

The International Comparative Legal Guide to:

Environment Law 2008

A practical insight to cross-border Environment Law



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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Australia and which agencies/bodies administer and enforce environmental law?

Australia has a federal legal system. Environmental issues are regulated primarily at a State or Territory level, and they vary from one State/Territory to another. Whilst there is environmental regulation at the Commonwealth or national level, this is generally confined to prescribed matters of national environmental significance and matters involving the Commonwealth and/or Commonwealth bodies.

Each of the seven Australian State and Territory jurisdictions (New South Wales (NSW), Victoria, Queensland, Western Australia, Tasmania, Northern Territory and the Australian Capital Territory), has legislation regulating issues such as development and land use control, pollution and waste management and control, environmental licensing, contaminated land, heritage and natural resource management, and protection of environmentally sensitive areas.

Generally the laws reflect the following principles:

- “ecologically sustainable development”;
- “polluter pays”;
- strategic planning in land development and use;
- resource conservation, particularly water conservation; and
- “cradle to grave” responsibilities for waste generators.

The Commonwealth Minister for the Environment and Heritage (**Cth Minister**), through the Department of Environment, Heritage, Water and the Arts, is responsible for the administration of Commonwealth environmental legislation.

In each of the State/Territory jurisdictions, environmental laws are administered by one or more Ministers and various regulatory bodies, such as the Environment Protection Authority in NSW (**EPA**).

Given the variety of legislative regimes in Australia, this chapter provides responses based on the laws in NSW.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

In all jurisdictions, the environmental regulators have strong enforcement powers. Breach of many environmental laws is a criminal offence and, in most cases, significant maximum fines apply (e.g. in NSW a maximum penalty of \$5 million applies to some pollution offences). Legislation in most jurisdictions also deems directors and persons involved in management to be personally liable for any contraventions by a corporation.

In addition, or as an alternative, regulators may issue clean up orders, on the spot fines, and in some instances require enforceable undertakings. Each of the regulators has developed a prosecution and enforcement policy which outlines, among other things, when legal proceedings would be considered appropriate. Often these policies provide that the commencement of legal proceedings would only be considered appropriate where there is significant environmental harm, significant culpability or a history of repeated contraventions of environmental laws.

The approach taken by the regulators in practice varies between the jurisdictions. Currently there is a trend towards the commencement of prosecution proceedings. This is particularly the case in NSW.

Many environmental laws have “open standing” provisions which allow any person to bring enforcement proceedings to ensure compliance with those laws, by regulators and administrators, as well as by persons carrying out actions in breach of those laws (e.g. developers and polluters).

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

In many Australian jurisdictions, environmental laws require the regulators to make certain information publicly available. Generally, information provided on public registers (often the regulator’s internet site) includes details of matters such as:

- environmental licences;
- applications for development approvals; and
- land which has been identified as contaminated and is subject to clean up requirements.

Reports published by regulators (usually annually) also provide information on enforcement action undertaken by the regulators.

In addition to requirements under environmental laws, freedom of information laws in all jurisdictions (including at the Commonwealth level) give the public the right to make an application to access documents held by government agencies, ministers, local governments and other public bodies. An agency can refuse to provide information in certain prescribed cases. An internal review and tribunal appeals process applies to a decision to grant or refuse to grant access to documents.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Australian environmental laws provide for a vast array of permits in various situations. It is not uncommon for these laws to require more than one environmental permit for a particular activity. The main environmental permits in each jurisdiction are the planning approvals.

Environmental permit requirements depend on a number of factors, such as:

- the nature of the proposed activity (including its likely environmental impacts);
- the State or regional significance of the proposed activity; and
- the location of the proposed activity (e.g. whether it could affect residential areas or issues of environmental sensitivity such as national parks, protected fauna or flora, or rivers or coastlines).

Generally, an activity which has significant potential environmental impacts will require both a planning approval and one or more environmental permits. In some jurisdictions, the need for more than one permit may be integrated through a statutory scheme for inter-agency consultation.

In addition, an activity may require permits at both the Commonwealth and State level.

In most cases, planning approvals run with the land (so they do not need to be transferred in the event of a change in ownership or operation of the permitted activity). However, most other environmental permits tend to be personal to the holder. These permits can usually be transferred with the prior consent of the relevant regulator.

