MANAGEMENT OF CONTAMINATED LAND IN WESTERN AUSTRALIA*

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INTRODUCTION

The problem of contaminated land has achieved some media publicity recently in Western Australia. Newspaper reports have drawn attention to the contamination of precious groundwater supplies on the Swan Coastal Plain in the northern and southern areas of the Perth Metropolitan Region.[1] As well, there has been local concern over the proposal to contain hazardous industrial waste on land proposed for residential re-development in Mosman Park on the shores of the lower reaches of the Swan River. Public and scientific concern about the problem of land contamination has flowed through to the governmental arena; the Environmental Protection Authority is leading a working party of officers from relevant State Government Departments to prepare for Government consideration a strategy on how to tackle the problem. The strategy may well lead to new and more comprehensive laws to deal with the contaminated land.

The purpose of this brief article is to consider the current law for dealing with the problem of land contamination in Western Australia. Any account of that law must refer to both common law principles as well as the various legislative provisions which may be applied.

1 COMMON LAW PRINCIPLES

The failure of the common law to respond to the environmental debate or foster in any way concepts of sustainability stems inevitably from its inability to take into account the wider public interest.[2]

Gerry Bates conclusion about the role of common law in the contemporary movement for environmental protection is evidenced by the lack of environmental cases before the Australian courts founded on the common law principles. It is rare these days to see common law actions for the protection of property rights; ie. actions in nuisance, trespass or *Rylands v Fletcher* strict liability. Actions for public nuisance are not common either, and are as likely to be prosecutions of statutory nuisance as common law actions.[3] Actions in negligence seeking damages for harm to environmental interests may be more common,[4] especially relating to claims for personal injuries in "toxic torts" cases.[5] Despite the infrequent resort to the common law principles, it is as well to remember that the Environmental Protection Act 1986 (WA) (the "EP Act") preserves these causes of action to protect private interests which may be affected by polluting activities.[6] Even so, there is little to be gained from reiterating here the established common law principles; I refer the interested reader to Bates account of them.[7]

I propose, instead, to make four points about the relevance of common law to the problem of contaminated land. Those points are that:

(1) the common law provides the starting proposition about the rights of landowners to use, even contaminate, their land;

(2) a recent English case reminds us that the common law of private nuisance can provide a remedy for private landowners who suffer injury to the use of their land caused by contamination from the use of other land by another person;

(3) a recent American case reminds us that the common law of public nuisance can be used by public authorities to require the clean-up of contaminated land which is causing harm to the public or the environment generally; and

(4) a recent Australian case reminds us that the common law of negligence places duties on occupiers of land to warn persons who may foreseeably be injured by a dangerous situation or hazard on that land.

The common law still provides the basic proposition about the rights of land owners to use their own land: land owners are entitled to use their land as they wish so long as they do not thereby cause damage to another person's land or interfere with another person's use of his or her land. Thus, land owners cannot be prevented from contaminating their own land in a way which does not directly affect another person's land. At common law, the only constraint on the degradation of land is the market value of the land should the owner ever wish to sell it.[8] What the common law principles fail to regulate is the cumulative effect of environmental degradation caused by the freedom of individual land owners to act in disregard of the public interest in the ecosystem as a whole. It is for this reason that legislation has been enacted to regulate community land use. But again the common law protects the interests of the individual land owner by a presumption of statutory interpretation that prevents the individual's common law rights from being diminished by statute except in the clearest legislative language. Furthermore, there is a presumption that statutes will only operate prospectively, not retrospectively. Nevertheless, the common law rights of the land owner must be viewed in the context of the common law liabilities which protect other private and public interests.

The common law doctrine of private nuisance provides the means by which one land owner may protect his or her land from contamination by another land owner. In *Cambridge Water Company v Eastern Counties Leather plc*[9] the English Court of Appeal held that a leather tanning business, Eastern Counties Leather, was strictly liable to a statutory water supply company, Cambridge Water Company, for the cost of the relocation of a bore because of chemical contamination of the groundwater emanating from the premises of Eastern Counties Leather. The Court held that the defendant company was liable on the ground of nuisance on the authority of an 1885 decision of the same court, *Ballard v Tomlinson*[10]. Mann LJ, giving the judgment of the Court, said:

> *Ballard v Tomlinson* decided that where the nuisance is an interference with a *natural right incident to ownership* then the *liability is a strict one.* The actor acts at his peril in that if his actions result by the operation of ordinary natural processes in an interference with the right then he is liable to compensate for any damage suffered by the owner.
> [emphasis added]

