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THE NEW APPROACH TO ENVIRONMENTAL
RISK IN CORPORATE MANAGEMENT

A commentary on the impact of Australian Corporation Law reform
legislation
and the new wave of environmental legislation in New South Wales.

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Protection of the Environment Operations Act 1997.

ABSTRACT _____

The Company Law Review Act 1998 and the Corporate Law Economic
Reform Bill 1998 (CLERB) will introduce a new age of corporate
responsibility replete with notion of good faith, rational
judgement and reasonable expectations in matters of environmental
due diligence. The "business judgement rule" has particular
implications in corporate risk management and in the important
task of protecting the environment from corporate operations which
threaten to pollute or contaminate. There is an increased need to
identify, assess and manage risk in New South Wales. This paper
examines the provisions in new Federal and State legislation and
the consequences for corporate liability through environmental
risk management.

BRAVE NEW WORLD

The movement which embraced the cause of sustainable development at the 1987 World Commission on Environment and Development had its genesis in a philosophy of the seventies: possession of a livable environment is not merely a state of affairs but something to which each human has a right. By the nineties most industrialised nations had accepted the recommendations of the 1987 Brundtland Commission Report. Almost overnight sustainable development became the catchcry of industry and the dream of a 'brave new world' built on a commitment to intergenerational equity began to look like an achievable objective from an environmental perspective.

As long as international conventions safeguarding the environment were able to be transposed successfully from the global forum into domestic applications the desire of governments to fulfil the needs of present generations would be met without placing at risk the environmental necessities of the future. With an abundance of worldwide goodwill the currency in international environmental agreements grew in status and credibility.

However, the task of transposing international environmental agreements across sovereign state borders has been difficult for multi-national corporations and federal legislators. The re-arrangement of environmental priorities in a federated system of government is a complex matter but the message is simple and being heard. Damage by way of pollution or depletion threatens lifestyles and ultimately life itself.

According to the Business Council of Australia, "business should be guided in their operations by an understanding of sustainable development ... which essentially, provides a means of integrating environmental and economic goals to produce outcomes that are both environmentally acceptable and cost effective in an economic sense. Business and industry, being the chief source of wealth creation in the community, has a major role to play in achieving these integrated goals. Within this context of sustainability, Australian business recognises the need to protect the environment ... by seeking to reduce any adverse impact of the business's operations and products on air, water, land and living organisms to a level where the cost to society of further reductions are no longer offset by the benefits."

The resurgence of international co-operation in environmental action has promoted this new global movement towards sustainable development to such a degree that the

"protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind." Indeed, Wensley observed that "society is redefining the concept of national interests with states less and less the centre of international relations, and instead mankind and its individual representatives, people and the common good, at centre stage. Essentially, environmental policy decisions have become exercises in risk management, where the increased need to identify, assess and manage risk has placed greater emphasis on environmental impact assessment, early warning systems and on systems for prioritising risk.

THE AUSTRALIAN RESPONSE

In a structural sense, Australia's environmental decision-making processes have remained largely unresponsive to these developments. Despite the strengthening assertion of larger international community interests, and despite what now amounts to over 30 years of attention within Australia to its environmental decision-making processes, those processes are still susceptible to the criticisms that they lack integration, and depend on a fragmented and highly complex regulatory system which impedes management initiative. In the meantime, demand for natural resources is increasing. Consequently there is a need for much closer co-ordination of the activities and approaches of State and Federal authorities.

To respond to its international obligations the Australian government has chosen to co-ordinate its efforts at setting national environmental standards through the persuasive influence of the Intergovernmental Agreement on the Environment (IGAE) supported by the National Environment Protection Council (NEPC) and the intention of NEPC to issue from time to time, a National Environment Protection Measure (NEPM) that will bind the States and Territories to the setting of national environmental standards.

Fowler notes there are significant limitations on the jurisdiction of the NEPC with respect to the setting of environmental standards.

"Whilst the promoters of the NEPC will undoubtedly extol the virtues of the national standardisation which it is intended to deliver, the reality is that its role in this respect is confined to the development of ambient standards and does not extend to specific discharge or emission standards.

