



## Smart business and carbon reduction - September 2008

While the various Bills relating to the Carbon Pollution Reduction Scheme (**CPRS**) were recently defeated in the Senate, it is possible that there will be Australian “climate change” legislation, in one form or another, in the future.

Already, there is certain “climate change and sustainability” legislation which is in force, such as (among others) the *National Greenhouse & Energy Reporting Act 2007*, the *Carbon Rights Act 2003* (WA), the *Tree Plantation Agreement Act 2003* (WA) and the *Renewable Energy (Electricity) Act 2000*, which was recently amended to expand the Mandatory Renewable Energy Target.

Relying on a “wait and see” approach to climate change and sustainability issues is unlikely to be in the long term best interests of business. However, in July 2009 the Australian Industry Group, together with KPMG, published a report “*Gearing Up: Business Readiness for Climate Change*.” The Report summarises that:

- many Australian businesses are taking steps to measure and manage their carbon footprints, with many other businesses planning to take steps over the next few years;
- a significant minority of businesses are not yet managing, and have no current plans to manage, their carbon footprint;
- business knowledge about the carbon pollution reduction scheme and its impacts are mixed; larger businesses and manufacturers are much more likely to have strong knowledge of the CPRS and its impacts but in the general business community, preparations are much less advanced;
- many businesses are planning to upgrade the skills of existing personnel and to call on external advice to assist in managing their carbon footprints over the next three years;
- early policy steps called for to build business awareness and readiness which would improve resilience during the early period of the CPRS; and
- there is a disturbing proliferation of regulatory measures operating across Australian jurisdictions.

It is not certain at this stage what form the proposed CPRS legislation will take. Despite this, we anticipate that there will be a “flow-through” effect of climate change and sustainability issues from those directly affected by the relevant legislation to those that are indirectly affected by “climate change.”

For example, climate change issues may indirectly impact on businesses because of:

- a greater focus on “climate change” and sustainability implications and liabilities in due diligence investigations by potential purchasers of land, investors and financiers of development projects; and
- bankers and financiers requiring climate change related warranties, covenants and indemnities in relation to project finance;
- bankers, financiers, investors etc increasingly taking into account matters such as:
  - o whether the entity or project is adversely affecting the environment;
  - o whether the biodiversity is adequately protected;

- o the affect on communities in an environmental and cultural sense and the extent to which they have been consulted;
- o environmental impact assessments, when deciding whether to invest in or finance projects;
- contractual passing on of “carbon costs” (i.e. landlords passing on “carbon costs” to tenants)
- new interpretations or applications of the common law in light of climate change and sustainability principles;
- directors’ and officers’ duties and what it means to act in the best interest of the company (i.e. preparing and facilitating a response to climate change and sustainability that is in the best interests of the company); and
- generally accepted warranties dealing with environmental matters or compliance with the law taking on a new and broader significance.

The result is that organisations that may have considered they were not “caught” by climate change or sustainability issues could well be indirectly affected by those issues.

We expect that climate change and sustainability will have an increasing impact on many transactions, either directly or indirectly.

As above, a “wait and see” approach to climate change and sustainability issues may not be in the long term best interests of business. All businesses could now be:

- reviewing existing contracts to determine whether a party to a contract may be liable for the “costs of carbon” and whether one party might be able to pass on the cost to the other party under the terms of the contract.
- considering the possible implications of climate change and sustainability issues, including the impact of CPRS, the *National Greenhouse & Energy Reporting Act 2007* etc on the company’s operations and contracts;
- determining a company’s strategy to deal with climate change and sustainability issues; and
- ensuring that when negotiating new contracts, the possible commercial ramifications of CPRS are carefully considered.

**If you have any queries please contact Luke Paterson.**



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