



# ICLG

The International Comparative Legal Guide to:

## **Environment & Climate Change Law 2015**

**12th Edition**

A practical cross-border insight into environment and climate change law

Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer LLP, with contributions from:

Allen & Overy LLP  
Borenus Attorneys Ltd  
Bowman Gilfillan  
ChanceryGreen  
CMS Cameron McKenna  
Debarliev, Dameski, Kelesoska Attorneys at Law  
Ferraiuoli, LLC  
Fillmore Riley LLP  
Guevara & Gutiérrez S.C. Servicios Legales  
Guyer & Regules  
Harris Kyriakides LLC  
Hunsucker Goodstein PC  
Iniciativa para el Desarrollo Ambiental y Sustentable S.C.

Koep & Partners  
Macías Gómez & Asociados Abogados S.A.S.  
Maddocks  
Makarim & Taira S.  
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados  
McCann FitzGerald  
Nagashima Ohno & Tsunematsu  
Quiroz Santroni Abogados Consultores  
Rattagan, Macchiavello, Arocena & Peña Robirosa  
Romulo Mabanta Buenaventura Sayoc & de los Angeles  
Uría Menéndez – Proença de Carvalho  
Urrutia & Cía. Abogados  
Ziv Lev & Co. Law Office

GLG

Global Legal Group

**Contributing Editors**

Daniel Lawrence and John Blain, Freshfields Bruckhaus Deringer LLP

**Head of Business Development**

Dror Levy

**Sales Director**

Florjan Osmani

**Commercial Director**

Antony Dine

**Account Directors**

Oliver Smith, Rory Smith

**Senior Account Manager**

Maria Lopez

**Sales Support Manager**

Toni Hayward

**Editor**

Gemma Bridge

**Senior Editor**

Suzie Levy

**Group Consulting Editor**

Alan Falach

**Group Publisher**

Richard Firth

**Published by**

Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**

F&F Studio Design

**GLG Cover Image Source**

iStockphoto

**Printed by**

Information Press Ltd.  
March 2015

Copyright © 2015

Global Legal Group Ltd.

All rights reserved

No photocopying

ISBN 978-1-910083-37-6

ISSN 2045-9661

**Strategic Partners**



**General Chapters:**

1	<b>Environmental Issues &amp; Human Rights Concerns – a Sharper Focus?</b> – Paul Bowden, Freshfields Bruckhaus Deringer LLP	1
2	<b>An Asia-Pacific Overview: Environment and Climate Change Law</b> – Christian Zeppezauer, Freshfields Bruckhaus Deringer LLP	8

