

25 October 2002

Shauna Coffey
Acting Manager, Waste and Recycling
Western Australian Local Government Association
Local Government House
15 Altona Street
WEST PERTH WA 6005

Dear Shauna

Contaminated Sites Bill – Preliminary Review

This letter is written in response to your request for our advice on particular aspects of the *Contaminated Sites Bill 2002* ('Bill') dated 1 May 2002. A draft copy of this letter was previously provided on 3 May 2002.

Introduction

We refer to your e-mail of 15 October 2002 requesting finalisation of the draft letter. We confirm your instructions to review the minutes of the Ministerial meeting, dated 3 May 2002. We confirm that we are to finalise the advice based on Draft Version 14 and not to review the latest amendments to the Bill. Please contact us if you require further advice on updates to the Bill as we would be happy to assist in this regard. For further reference and as an example of the ongoing work we are doing in this area, we enclose a copy of an article written by Rob Campbell-Watt from our office in July this year that was published in the August edition of the *Local Government Law Journal*.

Clarification of different definitions relating to ownership

Specific questions:

1. Has this type of inconsistency caused problems in the past in the interpretation or enforcement of a piece of legislation – can Local Government argue that it is for the benefit of the State to resolve this issue of inconsistency before the legislation is enacted?

In our opinion, there is no direct inconsistency between the *Land Administration Act 1997* ('LAA') and the Bill, in as much as the Bill does not confer upon a local authority an 'interest' in land which it does not otherwise have by virtue of a management order under the LAA.

2. If the LAA definition of ownership replaced the current definition of ownership in the Bill in relation to Crown land, would Local Government be able to avoid liability for

contaminated sites on Crown land or would this liability be included in a different section of the Bill?

There is no definition of ownership under the LAA. However if the definition of owner under the Bill did not include holders of management orders, local authorities would have less liabilities for site remediation although there are liabilities under the Bill which may capture local authorities as occupiers of the land.

Cancellation or revocation of management vesting orders

Specific questions:

1. Would a refusal to revoke an order in respect to a contaminated site be a contravention of the LAA?

We confirm that refusal to revoke an order in respect of a contaminated site by the Minister would not be a contravention of the LAA. The Minister has complete discretion on this regard. Section 50 of the LAA deals with the revocation of management orders. In the absence of an agreement or non-compliance, the Minister may also revoke a management order if it is in the public interest to do so. It is foreseeable that a public interest argument could be raised. For example, a local authority is unable to remediate a particular site for reasons of financial hardship; it was acting at the time the land was contaminated as an instrumentality of the Crown and yet the contamination has broader public implications and must be remediated as soon as possible. In this case however, clause 30 of the Bill may apply where the Minister administering the Bill, approves a transfer of the responsibility for remediation to the State.

2. Are there any other provisions under which Local Government would be able to request the revocation of a management order?

No.

3. You also asked whether the State could divest itself of land through management orders.

We advise that the granting of a management order to a local authority is at the Minister's discretion.

The discretion is limited to granting care, control and management of the reserve for the same purpose as that for which the relevant land is reserved. If the Minister wants to alter the conditions of the management order, then the agreement of the local authority is required: ss. 46(1) and 46(2).

Current list of issues and proposed resolution

In regards to the specific issues and proposed amendments raised in the table attached to your instructions, our view is as follows:

Clause 5 – Meaning of owner

The comments in relation to clause 5 are correct. It was apparent that the difficulty the Bill presents to local authorities does not simply rest with the definition of 'owner', but moreover –

with the inequities which arise once the polluter cannot be found the local authority is deemed responsible for remediation under clause 27 of Bill. This difficulty arises due to the unique nature of local authorities, their public responsibilities and the amount of land held by local authorities.

We suggest that this inequity may be more appropriately addressed by amending the Bill, to broaden the discretion of the CEO to take into account particular issues facing local authorities. Initially, we make the following suggestions:

1. Amend Clause 29 to include a provision which provides that the State assumes responsibility for remediation of sites, the care, control and management of which is vested in a local authority, where the contamination was caused or contributed to as a direct or unavoidable result of a direction, or delegation given, or action carried out by local authority at the direction or through delegation of the State.
2. Amend clause 59 to specify that it includes a situation where the person responsible is a local authority by virtue of being the holder a management order, and where the local authority had not, prior to the introduction of the Bill and when the contamination occurred been in occupation of the land despite holding the management order (ie. not had the care, control and management) and at that time, did not know, or suspect, and could not reasonably have known or suspected, that land was contaminated.
3. Amend clause 30(1)(b) to clarify how circumstances are prescribed. Also ensure that it includes circumstances where, the person liable under clause 27 is a local authority and can demonstrate that prior to the introduction of the Bill when the contamination occurred, it had not been in occupation of the land (ie. not had the care, control and management) and at that time, did not know, or suspect, and could not reasonably have known or suspected, that land was contaminated.

