

# CHAPTER 13

## CONTAMINATED SITES ON CROWN LAND

### TABLE OF CONTENTS

13.	CONTAMINATED SITES ON CROWN LAND	13-1
13.1.	INTRODUCTION	13-1
13.2.	CONTAMINATION OF CROWN LAND IDENTIFICATION, REMEDIATION AND MANAGEMENT	13-12
13.3.	CLASSIFICATION AND NOTICES	13-13
13.4.	REMEDICATION OF CONTAMINATED SITES	13-15
13.4.1.	EXEMPTIONS	13-5
13.5.	ORPHAN SITES	13-16
13.6.	IDENTIFICATION OF CONTAMINATION ON CROWN LAND	13-17
13.6.1.	IDENTIFICATION	13-7
13.6.2.	FORMER EXPLOSIVES DEPOT SITE	13-7
13.7.	LIABILITY IN RELATION TO CONTAMINATION ON CROWN LAND	13-19
13.7.1.	TRANSFERRING LIABILITY	13-9
13.8.	RECEIVING LAND INTO THE CROWN ESTATE/RDL CONTROL	13-113



# 13. CONTAMINATED SITES ON CROWN LAND

## 13.1. INTRODUCTION

The *Contaminated Sites Act 2003* (CSA) was proclaimed in December 2006. The CSA imposes significant responsibilities on parties causing contamination and on owners of contaminated land. The CSA binds the Crown, and limits the extent to which responsibility for (potentially) contaminated lands can be transferred to other parties.

The Minister for Lands is bound by the requirements of the CSA. It will be the responsibility of the Minister to report to the Department of Environment and Conservation's (DEC) Chief Executive Officer (CEO) any known or suspected contamination on Crown (or other government) land under the control of the Department of Regional Development and Lands (RDL). The Minister must also comply with the notice of classification given by DEC's CEO in relation to the land so reported.

## 13.2. CONTAMINATION OF CROWN LAND IDENTIFICATION, REMEDIATION AND MANAGEMENT

The CSA will bind the Crown. The Minister for Lands may be held to be responsible for a contaminated site in any of three capacities:

- As owner of the site;
- As a contributor to the contamination of the site; and
- As agent for the State.

The CSA (in effect) defines an “owner” of Crown land to be:

- A management body, in respect of a reserve.
- A vestee, in respect of Crown land vested or dedicated under an Act (eg. The Port Authorities Act 1999).
- A local government or Main Roads WA in respect of a dedicated road.
- The Minister for the Environment, in respect of orphan sites acquired under the CSA.
- The Minister for Lands, in respect of all other Crown land.

This definition of “owner” is critical when considering responsibility for (potentially) contaminated Crown land.

The CSA provides that if:

- An owner of land; or
- A person who suspects they have caused or contributed to contamination

Knows or suspects contamination of a site and fails to report it, that person commits an offence.

Therefore if the Minister for Lands is the owner of the land and “suspects” that the land may be contaminated, the suspected contamination must be reported to DEC’s CEO to avoid committing an offence.

### 13.3. CLASSIFICATION AND NOTICES

Within 45 days of receiving a report, DEC's CEO will classify the site as one of the following:

- Report not substantiated
- Possibly contaminated – investigation required
- Not contaminated – unrestricted use
- Contaminated – restricted use
- Remediated for restricted use
- Contaminated – remediation required
- Decontaminated

The owner of the site will receive written notice of the classification from DEC's CEO. Where a site is classified as "contaminated – remediation required" notice is given to each person considered responsible for remediation.

Notice of classification can be in the form of:

- A CSA Part 4 notice:- (a clean up notice, investigation notice or hazard abatement notice),
- A Certificate of Contamination Audit, or
- Any other written notice.

It is an offence not to comply with any notice given by DEC's CEO. Notices are binding on any person to whom they are given.

DEC's CEO must register a memorial against the title of the land:

- Which is classified as:
- Contaminated - remediation required;
- Contaminated – restricted use;
- Remediated for restricted use;
- Possibly contaminated – investigation required;
- For which a Part 4 notice has been given;
- On which a charge has been placed as part of a transfer of responsibility for remediation.

Where a memorial is registered against the title, a Part 4 notice becomes binding on each person who becomes the owner of the land.

