

Explanatory notes for Contaminated Sites Bill

Purpose of the Act

The Act is to enable and facilitate the identification of contaminated sites so they may be recorded on a free public database. This will ensure that those sites that pose a threat to human health or the environment are cleaned up. It facilitates the management and remediation of contaminated sites, and informs the land transaction process so no one should acquire a contaminated site not knowing it to be contaminated.

Part 1 Preliminary

This Part of the Act deals with definitions, exemptions and other preliminary matters.

c.1 The short title of the Act.

c.2 Once the Act is passed by Parliament and assented to by the Governor it is proclaimed by a notice, published in the Government Gazette, that specifies the date on which it comes into effect.

c.3(1) This section defines most of the terms used in this Act. Many of the terms take their meaning from later sections of this Act, which describe them in more detail, or from the *Environmental Protection Act 1986* (EP Act)(see below).

A Contaminated Sites Committee is established under clause 33 to make decisions about responsibility for remediation and resolve appeals against decisions of the CEO.

Two specially significant terms, '**contaminated**' and '**owner**' are defined in sections 4 and 5.

Note that a contaminated site can consist of part, one or several lots of land and may involve several owners and occupiers.

(2) Other terms in the Act have the same meaning as in the EP Act.

c.4 Land is not "**contaminated**" simply because a substance is present above a particular level. The presence of the substance at above background concentrations must pose a risk to human health or the environment for the land to be classified as contaminated. The substance may be foreign or naturally occurring.

Under c.4(2) regulations can be made to provide that land, water or a site is not contaminated under certain circumstances. It is proposed to provide, by regulation, that land, water or a site is not contaminated where:

(a) the land is affected by salinity; or

(b) the substance is present because of the correct application of a fertiliser, herbicide or pesticide.

c.5 Because of its significance in determining liability for remediating a contaminated site, the term "**owner**" is clearly defined. Normally, for private land, it is the freehold owner.

For Crown land vested in a management body such as a local government, the vestee is defined to be the owner, and takes on the responsibilities and privileges in the Act that that status implies. In some instances it may be unfair for the vestee to bear those responsibilities, and in that event the vestee may ask the Contaminated Sites Committee to make a different determination of responsibility (clause 27(3)).

c.6 A reference in the Act to an owner, occupier or mortgagee of a site includes all the people who are owners, occupiers or mortgagees of part of the site. Note that a site can include part of a lot, all of a lot, or all or part of several lots, each of which may have one or more owners, occupiers or mortgages

c.7 The State of Western Australia is bound to comply with this Act.

c.8 This clause lists the principles of environmental policy which the CEO must consider in fulfilling his or her functions under the Act. The first four principles are those agreed to by all States and the Commonwealth in the InterGovernmental Agreement on the Environment, and incorporated in the *National Environmental Protection Council (WA) Act 1996*. The fifth principle is the principle of waste minimisation. The Legislative Assembly recently approved the insertion of these principles into the EP Act.

c.9 This Act complements other laws and a person can be charged under another Act for an offence punishable under this Act (but not both Acts (section 11 of the *Sentencing Act 1995*)). Existing rights, any person already has in common law to prevent, control or abate pollution, or to obtain damages, are unaffected by this Act.

c.10(1)-(2) With the Governor's approval the Minister may issue an order that the provisions of this Act do not apply, or apply in modified form, in a specified area or in specified circumstances. The order may be subject to conditions.

(3)-(7) The Minister is to publish in the Government Gazette the reasons for issuing the order. The order may override provisions in the Act, and continues until revoked or until the conditions are breached. The order can only be revoked with the Governor's approval and after 14 days notice published in the Gazette.

(8) Contravening an order or condition is an offence (max penalty \$250,000). [Note that the penalties listed in this Act apply to individuals. Under the Sentencing Act the maximum penalty for a body corporate is five times that for an individual.]

- (9)** An order must be laid before the Houses of Parliament for 9 sitting days and is subject to possible disallowance.
- (10)** Regulations made under this Act can include provisions enabling exemptions.
- (11)** Definition.

Part 2 Reporting, classifying and recording sites

Division 1 Reporting of sites

c.11 Explains who may or must report a known or suspected contaminated site to the CEO, and how this is to be done.

(1) Anyone may report a site they know or suspect to be contaminated. This provision is very wide to encourage reporting. There are other provisions to protect the system from abuse, including (9).

(2) A report must be in writing and have enough information to enable it to be assessed, classified and any notices issued by the DEP. This does not preclude people from ringing up with information, but that would not amount to a “report”. It would not fulfill the obligation of those who must report sites under (4) and on receiving phone information the CEO would not be obliged to treat it as a report under (6). The DEP has prepared a guideline under c.96 titled “Reporting of known or suspected contaminated sites” to clarify reporting requirements.

(3), (4) Under (4) the following people have an obligation to report within 21 days a site they know or suspect is contaminated, and under (3) they commit an offence (max penalty \$250,000) if they fail to report the site:

- the owner or occupier;
- a person who knows or suspects they may have caused or contributed to the contamination; and
- an auditor hired to undertake an audit of the site for the purposes of compliance with the Act (Part 7 has more about auditors).

(5) If the failure to report was because of a reasonable belief that the site had already been reported to the DEP it is not an offence. This includes a situation where the discharge that caused the contamination was reported to the CEO under section 72 of the EP Act. There is also no offence if the failure to report related to a site identified in a programme approved by the CEO under section 12.

(6) Everyone has 6 months’ grace from the date the Act comes into effect to report sites before the failure to report within 21 days becomes an offence.

(7) Within 14 days of receiving a report the CEO must notify each owner and occupier that the report has been made...

(8) ...except the owner or occupier who made the report.

(9) It is an offence to report a site maliciously and without reasonable grounds to know or suspect contamination (max penalty \$250,000).

c.12 There are some companies and government agencies with very large landholdings, for whom it would be impossible to investigate and report all

known sites within 21 days. Under this clause, they may submit a programme for the CEO's approval, within 6 months of the commencement of the Act, specifying the landholdings to which the programme applies and outlining how and by when the landholdings will be investigated and reported. A person dealing with sites covered by an approved programme in accordance with the programme does not commit an offence if those sites are not reported within 21 days (after the 6 month grace period), but failure to comply with the programme is an offence (maximum penalty \$250,000). The CEO may amend the programme (eg. Change the sequence in which sites are to be indentified) but cannot make the programme more onerous without the person's agreement.

