ENVIRONMENTAL LAW AND REGULATION - Potential Impact on Financial Transactions

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INTRODUCTION

This paper aims to give you a briefing on the main legal issues being raised by the environment debate as it affects financial transactions in Australia and, by inference, New Zealand.

Management of these issues will become central to corporate operations over the next years. Already:

(a) environmental liability is, increasingly, being attached to mere occupation or ownership of property;

(b) directors and managers of companies are, increasingly, being made personally liable:

  (1) for breaches of environmental law by their companies; and

  (2) for the environmental liability attached to the properties that their companies occupy or own.

TRENDS IN ENVIRONMENTAL LAW IN AUSTRALIA

Attached to this paper, by way of background to the matters set out in the paper, is a three-part summary containing:

(a) first, some brief remarks concerning Australia's constitutional structure and the place of environmental law within it;

(b) second, some brief remarks to do with the level of concern about environmental issues in Australia; and

(c) third, some trends in environmental law, especially as it affects corporate management.

As set out in the summary, it is clear that the 1990s in Australia will see a continuing increase in the volume and complexity of environmental legislation, principally for two reasons:

(a) Environmental issues are continuing to command considerable national attention.

(b) At the same time, the need for effective national regulation of the economy is increasingly recognised.

The pressure will continue on Australian governments to legislate to meet both these concerns at once.

The legislation can be expected to have four general characteristics.

(a) Firstly, it will tend to make agencies of government increasingly responsible and accountable for ensuring that their policies, programmes and budgets support development that is environmentally as well as economically sustainable.

(b) Secondly, it will tend to strengthen the powers of agencies having functions of environmental protection and resource management.

(c) Thirdly, it will tend to involve increasingly the scientific community in designing and implementing pollution control members.

(d) Fourthly, it will tend to provide increasingly for public participation in the making of decisions on activities likely to significantly affect the environment.

As a cumulative result of these trends, environmental issues will continue to be, as they have already become in Australia, a daily factor in commercial activity. Environmental liability may now directly affect the value of commercial operations, and there is a growing trend to implement general corporate management practices which will anticipate and respond to these developments over the long term.

For example, the Corporations Act 1989 (Cth), which came into effect on 1 January this year, contains significant provisions in this regard.

(a) Section 1005 allows third parties who suffer loss or damage as a result of (among other things) false or misleading corporate statements, to bring proceedings against the company.

(b) Section 1006(2) allows the proceedings to be brought against a wide range of corporate managers as well as against the company itself.

(c) Section 1011 provides a defence to the proceedings where, among other things, "the defendant took reasonable precautions and exercised due diligence to ensure that" the statements were true.

Similar provisions already appear in s85 of the Trade Practices Act 1974. Section 1011 of the Corporations Act so closely resembles s85 of the Trade Practices Act that decisions on what amounts to "reasonable precautions and due diligence" for the purposes of s85 should indicate courts' attitudes to s1011.

The cases concerning s85 of the Trade Practices Act indicate that, in the context of environmental liability, a defendant corporation, board member or corporate manager will need to demonstrate, at a minimum, the existence of a proper system designed to avoid the commission of environmental offences, and adequate supervision of that system.

American cases on the subject are to the same effect.

IMPACTS ON FINANCING TRANSACTIONS

These trends have significant impacts for financial transactions. Recent changes to Australian environmental laws provide, for example, that:

(a) substantial penalties (up to $1 million) can be imposed for pollution offences;

(b) courts may make wide-ranging orders (including "freezing" a company's assets) where a pollution offence is committed; and

(c) the owners and occupiers of property are liable for types of environmental damage (irrespective of whether they were responsible for it) and may have to bear the substantial costs of decontaminating premises.

The environmental liabilities which may be imposed by these laws are not confined to the persons or companies actually operating the enterprise which attracts environmental liability. Lenders can be affected directly by these laws merely by virtue of the financial arrangements.

In particular, a lender may incur liability for costs (for example as mortgagee in possession of land for which a clean-up order has been made), which costs may exceed the value of the real property security.

LENDERS' DIRECT LIABILITY

Australian environmental laws focus liability on occupation, as well as ownership, of property. In general, the term "occupier" is defined to mean "the person in ... control of" the property.

