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ECO-LABELLING: LESSONS FROM THE ENERGY SECTOR

ECO-LABELLING involves the creation of a set of requirements that products may or must satisfy, and the establishment of a certification or testing procedure whereby manufacturers and retailers can prove compliance with the relevant standards by displaying an approved label provided by a testing laboratory or other organisation.[1] Eco-labelling enables consumers to make an informed choice on environmental grounds between various competing products, provides an incentive to manufacturers to design more energy-efficient products, and promotes environmental awareness generally.

The various eco-labelling programs in place in many developed countries differ as to their content, but appear to have the following four elements in common:

- A government department or statutorily authorised body selects and defines a product category.
- Environmental guidelines are prepared for each product as to the minimum performance and design characteristics to entitle the product to display an eco-label.
- Manufacturers who comply with the performance and design characteristics are licensed for a fee to use the eco-label for a specified period of time.
- Licence-holders are monitored at intervals to ensure continued compliance with the terms of the licence.[2]

Eco-labelling is a topic of environmental law that has been much discussed in recent years.[3] Although there is general consensus amongst environmentalists that a system of

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1 Lawrence & Minan, "The Role of Warranties and Product Standards in Solar Energy Development" (1981) 34 *Vand L Rev* 537 at 593.

2 See Cohen, "The Regulation of Green Advertising: The State, The Market and the Environmental Good" (1991) 25 *UBCLR* 225, at 256-258.

3 See for example Cohen, "The Regulation of Green Advertising: The State, The Market and the Environmental Good" (1991) 25 *UBCLR* 225 at 255-260; Kimmel, "Disclosing the Environmental Impact of Human Activities: How a Federal Pollution Control Program Based on Individual Decision Making and Consumer Demand Might Accomplish the Environmental Goals of the 1970s in the 1990s" (1989) 138 *UOPL Rev* 505; OECD, *Environmental Labelling in OECD Countries* (Paris, 1991); Israel, "Taming the Green

environmental labelling of products makes good sense, it has not been implemented on any consistent basis and there is little agreement as to the best system to adopt. One area of environmental law where significant legal advances with respect to eco-labelling have been made in recent years is in the energy sector, where a number of countries have legislated for compulsory labelling for energy consumption in respect of appliances and motor vehicles. This legislation occurred because of government concerns that manufacturers were paying insufficient attention to the energy consumption characteristics of their products and were actively or tacitly encouraging consumers to ignore this issue when making their choice of products to buy. These legal developments are interesting in that they apply a fundamentally different set of rules relating to labelling. This paper will examine these legal developments in order to determine what lessons they hold for the future development of the general body of environmental laws.

APPLIANCE LABELLING[4]

Compulsory systems of labelling of designated appliances for energy consumption exist in the United States, Canada and Australia, and are under active consideration in a number of other countries, including New Zealand.

In Australia, the initial move towards labelling occurred at the Commonwealth level in 1983 when, pursuant to a decision of the Australian Minerals and Energy Council, the Coordinating Committee on Energy Conservation investigated the possible introduction on a voluntary basis of a labelling scheme for a variety of electric appliances, commencing with freezers and refrigerators. Discussions were held with various industrial associations for the adoption of a voluntary Australia-wide scheme, but broke down in 1984. An alternative proposal advanced for a phased reduction in the average energy consumption of specified appliances together with a program to educate consumers on the efficient use of appliances also failed to gain support. In late 1985 the initiative was seized by the New South Wales and Victorian governments, which jointly advanced a proposal for a national appliance energy labelling law. This proposal formed the basis for legislation in those two States enacted in 1986 and 1987. South Australia introduced similar legislation in 1988.

In New South Wales the relevant law is contained in the *Electricity (Energy Labelling of Electrical Articles) Regulation 1995*,[5] made pursuant to s37(2) of the *Electricity Act* 1945.

Marketing Monster: National Standards for Environmental Marketing Claims" (1993) 20 *BC Envtl Aff L Rev* 303.

4 See generally Bradbrook, "The Development of Energy Efficiency Laws for Domestic Appliances" (1990) 12 *Adel LR* 306; Aust Dept of Resources and Energy, paper No 9, "Energy Conservation" *Energy 2000: A National Energy Policy Review* (Canberra 1986).