For example:

- An approval from the Cth Minister is required by the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) for actions which are likely to have a significant impact:
 - With respect to a “*matter of national environmental significance*” (e.g. world heritage and national heritage places, RAMSAR wetlands, protected species and nuclear actions);
 - on the environment in a “*Commonwealth area*”; or
 - on the environment anywhere, and are carried out by a Commonwealth agency.

Project approvals under the EPBC Act may be transferred with the consent of the Cth Minister.

- In NSW, under the *Environmental Planning and Assessment Act 1979* (**Planning Act**):
 - development consent is required under Part 4, usually from the relevant local council (or the Planning Minister for more significant development), for development which is identified by the relevant environmental planning instruments as requiring consent; and
 - planning approval from the Planning Minister is required under Part 3A for major infrastructure projects or other developments of State or regional environmental planning significance.

In NSW, an environment protection licence under the *Protection of the Environment Operations Act 1997* (**POEO Act**) is required for “*scheduled activities*”. These include activities which are likely to involve particularly important environmental impacts (such as

certain mining and related activities, petroleum or chemical operations, electricity-generating works, construction of freeways and tollways, operation of railways, and waste facilities). Environment protection licences may be transferred with the approval of the EPA.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

The existence and nature of appeal rights vary from one jurisdiction to another, and (within each jurisdiction) on the nature of the permit being sought. In most circumstances, an applicant or any other person may seek judicial review of an administrative decision to grant or refuse a permit, or a decision in relation to permit conditions. In some cases (usually with planning approvals) an applicant may also appeal on the merits of the relevant decision, and a tribunal will re-determine the application as if the tribunal was the original decision-maker.

For instance:

- The EPBC Act does not provide a right of appeal on the merits in relation to a decision not to grant a permit or to impose a condition of a permit. However, an applicant for a permit or certain other interested persons may seek judicial review of such a decision. This would allow, for example, a challenge to the lawfulness of the decision.
- In NSW, in most cases, an applicant may appeal on the merits in respect of the determination of its application for a planning approval or an environment protection licence. In special cases, an objector may also appeal on the merits. However, for some categories of development no appeal rights are available.
- In NSW, the Planning Act, the POEO Act and various other Acts entitle “*any person*” to commence court proceedings seeking an order to remedy or restrain a breach of the Act, in relation to a decision concerning an application for a permit under that Act.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

In all jurisdictions, an applicant is required to submit relevant environmental impact assessment information to the regulator at the time when the application for a new permit or a permit variation is made.

The nature and extent of the assessment, and the administrative process accompanying it, vary from one jurisdiction to another and (within jurisdictions) according to the requirements of the particular legislation and the nature and scope of the proposed activity. Most jurisdictions require or adopt a practice of publicly exhibiting applications, especially in the case of a planning permit.

The conditions of an environmental permit may specify requirements to prepare and implement management plans, to conduct environmental audits or to achieve certain standards of environmental protection or management in relation to the permitted action. Such requirements are common for large-scale or environmentally sensitive projects.

For instance:

- Under the EPBC Act, the Cth Minister determines the nature of environmental impact assessment required for an application for approval. The Cth Minister may also direct a permit holder to conduct an environmental audit, if the permit

holder has contravened or is likely to contravene a condition of the permit; or the impacts of an action are (or are considered likely to be) significantly greater than those indicated in the information provided with the permit application.

- In NSW:
 - Part 4 of the Planning Act requires a statement of environmental effects for an application for development consent, or an environmental impact statement (EIS) for prescribed categories of development (generally, those which are considered to be likely to have a significant environmental impact). The process of preparing an assessment may involve extensive consultation with government authorities and the public, and may be very time consuming and expensive. These consequences are inevitable for an EIS.
 - Part 3A of the Planning Act requires an environmental assessment report for an application for a major project approval, and this must be prepared in accordance with guidelines and activity-specific environmental assessment requirements prepared by the regulator.
- In NSW, environment protection licences under the POEO Act may include conditions requiring environmental audits, pollution studies and/or pollution reduction programmes. In addition, the EPA may compel a licence holder to undertake an environmental audit if it reasonably suspects a breach has caused, or is likely to cause, harm to the environment.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Environmental regulators have a range of enforcement options if a permit is violated.

