Q&A on Environmental Law in Australia

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Introduction

Using a Q&A format, this article provides a guide to environmental law in Australia and gives a practical description of a wide range of topics including:

- The main permitting frameworks
- Liability regimes for contaminated land and environmental damage
- Regulators' powers and approach to enforcement, and NGO involvement
- Lender liability
- How environmental issues are dealt with in asset and share sales
- Environmental due diligence in transactions
- Environmental reporting and auditing

The article was prepared by Jon Carson, Robyn Glindemann and Nicole Ortigosa of Clifford Chance, Perth. Details of the authors can be found in the Appendix.

It is one of a series of 10 articles produced by Clifford Chance covering Australia, Belgium, Czech Republic, France, Italy, Germany, the Netherlands, Poland, Spain and the United Kingdom (England & Wales). These articles can be found on this link:

http://www.cliffordchance.com/environment

This article was first published by Practical Law. The law is stated as at 1 September 2013.

Environmental regulatory framework

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

There are a large number of legislative instruments and regulatory bodies that govern environmental regulation in Australia.

Australia has a federal legal system with environmental matters primarily regulated at a state and territory level. The regime varies between each state and territory.

Policy changes and legislative developments have been relatively constant in the last five years. Recent developments in Australia include the formation of the Northern Territory Environment Protection Authority, the commitment by many state governments to reduce the 'green tape' associated with development approvals and an increasing focus on the duplication of approval processes between the different levels of government. For further developments, see *Question 30*.

State and territory legislation

The key environmental legislation, and the relevant regulatory body, for each state and territory is as follows:

- **Australian Capital Territory.** The Environmental Protection Act 1997 (ACT) administered by the Environment Protection Authority.

- **New South Wales.** The Protection of the Environment Operations Act 1997 (NSW) administered by the Environment Protection Authority.
- **Northern Territory.** The Waste Management and Pollution Control Act 1998 (NT) and Environmental
- **Queensland.** The Environmental Protection Act 1994 (QLD) administered by the Department of Environment and Heritage Protection.
- **South Australia.** The Environment Protection Act 1993 (SA) administered by the Environment Protection Authority.
- **Tasmania.** The Environmental Management and Pollution Control Act 1994 (TAS) administered by the Environment Protection Authority.
- **Victoria.** The Environment Protection Act 1970 (VIC) administered by the Environment Protection Authority.
- **Western Australia.** The Environmental Protection Act 1986 (WA) (EP Act) administered by the Environmental Protection Authority (EPA) and the Department of Environment Regulation (DER).

While the broad topics are generally consistent in the various pieces of legislation, this chapter concentrates on the provisions contained in Western Australian legislation.

Commonwealth legislation

Environmental regulation at the Commonwealth level is limited to areas of national significance and those involving the Commonwealth or Commonwealth bodies. The Commonwealth's primary environmental legislation is the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). It is administered by the Department of Sustainability, Environment, Water, Population and Communities (SEWPAC).

Sanctions and penalties

All jurisdictions in Australia consider a breach of environmental law a serious incident with significant consequences, including constituting a breach of the criminal law in some circumstances.

Assessment Act 1982 (NT) administered by the Environment Protection Authority.

Regulatory enforcement

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

While each jurisdiction varies, the relevant regulators all have significant enforcement powers, including:

- Instituting criminal and/or civil proceedings.
- Issuing notices and orders.
- Suspending or cancelling licences, or amending licence conditions.

In all jurisdictions the directors and managers of a company, unless they can establish one of the available defences, can also be guilty of an offence if the company is found guilty. Some jurisdictions also impose liability on licensees or occupiers for breach by a contractor.

In Western Australia, the available penalties under the EP Act include fines, imprisonment and "follow on" penalties such as the cancellation of licences. The range of fines is as follows:

- **Tier 1 offences.** These are the most serious offences involving penalties up to:
  - AU$1 million for corporations; and
  - AU$500,000 and/or up to five years imprisonment for individuals.

There are also penalties for each day that the offence continues.

- **Tier 2 offences.** These offences are strict liability offences resulting in penalties up to:
  - AU$250,000 for corporations;
  - AU$125,000 for individuals.

There are also penalties for each day that the offence continues.

- **Tier 3 offences.** These are generally minor offences involving penalties of up to AU$5,000 for both individuals and corporations.

In addition to monetary penalties, the defendant is likely to be the subject of a court order requiring them to carry out one or more of the following:

- Action to remedy, mitigate or prevent further environmental harm.
- Restorative action.
- Action to publicise the contravention.
- Pay an amount as determined by the court on a specified basis.

The approach that the Western Australian DER is likely to take to a breach of the EP Act is set out in the DER Enforcement and Prosecution Policy (July 2013). It outlines the factors to be taken into account in deciding what level of enforcement action is appropriate in each instance.