The case is interesting because the Trial Judge found that the defendant's conduct causing the water contamination had ceased in 1976 and the Cambridge Water Company only sustained damages after 1983 when the applicable water quality standards were changed to comply with a European Community directive. The Court said that it did not attach any legal importance to these facts, but they emphasize that the defendant was liable without fault.[11] The impact which this decision may have as a precedent for future common law actions to remedy land contamination will depend on two factors: first, what are determined to be "natural rights incident to ownership" of real property and, secondly, how willing the courts will be to impose strict liability for damage to such natural rights which may not have been a reasonably foreseeable consequence of generally accepted industrial activities.[12]

It has been suggested that the innovations of the American courts in tort law could invigorate the Australian law as a weapon in the environmental arena.[13] This encouragement to refer to American tort law should not be taken to indicate a relative burgeoning of the common law in the American endeavours to protect the environment. One American commentator has described a regulatory scene very similar to that in Australia.

Today, virtually all major sources of air and water pollution, as well as toxic waste disposal, surface mining, and coastal development, are regulated by detailed federal statutes. Regardless of one's assessment of their effectiveness, these statutes and their regulatory programs have largely supplanted the law of private nuisance at the forefront of our efforts to protect the environment.[14]

Nevertheless, in America common law principles still have their place alongside the plethora of legislation, as is shown by the litigation concerning Love Canal, that infamous contaminated site which led to the enactment in 1980 by the US Congress of the Comprehensive Environmental Response, Compensation and Liability Act. In 1989, the Federal District Court of New York State held in *United States v Hooker Chemicals & Plastics Corp* that Hooker Chemicals & Plastics Corp, the company responsible for dumping the waste at Love Canal, was liable under the common law doctrine of public nuisance to the State and Federal Governments for the cost of clean-up.[15] The Court held that the company was strictly liable, ie. regardless of fault or negligence, because the activity of dumping the waste was an abnormally dangerous one. The Court rejected the company's defence that it had sold the land to a purchaser (the New York State Board of Education for $1) who had knowledge of the condition of contamination and a reasonable time to abate it. The Court also rejected as a complete defence to liability the company's claim that the Board of Education had, by a "nonliability clause" in the contract of sale, assumed liability for the risk. The Court added that this defence could go to mitigation of damages. Regulatory authorities in Australia would do well to note this case because it may signal their avenue to recovering from polluters the cost of clean-up in situations where it may not be possible to prove fault on the part of the polluter.

Finally, this discussion of the common law would not be complete without giving notice of a "warning" given in the recent decision of the Australian High Court in *Nagle v Rottnest Island Authority.*[16] That case involved a claim for damages for personal injury sustained when the plaintiff dived from a ledge at the "Basin", a popular swimming spot on Rottnest Island, and hit a submerged rock which he had not seen. The plaintiff alleged that the injury was caused by the negligence of the Rottnest Island Board, the statutory predecessor of the Rottnest Island Authority, in failing to give any or an adequate warning that the ledge was unsafe for diving. It was accepted that the ordinary principles of liability in negligence of occupiers of land would apply to the Board.[17] The Court held that the Board, as occupier of the Island reserve with a statutory duty to manage the Island for the benefit of the public, had a duty to warn any visitors of foreseeable risks of injury associated with activities which the Board encouraged at the Island. Further, the Court held that the risk of injury to persons diving from the ledge was reasonably foreseeable, that the Board should have given a warning that the ledge was unsafe for diving and that the failure of the Board in its duty caused the plaintiff's injury.[18] Although this case relates to personal injuries to a visitor to land, I suggest that it gives a salutary warning to any occupier of contaminated land of the duty to give notice to any person who may be at risk of injury from the contamination, whether as a visitor to the land or a neighbour. Perhaps one could even extend the duty to require notice of an activity which could foreseeably create a risk of injury by contamination of land. Although it is difficult to speculate on the precise practical implications of such a general duty, I would suggest that in defending negligence actions for damages arising from injury from contaminated land, defendants may need to show that they had given notice of their activity as well as having taken all reasonable precautions in the conduct of the activity. Further, a potential defendant to actions in private or public nuisance may be able to limit the liability for damages by giving notice of pending contamination. Such notice would arguably give rise to a duty on the part of the potential plaintiffs to mitigate their losses by reasonable alteration of their use of land to avoid potential damage.