It is not easy to see how the NEPC can meet the object of the Act in these circumstances. If the States and Territories continue to administer, under their own environment protection laws, varying standards for the emission of

pollutants to the atmosphere or discharge or wastes into the soil and water, 'equivalent protection' can not be assured and 'variations between participating jurisdiction' will be maintained. This may particularly disappoint the business community, which has strongly urged more consistent measures with respect to environment protection and may look to this particular initiative to deliver such consistency."

Some consistency in approach can be drawn from the Fourth Schedule of IGAE Clause 16 which appears to confirm the status of NEPC to promulgate an NEPM "throughout Australia, as a valid law in each jurisdiction." However, there appears to be a clear intention within the NEPC Act that a National Environment Protection Measure will not be self-executing, but rather will be put into effect "by laws and other arrangements" within each participating jurisdiction, which in turn will have sole responsibility for the enforcement of the relevant laws and arrangements.

Given this likely outcome, how do national Australian companies respond to highly complex state based regulatory systems which lack the necessary co-ordination at the federal level to provide a collaborative approach to risk management or sustainable development? The answer lies partly in balancing societies expectations with the economic burden of preserving the environment. The 'end of pipe' objectives of state regulators impose cost consequences for industry and the local community. At the global end of the environmental spectrum Australians need to recognise there is a universal trend towards sustainability which requires business to remain competitive by investing in cleaner production and systems which utilise alternative resources.

With the increased emphasis on environmental performance reporting and compliance primarily as a result of the introduction of the Company law Review Act 1998, the Protection of the Environment Management Act 1997 (NSW), and the Contaminated Land Management Act 1997 (NSW), there will be an increased economic burden on Australian companies to maintain a fully operational environmental management system (EMS) (including a due diligence plan) in order to assess the environmental impact of a corporation's activities and establish prudential standards of conduct conducive with the standard of care required to negate the risk of environmental harm.

Risk management in environmental terms is not just concerned with the here and now. It has a vital role to play in ensuring that 'best practice' environmental management delivers the promise of sustainable development that is an equitable share of a sustainable future.

Corporations operating with an efficient EMS and a 'best practice' environmental management plan are arguably protecting their exposure to environmental liability whilst enhancing their future marketability. Indeed, there is an abundance of case histories demonstrating the economic and competitive advantages gained by corporations engaged in 'best practice' environmental management. Companies following in their footsteps have reportedly improved profitability, enhanced corporate image and community acceptance, increased market opportunities, improved efficiencies and reduced potential for legal liability.

'Best practice' environmental management requires positive management initiatives in a number of operational areas with the motivation to go 'beyond compliance' in order to achieve environmental objectives. The key elements are:

- an emphasis on continuous monitoring improvements in pollution prevention and cleaner production as the foundation for optimal environmental performance;
- strong leadership by senior management in emphasising the importance of environmental issues;
- line management responsibility for enhancing pollution prevention and cleaner production, with line managers being directly accountable for environmental costs and savings;
- extensive consultation with major stakeholders, including employees, public interest groups, product customers and regulators and even other companies;
- the integration of environmental considerations into the management of enterprises to ensure effective links between environmental production and other company functions. This may include a commitment of resources to develop environmentally benign technologies and products.

But why choose to go beyond compliance? The answer partly lies in management's attempt to internalise the environmental challenge as an element of quality management and could also be attributed to management's search for responsive strategies to deal with environmental questions involving international competitiveness, changes to management processes and society's increased expectations concerning corporate responsibility. By shaking off the shackles of imposed regulation and by accepting the mantle of self-regulation, corporations are recognising the need for a revitalised approach to questions facing industry today; "how to reduce levels of pollution, waste generation and resource consumption to that required for long term environmental sustainability, while at the same time minimising reductions in competitiveness and profitability.

Recently, the President of the World Business Council for Sustainable Development identified the primary environmental risks facing risk managers today. He noted that environmental risks fell broadly into three categories:

§ Firstly, the short term risks of sudden pollution spills, fines for illegal emissions and public reactions to company practices like Brent Spar which can mean substantial costs and affect the share price. Environmental issues are also moving targets. How "Clean is clean enough?" They are emotional, political and require technical solutions.

