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# Proposed Contaminated Sites Legislation for Western Australia

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*The widely anticipated Contaminated Sites Bill 2002 is expected to be introduced into the Western Australian Parliament in the near future. This article gives the background on the requirement for new legislation, considers why local governments and other parties need to be aware of the proposed legislation, considers the scope of the Contaminated Sites Bill and provides an overview of site remediation issues.*

## New legislation?

### *Need identified*

The *Contaminated Sites Bill 2002* (CS Bill) is soon to be introduced into the Western Australian Parliament. The decision to introduce new contaminated sites legislation arose from the perceived shortfalls in current legislation as identified by legislators, policy-makers, industry and other people involved in the management of or affected by contaminated land. A public Position Paper<sup>1</sup> states that the CS Bill is designed to:

1. encourage the voluntary prevention and management of contamination; and
2. prevent innocent landowners and occupiers from being held responsible for the remediation of contaminated sites that were contaminated by former activities.

To do this the Position Paper recommended strong regulatory and enforcement procedures for inclusion in the legislation. A previous article in the *Local Government Law Journal*<sup>2</sup> provides further information on the Position Paper.

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<sup>1</sup> Western Australian Government. "Assessment and Management of Contaminated Land and Groundwater in Western Australia" (Perth, WA, May 1997).

<sup>2</sup> G McLeod "New Contaminated Land Legislation for Western Australia" (1997) 3 *Local Government Law Journal* 9.

### *Perceived inadequacies of the current legislation*

There is a threshold issue as to whether existing powers are adequate to address contaminated sites issues. Although this has been the subject of some debate, successive governments appear to have taken the view that a case is made out in this regard. This position will not therefore be examined in detail here.

New legislation will require additional Department of Environment and Water Catchment Protection (DEWCP) (formerly known as the Department of Environmental Protection (DEP)) resources for regulation and enforcement, which is a present issue under the existing regulatory and enforcement scheme.

### *Existing powers in regard to clean-up of sites*

Currently pollution abatement notices (PANs) issued pursuant to s 65 of the *Environmental Protection Act 1986* (the EP Act) or directions given under s 73 of the EP Act (s 73 Direction) and s 99X orders following conviction of an offence are the legislative mechanisms available to require and regulate remediation of a site.

Although judicially untested, PANs are limited in their application to past activities off a particular site from the wording of s 65 where it states:

"(1) If the Chief Executive Officer is satisfied that any waste is being or is likely to be discharged, or any noise, odour or electromagnetic radiation is being or is likely to be emitted, from any premises into the environment ... the Chief Executive Officer may cause to be served on the owner or the occupier, or on both the owner and the occupier, of the premises a pollution abatement notice in respect of the premises."

Section 73 Directions have similar limitations in their application to past activities on and off a particular site from the legislation:

"(1) If any waste has been or is being discharged from any premises otherwise than in accordance with a works approval licence or a requirement contained in a pollution abatement notice, or a condition of pollution is likely to arise or has arisen, an inspector or authorised person may, with the approval of the Chief Executive Officer –

(a) give such directions ..."

Section 99X provides that:

"(1) If a court convicts a person of an offence against this Act, the court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow) –

- to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence;
- to make good any resulting environmental damage; or
- to prevent the continuance or recurrence of the offence.

Other legislation such as the *Metropolitan Water Supply, Sewerage and Drainage Act 1999 By-Laws* and the *Mining Act 1978* make some provision for restoration of damage. Again, their application is limited.

The Position Paper takes the view that limited application of the current legislation heightened the need for the introduction of legislation which provided regulators with the ability to require the identification of contaminated sites and power to make those responsible for the contamination, pay for its remediation, regardless of the current occupation and ownership of the site.

The other perceived shortfalls in the regulatory regime in Western Australia relevant to

contaminated sites management are:

1. no clear rules on liability relating to the management of contaminated sites;
2. a lack of co-ordination among government agencies with no single agency having prime responsibility;
3. a lack of incentives that encourage self-initiated investigations and remediation of contaminated sites;
4. a lack of arrangements that ensure the availability and transfer of information (for example a contaminated sites register or memorials on titles); and
5. no means of ensuring available funding for the management of orphan and contaminated sites; noting that an orphan site is a site where contamination has occurred and investigation and/or remediation is required, but where no party can be identified or located to be held responsible or made to pay. In these situations the government is responsible for ensuring that necessary remedial work is undertaken.

