

# IILA / AIDA World Congress

## Topic IV – Pollution Insurance

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### 1. Environmental legal aspects (answer is optional)

1.1 Which are the major general rules on civil liability arising from environmental damages in your country?

Australia's regulatory basis for environmental law broadly is drawn from the concept of ecologically sustainable development, or otherwise known as 'ESD'. The concept was identified in the Report of the World Commission on Environment and Development, *Our Common Future*, which is also known as the Brundtland Report.

In Australia, the common definition is:

*Using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.*<sup>1</sup>

This concept is fundamental to most of Australia's environmental legislation.

On this basis, regulators within all three levels of government in Australia (Federal, State and Local Government) enforce environmental law. In general, there are three main ways such environmental laws are enforced:

- issuing administrative notices such as environmental protection orders;
- by seeking civil remedies; and
- by prosecuting offenders.

Regulators are tasked with determining which remedy will be most helpful and effective for the nature of the environmental non-compliance or offence, and are often able to use more than one remedy for the same environmental non-compliance. As an example, a regulator can issue administrative orders to clean up a site, as well as commence proceedings against the offender for civil or criminal penalties.

Administrative orders can be both proactive and reactive, so that an order can be made to prevent environmental harm occurring, as well as to remedy any harm actually caused.

Civil penalties will ordinarily seek to remedy the personal injury or harm, an injunction to restrain continuing or anticipated environmental harm, and may seek restorative orders to remediate and rehabilitate the environment in instances where environmental harm has been caused.<sup>2</sup> Criminal proceedings are usually reserved for serious and intentional environmental harm.

The State regulators commonly have specific tribunals or courts in which civil penalties can be enforced, such as the Planning and Environment Court in Queensland or the Land and environment Court in New South Wales.

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<sup>1</sup> ESD Steering Committee, *National Strategy for Ecologically Sustainable Development* (AGPS, Canberra, 1992).

<sup>2</sup> Bates, Gerry, *Environmental Law in Australia*, 7<sup>th</sup> edition, (Butterworths, 2010).

1.2 Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1 How are environmental damages described under the law?

Legislation determines the maximum penalty for the environmental non-compliance or offence. Where the nature of the harm is not serious, the damage can be given in the nature of a fine or penalty (like a speeding ticket), so that a criminal proceeding and conviction is not required before the penalty can be given.

1.2.2 Who may be (either directly or indirectly) made liable?

A wide range of people can be made liable for environmental damage, beyond simply the person who caused the damage.

In particular, land owners are often made responsible for contamination on their land, regardless of fault or knowledge of the contamination.

In each State, directors and officers who are in a position to influence the actions of a company can be found personally liable for acts of that company.

In Queensland, section 493 of the *Environmental Protection Act 1994* (Qld) states that where an executive officer of a company is in a position to influence the company in relation to an offence, they also commit an offence and will be liable to the penalty relevant to the contravention by an individual (including jail time). In addition, the scope for personal liability has been further expanded by the introduction of the Chain of Responsibility legislation which allows the regulator to issue environmental protection orders directly against individuals that have a “relevant connection” to a company, in certain circumstances.

In NSW, certain breaches of legislation can attract “special executive liability”. In those cases, directors and anyone concerned in the management of the corporation are taken to have also contravened the legislation, subject to certain limited exceptions.<sup>3</sup> A person can be prosecuted under this provision regardless of whether the corporation has or has not been proceeded against or convicted.

In Victoria, the legislation is nearly identical to NSW, other than that directors and anyone concerned in the management of the company can be found guilty of an offence for the company’s breach of any provision of the *Environmental Protection Act 1970* (Vic).<sup>4</sup> It is not limited to “special executive liability” provisions.

Legislation of this nature is common throughout other Australian jurisdictions.

Piercing the corporate veil and attaching additional pecuniary penalties for certain environmental offences demonstrates the hard-line approach of the regulators and the courts in ensuring proportionate punishment, particularly for intentional offences.

1.2.3 How is the determination of causal link of environmental damages?

Courts are commonly required to deliberate upon the relevant considerations prescribed by the regulation, including the seriousness of the offence, the purpose of the conduct and the offender’s record.<sup>5</sup>

1.2.4 Does your legislation provide for strict or fault-based environmental liability?

Both, depending on the non-compliance, breach or damaged caused.

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<sup>3</sup> Section 169 *Protection of the Environment Operations Act 1998* (NSW).

<sup>4</sup> Section 66B.

<sup>5</sup> Bates, Gerry, *Environmental Law in Australia*, 7<sup>th</sup> edition, (Butterworths, 2010) 662.

Where the offence imposes strict liability, criminal sanctions can be available in addition to civil penalties and administrative notices or orders.