2. LEGISLATIVE PROVISIONS

It is proposed to discuss briefly the main Western Australian legislation which may by used in relation to managing the problem of contaminated land; including prevention of contamination, regulation of its use and clean-up. The legislation may be broken into five categories:

(a) controls on the management of waste;

(b) controls on the use of hazardous materials which may cause land contamination;

(c) pollution controls;

(d) planning and development controls; and

(e) special administrative powers for remediation of polluted land (clean up).

2 1 CONTROLS ON MANAGEMENT OF WASTE

The first type of such legislation is that relating to the management of waste; principally, the Health Act 1911 (WA) sanitary provisions (Part IV) and regulations under that Act such as the Health (Licensing of Liquid Waste) Regulations. There are some provisions of the Health Act which could be used to effect clean up of contaminated land; such as the provisions relating to houses unfit for occupation (Part V, Div.1), the administrative powers of inquiry (Part II) and the powers to provide analytical services (Part VIIIA).

Occasionally other legislation may create duties and liabilities governing waste disposal. For example, Environmental Protection regulation 14, made under the EP Act, governs the disposal of tyres. Even the provisions of the Land Act 1933 (WA) have been used in an endeavour to determine liabilities for management of waste. For example, by Order in Council LA202 made under the Land Act s.33(2),[19] the Governor vested reserve land in the Shire of Broomehill for the designated purpose of "Disposal of Chemical Containers" subject to the following conditions:
"(1) The Crown accepts no responsibility for any form of claim from the Shire of Broomehill, its agents, contractors and the general public resulting from the use of [the] Reserve .. for the disposal of chemical containers.

(2) The Shire of Broomehill shall at its cost, be responsible for clean up and rehabilitation of [the] Reserve ... to the satisfaction of the Environmental Protection Authority and Health Department of Western Australia (or such other appropriate Government agencies at the time) upon the reserve no longer being required for the purpose designated in this Vesting Order.

(3) The reserve shall be used in accordance with the approved management plan."
With respect, it is arguable that the disclaimer of Crown liability in condition 1 is ultra vires s.33(2) which provides only for such "conditions and limitations as the Governor shall deem necessary to ensure that the land is used for the purpose". It is doubtful that the disclaimer of liability is a condition which ensures that the land is used for the purpose of disposal of chemical containers.

2.2. CONTROLS ON HAZARDOUS MATERIALS

This type of legislation includes:

(1) Aerial Spraying Control Act 1966 and its regulations;

(2) Agriculture Produce (Chemical Residues) Act 1983;

(3) Agriculture and Related Resources Protection Act 1976, especially the power in s.106A to make regulations regarding the storage, use and transport of prescribed agricultural chemicals, and the Spraying Restrictions Regulations 1979;

(4) Explosives and Dangerous Goods Act 1961 which regulates the manufacture, storage and transport of explosives and dangerous goods classified in the Act, and the Explosives Regulations 1963 and Dangerous Goods Regulations 1992;

(5) Nuclear Activities Regulation Act 1978; and

(6) Health Act 1911 provisions and the Health (Pesticides) Regulations for controlling the use of pesticides.

This body of legislation has the general purposes of controlling the importation, manufacture, sale, use, storage, transport and disposal of the range of hazardous substances within its parameters. Not all of these substances are controlled in respect of each of these actions. Of course, the effective application of these

controls will help prevent land contamination. However, these various regulatory controls do not regulate the liabilities for and management of land contamination after an event in breach of the controls.

It is also worth noting that there are other specific legislative provisions regulating particular hazardous substances. For example, regulation 16 under the Environmental Protection Act 1986 controls the use of organotin anti-fouling paint on marine vessels and the *Health (Asbestos) Regulations 1992* declare asbestos to be a hazardous substance and provide for the clean-up and disposal of asbestos products.

23. POLLUTION CONTROL LAWS

The provisions of the Environmental Protection Act relating to pollution control are probably the most developed part of the panoply of laws needed to manage land contamination. The Act creates planning (Part III), licensing (Part V, ss.53-64) and administrative (Part V, ss.65-73) powers for regulating pollution. These regulatory powers are reinforced by general offences of pollution and specific offences of breaching authorisations and administrative orders under the Act, for which there are criminal liabilities. It is fair to say that these provisions are aimed at preventing situations of unacceptable land contamination arising through the prevention, control and abatement of pollution. However, these provisions do not address the problem of managing land after it has become contaminated, especially the problems of identification, assessment and clean-up of contaminated land.

