

Contaminated Sites Amendment Bill 2005

Explanatory Memorandum

Introduction

Advice from the State Solicitor's Office to the Department of Environment has confirmed that there is a discrepancy between the intention of section 27 of the *Contaminated Sites Act 2003*, regarding land owners' responsibility for remediation, and its actual effect.

It was intended that, where contamination had migrated from a contaminated site (the "source site") to affect other land or groundwater (the "affected site") that the person responsible for remediating the source site should, in the first instance, also be responsible for remediating the affected site. Section 27, as currently drafted, does not achieve this.

The *Contaminated Sites Amendment Bill 2005* rectifies this discrepancy.

- c.1. Short title**
A formal clause titling the Bill.
- c.2. Commencement**
This amending Act is to come into operation on the same date as the *Contaminated Sites Act 2003*, the principal Act that it amends.
- c.3. The Act amended**
Specifies that the amendments refer to the *Contaminated Sites Act 2003* unless otherwise specified.
- c.4. Section 3 amended**
Inserts definitions of "**source site**" and "**affected site**". Under these definitions, if contamination or a substance migrates from one site to another and causes or contributes to contamination at the second site:

 - the site from which the contamination or substance originated is a "**source site**" (whether or not that site is itself contaminated); and
 - the site to which the contamination or substance has migrated and caused or contributed to contamination, is an "**affected site**".

Hierarchy of responsibility for remediation of contamination

A key feature of the *Contaminated Sites Act 2003* is Part 3, Division 1 which spells out a hierarchy of responsibility for the remediation of contamination.

Without the Act, responsibility generally fell to the owner of land to clean up any contamination, whether or not that person caused, or even knew about the contamination.

The Act draws a line in the sand, providing that for contamination caused after the Act comes into force, the person who causes the contamination is generally responsible for cleaning it up – the "polluter pays" principle.

Contaminated Sites Amendment Bill 2005
Explanatory Memorandum

For contamination caused before the Act comes into force, and contaminated land purchased before the Act comes into force, the situation is more complicated. There is a general principle that legislation should not retrospectively make something an offence. That would mean that people could be convicted for actions that were quite legal at the time they were committed.

The Act provides that, where a person caused contamination before the Act comes into force, by an action that was unlawful at the time, then the person is responsible for remediating the contamination.

Likewise, someone who bought land before the Act comes into effect, knowing it to be contaminated, has a position in the hierarchy of responsibility above an innocent, unknowing landowner.

The hierarchy also considers situations where people induce a need for remediation by changing the way land is used, and those in which the Government caused or contributed to the contamination. The Act establishes a Contaminated Sites Committee to help resolve questions about who is responsible for remediating contamination.

c.5. Section 24 amended

Consequential upon proposed amendments to section 27, below, under which the owner of a source site can be responsible for the remediation of an affected site.

c.6. Section 27 amended

(1) A minor amendment to s27(2), to improve the clarity of the subsection.

(2) Inserts new subsections (2a) and (2b).

Under s27(1) where a person became an owner of a contaminated site before the commencement of the Act and, at that time knew or suspected (or had grounds to know or suspect) that particular contamination was present, that owner is responsible for remediation of that contamination, not the person who caused the contamination, and not the State. The reason for this is that if the person knew of the contamination when they bought the property, the purchase price likely took this into account, and the principle of *caveat emptor* (let the buyer beware) should apply. Such a person could be called a “knowing owner”.

Under subsection (2)(a) a person who bought land before the Act commenced, not knowing or suspecting it to be contaminated (an “unknowing owner”) is responsible for remediating the contamination to the extent that the person who caused the contamination (section 25) or changed the land use so that the remediation was required (section 26) is not responsible or cannot be found. Where there is a plume of contaminated groundwater extending from a contaminated site and affecting adjacent land, this provision could have lead to a person owning the adjacent affected

Contaminated Sites Amendment Bill 2005
Explanatory Memorandum

land being responsible for remediating the contamination on their property.

(2a) Deals with the circumstance where a person is responsible for the remediation of a contaminated site, and the contamination or a substance from that site (the source site) has migrated so that other land (the affected site) is contaminated. Under this subsection, the person responsible for remediating the source site is also responsible for remediating the affected site, to the extent that

- contamination at the affected site was caused by contamination or a substance migrating from the source site; and
- no-one else is responsible (or can be made to assume responsibility) under section 25 (causing or contributing to the contamination) or 26 (changing the land use so as to require remediation).

(2b) This provision makes it absolutely clear that the owner of an affected site is not responsible for remediation of contamination that has migrated from another (source) site. If the affected site was also contaminated in its own right, the owner may, to that extent bear responsibility for that contamination, but not for the contamination that had migrated from the source site.

c.6(3), (4) Consequential amendments upon the insertion of (2a) and (2b).

c.7. **Section 28 amended**
Consequential amendments upon the changes to section 27.

c.8. **Section 35 amended**
The opportunity has been taken to correct a minor drafting error. Under s36(2) the Contaminated Sites Committee (a) must make a decision on responsibility for remediation if requested to do so by an interested person, and (b) can choose to make such a decision on its own initiative. Section 35, which defines the term “decision as to responsibility for remediation”, listing where in the Act these decisions are taken, refers to s36(2)(a) but not (b). The amended reference to s36(2) (i.e. including both (a) and (b)) corrects this error.

c.9. **Section 64 amended**
Section 64 provides that within the first two years of the operation of the Act, a person who owned land before the Act commenced, and still owns it can submit a disclosure statement. Under section 65, if the committee is satisfied that the land is contaminated, the person did not cause or contribute to the contamination or fail to prevent it and, when buying the land, did not know of the contamination, the committee is to give the person an exemption

Contaminated Sites Amendment Bill 2005
Explanatory Memorandum

certificate, exempting the person from responsibility for remediating the contamination.

This change to section 64 extends the scope of the disclosure statement so that if the disclosure statement relates to a source site it can also cover contamination at any associated affected sites.

c.10. Section 65 amended

Consequential amendments are made to 65(1) as a result of changes to sections 27 and 64.

c.10(cont'd). Section 65 amended

Subsections 65(2) and (3) are deleted and redrafted as new (2), (3) and (4) for greater clarity.

A new subsection (5) is inserted to enable the **transfer** of an exemption certificate, with the approval of the committee. Without this, the holder of an exemption certificate could probably not sell his land as any purchaser, potentially, could be held to be responsible for remediation. As elsewhere in the Act, the committee is to consider the relevant circumstances and any other matters prescribed in the regulations.

c.11. Section 77 amended

Consistent with the approach elsewhere in the Act, there is no appeal against the committee's decision on whether or not to allow the transfer of an exemption certificate. As far as possible, decisions of the committee are final to curtail legal wrangling and help ensure that money is spent, instead, on cleaning up contamination.

c.12. Schedule 3 amended

Schedule 3 of the CS Act makes consequential amendments to several related Acts, including the Environmental Protection Act.

Since the Parliament passed the CS Act, the *Environmental Protection Amendment Act 2003* has been proclaimed, making amendments to the EP Act. Some section numbers and wording in the EP Act have changed, with the result that some of the CS Act consequential amendments are no longer possible. Clause 12 makes changes to Schedule 3 that have been recommended by Parliamentary Counsel to make it consistent with the amended EP Act. Subclause (4) clarifies an inspector's powers of entry to sites classified as *contaminated – remediation required*.