
ENVIRONMENTAL LAW AND REGULATION - Potential Impact on Financial Transactions

QUESTIONS AND ANSWERS

Question - Jennifer Gillies (Ernst & Young, Auckland):

This is fairly new stuff for us. We do a lot of receiverships and investigations and I am concerned about the possibility of receivers continuing to trade businesses where there is a possibility of environmental conditions applying. I do not know the position in the statute here in New Zealand. We recently had a visitor from Ernst & Young in America who was not very pleased about the environmental aspects over there and virtually saw them as a damned nuisance in regard to any receiverships he is involved in. The possible on-going costs - and I am not too sure how even if there were environmental problems prior to the appointment of a receiver whether they would rank as an unsecured creditor or just be a cost of the receivership, or even if there are possibilities of the receiver being made personally liable for any environmental costs that might occur while he is continuing a business that is affecting the environment. I would just be interested in comments both in the Australian and the American conditions.

Response - Dan Rabinowitz (Speaker):

In the United States context you are raising a variety of important issues which kind of fall into a couple of different categories. There is certainly no special protection afforded to a receiver or a bankruptcy trustee in our system for failure to operate an on-going business in compliance with environmental laws. A business which is operating needs to comply regardless of who is operating or in whose ultimate economic benefit the income stream that the business is earning is going to be directed. So for the question on the compliance perspective, it is as important, I think in our system and I would venture to guess in yours as well, for a receiver to comply on an on-going basis with environmental regulations as it is for any business owner or operator.

With regard to the particular issue of the priority in a bankruptcy or in an insolvency proceeding of environmental claims, that is an issue which is hotly debated in the United States and there have been a number of interesting decision, some of them precluding trustees from abandoning properties which came or brought with them to the table substantial additional burdens of remediation liability, others of them requiring trustees to comply on a continuing basis. But the fundamental question of the precise fashion in which those priorities are to be judged as against the claims of secured creditors and other creditors is not yet fully worked out in American law, but it is not entirely clear that environmental issues will not receive somewhat special treatment in terms of the establishment of priorities.

Finally, the last component of your question dealt with the issue of the personal liability of the receiver. That is an issue which has been litigated, although not to conclusion, in

the United States, on a number of occasions and there are certainly instances in which regulatory authorities, typically at the State level, have taken the position that there existed liability in the receiver typically in organisations in some respects in our system for environmental issues in the same fashion that there would have existed liability in the owner of the business absent the receivership. But the issue is not fully developed. If I had to venture a prediction I would say that it is likely that the courts will carve some additional areas of protection for receivers beyond those which might be afforded to the owner of the business absent receivership or insolvency proceedings.

Comment - John King (Chairman):

I think that is all we have time for unfortunately. We are just after the 3:30 mark. It is probably a topic which warranted a little more time, but still I think we will have achieved something in our seminar by focusing your attention on the range of issues and the very serious matters which we will have to think about as we practise our various areas of law. With that it is now simply a matter of on your behalf saying thank you to our three speakers. Thank you particularly Dan for coming so far to speak to us, and thank you Geraldine and thank you Greg.