Division 2 Classification of sites

c.13(1) The CEO may classify a site at any time. In some instances explained elsewhere in the Act the CEO must classify a site.

(2) The CEO may classify a site more than once and the most recent classification is the one which prevails and will be listed on the Public Register of Confirmed Contamination Sites and any Certificates of Contamination Audit.

(3) Schedule 1 sets out in column 1 the classifications the CEO must use and in column 2 the criteria which must be satisfied for the CEO to determine the classification.

(4) The CEO must take into account any guidelines made under section 96 and other relevant information, such as nationally adopted methodologies, standards and assessment criteria.

(5) The CEO may seek comments from those with a direct interest in the classification of the site. If the site presents a risk to human health, the CEO must consult the CEO of the Health Department and reach agreement over the classification.

(6) Provides a resolution process if the CEO and the CEO Health cannot agree.

c.14 After receiving a report on a site the CEO is to assess it and classify the site as per the classifications listed in Schedule 1.

c.15(1) The CEO is obliged to notify of the classification given to a site within 10 days of classifying the site. Notification of classification must be given to each land owner, but the CEO can exercise judgment over those occupiers, public authorities or other people who require notification. The person who reported the site is notified if the report was not substantiated. If remediation is required, all those the CEO considers may be responsible for remediation are notified.

(2) Notification can be in the form of a notice under Part 4 (cleanup notice, hazard abatement notice or investigation notice) or a Certificate of Contamination Audit (subject to (3)) or in any other written form.

- (3) Notification of classification by issuing of a Certificate of Contamination Audit is only allowed where the Certificate has been requested under section 61, and does not apply to the classifications “*report not substantiated*” and “*possibly contaminated – investigation required*”.
- (4) Where a site is classified as “*contaminated-restricted use*” or “*remediated for restricted use*” the notification must specify the restrictions if any on the use of the site.
- (5) A notice must identify the site, say that it has been classified, what the classification is, the grounds for classification and details of any appeal rights, and information on disclosure of information to potential purchasers of the site. (see Division 3)
- c.16** Once a site has been classified as “*possibly contaminated – investigation required*” its classification can only change following investigation or remediation. It cannot, for example, be ‘un-registered’ or revert to “*report unsubstantiated*”.
- c.17** Within 10 days of classifying a site, the contaminated sites database must be updated to reflect the classification.

Division 3 Appeals against classification

- c.18(1)** A person who reports a site can appeal against it being classified “*report not substantiated*”.
- (2), (3) An owner or occupier or person responsible for remediation may appeal against a site’s classification.
- (4) Appeals are dealt with under Part 8.

Division 4 Contaminated sites database

- c.19** The CEO is to maintain a database of sites classified as “*contaminated – remediation required*”, “*contaminated – restricted use*” or “*remediated for restricted use*”. This database is to be publicly available, free of charge.
- c.20(1)** Records of sites classified as *possibly contaminated-investigation required not contaminated-unrestricted use* and *decontaminated* are also to be kept. Subsection (1) lists the records to be kept. This includes information about sites where a suspicion of contamination has been reported, but this has not yet been confirmed or denied by investigation.
- (2),(3) These records may be in electronic or some other form, and are to be retained for a period determined by the CEO..
- c.21** The CEO is to ensure the information is readily accessible. Information on confirmed contaminated sites is freely available under s19. Information about other sites is available on application, accompanied by the appropriate

fee. The applicant is provided with a summary of the records held with respect to the site.

Part 3 Remediation of contaminated sites

Division 1 Person responsible for remediation

Responsibility for remediation

At present, if a person owns a contaminated site, that person is responsible for cleaning it up – if someone's health was affected by the contamination the land owner would most likely be responsible. This seems unfair. It ought to be the person who caused the contamination who is responsible for clean-up. The Bill makes changes along those lines.

In general, for contamination caused after the Act comes into effect, the person who caused the contamination is responsible for remediation. For contamination caused before the Act comes into effect, by an act which was unlawful at the time, again the person who caused it is responsible. It is only where the past contamination was caused by a lawful act that (with some exceptions) the present land owner retains responsibility.

Some of the exceptions are:

- If responsibility for remediation has been duly transferred under section 30, the party to whom responsibility has been transferred is responsible to the extent of the transfer.
- If contamination was caused by an action or direction of the State, the State is responsible to that extent.
- If the CEO issued a clearance for a site which was in fact still contaminated because of an error or failing by the CEO or his staff (but not because of the limitations of the approved technique or the errors of others) the State is responsible for the remediation of the contamination which the error failed to identify.
- A person does not become responsible for remediation where the person caused the contamination as a result of reasonably responding to an emergency situation to protect human life or property.

Table 1 outlines the Bill's hierarchy of responsibility for remediation in more detail.

Table 1 - A summary of the Bill's hierarchy of responsibility for remediation

These people are responsible to the extent that these circumstances apply.

If, and to the extent that,...

<i>Circumstances</i>	<i>Clause of the Bill</i>	<i>Responsible</i>
the remediation is required by the present owner changing use of the site after the commencement of the Act	26(1)	the owner
the present owner became the owner, knowing or suspecting the contamination, before the commencement of the Act	27(1)	the owner
the contamination was caused/contributed by an action or direction of the State (other than reasonable emergency response)	29(1)(a)	the State
the State failed in it's identification/classification actions	29(1)(b)	the State
responsibility has been transferred to a third party	30(1)(a)	the transferee
responsibility has been transferred to the State	30(1)(b)	the State
responsibility has been transferred from a mortgagee in possession to the State	31(1)	the State
responsibility has been transferred to an owner/occupier refusing the 'responsible person' access	54	the owner/ occupier

Otherwise, if the contamination was not the result of reasonable emergency response and was...

caused/contributed after the commencement of the Act	25(1)	the causer
caused/contributed before the commencement of the Act...		
without lawful authority	25(3)	the causer
with lawful authority, and ...		
the person responsible under 25, 26 can be found, and is...		
solvent	25, 26	that person
insolvent , but another person is responsible under 28	28(2)	that person
no-one is found, solvent, or responsible under 28	27(2)	the owner
the owner is a body managing vested Crown land , and is not responsible because of "relevant circumstances" under 27(3)	29(1)(f)	the State

And if, despite all of these,...

no other person is responsible under 24 (all of the above)	29(1)(c)	the State
the responsible person under 24 cannot be found (orphan site)	29(1)(d)	the State
the responsible person under 24 is insolvent	29(1)(e)	the State

(Note "under 24" includes the provisions of 25, 26, 27 and 28 under which some one else may be responsible if the first person responsible cannot be found or is insolvent.)

