

Contaminated Sites – Legal Update

Local Government Planner's Association



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Introduction & Overview

- Duty to report contamination
- Classification of contaminated sites
- Identifying contaminated sites
- Hierarchy of responsibility for remediation
 - Polluter
 - Developer (change to more sensitive use)
 - Owner
 - State
- Notices
- Case Law

Duty to report (s.11)

- Mandatory reporting of contamination by:
 - Owner or occupier of site
 - Person causing/contributing to contamination
 - Auditor engaged to provide report under Act
- Definition of “owner”
- Reporting of sites to date
- Review issues
 - Persons with professional knowledge
 - Requirements for reporting

Classification of contaminated sites

- Classification categories (Schedule 1):
 - Report not substantiated
 - Possibly contaminated - investigation required
 - Not contaminated – unrestricted use
 - Contaminated – restricted use
 - Remediated for restricted use
 - Contamination – remediation required
 - Decontaminated
- Classification of sites to date
- Proposed new category
- Notice of classification

Identification of contaminated sites

- Contaminated sites database (s.19)
- Reported sites register
- Review of access to information
- Memorials
- Restriction on approval of development
- Potential liability for approval of development on contaminated land

Responsibility for remediation

- Obligation to remediate
- Hierarchy of responsibility
 - Polluter (s.25)
 - Developer (s.26)
 - Owner (s.27)
 - Insolvent bodies corporate (s.28)
 - State (s.29)
- Role of Contaminated Sites Committee
- Review

Compliance issues

- No timeframe specified
- Current approach of DEC
- Enforcement notices
 - Investigation Notice (s.49)
 - Cleanup Notice (s.50)
 - Hazard Abatement Notice (s.51)
- Issues arising in review

Recent Case Law

- *BP Australia Pty Ltd v Contaminated Sites Committee* [2012] WASC 221
- *Re Contaminated Sites Committee (Comprised of the Chairperson, James (Jim) Malcolm and others); ex parte Coffey LPM Pty Ltd* [2012] WASC 242

BP Australia

- Committee determined BP as former tenant and operator of service station was partly responsible for remediation of contamination resulting from underground pipe leak
- BP appealed on question of law to Supreme Court
- Person only responsible for remediation if caused or contributed to contamination “without lawful authority”
- Committee finding that BP’s actions contravened s.49 of the EP Act
- BP contended that, as a breach of s.49 amounted to the commission of an offence, the Committee was obliged to apply the criminal standard
- The Court disagreed:
“...a court or administrative body engaged in the allocation of civil liability is [not] obliged to apply the criminal standard of proof, merely because the path to liability involves a finding which could also constitute the commission of a criminal offence”: at [51]*ff*

BP Australia (con.)

- Court considered that the offence only had to be proven to the civil standard (balance of probabilities) and the allocation of responsibility amongst various persons for remediation also necessarily involves an element of subjectivity
- Decision maker must set out the findings of fact upon which the allocation is made BUT decision maker is not required, nor is it the practice, to enunciate the reasons why a particular proportion was allocated to a particular person: [136]
- Process of allocating proportionate liability necessarily involves value judgment: [134]

Ex parte Coffey

- Former service station in Osborne Park
- Committee formed preliminary view that:
 - the main source of contamination was a damaged underground pipeline
 - The pipeline was damaged by Coffey during its 2004 investigation of pre-existing contamination
- Committee issued s.37 Notice inviting responsive submissions
- Coffey brought judicial review proceedings alleging that:
 - S.37 notice was invalid as it failed to comply with statutory requirements and failed to provide sufficient reasons
 - Committee had failed to provide it with procedural fairness

Ex parte Coffey (con.)

- Court held all of the grounds were reasonably arguable and had sufficient merit to warrant the grant of an *order nisi* suspending the notice -
 - Notwithstanding that the s.37 determination was preliminary to any final decision under s.39, it was reasonably arguable that it was a “necessary and indispensable step” to that final decision so that it was susceptible to judicial review
 - Also reasonably arguable that procedural fairness applied to the decision making processes under ss.37 and 38
 - It was RA that the s.37 notice was invalid because:
 - the reasons given were insufficient in that the basis for the reasonable belief that there had been a breach of EP Act (pollution) was not adequately set out – there may be an obligation to set out the reasons why certain evidence was preferred over other evidence
 - it did not provide sufficient certainty as to the matters to which Coffey had a right to put answers and responses
 - Arguable an oral hearing was required in order to satisfy the obligation to provide procedural fairness



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