Clause 41(1) – Delegated authority

Clause 41(1) does not exist in the current Draft Version 14 of the Bill. Clause 29(1) seems to address the recommendation. In relation to clause 29(1) we refer to our comments above. The clause should be amended to the effect that the State will be responsible where action is taken by a local authority under a delegation given or carried out by the State.

Clause 59 – Exemption certificates

See our comments above.

Clause 29, 30 and 32 – Right to recover costs

Clause 51 provides local authorities with a right to recover costs in certain circumstances. Costs of investigation may be recoverable under this provision. The clean up notice for remediation should be funded by the polluter. Cancellation of an investigation or clean up notice on the local authority can be cancelled where this occurs.

Change of land use

Clause 38 concerns notices to be complied with. Changes of land use are now dealt with under clause 26. The recommendation is addressed in our view on the definition of owner.

Orphan sites

Clause 32 now deals with orphan sites. Clause 32(2) states that the Minister can put a charge on an orphan site in favour of the State or a public authority nominated by the Minister. This may work to the advantage of local authorities. The recommendation for removal of this reference is a policy matter.

Uncertain

Contaminated sites is broadly defined in the Bill. An indemnity for local authorities will be difficult to define and implement. Amendments could be introduced which will enable local authorities to seek an exemption or alternatively, State Government assistance for further remediation. Alternatively, local authorities may suggest that the clause is amended by adding '*to the extent that the remediation is required because of change of use of the site or surrounding land which requires additional remediation to the site*'.

Shared responsibility

You requested advice on sharing of responsibility for remediation of contaminated sites. Clause 22 of the Bill provides that more than one person may be responsible for remediation of a site. The CEO of the Department of Environmental Protection ('DEP') makes a decision under Division 2, particularly clause 34(2)(b). In our opinion apportionment will be determined in accordance with the priorities allocated in the hierarchy of decreasing responsibility as outlined in clause 24. The owner/occupier will bear some onus on the basis that they derive benefits from the use of the land. However your attention is drawn to clause 25(3) of the Bill where a person who has caused, or contributed to, the contamination of a site or the commencement of the Bill is responsible for remediation of the site only to the extent that person caused or contributed to that contamination by an Act that was done without lawful authority. This does limit local government's responsibility for remediation to some extent. Further your attention is drawn to clause 28 in relation to insolvent bodies corporate where directors of the previously solvent polluter can be made responsible.

You request our view on the kind of mechanism that may be included in the Bill to allow for a case by case examination of contaminated sites with regard to shared responsibility. The discretion largely rests with the CEO of the DEP at present. Clause 93 of the Bill enables the CEO of the DEP to make guidelines in relation to, amongst other things, the 'assessment, management and reporting of contaminated sites'. We suggest that this clause be amended so that it includes remediation and shared responsibility for site remediation.

Orphan site provision where land is vested in local government

If the amendments suggested above in relation to clause 29 is accepted, then the definition of 'orphan site' would be amended to include those sites.

Issues raised by minutes of Ministerial Meeting of Friday 3 May 2002 ('Minutes')

We note that you have not instructed us to advise on any particular issues in relation to the Minutes. However, we have reviewed the Minutes and made some observations for your further reference.

The second sentence of the first paragraph on Exemption Certificates requires clarification. Clause 59(1)(d) of Draft Version 14 of the Bill requires the CEO to give an exemption in respect of land where, if in the CEO's opinion a person does 'not' know, or suspect, and could 'not' reasonably have known or suspected, that the land was contaminated. Further, the sentence leaves the reader with the impression that there is more than one definition of 'contaminated' in the Bill. This is not the case.

The paragraph on Ownership Appeals requires clarification. The Bill provides that any appeals in relation to the CEO's decision on remediation responsibilities are to the Minister for Environment and are convened by the Appeals Convenor in accordance with the Environmental Protection Act 1986. From our reading of the Minutes, you may be suggesting that appeals on ownership will be referred to a difference appeals forum. This needs to be clarified.

There are other areas within the Minutes that may benefit from further clarification such as the paragraphs on Landholdings Management Plan and Changing Standards. As previously noted, the Bill has been significantly amended since Draft Version 14. You may wish to consider providing us with further background and instruct us to clarify what effect this may have on local governments.

Yours sincerely

Gretta Lee
Senior Associate

Contact Rob Campbell-Watt (08) 9429 7685 rob.cambell-watt@minterellison.com
Partner responsible: Graham Castledine (08) 9429 7427
Our Reference: RCW:AGC:1111169
Your Reference WAS032/SJcminter