



# Environmental update

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## Failure to agree at the Greenhouse conference

As reported in previous editions of 'Keeping Good Companies', the Sixth Conference of the Parties to the United Nations Framework Convention on Climate Change (COP-6) was held at the Hague on 13–24 November 2000.

At the end of the two weeks, consensus was not reached on a number of key political issues and a further conference is now scheduled in Bonn during May and June 2001.

The key stumbling block was a failure to agree on what may be considered a 'carbon sink' under the terms of the Kyoto Protocol. Essentially the US, Canada and Japan argued for a broad definition of carbon sink which would include a wide range of 'human induced' sink activities, for example crop and grazing land management. Other nations, particularly the countries comprising the European Union, were against such a broad definition as they believed such a move would allow countries to avoid real reductions in greenhouse gas emissions.

In terms of the debate, Australia was more closely aligned with the countries arguing for a broad definition however Australia's proposals regarding sinks were not as controversial as those made by the US, Japan and Canada. Australia's main concern was to secure clear definitions relating to those existing sink activities already accepted as legitimate at

Kyoto.

Australia, along with Canada, Japan and the US, were invited to talks with EU representatives in Oslo in late December to see whether the debate could be resolved. At the time of writing it appeared that those talks would not go ahead.

Being unable to reach an agreement the Parties agreed to reconvene for COP-6 Part 2 in 2001 to further negotiate these issues. This conference is scheduled to be held at Bonn, Germany on 21 May — 1 June 2001. The following Conference of the Parties — COP-7 — is scheduled at Marrakech, Morocco for 29 October — 9 November 2001.

## Directors and managers and the lack of uniformity in the provisions of environmental protection law

It is generally thought that there is a degree of uniformity between each State and Territory of Australia in the environmental protection laws regulating the behaviour of directors and corporate officers. For example provisions exist in the environmental laws in each State and Territory for directors to be held criminally liable for the offences of their corporations, and in certain circumstances, receive a term of imprisonment for these offences (the exception is the Northern Territory).

Tom Howard, in his article 'Liability of Directors for Environmental Crime: The Anything But Level Playing Field in Australia' (*Environment and Planning Law Journal*, Volume 17, No. 4, p. 250) reviews the environmental protection laws and offences of each State and Territory and their relevance to directors. He identifies that, notwithstanding some consistency, there is a lack of uniformity in these laws and their enforcement throughout Australia. Essentially, this lack of uniformity has

a number of characteristics including the:

- legal provisions of each State and Territory under which directors' liability arise use different language, definitions and terms
- defences to a prosecution that are available to directors vary, for example some States do not have a statutory defence
- investigators and prosecutors of corporate offences in each State vary in terms of experience and expertise in the area of environmental prosecution
- maximum penalty and years of imprisonment vary
- active and diligent pursuit of directors for environmental offences varies between the officers of environmental agencies of each State
- court procedures for dealing with the prosecution of environmental offences varies between each State and Territory.

Howard argues that the difference in environmental laws between the States and Territories is not the product of careful deliberation by the legislatures and agencies. The difference in the laws derives from a failure to consider the advantages of uniformity.

Howard is cognisant that uniformity of all environmental laws within Australia is not achievable at this point in time, however uniform laws regulating the criminal liability of directors and corporate officers is achievable.

Howard identifies a number of advantages that would arise from having these uniform laws including:

- the penalty considerations – such as maximum penalty – relevant to sentencing of the director at conviction would be uniform throughout Australia
- directors would be expected to be mindful of only one set of laws regarding environmental offences
- a consistent approach to

enforcement would be beneficial to the communities of each State and Territory who rely on the environmental protection laws and their enforcement for their health, amenity and livelihoods

- the cost of corporate compliance with environmental laws would be reduced, in particular, the cost of creating, implementing and maintaining environmental due diligence systems.

It is generally recognised that uniform law, especially in relation to corporate governance, is not only desirable but essential. Uniform environmental laws relating to the liability of directors may also be considered essential. Uniformity would assist in creating better corporate governance, lower compliance costs and possibly lead to better environmental protection. However it is unlikely that uniformity would be achieved through the States and Territories granting power to the Commonwealth to regulate such matters. An alternative is for uniformity to be achieved by agreement between each State and Territory to enact the same legislative provisions. Previous experience with such a legislative system suggests that while the legislation may commence as uniform, differences would soon emerge (eg the Companies Code).

While differences remain in the provisions of environmental law in each State and Territory directors and company officers must continue to keep abreast of relevant developments in the jurisdiction in which their company operates.

## Better design of residential flat developments: a new State planning policy

The New South Wales Government has introduced a

package designed to improve residential flat design.

The main component of the package is a proposed new State Environmental Planning Policy ('SEPP') for residential flat development. Councils, developers and property owners must have regard to the new SEPP.

Also included in the package are:

- a model design code for residential flats (to be implemented through the SEPP);
- a 'Residential Design Fund' (\$1.1 million over two years) to provide assistance to councils and establish expert design review panels; and
- an annual award for residential flat buildings to promote better design.

The purpose of the package is to:

- force developers of residential flats of three or more storeys to use a registered architect to prepare the design and
- assist council's deliberations on the design of developments during the assessment stages of an application.

The State Government initiative follows a report from the Urban Design Advisory Committee ('UDAC') 'Achieving Better Design — Residential Flat Developments in New South Wales' published in July 2000. (A copy of this report can be obtained at [www.duap.nsw.gov.au](http://www.duap.nsw.gov.au).)

### The 'Achieving Better Design' report

In February 2000, the Premier invited the UDAC to prepare a report to consider how the design of residential flat developments in New South Wales could be improved. In order to prepare the report, UDAC undertook a number of projects and research including:

- The resourcing of public submissions from developers, architects and local councils



regarding residential flat development;

- Consultation workshops.

The findings of the report were published in July 2000. The recommendations to the NSW Government were:

1. Establish consistent objectives and processes within the planning system by implementing a SEPP on residential flat developments
2. Introduce a requirement for a registered architect to design and certify all residential flat developments so as to achieve higher design standards
3. Establish funding to assist councils experiencing significant volumes of development to implement better residential flat development control and to contribute to the better preparation of development control plans

4. Introduce regional design review panels to advise in the assessment of development proposals for residential flats and
5. Establish a mechanism so that matters under review before the Land and Environment Court may be referred to experts to consider the development design merits.

**Comment**

Developers have used, and will continue to use, architects to prepare the design of residential flat developments. To formalise this as an obligation is not necessarily a radical step.

Indeed the motivation of the Government's measure — to improve residential flat design — is one with which it is difficult to argue.

The real tests will be:

- the detail in the SEPP — what will developers have to do to meet the

objectives and

- whether there is any improvement in the speed and certainly whereby development applications ('DAs') for residential flat buildings are assessed.

At a time when industry reports indicate that the building industry is relatively depressed (compare the number of DAs and approvals pre and post GST) fund managers, developers and property owners do not need further disincentive to invest in the property sector.

The success of the operation of the SEPP should be measured by whether it improves the speed and certainty whereby DAs are assessed, coupled with transparency and accountability of decision making by consent authorities.

The SEPP is scheduled to be in operation by mid 2001.



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