212 (3) even in respect of “*special executive liability*” offences.
- In a climate where matters of environmental protection are of increasing importance and those potentially responsible for potential breaches of environmental legislation are more frequently pursued, this clarification provides important reassurance for individuals compelled to attend an interview by the EPA.

The circumstances

In *Fordham v Environment Protection Agency [2018] NSWCA 167*, the EPA investigated the unlawful disposal of waste by a company (**the Company**). As

part of its investigation, the EPA issued Notices under s.203 of the POEO Act, requiring the Company director and its managers to attend interviews.

The EPA investigation reviewed possible contraventions of the POEO Act by the Company, which also attracted “*special executive liability*” under s.169 of the POEO Act. This means that when a corporation contravenes a provision of the POEO Act, its directors and managers can also be deemed to have contravened the same provision.

The EPA Interview Process – An Individual Adjustment?

It is an offence under s.211 of the POEO Act for an individual to fail to attend an interview requested by the EPA unless they have a “*lawful excuse*” (notably the POEO Act does not elaborate on the meaning of “*lawful excuse*”).

However, under s.212(3), individuals can seek protection that information and answers provided in an interview will not be admissible against them individually in criminal proceedings. In this matter, the director and managers of the Company were concerned that protection provided by s.212(3) of the POEO Act would not extend to an individual offence deemed under s.169 of the POEO Act. Therefore, the director and managers requested the EPA not ask questions relating to “*special executive liability*” offences, or not prosecute them for offences relating to the answers provided. In the alternate, the directors and managers requested consent to refuse to answer questions.

The EPA refused to comply with the request from the director and managers. The director and managers subsequently sought declaratory relief from the Land and Environment Court (**the Court**) that:

- any answers they gave in interview compelled by the EPA, would not be admissible for the purposes of prosecution under s.169 of the POEO Act; and
- they had a “*lawful excuse*” under s.211 (1) of the POEO Act to refuse to answer questions.

In response, the EPA sought declarations that the director and managers were in breach of s.203 of the POEO Act and mandatory injunctions requiring their attendance for questioning by the EPA.

At first instance, the relief requested by the director and managers was declined. The Court concluded that the relief sought was an advisory opinion on an abstract or hypothetical question (because no prosecution against the director and managers had commenced) and as such, could not be granted.

The Appeal

Before the appeal was heard, the EPA made a significant concession that information provided in an interview pursuant to the protection of s.212(3) of the POEO Act, would not be admissible in a prosecution for an offence to which s.169 of the POEO Act applied.

Nonetheless the Appeal continued and the Court considered whether the director and managers should have been granted the relief requested.

The Supreme Court held that at first instance the Court had erred in finding that the answers sought were on an advisory basis and therefore the relief should be declined. The Supreme Court considered there was a legal controversy (which was not hypothetical) between the parties which could be the subject of declaratory relief.

However, in view of the concession made by the EPA, the Court did not make a finding on whether the director and managers otherwise would have had a “*lawful excuse*” not to attend interview and/or refuse to answer questions. It was also deemed unnecessary by the Supreme Court to determine the admissibility of evidence provided by an individual in interview, with respect to a deemed prosecution under s.169.

Implications

In summary, the NSW EPA has clarified that any responses provided by individuals during interviews as part of an investigation of a “*special executive liability*” offence, cannot be used against the individual in criminal proceedings. This is provided the individual seeks protection under s.212(3).

In recent years the issue of environmental protection has grown in importance. It follows that EPA powers to investigate and prosecute environmental offenders (including corporations and individuals) have grown and are increasingly applied.

For individuals the subject of a potential EPA investigation or prosecution, the protection against self-incrimination provided by s.212(3) of the POEO Act is very important. The clarification by the EPA that this protection also extends to offences attracting “*special executive liability*” is a reassuring development for affected individuals.

However, it is important to note that protection provided by s.212(3) is not an automatic protection. Therefore, we advise those seeking to rely on this to seek appropriate legal advice to ensure maximum protection.

Importantly, the protection available under s.212(3) extends to criminal but not civil proceedings.

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