While an offence may carry with it many enforcement options, the circumstances of the offending behaviour will dictate the appropriate enforcement response. The seriousness of the offence, any action of voluntary mitigation and an outcome that best achieves the objectives of the EP Act are all relevant considerations. Prosecution is not seen as a tool of last resort, and instead is employed as the appropriate response to a particular circumstance.

Private persons can also bring civil proceedings to recover damages where they have suffered loss or damage.

Environmental NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

NGOs play an important role in environmental law in Australia. They have brought a number of public interest environmental litigation cases. In many jurisdictions in Australia there is open standing for NGOs to bring civil proceedings to enforce particular statutory obligations or to challenge the decision making process in respect of the approvals for a particular project.

Recently there has been a re-emergence of NGO activity. This is because of the number of proposed coal seam gas (CSG) projects in Australia, and the perceived environmental risks associated with the CSG industry.

For example, an anti-coal activist has recently been charged by the Australian Securities and Investment Commission over a false press release that caused a AUS$300 million decrease in a major coal company's share price.

It is not surprising that political agendas and environmental activism have aligned, particular seeing the important role that NGOs play in environmental policy. The Australian Greens political party has been more prominent in the last six years and, supported by NGOs, has promoted greater activism in Australia.

Environmental permits

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

Generally speaking, Australia does not have a fully integrated permitting regime. Each project must be assessed on its merits, nature and location to determine what environmental permits are required and if state and/or Commonwealth permits are needed. Any project or activity with any level of consequence for the environment is likely to require several permits, including development, environmental and heritage.

While such permits are not strictly integrated, the permitting regime in each jurisdiction generally allows a degree of integration. For example in most Australian jurisdictions, a single environmental permit or authorisation may govern a number of relevant environmental concerns such as noise, air, water and waste for each of the prescribed premises.

Some jurisdictions permit a degree of planning and environmental approval integration. In others, approvals for certain major projects may remove the need to obtain other environmental permits.

Single/separate permits

The environmental permits required for a particular project depend on a number of factors including the nature and location of the project, the type of activity and the proposed

treatment of waste and rehabilitation plans. For example, resource projects require environmental authorisations to cover waste and rehabilitation concerns that do not necessarily need to be addressed in residential developments.

5. What is the framework for the integrated permitting regime?

As previously noted, there is no integrated permitting regime in Australia (*see Question 4, Integrated/separate permitting regime*). Therefore, each project should be assessed and all relevant environmental permits and other authorisations obtained, having regard to the merits, nature and location of the project.

Water pollution

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Permits and regulator

Water pollution is regulated at both a Commonwealth and state/territory level. The key water licensing legislation, and the relevant regulatory body, for the Commonwealth and each state and territory is the following:

- **Commonwealth.** The Water Act 2007 (Cth) and the Water Amendment Act 2008 (Cth) administered by the Department of Sustainability, Environment, Water, Population and Communities.
- **Australian Capital Territory.** The Water Resources Act 2007 (ACT) administered by the Environment Protection Agency.
- **New South Wales.** The Water Management Act 2001 (NSW) and the Water Act 1912 (NSW) administered by the Office of Water, Department of Primary Industries.
- **Northern Territory.** The Water Act 1992 (NT) administered by the Water Resources Division of the Department of Natural Resources, Environment, The Arts and Sport.
- **Queensland.** The Water Act 2000 (QLD) administered by the Department of Energy and Water Supply.
- **South Australia.** The Water Resources Act 1997 (SA) and the Water Industry Act 2012 (SA) administered by the Department of Environment, Water and Natural Resources.
- **Tasmania.** The Water Management Act 1999 (TAS) administered by the Department of Primary Industries, Parks, Water and Environment.
- **Victoria.** The Water Industry Act 1994 (VIC), Water Act 1989 (VIC) administered by the Department of Environment and Primary Industries.
- **Western Australia.** The Rights in Water and Irrigation Act 1914 (WA) administered by the Department of Water.

Water pollution is distinct from water licensing because it is regulated by each of the state's individual Environment Protection Act (*see Question 1*).

In Western Australia, businesses operating a prescribed premises as listed in Schedule 1 of the Environmental Protection Regulations 1987 (WA) have the potential to cause environmental harm. Licences and works approvals are issued under Part V of the EP Act to these businesses and may specify conditions to ensure compliance with the EP Act and relevant best practice for that industry. Conditions may include regular audits, monitoring and reporting or compliance with a standard or code of practice. Water pollution is covered by this licensing regime.

