

**CONTAMINATED SITES BILL 2002**

*Committee*

Resumed from 19 September. The Chairman of Committees (Hon George Cash) in the Chair; Hon Tom Stephens (Minister for Local Government and Regional Development) in charge of the Bill.

**Clause 13: CEO to classify sites -**

Progress was reported after Hon Robyn McSweeney had moved the following amendment -

Page 12, after line 28 - To insert -

(c) shall consult with the owner and occupier of the site;

Hon ROBYN McSWEENEY: Hon Tom Stephens said that there was no need for this amendment because under clause 11(7) notification to an owner and occupier is required and a report will be received under the interplay of clauses 11 and 15. Clause 11(7) states -

The CEO is to ensure that each owner and occupier of a site in relation to which the CEO has received a report is informed in writing within 14 days -

That is, not consulted -

after the day on which the report was received that a report has been made under this section or that reasonable attempts have been made to do so.

Writing is a little different. I believe a property owner should be consulted when his or her site is classified. Clause 15 states -

As soon as is practicable after a site is classified, and in any event not later than 10 days after the site is classified, the CEO is to cause written notice of the classification . . .

It is too late after it has been classified. Writing to the owner is not really consulting. The idea of consulting is to talk to the owner. It is a pretty horrendous thing for somebody's site to be classified.

Hon TOM STEPHENS: The debate over the word "consultation" is one with which this Chamber is very familiar. It has been debated on a range of different pieces of legislation. There are occasions when the concept of consultation is integrated into legislation because it is an appropriate inclusion within a particular provision of a Bill. However, we are dealing with the technical identification of sites that have been contaminated. Inevitably, people with technical expertise would be consulted, including people within the Department of Health for instance, and any other people who can provide technical input. The Government does not consider it necessary to consult with the owner about whether a site has been contaminated. In our view, that would frustrate the Government's intention of the Bill to ensure that contaminated sites are identified. I responded to this issue earlier when the member seemed to be under the impression that there was no obligation to even notify the owner that a site was contaminated. I am glad the member is now clear on that point.

The Bill provides an obligation to notify the owner that a site has been classified as a contaminated site. I am sure that at the point of notification the owner of the site would express his view about the decision to identify the site as a contaminated site and discussions would take place. The Government does not intend to accept the concept that the owner has a right to be consulted as though that consultation could lead to the withdrawal of the owner's consent and on that basis the notification would not be put into effect.

The definition of consultation in statutes has been well discussed in reference to other issues. Some of us who have sat on select committees have spent weeks on the meaning of "consultation" and how it can vary from the simple act of notification of an intention to do something to the absolute consent of the person being required. We are not going down that continuum in this Bill. We have no intention of accepting the member's amendment. The Government's intention is clear. Technical experts will have input into the consultation process. The owner will be notified and will be in a position to discuss the issues. However, the owner's consent will neither be sought nor required.

Hon ROBYN McSWEENEY: I am very sorry that the Government will not accept the amendment. A person in my electorate was developing a project, which was going along fine until he found that the site was on an old gas works. Because of that, everything came to a halt. Consultation must take place face to face. It is not good enough to consult only in writing when classifying people's property. Once a property is classified as a contaminated site, it no longer has any value. It is important that consultation take place with the owner. The minister has had his say and I have had my say and we both know where we stand.

Hon JIM SCOTT: I note Hon Robyn McSweeney's intention and I have no problem with it. However, the problem with the amendment is that it goes beyond the technical issues about which the minister spoke. The

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owner of the site does not take part in the classification process. I believe people should be notified when their property will be classified. However, a lot of sites have been abandoned. Nobody owns those sites any more; they are so-called orphan sites. Some of those sites have been traded and swapped for many years. The people who caused the pollution might not even be alive. This amendment would make it very difficult to operate the Act. Therefore, we cannot support it.