**Country Question and Answer Chapters:**

3	<b>Argentina</b>	Rattagan, Macchiavello, Arocena & Peña Robirosa: Gabriel R. Macchiavello & Lucia Sesto	14
4	<b>Australia</b>	Maddocks: Patrick Ibbotson & Michael Winram	26
5	<b>Austria</b>	Freshfields Bruckhaus Deringer LLP: Stephan Denk	35
6	<b>Belgium</b>	Allen & Overy LLP: Gauthier van Thuyne & Fee Goossens	45
7	<b>Bolivia</b>	Guevara & Gutiérrez S.C. Servicios Legales: Jorge Inchauste & Zoya Galarza	53
8	<b>Brazil</b>	Mattos Filho, Veiga Filho, Marrey Jr. and Quiroga Advogados: Lina Pimentel Garcia & Rafael Fernando Feldmann	59
9	<b>Bulgaria</b>	CMS Cameron McKenna: Kostadin Sirlishtov & Raya Maneva	67
10	<b>Canada</b>	Fillmore Riley LLP: Sven Thorsten Hombach	77
11	<b>Chile</b>	Urrutia & Cia. Abogados: José Antonio Urrutia Riesco & Santiago Lyon Labbé	85
12	<b>China</b>	Freshfields Bruckhaus Deringer LLP: Christian Zeppezauer & Zhe Liu	93
13	<b>Colombia</b>	Macías Gómez & Asociados Abogados S.A.S.: Luis Fernando Macías Gómez	100
14	<b>Cyprus</b>	Harris Kyriakides LLC: Michalis Kyriakides & Athanasia Achilleos	107
15	<b>Dominican Republic</b>	Quiroz Santroni Abogados Consultores: Romina Santroni	114
16	<b>England</b>	Freshfields Bruckhaus Deringer LLP: Daniel Lawrence & John Blain	122
17	<b>Finland</b>	Borenus Attorneys Ltd: Casper Herler & Henna Lusenius	139
18	<b>France</b>	Freshfields Bruckhaus Deringer LLP: Pascal Cuhe & Juliette Deslandres	145
19	<b>Germany</b>	Freshfields Bruckhaus Deringer LLP: Dr. Wolf Friedrich Spieth & Dr. Michael Ramb	157
20	<b>Indonesia</b>	Makarim & Taira S.: Alexandra Gerungan & Brimanti Sari	169
21	<b>Ireland</b>	McCann FitzGerald: Kevin Kelly & Rachel Dolan	175
22	<b>Israel</b>	Ziv Lev & Co. Law Office: Moshe Merdler & Ziv Lev	183
23	<b>Italy</b>	Freshfields Bruckhaus Deringer LLP: Fabrizio Arossa & Miriam Di Traglia	193
24	<b>Japan</b>	Nagashima Ohno & Tsunematsu: Kiyoshi Honda	204
25	<b>Macedonia</b>	Debarliev, Dameski, Kelesoska Attorneys at Law: Dragan Dameski	212
26	<b>Mexico</b>	Iniciativa para el Desarrollo Ambiental y Sustentable S.C.: Daniel Basurto González	218
27	<b>Namibia</b>	Koep & Partners: Hugo Meyer van den Berg & Peter Frank Koep	225
28	<b>New Zealand</b>	ChanceryGreen: Karen Price & Chris Simmons	231
29	<b>Philippines</b>	Romulo Mabanta Buenaventura Sayoc & de los Angeles: Benjamin Z. Lerma & Timothy John R. Batan	239
30	<b>Portugal</b>	Uria Menéndez – Proença de Carvalho: João Louro e Costa	247
31	<b>Puerto Rico</b>	Ferraiuoli, LLC: Jorge L. San Miguel & Lillian Mateo-Santos	255
32	<b>South Africa</b>	Bowman Gilfillan: Claire Tucker	263
33	<b>Spain</b>	Freshfields Bruckhaus Deringer LLP: Vicente Sierra & Mónica Nieberding	271
34	<b>USA</b>	Hunsucker Goodstein PC: Anne E. Lynch & Maureen B. Hodson	283
35	<b>Uruguay</b>	Guyer & Regules: Anabela Aldaz Peraza & Gonzalo Fernando Iglesias Rossini	289

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

**Disclaimer**

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

# South Africa

Bowman Gilfillan

Claire Tucker



## 1 Environmental Policy and its Enforcement

### 1.1 What is the basis of environmental policy in South Africa and which agencies/bodies administer and enforce environmental law?

The environmental right enshrined in the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and relevant national and provincial legislation are the basis for environmental policy.

The Constitution provides that “the Environment” is a functional area of concurrent national and provincial legislative competence.

The following government departments are involved in the administration and enforcement of environmental laws, namely the:

- Department of Environmental Affairs (“DEA”);
- Department of Mineral Resources (“DMR”);
- Department of Water and Sanitation (“DWS”);
- Department of Energy (“DoE”);
- Department of Rural Development and Land Reform (“DRDLR”); and
- Department of Agriculture, Forestry and Fisheries.

At provincial level, environmental directorates in the nine provincial governments are responsible for the administration and enforcement of environmental law in the relevant province.

### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

In the first instance, the departments involved in the administration and enforcement of environmental law have created specialist enforcement directorates or designated officials as inspectors.

The enforcement directorates/inspectors mainly use administrative and criminal measures to enforce environmental laws.

The relevant directorates/inspectors are becoming increasingly active in the enforcement of environmental laws.

### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Access to information held by the State is governed by the Constitution and the Promotion of Access to Information Act, 2000. Every person is entitled to access information held by the State.

Although the State could have grounds to refuse access, unless disclosure of the record would reveal imminent and serious public safety or environmental risk, disclosure is mandatory.