§ Secondly, the medium term risks of not reading the market signals correctly and not redesigning products and processes to meet changing customers demands for more green products can lead to loss of market share. Contaminated land owned by the company can turn out to be major obstacle in a merger situation or when selling the company.

§ Thirdly, the longer term risks associated with the carrying capacity of the worlds ecosystems. We know very little about the ecosystems as mentioned earlier and therefore there are major uncertainties around issues like Climate Change. However, society demands that business takes a precautionary approach to these issues. The big challenge then becomes: how much can we afford to invest today to minimise the consequences of Climate Change in the future and who in society should pay for the uncertainty? the third category of long term risks put risk managers in a very difficult dilemma. How can you judge the long term vulnerability of your company? An important element in insurance is historical statistics. How do you judge and price these types of future uncertainties?"

INTO THE FUTURE : CORPORATION LAW REFORM

The Australian Securities and Investments Commission (ASIC) has endeavoured to remove future uncertainties in corporate environmental reporting with the release on 5 November 1998 of ASIC Guidelines on Environmental Reporting. The guidelines are set out in ASIC Practice Note 68, "New Financial Reporting and Procedural Requirements. and follow the commencement of the Corporations Law Review Act 1998 (CLRA) and the Managed Investments Act 1998 (MIA) on 1 July 1998.

ASIC Commissioner Jilian Segal said recent changes to the law meant that companies, registered schemes, and disclosing entities have to disclose their performance in relation to environmental regulation in annual reports for years ending on or after 1 July 1998.

"The requirement applies where a company's operations are subject to any particular and significant environmental regulation under a Federal, State or Territory law, " Ms Segal said.

"AS the responsibility for complying with the new environmental reporting requirements falls on directors, ASIC felt it was important to provide some general guidelines to assist directors in complying with these new requirements."

The relevant clauses [72-75] of Practice Note 68 are in the following terms:

Environmental reporting

72. Pursuant to the new s.299(1)(f) [Corporations Law Review Act 1998] , the directors' report of a company, registered scheme or disclosing entity for financial years ending on or after 1 July 1998 must give:

"if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State of Territory - details of the entity's performance in relation to environmental regulation".

73. The requirements of s.299(1)(f) have been referred to the Parliamentary Joint Committee on Corporations and Securities for review. The Committee has not yet reported and any report is still to be considered by the Government. The guidance provided in this Practice Note recognises that s.299(1)(f) is law at the date of this Practice Note.

74. The following general guidelines are relevant in relation to the environmental reporting requirements:

(a) Prima facie, the requirements would normally apply where an entity is licensed or otherwise subject to conditions for the purposes of environmental legislation or regulation.

(b) The requirements are not related specifically to financial disclosures (eg contingent liabilities and capital commitments) but relate to performance in relation to environmental regulation. Hence, accounting concepts of materiality in financial statements are not applicable.

(c) The information provided in the directors' report cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation.

(d) The information provided in the directors' report would normally be more general and less technical than information which an entity is required to provide in any compliance reports to an environmental regulator.

75. The circumstances of each entity will be different and many entities affected by the new s.299(1)(f) are still to come to terms with these new

reporting requirements. ASIC is conscious that reporting practices in relation to environmental matters will evolve, particularly during the coming 12 months. ASIC will be monitoring reports to assess whether further guidance is necessary. ASIC expects full compliance with the spirit as well as the terms of the law."

Whilst ASIC recognises that "reporting practices in relation to environmental matters will evolve, particularly during the coming 12 months," those concerned with gaining a wider perspective on a company's operations outside of Australia for the purpose of determining the financial risk of legal liability will view the requirement of s.299(1)(f) with obvious disappointment. The requirement that the "directors' report for a financial year must ... if the entity's operations are subject to any particular operations and significant environmental regulation under a law of the Commonwealth or of a State or Territory ... [give] details of the entity's performance in relation to environmental regulation" will open ASIC to the criticism that Australian multi-nationals are not required to report on the environmental performance of their overseas subsidiaries.