These include:

- commencing criminal or civil enforcement proceedings in Court;
- issuing orders or notices (e.g. stop work orders);
- issuing penalty infringement notices (which impose lower level fines); and
- suspending or cancelling a permit, or (in some cases) imposing additional permit conditions.

In some jurisdictions the regulator may accept an undertaking to conduct certain restorative actions or to pay money by way of a fine or to a specified environmental project or body.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The term “waste” is defined very broadly in the various Australian environmental laws. The definition of the “waste” will often include:

- any substance which is discharged, emitted or deposited in the environment so as to cause an alteration in the environment; and
- any discarded, rejected, unwanted, surplus or abandoned substance, whether or not it is intended to be (or can be) reprocessed, re-used or recycled.

Most Australian jurisdictions classify wastes according to their basic characteristics, including potential risk or impact on the environment. Different obligations apply to the different classifications of waste. These obligations may include:

- obtaining a specific permit to generate, store, transport, process, use or dispose of a particular type of waste;

- complying with specific requirements (such as those regulating the manner in which the waste is stored, transported or disposed of) relating to any such activities; and
- ensuring that the people who deal with certain wastes have specific qualifications and permits.

Specific requirements may apply to certain types of waste, such as asbestos (see question 10.2).

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

The specific legal requirements which apply to storage and/or disposal of waste on a property will depend on a range of factors, such as:

- the nature of the waste to be stored and/or disposed of;
- the volume of waste to be stored and/or disposed of, either absolutely or within a specified time frame;
- the manner in which the waste is proposed to be stored and/or disposed of; and
- the location of the property (i.e. its proximity to sensitive environmental receptors).

The storage and/or disposal of waste may be prohibited on certain land under planning laws, or may give rise to permit requirements under the relevant Commonwealth and State environmental laws.

In all jurisdictions, it is an offence to dispose of waste in a manner that harms or is likely to harm the environment. Often the owner of the waste as well as the person disposing of it will be liable. Consequently, it is important to ensure that any contract which concerns any dealing with waste addresses the issue of transfer of ownership of that waste.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Most jurisdictions have sought to give effect to “cradle to grave” waste management obligations. As a result, the producer or owner of the waste is required to ensure that the waste is appropriately and lawfully transported and treated/disposed of. Generally, a waste producer may transfer all or some of that liability to a third party by appropriately documented transfer arrangements, provided that the third party is authorised to take possession and control of the waste.

However, some liabilities, including in relation to the transport of waste between certain jurisdictions, remain with the waste generator or owner.

In most jurisdictions, the waste owner, the waste transporter, the waste facility owner and a disposer may each be liable for offences relating to the improper disposal of waste. Consequently, waste supply and disposal contracts need to have regard to the specific environmental laws in the relevant jurisdiction.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

At this stage, the majority of the schemes for the take-back and recovery of waste are voluntary. However, in some instances, if the waste producer does not commit to a voluntary scheme (e.g. the covenant for used packaging materials), the relevant regulator may by notice require the waste producer to take specified action to minimise waste generated or disposed of at the landfill.

Environmental permits may include conditions requiring the permit

holder to implement a re-use, recycling or take-back and utilisation scheme in respect of any product or item manufactured or sold by the licence holder which creates waste.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Breach of environmental law is often a criminal offence subject to substantial fines and potentially also imprisonment. For example, the maximum penalty available in NSW is \$5 million in respect of a corporation, and \$1 million and/or 7 years' imprisonment in respect of an individual. This penalty applies to pollution offences committed wilfully. These penalties operate in addition to costs associated with remediation of any environmental harm or compensation payments.

In addition to the enforcement options available to regulators (see question 1.2), private parties affected by the breach may also bring proceedings in order to recover damages, or in some instances so as to enforce compliance with the relevant environmental law.

In addition, the Courts may in some jurisdictions impose other forms of sentencing which are designed to give publicity to the offence or to produce some environmental benefit. For example, the Court may order the defendant to advertise details of the offence, to carry out an environmental project, to pay money to an environmental fund, and/or to undertake environmental training.