The legislative responsibility for the assessment and management of contaminated sites rests with individual States and Territories in Australia. However ANZECC and NHMRC guidelines<sup>3</sup> state that despite this, they should do so in as consistent manner as possible.

### Who needs to be aware of contaminated sites legislation?

All landowners and occupiers, particularly industrial landowners, will benefit from understanding the CS Bill.

Those involved in the marketing, conveyancing and development of land will be most affected by new legislation. Vendors will be seeking to minimise their future liability after sale while purchasers will seek to avoid inheriting liabilities.

<sup>3</sup> Australia and New Zealand Environment and Conservation Council together with the National Health and Medical Research Council produced a guideline titled *Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites*. January 1992. referred to in the Position Paper. The other important national documents are the ANZECC *Position Paper on Financial Liability for Contaminated Site Remediation*. April 1994, favouring the polluter pays principle as a general rule, and the Commonwealth Government's National Environment Protection (Assessment of Site Contamination) Measure 1999, adopted by the DEP in a draft guideline titled *Assessment Levels for Soil, Sediment and Water*, December 2001.

Local governments receive no immunity under the CS Bill. Local governments already owe a person lodging an application for development of contaminated land a duty to take reasonable care when approving a development application and a duty to keep the economic interest of the applicant in mind, in accordance with the decision of the Federal Court in *Armidale City Council v Alex Finlayson Pty Ltd*.<sup>4</sup> The proposed new legislation will increase local government responsibility and potential liability for land they own or manage.

### Scope of the current draft

#### Definition of "contaminated"

Clause 4, a recent version of the CS Bill defines "contaminated" as:

"having a substance present in, on or under that land, in that water, or at that site, at a concentration that presents, or has the potential to present, a risk of harm to human health or any environmental value."

This definition could be applied to most land uses and not merely the obvious sites (such as "heavy industry" sites). The definition does not constrain application of the CS Bill; although it would be unlikely to be applied to environmental problems catered for under other legislation. For example, salinity problems or remediation of land that is the subject of a mining tenement, are matters unlikely to be considered by the DEWCP under the CS Bill. The CS Bill does not seek to exclude application of the EP Act 1986, water legislation and other relevant legislation in their application to contaminated sites.

#### Principles to be applied

In performance of his or her powers under cl 8 of the CS Bill the Chief Executive Officer (CEO) of the DEWCP is required to consider the following principles in environmental policy:

1. The precautionary principle;
2. The principle of inter-generational equity;
3. The principle of the conservation of biological diversity and ecological integrity;
4. Principles relating to improved valuation,

<sup>4</sup> *Armidale City Council v Alex Finlayson Pty Ltd* [1999] FCA 330 29/03/99; S Brown, "Council Sued for Contaminated Land: Case Note" (1999) 5 *Local Government Law Journal* 24.

- pricing and incentive mechanisms; and
5. The principle of waste minimisation.

Clause 8 of the CS Bill provides open-ended definition of these terms, which will no doubt give rise to much debate in particular circumstances and perhaps inevitably, clarification by the courts.

As an example, the precautionary principle<sup>5</sup> is now an accepted principle in Australian Environmental Law. It is expressly included nationally in the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and other Acts. In Western Australia the precautionary principle is included in the *Agricultural Chemicals (Western Australia) Act 1995* and the *Fish Resources Management Act 1994*, amongst other legislation.

Since its application in the *Leatch* case<sup>6</sup> in 1993, the precautionary principle is now widely accepted and requires decision-makers to positively weigh and assess environmental consequences even where these consequences are scientifically uncertain. The precautionary principle has recently been applied in the cases of *Re Ajka Pty Ltd and Australian Fisheries Management Authority*<sup>7</sup> and *Re Blank and Australian Fisheries Management Authority*.<sup>8</sup>

The CS Bill defines the precautionary principle as:

"Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, decisions should be guided by –

- (a) careful evaluation to avoid, where practicable, serious or irreversible damage to the environment; and
- (b) an assessment of the risk-weighted consequences of various options."