Prohibited activities

In Western Australia, pollution of watercourses is addressed under the EP Act. Under the EP Act, it is an offence for a person to pollute the environment or cause environmental harm. A person who discharges or abandons, or causes or allows to be discharged or abandoned, any solid or liquid waste in water to which the public has access commits an offence, unless they can establish that the pollution, emission or harm occurred in the course of carrying out a development approved under the EP Act or the discharge was the result of an emergency.

The Health Act 1911 (WA) (Health Act) makes it an offence for any person to pollute any water supply or water catchment containing water intended for human consumption. The Rights in Water and Irrigation Act 1914 (Irrigation Act) creates several offences with respect to the use of water, including that a person must not, without authorisation, take water from or discharge any matter likely to obstruct flow of the current in prescribed watercourse or underground water sources.

The Department of Water (WA) and local government have power to control pollution of watercourses within and under

catchment areas and water reserves. This includes the power to make local laws to control polluting activities within a catchment.

Clean-up/compensation

In Western Australia, under the DER's Enforcement and Prosecution Policy, DER can take action to remedy the breach and the offender can be pursued for the cost of the clean-up.

Penalties

In Western Australia, as in other jurisdictions, there are financial penalties for causing water pollution. (*Question 2*).

The penalty for failing to comply with the Health Act provision is a maximum fine of AU$10,000 and a daily penalty of AU$1,000. The Irrigation Act imposes penalties of up to AU$10,000 for each offence and additional daily penalties may apply.

Air pollution

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Permits and regulator

Air pollution is regulated at both a Commonwealth and State and Territory level. There are a number of national policies and programmes related to the reduction of air pollution in relation to the transport, residential and industrial sectors.

Commonwealth and complimentary state and territory legislation allow the National Environment Protection Council to make National Environment Protection Measures (NEPMs), including the:

- National Environment Protection (Air Toxics) Measure.
- National Environment Protection (Ambient Air Quality) Measure.

NEPMs are national objectives aimed at assisting the protection and management of air quality in Australia. However, each jurisdiction implements NEPMs in a slightly different way.

Air pollution is regulated at a state and territory level through general environmental laws. It is a standard requirement to comply with pollution caps as well as obtaining permits for continuous emissions into the air. Air pollution is typically dealt with under the general pollution provisions of the environmental legislative instruments listed in *Question 1*.

For example, in Western Australia, air pollution is dealt with under the general pollution provisions of Part V of the EP Act (*see Question 6*). Accordingly, any works that may cause emissions to air or alter the nature or volume of emissions at a prescribed premises requires a works approval or a licence. It is a general condition of the works approval or licence that the licensee report on emissions to air.

Air pollution is also dealt with under numerous regulations including the Clean Air (Determination of air impurities in gases discharged into the atmosphere) Regulations 1983 and, as noise pollution is considered air pollution for the purposes of the EP Act, the Environmental Protection (Noise Regulations) 1997. Additionally, the Environment Protection (Unauthorised Discharges) Regulations 2004 specifies certain materials that are not to be released into the environment.

Prohibited activities

Under the Western Australian EP Act, it is an offence for a person to cause air pollution or to allow an unreasonable emission to air from any premises unless the pollution or emission was:

- Permitted under a works approval or licence.
- A result of an emergency or other exempt activity.
- Permitted under an approval granted by the Minister for the Environment.

Clean-up/compensation

Under the DER's Enforcement and Prosecution Policy in Western Australia, the DER can take action to remedy the breach and the offender may be pursued for the cost of the clean-up.

Penalties

There are financial penalties for causing air pollution in Western Australia as in other jurisdictions. See *Question 2*.

Climate change, renewable energy and energy efficiency

8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)?

Under the Kyoto Protocol, Australia agreed to limit annual greenhouse gas (GHG) emissions to an average of 108% of 1990 levels during the period from 2008 to 2012.

The Commonwealth government has also set national targets for both the reduction of GHG emissions and the increased use of renewable energy.

GHG emissions. The Commonwealth government's target is a reduction in GHG emissions by at least 5% by 2020 as compared to 2000 levels. This target may be increased depending on the outcome of international negotiations. The Commonwealth has also committed to reducing pollution to 80% below 2000 levels by 2050.

These targets have remained constant for some years now but the method of implementation may change (*see Question 10*).

Renewable energy. The Commonwealth has committed to ensuring that 20% of Australia's electricity supply comes from renewable sources by 2020. Total renewable generation is projected to comprise around 40% of electricity generation by 2050.

Energy efficiency. While there is no national energy efficiency target, the Commonwealth has pursued various policy initiatives to increase energy efficiency.

For example, in July 2009, the Council of Australian Governments agreed to a ten-year strategy for the acceleration of energy efficiency and to provide cost-effective energy efficiency throughout Australia.