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- c.22** Where this Act mentions a person responsible for remediation, it includes and means all of the people responsible for remediation.
- c.23** The only sites that are required to be remediated under this Act are those sites classified as “*contaminated – remediation required*”. (Sites classified as “*contaminated-restricted use*” or “*remediated for restricted use*” still have contamination present, but need not be further remediated while the restrictions on use are observed.)
- c.24(1)** A person is responsible for the remediation of a site requiring remediation if that person caused or contributed to the contamination (s25), owns the land and changes the use of the land (s26) or owns the land that is part of the site (s27). (Each of these cases is subject to some qualification – see below.)
- (2)** This subsection lists the exceptions to subsection (1). If the company that would otherwise be responsible is insolvent, the directors of that company, or related companies may be responsible (s28). Otherwise, The responsibilities in (1) apply unless the State is responsible under section 29 or responsibility has been transferred under section 30 or 54. S30(1)(a) provides for transfer of responsibility for remediation (with written agreement from the party the responsibility is being transferred to), and s54 relates to circumstances where the person responsible is denied access to land to remediate and, as a result, the owner or occupier (who denied the access) may become the responsible person.
- c.25(1), (2)** A person is responsible for remediation to the extent that the person caused or contributed to the contamination after the commencement of this Act, whether or not it was caused with lawful authority. This places an onus on all people to ensure that they do not cause contamination.
- (3)** Where a person caused or contributed to contamination before the commencement of this act, the person is not responsible for remediation unless the act (or omission – see definition of “act”) which caused or contributed to the contamination was done without lawful authority.
- (4)** Contamination the result of reasonable emergency response is excluded.
- (5)** This subsection spells out what is meant by “without lawful authority”. It includes an act that contravened a written law in force at the time, whether or not there was a conviction. The effect of this provision does not mean that the person is convicted of any offence. It just means the person is responsible for remediating the site to the extent that they caused the contamination.
- (6)** Section 26 and 27 may override this section (25).
- c.26** To the extent that the requirement for remediation is caused by a change of land use by a subsequent land owner after the commencement of this Act, the person who caused or contributed to the contamination is not responsible for that remediation. Rather, the owner of the land, who changed the land

use, is responsible for any remediation required as a result of the land use change (e.g. industrial land to residential land).

c.27(1) A land owner who acquired land before the commencement of the Act, knowing or suspecting it to be contaminated is responsible for remediation of the contamination rather than the State or the person who caused it.

(2) If the person responsible for remediation cannot be identified or found or is insolvent, then the owners of the site share responsibility for remediation unless and to the extent that, they are exempted by having received exemption certificates under s64.

(3)-(5) Under the definition of “owner”, local governments and other management bodies are regarded as the “owner” of Crown land vested in them. In some circumstances this could be an unfair burden on the management body, which would not be able to sell the land, as other owners could, to recoup the cost of remediation. These subclauses enable the Contaminated Sites Committee to determine that such an “owner” is not responsible for remediation if the circumstances so warrant. In such a case the State is responsible for any remediation required. The Committee’s decision is made under Division 3. There is no appeal except on a point of law, and those appeals are considered by the Supreme Court.

(6) An owner who has been given an exemption certificate under section 64 is not responsible under this section.

c.28 (1)-(2) If a company responsible for remediation becomes insolvent, or if, in the Committee’s opinion, the remediation would make it insolvent, the Committee may decide that responsibility for the clean up will fall on each director of the company and, each company related to the company immediately before it became responsible for the remediation. The combined responsibilities so assigned must not exceed the responsibility of the initial company.

(3) The Committee can only reassign responsibility to a person (or company) in this way where the Committee considers the insolvency or lack of solvency of the initial company was deliberately caused to avoid responsibility for remediation, and that the person knew about the action taken to make the company insolvent, and was in a position to influence that action.

(4) Where action to cause the insolvency was undertaken by a “person” that is a company, to determine intent or state of knowledge of the company the Committee need only establish that a director or employee of the company was involved in the action and had that intent or knowledge and relevant state of mind.

(5) The Committee’s decision is made under Division 3. There is no appeal except on a point of law, and those appeals are considered by the Supreme Court.

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- (6) Defines “**director**”, “**engage in conduct**” and “**state of mind**”. Note that action to cause the insolvency includes the failure or refusal to take action.
- c.29(1)** Explains the circumstances in which the State is responsible for remediation. The State is responsible if, and to the extent that:
- (a) action by a State agency caused the contamination, other than by reasonable emergency response (Local government is excluded, despite the fact that local governments often issue directions under delegated power from the State, because they are required and expected to use discretion in exercising those delegations and to take responsibility for how the discretion is exercised. Where the local government is merely transmitting the direction of the State without the exercise of discretion, the provision would apply and the State would be responsible.);
 - (b) the CEO erroneously issued a clearance for land which was, in fact, contaminated (this does not include situations where clearance was issued due to a limitation of the best practice techniques or an error by a party other than the CEO and his staff)
 - (c) the Committee has decided that no other person is responsible;
 - (d) the responsible person cannot be identified or found;
 - (e) the responsible person is insolvent and there is no other person to whom responsibility can be assigned;
 - (f) the Contaminated Sites Committee determines under 27(3) that a management body is not responsible for remediation of Crown land; or
 - (g) responsibility is formally transferred to the State.
- (2) The Committee’s decision is made under Division 3. There is no appeal except on a point of law, and those appeals are considered by the Supreme Court.
- c.29(3),(4)** Requires the CEO to investigate and remediate a site, for which the State is responsible, assisted by whoever the CEO considers necessary. Sections 87 and 88 of the EP Act relate to the appointment of authorised persons and inspectors.
- c.30(1), (2)** Responsibility for remediation can be transferred to another person, with that person’s written agreement and the CEO’s written approval, or to the State, with the written approval of the Minister.
- (3) Terms of the transfer can include transfer of the land or placing a charge on the land (having a financial claim with the land as security).
- (4) The person responsible for remediation must provide a statement and proof that the person to whom responsibility for remediation is to be transferred has sufficient finances available to complete the remediation and a Certificate of Contamination Audit, or request for the Certificate.
- (5) Further information may be requested regarding the financial capacity of the person to whom responsibility is being transferred if necessary.