5 *NSW Gaz,* No 105, 1 September 1995. This Regulation consolidates into one document the provisions originally contained in the now-repealed *Energy Labelling and Standards (Refrigerators, Freezers and Refrigerator-Freezers) Regulation* 1986 (*NSW Gaz,* No 185, 28 November 1986), made pursuant to s 37(2) of the *Electricity Act* 1945, and the *Energy Labelling and Standards (Refrigerative Air Conditioners) Regulation* 1987 (*NSW Gaz,* No

The regulation establishes a mandatory system of energy efficiency labelling, and states that a person shall not sell any prescribed electrical article[6] in respect of which there is a registered label unless the label is prominently displayed on the article.[7] Application forms for registration are specified.[8] Each application must contain test reports ensuring that the appliance complies with the performance standards stipulated in the Regulation.[9] The Energy Corporation of New South Wales may refuse an application for registration of a label for an appliance if the applicant fails to comply with any of the terms of the Regulation or if the Corporation is in doubt as to the accuracy or reliability of either the report accompanying the application or the tests to which the report relates.[10] The Corporation may cancel the registration of a label if the registered person for the article fails to comply with a request by the Corporation to furnish a sample of the article to the Corporation for testing, or if, after carrying out tests on the appliance, it is of the opinion that the energy consumption rate or the efficiency rating on the label is incorrect or misleading.[11] Each regulation prescribes a Register of Electrical Articles, which is open for public inspection.[12] It is an offence to advertise for sale any electrical article, to attach any label to an electrical article that is offered for sale, or to display on or near an electrical article that is offered for sale any sign or notice, if the person knows, or ought reasonably to have been aware, that it is false or misleading as to the article's comparative energy consumption, energy efficiency rating or star rating.[13] A maximum penalty of 20 penalty units is prescribed for a breach of this provision.[14]

In Victoria, Queensland and South Australia roughly similar provisions are contained in the *State Electricity Commission (Energy Efficiency Labelling) Regulations* 1987,[15] made pursuant to ss57 and 111 of the *State Electricity Commission Act* 1958 (Vic), the *Electricity (Electrical Articles) Regulation* 1994,[16] made pursuant to s266 of the *Electricity*

131, 14 August 1987) and the *Energy Labelling and Standards (Dishwashers) Regulation* 1988 (*NSW Gaz, No* 41, 26 February 1988), made pursuant to s38 of the *Energy Administration Act* 1987.

6 Reg 3(1) states that the Regulation applies to dishwashers, refrigerators, freezers, refrigerator/freezers and air conditioners as defined in Schedule 1. Note that the Regulation does not apply to the sale of second-hand articles: Reg 3(2).

7 Reg 5(1). In respect of an air conditioner that is sold in a package, the approved energy efficiency label may instead be displayed on the package: Reg 5(2).

8 Reg 7(1) and Schedule 2.

9 Reg 7(2).

10 Reg 8(2).

11 Reg 12.

12 Reg 14.

13 Reg 15.

14 A penalty unit is $100: *Interpretation Act* 1987 (NSW) s56. Pursuant to Reg 16, it is also an offence punishable by a maximum penalty of 20 penalty units for a person, in connection with any application or test report under the Regulation, to make any statement that the person knows to be, or ought reasonably to be aware is, false or misleading.

15 SR No 88 of 1987.

16 SL No 469 of 1994.

Act 1994 (Qld), and the *Electrical Products Regulations* 1990,[17] made pursuant to s8 of the *Electrical Products Act* 1988 (SA).

The matter of adopting uniform appliance labelling was taken up several years later by ANZMEC. The Commonwealth and State Energy Ministers agreed in late 1991 that mandatory electric appliance labelling would be introduced in all Australian States and Territories, and that the program would be extended in scope to include all major electrical, gas and solar appliances.[18] To date, this has not occurred.

In the United States appliance labelling was first introduced in California, pursuant to the *Warren-Alquist State Energy Resources Conservation and Development Act* 1974. This Act added a new Division 15, "Energy Conservation and Development", to the California Public Resources Code.[19] Section 25402 of the Code empowered the State Energy Resources Conservation and Development Commission to prescribe energy consumption labelling programs in respect of appliances which, in the opinion of the Commission, required a significant amount of energy on a state-wide basis. The Federal Government legislated in this area in the *Energy Policy and Conservation Act* of 1975.[20] This Act, inter alia, required the Federal Trade Commission to consider the imposition of energy labelling requirements for domestic appliances. The Commission adopted a rule for labelling in 1979, which requires manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers, furnaces and room air conditioners to disclose energy efficiency ratings and energy costs. The rule requires a label to be placed on each unit for sale containing, inter alia, a highlighted annual energy cost or efficiency number, a comparison of energy cost or efficiency with the highest and lowest efficiency models, and a chart to estimate yearly operating costs.