## 2 Environmental Permits

### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

Most environmental statutes require authorisations, licences or permits before particular activities can commence. Permits are usually required for natural resource extraction or utilisation. Permits are required under legislation regulating hazardous substances, nuclear activities, biodiversity conservation, protected areas, fishing and certain agricultural activities. Activities causing pollution or which may result in pollution may also require authorisation.

The National Water Act, 1998 (“NWA”) requires licences for certain water uses. The National Environmental Management Act, 1998 (“NEMA”) requires an environmental authorisation before many types of construction activities can commence as well activities associated with the extraction and production of mineral and petroleum resources. The National Environmental Management Waste Act, 2008 (“the Waste Act”) requires licensing of various listed waste activities. The National Environmental Management Air Quality Act, 2004 (“the Air Quality Act”) requires licensing of various listed activities which result in atmospheric emissions.

Generally, dependent upon the empowering legislation, environmental authorisations or permits are only transferable with the consent or approval of the relevant authority.

### 2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

Environmental legislation generally contains provisions permitting appeals of decisions granting permits, licences and authorisations. In addition, a person aggrieved by an authority’s decision may, under the Promotion of Administrative Justice Act, 2000 (“PAJA”), seek a judicial review of the decision in a court or tribunal. However, such a review may only be sought through the courts once the aggrieved individual has exhausted all internal remedies provided for in the environmental legislation concerned. Furthermore, in terms of PAJA, a person who has been aggrieved by an authority’s decision has a right to be given reasons for the decision.

### 2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

The main environmental impact assessment provisions are contained in NEMA which requires an environmental authorisation preceded by some form of impact assessment for a wide range of construction – and more recently, mining – activities. In addition, some sectoral legislation, such as the Waste Act, Minerals and Petroleum Resources Development Act, 2002 (“MPRDA”), Development Facilitation Act, 1995, Biodiversity Act, 2004 and Marine Living Resource Act, 1998 contain impact assessment provisions. Most Environmental Impact Assessments (“EIAs”) are governed by the EIA Regulations, promulgated under NEMA.

Environmental authorisations to commence certain activities may require holders to furnish competent authorities with reports on environmental impacts of the activities at specified intervals or when requested by authorities.

### 2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

NEMA provides for the establishment of Environmental Management Inspectors and there are both national and provincial enforcement departments. Most environmental statutes contain criminal sanctions for breach. Penalties usually involve a prison sentence for a specific period, a fine or both such prison sentence and fine. Penalties in the range of R5 million to R10 million are increasingly prescribed.

Many statutes empower officials to issue abatement notices and/or directives. Failure to comply with directives usually constitutes an offence.

Civil liability may arise, on the basis of delictual/tort law, from violations of permits, licences or authorisations, if a person acted wrongfully, culpably and caused harm to another, and damages resulted.

Virtually all environmental legislation requiring permits, licences or authorisations contain provisions providing for their withdrawal, suspension or cancellation.

## 3 Waste

### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The Waste Act introduces a more extensive waste definition. It includes waste generated by mining, medical or other sectors, but does not apply to radioactive waste or explosives. Through recent amendments, mining residue deposits/stockpiles are now also included. Hazardous waste is widely defined, including any waste that may have a detrimental impact on health and the environment. By-products are not defined as waste and any portion of waste re-used, recycled and recovered ceases to be waste.

Under the Waste Act, specified measures may be required for waste identified by the Minister of Environmental Affairs (“the Minister”) as “priority waste”. Such measures could relate to minimisation, storage, re-use, recycling, recovery, treatment and disposal of waste, registration, monitoring and reporting requirements and compiling industry waste management plans. These measures are not yet of legal force.

A person transporting hazardous waste must obtain written confirmation that receivers are authorised to accept.

The Hazardous Substances Act, 1973, classifies hazardous substances into four categories, each with their own requirements for disposal. The Hazardous Chemical Substances Regulations, published under the Occupational Health and Safety Act, 1993, has requirements for packaging, transportation and disposal of hazardous waste.

The Hazardous Substances Act prohibits persons handling or dealing with radioactive waste without the Director-General’s written authority. The National Radioactive Waste Disposal Institute Act, 2009, provides the legislative framework for establishing an Agency responsible for radioactive waste disposal.