In this context it is worth asking whether the act of contaminating land (that is, of depositing hazardous substances at concentrations above the background levels so that it poses, or is likely to pose, an immediate or long term hazard to human health or the environment)[20] would, without authority under the Act, constitute the offence of pollution under the Act ? In *Palos Verdes Estates Pty Ltd v Carbon*[21] the Supreme Court of Western Australia restricted the broad literal meaning of pollution under the Act to its traditional or "ordinary" meaning;

"namely, that the environment is altered to its detriment because the condition of the water, atmosphere, land or other aspect of the environment is altered so as to make it harmful or potentially harmful to the health, welfare, safety or property of human beings or harmful or potentially harmful to animals, birds, fish, other aquatic life, plants or vegetation".[22]

In that case, it followed that clearing land for a vehicle track fell outside the definition of pollution. However, I suggest there would be little doubt that causing land contamination would be pollution and the polluter would be subject to criminal penalties under the Act.

24. PLANNING AND DEVELOPMENT CONTROLS

The main planning and development controls are in four acts:

(a) State Planning Commission Act 1985;

(b) Metropolitan Region Town Planning Scheme Act 1959;

(c) Town Planning and Development Act 1928; and

(d) Environmental Protection Act 1986, Parts III and IV.

The first three of these acts, the "planning acts", provide the institutional structure and mechanisms for general land use planning and land use development approval in Western Australia. The land use controls of these planning acts can be used to:

(1) isolate potentially contaminating activities from sensitive land use areas; eg. zoning of industrial and residential areas;

(2) restrict the use of lands known to be contaminated to uses compatible with the level of contamination; eg. it may be acceptable to continue the industrial use of land known to be contaminated at certain levels;

(3) identify lands which need to be assessed for contamination and clean-up when they are the subject of development or re-development proposals, especially proposals for a more sensitive use; eg. industrial land proposed for residential development; and

(4) prepare plans for clean-up and management of lands which are contaminated.

This is not the place to describe in detail the operation of the planning acts and how they interact with the planning and environmental impact assessment powers and procedures under the EP Act. It was also too large a task in preparing this paper to survey the operation of the planning acts and assess how well they are being applied to problems of land contamination. However, my initial observations of how land contamination is being addressed in Western Australia indicate that little thought has been given to how the planning acts can be used. Obviously, the general operation of the planning acts has to some extent been achieving the first and second purposes mentioned above. More could be done, however, by preparing State or at least regional planning policies to regulate environmentally hazardous developments which could lead to land contamination. Perhaps the New South Wales State Environmental Planning Policy no.33 governing Hazardous and Offensive Developments could provide some guidance on the planning policies which could be adopted in Western Australia.[23] A Statement of Planning Policy under s.5AA of the Town Planning and Development Act would be one way of issuing a general planning directive. One suspects, however, that if such a policy were to be prepared it would be under Part III of the EP Act 1986 pertaining to Environmental Protection Policies. Such policies are already being used to provide general standards of permitted groundwater contamination to be applied by local authorities and other regulatory bodies in the exercise of their decision-making powers.[24]

How well adapted are the planning acts for achieving the third purpose mentioned above. I am unaware of any organized attempt to use the planning acts to achieve the identification and assessment of contaminated lands. By way of comparative illustration, let me mention relevant procedures in South Australia. The South Australian Minister for Environment and Planning issued in October 1990 a planning practice circular in respect of land contamination. The circular recommends procedures to be adopted by local planning authorities when preparing development plans and assessing development applications. In respect of development plans, the procedures require the authority to consider the known history of the site and to report on its suitability for the proposed land use. In respect of development applications, the authority should request the applicant to report on the history of the site and the potential for contamination and, in the event that there is a risk of contamination, not determine the application until the applicant has provided detailed information about for the consideration of the authority and the authority has consulted the Division of Environment of the Department. The circular goes on to provide a list of industries which may be site contaminators and a list of government departments with relevant regulatory responsibilities. I suggest that the State Planning Commission should consider adopting similar planning procedures in Western Australia.