Appliance labelling in Canada is of more recent origin. The first province to take legislative action in this area was Ontario, which enacted the *Energy Efficiency Act* 1988.[21] Section 3 of this Act prohibits any person from offering for sale, selling or leasing an appliance subject to the legislation unless an approved label that sets out the efficiency standard of the appliance is affixed to it. Penalties of up to $25,000 are specified for a breach of this provision. Similar legislation was introduced in British Columbia by the *Energy Efficiency Act* 1990.[22] Legislative control at the federal level did not occur until 1992. Prior to this, the Federal Government operated a voluntary 'Energuide' program

17 Reg No 60 of 1990.

18 See Australian and New Zealand Minerals and Energy Council, Report 23 *National Co-ordination of Energy Efficiency* (1991).

19 Division 15 was added by Stats 1974, c276. The Warren-Alquist Act constitutes ss25000-25986 of the California *Public Resources Code*.

20 Pub L 94-163, 89 Stats 871. See generally, California Energy Commission, *California's Appliance Standards: An Historical Review, Analysis, and Recommendations*, Staff Report, Sacramento, 1983.

21 Stats Ont 1988, c32.

22 Stats BC 1990, c40.

pursuant to which appliances which reached a designated standard were entitled to display an Energuide label to each new unit. The purpose of this label was to attract the attention of potential customers to the low-energy consumption characteristics of appliances entitled to display the label. Following extensive policy discussions at Energy, Mines and Resources Canada, the Federal Government later replaced this voluntary scheme with its own *Energy Efficiency Act* 1992.[23] This Act covers a wide range of energy efficiency matters, and includes compulsory labelling laws within the ambit of Part I. For constitutional reasons, the Act is limited to interprovincial trade and importation, and has no application where a product is manufactured and sold in the same province. The operative provision is s4(1), which states that it is prohibited for a dealer, for the purpose of sale or lease, to ship an energy-using product from the province in which it was manufactured to another province, or import an energy-using product into Canada, unless the product or its package is labelled in the prescribed form and manner. The new provincial and federal legislation in this area were dictated by the fear that if the Canadian energy-efficiency requirements did not match those imposed in the United States, Canadian manufacturers would lose their export markets.[24]

VEHICLE FUEL CONSUMPTION LABELLING[25]

A compulsory system of labelling for fuel efficiency in motor vehicles has been in effect for several years in the United States,[26] the United Kingdom[27] and Japan.[28] A voluntary system of energy labelling exists in many other countries, including Canada, where legislation designed to make the system compulsory has been enacted and will be promulgated if vehicle manufacturers cease to comply with the present "voluntary" scheme.[29]

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23 Stats Can 1992, 40-41 Eliz II, c36.

24 See Marbek Resource Consultants Ltd, *Appliance Efficiency Information Base* (Ontario Ministry of Energy, 1987).

25 See generally Bradbrook, "Regulating for Fuel Efficiency in the Road Transport Sector" (1994) 1 *Australasian J Natural Resources Law and Policy* 1 at 19ff; Beca Carter Hollings and Ferner Ltd, *Vehicle Fuel Economy Labelling and Other Fuel Economy Measures* (Wellington, NZ 1993).

26 See *Motor Vehicle Information and Cost Savings Act*, 15 USC s2006. The actual contents of the label are prescribed in 40 CFR 600. The system applies to all passenger vehicles with a capacity up to 10 persons (including the driver) and light trucks with a gross weight up to 3.9 tonnes.

27 See *Passenger Car Fuel Consumption Order* 1977 (later amended as SI 1983/1486), made pursuant to the *Energy Act* 1976 (UK). As for the European Union, current EU Directives require any vehicle testing to conform to EU regulations (70/156/EU), but fuel consumption labelling of vehicles offered for sale is not required.

28 For information on the Japanese system, see Beca Carter Hollings and Ferner Ltd, *Vehicle Fuel Economy Labelling and Other Fuel Economy Measures* (Wellington, NZ 1993).

29 The relevant Canadian legislation is the *Motor Vehicle Fuel Consumption Standards Act*, Stats Can 1980-81-82-83, c113, ss17-21. The Canadian system is discussed in Transport Canada, *Voluntary Motor Vehicle Fuel Consumption Program* (Report TP 6890/E, 1993).