DWAF’s “Minimum Requirements for the Disposal of Waste by Landfill” distinguishes between waste categories; they have no legal force, but are often incorporated into waste disposal site permits, thereby enforcing additional duties and controls regarding hazardous waste.

### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Generally this is prohibited. The Waste Act prohibits waste disposal that is likely to cause environmental pollution or harm to health and well-being.

It requires that a waste disposal site may only be established or operated once the Minister has issued a licence and an environmental assessment is submitted. The storage of general waste and hazardous waste in lagoons or at a facility that has the capacity to store in excess of 100m<sup>3</sup> or 80m<sup>3</sup> of general waste and hazardous waste respectively requires a licence.

### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

NEMA contains “cradle to grave” principles (responsibility for the environmental and health consequences of products, processes or services, starting with the extraction or processing of raw materials and extending through manufacturing and use to include ultimate disposal).

The Waste Act incorporates this principle, by providing for extended producer responsibility for certain products. These responsibilities are subject to the Minister issuing regulations on specified measures that are required; this has not yet occurred. A producer’s responsibilities may include waste minimisation programmes, the financing of such programmes, conducting life cycle assessments or labelling requirements. The application of these provisions implies that producers retain responsibility for their waste, notwithstanding transfer to a lawful recipient.

It also places a general duty on sellers of products, that may be used by the public and which are likely to result in hazardous waste generation, to take reasonable steps to inform the public of the waste’s impact on health and the environment.

### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

There are presently no specific obligations, in terms of the Waste

Act, requiring that waste producers take back or recover their waste; however, as discussed above, a person retains responsibility for their waste.

Extended producer responsibility under the Waste Act may include requirements for re-use, recycling, reduction and treatment of waste resulting from identified products.

Furthermore, in terms of the Consumer Protection Act, 2008, where goods, components and remnants thereof (“goods”) contain substances that may not be disposed of in a common waste collection system, the supplier of such goods is under an obligation to accept their return from any consumer without charge and irrespective of whether they supplied the particular goods to the returning consumer. Furthermore, there is an obligation on the producer, importer or supplier of goods who acts as part of a supply chain by which such matter reaches the consumer to accept any goods returned by any supplier. This means that upon the goods being returned to the supplier, such a supplier may return the matter to the manufacturer, distributor or importer from whom such goods were obtained.

## 4 Liabilities

### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Generally, breach of environmental statutes invokes criminal sanctions.

Certain statutes impose strict liability, including the MPRDA and National Nuclear Regulator Act, 1999.

NEMA and the NWA also provide for recovery of costs for preventing damage and rehabilitation of the environment.

### 4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

NEMA provides that if environmental harm is authorised by law, such as a permit issued under any environmental law, the relevant operator is obliged to minimise and rectify such harm. Where a person fails to take reasonable measures to minimise or rectify effects of environmental pollution or degradation, the relevant authority may itself take such measures, and recover costs from the responsible operator.

NEMA has been amended recently to provide for liability for historical pollution. An operator occupying land may also be liable in future for remediation costs under the Waste Act (discussed below).

An operator may therefore, in certain circumstances, be liable for pollution remediation costs, notwithstanding that the activity is authorised.

### 4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under NEMA, a corporation’s officer may, in certain circumstances, personally be criminally liable for an offence and damages.

A corporation’s director may also be criminally prosecuted and liable to pay what are, in effect, civil damages, if such director fails to take all reasonable steps necessary to prevent an offence being committed.

Directors and officers of corporations cannot contract out of statutory liability which they incur for environmental wrongdoing, although there is nothing which provides that they cannot: a) be indemnified by their corporations for any damages or fines payable for environmental damage; or b) take out insurance against the payment of any damages or fines.

### 4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

The environmental legislative regime imposes strict obligations on persons (including companies) who pollute the environment. These obligations are specifically aimed at land owners or operations or substances causing pollution. However, due to the principle of separate legal personality in company law, these obligations do not usually extend to such owners’ shareholders, although the statutes as drafted potentially allow a claim against a person who benefited from polluting activity which could include a shareholder.

Generally, it is therefore preferable, from an environmental liability perspective, to purchase shares rather than assets.

However, direct delictual liability could be attributed to shareholders in certain limited circumstances, such as for operations, plans, policies, procedures they imposed or omissions they caused a subsidiary to make, provided all the delictual liability elements are present.