Two types of memorials might be registered – one where the land can be dealt with despite the memorial, and one where the land cannot be dealt with unless the memorial is withdrawn.

An investigation notice will set out the action required to investigate, monitor and assess a site. Therefore, if the Department of Regional Development and Lands' Lands Division (RDL-LD) reports a site which it suspects is contaminated, and RDL/LD have not carried out any investigation, as owner of the land, the Minister for Lands (through RDL/LD) may be required to investigate (if DEC's CEO serves an investigation notice on RDL/LD).

A clean-up notice can only be issued in respect of a site classified as "contaminated – remediation required". Therefore, the Minister for Lands is only likely to receive a clean-up notice if this classification of a site is given. This is unlikely until an investigation of the site is carried out.

A Part 4 notice requires the person on whom the notice is binding to obtain an auditor's report on compliance with the notice. RDL/State Land Services Managers will need to arrange this.

A hazard abatement notice is given by DEC's CEO if he or she considers that there is an immediate and serious risk to human health or the environment.

Failure to comply with a notice is an offence (maximum penalty \$500,000).

Under the CSA's guidelines, both the auditor's charges and DEC's charges are payable by the person carrying out the action, regardless of whether it is voluntary or not. Therefore, if the Minister for Lands is served with an investigation notice or a clean-up notice, the Minister will be responsible for payment of both the auditor's charges and DEC's costs. Where other agencies are served with a notice, they will be responsible for these costs.

## **13.4. REMEDIATION OF CONTAMINATED SITES**

The State is responsible for remediation to the extent that, amongst other things:

- The contamination is a result of a direction given or an action carried out by a public authority;
- The person responsible cannot be identified, found or is insolvent; or
- No one else is responsible.

Other grounds are set out at section 29 of the CSA.

The State will be the agency which is deemed to be, or by statute is primarily, responsible for the actual contamination (eg. DoIR in relation to mining activities causing contamination). A person is only responsible for contamination to the extent that that person caused or contributed to the contamination after commencement of the CSA, or for an unlawful action before the commencement of the CSA.

LandCorp is the State's remediator. Where contamination is shown to exist on Crown land, LandCorp will undertake any remediation action it sees as appropriate, whether at the expense of the agency which caused the contamination, or with funds provided by the Department of Treasury and Finance, or by DEC from its Contaminated Sites Management Fund.

### **13.4.1. EXEMPTIONS**

Within two years of the commencement of the CSA, an owner of land may make a disclosure statement to DEC's CEO, disclosing any contamination of the land of which the owner is aware. The CEO may request further information upon receiving the disclosure statement. On receiving the disclosure statement, the CEO must give an exemption certificate in respect of the site if, in the opinion of the CEO:

- The land is contaminated;
- The contamination was not caused or contributed to by the action of the owner;
- The owner did not fail to prevent the contamination of the land; and
- The land was contaminated at the time the owner became the owner of the land and the owner did not know or suspect that the land was contaminated.

An owner of a site classified as "contamination – remediation required" is then exempted from responsibility for remediation.

The DEC has advised that it does not propose to give exemption certificates to government agencies.

### 13.5. ORPHAN SITES

The CSA defines an “orphan site” to mean all, or part, of a site which has been determined to be contaminated and needing remediation, and for which the State has assumed responsibility because:

- No one else is responsible;
- The responsible person cannot be found or made to assume responsibility; or
- The responsible person is insolvent.

The CSA provides for the creation of a Contaminated Sites Management Fund, financed out of appropriation, proceeds of sale of orphan sites, and other moneys collected under the Act. The fund may be used for investigation and remediation of land, which the State is responsible for. While LandCorp will undertake remediation of orphan sites, RDL/LD may be asked to take on the role of “holding in the name of the State” land to be remediated, and to be responsible for non-saleable land once it is remediated.

The CSA enables orphan sites to be compulsorily acquired for remediation – for instance, where they are held in freehold by a person who is unable to, or refuses to, undertake remediation. The Minister for Lands would need to use powers under the LAA to take land on behalf of LandCorp, with RDL preparing and submitting the relevant documentation. In absence of express agreement for RDL/LD to hold, such land should be directly vested in LandCorp, in freehold, rather than being vested in the State and re-vested as Crown land.