**Amendment put and negatived.**

**Clause put and passed.**

**Clauses 14 to 16 put and passed.**

**Clause 17: Database and records to be adjusted -**

Hon ROBIN CHAPPLE: I want to seek some clarification from the minister about material that may be moved off a contaminated site. I come back to my key issue, which is tailings dams. Over time xanthate plumes and a number of other plumes, including cyanide and mercury, move through an aquifer well outside the defined contaminated area. Will the minister clarify that once a site is recorded, those boundaries could or should be adjusted to reflect the contamination over time, and how might that occur?

Hon TOM STEPHENS: Yes. As the information becomes available it will be processed and dealt with by the department.

Hon ROBIN CHAPPLE: Does that mean an area that is gazetted or deemed to be a contaminated site would be increased to reflect the spread of contamination?

Hon TOM STEPHENS: The intent of the Bill is that everything that is affected by contamination will be classified as having been contaminated.

**Clause put and passed.**

**Clauses 18 to 20 put and passed.**

**Clause 21: Public access to records -**

Hon JIM SCOTT: I recall getting an assurance from the minister's advisers that public interest will take precedence over commercial confidentiality with regard to the provision of access when it is considered that records infringe on commercial confidentiality.

Hon TOM STEPHENS: The intent is to make information available. That will still be subject to the normal legal constraints. The interplay of other legal and statutory rights would have to be assessed in each case.

Hon JIM SCOTT: I put on the record that we feel there should be a very firm commitment that the public interest will always take precedence over commercial confidentiality, particularly when it relates to the possibility that people's health will be impaired.

**Clause put and passed.**

**Clauses 22 and 23 put and passed.**

**Clause 24: Who is responsible for remediation - hierarchy of responsibility -**

Hon JIM SCOTT: I have a query about a contaminated site being sold, as is allowed under this legislation. I would like to put this on the public record. The new owner will know that he is responsible for the clean-up of that particular site. As Hon Robin Chapple said, a lot of contamination moves off site. If somebody provides for a buyer to take over a site, and the buyer knows that he must clean up the contamination on that site, who will have responsibility for the off-site pollution?

Hon TOM STEPHENS: It will depend upon the terms of the transfer of the site. If the transfer covered all contamination, either on or off site, the new owner would be responsible for its clean-up. Presumably the transfer price would reflect this. Clearly, it will be important for new owners to conduct thorough due diligence studies to know precisely what they are taking on. If off-site contamination is not specifically referred to in the transfer agreement, it would likely remain the responsibility of the original landowner. Provided he was able to take responsibility, no liability will fall to the innocent owner of the adjacent land. Decisions about who is responsible for remediation of the site will be made by the Contaminated Sites Committee. The committee will take all relevant facts and circumstances into account when making its decision.

**Clause put and passed.**

**Clause 25: Person who caused, or contributed to, contamination - responsibility for remediation -**

Hon JIM SCOTT: I move -

Page 20, line 15 - To insert before "A" -

Subject to subsection (3),

My proposed amendments to this clause deal with the situation in which contamination occurred before appropriate legislation was in place to deal with it. I have a concern with the way the Bill is written in that a person may be able to say that no legislation preventing his causing that pollution was in place and therefore he was not responsible for its clean-up. My foreshadowed amendment to insert new subclause (4) goes to the crux of the matter. It states in part -

It is the responsibility of a person to whom subsection (3) applies to show that the act causing or contributing to the contamination was done with lawful authority.

Instead of being able to say that no laws were in place, the landowner would have to show that he was allowed by some lawful authority to cause that contamination. The proposed amendment continues -

Evidence to show that it was done without lawful authority may be introduced in rebuttal.

This will ensure that people who would have known full well that the release of certain materials into the ground water would cause damage to the environment, people's health or whatever can be found responsible for the clean-up of that site, rather than its being paid for by the public purse; that is, the taxpayer. This is quite an important change. Many sites in the State would fall into that category. I have heard that if this is not changed, the cost to the State of cleaning up those sites would be in the order of \$500 million.