The precautionary principle will be of particular importance in application of the notification

<sup>5</sup> Refer to article by the Honorary Justice PL Stein, AM "Are Decision-makers too Cautious with the Precautionary Principle?" (2000) 17 *Environmental Planning Law Journal* 20, for review of the principle.

<sup>6</sup> "Leatch v Director-General of National Parks & Wildlife Service and Shoalhaven City Council" (1993) 81 *Local Government and Environmental Reports of Australia* 270.

<sup>7</sup> *Re Ajka Pty Ltd and Australian Fisheries Management Authority* (2001) 63 ALD 261.

<sup>8</sup> *Re Blank and Australian Fisheries Management Authority* (2000) 62 ALD 787.

required by the CS Bill.

### *Notification*

The CS Bill requires notification of all contamination and subsequent classification of sites. Clause 11 of the CS Bill requires that owners or occupiers, persons who have caused or contributed to contamination, and auditors have a duty to report on contaminated or suspected contaminated sites. There is a 21 day notice period that applies and a penalty for breach from cl 11(3) which states:

"Except as provided in subsection (5), a person referred to in subsection (4) must report to the CEO any site that the person –

- (a) knows is contaminated, within 21 days after the site was contaminated, or such later period as the CEO approves in writing before the expiration of that 21 days; or
- (b) suspects is contaminated, as soon as it is reasonably practicable to do so.

Penalty: \$250,000, and a daily penalty of \$50,000."

The CS Bill provides for a six-month statutory defence or moratorium period post commencement of the Act at cl 11(5):

"A person does not contravene subsection (3), even though he or she does not comply with that provision, during the period of six months after the commencement of this Act."

Following that six-month period the defences are listed under cl 11(5) of the Bill. This is a strict measure where the onus of proof is on:

"the person to prove that the person knew or believed on reasonable grounds that –

- (a) the site had already been reported to the CEO;
- (a) the contamination, or suspected contamination, was caused by a discharge of waste of which the CEO had already been notified under s 72 of the EP Act; or
- (b) the site was, or was to be, identified in a program approved by the CEO under s 12, or in a programme submitted for that approval and approval had not been refused."

The CEO in accordance with cl 15, will then classify a site as either:

1. not contaminated – unrestricted use;
2. contaminated – restricted use;
3. contaminated – remediation required; or

4. decontaminated.

There is an appeal against the classification to the Minister for the Environment. The appeal process is discussed later.

A fifth classification of "possibly contaminated – investigation required" exists as an interim measure until the CEO determines an appropriate classification.

### *Remediation*

Possibly the most contentious part of the CS Bill is that relating to remediation of contaminated sites. More than one person can be responsible for remediation, although there is no clear process for apportionment. Clause 24 identifies a hierarchy of responsibility for remediation of a site in the following order:

1. the person who caused or contributed to the contamination of the site (polluter pays principle);<sup>9</sup>
2. where the person is an owner or occupier and changes the use of the site;
3. the person is an owner of the site in accordance with the definition in the CS Bill; and
4. the person who is or was a director or related body corporate of an insolvent body corporate that would otherwise be a responsible person.

This hierarchy is subject to responsibility of the State for remediation or transfer of responsibility to another person, in accordance with cl 30 of the CS Bill.

### *Remediation issues*

Issues arising from the provisions are:

1. contamination caused prior to enactment;
2. the definition of owner within the CS Bill;
3. orphan sites; and
4. nature of the appeal process.

### *Contamination caused prior to enactment*

Clause 25(3) exempts the person causing or contributing to contamination (polluter) from responsibility for remediation of acts done with lawful authority prior to enactment. The polluter must have contravened a law in force at the time the

<sup>9</sup> Included in cl 8 of the CS Bill under the "Principles relating to improved valuation, pricing and incentive mechanisms" and defined as "those who generate pollution and waste should bear the cost containment, avoidance or abatement".

contaminating act occurred:

"A person who has caused, or contributed to, the contamination of a site before the commencement of this Act is responsible for remediation of the site only to the extent that the person caused, or contributed to, that contamination by an act that was done without lawful authority."