## **13.6. IDENTIFICATION OF CONTAMINATION ON CROWN LAND**

### **13.6.1. IDENTIFICATION**

Under section 12 of the CSA, DEC's CEO may approve a program for the identification and reporting of sites. This is primarily to address those companies and government agencies like RDL with very large landholdings.

The CSA will provide a 6-month period from the Act's commencement for land management agencies (such as RDL) to develop and submit to DEC a procedure to identify potentially contaminated sites under their management and a program for dealing with such sites in accordance with the CSA. The procedure, and timeframes for its implementation, will need to be agreed by DEC.

It is intended that RDL/LD' procedure will have the following elements:

- It will be confined to land which is currently RDL/LD' responsibility –
  - UCL, UMR
  - Crown land leased by RDL/LD to other parties, and
  - Properties acquired for public works, which RDL/LD, is presently managing;
  
- It will focus on the land which is likely to attract a higher priority, if it were to be contaminated, having regard for factors such as -
  - Proximity to active townsites, by popular density
  - Likelihood and potential severity of contamination
  - Potential for leaching into the external environment
  - Probability of RDL liability.
  
- It will be limited by the extent to which historical data is readily available.

As sites on Crown or other government land under RDL/LD control are identified as potentially contaminated, each State Lands Manager will be responsible for reporting to DEC (Managers to negotiate with DEC, with a view to limiting costs and effort).

A person dealing with sites covered by an approved program in accordance with the program 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 program is an offence (max penalty \$250,000). The CEO may amend the program (eg change the sequence in which sites are to be identified) but cannot make the program more onerous without the person's agreement. Accordingly, there needs to be a commitment to programmed treatment of contaminated lands on UCL.

The CSA recognises, in principle, that an agency which was responsible for an activity which resulted in contamination, should be responsible for any actions under the CSA.

### **13.6.2. FORMER EXPLOSIVES DEPOT SITE**

The Contaminated Sites Regulations 2004 will provide that unexploded ordnance (UXO) does not come under the mandate of the CSA – unless there is contamination resulting from the storage of explosives.

LD should not permit disused explosives reserves or land leased for storage of explosives to be returned by DoIR to RDL control, without appropriate safeguards.

If the reserve is to be returned, full site reports must be provided by DoIR outlining:

- Any potential contamination of the reserve/s;
- Any dangers known to exist on the reserve/s; and
- Any security required in respect of the reserves.

Comments on each report should be sought from the Fire and Emergency Services Authority (FESA) or other agency having the responsibility for coordinating State policy in relation to UXO.

If the reserves are to be sold or leased, a memorial under s.17 of the LAA should be registered against the relevant CLT outlining past usage and hazards.

RDL should not accept responsibility for the administration of leases of reserves that have been leased to other parties by the DoIR, without due consideration to the above points.

Policy 17.9.3 provides further guidance in this connection.

## **13.7. LIABILITY IN RELATION TO CONTAMINATION ON CROWN LAND**

### **13.7.1. TRANSFERRING LIABILITY**

The CSA provides for the transfer of liability in relation to contamination under particular circumstances.

#### **13.7.1.1. LIABILITY FOR REMEDIATION**

Where the CSA refers to a “person responsible for remediation”, it includes and means all people responsible for remediation. The only sites required to be remediated under the Act are those sites classified contaminated – remediation required.

The CSA limits the extent to which the liability for contamination can be transferred. This applies to sales or other dispositions of land (including issue of management orders over reserves or dedications of roads) which have the effect of transferring liability for remediation.

In order to transfer liability for remediation, there must be:

- Written agreement by the transferee purchaser/lessee to take on responsibility, and
- Approval by DEC’s CEO to the agreement. The CSA sets out the requirements for applying for that approval, and these include that there be a statement or belief (by the Minister for Lands) that the transferee has sufficient financial ability to carry out the remediation.

Therefore, if a contaminated Crown site is to be sold in freehold, and if the purchaser agrees, a transfer of the responsibility for remediation from the State to that purchaser could occur. However, this is subject to the agreement of DEC’s CEO and subject to the Minister for Lands providing the above details.

