Sustainability – more than just a decision-maker's duty

by **Megan Lee,** Senior Solicitor, Mallesons Stephens Jaques, Melbourne

Introduction

Despite the fact that environmentalists and international lawyers have been excited by the concept of "sustainability" since 1987 when Gro Harland Bruntland first crystallised the concept in the *Brundtland Report*[1], the interpretation and implementation of "sustainability" seems only to have come to the popular attention of the judiciary and the legislators in the last few years[2].

In his article exploring the implementation and enforcement of the principle of sustainability, Fisher proposes several "sustainability rules" as various means of incorporating sustainability in legislation. Ranging from the existing means to more radical proposals for legislative reform Fisher's ideas include the following[3]:

- Clearly requiring Decision-makers to consider sustainability principles when making decisions on applications for development;
- Including a general duty on "persons" not to undertake development that is not ecologically sustainable; and
- Imposing liability on a developer for non-compliance with sustainability principles where damage is caused to the environment

This paper explores some of the ways sustainability has been incorporated and considered in Australia and then turns to briefly outline an example of a novel way of incorporating sustainability in legislation which has been brought in recently in Victoria as an extension of some of the ideas put forward by Fisher.

Sustainability – the maturing of environmental regulation

Environmental law has evolved significantly over the last thirty years in Australia. It commenced with an initial emphases on regulation of point-source emissions through the command and control mechanism[4]. Such regulation focussed on permissible and impermissible behaviour utilising tools such as emission licences and the setting of emissions standards.

Environmental regulators then moved through a phase of focusing on market and economic mechanisms, such as load based licensing and the introduction of landfill levies[5]. Such economic instruments were perhaps the forerunner to implementation of sustainability as a tool for regulating environmental behaviour. Through the use of such instruments regulators began to focus more on the outcome they wish to achieve and then developed legislation to implement economic incentives or disincentives which operate to move companies in the direction which regulators desire .

This paper argues that perhaps environmental law is maturing to a third key phase which has a combined focus on both outcomes and on the processes by which those outcomes are achieved.[6]

As Fisher notes:

> *"Law has traditionally set standards for human behaviour by prescribing rules governing activities and decisions. For the most part these are enforceable by applying the standard set by the law to the actual behaviour whose legality has been challenged. It is different if the law seeks to set not a standard of behaviour in general, but the outcomes to be achieved by future behaviour in particular sets of circumstances"*[7] .

This change of emphasis is a challenge for regulators as it steps away from the comfort and certainty of regulation which allows compliance to be easily determinable at a particular point in time. Regulation of outcomes is rather more vague and indeterminable.

Again, Fisher articulates the challenge that sustainability sets regulators in stating that:

> *"Sustainability in its most extended form drives not only the decision of government whether to approve the proposal and the decision of the entrepreneur to go ahead with it, but also the management of the project by the entrepreneur over a period of years."* [8]

An inspiring example of a company which has become somewhat of a beacon in sustainability circles and is perhaps the inspiration behind the new sustainability legislation in Victoria. is the company Interface Inc. Interface is a carpet manufacturer based in Atlanta. It is the largest commercial carpet manufacturer in the world with 2000 sales just under US$1.3B[9].

In 1995 Interface set the goal of becoming the first sustainable corporation by 2020. To achieve this, it developed seven sustainability goals[10] including the elimination of waste, the elimination of toxic emissions, to increase reliance on renewable energy and to attempt to form a closed loop production system.

One of the most important of these is its seventh goal which is to *"redesign commerce"*. It now focuses on service delivery, rather than *product* delivery. That is, it leases carpets rather than sells them. In this way, no waste is created and Interface collects worn carpet from its customers and replaces it with new carpet squares. It then recycles the worn carpet on its own sites.

While some industries would obviously find it more difficult than others to implement the Interface model, its example is now well known and appears to be a model which the Victorian EPA is moving towards.

Sustainability – its incorporation in Australian Law

Before turning to the new Victorian legislation, it can be seen from the following table that the approach to the incorporation of sustainability in most jurisdictions in Australia has been similar. That is, sustainability or "ecological sustainable development" ("ESD") has been incorporated in the objects clauses in all States and it has been coupled with a duty imposed on decision-makers to consider such objects in their decisions about developments in Queensland, South Australia, New South Wales and Victoria.