Under its Clean Energy Future Plan, the Australian Labor Government committed to investigate the merits of a national Energy Savings Initiative (ESI). The national ESI will operate similar to those currently operating in New South Wales, Victoria, South Australia and the Australian Capital Territory, in order to create energy efficiency improvements for the whole economy. In July 2013 the Energy Savings Initiative Working Group released its information paper on the ESI.

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

In December 1993 Australia became one of the first countries to ratify the UNFCCC.

On 3 December 2007 Australia signed the instrument of ratification of the Kyoto Protocol. Australia's ratification of the Kyoto Protocol came into effect on 11 March 2008.

Implementation

The Commonwealth has implemented various measures to comply with its obligations under these international agreements, the most important of which is the carbon pricing mechanism under the Clean Energy Act 2011 (Cth) (CE Act) (*see Question 10*).

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

On 1 July 2012, the carbon pricing mechanism under the CE Act, and its associated regulations, came into operation in Australia. It requires a liable entity operating a facility to surrender units to match the GHG emissions from the operation of that facility. Liable entities are generally companies that:

- Operate facilities that have direct emissions of over 25,000 tonnes of carbon dioxide equivalent in a financial year.
- Operate landfill sites that have direct emissions of over 10,000 tonnes of carbon dioxide equivalent in a financial year.
- Supply natural gas.
- Operate large gas consuming facilities.

On 28 August 2012, the Commonwealth government announced plans for the carbon pricing mechanism to be linked to the EU Emissions Trading Scheme (ETS).

On 16 July 2013, the then Australian Labor Government announced that the carbon pricing mechanism would change to an emissions trading scheme on 1 July 2014, one year earlier than anticipated. The carbon pricing mechanism is now proposed to work as follows:

- 1 July 2012 to 30 June 2014. Units are issued by the Commonwealth government at a fixed price starting at AU$23 per tonne, rising by 2.5% a year in real terms, and the number units available is uncapped.
- 1 July 2014 onwards. The carbon pricing mechanism will change to a cap-and-trade emissions trading scheme.

At the time of writing, the future of the CE Act is uncertain due to the recent change of Government at Commonwealth level. The new Liberal/National Coalition Government has promised to repeal the CE Act and achieve Australia's emissions reduction targets through increased incentives for "direct" sequestration activities. However, the repeal will require appropriate legislation to be passed and, as the new Government does not hold the balance of power in the Senate (the upper house of Parliament), it is not certain that the Government will be able to achieve its objectives in this regard.

Environmental impact assessments

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

Not all projects require an EIA. For projects that meet threshold requirements, such as those with a significant environmental impact, all jurisdictions in Australia require EIAs be carried out and submitted to the relevant regulator before work begins. The extent of assessment that is required depends on the nature of the project. The EIA is generally carried out by the proponent of the project and submitted to the relevant regulator in the appropriate state or territory for approval.

In Western Australia, EIAs are required under several pieces of legislation. The nature and scope of an EIA depends on the proposed project and the governing Act. The EPA undertakes the assessment of the EIA of development proposals in accordance with Part IV of the EP Act and the Environmental Impact Assessment Administrative Procedures 2012. Local planning schemes are governed by the Planning and Development Act 2005 (WA) and may be referred to the EPA for EIA (EP Act).

In all jurisdictions, the EIA process is transparent, with opportunities for public and other stakeholder comment. The applicant is generally required to provide information about the proposed projects as well as its environmental impacts and how those impacts are to be managed. The assessment is submitted to the relevant regulator, which prepares a report and recommendations for the relevant Minister for Environment as to whether the project should be approved.

Assessment of projects may also be required under the EPBC Act. The Commonwealth of Australia and all states and territories have entered into bilateral agreements regarding the assessment process for major projects. In general, projects that are likely to have a significant impact on matters of national environmental significance require the approval of the Commonwealth Minister, but additional assessment, beyond that required by the relevant state or territory law, is not required (provided that the assessment carried out under the relevant state or territory law also assesses the impact of the project on matters of national environmental significance).

Permits and regulator

If an EIA is required, the outcome of the EIA process is a decision by the relevant Minister or delegated decision maker that the proposed development may or may not proceed. If a development is approved, there are usually a range of conditions attaching to that approval.

Penalties

In all jurisdictions, failure to comply with the requirements of the EIA process may invalidate the approval or consent obtained. There is also the possibility of financial penalties.

Waste

12. What is the regulatory regime for waste?

Permits and regulator

Waste is generally regulated at a state and territory level and depends on the nature of the waste involved.

In Western Australia, municipal waste (that is, general household waste) is principally the responsibility of local governments (*Health Act*). However, the Department of Health also has all powers of local governments in respect of municipal waste.

Otherwise, DER and the Waste Authority are the primary regulators of waste in Western Australia. DER is empowered by the EP Act, while the Waste Authority was established by the Waste Avoidance and Resource Recovery Act 2007 (WA) (WARR Act).