The proposal to introduce a mandatory system of fuel consumption labelling has proved to be unpopular amongst vehicle manufacturers in Australia. The major objection has been that fuel consumption figures achieved under test conditions could never be achieved under road conditions, and that this would lead to a rash of complaints against the manufacturers.[30] This problem has been taken into account under the United States regulations on labelling. Under rules produced by the Department of Transportation pursuant to the *Motor Vehicle Information and Cost Savings Act,*[31] the label attached to motor vehicles must display two separate fuel consumption figures, one for fuel consumption in city conditions, and one for fuel consumption in highway conditions. These figures are calculated by discounting the figure for city driving by 10 per cent from the figure obtained during test conditions, and by discounting the figure for highway driving by 22 per cent. Any overall fuel consumption displayed must be calculated using the discounted figures above and on the assumption that the vehicle will be driven 55 per cent of the time under city conditions and 45 per cent under highway conditions.[32]

LESSONS FOR ECO-LABELLING

Unlike other environmental areas labelling is now well-established in the energy sector. What lessons can we draw for eco-labelling generally from its application in the labelling of fuel consumption in vehicles and appliances?

Compulsion as to the Use of Eco-Labels?

Perhaps the most striking feature of the eco-labelling system in the energy sector described above is that the relevant law goes beyond the traditional role of labelling laws, which establish an approved eco-logo, but leave it to each manufacturer to decide whether it wishes to apply for a licence to use the logo. Under this traditional role, a manufacturer is thus free to continue to use environmentally-unfriendly methods and/or products, provided only that no attempt is made to use the logo. This can be contrasted with eco-labelling systems in the energy sector where the manufacturer is required to use a specified label showing the environmental characteristics of the product, even if the label shows that the product is clearly environmentally-unfriendly and potential customers are thereby deterred. To achieve this result it is necessary to reconsider the design of labels. It would no longer be sufficient to simply design a sole logo suitable for all occasions. What is required is a logo that shows by way of a star-rating system the level of environmental achievement reached by the product in question in comparison either with similar products already on the market or by reference to a prescribed system of measurement. This star-rating system is used throughout the energy sector for all types of products affected by the law. The award of five stars indicates that the product is the most efficient in terms of energy

30 See Bradbrook, "Regulating for Fuel Efficiency in the Road Transport Sector" (1994) 1 *Australasian J Natural Resources Law and Policy* 1 at 19ff.

31 15 USC s2006.

32 40 CFR 600.307.

consumption amongst all similar products of a specified type on the market, while the award of one or no stars shows the opposite.

If the political will is present, it is possible to go one stage further. In 1991 the Australian Ecologically Sustainable Development (ESD) Transport Working Group[33] recommended in its final report that all advertising in relation to the sale of motor vehicles should make precise reference to the fuel consumption figures.[34] This recommendation was made in response to a finding by the Department of Primary Industries and Energy that only about 10 per cent of model-specific motor vehicle advertisements contained statements about fuel consumption, and that many of these statements were misleading.[35] It reflects the feeling that the legal protection against false and misleading advertising contained in sections 52-55 of the *Trade Practices Act* 1974 (Cth) are ineffective to cure the problem. The problem of false advertising was regarded by the Trade Practices Commission as sufficiently severe to lead it to publish in 1992 a guideline on "Fuel Consumption Claims in the Marketing of New Motor Vehicles", pursuant to its powers under s28(1)(a) of the Act. This guideline specified appropriate means of testing fuel consumption. However, it is only advisory, and it does not tackle the problem of advertisers deliberately ignoring the fuel consumption issue.

The introduction of laws compelling manufacturers against their will to specify environmental characteristics of their products in any advertising, even where the results are likely to deter potential consumers, may be regarded by some as extreme. However, interesting analogies exist. In many jurisdictions there is legislation imposing systems of film censorship which place restrictions on film advertisements. For example, the *Film and Video Tape Classification Act 1984* (NSW), s10 states that the censor may approve, unconditionally or subject to conditions, or disapprove the use of any advertisement relating to a film that is the subject of classification, while Regulation 5 states that the censor may require the inclusion of any designated words or symbols in the advertisement as part of the conditions for approving the advertisement.[36] Another illustration is food advertising legislation. In many jurisdictions it is an offence to publish, or to be a party to the publication of, an advertisement which falsely describes any food or which is likely to mislead as to the nature, substance or quality of any food.[37] Perhaps the best example is

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33 Nine ESD Working Groups were established by the Commonwealth Government in August 1990 following the release in June 1990 of a Discussion Paper outlining the concept of ESD in the context of Australia. The nine Working Groups were on agriculture, energy use, energy production, fisheries, forest use, manufacturing, mining, tourism and transport. Each Working Group produced a Final Report in late 1991.