Hon TOM STEPHENS: The Government is opposed to the amendment moved by Hon Jim Scott. The reason for our opposition is the suggestion that instead of responsibility falling upon the shoulders of a person who has caused contamination in breach of a statute, it would be necessary for that person to prove that he had lawful authority; that is, to have been authorised formally. The effect of the amendment would be to reverse the processes that we consider to be reasonable. We are of the view that this Bill reflects what our party said it would do about contaminated sites. In government, we have consulted widely with the community and industry. We have never for a minute suggested we would go to this extent; nor do we think it is an extent to which we should go. We do not believe that people who have caused contamination but who have not broken the law in the causing of that contamination should be caught by this Bill. However, the passage of this legislation will result in some liabilities falling onto those who have breached a statute historically and caused contamination. The amendment proposed by Hon Jim Scott goes that extra step that we as a Government have no intention of taking.

Hon ROBYN MCSWEENEY: We do not agree with the Greens' amendment, and we agree with the Government. Clause 25 is written very clearly. It must have been written by a Liberal Government! It makes sense. It is very easy to follow and we do not agree with the amendment.

Hon JIM SCOTT: It is quite extraordinary that the two largest parties in the State, representatives of which have been in this place for many years, are so free and easy with taxpayers' money that they want taxpayers to pay for pollution caused by a careless individual on his land without authority. All my life I have known that if I pour onto soil arsenic or other heavy metals that could cause environmental damage and affect people's health, I am doing something that is irresponsible and wrong. To do that with large quantities of such substances over time is something that is done in full knowledge that damage will occur. The Government and the Opposition are saying that they are happy for taxpayers to pick up the \$500 million bill to clean up other people's pollution because, at the time the pollution was created, there was no law stopping somebody from polluting - it was expected that people would be responsible without needing a law to enforce it. However, this is clearly an area that will cause significant monetary costs to this State because the State does not have bottomless pockets to reach into to pay for contaminated issues. I ask the minister: is there \$500 million in the budget to pay for the clean-up of these sites that will escape a payment unless this amendment is passed? Of course the money is not there. People who live alongside these sites will continue to be made ill, the environment will continue to be degraded and the river systems will continue to be polluted because there will not be the money to pay for the clean-up. It is irresponsible of the Government and the Opposition not to support this clause. If somebody caused pollution and knew at the time they did it and did not have the authority to do so, they should pay for the clean-up.

Amendment put and a division taken with the following result -

**Extract from *Hansard***  
[COUNCIL - Wednesday, 22 October 2003]  
p12386c-12392a

Hon Robyn McSweeney; Mr Tom Stephens; Hon Jim Scott; Hon Robin Chapple; Chairman; Hon John Fischer

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Ayes (4)

Hon Dee Margetts	Hon Jim Scott	Hon Christine Sharp	Hon Robin Chapple ( <i>Teller</i> )
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Noes (22)

Hon Alan Cadby	Hon Sue Ellery	Hon Barry House	Hon Tom Stephens
Hon George Cash	Hon Paddy Embry	Hon Robyn McSweeney	Hon Derrick Tomlinson
Hon Kim Chance	Hon Adele Farina	Hon Norman Moore	Hon Ken Travers
Hon Murray Criddle	Hon John Fischer	Hon Simon O'Brien	Hon Ed Dermer ( <i>Teller</i> )
Hon Bruce Donaldson	Hon Peter Foss	Hon Louise Pratt	
Hon Kate Doust	Hon Ray Halligan	Hon Ljiljana Ravlich	

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Pair

Hon Giz Watson

Hon Graham Giffard

**Amendment thus negated.**

Hon JIM SCOTT: The following amendments on the supplementary notice paper are consequential on the first amendment, so I do not intend to move them.

The CHAIRMAN: The member has indicated that he will not move amendments 13/25 and 14/25.