Contravention of environmental laws is usually a "strict liability" offence, which means that the prosecutor does not need to prove that the defendant acted intentionally or recklessly in order to secure a conviction.

In addition, in some jurisdictions a licence holder or occupier can be deemed to be liable for any breach of the licence, even if the breach was caused by a third party (such as a contractor).

Very limited defences are available. Generally, it is a defence to prove that the pollution was permitted by a valid licence or permit. In some circumstances a "due diligence" defence will apply to certain types of offence.

Directors and and/or certain other officers (e.g. managers) of a corporation may also be deemed to be liable for, and personally prosecuted in respect of, breaches of some environmental laws by the corporation. See question 4.3.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Yes, an operator can be liable for environmental damage even if the polluting activity is permitted.

Statutory Liability

Generally, if a polluting activity is specifically authorised by a permit, the licence holder will be protected against liability for breach of the legislation under which the permit was granted. However,

- the action may still give rise to a contravention of another statute (as noted in question 2.1, in some cases a particular action may be regulated by a number of different environmental statutes); and
- in some instances (for example odour in NSW), a polluting activity may breach the relevant law even though it is within the licence limits.

Common Law Liability

In addition, an operator may be liable under the common law torts of nuisance and negligence for environmental damage authorised by a permit. Several environmental statutes which impose requirements for permits (such as the POEO Act in NSW) expressly preserve the operation of other relevant laws, such as the common law.

In certain rare circumstances, compliance with a permit may operate as a defence to a claim of nuisance. However, in most cases it should be assumed that any environmental damage could attract liability in negligence and/or nuisance.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

In all jurisdictions, directors and/or certain other officers of a corporation may be deemed personally liable for contraventions of certain environmental laws by the corporation, and may be individually prosecuted. In NSW for example, the POEO Act deems "directors and those concerned in the management of" a corporation to be personally liable for the offences of that corporation.

Very few defences are available for offences of this kind. Generally, a "due diligence" defence is available to directors/managers. To make out this defence it is usually necessary to establish that the person was not in a position to influence the conduct of the corporation, or that the person used all due diligence to prevent the contravention by the corporation. This defence is, in practice, very difficult to establish.

It is unlikely that a company would be able to indemnify an officer of the company for a criminal penalty because of section 199A(2) of the *Corporations Act 2001* (limiting indemnities to conduct in good faith). The company could advance the costs of defending proceedings, but the officer may be required to repay the costs if ultimately found liable. Environmental offences are "criminal" in nature, and it would also arguably be against public policy to allow indemnity in relation to environmental offences. However, certain directors' and officers' liability (D&O) policies may cover "strict liability" offences.

Criminal penalties will generally be specifically excluded under any D&O liability policy, but civil penalties may be covered. Most policies contain pollution exclusions. However, pollution exclusions commonly do not apply to defence costs (but are usually subject to a sub-limit) or to shareholder derivative actions.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

Most civil and criminal liability for environmental harm or other contraventions of environmental laws applies to the person who is responsible for causing that harm or contravention. Consequently, in many cases, the purchase of assets rather than shares will avoid the purchaser "inheriting" civil or criminal liability for past environmental harm or contravention of environmental laws. This may be particularly important if the operator of the target business has a poor environmental record with the regulatory authorities.

One important exception to this is responsibility for contaminated land. For example, under current NSW laws, if it is not practicable to require a person who is responsible for contamination of land to investigate and/or remediate that contamination, the EPA may pursue the current land owner (see question 5.1).

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

In many jurisdictions, lenders are not liable for environmental wrongdoing or remediation costs unless the lender is involved in controlling the management decisions of the defaulting company.

In NSW, for instance, the *Contaminated Land Management Act 1997 (CLM Act)* expressly excludes a person who merely has a security over the land, such as a mortgage or a charge, from liability as a “notional owner” (see question 5.1 below). However, a lender can be liable as a notional owner if a security interest carries an entitlement to have a freehold interest in the land vested in the security holder, or enables the security holder to dispose of, or otherwise deal with, the land in order to benefit from its value, and that entitlement is being exercised. For example, the CLM Act expressly includes a mortgagee in possession as a notional owner.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Contamination of land in Australia is generally addressed at a State and Territory level. Most legislation seeks to give effect to the “polluter pays” principle.

