

The sky's the limit

Since *IHL* last reported on the environment in July 2006, the clamour to save the planet from global warming has become a din - and from some very influential quarters. Companies have to keep up or fall behind, warns **Katharine O'Neill**

IN-HOUSE LAWYERS ARE ONLY too familiar with environmental responsibilities, present in every facet of practice from product design and procurement to acquisitions and disposals. Environmental concerns are frequently built into new legislation: the new Home Information Packs being a prime example. 'HIPs, if eventually introduced, will have a requirement for assessing energy efficiency in new build and there is also a raft of new legislation for waste recycling, with the overall aim of reducing waste to landfill,' says Ian Salter, joint head of environment at Burges Salmon. Most global and multinational operations are alert for environmental provisions in legislation worldwide - including those found in

legislation that is not flagged up as 'environmental' - and regularly review the stance of the regulator in each jurisdiction in which they operate. But as the imperilled environment is destined to remain at the top of the political and business agenda, it is no longer enough just to comply with 'black-letter' law.

RISK TO REPUTATION

'Although waste and efficiency regulation hit the bottom line, so the project and finance guys will be leading the way, in-house lawyers do need to recognise the growing influence of NGOs on the public perception of how companies perform on environmental issues, and the risk of damage to their reputations,' explains Stephen Shergold, environment partner at Denton Wilde Sapte. Burges Salmon co-head of environment Ross Fairley agrees: 'Stakeholders and investors are focused strongly on a company's carbon footprint. In-house lawyers need to be aware of this and the issues that surround a company's environmental performance.'

Industry is responding to a potent mix of legislation and consumer pressure. The current government mantra for tackling climate change is 'energy efficiency',



SHERGOLD: producers encouraged to recycle



Checklist of recent legislation

Waste Electrical and Electronic Equipment (WEEE), Restrictions of the use of certain Hazardous Substances in electronic and electrical equipment (RoHS) and the Registration, Evaluation and Authorisation of Chemicals (REACH) are regulations that stem from a series of 'producer responsibility' directives making producers responsible for the products that they manufacture or put on the market.



Waste Electrical and Electronic Equipment Regulations 2006: in force January 2007

The WEEE Regulations affect any business (known as a 'producer') that manufactures, brands or imports electrical or electronic equipment. Businesses that sell, store, treat or dismantle electrical items are also affected. The producer is responsible for financing the recycling, safe treatment and disposal of products they manufacture or put on the market when they are no longer in use, reducing the amount of WEEE going to landfill.

1 July 2007 is 'WEEE Day', when the full take-back, treatment and recycling systems have to be in place.



Restrictions of the use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2006: in force July 2006

The Regulations affect manufacturers, sellers, distributors and recyclers of electrical and electronic equipment containing lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBBs) or polybrominated diphenyl ethers (PBDEs). Products must comply with the requirements set out in the Regulations in order to be placed on the market in the EU.



Registration, Evaluation and Authorisation of Chemicals Regulation: in force June 2007

REACH places responsibility for understanding and managing the risks associated with the use of chemicals firmly on the people who place them on the market: chiefly manufacturers and importers. Businesses that manufacture more than one tonne of a chemical substance per year will have to register this in a central database. REACH replaces a number of European directives with a single system, with the goal of simplifying the control of chemicals within the European marketplace.

> together with an increased recognition of the importance of recycling waste. 'A few years ago, 80% of a photocopier would end up in landfill,' Shergold says. 'Now almost all of it can be recycled - the producer is incentivised to do so as much as possible.'

Although companies grab column inches for turning 'carbon neutral' - recent converts include Marks & Spencer and new airline Silverjet - this in itself courts controversy, and has been compared to the medieval practice of buying indulgences for 'carbon sins'. 'One difficulty is that there is no form of recognised accreditation,' Salter says. 'In any event, the priority should not be offsetting carbon but energy performance, cutting down emissions and being energy-efficient.'