Gordon's comments [Slater & Gordon] concerning BHP's environmental performance at the OK Tedi mines in Papua New Guinea (1984-94) are particularly relevant to the issue raised. He notes:

"From the earliest operational years of the mine the intensity of the extractive process at OK Tedi mines severely impacted on the environment affecting 30,000 Papua New Guinean subsistence villagers, growers and fishermen and women ... along the entire river system. 20 years ago, the effects of what is now a profitable mine on some subsistence villagers in the far Western part of Papua New Guinea might have rated a mention in "National Geographic" or anthropological journals, but the question must be asked why has the issue asserted such prominence that everyone from a US Presidential Candidate to the weekly network comedy programme "Full Frontal" have made their views known? In my view, it is a consequence of the active concern of the Australian people for important environmental issues within Australia or involving Australian companies, and the failure of BHP to recognise this concern and respond appropriately to it.

The first thing to say about Ok Tedi, in this context, is that there has never been any legal compulsion, in the sense of statutory requirement, upon BHP to report on the environmental impacts of its operations at Ok Tedi, to the Australian Government or people (other than the usual requirements of the Stock Exchange to report matters which might influence the market and their share price). This contrasts with the requirement of the USA Government which requires BHP to report annually to the Securities and Exchange Commission on a wide range of matters, including overseas environmental regulation and performance, pursuant to Section 13 or Section 15(d) of the Securities Exchange Act 1934(US).

This is, I think why this case study is so useful in the context of this discussion - the decision on what, if anything, to say to the Australian people about its environmental performance at Ok Tedi was purely voluntary. It was a response governed, not by the requirement to adhere to some statutory regulation, but purely by the company's own perception of what it should disclose about the environmental impacts of the mine."

Although Gordon's comments are pertinent to a multi-national corporation operating outside of Australia, to what degree will the obligation to report an "entity's performance in relation to environmental regulation" impact on corporate risk management practices within Australia? For a start it is a question of what is reported and what action is subsequently taken by directors as a result of adverse publicity by way of s.299(1)(f) disclosure.

The ASIC Practice Note 68 suggests "information will generally be less technical than information provided in any compliance reports to an environmental regulator" but insists that "information provided cannot be reduced or eliminated because information has been provided to a regulatory authority for the purposes of any environmental legislation.." Consequently, it would seem that if a New South Wales corporation is providing information on environmental performance through the process of a voluntary independent audit, the corporation may be deprived of its statutory right to non-disclosure that is afforded by s.181 of the Protection of the Environment Operations Act 1997. In the USA the reporting of environmental performance on an annual basis has resulted in a 'score card' rating of national companies. The awareness of environmental risk and the raising of social responsibility has led to the introduction of "Responsible Care" programs in major industry sectors.

Similar "Responsible Care" programs are now underway in Australia. BP Australia's annual environmental spending is over \$US 40 Million a year and is designed to minimise the company's environmental "footprint" by cutting hydrocarbon emissions to air, discharges to water, oil spills and waste world wide.

CORPORATE LAW ECONOMIC REFORM BILL 1998

The relevant provisions of the Corporate Law Economic Reform Bill (CLERB) are to be found in Part 2D.1 - Duties and Powers. As a preamble to this discussion it is interesting to note that Section 9 of CLERB defines some people who manage the corporation or its property (other than directors and secretaries) as an "officer" of the

corporation. Receivers, administrators and liquidators could therefore be regarded as "officers" of the corporation for the purposes of Part 2D.1. Section 180 establishes the degree of 'care and diligence' required of 'directors and other officers' and institutes a 'business judgment rule' to guide directors and officers in their decision making process.

Section 180 is expressed in the following terms:

Section 180 Care and diligence - civil obligation only

Care and diligence - directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

Business judgment rule

(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1) and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation."

The Government's "Explanatory Memorandum" accompanying the introduction of CLERB, specifically referred to the 'risk adverse behaviour by directors' when decisions were made in 'good faith'. The commentary (2.9 - 2.10) noted that:

"Directors uncertainty as to liability for decisions made in good faith is operating as an inhibitor of business activity and is leading to risk averse behaviour by directors. The option for the Government is to take no action and allow the courts to clarify this area of the Law. However, the courts have failed to provide clear guidance to directors on the level of skill and care expected of them, particularly in relation to the responsibilities and liability of executive and non-executive directors. The incremental approach of the courts has not clarified uncertainty in the operation of the Law. At the same time shareholders are demanding greater accountability from directors. However, the Law does not provide an adequate remedy for shareholders who wish to take action on behalf of the company where directors have failed to do so."

