ENVIRONMENTAL LAW

Liabilities of Lenders

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INTRODUCTION

I am responding to Greg Pearce's paper from a broad business and public policy perspective. The Business Council of Australia represents over 80 of Australia's major companies. Those companies are at the forefront of the issues we are discussing today.

The paper has given us an accurate and perceptive diagnosis of the difficulties facing lenders in the current difficult climate. He has described the rapid increase in legislation, which when linked with continuing uncertainty has created a real paradox for lenders, ie *more rules than ever but less confidence.*

My primary interest is how this situation is impinging upon investors and upon Australia's competitiveness. The 1992 World Competitiveness Report placed Australia well down the league in terms of effectiveness of our environmental regulation, ie our regulatory framework was adversely affecting our competitiveness.

I wish to make some additions to the analysis which Greg has undertaken, and to outline some of the responses which Australian business is making.

ADDITIONAL FACTORS

The environmental debate is very complex - and is moving extremely quickly. We are in a process of intense change - which I believe will continue well into the next century. The paper identifies some of the recent shifts from a legal and management perspective:

- from criminal to financial liability
- the integration of environmental concerns into routine management.

Other current issues in Australia include:

Role and liability of auditors

This question is currently subject to much discussion (and an avalanche of policy papers). Different approaches are being taken by different states.

The issues for business include:

- the need to encourage voluntary environmental audits and a self regulatory approach rather than compulsory audits;
- voluntary disclosure of information is something to be left to individual companies; and
- the need to seek alternatives to 'accreditation' of auditors.

Management of contaminated sites

Greg Pearce has explored this issue which is of major concern to business in general and financial institutions in particular. He has outlined the confusing framework which currently exists. Another aspect was identified in a paper given by Geoff Ayling at an international conference in Bangkok in late 1991:

> *'As the situation currently exists, there is an incentive for the professional to err in favour of declaring a site contaminated. In this case, a professional indemnity writ from a future site resident, who incurs toxic effects, is less likely to be encountered. In the other examples given where the consultant has failed to advise the client of potential liabilities, there would appear to be less scope for a professional indemnity claim.'*

So the current situation actually drives professionals to over-estimate contamination.

From an investment point of view, continuing uncertainty in regard to environmental liability is an added disincentive. There are other problems. As the paper rightly points out:

> *'The direct liability of lenders under environmental law is only part of the problem as far as financial institutions are concerned. ... The problems facing financial institutions stem not only from liability under environmental legislation. The issue is commercial.'*

He goes on to detail:

- fines
- damages
- cleanup costs
- legal costs
- increases in insurance premiums
- adverse publicity
- closure of facilities.

I would have to add fines and imprisonment of directors and managers.

From an investment point of view, unclear decision making processes can rule out a project altogether.

Complexity of regulation

- Example of Contaminated Site Management
- More recently, paper given by Michael Young at a seminar on Regulating the Environment in March 1993 - NSW statements.

The sheer complexity of regulation imposes severe difficulties on companies and jeopardises compliance.

Cost of regulation

This factor is deserving of much more public debate, which is beginning to happen in the US.

In April 1992 there were 59 regulatory agencies with 125,000 employees working on 4,186 regulations. Cost during 1991 of mandates in place was $542 billion. (Fastest growing component is environmental regulation, amounting to $115 billion in 1991 - growing by 50% by year 2000).

The question being faced by government and industry is whether the dollars are being spent on real hazards. The community needs to determine where resources should be allocated in an informed way.

Example 1 - data prepared by Association of Californian Water Agencies - cost of meeting radon water standard in California would be $3.7 billion and only 1% of public radon exposure would be reduced.[1]

Example 2[2] - cost per life saved across a variety of hazards:

THE COSTS VARY			
REGULATION	AGENCY	ANNUAL NO OF DEATHS per 100,000 of exposed population	COST PER LIFE SAVED
Mandatory seat belts for cars	National Highway Traffic Safety Administration	9.1	$390,000
Prohibitions on alcohol and drug use by railroad employees	Federal Railroad Administration	0.2	$650,000
Control and disposal standards for benzene	Environmental Protection Agency	2.1	$4 million
Disposal standards for uranium mine wastes	Environmental Protection Agency	43.0	$69 million
Restrictions on worker exposure to asbestos	Occupational Safety and Health Administration	6.7	$117 million
Restrictions on worker exposure to formaldehyde	Occupational Safety and Health Administration	0.1	$94 billion

Right to know/disclosure provisions

The paper touched upon changing community expectations. Both governments and business can expect increased scrutiny. In some areas this will be legally mandated. Discussions are already proceeding in regard to a National Pollutant Inventory.

The pressure for disclosure has led to the creation of self regulatory codes, eg chemical industry 'Responsible Care'.

There is a question here: *'is the right to know'* the same as *'the right to understand'*?

BROADER ISSUES

The globalisation of regulation

Prior to the Earth Summit in Rio last year there were international agreements on environment, eg conventions on movement of waste. After Rio - we have specific agreements on climate change, biodiversity, forest principles.

The Earth Summit agreed to the Declaration of Principles which has implications for risk management and liability and *Agenda 21*. Earlier this year the Business Council commissioned a study of *Agenda 21* which concluded that it has important legal implications:

- in the interpretation of existing international obligations;
- in the negotiation of future international and national standards; and
- in influencing governments and containing State action.

The precautionary approach is outlined in the Rio declaration and also appears in the preamble to the NSW EPA Act. The precautionary approach is stated as Principle 15 in the Declaration:

> *'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'*

International treaties are being ratified which can have direct consequences upon our domestic regulatory regime.

BUSINESS RESPONSE

Australian business is responding to these challenges in a variety of ways, both in terms of public policy and company practice. For example, the Business Council is an active participant in international environmental negotiations.

Public policy focus

International:

Environment Policy Project.

National:

Ecologically Sustainable Development.

Commonwealth Environment Protection Agency consultative mechanisms.

Various policy responses to specific initiatives.

(These arrangements also occur at the State level).

Internal to companies

I have already mentioned the 'Responsible Care' program initiative by the chemical industry. The Business Council last year published its - Principles of Environmental Management.

There is, however, a broader question of what it means for a company to go 'beyond compliance'. This will be an important element of the future debate in Australia (fuelled by 'right to know').

CONCLUSION

There is a broad consensus that we need to aim for sustainable development - the achievement of appropriate environmental protection together with sound economic development.

Compliance with appropriate environmental standards is a critical aspect of achieving this aim. It is useless having the most 'stringent standards in the world' if compliance is made unnecessarily difficult - through a complex and confusing legislative and regulatory framework.

If we want to encourage companies (and communities) to go 'beyond compliance' - then it is important to create policy frameworks which provide *incentives* and not *just sanctions*.

Australia's legal and policy framework is an important aspect of our competitiveness. If we are too far out of step with our trading partners there is a danger that investment will be discouraged (either by confused approval processes, lengthy decision making etc).

Finally, there is a real need for legislators to face the hard choices in terms of cost of regulation. All too often the cost of a particular piece of legislation or regulation is counted only in terms of its administration. In fact the entire cost needs to be faced and the community needs to make an informed judgment about where scarce resources are to be allocated. We are all faced with an increasingly complex array of choices and we are all responsible - as lawyers, bankers, consumers, politicians and business people for the outcome of those choices.

As President Clinton said very recently in a speech committing the US to signing the Biodiversity Convention:

> *'In the face of great challenges we need a government that not only guards against the worst in us, but helps to bring out the best in us.'*

FOOTNOTES

1. *Science*, Vol 259, January 1993.

2. *Fortune*, October 1992.