EDITORIAL

Statutory environmental controls and incentives for compliance

The usual format for statutory environmental controls (such as pollution legislation) is to set up a regime with the aim that those operating within that regime achieve the specified environmental standard (eg for air emissions, waste discharges etc).

In most cases the regime will specify the standard through a conditional licence system or alternatively the standard may be set forth in the relevant Acts or Regulations.

Setting the standard is, however, but one part of the equation. The reality is that not all those who are set a standard to meet will achieve it, and in the real world the setting of standards must be accompanied by the specification of mechanisms (or incentives) to ensure compliance.

At present, the predominant compliance incentive on which we rely is the threat of the imposition of sanctions (such as fines, jail terms, loss of licences, and liability for clean up and compensation costs) for non-compliance.

The growth of the environmental audit industry in the country, inter alia, is evidence that this compliance incentive is, at least in part, an effective incentive for some - and perhaps now even more so with the significant increases in recent years of fines and the introduction of strict liability offences for directors of polluting companies. Notwithstanding this, there seems to remain the problem of the operator who is prepared to run the risk of non-compliance, and for many in this category a prime motivation for taking this risk can be the inability or unwillingness of incurring the cost of upgrading their operations to the parameters of the relevant standards.

And here lies the crux of the compliance incentive problem. To the extent that operators are not deterred by the possible present sanctions for non-compliance, for whatever reason, the sanction incentive system falls short of its aim because the system in such circumstances is only truly effective if all significant breaches by non-compliers are detected and acted upon by the regulatory authorities. Clearly, none of the regulatory authorities presently have the resources to do this. And even if their resources were increased, it is arguable they would never be able to detect all but a small portion of breaches. Also, we need to remember that, unfortunately, in many cases environmental damage is permanent and irreversible, and unlike many other forms of damage, it cannot simply be compensated for in dollars and cents.

Thus, ensuring or motivating compliance through the threats of sanctions may go some way to achieving the aim of statutory environments controls, but arguably it does not go far enough.

So how should the problem be addressed - how do we entice the remaining non-compliers to comply?

Is the answer to increase the size and type of the sanctions? This may have some effect, but arguably the overwhelming majority of those who are likely to respond to the sanction incentive probably have already done so.

Perhaps what is now required is a rethink of our approach to this problem, and consideration of the utilisation of implementing other forms of compliance incentive.

To a large degree, whether we develop other incentives, and what form they will take, will depend upon the extent to which we consider it important to have operators conducting their activities within the requisite standards. This is a matter for fundamental value judgments.

To the extent that operators are risking non-compliance for economic reasons, it may be useful to consider the introduction of financial incentives to operators who achieve the highest standard of environmental cleanliness in their activities. The incentives might take many form. The Federal government's recent amendment to the Income Tax Assessment Act to allow a deduction for expenditure on certain types of environmental impact studies is a useful example of such an incentive (albeit in a slightly different context). Another form may be the establishment of a loan scheme to allow operators to borrow money to upgrade.

For many, providing such incentives will be seen as wasteful - some may argue that if an operator cannot afford to conduct his activities in such a way that it meets relevant standards it should not be operating at all. For others, the potential benefit of reducing the number of non-compliers, and preserving industries and employment through such incentives may carry more weight.

On either analysis, such incentives come at a cost to someone. Where the community is picking up the bill it will need to carefully weigh the utility of providing an incentive in this form, against the benefit of expending the incentive revenue on other community facilities or services.

Yet another form of incentive could be the introduction of a mechanism that allows operators

a self evaluation privilege when assessing their own compliance with environmental standards.

In a number of Australian jurisdictions, if an operator wants to assess its compliance with relevant environmental standards, it presently runs the risk that the audit report (and information generated to prepare the report) for this purpose could be seized by regulatory authorities under their inspection powers, or revealed to other litigants in civil proceedings through the discovery mechanism. Should the audit material reveal non-compliance, it could be used against the operator in evidence in a prosecution or a civil action.

The response of some operators to this problem has created an industry in the legal community devoted solely to the development of mechanisms that attempt to structure audit arrangements and material to bring them within the ambit of a recognised form of privilege - principally legal professional privilege - and by doing so to minimise the prospect of regulatory authorities and other litigants being able to get their hands on audit material.

However, with the uncertainty of the availability of legal professional privilege for this purpose in light of recent decisions like that of the High Court in Yuill v CAC, the effectiveness of such mechanisms is now less certain. Thus, operators who might otherwise have undertaken audits may now not do so, and may now rather risk the sanction provisions of the statutory environmental control against the prospect of being caught out by generally under-resourced regulatory authorities.

The introduction of a carefully formulated statutory self evaluation privilege that would allow operators the freedom of working out their compliance deficiencies without fear of documents falling into the hands of the regulatory authorities or other litigants would almost certainly encourage auditing.

On the one hand, it is arguable that as "effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment" (US EPA statement of 9 July 1986), a step such the introduction of a self evaluation privilege that encourages auditing is a positive move.

Others, of course may argue that granting the privilege is too high a price to pay - why should those who have breached relevant environmental standards be allowed to conceal this fact, especially if substantial damage to human health or the environment has occurred - regulatory authorities and other litigants, they would say, should be allowed to get their hands on such documents to pursue legitimate causes of action.

Again, such an incentive comes at a cost and a generic value judgment of whether the loss of potential access to information is outweighed by the prospect of an increase in auditing practice is required..

Many other incentives could obviously be contrived -for example an endorsement arrangement where the government awards "clean" operators the right to use a particular logo in their advertising for a prescribed period. The area is obviously flagged with many difficult policy issues. But the issues clearly requires further discussion. Any readers wishing to offer comment on the incentive question for possible publication in the next issue of AELN should forward their written contribution to NELA at the address noted on page 63.

Editorial Policy for AELN

Having recently taken over the reins as editor from Christine Trenorden, it is appropriate that I take this opportunity to congratulate her on the excellent job she did last year with the production of the AELN.

As far as possible I propose to ensure that the AELN continues to maintain the high standards set by Christine.

Those who have read this publication over the past few years will note an evolution in its presentation. The new format introduced by this edition is yet another step in that process, although an attempt has been made to preserve many of the key elements of the previous AELN's - the recent developments section, casenotes etc. Some of the other items (such as divisional news) previously published in the AELN will now be picked up as appropriate in the NELA Bulletins.

I am keen to see the AELN used as a vehicle for intelligent discussion of environmental law and related policy issues. However, I must emphasise that YOU DO NOT HAVE TO BE A LAWYER TO CONTRIBUTE. Articles, letters to the editor, conference reports etc are welcome from all interested persons.