Environmental regulators have broad powers to issue clean up notices. These can be issued to the polluter and also in some instances to the occupier or owner of land. An occupier may, in various circumstances, be deemed to be a polluter. Generally a certain threshold of contamination is required before an order can be issued.

For instance, in NSW, the EPA may require either (in order of preference) a polluter, an owner or a “notional owner” (e.g. a mortgagee in possession) to undertake the investigation and/or remediation of land, if it has reason to believe that the land is contaminated in such a way as to present a “*significant risk of harm*” to human health or the environment.

In determining whether or not to issue an investigation or remediation order against a particular person, the EPA may take into account (among other things) that person’s capacity to pay for the actions specified in the order.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Generally, the legislation merely states that orders can be issued to the person responsible for causing the contamination, and does not specifically discuss how the responsibility between multiple polluters should be apportioned.

The “last” polluter may be required to undertake the clean up if the pollution it has caused has resulted in the level of contamination at the site exceeding the threshold trigger for regulatory intervention.

In NSW, under the CLM Act, orders may be issued to a person “principally responsible” for the contamination. Any such orders must be copied to other persons whom the EPA considers are also responsible for the contamination. The CLM Act allows the principal polluter to recover an appropriate “portion of” its costs from other polluters.

5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

The arrangements for voluntary remediation agreements with environmental regulators differ between jurisdictions.

In NSW, the EPA may enter into a voluntary agreement in which it agrees not to issue an investigation or remediation order against the parties to the agreement provided that those persons comply with the investigation or remediation proposal (as the case may be) in that agreement. These agreements are binding on the parties to them. However, this does not prevent the EPA from issuing an investigation and/or remediation order against a person who is not party to such an agreement. Conceivably, the EPA could also issue investigation and/or remediation orders against parties to such an agreement if further contamination is suspected and the “*significant risk of harm*” threshold is met (see question 5.5).

The CLM Act requires that the EPA not agree to a voluntary investigation or remediation proposal unless the EPA is satisfied either that the parties have taken all reasonable steps to identify and find other persons whom an investigation or remediation order may be issued and have given those persons a reasonable opportunity to participate in the preparation of the proposal, or that the parties have undertaken not to pursue financial contributions under the CLM Act against those other persons.

The statutory nature of voluntary agreements means that although third parties will not be party to them, such agreements may nevertheless be subject to judicial scrutiny (as a result of judicial review actions initiated by third parties) so as to ensure that they comply with the provisions of the CLM Act. These principles are discussed more fully in question 2.2.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

Private rights of action in relation to contamination of land may be available at common law under the torts of negligence or nuisance or, depending on the terms of the sale contract for that land, for breach of contract.

A cause of action in nuisance against a polluter of land will be available to the owner of that land if it can be established that the polluter has caused contamination of the land which is both unreasonable and substantially interferes with the owner’s use and enjoyment of its property rights.

A cause of action in negligence is available if it can be established that the polluter caused the contamination, and was in breach of a duty of care to the land owner.

In addition to the problems of establishing causation, the application of relevant limitation periods may prevent action being taken against the polluter at common law.

In some jurisdictions, statutory rights of recovery may also be available. In NSW, under the CLM Act, persons who carry out the requirements of an investigation or remediation order may recover, in court proceedings, a reasonable portion of their costs from each person who has responsibility for the contamination giving rise to that order.

If responsibility for undertaking remediation work is allocated to the purchaser in the sale contract and the work is not carried out, the regulator may still (depending on the provisions for clean up orders

in that jurisdiction) issue an order to the vendor-polluter. In that case, the vendor would need to commence legal proceedings against the purchaser for breach of contract and/or to rely on any indemnities provided in the contract.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

Generally speaking, Australian environmental laws do not give governments the right to seek damages for harm (including aesthetic harm) caused to public assets.

To the extent that the government has a right or interest in public assets, the interference with those rights may be the subject of a common law action in negligence or nuisance. It is rare for Australian environmental legislation to provide specifically for recovery of damages in such instances.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

In all jurisdictions, regulators have very broad investigative powers. These include the power to investigate, to require the provision of information and/or records, to enter and search premises/land, and to question and identify persons. These powers can be exercised for the purposes of generally administering the relevant Act and protecting the environment.