**Clause put and passed.**

**Clause 26 put and passed.**

**Clause 27: Land owners - responsibility for remediation -**

Hon TOM STEPHENS: I move -

Page 22, line 5 - To insert after "suspected," -

or had reasonable grounds to know or suspect,

Page 22, line 16 - To insert after "suspect," -

and had no reasonable grounds to know or suspect,

Parliamentary counsel has advised that these words should be inserted to assist the Contaminated Sites Committee when making a decision on responsibility for remediation. The amendments allow the committee to consider the information available to the purchaser at the time of the transaction rather than trying to determine the purchaser's state of mind.

Hon JIM SCOTT: It was suggested that amendments 3/27 and 4/27 could be moved together. However, their wording is different -

Hon Tom Stephens: They essentially have the same reason and explanation.

Hon JIM SCOTT: Okay, I was just checking that that was not a mistake.

**Amendments put and passed.**

Hon TOM STEPHENS: I move -

Page 22, after line 20 - To insert -

or

(c) is an owner of a site and was an owner of that site at the time the contamination was caused, or contributed to,

Page 22, after line 21 - To insert -

(c) a person is not responsible under section 25 or 26; or

Page 22, line 22 - To delete "in accordance with" and insert instead "under".

Page 22, line 30 - To delete "(d)".

These amendments have the same intent. It is the advice of parliamentary counsel that these amendments need to be made to ensure that clause 27 achieves its intended effect. In essence, the intent of the clause is to make the current landowner responsible for remediation when the polluter cannot be made to pay. However, innocent

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landowners are still able to submit disclosure statements and obtain exemption certificates. Unfortunately, the current wording unambiguously achieves this intent and the amendment has the effect of correcting this shortcoming.

**Amendments put and passed.**

**Clause, as amended, put and passed.**

**Clauses 28 and 29 put and passed.**

**Clause 30: Responsibility for remediation may be transferred -**

Hon JIM SCOTT: I just want to get clarification of the assessment of the clean-up cost. Who will pay for that assessment under clause 30(4)(a)(i) and (ii), at the bottom of page 27 and the top of page 28?

Hon TOM STEPHENS: The person seeking to transfer the responsibility for remediation will be responsible for the assessment.

**Clause put and passed.**

**Clause 31 put and passed.**

**Clause 32: Orphan sites -**

Hon ROBYN McSWEENEY: Will the minister give me an example of an orphan site that we currently have in Western Australia?

Hon TOM STEPHENS: I will try. Morangup Road in Toodyay is an example which comes to the officer's mind and which I am able to share with the honourable member. Perhaps if any others come to mind during the passage of this legislation or afterwards, we will share them with the member. Some others are coming to mind now. For instance, Albany gasworks is a possibility. Is there a reason for the member's question?

Hon ROBYN McSWEENEY: The reason for my asking is that I am not too familiar with what an orphan site is. The minister has given me one example, but I still do not understand why that example would be an orphan site, or why that road would be an orphan site. Why is it classified as an orphan site?

Hon TOM STEPHENS: Apparently, no-one is left to pick up responsibility for properties along that road. I do not have the background on that. Perhaps I could take the time to get a briefing on that and share it with the member. Simply put, orphan sites refer to sites for which there is no-one who can take responsibility for the contamination on the site. In my case, and in the case of Hon Norman Moore, we deal with towns like Sandstone. Hon Norman Moore raised an issue with me about Sandstone last week. He did not ask me to work on the issue, but I decided -

Hon Norman Moore: I was going to ask a hard question. I should not have told you.