An alternative method of strengthening the role of local authorities in identifying and assessing contaminated lands would be to prescribe by statute the matters to be considered when a local authority is considering a development application. For example, the Environmental Planning and Assessment Act 1979 (NSW) s.90(1) prescribes a list of matters to be considered in relation to a development application, including in s.90(1)(g) "whether the land to which that development application relates is unsuitable for that development by reason of its being, or being likely to be, subject to flooding, tidal inundation, subsidence, slip or bush fire or any other risk". The relevant Western Australian laws seem to leave the matters to be considered by a local authority on a development application almost entirely to the discretion of the authority.[25]

My final comment about the planning acts is that they are conspicuously excluded from a recent instance of planning and managing clean-up and subsequent use of contaminated lands. The East Perth Redevelopment Act 1991 (WA), which provides for the redevelopment of contaminated lands at East Perth, disapplied the local planning schemes and the Metropolitan Region Scheme and amended the Town Planning and Development Act, inserting s.6(4), to provide that no town planning scheme shall be made under that Act for any land within the

East Perth redevelopment area so long as there is in operation in respect of that land a scheme under the East Perth Redevelopment Act. This enactment suggests a lack of confidence in the facilities of the planning acts to deal with contaminated lands. It may also reflect on the role of local government in dealing with problems of contaminated lands.

In terms of recent practice, it is the environmental impact assessment provisions of the EP Act which have been used most used to investigate, assess and determine requirements for clean-up of contaminated lands. There are the three well known assessments of contaminated sites at Tonkin Industrial Park (August 1989 & September 1991), the East Perth Redevelopment Project involving the clean-up of the State Energy Commission gasworks site and Claisebrook Inlet (October 1992), and old fertilizer works at McCabe Street in Mosman Park (August 1993). Also, the Environmental Protection Authority ("the EPA") is currently considering assessment of a liquid effluent disposal site at Canning Vale, Southern River, an area being proposed for rezoning from rural to urban and urban deferred. In each of these cases, identifying the sites as contaminated was not difficult; especially as two of the sites were owned by State Government agencies and a third site (the Canning Vale site) is owned by the City of Gosnells. Three of these sites involve rezoning of land to include residential development and land use incompatible with the current levels of contamination. The fourth site, Tonkin Park involves a large industrial site which was proposed for subdivision into commercial and industrial lots. The three assessments which have to date been completed have all recommended that the proposal be approved by the Minister as environmentally acceptable on conditions which require some method of clean-up and a plan for the ongoing monitoring and management of the site.

A particular point to note about the environmental impact assessment procedures is that there is a duty on decision making authorities, which clearly includes local government authorities considering subdivision and development applications, to refer in writing to the EPA any "proposal that appears likely, if implemented, to have a significant effect on the environment, or a proposal of a prescribed class". Whilst proposals relating to identified contaminated land would generally be regarded as likely to have a significant effect on the environment, there may be situations where low level contaminated land is not so regarded. There may also be some doubt about land which has a history of use which makes it a potential but unconfirmed contaminated site. The EPA should consider making proposals relating to contaminated and potentially contaminated sites a "prescribed class" of proposal in order to clarify the duties of decision making authorities in respect of them. To date, there are no formal prescriptions of any class of proposal for the purposes of s.38(1), although the EPA does have informal agreements with a number of government departments relating to the types of proposals which should be referred.

As well as the four Acts mentioned here, there is a range of natural resources development legislation which may place land use and rehabilitation conditions on development projects. For example, the Mining Act 1978, ss.46A, 63AA and 84 provide for the imposition on mining tenements of conditions relating to the remediation of injury to the natural surface of the land.[26] Also, there are many major resource development projects conducted under authority of "State Agreement Acts" which are generally subject to the operation of the EP Act.

A final point to note in relation to planning and development controls is the liabilities which might be incurred by regulatory authorities such as local government authorities and the EPA if a development proposal in respect of contaminated land is approved and results in injury to people or property from the contamination. Regulatory authorities could be subject to common law negligence suits in such situations. Local government authorities could be liable for the damages sustained if the injury or loss to either the development applicant or another person is shown to have been caused by the negligence of the authority or its officers.[27] Individual councillors and officers of the authorities would not be held personally liable because of a general indemnity provision which protects them in the course of their official duties.[28] In respect of decisions pursuant to environmental impact assessment, the question of liability is a little more uncertain. The EPA makes only recommendations, not decisions, on proposals which are referred to it. Although the Minister for Environment or Cabinet makes the decision, it would be difficult to show that ministerial or cabinet decisions are negligent as they are typically policy decisions and made on advice from the EPA. Whilst the Crown would most probably be vicariously liable for the negligence of its departmental employees, it is unlikely to be so liable for any negligence on the part of members of the Authority because they are independent of the Minister.[29] It would also be difficult to sue the Authority directly because it has no separate corporate existence. Also, the