The power to enter and search premises/land usually includes (among other things) the power to take and remove samples, take photographs and video recordings, and seize anything which an officer has reasonable grounds for believing is connected with an offence against the relevant statute.

These powers do not require the production of information protected by legal professional privilege, and a limited protection against providing information which tends to incriminate an individual usually applies.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Reporting requirements vary between the jurisdictions.

In NSW:

- polluters and occupiers of land must notify the EPA of “pollution incidents” which have caused or threatened “material harm to the environment”; and
- polluters and owners of land must notify the EPA if they become aware that land has been contaminated so as to present a “significant risk of harm”.

Site auditors who are accredited under the CLM Act must provide to the EPA certain details of site audits which they carry out.

There are no specific duties to notify potentially affected third parties (except in the context of a transaction - see question 7.3). However, information notified to the EPA as outlined above will generally be publicly available.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

A statutory obligation to investigate land for contamination will arise:

- if required by a permit condition; or
- if the environmental regulator has a statutory power to and does in fact order it.

A person may have a contractual obligation to investigate land for contamination if the terms of any relevant contract so provide. In this regard, it is not uncommon for contracts in Australia (and in particular, leases and licences in respect of land) to require a party who occupies land to investigate and, if necessary, remediate that land before completing the period of its occupation.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

In NSW, a contract for the sale of land must disclose whether the land is the subject of certain orders or other instruments under the CLM Act. Similar provisions apply in many jurisdictions, and more extensive obligations apply in some other jurisdictions such as Queensland.

Consumer protection legislation at State and Commonwealth level prohibits misleading or deceptive conduct (such as making false or misleading representations concerning certain matters in connection with land). Silence as to a matter within a party's knowledge can be regarded as misleading or deceptive conduct.

Under the common law, the torts of misrepresentation and deceit may also carry liability where a party is silent as to the environmental status of land.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

An indemnity may be used to provide a contractual mechanism, as between the contracting parties, for the recovery of clean up costs or the costs of undertaking works required under an order from the regulator. It is common in Australia for transaction documents to include an indemnity by one or more contracting parties in relation to specific environmental issues.

In most cases, however, public policy forbids the use of an indemnity to protect a person in relation to criminal liability, and provisions in agreements which seek to provide such protection may be declared invalid by a court.

Payment under a contractual term is unlikely to have any effect on a payer's statutory liability (if any) for environmental issues. However, if a person uses a statutory power to recover a portion of its environmental liability from another person, any payment that the other person has already made to the claimant (for example, under a contract) in respect of that liability is likely to affect the claimant's success in the statutory recovery action.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Australian environmental law does not contain any express requirements to address environmental liabilities in financial records or reports. However, the *Corporations Act 2001* (Cth) and various Australian accounting standards establish strict requirements for the preparation of company financial records and reports.

In addition, though not necessarily related to balance sheet disclosure, section 299(1)(f) of the *Corporations Act 2001* requires all reporting entities which are “*subject to any particular and significant environmental regulation*” to address their environmental performance in the annual Directors’ Report.

Environmental legislation in each jurisdiction may also provide consequences for the use of corporate structures to avoid environmental liabilities. In NSW, for example, the CLM Act provides that, if a company transfers land to a related company or is wound up within the previous two years, as part of a scheme to avoid compliance with a contamination investigation or remediation order issued by the EPA, then the EPA may be able to serve a similar order against a director of, a person involved in the management of, or the holding company of, that company.

See the response to question 10.1 for further discussion on “ring-fencing” environmental liabilities using special purpose vehicles.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

Shareholders cannot be held liable for breaches of environmental law caused by the company.

Generally the “corporate veil” operates to shield parent companies from liability for the actions of their affiliates. There are, however, certain circumstances in which the corporate veil may be pierced, including:

- where the parent company has such level of control over the management of the affiliate company that, for all intents and purposes, the affiliate company is simply an agent of the parent company; and
- where there is fraud on the part of the parent company in setting up the affiliate company.

Australian courts have generally been reluctant to pierce the corporate veil and there have been only very limited instances to date in which the issue has been tested in an environmental context.