- 1.3 Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

Pollution or contamination offences relating to air, water and soil / land pollution are key components of environmental regulation.

As an example, water can be scarce in some regions of Australia and is therefore highly regulated. In Queensland, environmental conditions relating to land use will often consider run-off into rivers that lead to the Great Barrier Reef, even where the activity may be many hundreds of kilometres downstream.

Water use is separately regulated, and taking or interfering with surface or ground water is broadly prohibited without appropriate licences and approvals.

- 1.4 Which are the governmental entities in charge of authorising and supervising activities that produce environmental impacts or pollution?

Australia has three tiers of Government, all of which are responsible for environmental protection and regulation in different ways.

- 1.4.1 What is the scope of activity of these entities?

The regulatory entities are responsible for setting environmental targets and outcomes, regulation of activities that could have an impact on the environment, and managing and regulating non-compliances or environmental incidents.

- 1.4.2 How do they operate, and on which legal grounds?

The regulator is usually a department within the relevant government body (Commonwealth, State or Local Government). The department is empowered through legislation to condition activities and impose sanctions on offenders.

- 1.5 Is there a legal system of procedural mechanisms in case of environmental offenses?

Yes, each level of Government, and each relevant department has its own mechanisms to condition activities and monitor compliance. At the State Government level, there can be separate departments responsible for environmental protection, water, mining, land clearing and vegetation management.

- 1.5.1 Who is in charge of keeping the environmental protection?

The relevant department responsible for the administration of the relevant legislation is primarily responsible.

However, Australia commonly has rights for third parties to bring actions to stop environmental harm occurring, or to remedy harm that has occurred, even where that person has not suffered a direct loss. As an example, activist groups in Australia are able to bring actions in court for various matters.

- 1.5.2 How does this system work?

In many Australian jurisdictions, it is common for businesses to be required to notify the relevant environment department of actual or threatened environmental harm or environmental damage. Queensland's self-notification system has been a cornerstone of its legislation for many years, and requires not only the perpetrator to report an environmental incident within 24 hours of it occurring, but also requires employees within the organisation to notify their employer of an incident. New South

Wales has similar legislation, and Victoria is in the process of introducing such a requirement into its environmental law, as are some other jurisdictions.

Businesses are also required to notify other relevant stakeholders, including the land owner (where they are conducting activities on another person's land), or neighbouring properties, that could be affected by the incident.

In addition, regulators undertake inspections and are actively involved in managing sites where environmental harm could occur, such as mining and large construction sites.

## **2. Legal aspects on environmental insurance policies (answer is required)**

2.1 Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

No, environmental insurance is not regulated; in fact, it is a relatively new policy in the Australian market.

However, there are two ways in which the insurance market is moving into the environmental risk arena from a regulatory perspective. They are:

- Using insurance bonds in place or, or in addition to, other sureties for activities that are likely to cause environmental harm. Queensland has recently introduced legislation that will permit this for mining companies who are required to provide the regulator with sureties for the value of the site remediation required at the end of the mine life, and New South Wales are considering similar legislation and other states are likely to follow; and,
- Agitating for businesses to hold policies of environmental insurance that can be claimed against by the regulator in the case of an environmental incident or a failure to comply with environmental obligations (such as site remediation after closure, which is particularly relevant for mining sites).

2.2 In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

As noted above, Queensland has just amended its legislation relating to mining activities to allow insurance bonds to be used in the place of bank guarantees as a surety for environmental harm that is caused and not remedied by the mining proponent. Other States are likely to follow.

2.3 Does the law provide for compulsory environmental insurance?

Not at this stage, but there is discussion about it at the moment.

2.3.1 If so, which would be the relevant risks, covered items and limits?

N/A

2.4 In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

Where insurance bonds are being used as a surety for environmentally relevant activities, the insurance bond must be issued prior to the work commencing.

2.4.1 In which step of a venture should such policy be submitted under the law?

In respect of bonds of mining operations in Queensland, they are required prior to the activity commencing, and the amount can change during operations.

### **3. Operational methods for pollution insurance (answer is required)**

3.1 What are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

The key policies available on the market at the moment include:

- Contractor's pollution liability cover;
- Pure financial loss policies to cover third party financial losses;
- Statutory fines and penalties cover;
- Contractual warranties and indemnities cover; and
- Environmental impairment policies that are often acquired in conjunction with a general liability policy.

3.1.1 What kinds of risks should be covered thereunder?

Commonly covered risks include:

- Sudden and accidental events that cause environmental harm for first and third party;
- Gradual contamination (such as a slowly leaking tank) for first and third party;
- Fines and penalties for non-compliance;
- Site rehabilitation for the first party and any third party;
- Media management and stakeholder engagement assistance;
- Personal injury and property damage;
- Legal costs.

