Contaminated Land - who’s liable?

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Introduction

- Clean Up Notice/Common Law
- Planning for Contaminated Site
- Case Studies and Litigation Risk
• Section 62 - Where pollutants have been or are being released, Authority may conduct or cause a clean up to occur. More common section 62A – Authority can direct clean up or other activities on contaminated land.

• ‘Polluter pays principle’… but clean up notice can be issued to polluter or owner or occupier. Note emphasis on ‘permitting pollution to occur’

• Informed by Vic EPA Enforcement Policy (but limited guidance)

• Section 62A(2) supports claim by occupier against polluter for compensation for costs reasonably incurred in complying with notice in good faith.

• Clean Up Notice can provide for level of works to be undertaken, nature of activities, ongoing management, measurements and recordings required.
Costs recovery

- 62A(2) provides that you can recover costs against polluter of land if issued with a clean up notice.

- You may also have ‘common law’ rights:
  - Nuisance, activity that damages land or the use and enjoyment of that land such as water borne or air borne pollution.
  - Negligence, relies on duty of care, breach and material damage caused by the breach.

- Nuisance and negligence may apply to circumstances where ‘neighbours’ pollute land.

- Negligence may also apply to acquisitions of land where the vendor knows of pollution risk.
Section 12 - Planning and Environment Act 1987:

Requires a planning authority when preparing a planning scheme or a planning scheme amendment to ‘take into account any significant effects which it considers the scheme or amendment might have on the environment or which it considers the environment might have on any use or development envisaged in the scheme or amendment.’
Section 60 Planning and Environment Act

‘Before deciding on an application (for a permit) the responsible authority:

(a) Must consider:

(iii) any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development.’
In considering applications for use of land used or known to have been used for industry, mining or the storage of chemicals, gas, waste and liquid fuel, responsible authorities should require applicants to provide adequate information on the potential for contamination to have adverse effects on the future land use (15.06-2).

Environmental Audit Overlay (clause 45.03)

The overlay is a mechanism to ensure that the requirements for an environmental audit under Ministerial Direction No 1 is met before the commencement of the sensitive use or any buildings or works associated with that use.
Objective: Ensure potentially contaminated land is suitable for use which could be significantly adversely affected by any contamination

Requirement: Before a sensitive use commences or before construction or carrying out of buildings and works associated with a sensitive use commences, a Certificate or Statement of Environmental Audit must be issued.
Ministerial Direction No. 1

- Rezoning
  - Section 12 Planning and Environment Act 1987
  - Ministerial Direction No 1
    - Rezoning – amendment to Planning Scheme
    - Definition of ‘potentially contaminated land’:
      ‘land used or known to have been used for:
      (a) industry,
      (b) mining, or
      (c) storage of chemicals, gas, wastes or liquid fuel.’
  - Definition of ‘sensitive use’
    ‘residential use, a child care centre, a pre-school centre or a primary school’.
  - Council to satisfy itself site suitable
    - environmental auditors scheme
    - statements/certificates
SEPP (Prevention Management of Contamination of Land) 2002

- SEPP declared by the Governor in Council under the Environment Protection Act 1970
- A SEPP provides the framework for environmental decision making and a clear set of publicly agreed environmental objectives
- Brings together matters relating to contamination of land, including responsibilities for prevention and management of contamination
- Confirms Ministerial Direction No 1 and actions a responsible authority should take in the assessment of planning permit applications
Any planning decision needs to consider contamination.

Triggers for involvement:

- Audit required where potentially contaminated land has been converted to a Sensitive Use (clauses 13(3) and (4)).
- Important note: Audit required irrespective of whether a planning scheme amendment or a planning permit required (Compare: Ministerial Direction No 1).
- Where a potentially contaminated land has been converted to a Non-Sensitive Use then Council may still require information from the proponent and consider the need to impose conditions (clause 14(2)).
Potentially contaminated land - General Practice Note

- Appropriate level of assessment of contamination for planning scheme amendment or planning permit application
- Appropriate conditions on planning permits
- Circumstances where the EAO should be applied or removed
Level of assessment required

- Require environmental audit/require site assessment?