- (6) Making a false statement under ss(4) or (5) is an offence (max penalty \$250,000).
- (7) Where, under ss(3)(b) the charge is for the benefit of the State, s32(3) provides that that charge ranks equally with charges under any other Act, has priority over all other encumbrances and remains on the land whenever it is transferred or disposed.
- (8) Once an agreement on the transfer of responsibility has been reached and approved, responsibility for remediation is transferred to the extent of the agreement or the approval of the Minister.
- c.31(1),(2)** If a mortgagee, by taking possession of a property, becomes the person responsible for remediation, the mortgagee has 45 days in which to write to the CEO requesting that part or all of the responsibility be transferred to the State.
- (3),(4) If such a transfer occurs, the terms and conditions of the transfer have to be agreed by the Minister. The terms and conditions may include transferring all or part of the land to the State, and may include some charge being put on the land to secure the estimated costs for the remediation, with the charge going to the State or to a public authority nominated by the Minister.
- c.32** This section describes what is meant by the term "**orphan site**", and how the State will deal with them.
- (1) An orphan site is a site which has been determined to be contaminated and needing remediation, and for which the State has assumed responsibility because:
- (a) no one else is responsible (s29(1)(c)), or the responsible person cannot be found or made to assume responsibility (s29(1)(d)); or
 - (b) the responsible person is insolvent (s29(1)(e)), and responsibility has not been transferred to anybody else.
- (2) The Minister may place a charge on the land to secure the payment of the costs of investigation and remediation.
- (3) That charge ranks equally with charges under any other Act, has priority over all other encumbrances, and remains on the land whenever it is transferred or disposed.
- (4), (5) On the recommendation of the Minister for the Environment an orphan site may be compulsorily acquired using the provisions of Parts 9 and 10 of the Land Administration Act 1997.

Division 2 Contaminated Sites Committee

- c.33** The Minister is to establish a committee of 3-5 members with relevant expertise or experience. At least one is to be a legal practitioner and one an accredited contaminated sites auditor.

The functions of the Committee are spelled out in various parts of the Bill and include the determination of responsibility for remediation and the resolution of some appeals.

- c.34** The Committee must consult the CEO and the parties directly involved, when making a decision. Anyone else may be consulted, and the Committee has flexibility about its procedures and the conduct of its inquiries.

Division 3 Decisions as to responsibility for remediation

- c.35** Under this Division the Committee decides who is responsible for remediation of a contaminated site. This section lists the sections of the Act under which these decisions can be made.

- c.36** The Committee may, and if requested under 36(2)(a) must, make a decision about who is responsible for remediation and to what extent. Regulations will prescribe the form of the request and the “interested persons” who may request the Committee to make a decision.

- c.37** Before deciding on the responsibility for remediation, the Committee must give the person notice:

- a) specifying the nature and extent of the contamination;
- b) specifying the act, if any, that the Committee believes the person did without lawful authority;
- c) specifying the change of use of the land, if any
- d) giving any other relevant information;
- e) inviting the person to make a submission giving reasons why the person is not responsible for the contamination; and
- f) explaining that the Committee is obliged to take any submission into account and that there are provisions for appeal against the Committee’s decision on a point of law.

- c.38** The Committee’s decision is to be in accordance with the hierarchy of responsibility detailed in Division 1. The Committee is to take into account any submissions received under 37 and may take account of other matters it considers relevant.

- c.39(1)** Once the Committee makes a decision on assignment of responsibility for remediation of a site, it is to write to all the people responsible for the remediation to notify them of the decision, the details of who is responsible and to what extent, and their appeal rights. Copies of this information can be provided to interested parties.

- (2)** Lists what a notice under (1) must contain.

- (3)** This notice has effect according to the terms of the notice, not just its general effect.

- c.40** Anyone who receives a notice of the Committee's decision and is aggrieved may appeal the decision on a question of law to the Supreme Court in accordance with s76. There is no appeal other than on a question of law.

Part 4 Investigation, clean up, and hazard abatement notices**Division 1 General**

c.41 Defines “**notice**” as used in this Part of the Act – it includes an investigation notice (s49), a clean up notice (s50) and a hazard abatement notice (s51). The term “notice” is used to cover all three as many of the provisions apply to all three types of notice.

c.42 A notice must be given in writing by the CEO, this section explains to whom it may be given. A notice can only be issued to a person responsible for remediation of the site (or who, in the CEO’s opinion would be responsible) or an owner or occupier of land. Part 3 Division 1 clarifies who is a “**person responsible**”. Any notice should advise the recipient of the avenues of appeal against its contents. Where a notice is issued to some of the owners or occupiers of a site, copies of the notice must be issued to all other owners and occupiers of the site within 10 days. More than one notice may be issued relating to a site, on more than one person.