There is no Australian case on what constitutes the requisite amount of "control" for the purposes of this definition of "occupier". But it is strongly arguable that, from the moment of a borrower's default, the lender has assumed a sufficient degree of control over the borrower to become the "occupier" of real property attached as security to the defaulting loan.

In America, in cases considering statutes similar to those in Australia, very limited degrees of "control" have been sufficient to entail liability in the lender.

In ***United States v Fleet Factors Corporation*** (901 F 2d 1550, 17 July 1990), Fleet Factors Corporation ("Fleet") had an agreement with Swainsboro Print Works ("SPW"), a cloth printing facility. Under the agreement, Fleet agreed to advance funds against the assignment of SPW's accounts receivable. Fleet also obtained a security interest in SPW's textile facility and all of its equipment, inventory and fixtures. SPW declared bankruptcy. Pursuant to the agreement between Fleet and SPW, Fleet became involved in SPW's management. Eventually, Fleet sold the security interest. Later, the United States Environmental Protection Agency ("EPA") inspected the facility and found 75 five-gallon drums of toxic chemicals and 44 truckloads of asbestos-containing materials. The EPA paid $US400,000 in removal costs and then sued Fleet, among others, to recover its costs alleging that Fleet "participated in the management" of the facility as that phrase was used in s101(20)(A) of the ***Comprehensive Environmental Response Compensation and Liability Act*** (commonly known as "Superfund").

The court adopted this argument. The court held that a secured creditor may incur liability "without being an operator by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of" pollutants (at page 1558). The court added that a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it "could affect" pollutant disposal decisions "if it so chose" (at page 1558).

On the other hand, in ***Bergsoe Metal Corporation v East Asiatic Company*** (No 89 - 35397, 9th Circuit, 9 August 1990), the secured lender was not found liable. In ***Bergsoe***, action was taken against a city which had taken a security interest in the form of a mortgage on a lead recycling plant owned by the Bergsoe Metal Corporation ("Bergsoe"). It was alleged in the case that the City was liable for the cost of cleaning up the recycling plant following its abandonment by Bergsoe.

The court found that the City had contractual rights to participate in the management of the debtor (such as the right to inspect the premises and direct proper storage of pollutants) but that the City never exercised any of those rights and never actively participated in the management or operation of Bergsoe.

Accordingly, the court found no liability, stating:

> "a creditor must, as a threshold matter exercise actual management authority before it can be held liable for action or inaction which results in the discharge of (pollutants). Merely having the power to get involved in management, but failing to exercise it, is not enough".

The most recent relevant US case of ***O'Neil v QLCRI Inc*** (750 F Supp 551) indicates that where a lender:

(a) is aware of environmental violations on secured property; and

(b) fails to impose conditions in the loan relating to remediation of the violations;

it can be claimed that the lender has aided the borrower's violations, regardless of whether the lender has entered into possession of the secured property.

Further cases will be needed before it can be said finally where the issue of lender liability rests in the United States. But this much is clear: the possibility of a lender assuming control of the borrower's operations raises directly the prospect of liability in the lender.

The conclusions from these cases will be strongly influential when the issue arises in Australia as to the requisite degree of control needed to constitute "occupation" for the purposes of environmental laws.

This conclusion is reinforced by the commonly espoused policy of both governments and regulatory agencies that environment liability should be borne by an appropriately "deep pocketed" private beneficiary of the property to which the liability attaches. This policy is particularly evident from the Guidelines for the Assessment and Management of Contaminated Sites being developed jointly by the Australian and New Zealand Environment Council and the National Health and Medical Research Council, of which drafts are now available.

LENDERS' INDIRECT LIABILITY

Environmental issues may affect the value of interests in real property being used as security. Environmental liabilities may also impose significant costs on a borrower which may undermine the borrower's cash flow and capacity to service and repay a loan.

The costs which may be incurred by a borrower for the breach of environmental laws and any civil liability from the effect of pollution include:

(a) fines;

(b) damages;

(c) adverse publicity;

(d) disruption as a result of involvement in litigation or a publicity crisis;

(e) closure, or threat of closure, of a facility;

(f) legal costs in defending claims and prosecutions;

(g) expenses of decontaminating premises or other corrective action; and

(h) increases in insurance premiums.

GUIDELINES

As a result of these developments, environmental issues now arise in relation to a variety of matters relevant to a financial institution which is considering lending to property or projects.