Licences and works approvals under Part V of the EP Act are required to conduct waste related activities in Western Australia. Additionally, specific licences are required for certain classes of waste, for example, to:

- Transport controlled waste (*see below, Special rules for certain waste*).
- Conduct the collection of municipal waste.

Similar controls exist in other states and territories.

Prohibited activities

The EP Act and the WARR Act establish offences relating to waste, including the following:

- Collection of waste by unauthorised persons.
- Obstructing or hindering the holder of a waste collection permit in the collection of local government waste.
- Discharging or abandoning, or causing or allowing the discharge or abandonment of, any solid or liquid waste in water to which the public has access.
- Intentionally, or with criminal negligence, allowing or causing waste to be placed in a position whereby it would likely result in pollution.
- Otherwise allowing or causing waste to be placed in a position whereby it would likely result in pollution.

The Western Australian Marine (Sea Dumping) Act 1981 (WA) makes it an offence to dump waste or any other matter into coastal waters without a permit. The Commonwealth Environment Protection (Sea Dumping) Act 1981 (Cth) deals with the loading and dumping of waste at sea and applies to all vessels, aircraft and platforms in Australian waters and to all Australian vessels and aircrafts in any part of the sea.

Operator criteria

There are no financial criteria for operators of waste disposal sites. However, other means of ensuring financial competence of operators are adopted, such as landfill levies payable by waste disposal site operators and financial assurances.

While landfills must be licensed under Part V of the EP Act, in Western Australia there are no specific technical requirements for operators of landfills or waste disposal sites in the EP Act.

Special rules for certain waste

In all jurisdictions, waste is classified into several classes, which in turn dictate the conditions and requirements for its disposal.

For example, in Western Australia DER regulates the transportation of wastes that may cause environmental or health risks, known as controlled waste. Controlled waste is regulated through the Environmental Protection (Controlled Waste) Regulations 2004 (WA) (Controlled Waste Regulations), which provide for the licensing of carriers, drivers and vehicles involved in the transportation of controlled waste on public roads.

Penalties

The fine for breaching an obligation under the Controlled Waste Regulations is AU$5,000 for individuals or AU$25,000 for companies.

Penalties under the WARR Act are up to AU$25,000 per offence. A penalty for each day that the offence continues may also apply..

Asbestos

13. What is the regulatory regime for asbestos in buildings?

Prohibited activities

An Australia-wide ban on the importation, manufacture and use of all forms of asbestos and asbestos containing

products has been in place since 2003. It does not apply to asbestos products already in place.

The importation of asbestos or goods containing asbestos into Australia is generally prohibited by the Customs (Prohibited Imports) Regulations 1956 (Cth). There is also other legislation, such as state and territory occupational health and safety legislation, dealing with the requirements for storage, handling and disposal of asbestos.

Asbestos contaminating materials in soils will generally amount to "contamination" according to each respective state or territory's contaminated land provisions (*see Question 14*) and prescribed persons have obligations to remediate contaminated land.

Main obligations

Asbestos related duties and obligations are regulated at both a Commonwealth and state level. Each state generally regulates asbestos through its relevant occupational health and safety laws.

In Western Australia, the Occupational Safety and Health Act 1984 (WA) (OHS Act) places a duty on employers to provide a safe workplace for all employees. It is an offence under the OHS Act to use, sell or supply an asbestos product without approval or to handle asbestos products without taking reasonable measures to prevent asbestos fibres entering the atmosphere.

The Occupational Safety and Health Regulations 1996 (WA) require an employer or person in control of a workplace to identify the presence and location of asbestos and assess relevant health risks. If the asbestos found presents a health risk, then the employer has a duty of care under the OHS Act to implement controls.

Transport and disposal of asbestos waste must be carried out in accordance with all relevant legislation and guidelines, including the Controlled Waste Regulations.

As at 5 September 2012, many jurisdictions in Australia have implemented, or are close to implementing, the model Work Health and Safety Act (WHS Act) and associated regulations and codes of practice, which is designed to implement national harmonisation of occupational health and safety laws across all Australian jurisdictions. The WHS Act requires all persons who conduct a business or undertaking to, so far as is reasonably practicable, ensure workers (among others) are not put at risk in the course of the business or undertaking. The regulations include specific obligations to manage and control asbestos.

Permits and regulator

In Western Australia, a licence from WorkSafe is required for the removal of most materials that contain asbestos. There are two types of licence:

- Unrestricted, which allows to remove all forms of asbestos (friable and non-friable).
- Restricted, which allows to remove amounts exceeding ten square metres of bonded (non-friable) asbestos.

There are also asbestos related provisions in the Controlled Waste Regulations.