As noted in question 8.2, in limited circumstances a court may order a director of, a person involved in the management of, or a holding company of, a former corporate owner of potentially contaminated land to comply with an investigation or remediation order under the CLM Act in respect of that land, where the former land owner transferred the land or was wound up as part of a scheme to avoid responsibility for the contamination.

8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

In some jurisdictions, provisions protecting whistle-blowers have been enacted. However, they generally either provide for the protection of whistle-blowers who are public servants, or for the protection of persons making disclosures in respect of improprieties

by public servants. These laws may be relevant in an environmental context for an environmental violation by a public authority.

8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

Whilst the open standing provisions of many environmental statutes permit a person to bring civil enforcement proceedings on behalf of an unincorporated group, environmental statutes do not specifically provide for “class” actions as such.

However, class action procedures (technically called “representative” or “group” proceedings) are available in several jurisdictions under relevant court rules or constituting legislation. Two jurisdictions, the Federal Court of Australia and the Supreme Court of Victoria, have a modern class actions procedure which resembles in some, but not all respects, the US procedure. An action can only be commenced in the Federal Court where it attracts Commonwealth jurisdiction, for example if it involves a claim under the EPBC Act. Other jurisdictions do have a limited form of representative procedure, although the circumstances in which these procedures can be used have not been established with certainty.

The incidence of class actions has increased markedly since the provisions were introduced in these jurisdictions. Australia is now the most likely jurisdiction outside North America in which a corporation may be faced with a class action. There have been some examples of class actions which have involved some environmental issues, the most prominent of which was a claim arising from the contamination of oyster stocks with the Hepatitis A virus.

Exemplary or punitive damages can be awarded by the courts, except in personal injury claims (most jurisdictions have removed the right to claim such damages in most types of personal injury claims). Whilst exemplary damages are available where the cause of action is based on nuisance or negligence, such awards are extremely unusual. Where such an award is made, it is likely to be significantly lower than similar amounts which have been awarded in other countries, for example in the United States.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Australia and how is the emissions trading market developing there?

Australia ratified the Kyoto Protocol after a change in the Commonwealth Government, in late 2007. The effect of this is a formal commitment to the targets set out in the Kyoto Protocol, most notably meeting Australia’s commitment to achieving a total output of annual greenhouse gas emissions at 108% of 1990 levels in the period from 2008 to 2012.

The Commonwealth Government has, to date, committed to reducing greenhouse gas emissions to 60% of 2000 levels by 2050. It has also commissioned an economist, Ross Garnaut, to prepare a comprehensive report outlining the costs and benefits of action and inaction on a range of climate change issues, including measures to combat climate change, and outlining key features of an emissions trading scheme.

The Commonwealth Government has also committed to introducing a national emissions trading scheme by 2010. At this stage, it appears likely that the scheme will be a “cap and trade” scheme. A Commonwealth legislative regime for reporting greenhouse gas emissions in energy production and use - the *National Greenhouse and Energy Reporting Act 2007* - is due to

commence in July 2008.

There are currently various voluntary State-based initiatives designed to reduce greenhouse gas emissions, such as NSW Greenhouse Gas Abatement Scheme (which commenced in 2003 and focuses on electricity retailers and large consumers) and the introduction by the Queensland Government of a 13 per cent gas scheme designed to boost the State's gas industry.

The New South Wales and Victorian State Governments have also adopted new mandatory renewable energy targets. The NSW Government has committed to targets of 10% of electricity sourced from renewable sources by 2010 and 15% by 2020.

10 Asbestos

10.1 Is Australia likely to follow the experience of the US in terms of asbestos litigation?

There has been asbestos litigation on foot in Australia for many years, and Australia has developed its own solutions for the peculiar problems posed by such litigation.

Many Australian jurisdictions now have special rules governing the management of asbestos litigation. The most significant rules are in NSW which has a specialist Dust Diseases Tribunal devoted entirely to determining dust diseases (chiefly asbestos) claims. Several other state courts have special lists for asbestos claims.

Although the specific rules vary from jurisdiction to jurisdiction, they may include:

- procedural measures designed to streamline trial preparation;
- rules which facilitate the proof of issues which are common to many asbestos claims; and
- rules which either abrogate limitations defences for asbestos claims entirely, or which make it reasonably easy for plaintiffs to obtain extensions of time.