In light of the foregoing uncertainties, the following guidelines should be considered by lenders to avoid or minimise environmental liability:

(a) **Credit evaluation and terms**

(1) A lender should not extend secured financing, especially where the principal security is industrial or commercial property, without first considering whether an environmental assessment of the property should be undertaken, depending on the location and the present and prior uses of the property.

(2) A full set of environmental representations, warranties and covenants, tailored to the borrower's operations, should be included in the credit agreement. At a minimum, they should address compliance with environmental laws and regulations, possession of and compliance with all required permits and licences, absence of contamination at presently and formerly owned properties, and notices of pending or threatened claims with respect to environmental matters. Other protections may be necessary in individual circumstances. There should also be a covenant that the lender will be provided access to the borrower's properties during the term of the loan, on appropriate notice, and it should be made a related event of default if access is denied.

(3) The credit agreement should also include full environmental indemnities that survive the repayment orother determination of the loan. Ideally, these indemnities also would be given by a source whose credit would not be seriously affected by an environmental problem on the property.

(b) **Credit management**

After a loan has been made to a business that generates, uses, stores or otherwise handles hazardous or potentially hazardous substances, the lender should avoid becoming involved in the borrower's day-to-day operations, even if the borrower's financial stability comes into question, without careful consideration of the possible adverse consequences from the point of view of environmental liability.

(c) **Workout**

(1) If the loan becomes questionable, or goes into default and some "workout" action is being considered, the lender should determine whether a current environmental assessment of the property should be first undertaken. If an assessment was done prior to making the loan, an update should be obtained to cover any activities that may have occurred subsequently. In many instances, a current assessment will provide important information on which to base judgments as to the risk attendant to "workout" participation or the exercise of contractual remedies for default.

(2) If hazardous or potentially hazardous substances are present on the property, the lender must decide whether exercise of default-related powers will expose the lender to undue liability. Environmental assessments are not guaranteed to detect all environmental problems, and estimates of clean-up and other costs are difficult to make.

(3) In taking any default-related action, the lender should be careful not to cause or permit the release of any hazardous or potentially hazardous substance, and must act responsibly with regard to notice and mitigation of any public health hazard.

HYPOTHETICAL CASE STUDY

The following supplies an example of the practical consequences for lenders in Australia of the developments in environmental law referred to above:

(a) You are a director of a lender company.

(b) Your company lends to a borrower which pollutes causing contamination of the land forming the security under the loan document.

(c) The loan documentation gives your company powers over the borrower company in default to appoint a receiver and otherwise to enforce the security by (for example) entering into possession of the land or by directing the borrower company's activities.

(d) The borrower company has defaulted and has no money to effect any cleanup of the contaminated land.

(e) The State Pollution Control Commission ("SPCC"), or an equivalent agency in a State other than New South Wales, directs your company to clean up the contaminated land under any of s25 of the Clean Air Act 1961, s27A of the Clean Water Act 1970 or s36 of the Environmentally Hazardous Chemicals Act 1985.

(f) Your company has not entered into possession of the land and the land has not been cleaned up.

Are you liable personally? The answer: Yes, for the following reasons.

(a) **Directors' Personal Liability**

(1) Notices issued by the SPCC under s25 of the Clean Air Act 1961, s27A of the Clean Water Act 1970 or s36 of the Environmentally Hazardous Chemicals Act 1985 may all be issued on "the occupier" of the contaminated land.

(2) "Occupier" is defined in each of those Acts to mean "the person in ... control of" the contaminated land.

(3) Although there is no Australian case on what constitutes the requisite amount of "control" for the purposes of this definition of "occupier", it is strongly arguable that, from the moment the borrower company's default, your company has assumed a sufficient degree of control to become "an occupier".

(4) In America, as already mentioned, in cases considering similar statutes, very limited degrees of "control" have been sufficient to entail liability in the lender company. These cases are considered below.

(5) Assuming that your company is "an occupier", the SPCC's notice to your company is valid.

(6) Your company must comply with the notice. Failure to do so is an offence attracting maximum penalties for the company of:

(A) (in the case of the Clean Air Act) $125,000 (and $60,000 per day for continuing offences);

(B) (in the case of the Clean Water Act) $15,000 (with no provision for continuing offences); and

(C) (in the case of the Environmentally Hazardous Chemicals Act) $40,000 (with no provision for continuing offences).