34 Ecologically Sustainable Development Transport Working Group, *Final Report - Transport* (AGPS, Canberra 1991) p148.

35 Aust, Department of Primary Industries and Energy (Energy Progams Branch), Discussion Paper, "Vehicle Fuel Consumption Advertising" (unpublished, Nov 1992).

36 See also *Classification of Films Act* 1991 (Qld) s10; *Video Tapes Classification and Control Act* 1987 (WA) ss9,10.

37 See for example *Food Act* 1984 (Vic) ss11,12.

tobacco advertising. The relevant form of legislation differs between the jurisdictions. The controls extend to an outright ban on corporations publishing an advertisement for smoking or for the use of tobacco products, or alternatively to a restriction on such advertisements that they include a health warning in prescribed terms.[38]

The Nature of the Subject Matter

The nature of the subject matter in respect of which it is proposed to establish a system of labelling may well have a determining factor as to the ease of implementation of any new laws. No system of labelling can be established unless there is general agreement in advance on the system of measurement to be employed. In the energy sector this presents few problems as energy consumption can be easily measured statistically, and there can be no dispute over the method of calculation of the figures. This can be contrasted with certain other environmental areas where the measurement criteria and factors to take into account may be highly controversial, and may involve subjective considerations not susceptible to statistical verification.

International or Domestic Law?

The experience in the energy sector has shown that all legal attention to date has been in the context of domestic rather than international law. So far as I am aware, the matter of the development of international conventions in this area has not been discussed, and it seems to have been assumed that any laws relating to eco-labelling will be enacted at the domestic level. Despite the rapid internationalisation of environmental law in recent years, there seems to be no real need or purpose in attempting to develop an international convention to govern eco-labelling.

The real interest should lie in the field of comparative law. Eco-labelling is a topic that may produce a variety of possible legislative responses, all of them designed to achieve the same goal of promoting public awareness of the environmental factors associated with the matter concerned. One country can learn from the legislation of another. It is not necessary to come to an international consensus as to a mandatory system of eco-labelling for every country. It is submitted that binding international environmental conventions are only appropriate where there are objectively-tested and internationally agreed statistics available to measure the extent of the environmental problem and which can be used to formulate a remedy. One can neatly contrast the international responses to the problems of depletion of the ozone layer and climate change. In international law terms, the development of the Vienna Convention for the Protection of the Ozone Layer[39] and the

38 See for example Canada: *Tobacco Products Control Act*, Stats Can 1988, c20; New Zealand: *Smoke-Free Environments Act* 1990; Hong Kong: *Smoking (Public Health) Ordinance* 1982. See also generally World Health Organisation, *Legislative Responses to Tobacco Use* (Martinus Nijhoff, Dordrecht 1992).

39 26 ILM 1529.

subsequent Montreal Protocol and Copenhagen and London Adjustments and Amendments[40] proceeded to a very rapid and successful conclusion because of the fact that the problem could be measured by traditional scientific measures and could be resolved by numerical means. This can be contrasted with the climate change issue, where, despite the existence of the Framework Convention on Climate Change, there are effectively no binding international obligations at international law to reduce greenhouse gas emissions and it has proved very difficult at subsequent meetings to come up with an acceptable formula for so doing. While politics and national economic interest are obviously powerful factors here, part of the problem lies in the fact that there is still a dispute amongst the scientific community as to the effect of certain factors on the atmospheric environment and there is still doubt as to the appropriate method of formulating a quantifiable remedy to the problem.

Legislative Issues

On the assumption that eco-labelling legislation will be introduced on a national basis, it is important to consider the most suitable means of incorporating eco-labelling into law. This issue will vary from country to country, but at the very least will involve a consideration of the constitutional position, the existence of general consumer protection laws which might be amended to incorporate eco-labelling laws, and the need for totally new legislation. Politics plays a significant role in a number of different respects: for example, in a country with a federal system of government, will the Federal Government be willing to intervene in a field where one or more of the States have already legislated?; would any such legislation be subject to constitutional challenge?; even if totally new legislation for eco-labelling is preferable, will the government be prepared to consume scarce parliamentary time on an issue that it may view as only of minor importance compared with other pressing social issues of the day?