In accordance with cl 25(4):

"an act that was done without lawful authority", without limiting the meaning of the expression, includes an act –

- (1) that constituted an offence for which the person was convicted; or
- (2) that contravened –
  - (i) any written law in force at the time the act occurred; or
  - (ii) any contract, permit, lease, licence, standard, policy, direction, exemption, authority, approval or requirement, however described that was given or made under a written law in force at the time the act occurred,

and is prescribed for the purpose of this definition."

Clause 29(1)(b) makes the State responsible for remediation to the extent that "the person who caused, or contributed to, the contamination is not responsible for remediation of the site due to the application of s 25(3)".

Therefore the CS Bill transfers part (and potentially full) responsibility to owners or occupiers for acts done by the polluter within lawful authority prior to enactment. The owner or occupier is the person most likely to derive benefit from the site and with the most to gain from remediation, however where the current landowner or occupier is not the polluter, they may feel unfairly prejudiced if held partly or fully responsible for remediation of the site based on the previously acceptable practices of the polluter.

#### *Definition of "owner"*

The definition of "owner" has been changed since earlier drafts of the CS Bill. Owners will include management bodies within the definition of the *Land Administration Act 1997* and those persons responsible for the administration of Crown land while it is reserved, set apart, vested or dedicated. If the CS Bill is enacted, this will affect those local governments and other statutory authorities vested

with land under management orders. Liability may not be reduced by the fact that the local government or statutory authority derives no profit from use of the land upon remediation.

#### *Orphan sites*

Orphan sites are those for which the State assumes the responsibility of remediation. A fund will be established and used for this purpose. State responsibility is an attractive proposition for those owners and occupiers of sites that are already contaminated in accordance with the CS Bill definition. Minor variations in the hierarchy of responsibility in the CS Bill could vary the demands for use of the fund significantly.

#### *Appeal process*

Remediation of contaminated sites is a necessary but costly exercise. Decisions made by the DEWCP on responsibility for remediation will be challenged from time to time and will more than likely be the subject of appeals. EP Act provisions will govern appeals against decisions by the DEWCP. The EP Act provides that appeals are made to the Minister who is responsible for the DEWCP. An officer called the Appeals Convenor advises the Minister. This position is inherently constrained by the Appeals Convenor in effect being a Ministerial Officer who is not well placed to make robustly independent decisions about the DEWCP.

In this context, the remarks of the Honorary Justice Paul Stein are relevant.<sup>10</sup> Stein J stated that the first principle in relation to appeals in environmental law is that they:

"must be to a body independent of the Executive. The Executive will not, indeed cannot, conform to the common law requirements of procedural fairness or the rules of natural justice. The hearing, if there be one, is not going to be in public... There can be no right to call witnesses or to cross-examine. There can be no right to access documents. There is likely to be no written reasons provided for a decision and no right of appeal, even for error of law. Such a system... inevitably, however honestly administered, will draw fire for its secrecy and suspicion of bias and pre-determination."

<sup>10</sup> Made at the 1988 National Environmental Law Association's State Conference.

Stein J listed certain principles which he believes are essential to an appeal system. These included:

- independence of the appellate body from the Executive arm of government;
- proceedings in public;
- procedural fairness and obedience to the rules of natural justice;
- ease of access and relative informality;
- expertise of adjudicators and capability for panel hearings;
- access to documents;
- reasons for decision;
- efficiency of processes and speed of decision-making;
- appeals on questions of law; and
- enforcement mechanisms and availability of alternative dispute resolution mechanisms.<sup>11</sup>

The proposed presentation of the CS Bill to the Western Australian Parliament provides further opportunity for development of an independent review body for land and environment matters.

### Summary

The CS Bill is intended to address the perceived shortfalls in current legislation in relation to contaminated sites management. If enacted, the current draft of the CS Bill will address many of the stated objectives of the Position Paper. Landowners, occupiers and other interested parties will need to be aware of its potential effects; particularly the issues raised regarding responsibility for remediation.

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<sup>11</sup> Stein, n 5.