Table 2 - Assessment matrix

<table>
<thead>
<tr>
<th>Proposed Land Use</th>
<th>Potential for Contamination (as indicated in Table 1)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>High</td>
</tr>
<tr>
<td>Sensitive Uses</td>
<td></td>
</tr>
<tr>
<td>Child care centre, pre-school or primary school</td>
<td>A</td>
</tr>
<tr>
<td>Dwellings, residential buildings etc</td>
<td>A</td>
</tr>
<tr>
<td>Other Uses</td>
<td></td>
</tr>
<tr>
<td>Open Space</td>
<td></td>
</tr>
<tr>
<td>Agriculture</td>
<td></td>
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<tr>
<td>Retail or Office</td>
<td></td>
</tr>
<tr>
<td>Industry or warehouse</td>
<td></td>
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</tbody>
</table>

- **A** Require an environmental audit as required by Ministerial Direction No. 1 or the Environmental Audit Overlay when a planning scheme amendment or planning permit application would allow a sensitive use to establish on potentially contaminated land.
- **B:** Require a site assessment from a suitably qualified environmental professional if insufficient information is available to determine if an audit is appropriate. If advised that an audit is not required, default to C.
- **C:** General duty under Section 12(2)(b) and Section 60(1)(a)(iii) of the Planning and Environment Act 1987.
Planning permit application – environment audit necessary?
Yes for land identified as potentially contaminated an application is to allow for sensitive use certificate/statement of environment audit
Exception – where proponent can demonstrate to the satisfaction of the responsible authority that the site has never been used for a potentially contaminating activity or that other strategies or programs are in place to effectively manage any contamination
Sensitive use? Open space, agricultural and outdoor playgrounds are not sensitive uses careful consideration should be given to likelihood of contamination and the need for an environmental audit
Timing of environmental audit

- As early as possible in the planning process
  Possible/reasonable?
- Can be condition of permit if responsible authority is satisfied that the level of contamination will not prevent the use of the site (how assessed?)
- Note works or activities associated with the environmental audit may be undertaken prior to permit
- Works associated with development which are also remediation works – do not commence before the completion of the audit if planning permit has not been issued for the development
- Council to consider carefully the wording of conditions to allow early building works that facilitate remediation
Section 173 Agreements
Where appropriate

- Where the conditions on a Statement of Environmental Audit are ongoing in nature and require maintenance or monitoring such as regular groundwater or waterway testing.
- Other parties such as the EPA or Water Authority are involved with conditions of an ongoing nature (parties?)
Examples

1. Prior to the commencement of the use or buildings and works associated with the use (or the certification or issue of the Statement of Compliance under the *Subdivision Act* 1988), the applicant must provide:
   
a) A Certificate of Environmental Audit in accordance with section 53Y of the *Environment Protection Act* 1970; or
   
b) A Statement of Environmental Audit under section 53Z of the *Environment Protection Act* 1970. A Statement must state that the site is suitable for the use and development allowed by this Permit.
1. All the conditions of the Statement of Environmental Audit must be complied with to the satisfaction of the Responsible Authority, prior to commencement of use of the site. Written confirmation of compliance must be provided by a suitably qualified environmental professional or other suitable person acceptable to the Responsible Authority. In addition, sign off must be in accordance with any requirements in the Statement conditions regarding verification of works.

2. The applicant must enter into a section 173 agreement under the Planning & Environment Act 1987. The agreement must be executed on Title prior to the commencement of the use and prior to the issue of a Statement of Compliance under the Subdivision Act. The applicant must meet all costs associated with the drafting and execution of the agreement, including those incurred by the Responsible Authority.
Council to require applicant to demonstrate that the conditions have been or will be met **before** the use commences
- Joint enforcement with EPA - groundwater
- Section 173 – conditions of an ongoing nature eg groundwater monitoring
- Agreement to provide for periodic reporting
- Staging of audit possible but watch groundwater – may require amendment of staging
➤ Council to require applicant to demonstrate that the conditions have been or will be met before the use commences
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➤ Agreement to provide for periodic reporting
➤ Staging of audit possible but watch groundwater – may require amendment of staging
Ministerial Direction No.1 requires a Certificate or Statement before Notice of a Planning Scheme Amendment is given. May sometimes be appropriate to delay this requirement if testing of the land before Notice of the Amendment is difficult or inappropriate.