Hon TOM STEPHENS: Yes. Instead, I showed my shared enthusiasm for these parts of the world, and I immediately started to make inquiries. I have found that blocks of land have been relinquished. I have no idea whether any of them had any contamination on them. In some cases it would appear that they have been returned to the Crown; in other cases there is no clear indication of with whom the title currently lies. If there were contamination on any of those sites, I hope they would be covered by this provision and become orphan sites. I do not believe Sandstone has massive amounts of contamination. However, some of the blocks may have been contaminated by previous owners, and they have been left as orphan sites. From recent discussions, I know that some of the blocks are not orphans. They have owners. If they have picked up contamination, those owners will be looking after the sites. However, in those situations in which they are not being looked after by the owners, the provision in the Bill that describes them as orphan sites will apply.

Hon JIM SCOTT: I have long thought that "orphan site" is not a very good term. Some examples exist quite close to Parliament House. For example, there was a clean-up of a whole lot of sites at Minim Cove. Over time, companies had changed hands and changed name. However, no laws such as this were in place to prevent the handing over of land to other people. Of course, those sites ended up with other people or the State being required to pay for part of the clean-up. These sites should be called disowned or abandoned sites rather than orphan sites, because the term "orphan site" implies the death of a parent, when quite often the parents are still around and should be paying for the clean-up - not the taxpayer.

Hon ROBYN McSWEENEY: The minister mentioned a local government area such as Sandstone. If an orphan site falls within a local government area, there will be no hassle. The site belongs to the State, and it will not interfere with local government, will it; local government will not have the responsibility for cleaning it up? I wondered about that.

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Hon TOM STEPHENS: The orphan site provision will pick up a situation in which no-one else is responsible for the site, and the site has reverted to the State. I do not have this as advice, but I believe I am correct in saying that if a site is owned by a council and therefore is not orphaned, it will revert to the person in whom the responsibility is vested. In some cases that will be the council. However, unless there is a clear legal connection between the site and the council, the normal circumstances will apply; that is, if a site has been orphaned and no-one else is involved - a local authority, a federal authority or individual people or companies - it is an orphan site and the State will accept responsibility for it.

Hon JIM SCOTT: One of the problems that will arise with these sorts of definitions relates to sites like the tip in South Fremantle. It is likely that the council will be lumbered with responsibility for the clean-up of that site. I believe that at one stage it was a regional tip, and people from the area dumped material on that site. I believe that oil companies dumped oil waste in that area, as did the State Engineering Works. At the end of the day, it appears that the local community will have to pay for the clean-up of that site. Under these sorts of definitions and under the legislation, what will happen in an instance such as that?

Hon TOM STEPHENS: In difficult cases such as that, the work of the Contaminated Sites Committee would be focused on the issues, the contributors to the contamination and working out equitable solutions.

Hon JOHN FISCHER: I have a brief question for the minister. I want to make this issue clear in my mind, because it appears from the comments that have been made that the site in Roebourne involving asbestos just south of the pipeline - I am sure the minister is aware of the area -

Hon Tom Stephens: It has been cleaned up.

Hon JOHN FISCHER: I know that it has been cleaned up. In that situation, is that a true orphan site?

Hon TOM STEPHENS: I do not know enough about the title. The Government accepted responsibility for that site. As Minister for the Pilbara, I never inquired about trying to go back. I cannot remember the name of the company involved. Hon Norman Moore might be able to help me. It was the company that transported the material between Wittenoom, Roebourne and Point Samson. The father of a former adviser to the Labor Party had a connection with that business. They are all dead. The kid is dead, the father is dead - the whole lot of them are dead. They all died from the awful diseases that came out of this awful business. There would not be an asset left. It was a partnership and there were two names in the title of the business. The name of the business has momentarily escaped me. I am sure that nobody is left to accept responsibility for cleaning up Roebourne. In those circumstances the Government got on and did it. It cost \$1 million and, in that case, was finally done. I am not sure whether it was truly an orphan site, but it was certainly a neglected child. The Government got on and cleaned up that site. Hon Jim Scott made the point that the Government could perhaps have pursued somebody somewhere.

Hon John Fischer: I doubt it, as you say.