Australia can be used as an illustration of the type of legal issues posed by the introduction of new eco-labelling legislation in a federal jurisdiction. In this country, eco-labelling in all environmental areas would appear to be within the residual constitutional powers of the States. However, it seems clear that the Commonwealth could legislate, if it so wished, pursuant to s51(xx) of the Constitution, which gives the Commonwealth Parliament the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". In addition to the corporations power, Commonwealth legislation in this area could be justified by the trade and commerce power. Pursuant to s51(i) of the Constitution, the Commonwealth can enact laws concerning "trade and commerce with other countries, and among the States". In the present context, the use of the trade and commerce power appears to be unnecessary as manufacturers of products likely to attract eco-labelling would be regarded as "trading

40 *Montreal Protocol on Substances that Deplete the Ozone Layer*, 26 ILM 1541; *Montreal Protocol (1992) on Substances that Deplete the Ozone Layer - Adjustments and Amendments* (London), 30 ILM 537; (Copenhagen), 32 ILM 874.

corporations" within the accepted meaning of that phrase[41] and would, therefore, fall squarely within the Commonwealth's legislative power.

It is submitted that the Commonwealth would not need to introduce a completely new statute to cover eco-labelling as Part V of the *Trade Practices Act* 1974 could be suitably adapted. Sections 65C, 65D and 65E establish consumer product standards, which have been described as "agreed-upon statements of minimally acceptable characteristics of materials, products, systems or services".[42] Sections 65C and 65D divide product standards into product safety and product information standards. Section 65C, which deals with product safety standards, provides, inter alia, that a corporation must not, in trade or commerce, supply goods in respect of which there is a prescribed consumer product safety standard and which do not comply with that standard, or goods in respect of which there is in force a notice under s65C declaring the goods to be unsafe goods (s65C(1)). Regulations made under the Act may, in respect of goods of a particular kind, prescribe a safety standard consisting of requirements as to, inter alia, packaging, design, construction, and performance of the goods, and as to the form and content of markings, warnings or instructions to accompany the goods as are reasonably necessary to prevent or reduce risk of injury to any person (s65C(2)).[43] Failure to comply with s65C is an offence against the Act and subjects the offender to a fine (s79). In addition, it may give rise to an action for damages under s82 or an application for an injunction under s80.

Section 65D, which deals with product information standards, makes it an offence for a corporation, in trade or commerce, to supply goods in respect of which a consumer product information standard has been prescribed, unless the corporation has complied with that standard in relation to those goods (s65D(1)). Similar to s65C(2), s65D(2) states that regulations may be made under the Act, in respect of goods of a particular kind, which may prescribe a consumer product information standard consisting of requirements as to, inter alia, packaging, design, construction and performance of the goods, and as to the form and manner in which that information is to be disclosed on or with the goods, as are reasonably necessary to give persons using the goods information as to the quantity, quality, nature or value of the goods.[44] Failure to comply with s65D carries the same legal consequences as a failure to comply with s65C.

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41 See *Commonwealth v Tasmania* (1983) 158 CLR 1; *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian Football League Inc* (1979) 143 CLR 190; *Fencott v Muller* (1983) 152 CLR 570; *State Superannuation Board v Trade Practices Commission* (1983) 57 ALJR 89 for the meaning of a "trading corporation".

42 Lawrence & Minan, "The Role of Warranties and Product Standards in Solar Energy Development" (1981) 34 *Vand L Rev* 537 at 568.

43 For illustrations of the operation of s65C, see *Gardam v Splendid Enterprises Pty Ltd* (1987) ATPR 40-779; *Hamlyn v Norman Ross Stores Pty Ltd* (1985) ATPR 40-514; *Hamlyn v Moppet Grange Pty Ltd* (1984) ATPR 40-439; *Miller v Cunningham's Warehouse Sales Pty Ltd* (1994) ATPR 41-321.