3.2 Does the law or administrative rule define upper limits for losses or coverage?

No. However, this is a key concern for regulators who are considering the application of insurance policies (as opposed to insurance bonds) to site management and permitting requirements.

3.2.1 Which are the criteria that should apply to limits' definition?

N/A

3.3 Is there any difference in the legal treatment of state-owned and private ventures?

No.

3.4 Is there any difference in the legal treatment to fixed and mobile facilities?

Not with respect to regulated insurance requirements. Environmental permits to undertake such work can be different if the nature of the activity is fixed or mobile, which can affect the value of any surety that may be required.

3.5 Is there any difference in the legal treatment to underground works, mines or underground quarries?

Mines have different legal tenure to facilitate extraction, processing and sale, as compared to quarries. Depending on the nature and type of extraction method (including underground mining) the conditions of approval to undertake the works will differ. These conditions are determined by the relevant regulator.

Generally speaking, mining is approved by State based regulators, and quarrying is approved by local governments.

Underground works are usually subject to more stringent conditions, as well as higher amounts of financial surety to be provided for the duration of the mine life.

3.6 Do insurers usually insert pre-contractual provisions in the policy (pre-contractual disclosure)?

Yes.

3.6.1 Which are the most usual ones?

Site due diligence is often required. This usually encompasses a range of desk-top and on site environmental investigations to determine the current environmental standing of the relevant land.

Insurance companies may also refer to policies and procedures of the company, and its historic compliance with environmental law and environmental best practice, depending on the nature of the activity contemplated.

#### **4. Coverage under pollution insurance (answer is required)**

4.1 Which are the major covered risks relating to civil liability arising from pollution?

- Sudden and accidental events that cause environmental harm for first and third party;
- Gradual contamination (such as a slowly leaking tank) for first and third party;
- Fines and penalties for non-compliance;
- Legal costs.

Some policies are also including cover for injury to persons caused by the contamination event.

4.2 Which are the major covered guarantees for events arising from pollution?

Policies do not generally cover guarantees or warranties as a general cover under environmental impairment policies, however many insurers are working closely with insureds to develop policies that respond to specific risks in the environmental space.

4.3 Which are the major covered operational risks arising from pollution?

- Site rehabilitation for the first party and any third party;
- Emergency response and recovery;
- Legal costs;
- Media management and stakeholder engagement assistance (to manage business reputation risks).

4.4 Does the insurance cover fines?

Yes, but only civil penalties. Criminal penalties are excluded.

4.5 Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?

In Australia "moral" damages for injuries to feelings/honour/personality are not recognised. Damages for hurt feelings or humiliation or distress are usually included in the overall damages awarded, such as general damages for pain and suffering, compensation for hurt feelings and stress in defamation cases, compensation for hurt and humiliation experienced by employees in sexual harassment cases, and compensation for distress, hurt and humiliation for wrongful termination cases. Although the operation of each policy depends on the liability that it covers, it would not be typical for liability for compensation resembling "moral damages" to be covered or under an environmental/pollution policy. Liability to pay compensation for injury is more typically covered under a general liability policy.

4.6 Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

See 4.5.

4.7 Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

Yes, civil fines can be covered, but criminal fines are not.

## **5. Beneficiaries (answer is required)**

5.1 Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

At this point in time, only named policy holders can recover under environmental policies. However, there is consideration at the moment regarding the ability for environmental insurance policies to be able to be claimed against by the regulators, so that in the event of an environmental incident, the regulator is able to make a claim against the insurance policy held where the proponent fails to do so (commonly, in instances of insolvency).

This is a big issue at a regulatory level at the moment, and there is work being done to consider how policies can respond in this context.

## **6. Market status (answer is required)**

6.1 What is the percentage of participation of environmental insurance at the insurance market in its whole?

*Chris Rodd to provide*

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

*Chris Rodd to provide*

6.2 Which are the sectors of economic activity that use to obtain environmental insurance?

*Chris Rodd to provide*

6.3 During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

*Chris Rodd to provide*

6.3.1 What percentage of the aforesaid losses was covered under insurance?

*Chris Rodd to provide*

**7. Academic development (answer is required)**

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

There are no identified research institutes focused directly on the study of environmental insurance. There are however many research institutes undertaking study of environmental issues where insurance could possibly form a part of that study.

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialise in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

No, not that is dedicated to the Australian insurance market specifically. The Australian Journal of Environmental Management does include articles regarding environmental risks, and the consideration of the potential for insurance to become part of the mitigation measures broadly (particularly in response to climate change and major climate events, such as a floods or bushfires).