(7) To date, your company has failed to comply with the notice and therefore can be charged with an offence under those statutes.

(8) Section 10 of the Environmental Offences and Penalties Act 1989 is aimed at making directors of your company (such as yourself) criminally liable in these circumstances even if your company is not charged itself. The maximum penalties for directors are:

(A) (in the case of the Clean Air Act) $60,000 (and $30,000 per day for continuing offences); and

(B) (in the case of the Clean Water Act) $15,000 (with no provision for continuing offences).

Section 54 of the Environmentally Hazardous Chemicals Act is to the same effect and the maximum penalties for directors are $20,00 (with no provision for continuing offences).

(b) **Other Liability**

(1) As well, because the land is contaminated, the probability is that an offence has also been committed under s5 or s6 or both of the Environmental Offences and Penalties Act 1989 as a result of a leaking container or an unlawful disposal of waste. If so, prosecutions may lie against:

(A) the owner of the waste, or the container, or the land; and

(B) "the occupier" of the contaminated land.

The borrower company is the relevant owner. Your company is arguably "the occupier".

(2) The maximum penalties under the Environmental Offences and Penalties Act are:

(A) (for corporations) $1,000,000; and

(B) (for individuals, including company directors such as you) $250,000 and 7 years gaol.

Again, for reasons set out above, corporate directors are liable even if the corporation is not charged.

(3) If a conviction is entered under the Environmental Offences and Penalties Act:

(A) damages proceedings are available against persons convicted (both corporations and their directors); and

(B) various charges and restraining orders may be attached to the contaminated land and other property including yours.

In all cases so far mentioned where a director is charged for an offence committed by the company, the defences are set out in the relevant statute and the only one available in practice is the defence of "due diligence".

You cannot establish "due diligence" unless you can show that:

(a) adequate enquiries were made of the borrower company when the loan facility was provided;

(b) an adequate system was put in place to ensure compliance and to reveal any environmental problems which may emerge during the course of the loan; and

(c) this system has been adequately monitored and appropriate action promptly taken.

CONCLUSION

In short, the concept of "due diligence" has expanded. Increasingly, it is being seen to include environmental matters, and to require companies and corporate officers to show independent efforts to verify compliance with environmental laws. Consequently, there is increasing pressure on corporate officers to adopt practices which will anticipate and respond to environmental issues in the longer term.

Failure to develop and implement adequate environmental management programmes will be likely to breach ordinary corporate laws, and to expose companies and corporate officers to actions for breach of environmental laws.

However, the benefit of successfully developing and implementing such programmes is not limited to the avoidance of legal liability.

One example may suffice, In February this year, the Senate Industry, Science and Technology Committee tabled its report to Parliament. It emphasised that Australia could at once contribute to solving the international "global warming problem" and help address the domestic trade deficit by the development of pollution control technology for application locally and for export overseas. The committee was keen to imitate the example of countries such as (formerly West) Germany which, in the last decade, have made very substantial additions to their export earnings, and long term improvements to their balances of trade, by developing and exporting, particularly to Eastern Europe, pollution control technology.

In relation to export of technology to Asia, Australia's strategic advantages over those countries is apparent, and the need in Asian countries for a wide range of environmental strategies (including pollution control technology) will increase in the next decade:

(a) Those countries will fall under increasing pressure for domestic environmental regulation.

(b) Those pressures will be:

  (1) in part, legal (as more treaties are entered into like the one proposed for the UNCED conference in Rio di Janeiro in June 1992);

  (2) in part, commercial (as the developed countries increasingly require compliance with environmental standards in imports from their Asian trading partners); and

  (3) in part, demographic (as the pressures of increasing Asian population give rise to an increasing need to overhaul the Asian urban infrastructure so as to assure the continued performance of Asian economies).

The prospects are bright for corporations which see the expansion of the concept of due diligence as an opportunity and not as an obstacle.

ATTACHMENT TO PAPER DELIVERED BY GREGORY PEARCE

SUMMARY

AUSTRALIAN CONSTITUTIONAL STRUCTURE

Like the United States, Australia has a federal system of government and allocates a specific range of powers to the federal government. "The environment" is not specifically listed among the matters on which the Australian federal parliament may legislate. As a result, the demarcation of legislative authority in the field of environmental law in Australia between the federal and state parliaments is complex.