Minister, authorised officers of the Department and members of the Authority are not personally liable for acts in their official capacity.[30]

25. ADMINISTRATIVE POWERS FOR CLEAN-UP

There is no legislation dealing comprehensively with remediation of contaminated sites in Western Australia, but the Environmental Protection Act 1986 (WA) ("the EP Act") provides some limited powers to deal with the problem. Activities causing land contamination may be prosecuted under the EP Act for general offences of causing pollution or breaching an authority under the Act. But there are inherent limitations in these criminal sanctions for dealing with land contamination; they apply only to contamination caused after the enactment of the Act and prosecutions must be commenced within 12 months from the time when the contamination occurs.[31] As well, the penalty paid may well not pay for the cost of clean-up by public authorities. What provision does the EP Act make for cleaning up contamination, whether it has been a matter for prosecution or not ? Two provisions under the EP Act should be mentioned.

The first is s.65 pertaining to pollution abatement notices. It provides, inter alia, that if the Chief Executive Officer ("CEO") is satisfied that waste is being or is likely to be discharged from any premises, otherwise than in accordance with an approved environmental protection policy or a prescribed standard under the Act or that the discharge has caused or is likely to cause pollution, then the CEO may issue a pollution abatement notice to the owner or occupier of those premises requiring the person to take measures to abate the discharge. It is evident that this power is principally aimed at preventing or stopping contaminating activities rather than cleaning up existing contamination, but it may conceivably be used to require some measure of clean-up. An anomaly in the drafting of the section is that it does not acknowledge that an occupier of premises may have an authority (works approval or licence) under the Act to "cause pollution". It would appear to be inconsistent with the scheme of the Act to issue a pollution abatement notice to a person discharging waste in compliance with the conditions of a licence.

The second provision is s.73 pertaining to powers to order clean-up. The section confers certain powers on the CEO and authorised officers of the Environmental Protection Authority in two situations:

(a) when any waste is being or has been **discharged from any premises** otherwise than in accordance with an authority under the Act; or

(b) a **condition of pollution** is likely to arise or has arisen.

In these situations:

(1) an inspector or authorised person may, with the approval of the CEO, give directions to "such person" as is considered appropriate to conduct or assist remediation: s.73(1);

(2) a person who incurs costs of remediation pursuant to directions under s.73(1) and was neither the occupier of the premises at the time of the discharge from the premises nor the person who caused the discharge or condition of pollution **shall** be reimbursed by the CEO for the costs: s.73(2);

(3) the CEO may recover the cost of investigations and reimbursement under subss.73(1) & (2) from either the occupier of the premises at the time of the discharge from the premises or the person who caused or allowed the discharge or the condition of pollution : s.73(3); and

(4) the CEO may, instead of directing another person to effect remediation, cause the remediation to be carried out and recover the cost of the remediation from either the occupier of the premises at the time of the discharge from the premises or the person who caused or allowed the discharge or the condition of pollution: s.73(4).

In these provisions, the singular "person" and "occupier" would mean the plural as well: s.10 Interpretation Act 1984 (WA).

It is helpful to summarise the effect of these provisions. Section 73 confers powers to clean-up either contamination of another person's land (ie. "a discharge from premises") or of one's own land (ie. "a condition o pollution"), thus reversing the effect of the common law presumption that one is free to contaminate one's own land.[32] The EPA is authorised to require any person it considers appropriate to remediate the contaminated land, including "innocent" persons who did not cause the contamination or were not in occupation of the premises at the time of the contamination. However, these innocent persons may recover the cost of remediation from the EPA, ie. from a public fund. Alternatively, the EPA may decide to undertake remediation itself. If the EPA has reimbursed innocent persons for the costs of remediation or has undertaken the remediation itself, it can then seek to recover the cost of remediation from either the actual polluter (the person who caused or allowed the discharge or the condition of pollution) or the occupier of the premises at the time of the discharge from the premises. This effectively deems the occupier of the premises at the time of the discharge to be liable, whether or not the occupier caused the discharge which led to the contamination. This liability would seem consistent with the general scheme of the pollution control provisions of the EP Act which seek to regulate the occupiers of premises. However, it should be noted that the liability of occupiers for the costs of remediation is not by section 73(3) extended to an occupier of premises at the time a "condition of pollution" arises; ie when there is a contamination of the land not extending beyond the premises. The effect of the Interpretation Act provision is that the EPA may give directions to multiple parties and recover the cost of the remediation from multiple parties. If the actual polluters and / or responsible occupiers cannot be found, then the costs of any remediation will be borne by the public fund.