The furore over carbon offsetting demonstrates that choosing an

environmentally sound business plan is fraught with pitfalls. Another area of hot debate is biofuels, which can have negative consequences - including degradation of the rainforest, possible impact on the food chain and river pollution. Industry has to make sure supplies are from sustainable sources or risk reputational damage.

POLITICAL PRESSURE

The political ante has, of late, been upped. The Stern Review, released in October 2006 by the Chancellor and endorsed by the Prime Minister, laid bare the economic consequences of inaction: the shrinking of the global economy by 20%. 'It is too early to say what the impact of the Stern Review will be, but it demonstrates political will to make major change,' Shergold comments.

In February 2007, EU heads of state agreed that by 2020 greenhouse emissions would be cut to 20% below 1990 levels, that 20% of energy used in the EU would come from renewable sources, and at least 10% of fuels used in transport would be biofuels.

ENFORCEMENT IN THE COURTS

Environmental prosecutions are on the rise. 'We have noticed an increased willingness on the part of the regulator to enforce,' Fairley says, 'and a greater use of statutory notices.' Stephen Tromans, an environmental barrister practising from 39 Essex Street, agrees that a stricter approach is being taken: 'There has been much litigation over the definition of waste products, which has big implications for industry.' Tromans recently appeared in the case of *Solvent Resource Management Ltd v Environment Agency*; *OSS Group Ltd v Environment Agency* on this issue.

Squabbles over the allocation of carbon credits for the emissions trading scheme are also rife: see *Cemex UK Cement Ltd v Department for Environment, Food & Rural Affairs* and others. 'This is not surprising when there is substantial money at stake,' Tromans explains.

LEGISLATION, LEGISLATION, LEGISLATION

The Companies Act (formerly the Company Law Reform Bill) received Royal Assent in 2006. It has been welcomed by environmental campaigners for imposing social and environmental reporting requirements on listed companies, as well as a duty on directors to consider the business impact on communities and the environment. Although not considered to be overly onerous on directors, it is an indication of the way the wind is blowing. Salter comments: 'The emphasis on directors' liability in terms of the environment has a parallel with that of health and safety a few years ago. There is a tendency for a drift towards individual responsibility at board level.' Environmental tax reform will also be high up on the agenda of a Brown premiership: something on which industry is keeping a watchful eye.

Lawyers also highlight the REACH Regulations, which came into force in the UK on 1 June 2007, hot on the heels of the long-awaited WEEE Regulations in January, as a major shake-up for industry. David Mulliken, a partner in the London office of US firm Latham & Watkins, says: 'It is one thing when

'Europe has taken aggressive action with REACH, but the US certainly has a long history of strong regulation in this area. It remains to be seen if the US is going to fashion its rules after the EU, but it's a hot area to watch.' **Ann Klee, Crowell & Moring**