#### **13.7.1.2. LIABILITY FOR CONTAMINATION GENERALLY**

An owner of contaminated land must, within 14 days before finalising the relevant transaction, disclose to the potential new owner, mortgagee, lessee, or management body (in relation to a management order over a reserve, or to a dedicated road) written details of the contamination (in prescribed form) including a copy of any certificate of contamination audit that may have been issued, in relation to land classified as:

- Contaminated – remediation required;
- Contaminated – restricted use;
- Remediated for restricted use; or
- Land in respect of which a notice under Part 4 of the CSA has been given and in respect of which a memorial is registered.

It is an offence to fail to disclose that the land is contaminated (max penalty \$250,000). The affected new owner can also take civil action against the owner for the failure to disclose as a breach of statutory duty.

## 13.7.1.3. SUSPICION OF CONTAMINATION ONLY

The CSA does not address the transfer of the responsibility for sites which are suspected as contaminated, but which have not been investigated. The CSA only refers to transfer of responsibility once it has been established that remediation is required. It may be extremely difficult for an owner or polluter of land to contract out of his or her responsibility to investigate and remediate contaminated land except under section 30 of the CSA. Even if responsibility can be transferred in these circumstances, it would only operate between the Minister for Lands as vendor, and the purchaser of the land – it would not release the owner's liability otherwise under the CSA, once it is proclaimed.

Regardless of whether contaminated sites are transferred or not, it is therefore likely that the State will be responsible for investigation and remediation. However, RDL should also consider whether there is a moral 'public interest' obligation upon the Minister for Lands to investigate possible contamination before disposing of, or leasing the site to a member of the public. The possible contamination should be looked at on a case-by-case basis.

It is strongly arguable that it is not appropriate for RDL to transfer or lease out a Crown site that is likely to be contaminated, before an investigation has been carried out. At the very least, the purchaser/lessee must acknowledge that the site may be contaminated and that they enter into possession at their own risk.

## 13.7.1.4. DISPOSING OF INTERESTS IN CROWN LAND

State Lands Managers need to ensure contaminated Crown land is not transferred or leased to other parties, without clear knowledge on both sides and appropriate contractual statements and warnings on Titles.

If a contaminated site is proposed to be sold in freehold, and if the purchaser agrees, a transfer of the responsibility for remediation from the State to that purchaser could occur. This is subject to the agreement of DEC's CEO, and subject to the Minister for Lands believing that the purchaser has sufficient financial assets to carry out the remediation. Also, the site must have already been classified by DEC's CEO.

The CSA also requires that at least 14 days before completion of a transfer, lease, mortgage or management order issue (in relation to a reserve), or dedication (in relation to a road), each party is to be given a written disclosure of the contamination, in relation to land that has been classified as:

- Contaminated – remediation required;
- Contaminated – restricted use;
- Remediation for restricted use; or
- Land in respect of which a notice under Part 4 of the CSA has been given and in respect of which a memorial is registered.

A copy of the disclosure is also to be given to DEC's CEO. There is a penalty of \$250,000 for breach of this requirement.

## 13.7.1.5. LEASING OF DISCONTINUED RAILWAYS

Any contamination on former railway land returning to RDL as a consequence of a Discontinuance Act and s.266 of the LAA remains the responsibility of the Public Transport Authority (PTA).

Land returning to the State as a result of expiration of leases or termination of leases will be subject to inspection to ensure that any use or alterations to the land are not in any way hazardous or contaminating.

The continuing responsibility of the PTA for any contamination of the land, resulting from railway operations, needs to be noted by State Lands Managers, when considering leasing proposals.

In developing leasing proposals, State Lands Managers must follow the guidelines of Government Land Policy 6.2.1, in relation to contamination and hazards.

Further information on leasing of discontinued railways can be found in Government Land Policy 6.3.14.

#### 13.7.1.6. SECTION 17 MEMORIAL

Before any sale or leasing of a contaminated site occurs, a memorial under s.17 of the LAA should be registered against the relevant Crown land title. Under section 17(2) of the LAA, the Minister for Lands can endorse a statement on a certificate of Crown land title, to which an interest has been or is to be granted or entered into under the LAA, warning of hazards or other factors affecting or likely to affect the use or enjoyment of that land.

Therefore, a warning of possible contamination can only be endorsed on the title if it is a hazard which will or is “likely to affect the use or enjoyment” of that land. Unless it is likely that the site is contaminated, a memorial under s.17 of the LAA cannot be registered against the title.