The new provisions require that directors and officers of the corporation exercise due diligence specifically related to the 'corporations circumstances'. Environmental due diligence may be defined as "the measure of prudent, vigilant action exercised under the particular circumstances in order to extinguish the foreseeable risk of environmental harm" and conceptually the principles of environmental due diligence accord well with the obligations imposed on directors and other officers to "exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise..." Where corporate operations constitute a real risk to the environment it is expected that directors and officers of the corporation will comply with the 'business judgment rule' and "inform themselves about the subject matter.." by focusing on the nature of the 'risk' involved.

How should a board of directors judge the question of risk when reviewing environmental risk in corporate operations? "Risk" is concerned with the chance of an event happening and the magnitude of the harm caused by the event. "Even if the magnitude of the risk is considered to be small it does not follow it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so; e.g. that it would involve considerable expense to eliminate the risk, but first he would weigh the risk against the difficulty of eliminating it." If the threat to the environment constitutes a real risk of environmental harm directors may only ignore its presence at their peril.

What is a real risk? "A real risk is one that a reasonable person would not brush aside as being far-fetched or fanciful" and indeed "if a person has not taken reasonable

steps to eliminate a real risk that person has breached their duty of care and will be liable for any damage caused by that breach."

The question of environmental factors that should be addressed by a board of directors in their exercise of environmental due diligence was succinctly enunciated by Ormiston J., in the Bata Industries Case where his Honour offered the following advice:

§ "The directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.

§ The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders

§ The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks.

§ The directors should immediately and personally react when they have notice the system has failed.

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 a pro-active environmental policy."

LEGISLATION IN NEW SOUTH WALES

The Protection of the Environmental Operations Act 1997 (PEO Act) is designed inter alia to promote pollution prevention and cleaner production; the reduction to harmless levels of substances likely to cause harm to the environment on discharge; the reduction of pollution at its source, and the monitoring and reporting of environmental quality on a regular basis. But the real power to reduce the risk of environmental harm is vested in the relationship which the Act establishes between the primary regulator, the NSW Environment Protection Authority (EPA) and the local municipal and shire authorities throughout New South Wales.

The local authorities will effectively become the local enforcement agents for the EPA when the training and accreditation process is completed. In return for these services the EPA will empower local authorities to serve notices on local industry and

receive fines and other penalties which would otherwise be received by the EPA or consolidated revenue.

In practical terms there will be an increased presence of authorised officers in all regions to inspect, regulate and monitor the risk abatement progress of local industry. Such initiative when implemented, should greatly assist in reducing to harmless levels the discharge of substances likely to cause harm to the environment but more importantly, the effectiveness of the PEO Act will be measurable in the increased incidence of voluntary independent auditing of industry's environmental management systems.

Auditing, whether voluntary or compulsory, is an essential mechanism for testing whether compliance with environmental law has or is being achieved. Risk minimisation without an independent auditing process is almost unthinkable in this day and age. The PEO Act defines the "Nature of environmental audit" in section 172 of the Act.

"An environmental audit is a periodic documented evaluation of an activity (including an evaluation of management practices, systems and plant) for either or both of the following purposes:

- (a) to provide information to the persons managing the activity on compliance with legal requirements, codes of practice and relevant policies relating to the protection of the environment,
- (b) to enable those persons to determine whether the way the activity is carried on can be improved in order to protect the environment and to minimise waste."

The Act provides for both mandatory environmental audits, voluntary environmental audits and the accreditation and regulation by the EPA of environmental auditors. As discussed earlier in this paper the voluntary audit process protects the disclosure of any documents "prepared for the sole purpose of voluntary environmental audit including the final report of the audit." The PEO Act will commence when the training and accreditation of officers in local authorities has been completed.