TABLE 1: **State Incorporation of sustainability principles**

STATE	LEGISLATION	MEANS OF INCORPORATION OF SUSTAINABILITY
TASMANIA	Environmental Management & Pollution Control Act 1994 (s.8, Schedule 1)	Objects clause: to promote the sustainable development of natural & physical resources and the maintenance of ecological process and genetic diversity
WESTERN AUSTRALIA	Environmental Protection Bill 2003 (new clause 4A)	Objects clause: Decision-makers to be guided by precautionary principle, intergenerational equity, conservation of biodiversity, principles relating to improved valuation, pricing and incentive mechanisms, the principle of waste minimisation
QUEENSLAND	Environmental Protection Act 1994 (s.3 & s.5)	Object Clause: To protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends Duty: If a power is conferred, then person must exercise the power in the way that best achieves the object of this Act.
SOUTH AUSTRALIA	Environment Protection Act 1997 (s.10(1) & (2))	Objects Clause: to promote the principles of ecologically sustainable development Duty: Decision-makers to have regard to the objects
NEW SOUTH WALES	Protection of the Environment Operations Act 1991 (s.3A & s.294A))	Objects Clause: to have regard to the need to maintain ESD Duty: In exercising their functions under this Part and Part 9.3A, the Minister and the EPA are to have regard to the objects of this Act.
VICTORIA	Environment Protection Act 1970	Objects clause: The purpose of the Act is to create a legislative framework for the protection of the environment in Victoria having regard to the 11 principles of environment protection set out (including, intergenerational equity, precautionary principle, conservation of biodiversity, product stewardship) Duty: "It is the intention of Parliament that in the administration of this Act regard should be given to the principles of environment protection"

Fisher correctly states that one of the difficulties associated with "sustainability" is the generality of the concept, whatever its legal status[1].

However, he also points out that other legal concepts such as "reasonableness", "practicable" and "foreseeable" are all general concepts which are given meaning by the courts in particular contexts and have proven quite capable of being given definition. The challenge to the courts is therefore, why should sustainability be any different ? As Paul Stein puts it, the challenge is to turn "soft law into hard law"[12].

Indeed there has been growing judicial activity in relation to interpretation of the duties and objects set out in the above table. While it is beyond the scope of this paper to explore in detail the implementation of the above legislative provisions in each jurisdiction, table 2 sets out some of the most useful statements made by the judiciary in interpreting sustainability objects and duties.

TABLE 2: **Judicial Commentry on Sustainability**

CASE/JUDGE	COMENT
Weal v Bathurst City Council (2000) 111 LGERA 181 at 201, Giles JA	"there is little doubt that the duty to take into account prescribed matters is an onerous obligation"
Carstens v Pittwater Council (1999) 111 LGERA 1 at 25, Lloyd J.	"a statutory statement of objects, including sustainability, carries with it a duty to take these into consideration"
Leatch v National Parks and Wildlife Service (1993) 81 LGERA 270 at 282 -283, Stein J.	"the precautionary principle, as a component of sustainability, may require the imposition on an applicant... of a responsibility to establish why the approval should be granted" "this may involve a responsibility to justify the sustainability of the proposal"
Blank and the Australian Fisheries Management Authority [2000] AATA 1027, Member Associate Professor B W Davis AM.	"the Authority was required under its legislation to pursue the long-term interests of the fishery as a whole and not protect or enhance the financial position of any given individual or group of operators..... There was a clear legislative requirement for the Authority to adopt a precautionary approach. The onus was on the applicant to show harm was not being caused rather than on the Authority to prove that safeguards were essential."

It can be easily noted from the above table that most of the important judicial statements are from specialist planning and environment courts.

While there clearly has been development in judicial thinking in the last 30 years and the power of objects clauses is getting stronger as the case law develops, the focus of most legislation and judicial interpretation of it, is on the initial establishment of a project and its approval by a government regulator.

The new Victorian legislation which will be explained in the following section is an example of an alternative and much more direct way to incorporate sustainability into legislation and into the ongoing operations of businesses beyond the project approval stage.

Sustainability – a new model for regulators

Last year, with the passing of the *Environment Protection (Resource Efficiency) Act 2002* (Vic) new provisions were introduced to the *Environment Protection Act 1970* (Vic) which are designed to push Victorian corporations towards measures which increase resource efficiency and decrease ecological impact in their ongoing operations.

The amendments represent the farthest reaching attempt to incorporate sustainability principles in legislation in Australia as the emphasis of the new legislation is to re-engineer corporations in their environmental management with respect to sustainable development, rather than the traditional focus on the obligation of government decision-makers to incorporate sustainability into their initial approval decisions.

The second reading speech sets out the aspiration of the new legislative scheme[13]:

> *"The voluntary sustainability covenants will empower progressive industries to choose their own pathways to a sustainable future".*
>
> *"[The Act]...introduces sustainability covenants to enable industries and companies to identify resource efficiency gains and reduce their ecological impact".*

The new provisions provide for both a voluntary and a mandatory regime under which corporations may either enter into a voluntary covenant to increase resource efficiency and decrease their ecological impact, or face the risk that the Victorian Environment Protection Authority's ("EPA") will invoke its considerable powers to force these changes upon them.