There are a number of **problems with s.73** as a basis for managing clean-up of contaminated lands.

(1) The section can only be used for clean-up of contamination which has occurred after the enactment of the EP Act. Many contaminated sites needing remediation would have been polluted before 1 January 1987 when the Act came into force.

(2) There are problems of statutory drafting which make uncertain the defence of a discharge with authority under the Act. In s.73(1), the power to authorise clean-up directions is expressed to arise where there has been a discharge from premises otherwise than in accordance with an authority under the Act. No similar defence of authority under Act is expressed in s.73(1) to apply to a situation of a condition of pollution; ie contamination of one's own land. Further, s.73(4) is not similarly qualified. It activates the CEO's powers "if any waste has been or is being discharged from any premises or a condition of pollution is likely to arise or has arisen". It appears inconsistent with the scheme of the Act to provide these powers of clean-up where the discharge may be pursuant to an authority under the Act, which is a defence to prosecution under the Act for the offence of pollution. These inconsistencies of statutory drafting make uncertain the circumstances in which the clean-up powers may be exercised.

(3) There is the further anomaly in the provisions (mentioned above) that an occupier of premises at the time of a discharge from premises will be liable for the cost of remediation, but an occupier of premises at the time a condition of pollution arises will not.

(4) The powers under s.73 depend considerably on the exercise of administrative discretion by the CEO. No guidance is given for apportioning liability between multiple parties who are potentially liable.

(5) Section 74 of the EP Act provides limited defences against proceedings for offences under the Act. It is arguable that similar defences should apply to polluters and occupiers who are either ordered to clean-up or who are pursued for the costs of clean-up.

(6) The provisions of s.73 do not at all allocate financial liability for remediation on a risk basis; ie to an owner or occupier who was not the polluter or occupier at the time of the contamination but who may gain some benefit from the use of the land which is cleaned up using public funds.

Finally, I should note another method by which contamination clean-up may be required. The EPA could impose clean-up requirements as conditions of a works approval or licence under Part V of the Act. I am unaware of what the practice of the Authority has been in this regard, but it seems to me that this method of

regulation has some problems given the current administrative practice of licensing. First, licences tend to be short term authorities subject to renewal and any decommissioning requirements of clean-up would have to be restated each time. Secondly, given the frequent renewal, the requirements could be subject to revision providing uncertainty for the licensee. Finally, requirements imposed on licences issued late in the life of an industrial operation could be onerous as they may substantially change the management objectives of the licensee. These points are not made to suggest that clean-up conditions should not be imposed on pollution licences; rather that clean-up considerations should be an intrinsic part of the planning and initial approval of a project.

3 CONCLUSION: THE NEED FOR LEGISLATIVE REFORM

The current review of contaminated land management in Western Australia is timely. It is estimated that there are at least 1500 contaminated sites in the State, although not all would necessarily require clean-up. Some of the sites of contamination are already significant problems, especially in relation to groundwater. There needs to be a thorough review of the relevant legislation discussed here to provide a certain and sufficient framework for a comprehensive treatment of the problem. The elements of such a framework must include better methods for preventing contamination through more effective laws for planning land use, controlling the use of hazardous substances and controlling pollution. The use of fiscal incentives should also be explored.

Unfortunately, one suspects that the emphasis of much of the law reform will be on cleaning up land already contaminated. In this regard, Western Australian law is particularly deficient in providing for the identification and investigation of sites. There needs to be a better use of planning laws to aid in identification of sites, a register to give notice of sites and a system of accredited auditors for investigation of sites. There will also need to be a re-consideration of the rules for allocating financial liability for remediating contaminated land and the defences available for such liabilities. As is shown above, even the current provisions relating to actual powers of clean-up will need to be reformed. Finally, provision should be made for the clean-up of "lawful pollution" when community standards change or new technology becomes available.

Even if this legislative reform takes place soon, it will still be prospective in effect (unless Parliament takes the unusual step of making it retrospective). It would be wise, therefore, for statutory authorities and private persons to remember the principles of the common law. It may well be that we will see a reform of its principles by the courts.

This article is extracted from a paper presented at the NELA (WA Division) Seminar "Local Government and Environmental Management", in Perth, 27 September 1993.