Two general statements can be made:

(a) In relation to environmental legislation operating off-shore, the Australian federal parliament has plenary power.

(b) On-shore, the demarcation of legislative authority between the federal and state governments is less clear, but the Australian federal parliament has wide-ranging powers to enact such legislation.

Despite the complex distribution in Australia of authority with respect to environmental law, laws which affect or regulate particular or general aspects of the use and enjoyment of the environment are familiar in Australia.

(a) The common law of Australia, for example, contains rudimentary forms of environmental control which are of ancient origin. The tort actions of nuisance and trespass are of this sort. Tort actions in negligence and tort actions involving the rule in ***Rylands v Fletcher*** are of a more recent origin.

(b) Other forms of environmental control available at common law include those affected by means of contract, by restrictive covenants over land and by easement.

"Environmental torts" have yet to assume the significance in Australia that they have in the United States, but there are signs that this position is changing.

The most important environmental controls in Australia, however, arise by way of legislation. Various categories of environmental legislation are discernible:

(a) Legislation concerned with environmental planning and protection. This includes a large volume of legislation regulating commercial and industrial activities affecting the environment. Within this category are various overlapping subcategories of legislation to:

(1) land use planning;

(2) environmental impact assessment;

(3) hazardous substances (including use, storage, transportation and disposal);

(4) pollution control (including legislation relating to clean air and water); and

(5) occupational health and safety.

(b) Legislation intended to protect the natural, built or cultural environment.

(c) Legislation controlling the development of natural resources.

All the Australian jurisdictions have legislation in each of these categories.

LEVEL OF CONCERN

Community

Concern about environmental issues is growing rapidly in Australia. Most major international environmental organisations have established themselves in Australia. Both environmentalism and environmental groups are now established in the mainstream of political activity.

For example, last year Greenpeace launched campaigns against three major companies, one in each of Tasmania, New South Wales and Victoria. In each case, the action caused commercial and political embarrassment. In the New South Wales case, Greenpeace secured the right to sue the alleged offender under a statute carrying a maximum penalty of $1 million. Similarly, last year the Australian Conservation Foundation (the largest purely Australian organisation) brought two actions against the federal Minister for Resources over woodchip export approvals.

Industrial and commercial organisations are responding to these changes. It is becoming common for in-house industrial and commercial conferences to be addressed by representatives from peak environmental groups. Increasingly, senior management is taking into account publicly environmental issues. For example, the Australian Institute of Project Management held a major conference in Canberra on 24 May 1990 at which speakers, and particularly the General Manager of BHP Engineering Pty Limited, examined at length how to manage environmental issues.

Politics

Both state and federal governments have recognised the significance of the growing concern in Australia about environmental issues

Commonwealth Government

In July 1989, the Prime Minister, Mr Hawke, released the first national environmental statement by an Australian Prime Minister. His statement announced the appointment of Australia's first Ambassador for the Environment and detailed a three-year $A320 million package of environmental measures.

In March 1990, the Prime Minister reaffirmed his government's commitments, issuing a second environment statement reporting on the implementation of the first statement,

and announcing a further package of environmental measures addressed particularly to greenhouse gas emissions.

The Prime Minister also appointed a cabinet committee on sustainable development and a working group to advise about introducing controls relating to greenhouse gases, particularly controls on energy consumption. The first report of this committee has been released.

The Prime Minister has also announced that his government is considering ways to reduce greenhouse gas emissions by 20% by the year 2000, and by as much as 50% by the year 2015. This will probably require legislation, and a decision is expected to be announced within the next eight months.

Attention to environmental matters remained a principal, and controversial, focus of the Commonwealth Government in its March 1991 Industry Statement.

State Governments

In April 1990, the Premier of New South Wales also issued an environmental statement. Mr Greiner remarked that:

> "Environmentalism has come of age as a political issue. In a brief period of time, the environment has matured from a radical issue on the fringes of politics into mainstream concern shared by middle Australia."