Additionally, if shareholders misused the corporate personality of a subsidiary for advantage, resulting in environmental harm, courts may pierce the corporate veil and attribute liability to shareholders of the subsidiary, for environmental damage caused by the subsidiary.

### 4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

NEMA and the NWA extend the net of liability to include persons who ‘indirectly contribute to’ or benefit from pollution or degradation. Whilst the ambit of this terminology has not been tested in courts, it is possible that in certain circumstances, liability may extend to include a lender, but in the absence of direct intervention, this is unlikely.

## 5 Contaminated Land

### 5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The fact that soil or groundwater contamination occurred before a new land owner takes ownership does not exempt the new owner from taking steps to remedy such environmental damage. Both NEMA and the NWA provide that land owners may be liable for historic contamination, which occurred prior to taking ownership. The owner could attempt to recover a share of remediation costs from any prior polluter.

The Waste Act also provides, if the authorities declare land a remediation site, that remediation costs may be recovered for historic contamination from persons “responsible for undertaking the remediation”. The Act does not specify from whom such costs are recoverable and a land occupier could be liable, particularly if high risk activities are undertaken which may contribute to the contamination.

## 5.2 How is liability allocated where more than one person is responsible for the contamination?

NEMA and the NWA provide for apportionment of costs incurred by a government agency in remedying environmental pollution amongst persons responsible for the pollution, according to the degree to which each is responsible for the environmental harm.

## 5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Yes this is possible, but there is no specific provision for this.

## 5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

It would be possible to institute a claim for damages against a predecessor-in-title if it could be proved that the loss occasioned to the new owner was caused by the predecessor's failure to take measures to alleviate environmental harm.

## 5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

Yes, damages are limited to what is required to remediate the polluted land.

## 6 Powers of Regulators

### 6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

NEMA creates broad search and seizure powers for inspectors appointed under the statute. Inspectors are empowered to question persons regarding acts or omissions which may constitute environmental offences, require production of documents, remove specimens, and take samples. These powers must be exercised in a procedurally fair manner. These powers were extended by providing that inspectors be regarded as peace officers, with powers assigned to peace officers or police officials who are not commissioned officers under the Criminal Procedures Act, 1997. Further, amendments introduced by the National Environmental Laws Second Amendment Act, 2013 extend these powers by providing inspectors with the legal mandate to seize, without a warrant, any items including vehicles, vessels, aircraft or other transport mechanisms, used in the commissioning of an offence under NEMA.

The NWA provides that the DEA may request any data, information, documents, samples or materials reasonably required for monitoring purposes or protection of water resources be provided to it.

Various other environmental statutes also provide wide powers of search and seizure for inspectors appointed under those Acts.

## 7 Reporting / Disclosure Obligations

### 7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

NEMA does not oblige a person to report pollution to an environmental regulator, unless it constitutes an "emergency incident". In such circumstances, responsible persons must report the incident and all relevant information to the Director-General of DEA, police, head of the relevant provincial government department and all persons whose health may be affected.

Under the National Building Regulations, persons who own significantly contaminated land must notify the relevant authority as soon as they become aware of it. Similar provisions are contained in the Waste Act.

### 7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Where an emergency incident occurs, responsible persons must take certain steps under NEMA, including assessing immediate and long-term effects of the incident and the extent and existence of contamination.

The National Building Regulations require an authority, with a reasonable belief that land upon which a building is to be erected is contaminated, to inform the owner, who must undertake a site assessment. There are similar provisions in the Waste Act relating to contaminated land.

### 7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

There is no statutory obligation to make any disclosures. Parties usually perform due diligence investigations to assess any potential environmental liability relevant to the transaction.

## 8 General

### 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

It is common for commercial transactions to incorporate environmental indemnities to limit exposure for actual or potential environmental-related liabilities.

The polluter remains liable in statute for any contamination or pollution, but could require any loss occasioned following successful prosecution to be made good by the indemnifier.

### 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

There is no specific legislation regulating dissolution of companies with particular reference to environmental liabilities. However, normal company law principles apply and any outstanding creditors, including those with environmental or delictual claims for harm caused by the company, could apply to court to prevent the dissolution.