Penalties

All breaches of the OHS Act and the Controlled Waste Regulations are subject to monetary penalties. Additionally, after notice of the offence has been given by an inspector to the offender, the offence is taken to continue for every day that it goes unremedied, meaning that additional daily default fines may be payable.

Contaminated land

14. What is the regulatory regime for contaminated land?

Regulator and legislation

Each state and territory has its own legislative regime to deal with contaminated land.

In Western Australia it is the Contaminated Sites Act 2003 (WA) (CS Act).

Investigation and clean-up

Under the CS Act, if a site is suspected of contamination, the CEO of DER will require investigation of the site. The CEO can give an investigation notice to relevant persons (*see Question 15*) when there are reasonable grounds to indicate that a site is possibly contaminated and appropriate action to investigate, monitor or assess the site is not being taken, or has not been taken.

Each site is classified as:

- Report not substantiated.
- Possibly contaminated – investigation required.
- Not contaminated – unrestricted use.
- Decontaminated.
- Contaminated – remediation required.

- Contaminated – restricted use.
- Remediated for restricted use.

Except for sites classed "report not substantiated", "not contaminated" and "decontaminated", DEC must place a memorial notice on the certificate of title to alert potential buyers. However, only sites classified "contaminated - remediation required" must be remediated by the relevant liable person(s). In this instance, the CEO can issue a clean-up notice to liable persons, which specifies the nature and form of remediation required.

Penalties

There are a range of offences under the CS Act, including a failure to:

- Report likely contamination (only applicable to prescribed persons such as the owner or occupier of the site or the person that caused the contamination).
- Disclose certain classifications of land to potential owners before change of ownership.
- Comply with the requirements of a notice.

Each offence has a prescribed penalty. The maximum penalty under the CS Act is AU$500,000 and a daily penalty of AU$100,000 for each continuing day that the offence continues, and up to five times the maximum fine for a body corporate.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

Generally, in all jurisdictions, more than one person may be responsible for remediation of a site. The hierarchy of responsibility is as follows:

- The person that caused, or contributed to, the contamination.
- An owner or occupier changing the use of the site where, as a result of the change, remediation is required.
- The owner of the site.

In Western Australia the owner of freehold land means both the holder of the freehold land and a mortgagee in possession. In certain circumstances, responsibility for remediation may be transferred. Such circumstances can include with the written agreement of the transferee, and only takes effect if approved by the CEO of DER in writing.

Directors can also be held liable for the remediation obligations of their corporation if it is insolvent. Related bodies corporate may have the same liability.

Limitation of liability

The CS Act provides that a person with responsibility for a site can transfer that responsibility, or part of that responsibility, to:

- Another person with that person's written consent.
- In prescribed circumstances, to the state with the written approval of the Minister for the Environment.

16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

Each state and territory's legislation deals with the issue of lender liability differently. As a general principle, lenders who simply hold a security interest over land, without possession, are not liable for any contamination of that land.

In Western Australia, a mortgagee is an owner for the purposes of the CS Act if it is in possession of all or part of the site (*CS Act*). This may result in a mortgagee in possession having liability under the CS Act.

Minimising liability

In Western Australia, a mortgagee can avoid liability under the CS Act by not taking possession of land. Lenders will often try to minimise potential future liability by conducting detailed due diligence of the borrower and the project prior to lending funds. They will also impose detailed obligations on the borrower in relation to compliance with environmental laws and reporting and managing of environmental incidents.

17. Can an individual bring legal action against a polluter, owner or occupier?

Depending on the circumstances, an individual may have a common law cause of action, or a claim for breach of contract, available to them if they have been affected by pollution. An individual may be able to bring an action in negligence or nuisance for damage caused by the movement of contamination onto their land.

In some jurisdictions, individuals may have a right to enforce certain provisions of environmental laws and/or receive compensation for losses suffered as a result of a breach.

Environmental liability and asset/share transfers

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

Most liability for environmental harm or other contraventions of environmental laws attaches to the responsible person or entity. Therefore, in many cases, the buyer of assets does not inherit the environmental liabilities of the seller.

However, some liability may be passed to the buyer by contract. One important example is responsibility for contaminated land. Although principal liability rests with the entity that caused the contamination, an occupier or owner may, in various circumstances, be deemed to be liable, which could expose a buyer to liability.

Share sale

The acquisition of shares means that the buyer acquires the company with all of its assets and liabilities, including the company's pre-acquisition environmental liability. The position can be altered by contract, although it is not possible to completely contract out of statutory duties. The seller continues to be responsible for the contamination of any land and continues to be the subject of any orders issued by the relevant regulator.