These sentiments are equally evident in the other states. The Tasmanian Government still relies for its majority in the parliament on an independent "green" group. In Queensland, the Goss Labor Government is implementing a series of announced environmental measures, including the imposition of $1 million fines and the establishment of an environment protection agency. The Western Australian Government is pursuing its first World Heritage List nominations. The Victorian Government has created a "super" environment ministry combining under the one minister various responsibilities which used to be distributed among several portfolios.

Translation of Concern into Laws

All Australian governments are introducing increasingly detailed legislation controlling activities affecting the environment. A few recent examples of this legislation are as follows:

(a) ***Commonwealth legislation***: the Agricultural and Veterinary Chemicals Act; the Industrial Chemicals (Notification and Assessment) Act; the Hazardous Waste (Regulation of Exports and Imports) Act; and the Ozone Protection Act.

(b) ***New South Wales legislation***: the Environmentally Hazardous Chemicals Act; the Environmental Offences and Penalties Act; the Environment Education Trust Act; the Environment Research Trust Act; the Environment Restoration and Rehabilitation Trust Act; a bill to establish an environment protection authority was made available for public comment in the last month; further bills giving that authority its substantive powers will be drafted by October.

(c) ***Victorian legislation***: the Environment Protection (General Amendment) Act.

(d) ***Queensland legislation***: the Heritage Buildings Protection Act; the Local Government (Planning and Environment) Bill was introduced into parliament in June this year and commenced on 15 April 1991; comprehensive pollution control legislation is now being drafted.

In general, this legislation, like other Australian environmental legislation, prohibits activities subject to government-issued licences or permits. Increasingly, the licences or permits are issued on stringent conditions, and monitored by independent enforcement agencies.

TRENDS

Increasing Use of Legislation

Both the volume and scope of Australian environmental legislation are increasing rapidly.

This tendency to legislate is new. Australian governments traditionally have been reluctant to legislate, especially in relation to environmental controls. They preferred to apply administrative controls until confident that they had selected the appropriate regulatory regime.

Now, for example, all Australian governments have recognised the need for national pollution control legislation. This has been discussed at meetings of various inter-governmental standing committees and, in our view, it is likely that national pollution control legislation will be introduced within the next 18 months.

Regulation Controlling Entire Industries

A related trend is that Australian governments are beginning to legislate to impose "industry-wide" environmental controls. For example, the Commonwealth Government is conducting a number of inquiries with a view to introducing specific industry-related controls. The most significant inquiries are into forestry, sandmining and management of Australia's coastal waters. Similarly, the New South Wales Government recently introduced a comprehensive set of controls for offensive and hazardous industries.

Comprehensive Legislation

Australian environmental law is becoming increasingly cohesive. Umbrella authorities are being established, such as the Industries Commission and the Resource Assessment Commission, to co-ordinate federal policy development in areas in which separate ministers have divergent responsibilities. For example, the federal laws controlling forestry operations, which may be administered by the environment minister (concerned to protect the natural environment) and the resources minister (concerned to ensure effective forestry operations), are being reviewed.

Similarly, most of the state governments are discussing integration of their respective pollution control legislation.

Uniform Legislation

As mentioned, Australian governments are recognising the need for uniform environmental legislation, especially national pollution standards. As the Premier of New

South Wales commented in his environment speech in April this year, "we must reconsider our narrow obsession with State rights."

The Australian and New Zealand Environment Council ("ANZEC") and the Conservation Ministers Council (comprising the relevant Australian and New Zealand conservation ministers) ("COMCON") each meet twice a year to discuss developments, and, so far as is practical, to agree on uniform regulations in their respective jurisdictions. Each of the Councils has established a range of specialist working groups to develop uniform regulations to be introduced in each jurisdiction.

Complimenting this trend toward uniform legislation, is a trend toward more detailed standards. In this respect, Australian law is drawing increasingly on American and European law.

Commonwealth Regulation

Traditionally, the states enacted most of Australia's environmental legislation. However the Commonwealth Government is becoming more active,

The Australian Constitution gives the Commonwealth Parliament a number of indirect powers to legislate on matters affecting the environment. For example, in addition to the power to implement international obligations (such as those acquired under treaties such as the Convention for the Protection of the World Cultural and Natural Heritage and the Montreal Protocol on Substances that Deplete the Ozone Layer), the Commonwealth Government regulates:

(a) international and interstate trade;

(b) activities by foreign, financial or trading corporations (which has been interpreted extremely widely); and

(c) activities in the external territories or off-shore.