Asbestos claims have also, generally speaking, been excluded from recent reforms which have sought to limit the entitlements of plaintiffs in personal injury claims.

In recent times, the Australian experience of asbestos litigation has been complicated by developments in relation to claims against major manufacturers of asbestos products, particularly building products. One result of these developments was a recognition that it is desirable to reduce the costs associated with the resolution of asbestos claims; both legal costs and damages awarded to plaintiffs (which had been steadily increasing). As a result, reforms have been made to the Dust Diseases Tribunal procedures with a view to promoting the early resolution of claims, by encouraging negotiated settlement at an early stage and by establishing fixed standards by reference to which damages are calculated. The effect of these reforms remains to be seen. It is also not clear to what extent they will be adopted in other jurisdictions.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

Occupational health and safety laws in each jurisdiction extensively regulate employers' and building occupiers' responsibility in relation to asbestos. These laws typically require asbestos identification, undertaking risks assessment, implementation of control measures to eliminate or minimise exposure risks such as asbestos management plans and labelling, and health monitoring (in certain circumstances). These laws also establish certification requirements for persons in the asbestos removal industry.

In some jurisdictions, for example Queensland, an asbestos audit must

be provided to the purchaser in respect of the sale of certain property.

Issues relating to the disposal of asbestos waste are dealt with under environmental laws. For example, NSW has environmental laws which specifically regulate the storage, handling and disposal of asbestos, and require financial contributions to be made by waste facility operators.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Australia?

All of the major environmental policies are available in Australia, including:

- environmental impairment policies covering sudden accidental pollution incidents and (to a small extent) gradual release incidents;
- directors' and officers' indemnity from certain forms of environmental offences and claims;
- merger and acquisition policies, providing warranty top-up cover (e.g. providing cover in the form of environmental warranties in a commercial transaction where one party may not be able to give warranties which might otherwise be expected to be provided - such as where a company is insolvent); and
- environmental clean-up cost overrun policies.

However, the environmental insurance Market in Australia is still in a relatively early stage of development, and environmental insurance plays a small role in transactions and projects.

11.2 What is the environmental insurance claims experience in Australia?

It is difficult to make any generalisations about the nature of environmental insurance claims in Australia because claims have been limited.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Australia.

Environmental law is a particularly dynamic area of law throughout Australia. Highlights of recent developments and trends in Australian environmental law include the following:

- The principles of ecologically sustainable development (ESD) are becoming increasingly important, particularly in judicial decision-making. This is driving a better integration of ESD into planning and decision-making in a broad range of fields, such as equity and debt financing, project control and the enforcement of environmental laws.
- Climate change is dominating public debate and policy making. Apart from developments in greenhouse gas reduction initiatives and emissions trading (see question 9.1), there is increasing emphasis on the importance of climate change in project control. Decision-makers are being expected (or compelled) to take proper account not only of the potential effects of their projects on climate change but also the potential effects of climate change on their projects.
- The National Water Initiative continues to drive significant changes in water law and policy, for both urban and non-

urban areas, in recognition of increasingly drier conditions in Australia.

- Contaminated land laws are being made stricter across Australia. Jurisdictions such as Western Australia are introducing their first specific contaminated land legislation, whilst others such as NSW are proposing more stringent controls and greater regulatory flexibility.
- The introduction of economic (especially market-based) mechanisms in environmental regulation is becoming

increasingly popular among Australian governments. The proposal for a greenhouse gas emissions trading scheme, and the development of water trading regimes (within and across jurisdictions) are two examples. Another in NSW is “biobanking”, which enables land owners to conserve biodiversity on their land and generate biobank credits in certain situations, which can then be sold to developers who require them to obtain approval for projects which may adversely affect biodiversity on other land.



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Nick acts for clients on transactional work, assessment and approvals processes, operations and compliance, and incident management. His experience extends to drafting legislation and planning instruments. He advises on environmental aspects of corporate governance and risk management. In addition, he has a strong background in dispute resolution, having acted in Federal and State jurisdictions as well as various commissions and public inquiries.

Nick's recent experience covers major public and private sector projects, and among them Australia's most significant infrastructure projects. Clients for whom Nick has acted include Commonwealth and State Government agencies, as well as some of Australia's largest corporations.

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