Under (5), the CEO may seek comments from those with a direct interest in the classification of the site. If the site presents a risk to human health, the CEO must consult the CEO of the Health Department and reach agreement over the classification. Subclause (6) provides a resolution process if the CEO and the CEO Health cannot agree.

c.43 A notice must be complied with. To fail to comply is an offence (max penalty \$500,000). Where there is a conviction for non-compliance, or where the CEO believes a hazard abatement notice has not been complied with within the specified time the CEO can take action to ensure the notice is complied with. The CEO must use best endeavours to notify the person of his intention to take action, inviting them to show cause why the action should not be taken, but he is not required to delay taking the action while awaiting the person’s response. The CEO’s powers are outlined in s53.

c.44 The notice is to require the recipient to hire an auditor (accredited under s68) to report on compliance with the notice. The requirements for the auditor’s report are specified in regulations or the notice.

c.45 The CEO may cancel a notice, and once cancelled it is of no effect. Where a notice is cancelled, written notification is to be provided to the parties on whom the notice was issued, and all other parties who received a copy of the notice within 10 days of cancellation of the notice.

c.46 Power to give a notice includes power to amend it or issue an additional notice.

Division 2 Person on whom notice is binding

- c.47** Subject to cancellation (s45) or possible suspension while an appeal is resolved (s78(3)), a notice is binding on the person to whom it is given. Where land the subject of a notice changes hands the notice can become binding on the new owner under s48. If the person on whom the notice is binding, is refused entry to land by the occupier or owner s54 provides that the notice can become binding on the occupier or owner who refused access.
- c.48(1)** While a memorial is registered under s58 in respect of land the subject of a notice, the notice becomes binding on each subsequent owner of the land.
- (2), (3)** Where a person becomes the owner of land by being a mortgagee in possession, the notice doesn't become binding for 45 days, and only then if, in the meantime, the responsibility has not been transferred to the State under s31.

Division 3 Types of notices

- c.49(1), (2)** When the CEO becomes aware that a site may be contaminated (e.g. by a report under s11) and has undertaken sufficient inquiries so that the CEO has reasonable grounds to suspect that the site is contaminated and not being appropriately investigated, monitored or assessed, the CEO may issue an **investigation notice** which sets out the action to be taken to investigate, monitor and assess the site.
- (3), (4)** An investigation notice is to specify to whom it is given, why and in respect of what land. It must also describe what investigation, monitoring and assessment must be undertaken and what the reporting requirements are. These provisions are general so, to provide guidance, ss(4) lists some of the things that might be required under an investigation notice. Note that (b) provides for the preparation of a management plan, enabling the responsible person to design a remediation plan which suits the person's circumstances, while meeting the CEO's requirements.
- (5), (6) & (7)** The notice can specify that actions are to be taken to the requirements of some other person specified in the notice. In order to fulfill the requirements of the notice, a person on whom a notice is served may need to gain permission to access land that is owned or occupied by another person. If the permission is not forthcoming, the person is to advise the CEO, who has powers under s53 to transfer responsibility for remediation of the site or to remediate the site and recover costs.
- c.50** The CEO may issue a **clean up notice**, in respect of a site classified as "*contaminated – remediation required*", where the appropriate remediation action is not being taken. The notice specifies the action to be taken – ss(4) lists some of the things that might be required under a clean up notice. Note that (a) provides for the preparation and (b) for the implementation of a management plan. The intent is to encourage the person responsible to take an active role in planning the remediation.

As with an investigation notice, in order to fulfill the requirements of a clean-up notice, a person on whom the notice is binding may need to gain permission to enter land that is owned or occupied by other parties (5). Matters specified under the notice can be to the requirements of some other person, as specified in the notice (4).

- c.51** Where the CEO is of the opinion that there is an immediate and serious risk of harm to human health or the environment the CEO must issue a **hazard abatement notice**, setting out the immediate actions required to control or reduce the risk.

Division 4 Appeals from notices

- c.52(1)** A person on whom an investigation notice or a clean up notice is binding may appeal against any requirement of the notice.
- (2)(a)** Where the CEO has decided under s42(1) to issue a notice, the recipient may appeal that decision, unless the recipient is responsible for the remediation of the site (see (4) below).
- (2)(b)** Where an occupier or owner has refused access to a person on whom a notice was binding to do the work specified in the notice, and the CEO decides under s54(1)(d)(ii) that the notice should become binding on the occupier or owner, the occupier or owner can appeal against the CEO's decision.
- (3)** Explains the qualifications relating to (2) (a) and (b).
- (4)** On a point of law, a person can still appeal to the Supreme Court under s40 the Committee's decision that that person is the person responsible for remediation.
- (5)** Part 8 explains how these appeals are to be dealt with.

Part 5 Provisions relating to remediation and notices**Division 1 Powers of CEO in respect of remediation, investigation and ensuring compliance**

- c.53(1)** The CEO has the power to enter land to take action to ensure the relevant notice is complied with or to carry out the works specified in the notice.
- (2)** Before doing so, the CEO must give 14 days notice to the occupier, or the owner if there is no occupier.
- (3)** Notice is not required if the State is responsible because the owner cannot be found or the land has been taken.
- (4), (5)** If there is an urgent need to remediate the site to prevent a risk of harm to human health or the environment, the Minister can waive the requirement for 14 days but the CEO is still to give as much notice as is reasonably practicable.
- (6)** Authorised persons or inspectors under the EP Act can assist the CEO if required.
- c.54(1), (2)** If someone has been made responsible for remediation of a contaminated site or for complying with a notice under Part 4, and the occupier or owner refuses to cooperate, then the occupier or owner commits an offence (max penalty \$500,000) and the Committee can make the occupier or owner responsible for complying with the notice or doing the remediation work.
- (3)** If the owner or occupier who refused access (or otherwise prevented compliance with the notice) takes action to remediate the site or comply with the notice, the first person is still responsible and the owner or occupier can recover costs.
- (4)** The Committee can seek additional information on the financial capacity of the owner or occupier to do the remediation before making them responsible.
- (5)** The information requested must be provided.
- (6)** The occupier or owner can appeal against the decision to make him/her responsible.
- (7),(8)** The Committee's decision is made under Division 3. There is no appeal except on a point of law, and those appeals are considered by the Supreme Court. **(9)** lists required recipients of the notice.