As set out below, parent companies of subsidiaries which have caused environmental damage can be held liable, where the subsidiary has been dissolved.

For environmental harm caused by mining activities, the MPRDA imposes strict liability on company directors or close corporation members for environmental damage caused by the entity they represented, even if they no longer represent such entity or the entity no longer exists.

### 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

The NWA and NEMA provide that, any person “in control” of land, or who has benefited from pollution, may be liable for pollution arising from the land. There is no case law on whether this extends to parent companies.

Delictual or tortious liability may theoretically be attributed to a foreign parent company for damage caused to persons or property by operations, plans, policies, procedures or investments it proposed, or for omissions it directly caused a South African subsidiary to make, provided that all the delictual liability elements are present. There is, however, no decided case law on this in South Africa.

### 8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?

The Protected Disclosures Act, 2000, has procedures for disclosure of information by employees in both public and private sectors regarding unlawful or irregular conduct by their employers. Disclosure of information regarding damage or likely damage to the environment is specifically protected, as are persons making such disclosures. Remedies are available to employees who suffer detriment by making a protected disclosure.

NEMA also makes provisions for the protection of employees who disclose information they believe is evidence of an environmental risk.

### 8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

The Protected Disclosures Act, 2000, has procedures for disclosure of information by employees in both public and private sectors regarding unlawful or irregular conduct by their employers. Disclosure of information regarding damage or likely damage to the environment is specifically protected, as are persons making such disclosures. Remedies are available to employees who suffer detriment by making a protected disclosure.

NEMA also makes provisions for the protection of employees who disclose information they believe is evidence of an environmental risk.

### 8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

The NEMA states that a court may decide not to award costs against individuals or groups who fail to secure the relief sought when pursuing environmental litigation if the court is of the opinion that the person or group of persons “acted reasonably out of concern for the public interest or in the interest of protecting the environment” and had made due efforts to use other means reasonably available for obtaining the relief sought.

Where an individual or group of persons secures the relief sought in environmental litigation, the court may award costs to the individual or group of persons (including their legal representatives) and order that the party against whom relief is granted pay any reasonable costs incurred by the individual or group of persons in investigating the matter and its preparation for the proceedings.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in South Africa and how is the emissions trading market developing there?

South Africa is a party to the United Nations Framework Convention on Climate Change and the Kyoto Protocol.

It is categorised as a developing country under the Kyoto Protocol and does not have specified commitments to reduce or cap its carbon emissions.

However, of the three mechanisms available for countries to meet emission reduction targets under the Kyoto Protocol, namely the International Emissions Trade, Joint Implementation, and the Clean Development Mechanism (“CDM”), South Africa is involved in several CDM Projects. South Africa has established a designated national authority (“DNA”) under the Department of Energy (“DoE”) to consider and approve CDM applications that will result in GHG emission reductions. This process is governed by regulations published under the National Environmental Management Act, 1998 (the “CDM Regulations”).

The Johannesburg Stock Exchange opened to trading in credit emission reductions during 2008.

### 9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

The Air Quality Act requires the authorities, when issuing atmospheric emissions licences, to specify the greenhouse gas emission measurements, monitoring and reporting requirements in the licence.

The Regulations of the Air Quality Act distinguish between two kinds of emissions monitoring, namely: (i) continuous emission monitoring; and (ii) periodic emission monitoring. Depending on the nature of the activity involved and the impact of that activity on air quality, either one of these emission monitoring requirements will be required.

Holders of atmospheric emission licences are also required to annually submit an emissions monitoring report to the licensing authority.

### 9.3 What is the overall policy approach to climate change regulation in South Africa?

Though South Africa is classed as a developing country and is not subject to stringent regulation in terms of the Kyoto Protocol, South Africa committed to lowering its greenhouse gas (“GHG”) emissions to 34 per cent below current expected levels by 2020 and 42 per cent below current trends by 2025 at the Conference of Parties in Copenhagen in 2010. This commitment is conditional on a fair, ambitious and effective international climate change agreement being reached and financial and technological support being provided by developed countries.

South Africa has not yet enacted a national legislation or regulations/policy directly pertaining to climate change, however it has a number of initiatives under way or mechanisms in place to address challenges of climate change.