44 For an illustration of the operation of s65D, see *Hamlyn v Mark Foy's Pty Ltd* (1982) ATPR 40-316.

Sections 65C and 65D must be read together with s65E. Section 65E(1) states that the Minister may, by notice in writing published in the *Gazette*, declare that, in respect of goods of a kind specified in the notice, a particular standard, or a particular part of a standard, prepared or approved by the Standards Association of Australia or by a prescribed association or body, is a consumer product safety standard for the purposes of section 65C or a prescribed consumer product information standard for the purposes of section 65D. Where a notice under this subsection is published, the standard shall be deemed to be a prescribed consumer product safety standard for the purposes of s65D or a prescribed consumer information standard for the purposes of s65D (s65E(2)).[45]

This analysis shows that the Commonwealth could, if it wished, legislate for a compulsory system of eco-labelling simply by using s65D of the *Trade Practices Act* and by introducing new Regulations specifying the content of the labels. Ultimately, however, it comes down to politics. The Commonwealth will not act unless it is convinced that the problem is of sufficient importance to make it worthwhile crossing swords with the States and incurring the inevitable charge that it is interfering with the traditional areas of State responsibility and disturbing the balance of powers between the two tiers of government.

The Future and Significance of Eco-Labelling

Eco-labelling can certainly be viewed as an important tool for educating the public on environmental matters. As such, it can be regarded as a useful end in itself. Alternatively, however, it can be seen as a forerunner of a system of compulsory environmental standards for consumer products. The introduction of a legislative system of this nature requires a much greater exercise of political determination, which unfortunately appears to be lacking at the present time.

While eco-labelling appears to have been successfully adopted in a limited context in the energy sector, its future in other environmental contexts is more doubtful. Recent research by Dawson and Gunningham has highlighted the difficulty in legislating for an effective system of eco-labelling in light of a number of practical problems, of which the most intractable is that of developing an accurate life-cycle based certification scheme.[46] Their conclusion is that except for specific issues such as the energy efficiency of appliances, where energy consumption can easily be quantified, the development of a life-cycle based certification scheme designed to summarise information for consumers about a range of environmental impacts is not justified. They believe that the benefits of such a scheme

45 A parallel system of consumer product safety standards has been established by State and Territory legislation: *Fair Trading Act* 1987 (NSW); *Fair Trading Act* 1985 (Vic); *Fair Trading Act* 1989 (Qld); *Fair Trading Act* 1987 (SA); *Fair Trading Act* 1987 (WA); *Fair Trading Act* 1990 (Tas); *Consumer Affairs and Fair Trading Act* 1990 (NT); *Fair Trading Act* 1992 (ACT).

46 Dawson & Gunningham, "The More Dolphins There Are The Less I Trust What They're Saying: Can Green Labelling Work?" (1996) 18 *Adel LR* 1.

outweigh the costs.[47] Is this view too pessimistic? The general thrust of Dawson and Gunningham's conclusion appears sound as it is virtually impossible to gain agreement between the manufacturers and environmentalists as to the method of calculating life-cycle costs or even in some cases to acquire all the necessary information to make the life-cycle environmental calculations. Nevertheless, perhaps some of the difficulties have been caused by the desire of the parties to consider every one of the possible environmental impacts over the life-time of the various products. If a more practical and realistic approach were made to the calculation of life-cycle costs, so that the more remote and less easily measurable environmental impacts were discarded, even on Dawson and Gunningham's analysis eco-labelling would be seen to have a much brighter future.[48] This approach could obviously be criticised as being less accurate, but could still give a good approximation of the environmental costs associated with each product. It is submitted that mathematical accuracy is not necessary in the present context in order to achieve the aims of eco-labelling, and that a rough approximation would be sufficient.

It is beyond the scope of this article to pursue in detail the debate as to the desirability of a general system of eco-labelling as opposed to other alternative approaches of informing consumers as to the relative environmental merits of available products.[49] If the present strict requirements for life-cycle based certification schemes are maintained, eco-labelling could well remain the preserve of the energy sector. If, however, as the author hopes, eco-labelling makes significant inroads into other aspects of environmental law, the experience in the energy sector should provide a useful and important precedent for the development of new legislation.

47 As above.

48 For a discussion of the possibility of adopting simplified approximations of life-cycle costing in eco-labelling systems, see Dawson & Gunningham, "The More Dolphins There Are The Less I Trust What They're Saying: Can Green Labelling Work?" (1996) 18 *Adel LR* 1; Grodsky, "Certified Green: The Law and Future of Environmental Labelling" (1993) 10 *Yale J on Reg* 147 at 218ff.

49 For other possible alternatives, see for example Gunningham & Cornwall, "Toxics and the Community: Legislating the Right to Know", Working Paper, ANU (Canberra 1994).