Although indemnities can be used to recover the costs of some liabilities from the seller, in most cases public policy forbids the use of an indemnity to protect a person from criminal liability and as such, criminal liability remains with the company.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

In an asset sale, a seller generally retains liability for any pre-disposal breaches of environmental laws or environmental permits as such liabilities are personal to the seller. The position can be altered by contract, but it is not possible to completely contract out of statutory duties. The seller continues to be responsible for the contamination of any land and continues to be the subject of any orders issued by the relevant regulator.

Share sale

In a share sale, liabilities incurred by the company pre-sale (or post-sale but relating to acts or omissions occurring pre-sale) remain with the company. This is, however, subject to the terms of the contract, and it is common in Australia for transaction documents to include an indemnity in relation to specific environmental issues.

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Asset sale

In all jurisdictions in Australia, there are requirements for contracts for the sale of land to disclose whether the land is the subject of certain orders or other instruments under the legislation in that state or territory. More extensive obligations apply in some other jurisdictions such as Queensland.

Consumer protection legislation prohibits misleading or deceptive conduct (such as making false or misleading representations concerning certain matters in connection with the sale land). Silence as to a matter within a party's knowledge, for example whether land is contaminated, can be regarded as misleading or deceptive conduct. Additionally, where a party is silent as to whether land is contaminated, there may also be liability under common law.

Share sale

The principles regarding disclosure in respect of asset sales also apply to share sales (see above, Asset sale).

21. Is environmental due diligence common in an asset sale/a share sale?

Scope

Environmental due diligence is commonly carried out in both share sales and asset sales. Environmental due diligence assessments allow opportunities and constraints to be identified. It typically extends to:

- Historical and current land uses.
- Environmental approvals and current zonings.
- Aboriginal and European heritage sites.
- Pollution and contamination from prior and existing land use.
- Native title (that is, the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and custom).

Environmental due diligence processes in Australia have not generally seen an increase in the focus on climate change and sustainability issues.

Types of assessment

There are various types of environmental assessments available, which may be relevant at different stages of a project or for different types of projects. They include:

- Environmental assessment for statutory purposes (Environmental Audit).
- Environmental due diligence assessments.
- Contamination assessments and remediation.
- Groundwater resource assessments.
- Asbestos in soils assessments.
- Waste classification assessments.

Environmental consultants

Whether an environmental consultant is used depends on the nature and complexity of the due diligence. When instructing an environmental consultant the main issues that should be covered in an engagement letter include:

- The scope of the services the consultant is to provide.
- Confidentiality and legal professional privilege.
- Conflicts of interest.
- Fees.
- Intellectual property.
- Public liability and professional indemnity insurance.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

Asset sale

In both asset sales and share sales, it is common for transaction documents to include warranties and indemnities in relation to environmental issues including responsibility for remediation of contaminated land, past contamination incidents and the existence of any regulatory enforcement actions.

Public policy dictates that warranties and indemnities cannot protect a person against criminal liability, and a court may declare such warranties and indemnities to be void.

Share sale

The position is the same as for asset sales (see above, Asset sale).

23. Are there usually limits on environmental warranties and indemnities?

There are no statutory limits on environmental warranties and indemnities. Whether limits apply, and the nature of the limits, depends on the contractual terms agreed between the parties.

While environmental warranties and indemnities are negotiated between the parties, it is common for limits to be placed on them including time limits and financial caps. There may also be trigger events that must occur before a buyer can make a claim under an environmental indemnity. Environmental insurance is also common (see Question 28).

Reporting and auditing

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Public registers

Each jurisdiction maintains several public registers of environmental information. These are generally maintained by the relevant government department.

In Western Australia, DER maintains, among others, a contaminated sites register and a register of all current licences and works approvals granted under Part V of the EP Act.

The Commonwealth government also maintains public registers, including a native title application register, a register of approvals under the EPBC Act and a register of Indigenous Land Use Agreements.

Third party procedures

Most registers are free to search and are available on the relevant department's website. Some registers can only be searched in person at the relevant department, or on payment of a specified fee.

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

There are specific requirements in each jurisdiction for companies to carry out environmental auditing and public reporting about environmental performance.

Reporting requirements

In Western Australia, environment licences often include conditions requiring annual audits and reports, as well as requirements to report compliance with environmental standards and conditions to DER. Environmental licences generally contain a reporting requirement, particularly in the event of non-compliance with the conditions of the environmental licence or the relevant legislation. Resource tenures also include specific environmental conditions such as environmental management plans and reporting obligations.

Companies that meet the threshold must report their GHG emissions, energy production and energy consumption (*National Greenhouse and Energy Reporting Act 2007*).

It is compulsory under Commonwealth legislation that all businesses report their emissions of certain substances to air and water, and the transfers of those substances in waste annually to the National Pollutant Inventory (NPI) provided they exceed reporting thresholds. The data is assessed and published on the NPI website (*www.npi.gov.au*).