Ministerial Direction No. 1 provides for the requirement of an environmental audit in the amendment – environmental audit overlay.

Apply an EAO if you have assessed that the land is potentially contaminated and is unlikely to be suitable for sensitive use without further assessment and remediation works or management.
EAO (cont)

- EAO not a Permit trigger. Does not prevent works or activities being undertaken in association with an environmental audit eg soil sampling.

- EAO is not simply a means of identifying land that is or might be contaminated. Previous zoning not sufficient reason in itself to justify application of an EAO.

- All buildings and works associated with the sensitive use (irrespective of how minor) will trigger the need to undertake an environmental audit.
Remove the EAO if:

- You determine that the land is not potentially contaminated; or
- The site is given a Certificate of Environmental Audit
- Where you have a Statement not a Certificate of Environmental Audit, it may also be possible to remove the EAO where there are minimal restrictions or conditions on the use of the site or the conditions have been complied with.
When things go bad.....

- It is important for Council to carefully assessing environmental risks, conditions upon audits etc as the costs of remediation and litigation are high.

- Duty of care based on reliance where public authority in distinctly superior position to appreciate consequential threat, loss, injury

- Council, through its officers, aware of contamination but granted development consent for residential use without requiring consideration of impact of contamination (Alex Finlayson v Armidale City Council)

- Statutory duty to consider impact of environment on development (but note statutory limitation of liability, e.g. s.145B Environmental Planning and Assessment Act 1979 (NSW)... ‘anything done or omitted to be done in good faith’)
Leasing land…

- Awareness of contamination (implied based on corporate knowledge) (Noor Al Houda Islamic College v Bankstown Airport)
- Failure to disclose environmental reports when leasing land for a school (Noor Al Houda Islamic College v Bankstown Airport)
- s.52(1) TPA… misleading and deceptive conduct, silence when reasonable expectation of disclosure, need not be deliberate
- Common law negligence… duty to exercise reasonable care to provide information (where fundamental to use, vulnerability of inquirer, reliance)
- Common law duty concurrent with obligations under lease
Allowing development…

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Environmental reports…

- Environmental report making statement about suitability for land use, when investigation inadequate... misleading and deceptive conduct? (*Charben Haulage v Environmental & Earth Sciences*)
- Overturned by Full Court where no evidence representations induced to enter into or complete the contract of sale / report not intended for purchaser (*Caltex Australia Petroleum v Charben Haulage*)
Litigation – clean up

Remediation contracts…

- Contractual allocation of risks needs to be clear in contract (Thiess Services v Mirvac Queensland)

- Substantial contractual role will not be given to provisions not worded in language of contract… intent, objectives, goals, preferred options – e.g. in a RAP (Thiess Services v Mirvac Queensland)
Sale contracts...

- Contract construed in ‘common sense’ fashion to give effect to bargain between parties / clean up clause assessed against understanding of ‘reasonable person’ in position of parties (*Masha Nominees v Mobil Oil Australia*)

- Contract required remediation to a level that would permit purchaser's proposed use… but also provided for an indemnity and release following provision of environmental report > indemnity and release prevailed (*Caltex Australia Petroleum v Charben Haulage*)
Contaminated land litigation

2007 - *Premier Building and Consulting v Spotless Group*

- Land in Brunswick, Victoria used for dry cleaning and laundry business during 1970s
- Premier constructed 49 unit residential development
- Council refused occupancy permit
- Land contaminated (including PCE and white spirit)
- Premier sues Spotless Group Ltd, Spotless Services Ltd and Ensign Services (Aust) Pty Ltd (and multiple other defendants including former land owners, current owner of Spotless land, planners, environmental consultants)
- Claims in nuisance, negligence and seeks compensation under s.62A *Environment Protection Act 1970* (claim by occupier for costs incurred in complying with EPA clean up notice) and s.15 of the *Water Act 1989*
2007 - *Premier Building and Consulting v Spotless Group*