In addition, a memorial under s.17 of the LAA can only be registered over a Crown land title if an interest has been, or is to be, granted under the LAA.

If a memorial is registered against the title, under s.17, there will be an obligation on RDL and the Minister for Lands to report suspected contamination of the property under the CSA. This is because the Minister for Lands would have to “suspect” that a site was contaminated in order to register a s.17 memorial. Once an owner “suspects” that it is contaminated, that owner is obliged to report the suspected contamination under the CSA.

After RDL has provided a report under s.11 of the Act, there is no obligation on RDL to carry out any further investigation of the site unless required to do so by DEC’s CEO. However, full disclosure of all available information regarding possible contamination of a site should be given to any potential purchaser or lessee. In addition, any potential purchaser or lessee should be made aware of the provisions of the Act and their potential liability under the Act.

If the Minister for Lands elects to proceed with any sale (or long-term leases) of contaminated Crown sites before the sites are classified under the CSA, each sale or lease contract entered into should contain an indemnity clause. However, even if the indemnity clauses are inserted into any contract, it is unlikely that the Minister for Lands will be able to contract out of any responsibility that she has once the CSA has commenced. This is a matter that could only be finally decided by a Court of law.

#### 13.7.1.7. OTHER LIABILITY

Even if the Minister for Lands is the person responsible for remediation of the site for the purposes of the CSA, the liability as between the Minister and the holder of any interest in the land may still need to be considered. Recent advice from the State Solicitor’s Office (SSO) is that the provisions of the CSA will not affect the contractual arrangements between persons, or preclude the view that a person responsible for remediation may make contractual provisions for indemnification with another party.

In these circumstances, it would be necessary to consider the terms and conditions of any contractual arrangement. While a person who causes or has contributed to contamination before the commencement of the CSA is only responsible for remediation where the contamination was caused by an act done without lawful authority, there may nonetheless be liability under the contractual arrangement. While the Minister for Lands might remain the person responsible for remediation for the purposes of the CSA, this would not affect the obligations of the interest holder arising under that contractual arrangement. Each case will need to be considered on its merits, and should be referred for consideration by the Legislative and Legal Services Branch.

## **13.8. RECEIVING LAND INTO THE CROWN ESTATE/RDL CONTROL**

The Auditor General has advised in his Report No.6 of November 2002 that LD needs to purposefully manage all future land acquisitions, revestments, or vestings in the Crown in order to avoid unknowingly receiving contaminated land from other parties.

Land may revert to the State and to Land Division responsibility through a number of ways, including:

- Acquisition for public works
- Surrenders (land no longer required by a party)
- Exchanges (Crown land for freehold land)
- Revestments
- Forfeiture of tenures for non-compliance with use conditions or for rent defaults
- Forfeiture of tenures for non-payment of rates under the Local Government Act 1995
- Forfeiture or revestment under special Acts (eg. Confiscation of Crimes Proceeds, default under Government mortgages)
- Vesting pursuant to s. 20A of the Planning and Development Act 2005, for recreation and other purposes, consequent to the subdivision of freehold land
- Dedication as roads consequent to the subdivision of freehold land
- Expiry of leases
- Revocation of management orders in relation to reserved land
- Revocation or cancellation of a vesting or a dedication, under legislation such as the Government Railways Act 1904, Port Authorities Act 1999, or Marine and Harbours Act 1981

RDL procedures should ensure that when land is returned to RDL (eg. a management order is cancelled or the land is revested), the responsible/transferring authority provides information as to the past use of the site and advises whether or not it considers that potentially contaminating activities might have occurred on the site.

Diligence needs to be exercised by State Lands Managers where they have the opportunity to control or condition the way in which land becomes RDL/LD responsibility. This means adopting one or more of the following (where feasible):

- Disclaimers under Mortgages (Commonwealth legislation).
- Obtaining statements (statutory declarations) by present owners that the land is not contaminated, or has not been used for purposes which may cause contamination; or alternatively, statements (statutory declarations) on the nature and extent of (potential) contamination.
- Where there seems a strong chance that contamination may have occurred, undertaking further investigations and obtaining statements (statutory declarations).

- Inspecting the land.
- Requiring indemnities.
- Refusing to take ownership of the land.
- Looking for alternatives – e.g., not forfeiting, where an option might be to force a lessee to comply with lease conditions, and to remediate the land