For example, in November 2010, the government published for comment a National Climate Change Response Green Paper. The public comment period closed on 11 February 2011. The overarching objective of the Green Paper is to align South Africa’s climate change policy with international principles and to ensure a coordinated, coherent, efficient and effective response to the global challenge of climate change. The Green Paper is generally the first step in law or policy making. As a result, the Green Paper is currently a statement of intent.

Following the publication of the Green Paper, the government published the National Climate Change Response White Paper, which was released in October 2011. According to the White Paper, within two years of its publication, all government departments will be required to review the policies, strategies, legislation, regulations and plans falling within their jurisdictions to ensure their “full alignment” with the national climate change response. The South African government will then determine the adjustments that need to be made and identify any legislative or regulatory measures which are deemed to be necessary.

In addition to the Green Paper and the White Paper, South Africa has regulations regarding the establishment of a Designated National Authority (“DNA”) for the Clean Development Mechanism (“CDM”). These regulations were published in terms of NEMA and empower the DNA, which falls under the DoE, to consider and approve applications for CDM projects that will result in carbon reductions. The application process to be followed and the manner in which decisions will be taken are set out in the regulations.

South Africa has also published a Renewable Energy Procurement Programme to facilitate the construction of renewable energy by Independent Power Producers (“IPPs”) and has successfully completed the First and Second Rounds of the competitively bid procurement process for the IPPs to supply power in terms of the Renewable Energy Procurement Programme.

Following the First Round, 28 IPPs were announced as Preferred Bidders in December 2011. The Preferred Bidders named in the First Round included 18 solar photovoltaic (“PV”) projects, eight onshore winds projects and two concentrated solar power (“CSP”) projects. Financial Close was reached on the First Round in November 2012 and Power Purchase Agreements entered into power. After the Second Round, 19 IPPs were announced as Preferred Bidders in May 2012. The Preferred Bidders named in the Second Round included nine solar photovoltaic projects, seven onshore wind projects, two small hydro projects and one concentrated solar power project. Financial Close for the Second Round was reached

on 9 May 2013 and the Power Purchase Agreements entered into power. Following the Third Round, 17 IPPs were announced as Preferred Bidders in November 2013. The Preferred Bidders named in the Third Round included six photovoltaic projects, seven wind projects, two concentrated solar power projects, one landfill gas project and one biomass project. South Africa is currently preparing for Financial Close with the Preferred Bidders for the Third Round of the procurement process.

## 10 Asbestos

### 10.1 Is South Africa likely to follow the experience of the US in terms of asbestos litigation?

There have been more asbestos-related claims recently. However, claims directly against employers are extinguished by occupational compensation legislation and South Africa does not have a litigious culture on the scale of the US.

### 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The applicable regulations do not require the removal of asbestos from workplaces, but include control measures which employers must take for asbestos-containing materials, and also for exposure, spraying, demolition and disposal of asbestos.

The regulations require regular assessment of potential exposure of employees to asbestos.

The Regulations for the Prohibition of the Use, Manufacturing, Import, Export of Asbestos and Asbestos Containing Material regulate any dealings with asbestos products that may have a substantial detrimental effect on the environment or human health, by requiring registration of such activities. Employers are also required to notify the authorities of any work that exposes or is likely to expose any person to asbestos dust in terms of the Asbestos Regulations, 2002.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in South Africa?

The different types of environmental insurance available are:

- environmental impairment liability policies; and
- directors’ and officers’ liability insurance.

Whilst many companies are beginning to realise the potential of environmental liability, environmental risks are poorly covered and investing in appropriate risk management measures, principally through insurance policies, is still fairly limited.

### 11.2 What is the environmental insurance claims experience in South Africa?

At this stage, the environmental insurance claims experience is fairly limited.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in South Africa.

#### General Environmental Regulatory Framework

Recently, provisions relating to the creation of One Environmental System (“OES”) in South Africa have come into effect. The OES changes seek to integrate the environmental management provisions contained in the MPRDA into NEMA and align the requirements for acquiring the environmental approvals needed for a mining project. This integration began in 2008 and should be reaching its conclusion in mid-2016. The ultimate impact of the OES will be to have all environment-related aspects of the MPRDA rights regulated through the OES provided for in NEMA. Furthermore, all environmental provisions in the MPRDA, which would then duplicate NEMA provisions as a result of the amendments, would be repealed.