Perth depends on the Gnangara and Jandakot Water Mounds for 40% of its potable water supply.

G Bates, *Environmental Law in Australia*, 3rd ed, Butterworths, 1992, 49.

Baulkham Hills Shire Council v Domachuk (1988) 66 LGRA 110.

See *Ball v Consolidated Rutile Ltd* [1991] 1 Qd R 524.

Western Australia v Watson [1990] WAR 248.

S.111 Environmental Protection Act 1986 (WA)

G Bates, *Environmental Law in Australia*, 3rd ed, Butterworths, 1992, ch.2.

There are also the duties of the occupier of land towards visitors who come onto the land, such as are discussed below in *Nagle v Rottnest Island Authority* (1993) 112 ALR 393 in relation to the duty to give notice of hazards on one's land. [1992] TLR 654. An extract from the Court's judgment and an analysis of the decision by Nicola Atkinson are contained in (1993) 5(1) *Journal of Environmental Law* 172-184.

(1885) 29 Ch D 115.

The Trial Judge held that the defendant was not liable in negligence or nuisance because the damage to the plaintiff's use of land was not reasonably foreseeable and so the defendant not at fault. However, the Court of Appeal's decision is consistent with the view that strict liability in nuisance will arise where there is physical damage to the plaintiff's property as opposed to an effect upon the plaintiff's enjoyment of the property. In the latter case there must be some

proof of fault or unreasonable user of land by the defendant: see a brief analysis of this point in M Davies, "Private Nuisance, Fault and Personal Injuries" in (1990) 20 *UWALR* 129 at 132-136.

12 Leave to appeal to the House of Lords has been sought.

13 P Cashman, "Torts", ch.5 in T Bonyhady (ed) *Environmental Protection and Legal Change*, 1992, Federation Press, Sydney, 125. A general account of the application of American common law principles to the problem of hazardous waste is given by Susan M Cooke, *The Law of Hazardous Waste: Management, Clean-up, Liability, and Litigation*, Matthew Bender, vol.3, ch.17.

14 J Lewin, "*Boomer* and the American Law of Nuisance: Past, Present and Future", in (1990) 54 *Albany Law Review* 189 at 229-230.

15 722 F.Supp.960 (WDNY 1989). The case is discussed in a note by Julie Mauer, "The Availability of the Affirmative Defenses of Assumption of Risk and the "Sale Defense" Against Common Law Public Nuisance Actions: *United States v Hooker Chemicals & Plastics Corp*" in (1990) 30 *Natural Resources Journal* 941. Hooker was also held liable under CERCLA: (1988) 680 F.Supp. at 546.

16 *Nagle v Rottnest Island Authority* (1993) 112 ALR 393.

17 (1993) 112 ALR 393 at 395.

18 (1993) 112 ALR 393 at 397-400.

19 *Government Gazette, WA* 16 October 1992, p.5127.

20 See *Australian and New Zealand Guidelines for the Assessment and Management of Contaminated Sites*, published by the Australian and New Zealand Environment and Conservation Council in January 1992, 2, definition of contaminated site.

21 (1991) 72 LGRA 414.

22 (1991) 72 LGRA 414 at 429, per Malcolm CJ. See also *Electricity Commission of NSW v EPA* (1992) 28 NSWLR 494 and 77 LGRA 424.

23 See discussion of NSW laws applying to contaminated land management in D Craig & K Erlich, "Environmental Laws Applying to Contaminated Land" in (1993) Issue 1 *Australian Environmental Law News* 27.

24 See Environmental Protection (Gnangara Mound Crown Land) Policy 1992, Government Gazette of WA, 24 December 1992.

25 See Town Planning and Development Act 1928 s.8 governing general provisions of town planning schemes and Local Government Act 1960 s.248 giving councils the power to make by-laws for carrying out their town planning powers.

26 For a discussion of rehabilitation duties and liabilities, see articles in [1991] *AMPLA Yearbook*.

27 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

28 Local Government Act s.680.

29 Environmental Protection Act s.8.

30 Environmental Protection Act s.121.

31 Environmental Protection Act s.114(2).

32 "Condition of pollution" is a slightly unusual phrase not generally used in the Act or defined in the Act. "Pollution" i defined in s.3(1) to mean "direct or indirect alteration of the environment - (a) to its detriment or degradation; (b) to the detriment of any beneficial use; or (c) of a prescribed kind".