Part 5

Division 2 Recovery of costs in some circumstances

c.55(1) Where someone, issued under Part 3 with a clean up notice, hazard abatement notice or investigation notice, has failed to complete the requirements of the notice, and the CEO has consequently done the work, under the provisions of s53(1)(a), the CEO can recover the costs of completing the requirements of the notice via legal proceedings.

(2)-(6) If a site becomes an orphan site because the responsible person cannot be identified or found, the responsible person will be liable for any costs incurred by the state if that person is identified or found within 6 years of the site becoming an orphan site. The Committee may issue a notice to the person advising of the liability, and the costs can be recovered in court. The person may appeal against the notice on a question of law.

c.56(1) If a person who is not the person responsible for remediation incurs costs investigating or remediating a site, the reasonable costs may be recovered from the person responsible.

(2) To guide the court in determining the reasonable costs of investigation and remediation, this subsection provides that the CEO's statement about those matters is to be accepted by the court unless the parties present proof to the contrary.

(3) Where the State is responsible for the remediation of sites it is expected that the State will undertake the investigation and remediation of these sites, in which case the provisions of this section would not apply. This investigation and remediation would be undertaken in order of priority of the sites within the resources available and a simple application of the cost recovery provision could mean that sites could "jump the queue". Where the State is taking responsibility because the person who would otherwise be responsible cannot be found this would not be appropriate. However, where the State caused, or failed to identify the contamination, this subsection ensures that the same cost recovery provisions apply.

(4) Action to recover costs must be commenced within six years.

c.57 The person responsible for the remediation of a contaminated site is liable to both the owner and occupier of the land for any losses they suffer as a result of the remediation.

Division 3 Memorials

This Division sets out some of the specific provisions relating to memorials on the land. The purpose of these memorials is to inform people buying or selling land, and in making decisions about how to use it, of its

contamination status so contaminated land is not unknowingly purchased or inappropriately developed.

c.58 A memorial is to be registered against the land title if the land is classified as contaminated or if a notice has been given under Part 4 of this Act.

(1) The CEO is required to lodge a memorial on the land title if the land

- is part of a site classified as *contaminated - remediation required*;
- is part of a site classified as *contaminated - restricted use*;
- is part of a site classified as *remediated for restricted use*;
- is part of a site classified as *possibly contaminated – investigation required*;
- is the subject of a notice under Part 4; or
- is land on which a charge has been placed as part of a transfer of responsibility for remediation.

(2) The Registrar registers the memorial against the relevant land.

(3) The CEO is to inform the Registrar when the land has been decontaminated, when a notice is cancelled and when the charge on the land is no longer required. The Registrar then registers the withdrawal of the memorial.

(4) The memorial must specify the details of why it has been placed, and is to be in a form approved by the Registrar.

(5) The CEO can specify to the Registrar that contaminated land requiring remediation is not to be transferred unless the CEO consents to the transfer.

(6) Once a memorial has been registered in respect of land classified as *contaminated – remediation required*, *contaminated – restricted use*, *remediated for restricted use*, or *possibly contaminated – investigation required*, subdivision or development approvals must not be given without seeking and taking into account the advice of the CEO as to the suitability of the land for the proposed subdivision or development.

(7) A memorial about a notice retains its priority over other mortgages and charges even though the notice has been amended under s46.

(8) A memorial continues to be in effect until withdrawn under (3).

(9) Terms defined.

c.59 As soon as a memorial is lodged or withdrawn, the CEO must write to the owners and all the relevant authorities or agencies to inform them.

Division 4 Contaminated Sites Management Fund

This Division sets up an operating fund to provide for the State's responsibilities under this Act for the investigation and remediation of orphan sites and other contaminated sites for which the State is responsible through an exemption certificate issued under s64.

- c.60(1)-(3)** The money for the fund comes from periodic appropriations, the sale of orphan sites, fees received, costs recovered and charges on land which are recovered. The money is to be spent on the investigation and remediation of sites for which the State is responsible or where the CEO has taken action because the responsible person has failed to do so, under s50. The trust fund is to be called the "Contaminated Sites Management Fund".
- (4)-(6)** The Minister is to administer the Fund, using the services of the Department of Environmental Protection, in accordance with the provisions of the Financial Administration and Audit Act 1985.

Part 6 Certificates of contamination audit, exemption certificates and disclosure statements

Division 1 Certificate of contamination audit

- c.61(1)** The owner or occupier of the land, the person responsible for the remediation, and the person on whom an investigation notice for the land is binding may request the CEO to give them a certificate of contamination audit.
- (2) If a request for a certificate of contamination audit is made by someone other than the owner of the land, then a copy of the request is to be given to the owner by the person making the request within 14 days of the request being made.
- (3) A request for a certificate of contamination audit is to contain the relevant required information, as listed in this sub-section and be accompanied by the prescribed fee.
- (4) If the request for a certificate of contamination audit does not comply with this section, the CEO may decline to proceed with the request. For example, the information must be complete, the owner of the land has to be informed about the request, and the fee must be paid. The CEO must notify in writing the person requesting the certificate that he has declined to deal with the request and the reasons for declining to deal with the request.
- c.62(1)** In response to the request, the CEO may give the certificate of contamination audit, as requested, classify the site as *'possibly contaminated – investigation required'*, or serve a Part 4 notice on someone requiring certain work to be undertaken.
- (2) The CEO is to give a certificate of contamination audit when satisfied on reasonable grounds that all contamination has been identified, in accordance with relevant guidelines and using accepted methods and standards.
- (3) Specifies the form and content of a certificate of contamination audit.
- (4) If a certificate of contamination audit is given, a copy is to be given to each of the owners of the land and, at the CEO's discretion, to any occupiers of the land.
- (5) The CEO can amend a certificate of contamination audit to correct minor clerical errors.
- (6) A new certificate of contamination audit supercedes any previous certificates given.

Division 2 Disclosure regarding contamination, and exemption certificates.

This Division of the Act describes disclosure statements made to the Committee and exemption certificates given by the Committee.

c.63(1) The owner of land may, within 2 years of commencement of this Act, choose to disclose to the Committee that the land is contaminated.

(2) If a person, within the 2 year period, gives the Committee notice of an intention to submit a disclosure statement, the person has a further 12 months in which to submit the statement making the maximum period for submitting a statement three years from the commencement of the Act.