Hon TOM STEPHENS: I doubt it. They are all dead from the dreadful stuff that they were carting. Their kids are dead and their wives are dead. The whole lot of them were caught up in the hideous disease caused by that contamination. Regrettably, the residents of the community have had their own awful experiences with that as well.

**Clause put and passed.**

**Clause 33: Contaminated Sites Committee -**

Hon JIM SCOTT: I refer to subclause (3), which states -

A panel of names from which a committee is to be selected is to -

- (a) contain the names of at least one legal practitioner and one auditor; and
- (b) be chosen and submitted to the Minister in accordance with the regulations.

If we are also to be concerned about community health, why was a person with expertise in clinical toxicology, for instance, not also included in that provision?

Hon TOM STEPHENS: I am sure that the minister will be left with the opportunity to pick people with the sorts of expertise described by Hon Jim Scott from among the available community members who have relevant skills and expertise. It is not considered to be appropriate to be so specific as to provide such a narrow definition within the Bill. We are familiar with these sorts of discussions. We would like to leave with the minister the responsibility for getting an appropriate balance on a committee such as this.

**Clause put and passed.**

**Clauses 34 to 54 put and passed.**

**Clause 55: State may recover cost in some circumstances -**

Hon ROBYN McSWEENEY: Subclause (2)(b) states -

within 6 years of the site becoming an orphan site the person referred to in section 29(1)(d) is, in the opinion of the committee, identified, found or can be made to assume responsibility for remediation,

I take it that this provision would not be retrospective in any way.

Hon TOM STEPHENS: I thank the member for her question.. This provision is apparently provided in the Bill so that within six years of the State taking action on any remediation, it will have the opportunity to track down anyone who has legal responsibility for that contamination and who should have an opportunity to relieve the taxpayers of the cost of remediation.

**Clause put and passed.**

**Clauses 56 to 83 put and passed.**

**Clause 84: Time for bringing prosecutions -**

Hon TOM STEPHENS: I move -

Page 74, line 16 - To delete “1951” and insert instead “1902”.

This amendment corrects a drafting error in the title of the Justices Act.

**Amendment put and passed.**

Hon TOM STEPHENS: I ask the Chairman whether such an amendment would normally be necessary. Would it not just simply be a Clerks’ correction?

The CHAIRMAN: The problem is that there is a Justices Act 1902. In clause 84(2), the Government was trying to rely on the Justices Act of 1951, which does not exist. The answer is that this is relevant and the minister moved an amendment to address that mistake.

Hon Tom Stephens: Would not the Clerks normally just fix that?

The CHAIRMAN: Not to that extent, no.

**Clause, as amended, put and passed.**

**Clauses 85 to 87 put and passed.**

**Clause 88: Inspectors, authorised officers and analysts -**

Hon ROBYN McSWEENEY: Subclause (1) states -

An inspector appointed under section 88 of the EP Act may also be appointed under that section for the purposes of this Act.

I am thinking about country towns. Who would the Environmental Protection Authority appoint as an inspector or authorised officer? What is an analyst? Who would those people be?

Hon TOM STEPHENS: They would sometimes be employees of the department and sometimes those employed as environmental health officers with local government. It would vary depending upon the circumstances.

**Clause put and passed.**

**Clauses 89 to 99 put and passed.**

**New division 1 -**

Hon TOM STEPHENS: I move -

Page 58, after line 2 - To insert the following new Division -

**Division 1 - Interpretation**

**61. Interpretation**

In this Part, unless the contrary intention appears -

“land” includes -

- (a) underground water under that land; and
- (b) surface water on that land.

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I have moved this amendment because parliamentary counsel has advised that it is necessary to make it clear that certificates of contamination audit can be issued for surface water and ground water as well as for soil.

**New division put and passed.**

**Schedules 1 to 3 put and passed.**

**Title put and passed.**

*Report*

Bill reported, with amendments, and the report adopted.