An important example of the federal role in environmental law is provided by the Environmental Protection (Impact of Proposals) Act which requires the Commonwealth Government to assess the environmental impacts of projects which:

(a) need a Commonwealth decision (such as whether to approve investment from overseas); or

(b) are likely to affect the environment significantly.

Increasingly, the Commonwealth Government is exploiting these indirect powers to regulate environmental matters.

International Influence

The Australian Government is playing an increasingly active role in international environmental debates, particularly those about climate change. For example, high level bi-lateral discussions between the Australian Government and the European Community were held in the first week in June, and environmental issues were on the agenda.

In view of Australia's membership of ASEAN and its location in the Southern Hemisphere, it is likely that the Australian Government will continue and increase this

role, and will implement agreements reached at international fora increasingly rapidly by legislation.

Increasingly Stringent Penalties

Each Jurisdiction is introducing increasingly stringent environmental protection legislation. For example, last year the New South Wales State Government enacted legislation imposing, for the first time, $A1 million penalties on companies convicted of pollution offences. The Queensland and South Australian Governments have also provided for $1 million penalties, and it is likely that other states will follow suit.

The Commonwealth Government has not introduced similar penalties yet. However, the Commonwealth Government does require offenders to return to the country of origin hazardous waste illegally imported into Australia. And, increasingly, the Commonwealth Government is considering specific performance penalties, which may be very expensive, rather than fixed amount fines.

Increasing Directors' Liabilities

Several recent Australian statutes impose liability on directors and managers of offending corporations. They allow defences if, among other things, the person used "all due diligence" to prevent the commission of the offence by the corporation. The New South Wales Environmental Offences and Penalties Act is the first Australian legislation to make directors or managers liable to terms of imprisonment.

The Commonwealth Government is reviewing the roles of directors and managers (including their roles in environmental matters), and may enact legislation in the near future.

Limitation of Defences

There is a trend towards creating environmental offences the defences to which require the defendant to demonstrate that positive steps have been taken to prevent or mitigate damage and to place the onus on a defendant to prove that an element of culpability is not present.

There is also a trend towards strict liability.

These trends are reflections of developments in United States' federal legislation such as the Comprehensive Environmental Response Compensation and Liability Act. For example, the New South Wales Environmental Offences and Penalties Act creates an offence relating to spills from containers. Under the Act, the owner of the container, the owner or occupier of the land on which the container is located, the owner of the substance spilt, and other persons may be liable. The Victorian Environment Protection Act contains similar provisions.

New Types of Licence Conditions - Monitoring

Holders of pollution licences are increasingly being required to undertake a more active role in pollution monitoring. For example, it is becoming common to require polluters, as a condition of pollution licences, to monitor and to report to the licensor body the levels of pollution measured. This is consistent with the Resource Conservation and Recovery Act and other United States federal legislation providing for the issue of permits for

waste disposal and placing responsibility on waste generators to determine whether a waste is hazardous and to retain documentation to enable the "tracking" of lost waste products.

Third Party Actions

Standing

Traditionally, Australian courts have been loath to permit actions to be brought either by third parties, or by groups of plaintiffs. This is changing.

Increasingly, the right to sue in being extended in Australia. For example, a variety of statutes, such as the New South Wales Land and Environment Court Act, and the Administrative Appeals Tribunal Act, permit actions to be brought by any person interested. These statutory extensions of the standing rules have been interpreted, at minimum, to include environmental and conservation organisations whose charters include protection of the environment.

The courts themselves are relaxing their attitude to questions of standing. Even in the absence of express statutory authority, Australian courts are now inclined to permit third parties to bring actions where those third parties are able to demonstrate some bona fide interest in either the area likely to be affected or the environment generally.

In addition, the Commonwealth Government has announced that it is considering introducing class actions. It is likely that legislation will be introduced in 1991.

Undertakings as to Damages

The final bar to third party action, a requirement that such parties post bonds against the possibility that their actions will be unsuccessful, is also being relaxed.

Public Interest Litigation

There is only one public interest group directly concerned with environmental law: the New South Wales Environmental Defenders' Office. A similar office was recently established in Queensland, and it is likely that other public interest groups, such as the New South Wales Public Interest and Advocacy Centre will display increasing interest in environmental matters.