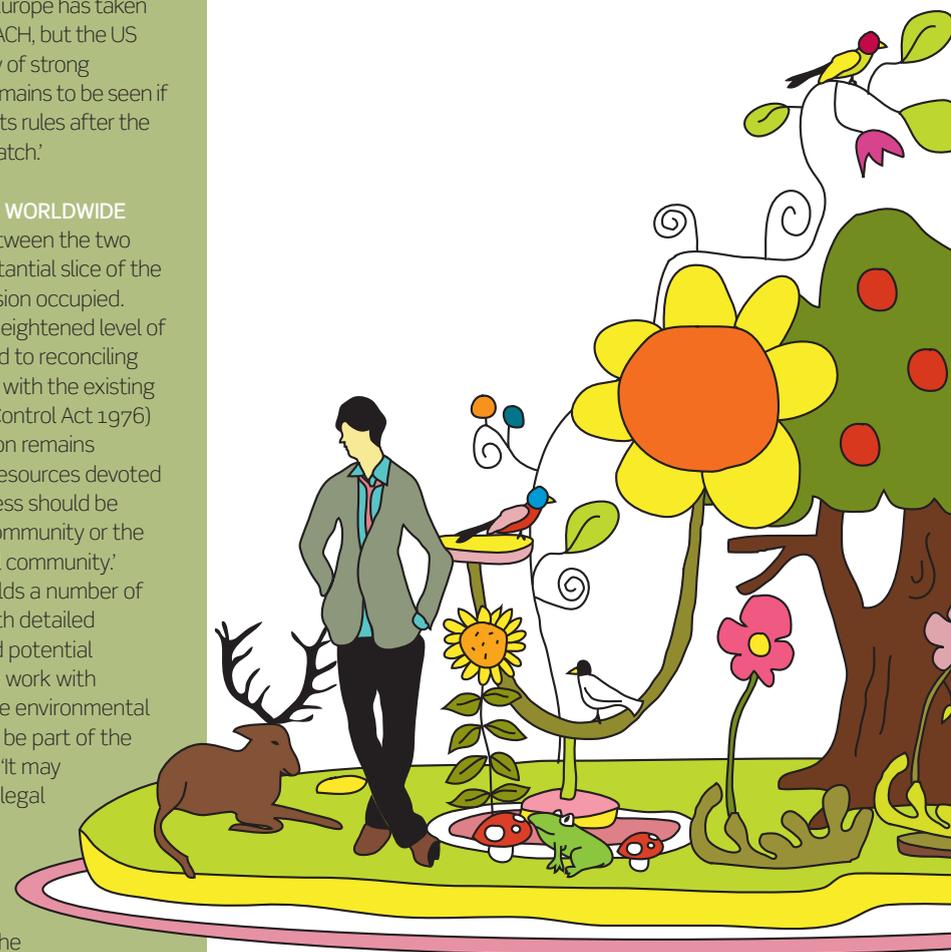
corporates know they have to do something in the future, and another when the reality of compliance is actually here.' Both sets of regulations put the onus firmly on industry to behave responsibly, in line with the EU's practice of finding mechanisms to promote change rather than 'command and control' – an approach rigorously pursued in the US.

Ann Klee, a partner at Washington-based regulatory firm Crowell & Moring, and former in-house lawyer at the US Environmental Protection Agency, says: 'Europe has taken aggressive action with REACH, but the US certainly has a long history of strong regulation in this area. It remains to be seen if the US is going to fashion its rules after the EU, but it's a hot area to watch.'

ENSURING COMPLIANCE WORLDWIDE

Indeed, harmonisation between the two approaches keeps a substantial slice of the transatlantic legal profession occupied. Mulliken says: 'There is a heightened level of activity and effort devoted to reconciling the importance of REACH with the existing TSCA (Toxic Substances Control Act 1976) requirements. The question remains whether the substantial resources devoted to the reconciliation process should be dominated by the legal community or the engineering and technical community.'

Latham & Watkins fields a number of 'policy wonks', experts with detailed knowledge of current and potential government policies, who work with industry to forecast future environmental developments. Could this be part of the role of in-house counsel? 'It may well be that the in-house legal team is better positioned than external counsel to address issues, but it depends on the corporate philosophy of the organisation,' Mulliken suggests.





KLEE: US Senate interest in EPA rules increasing

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> One in-house counsel with a global electronics company says: 'In-house lawyers should really be anticipating developments in all kinds of law, not just environmental. Whether the environment is high or low on your agenda will depend to a significant extent on the type of business you are in. But whatever your business, specialist support on environmental issues, both in-house and externally, is key – not least because of the possibility that a lengthy piece of legislation may contain one or two significant provisions relating to the environment, which a busy in-house lawyer scanning bulletins and the legal press may fail to pick up.'