The Contaminated Land Management Act 1997 became substantially operative on 1 June 1998 with the commencement of Parts 1,4,8,10 and sections 101,103,105,108,

110-116. The uncommenced provisions (with the exclusion of section 60 52) came into force on 1 September 1998. Objects of this Act are set out in section 3:

"(1) The general object of this Act is to establish a process for investigating and (where appropriate) remediating land areas where contamination presents a significant risk of harm to human health or some other aspect of the environment.

(2) Particular objects of this Act are:

- (a) to set out accountabilities for managing contamination if a significant risk of harm is identified, and
- (b) to set out the role of the EPA in the assessment of contamination and the supervision of the investigation, remediation and management of contaminated sites, and
- (c) to provide for the accreditation of site auditors of contaminated land to ensure appropriate standards of auditing in the management of contaminated land, and
- (d) to ensure that contaminated land is managed with regard to the principles of ecologically sustainable development."

Essentially the Act imposes a duty on the EPA to examine and respond to information that it receives of actual or possible contamination of land. In responding to evidence that the land is at risk or is already contaminated the EPA has the added duty of addressing "any significant risk of harm that the contamination presents." If the contamination presents a significant risk of harm the EPA may, using its wide ranging powers declare the land to be an investigation area or a remediation site and order persons to remediate it. In assessing the risk of harm the EPA "must include a consideration of all the following matters in its consideration:

- (a) whether the contamination of the land has already caused harm (for example in the form of toxic effects on plant or animal life),
- (b) whether the substances are toxic, persistent or bioaccumulative or are present in large quantities or high concentrations or occur in combinations,
- (c) whether there are exposure pathways available to the substances (that is, the routes whereby the substances may proceed from the source of the contamination to human beings or other aspects of the environment)
- (d) whether the uses to which the land and land adjoining it are currently being put are such as to increase the risk of harm (as for example, use for child care, dwellings or domestic food production),
- (e) whether the approved uses of the land and land adjoining it are such as to increase the risk of harm,
- (f) whether the substances have migrated or are likely to migrate from the land (whether because of the nature of the substances or because of the nature of the land),

- (g) any guidelines made by the EPA on contamination and remediation,
- (h) any guidelines approved by the EPA on contamination and remediation."

For the purposes of the Act the EPA may serve notices on the "notional owner" of the land who is a person (or corporation) with a "vested interest" in the land. The "notional owner" includes "a mortgagee in possession of the land". Through the use of notices and other recovery mechanisms the EPA is empowered to investigate and remediate contaminated land and in so doing may claim the cost of investigation or remediation from the persons responsible for the contamination or by default the owner of the land.

Under s.65 of the Act the Land and Environment Court may order, a corporation to comply with an investigation or remediation order at the corporations own expense if the corporation was the holding company of a company that (a) has been wound up within 2 years before the Court's order is made and (b) has failed to comply with the investigation or remediation order. The EPA is not required to prove that a person (or corporation) was the owner or occupier or the subject land unless evidence to the contrary is given.

SOME CONCLUDING COMMENTS

Corporate risk management and the principles of sustainable development are working towards common goals. Environmental regulators in Australia whilst seeking voluntary compliance are clearly targeting polluters with tougher penalties including jail sentences. Corporations who fail to address environmental risk at the point source will progressively find themselves under investigation by the EPA or the local authority.

Governments are being persuaded to make more use of economic instruments such as tradable pollution permits, taxes and charges to encourage the growth of environmental risk minimisation programs. Lending institutions and insurers concerned about their own legal liability are more carefully scrutinising the borrowing companies environmental record. Sharemarket investors are showing more interest in investing in environmental responsible corporations that can point to an enviable record in environment risk management. The recent changes to Australian Corporation Law coupled with the introduction of two new environmental protection Acts in New South Wales is further proof that we are heading into a sustainable future.

ENDNOTES

See discussion in W.T. Blackstone, "Ethics and Ecology in Philosophy and Environmental Crisis" (ed) Blackstone, W.T. (Athens, GA, University of Georgia Press, 1974)

The Brundtland Commission Report summarised the resolutions of the World Commission on Environment and Development 1987. "Sustainable Development" is development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs. Intergenerational Equity as defined in the Australian Intergovernmental Agreement on the Environment (IGAE) requires that "the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

See Carey B, "Environmental Ethics: A Framework for analysis" 5th Anniversary Conference "Corporate Responsibility for the Environment and the Community" Cambridge, England, 3 March 1993.