There are moves to establish a network of environmental lawyers to act (***pro bono***) on behalf of environment and conservation groups. Also, the major environmental groups are beginning to employ lawyers.

Since most Australian environmental law is statutory, the ordinary principles of administrative law (and judicial review) apply. This is recognised by the various environmental lobbyists in Australia, and the environmental organisations. For instance, the Australian Conservation Foundation has brought a number of actions for judicial review of federal environmental decisions.

Consolidation of Enforcement Agencies

In Australia, the regulatory authorities are usually also responsible for enforcement. Traditionally, these agencies have been under the direct or indirect control of the relevant environment minister. But this also is changing. All states have or are

considering establishing environment protection authorities as statutory bodies accountable to the respective parliaments but not directly susceptible to ministerial control.

Identification of Contaminated Sites

Most state legislation contains provisions enabling the relevant enforcement authority to identify contaminated sites and to require them to be cleaned up. A clean-up notice can be directed to an owner or occupier of land irrespective of whether the owner or occupier was responsible for the contamination.

In Victoria, legislation introduced in December last year enables the Victorian Environment Protection Authority to compel an "audit" of a contaminated site at the expense of the owner or occupier. It is anticipated that New South Wales will shortly introduce similar provisions.

In light of the activities of Greenpeace referred to earlier, it is clear that Australian governments will resort to these powers more frequently than they have to date.

As yet, in Australia, there are no laws that require the disclosure of contamination or other environmental problems, or that require special consideration of environmental issues at a transfer such as is set out in the United States Comprehensive Environment Response Compensation and Liability Act. However, if a relevant licence requires disclosure, or if representations or warranties are being made or withheld relating to environmental matters in a transaction, then there may be an obligation to disclose.

Emerging Specialists

A full range of environmental consultants, engineers and equipment suppliers now operates in Australia. An impression of the range and depth of their operations can be gained from the Sixth Edition (recently published in May 1990) of the Register of Members of the Australian Association of Consulting Planners. It lists approximately 100 major operators in this field.

CONCLUSIONS

Continuing Growth of Environmental Legislation

It is clear that the 1990s will see an increasing amount of environmental legislation, principally for two reasons:

(a) There is increasing recognition in Australia of the need for national regulation of the economy.

(b) At the same time, environmental issues have grown to considerable national importance.

There is significant pressure in Australia to legislate to meet both these concerns. The legislation can be expected to have four general characteristics.

(a) Firstly, it will tend to make agencies of government increasingly responsible and accountable for ensuring that their policies, programmes and budgets support development that is environmentally as well as economically sustainable.

(b) Secondly, it will tend to strengthen the powers of agencies having functions of environmental protection and resource management.

(c) Thirdly, it will tend to involve increasingly the scientific community in designing and implementing pollution control members.

(d) Fourthly, it will tend to provide increasingly for public participation in the making of decisions on activities likely to significantly affect the environment.

Effect on Corporate Management

The cumulative result of these trends is that the need to address environmental issues is already, and will continue to be, a daily factor in industrial and commercial activity in Australia. Environmental liability may now directly affect the value of commercial operations, and there is a growing trend to implement general corporate management practices which will anticipate and respond to these developments over the long term.

The Corporations Act 1989 (Cth) contains significant provisions in this regard.

(a) Section 1005 allows third parties who suffer loss or damage as a result of (among other things) false or misleading corporate statements, to bring proceedings against the company.

(b) Section 1006(2) allows the proceedings to be brought against a wide range of corporate managers as well as against the company itself.

(c) Section 1011 provides a defence to the proceedings where, among other things, "the defendant took reasonable precautions and exercised due diligence to ensure that" the statements were true.

Similar provisions already appear in s85 of the Trade Practices Act 1974. Section 1011 of the Corporations Act so closely resembles s85 of the Trade Practices Act that decisions on what amounts to "reasonable precautions and due diligence" for the purposes of s85 should indicate courts' attitudes to s1011.

The cases concerning s85 of the Trade Practices Act indicate that, in the context of environmental liability, a defendant corporation, board member or corporate manager will need to demonstrate, at a minimum:

(a) the existence of a proper system designed to avoid the commission of environmental offences; and

(b) adequate supervision of that system.

American cases on the subject are to the same effect.