THE US STEPS UP

No one could accuse the EU of 'business as usual' in light of the impending global catastrophe – an accusation frequently levelled at the US, whose refusal to sign the Kyoto Protocol produced much handwringing around the world. The past six months has seen a noticeable sea

change in the attitude of the world's leading superpower, however. Klee says: 'Now that the Democrats are in control of the Hill, we're seeing increasing congressional oversight on the rulemaking and enforcement coming from agencies like the EPA.'

According to Mulliken, the adjustment in perspective is not just at the top. 'Although it is easy to say that the change is a by-product of the shift in power from Republican to Democrat, this is a grass-roots evolution,' he says. 'The average citizen saw the reality.' Crucial drivers of change are the states themselves; Republican governor Arnold Schwarzenegger has pushed through stringent environmental policies in California, while Vermont has introduced tough measures against car manufacturers for carbon effects.

Klee notes: 'The stakes are higher than ever before for European companies doing business with the US. The US expects its businesses, including international companies doing business in the US, to be

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environmentally responsible and accountable to the public. That means no tolerance for mistakes or poor performance.'

Interestingly, another country that said no to Kyoto is heading in the same direction: Australia. Defying their Prime Minister, John Howard, the Australian states have vowed to make considerable cuts in greenhouse gas emissions and to set up a national carbon trading system by 2010.

Worldwide, big business is also pushing the agenda: the Global Roundtable on Climate Change in February 2007 - which included executives from General Electric, Ford, Toyota Motor North America and Wal-Mart - argued for targets to stabilise greenhouse gas emissions in the atmosphere.

CARBON: THE NEW CURRENCY?

So, with mounting pressure from all sides, the US has finally joined the party. Prospects look brighter, not least for the EU's Emission Trading Scheme. Although much maligned for the over-allocation of carbon credits in the first phase - which caused a price crash - there are high hopes for phase two, which will ratchet back the number of credits with the aim of creating a sought-after currency.

'The US becoming a player is of huge importance to member states,' Mulliken says, 'as it has a massive carbon footprint and could become a potential purchaser of carbon credits. Last year everyone was buying carbon credits to give future flexibility. The US now has a shorter window

Up-and-coming legislation



Directive 2005/32/EC on the Eco-Design Requirements for Energy-using Products (EuP): regulation expected this summer

The Directive aims to encourage manufacturers of energy-using products (EuP), including household appliances, to produce products that have a minimal environmental impact. It also affects importers, which must ensure that EuP comply with the Directive.



Batteries Directive: expected to be in force by 26 September 2008

Businesses that produce or sell batteries will be responsible for collecting and recycling spent batteries. The Directive applies to all batteries and accumulators regardless of chemical composition.

of time for reductions to be made.' A thriving global market could become a reality, if the banks can sniff a profit. Mulliken adds: 'All kinds of clients in investment banks see the opportunities for a huge market that may rival the commodities market. The banks are already working on derivatives products.'

The key question concerns India and China - should their industries be allowed to grow before having to meet targets? 'It is not a question of being selfish, it is a question of global survival,' Mulliken says. Salter also points out the disadvantage of a fragmented approach: 'The atmosphere is global, it does not recognise national boundaries. We need a global solution and to move to a long-term global carbon market.'

BUSINESS AS USUAL

If there is any vestige of an upside to the bleak picture of dustbowls, famine and

economic decline, it is the opportunities that will be created in looking for alternative technologies.

According to a Shell Springboard Report in 2006, 'green business' could inject a whopping \$1trillion into the global economy over the next five years, as a massive market is created for products and technologies designed to tackle climate change. Entrepreneur Richard Branson recently offered a \$25m reward for a low-cost technology to remove carbon dioxide from the atmosphere - and is already the recipient of an enthusiastic pitch from the Ocean Technology Group in Australia.

Shergold points out that the US is also already on the case. He says: 'If you look at California, it is much more technologically advanced for environmental innovation than the UK. The US is by no means behind the curve.' **IHL**

katharine.oneill@legalease.co.uk



MULLIKEN: banks poised to exploit opportunities