The voluntary covenants are provided under s 49AA[1]. The parties to these covenants are essentially industry members and the Victorian EPA. The covenants may either be firm specific or industry wide. Section 49AC(2) provides that the EPA may supply a benefit to any party of a voluntary covenant, however it is not specified what these benefits may entail. It may be that the EPA will endeavour to use the covenants as a new form of "accredited licensee" status whereby licence fees may be reduced for voluntary participants.

The mandatory regime is provided for in s 49AD whereby the EPA can request the Governor-in-Council to make a declaration that an industry has the potential to have a significant impact on the environment. The effect of a declaration is that it then permits the EPA to request an industry to prepare a 'Statement of Ecological Impact' which assesses four things[15]:

(a) what resources are being used and in what quantity;

(b) how resource efficiency could be improved;

(c) actual or potential ecological impacts of the enterprise or process and of the products or services produced; and

(d) how those impacts can be reduced.

If the statement discloses either:

- that an enterprise or process is a significant user of resources and that resource use efficiency can be improved; or
- that an enterprise or process has, or the products or services produced by an enterprise or process have major actual or potential ecological impacts and that those impacts can be reduced

then the powers given to the EPA under s 49H apply.

These powers are very broad. The EPA can require the person who produced the statement to:

(a) produce a plan of proposed actions to implement the resource use efficiency improvements or ecological impact reductions identified in the statement;

(b) specify in the plan what key actions are to be undertaken and their timeframes;

(c) specify in the plan resource efficiency or ecological impact reduction targets;

(d) specify in the plan a monitoring program;

(e) implement the plan; and

(f) take any specified action under the plan which has not been undertaken.

Further, section 49AH(3) provides other powers, namely requiring the person to:

(a) assess alternative practices and product stewardship approaches to improve the use efficiency of specified resources or to reduce the ecological impacts identified in the statement; and

(b) take specified actions to meet specified resource efficiency, or ecological impact reduction targets; and

(c) to publicly report in a specified type of publication or forum specified information in relation to resource use efficiency or ecological impact reduction.

The key to the mandatory regime is the power in section 49H(4) for the EPA to require a person to comply with a covenant which is in place for the industry of which that person is a part. These requirements are backed up by considerable sanctions as failure to comply is an indictable offence carrying a $250,000 fine.

These powers are incredibly broad, and although there is provision for appeal to the Victorian Civil and Administrative Appeals Tribunal ('VCAT') for the exercise of the s 49AH powers, there is a lack of clarity as to what VCAT can take into account when reviewing the decision, including whether cost or practicality can be considered.

While the requirements made by the EPA will feed off the statement of ecological impact (prepared by the company itself), there is the concern that such requirements could potentially be badly suited to the overall operations of the business if the EPA does not adequately understand the detailed operations of an industry.

Concluding remarks

Clearly the new Victorian provisions are a significant step in the maturation of environmental regulation, representing a move beyond pollution control and environmental conservation to a situation where the EPA has the power to step into the operations of a business and effectively require it to be re-engineered to incorporate sustainability in more meaningful ways.

It remains to be seen whether the EPA will utilise its substantial new powers or whether the threat of them doing so will be adequate to "encourage" industries to enter voluntary sustainability covenants. In any event however, the new provisions can be seen as the first substantial movement in Australia towards legislating for sustainable development in industry, rather than simply in government decision-making.

1. World Commission on Environment and Development, *Our Common Future* (1987).

2. See generally: Stein, P.L (2000) *Are decision-makers too cautious with the precautionary principle?* Environmental and Planning Law Journal (EPLJ), Feb 2000 v17(1) at 3.

3. Fisher, De (2001) "Sustainability – the Principle, its Implementation and its Enforcement", EPLJ 18(4) 361, at p 366-367

4.Gunningham, N. and Sinclair, D (1998) *Instruments for Environmental Protection* in Gunningham, N. and Grabosky, P. (eds) Smart Regulation: Designing Environmental Policy (Oxford, Clarendon Press, 1998) at 38-50.

5. Ibid. at 69-83.

6. Fisher, Douglas. (2002) *Instruments of Environmental Law* in Australian Environmental Law (LBC 2002) at 131.

7. Fisher, n. 3, at 361

8. *Id.*

9. See website - www.interfaceinc.com

10. See http://www.interfacesustainability.com/seven.html

11. Fisher, n.3, at 366

12. Stein, n.2, at 3.

13. Hansard, Second reading speech, 9 May 2002.

14. s.49AA *Environment Protection Act 1970* (Vic)

15. Sections 49AF, 49AG *Environment Protection Act 1970* (Vic)