Publicly listed corporations have reporting requirements pursuant to Stock Exchange Listing Rules and good governance rules.

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

The reporting requirements vary between jurisdictions in Australia. Generally, all unlicensed or emergency discharges to the environment must be reported as soon as possible to the regulator.

In Western Australia, an owner or occupier of a contaminated site or a person who knows, or suspects, that he has caused, or contributed to, the contamination of that site, must report to DER (*CS Act*).

27. What access powers do environmental regulators have to access a company?

Environmental regulators have broad powers to ensure compliance with environmental legislation and to prevent environmental harm. Their powers vary between jurisdictions, but generally include powers to enter and search premises, inspect documents, speak to workers or require the provision of information and records.

Environmental insurance

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

A fairly broad range of environmental insurance products is available. Each general liability policy has its own particular wording and coverage. These can include coverage for remediation and coverage for clean-up or damages to third parties from conditions at the site. Additionally, directors and officers' policies may provide coverage if the directors and officers of a company are sued as a result of an environmental incident or loss.

It is contrary to public policy to provide insurance for criminal liability.

Obtaining insurance

The environmental insurance market is just beginning to develop in Australia. Insurance can be obtained through local underwriting presence or through dealing with the American or UK insurance markets.

Environmental tax

29. What are the main environmental taxes in your jurisdiction?

Carbon pricing mechanism

Under the carbon pricing mechanism, certain companies must surrender units to match their GHG emissions (see Question 10).

Contaminated land tax break

Expenditure incurred for an environmental protection activity is deductable. An environmental protection activity is an activity carried out for the purposes of preventing, fighting or remedying pollution, or treating, cleaning-up, removing or storing waste where the pollution or waste has resulted, or is likely to result, from an earning activity in a site on which the taxpayer carried on, carries on, or proposed to carry on a business activity.

Reform

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

There is an increasing focus in current legislative reform on simplifying and streamlining the processes involved in environmental regulation.

In August 2012, following publication of the Report of the independent review of the EPBC Act, the Commonwealth government announced significant reforms to the EPBC Act. This included the promotion of five processes and future direction for Commonwealth environmental regulation, namely:

- Harmonisation
- Accreditation.
- Standardisation.
- Simplification
- Oversight.

None of these reforms have been implemented yet.

In April 2012, the Council of Australian Governments (COAG) meeting developed a draft Framework of Standards for Accreditation, to allow the Commonwealth Government to accredit state and territory assessment and approval processes. While this accreditation discussions have broken down, the Australian Productivity Commission released a draft report on Australia's major project development approval processes in August 2013 advocating, amongst other things, a resumption of those discussions over a greater focus on removing duplication between the top two levels of government.

While little progress has been made through COAG, most state and territory governments' have been carrying out their own reviews of policy, legislation or both with substantial changes either made or proposed in Western Australia, New South Wales and Queensland.

The regulatory authorities

Department of Environment and Conservation (DEC)

Main activities. DER's purpose is to advise on and implement strategies for a healthy environment for the benefit of all current and future Western Australians.

W *www.dec.wa.gov.au/*

Environment Protection Authority (EPA)

Main activities. The EPA is a five-member board with statutory obligations under the EP Act to conduct EIAs, implement procedures to protect the environment and to provide advice to the Minister for Environment on environmental matters.

W *www.epa.wa.gov.au*

Department of Sustainability, Environment, Water, Population and Communities (SEWPAC)

Main activities. The DOE is the Commonwealth body with responsibility for environment protection and conservation of biodiversity, air quality, national fuel quality standards, land contamination and water policy.

W *www.environment.gov.au/*

Online Resources

W
www.slp.wa.gov.au/legislation/statutes.nsf/main_actsif.html

Description. Official and up-to-date Western Australian state law publisher.

W *www.comlaw.gov.au*

Description. Official and up-to-date Commonwealth Legislation.

W *www.austlii.edu.au/*

Description. Database of legislation for all Australian jurisdictions, not up-to-date.

Appendix: Author details

Authors

Jon Carson
Partner

Qualified. Western Australia, 1980; Victoria, 1990

Areas of practice. Energy and resources; carbon emissions; environment.

T: +61 8 9262 5510
E: jon.carson
@cliffordchance.com

Robyn Glindemann
Counsel

Qualified. Victoria, 1995; Western Australia, 1997; New South Wales, 2003

Areas of practice. Environment; aboriginal law; carbon emissions; energy and resources.

T: +61 8 9262 5558
E: robyn.glindemann
@cliffordchance.com

Nicole Ortigosa
Associate

Qualified. South Australia, 2010

Areas of practice. Energy and resources; carbon emissions; environment.

T: +61 8 9262 5530
E: nicole.ortigosa
@cliffordchance.com