Business Council of Australia "Principles of Environmental Management" (1992)

pages 9 - 10

Eastern Counties Leather PLC v Cambridge Water Company [1994] 1ER 53 at 80

Wensely, P. "Global Trends: The Emergence of Institutional Environmental Law" Keynote address to the ACEL Environmental Outlook Conference, Sydney, 10-11 November 1993

Ibid

See Taberner, J, "beyond the National Environment Protection Council - Legislative Options for National Environmental Management" presented at ACEL 3rd Environmental Outlook Conference, 9 - 10 October 1997, Sydney.

The Commonwealth, the Australian Capital Territory, the Northern Territory, the Australian Local government Association and the States completed the signing of the IGAE on 1 May 1992. The signatories agreed that the following principles "should inform policy making and program implementation. The "precautionary principle" ; the principles of "intergenerational equity"; conservation of "biological diversity and ecological integrity" and "improved valuation, pricing and incentive mechanisms."

On September 1995 the National Environment Protection Council Act 1994 (Cth) was proclaimed and by 20 October 1995 all States and Territories throughout Australia had introduced legislation bearing in each instance the title, standards, guidelines and protection measures promulgated under the Commonwealth NEPC Act.

Fowler RJ "Law and Policy Aspects of National Standardisation" Australian Centre for Environmental Law, 2nd Environmental Outlook Conference, Sydney 22-23 March 1995

IGAE Schedule 4, Clause 16

See Fowler's comments in "Law and Policy Aspects of National Standardisation." Australian Centre for Environmental Law, 2nd Environmental Outlook Conference, Sydney 22-23 March 1995

See Environment Australia (1993) "Getting ahead of the Game: An anticipatory approach to environmental management." (approx 80 pages)

Commenced on 1 July 1998

As at 1 December 1998 the Act had not commenced.

Substantial parts of this Act commenced 1 June 1998

Some of the more pro-active corporations cited regularly in literature for their responsible initiatives are: Dow Chemical, 3M, Monsanto, Western Mining Corporation.

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Ibid

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The World Business Council for Sustainable Development is a coalition of 125 leading international companies drawn from 35 countries covering 20 major industrial sectors and represented in the Council by the CEOs. [see www.wbcsd.ch]

Stigson B., "Business Progress towards Sustainable Development" Risk Management Forum, Monte Carlo, 6 October 1997 (keynote address see www.wbcsd.ch)

See ASIC home page at www.asic.gov.au

See in particular clauses 72- 75 of Practice Note 68

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S.299(1)(f) Company Law Review Act 1998

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Gordon, J "Avoiding litigation by Voluntary Public Accountability - The Ok Tedi and Asbestos Case Studies" NIS Environmental Reporting Seminar, Melbourne, 8 May 1996

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Keogh, J. "Environmental Due Diligence, Managing the Newest Challenge" ANZAM Conference, 7-10 December 1994, Wellington, New Zealand.

Section 180 (1) CLERB

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Section 180 (2) (c) CLERB

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1 AC 617

Wyong Shire Council v Shirt (1980) 146 CLR 40

Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound No.2) [1967]

1 AC 617

R v Bata Industries Ltd (No 2) [1992] 70 C.C. C. (3rd) 394

Ibid at pp 429-430

See the full range of "objectives" in section 3 of the PEO Act.

See the powers and revenue possibilities in the PEO Act sections 6,187,192,218,220, 223-227

See PEO Act sections 223-227

PEO Act s.174

PEO Act s.180

PEO Act s.173

PEO Act s.180

Contaminated Land Management Act 1997 section 6(1)(a)

Ibid at s.6(1)(b)

Ibid at s.7(d)

Ibid at s.7(e)

Ibid

Ibid at s.9

See the definition of "notional owner" in s.14 of the Act

Ibid

Contaminated Land Management Act 1997 s.35-36

See the detail in s.65 which goes to evidence of whether a corporation was or was not the holding company

See s.68

Segal

S.299(1)