Where a person is operating under a programme for the reporting of sites (approved by the CEO under c.12) the “2 years plus 12 months” time limit does not apply and a disclosure statement can be made at any time before the programme is completed.

(3) If the Committee wants more information, it can request the owner to provide it.

(4) The Committee has 45 days to issue the owner with an exemption certificate, to refuse to issue the exemption certificate, or to advise the applicant that the disclosure statement is not in accordance with this section.

c.64(1) Once the owner has given the Committee the disclosure statement and all the required information, the Committee must give an exemption certificate if the Committee believes that the land is contaminated, was contaminated at the time that the owner acquired the land but that the owner didn't know of the contamination, and wasn't responsible for causing the contamination or failing to prevent it.

(2) The owner is not responsible for remediation of the site to the extent provided by the exemption certificate.

(3) Where an exemption certificate is issued, it does not exempt the owner from any responsibilities under this Act other than the responsibilities specified in the certificate.

c.65(1) The Committee can cancel or amend an exemption certificate, where the disclosure statement contained false or misleading information or failed to disclose relevant material, and as a result the certificate should not have been given or contains erroneous information.

(2) The Committee must give the holder notice of intention to cancel or amend the exemption certificate, and invite representations to the contrary within a specified period of at least 21 days.

(3), (4) The Committee can proceed to cancel or amend the exemption certificate as soon as the holder has advised there will be no representation, the period has

expired without having received a representation, or, having received a representation, once the Committee has considered the representation. Once cancelled the exemption certificate is of no effect.

- c.66** The submitter of a disclosure statement may appeal to the Supreme Court against the Committee's decision to refuse an exemption certificate, or the extent to which it provides an exemption, or to cancel or amend an exemption certificate, but only on a point of law. Appeals are dealt with under s76.
- c.67** An owner of contaminated land must, 14 days before finalising the relevant transaction, disclose to the potential new owner(s), mortgagee(s) or lessee(s) written details of the contamination including a copy of any certificate of contamination audit that may have been issued for the land. It is an offence to fail to disclose to the potential new owner, mortgagee or lessee that the land is contaminated (max penalty \$125,000). The affected new owner, mortgagee or lessee can also take civil action against the owner for the failure to disclose as a breach of statutory duty.

Part 7 Contaminated sites auditors**Division 1 Accreditation**

- c.68** The CEO may accredit people as contaminated sites auditors. Procedures for accreditation are to be spelled out in regulations.
- c.69 (1)** The CEO will give each contaminated sites auditor an authority of accreditation.
- (2)** The CEO may give an auditor the full suite of powers allowed under this Act for an auditor, or may restrict the powers as the CEO sees fit. For example, these might be powers of entry, conferred under a notice, or powers conferred under regulations (see Schedule 3, Part 2).
- (3)** It is an offence (maximum penalty \$125,000) for an auditor to purport to be taking action under this Act or the Environmental Protection Act if he does not have those powers conferred on him by the CEO through the certificate of accreditation.
- c.70** There are various offences associated with providing false or misleading information, falsely obtaining or attempting to obtain accreditation as an auditor, falsely representing oneself as an auditor, forging or fraudulently altering a certificate, or allowing one's certificate of accreditation to be used by someone else (max penalty \$125,000).
- c.71** The Crown, the Minister and the CEO are indemnified for any losses or injuries arising out of the accreditation process.

Division 2 Mandatory auditor's reports

- c.72** For a mandatory auditor's report to be acceptable, it must be accompanied by signed statements from;
- a) the person who commissioned the report, saying that all relevant information has been provided to the auditor and the information is all true; and,
 - b) the auditor, saying that the report is accurate and to the auditor's best knowledge contains all relevant information and all the contained information is complete and correct.
- c.73(1)** Anyone who provides false or misleading information to an auditor for a mandatory report, or who commissions such a report and fails to report all relevant information commits an offence (max penalty \$250,000).
- (2)** An auditor who, in a mandatory audit report, knowingly provides false or misleading information or fails to report all relevant information also commits an offence (max penalty \$250,000).

- c.74** Under this Part of the Act a person is legally compelled to provide information when required to do so - even if the provision of that information might incriminate the person supplying the information. For example, an owner who caused contamination by the commission of an offence can be required to provide information about the contamination, so it can be properly identified and dealt with, even though the provision of the information could lead to a conviction for the offence.
- c.75** Any information in a mandatory auditor's report, or in any other documentation supplied to the CEO with that report may be used for the purposes of this Act, including use in evidence in a prosecution.

Part 8 Appeals

Division 1 – Appeals from decisions of the Committee

c.76, 77 A party aggrieved by a decision of the Committee about **the responsibility for remediation** (s40), **cost recovery by the State** (s55(6)) or **an exemption certificate** (s66) has 21 days (or longer if the Supreme Court so grants) to appeal to the Supreme Court on a question of law. The Appeal must comply with the rules of the Supreme Court, and can only address a question of law. (Sections 40, 55 and 66 spell out the people to whom these appeal rights apply.)

Division 2 – Other appeals

c.78 (1) A person who wishes to appeal against the CEO's decision about **classification of a site** (s18) or a **notice** (s52) must do so by setting out the details, in writing, to the Contaminated Sites Committee. (Sections 18 and 52 spell out the people to whom these appeal rights apply.)

(2) The person has 21 days from the time they receive the notice or certificate to lodge the appeal, or a longer time as specified in the notice or certificate.

(3) While the appeal is being determined, a classification, decision, certificate or notice continues to have effect, but an investigation or clean-up notice is suspended.

c.79 When an appeal is received, the Committee must ask the CEO (and may ask the Environmental Protection Authority) to report on the appeal. The Committee may also ask the CEO to consult the appellant and other appropriate people to see if the point at issue can be resolved. An appeal against the CEO's decision on responsibility for remediation must be dealt with by an appeals committee. It is proposed to appoint a standing committee for this purpose and to give it the tenure and flexibility to act as a tribunal where appropriate.

c.80 The CEO, the Authority or the appeals committee must report if requested.

c.81 This section explains how the Committee is to reach a decision on the appeal. The Committee may affirm the CEO's decision, vary it or set it aside. The decision of the Committee is final.

c.82 The CEO has to implement any decision of the Committee as soon as is practicable and publish the details of the decision.