The Ministerial competence under the OES will be split between the Minister of Environmental Affairs, who will have exclusive authority to set the environmental regulatory framework and the norms and standards for environmental management, excepting matters

relating to water, and the Minister of Mineral Resources, who will implement the provisions of NEMA and the subordinate legislation in respect of prospecting, exploration, mining or production operations. Furthermore, the Minister of Environmental Affairs will be the appeal authority for all environmental authorisations including those issued by the Minister of Mineral Resources.

#### Listed Waste Management Activities

Several amendments to the Waste Act occurred in 2014. Significantly, the amendments removed the exclusion applicable to mining residue deposits and residue stockpiles, meaning that such deposits and stockpiles are now regulated through the Waste Act. The provisions relating to contaminated land and liability were changed. These provisions apply to contamination, even if such contamination occurred before the commencement of the Waste Act, that originates on land other than land identified as an investigation area, arises (or is likely to arise) at a different time from the actual activity that caused the contamination and/or arises through an act/activity of a person that results in a change to pre-existing contamination (i.e. where the movement of dormant pollutants/contamination is mobilised by something done by a person) which extends the ambit of liability significantly. The penalties for failure to comply with the requirements and provisions of the Waste Act may result in a fine not exceeding R10 million to be imposed or imprisonment for a period not exceeding 10 years, or both.



### Claire Tucker

Bowman Gilfillan  
165 West Street, Sandton  
Johannesburg, 2196  
South Africa

Tel: +27 11 669 9402  
Fax: +27 11 669 9001  
Email: [c.tucker@bowman.co.za](mailto:c.tucker@bowman.co.za)  
URL: [www.bowman.co.za](http://www.bowman.co.za)

B.A., LL.B. (Wits) and M.Sc. in Law and Development (London School of Economics).

Claire Tucker is a partner at Bowman Gilfillan and the head of the environmental practice area at the firm. She practises in regulatory and environmental law and is widely published on these matters.

Claire has worked on a wide range of regulatory matters, including the drafting of legislation, High Court review applications and the interpretation and application of statutes, as well as commercial and transactional advice. She also practises in and advises on environmental issues such as atmospheric pollution prevention, waste regulation, water, land use planning and environmental impact assessments. She has a particular interest in the socio-economic aspects of the constitutional right to a clean environment.

She is currently advising the South African National Treasury and the Department of Energy, which are running the first international independent power producer procurement process for renewable energy in South Africa, on all aspects of the design, implementation and drafting of the procurement process documents, and implementation of the process, as well as the evaluation of bids and negotiation with Preferred Bidders.

She worked for two years in London, at Leigh Day and Co, on plaintiff actions against multinational corporations causing damage to people and the environment in developing countries, particularly on the *Cape plc asbestos* case and the *Thor Chemicals* case.

## BG Bowman Gilfillan

Member of Bowman Gilfillan Africa Group

Bowman Gilfillan is widely regarded as one of the premier corporate law firms in Africa, with offices in Johannesburg and Cape Town. The firm has an association with Coulson Harney in Nairobi. Employing 311 specialised lawyers (including 120 partners), with a total staff of 630, the firm is recognised for its professionalism and superior legal services.

Bowman Gilfillan's **Environment, Natural Resources and Climate Change team** has developed an extensive, in-depth and practical knowledge of the legal system and policy framework (within which the environment is regulated in South Africa). The team works closely with all levels of government and other relevant stakeholders, and enjoys strong professional relationships with the various environmental regulatory authorities in South Africa.

Bowman Gilfillan's committed and diverse team of corporate attorneys, years of experience in the industry and supreme legal expertise comprise a winning formula that has earned it a series of accolades, including South African Law Firm of the Year at the PLC Which lawyer? Law Firm Awards 2010 and South African Law Firm of the Year at the Who's Who Law Firm Awards 2010.

### Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Litigation & Dispute Resolution
- Lending & Secured Finance
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



59 Tanner Street, London SE1 3PL, United Kingdom  
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255  
Email: [sales@glgroup.co.uk](mailto:sales@glgroup.co.uk)

[www.iclg.co.uk](http://www.iclg.co.uk)