- Damages sought for remediation and other losses (more than $10M claimed against Spotless and another $15M against other parties)
- More than 70 sitting days in Supreme Court of Victoria, pleadings 1700 pages, Court Book (evidence), 95 volumes, 22,000 pages
- Judgement 232 pages
• 2007 - *Premier Building and Consulting v Spotless Group* (cont.)

**Evidence**

- Evidence of environmental experts for Premier and Spotless viewed with caution because of lack of independence

‘...although litigation is an adversarial exercise, the role of the expert witness is not that of advocate. Such a witness is permitted to give opinion evidence to assist the Court in discharging its function. Like any witness, an expert witness is to tell the truth and the whole truth. The expert is, likewise expected to give an opinion which is genuinely held after making all due and proper enquiries and to disclose and qualifications to the opinion and any shortcomings to those enquiries. The Expert Witness Code of Conduct... requires no less’ (para.164)
2007 - *Premier Building and Consulting v Spotless Group* (cont.)

**Corporate identity**

- Spotless companies which operated laundry and dry cleaning at relevant time, Spotless Services and Spotless Laundry deregistered

- Not scheme to avoid liability, but Spotless position of not taking responsibility for actions of subsidiaries *‘one that reflects no credit on the commercial morality of those whose decision it was that this position should be adopted’* (para. 324)

- Premier sought to attach liability by principal and agent or common enterprise… neither successful on evidence as not a sufficient degree of ‘commercial intimacy’
2007 - Premier Building and Consulting v Spotless Group (cont.)

Nuisance

- Failed on corporate identity issue (Spotless defendants were not in occupation of the land the source of the alleged nuisance and not companies responsible for the alleged nuisance)

- Also no evidence of interference with Premier’s use and enjoyment of the land or interference with some right in connection with the land (when Premier purchased the land it was zoned industrial)

Negligence

- Rejected any duty of care owed to Premier and causation not established
Contaminated land litigation (cont.)

- **2007** - *Premier Building and Consulting v Spotless Group* (cont.)

  **S.62A(2) Environment Protection Act 1970**

  ‘On the application of an occupier of any premises which is the subject of a notice, a court of competent jurisdiction may order that the person described in sub-section (1)(b),(1)(c), or (1)(d) compensate the occupier for any costs incurred by the occupier which the court is satisfied are reasonable and were incurred in good faith in complying with the notice…’

- **S.62A(1)(b)** ‘person who caused or permitted the pollution to occur…’

  Spotless parties caused or permitted the pollution - pushed into the background arguments directed a ‘piercing the corporate veil’

- Spotless bringing contaminants onto the land, storing them there and using them in dry cleaning and laundry activities and evidence of spills and leakage was enough, where operations of subsidiaries so intertwined with those of holding company
2007 - Premier Building and Consulting v Spotless Group (cont.)

‘what is contended for here is not that the holding company is responsible for the acts of its subsidiary, but rather that the holding company is responsible for its own acts which brought into existence circumstances which would normally lead to the spillage and leakage’ (para. 463)

- Order for compensation made under s.62A(2) against Spotless

s.15 Water Act
- Pollution of water which causes economic loss - pollution not caused by holding companies, therefore not successful
Contaminated land litigation (cont.)

2007 - Premier Building and Consulting v Spotless Group (cont.)

- Claims against owner of Spotless land (North Suburban) dismissed
- Claims against environmental consultants dismissed (Court found that Premier did not act to detriment in reliance on the report)
- Claims against planners failed (Premier did not act to its detriment based on advice)
- Orders against Spotless in favour of Premier (to be determined) between $3M - $4M
- Declaration that Spotless liable to North Suburban (current owner of Spotless land) for costs in complying with clean up notices
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