Part 9 Enforcement

This Part sets out the way it is intended to enforce the Contaminated Sites Act.

c.83 Proceedings for offences are to be taken by the CEO or someone authorised by the CEO. If a complaint is made in the name of a person, that person is deemed to have made the complaint. (On a previous occasion, a case was dismissed because the genuine signature of the Minister, who initiated the prosecution, could not be easily recognised as a representation of the name of that Minister, and the Minister was unavailable to attend court to confirm the signature.)

c.84 If someone is to be charged with an offence, the complaint document has to be served within 2 years of the offence being committed or 2 years of the offence coming to the attention of the initiator of proceedings. In the first case the date of the offence must be specified, and if specified it is deemed to be correct unless proved to the contrary. (Under s51 of the Justices Act 1902, without this provision, the time-limit would be one year from the date of the offence.)

c.85 In prosecutions for offences under this Act, some things can be taken by the Court to be proven, unless the defence can prove otherwise.

c.86 In some cases, a daily penalty may apply to offences. This provision explains when the daily penalty applies from.

c.87 It is an offence to attempt to commit an offence under this Act or to help someone else to commit the offence, and the maximum penalty is just as severe as for the original offence.

c.88 Inspectors appointed under the EP Act can be appointed for the purposes of this Act, in which case they have additional powers of entry and sampling to determine compliance with notices and responsibility for remediation.

Authorised persons and analysts appointed under the EP Act can also be appointed for the purposes of this Act.

c.89 In imposing a penalty on a person convicted of an offence under this Act the court has access to a range of additional court orders provided in the EP Act. These include forfeiting equipment used in the commission of an offence, making good environmental damage caused by the offence, ordering the offender to pay for damaged caused or any monetary benefits gained by committing the offence.

Part 10 General

- c.90** Under sections 18 and 20, respectively, of the EP Act the Minister and the CEO have general powers to delegate their functions under that Act. This provision enables those power to be used to delegate their functions under this Act.
- c.91** Several other provisions of the EP Act apply to this Act. Section 115 of the EP Act relates to the power of the court to award prosecution costs, section 117 to proof of documents, 118 to director's liability and 120 is a secrecy provision.
- c.92(1)** If the CEO believes that underground water within an area may be contaminated, the CEO may write to the owners or occupiers of neighbouring properties within the area requiring them to provide information about wells or use of underground water on their land.
- (2)** It is an offence not to provide this information to the CEO within the required time (max penalty \$50,000).
- c.93** Giving false or misleading information is an offence (max penalty \$125,000).
- c.94** This provision protects from victimisation people who provide information for the purposes of this Act.
- c.95(1)** This provision protects the identity of a person who makes a report of a suspected or known contaminated site.
- (2)** This subsection lists the people who have a duty of confidentiality.
- (3)** Lists the things people with a duty of confidentiality must not reveal. If they do reveal these things they commit an offence (max penalty \$125,000).
- c.96(1),(2)** The CEO from time to time may put out and update publicly-available guidelines concerning contaminated sites.
- (3)** As is the normal convention, if an inconsistency occurs between a guideline and a regulation, the regulation prevails.
- (4)** A notice advising of the making or amendment of guidelines is to be published in the Gazette.
- c.97** The Governor, on the recommendation of the Minister may make regulations prescribing the details for the administration of the Act. Schedule 2 lists some of the things about which regulations may be made. Section 123(3) of the EP Act is a general provision about making regulations.

- c.98** The Act must be reviewed after five years of operation to determine its effectiveness, and the Minister is to report to Parliament on the results of the review.
- c.99** Amendments to other Acts are required to implement this Contaminated Sites Act. The amendments are detailed in Schedule 3.

Schedule 1 - Classification of sites

This Schedule lists the seven classifications for contaminated sites and the criteria applying to them.

Schedule 2 - Regulations

This Schedule lists some of the things about which regulations may be made.

Part 1 General

This Part lists regulations relating to disclosure statements, fees, the responsibility for remediation and access to the database and records.

Part 2 Auditors, audits

This Part lists regulations relating to auditors and audits.

Schedule 3 - Consequential provisions

This Schedule lists the consequential amendments to other Acts.

- Item.1(1)** Amendments to the *Environmental Protection Act 1986*.
- (2) Definitions of “**contaminated sites auditor**” and “**contaminated**” inserted – as defined in this Act.
- (3) Adds to the EPA’s powers as part of its assessment of a proposal the power to require an auditor’s report on the proposal.
- (4) Allows the EPA to make information from the auditor’s report public.
- (5), (6) Similar to (3), (4), but for the EPA’s assessment of a Town Planning Scheme or amendment.
- (7) Gives an inspector the power of entry onto land in respect of which a clean-up notice, inspection notice or hazard abatement notice has been issued, for purposes including determining whether the notice has been complied with.
- (8) The inspector’s more constrained powers of entry into a private dwelling house are extended to include where the inspector reasonably believes there is contamination.

- (9) The inspector can require information where waste has been or is being discharged onto land (to investigate whether contamination may have been caused).

Item.2 Under s10(5) of the *Land Administration Act 1997* the proceeds of the sale of lands sold under that Act must be paid into the Consolidated Fund. This is inconsistent with section 58 of this Act which empowers the Treasurer to decide that they be paid into the Contaminated Sites Fund. This amendment resolves the inconsistency retaining the Treasurer's discretion.

Under s159 of the LA Act the Minister responsible for the administration of the *Land Administration Act 1997* may delegate powers under that Act to other Ministers. This change ensures that this applies to the delegation of powers relating to compulsory acquisition of interests in land and compensation to the Minister responsible for this Act, who may sub-delegate to the CEO.

Item.3 Complements s32(3)(e) of this Act to ensure that where a charge has been placed on land under s32, it cannot be taken off under the provisions of the *Transfer of Lands Act 1893*.