Environmental reporting obligations – Corporations Law

The Corporations Law now imposes an environmental reporting obligation on directors. Young lawyers would be wise to advise their clients of these new obligations to avoid stiff penalties. The obligation commenced on 1 July 1998. However, there is still considerable uncertainty about the exact nature of those requirements.

What are the requirements of Section 299(1)(f) of the Corporations Law?

Section 299(1)(f) of the Corporations Law requires details of a company's performance in relation to environmental regulations to be included in the annual directors' report if the company's operations are *"subject to any **particular and significant** environmental regulation under the law of a Commonwealth or of a State or Territory"*.

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This obligation commenced on 1 July 1998, and applies to the 1998/1999 reporting year.

Who does it apply to?

The following directors must comply with the provision:

- directors of public companies;
- directors of large proprietary companies (as defined by the Corporations Law)
- directors of registered schemes; and
- directors of disclosing entities.

What must directors do to ensure compliance?

There is considerable difference of opinion, and a lack of guidance, on what section 299 requires in practical terms. The scope of section 299 is currently being considered by a joint Statutory Committee on Corporations and Securities (the "**Statutory Committee**"). This report has not yet been issued.

In the interim, the Australian Securities and Investment Commission (the "**ASIC**") issued Practice Note Number 68 (the "**Practice Note**") in November 1998 to provide some guidance on what the section requires. The Practice Note expressly recognises that reporting practices in relation to environmental matters will evolve, particularly in the first twelve months of operation of the section. The ASIC has indicated that it requires full compliance with the spirit of the section as well as its express terms.

The Practice Note contains the following general guidelines:

- the requirements will normally apply where a company holds an environmental licence or is otherwise subject to environmental regulatory conditions;
- the requirements do not relate specifically to financial disclosure (for example, contingent liabilities and capital commitments), but relate to environmental performance. Accounting concepts of materiality in financial statements are not relevant;
- the requirements apply despite separate disclosure of environmental performance and incidents of non compliance to a regulatory authority; and
- the information to be provided should be less technical and more general than that supplied to the environmental regulatory authorities.

The requirements fall short of full environmental disclosure, but it is not clear from section 299(1)(f) or the

Practice Note the exact nature of the requirements. Specifically, it is not clear which companies are required to report or what details a report must contain.

What does this mean?

There is considerable debate surrounding the intent and meaning of the words "particular and significant" in the context of section 299(1)(f) and on the terms of the Practice Note. Specifically, the Practice Note has been criticised for focussing too closely on the terms of licences and other statutory environmental authorisations.

The correct view may be:

- The term "particular" in the context of section 299(1)(f) refers to a specific law that applies to the environmental performance of a company. In other words it is a law which the company, by virtue of its operations, must comply with specifically, not just generally. An example would be the terms of an environmental licence.
- The term "significant" in the context of section 299(1)(f) refers to the impact which the environmental law has on the company's operations as opposed to the impact the company has on the environment.
- The section only applies to Australian environmental laws.

It is possible that section 299(1)(f) could be interpreted to apply where there is an environmental law that attracts "significant" penalties, but does not specifically relate to a breach of a licence. An example would be penalties imposed for soil contamination. On the other hand, it is arguable that not every breach of a licence would be considered "significant", and so not every breach would attract the section 299(1)(f) reporting requirements.

Until there is some form of judicial consideration of the section or the Statutory Committee has issued its report, and given the lack of information on the exact nature of the requirements, companies should give the section a wide interpretation.

In preparing a section 299(1)(f) disclosure, directors need to remember that failure to comply with the requirements of section 299 is a contravention of the Corporations Law.

What information should a report contain?

As a minimum, directors should include in their annual reports details of:

- any breaches of environmental regulations, licences or other authorisations;
- any prosecutions or convictions under any relevant environmental law; and
- steps taken to remedy defects or breaches of particular and significant environmental regulations.

The term "performance" in section 299(1)(f) could include a requirement to report on any remedial measures taken by companies to ensure compliance with particular and significant environmental regulations. It may also include a requirement to report on good environmental performance.

The Practice Note indicates that financial materiality is irrelevant, but does not give an indication of the level of detail that is required to ensure compliance or precisely what details should be included in a report. It is suggested, however, that a degree of specificity is required, and a general statement will not be sufficient to comply with the section.

Assessing and recording compliance

It appears that, to ensure compliance with section 299(1)(f) a company should:

- identify what aspects of its operations may be subject to section 299(1)(f) – the first step for ensuring compliance with the section is to identify clearly the environmental impacts of its activities and which environmental regulations apply; and
- ensure that it has a system in place which reliably assesses and records performance against any particular and significant environmental regulations, including any environmental licences and other authorisations. The system should operate as a method of retaining evidence that the reporting process has been followed and of defending the adequacy of disclosed material.

Conclusion

There is legal uncertainty on the extent of the environmental reporting obligations contained in section 299(1)(f). Accordingly, a broad interpretation of the requirements of section 299 should be adopted until the extent of these requirements are clarified.

It appears that a company should not focus simply on reporting failures to comply with statutory licences and other environmental authorisations. A company should take a more systemic approach to the reporting requirement and identify, in each reporting year, applicable environmental laws, including those which are particular and significant, details of breaches of those laws, and any steps taken to remedy those breaches.

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