

SOUTH AUSTRALIA

Environment Protection (Site Contamination) Amendment Bill 2007 (SA)*

Background

Legislation to deal with land contamination issues in South Australia has been proposed for many years to bring the State into line with the other States and Territories. After lengthy consultation processes on earlier drafts, a Bill was introduced into the Parliament in May and can be expected to be enacted in substantially that form shortly. This update summarises some of the key components of that Bill and what it may mean for landowners and occupiers.

Substantial changes

One of the substantial changes introduced by this Bill is the ability of the Environment Protection Authority (EPA) to issue assessment and remediation orders in relation to land. The orders can be issued where the EPA is satisfied, or even merely suspects, that site contamination exists on a site. Importantly, there is no distinction about when that contamination occurred which means the legislation effectively applies retrospectively. Owners and occupiers of contaminated land should seek advice about the extent of any liability they may have.

What is site contamination?

Site contamination exists at a site if chemical substances introduced to the site are present on or below the surface of the site in concentrations above the background concentrations (if any) resulting in:

- actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land use; or
- actual or potential harm to water that is not trivial; or
- other actual or potential environmental harm that is not trivial, taking into account current or proposed land uses.

Who is responsible?

The EPA will issue assessment or remediation orders to the person who caused the site contamination or, failing that, the current owner of the site. In instances where the EPA merely has a suspicion of site contamination they will issue an assessment order to the owner.

How can site contamination be caused?

If a party was the occupier of land when there was an activity on the land that caused or contributed to site contamination then they are taken to have caused the site contamination.

A party may be taken to have caused contamination if they brought about a change of use of a site. For example, when a developer buys former industrial land and intends to convert it to residential. In such a situation if site contamination results due to that change of use, the act of changing the use of the land is taken to have caused the site contamination. Again, this applies whether the change of use occurred before or after the commencement of these provisions.

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In some situations there may be two or more people who could be issued with orders. In such a case, the EPA may determine that any one of those people is the appropriate person to be issued with the order. Alternatively, it could be that two or more people will be issued with the order in which case they would be jointly and severally liable.

1. Site contamination assessment orders

If it is satisfied or merely suspects there is site contamination, the EPA can issue site contamination orders. Such orders must include a requirement that an assessment of the nature and extent of the site contamination be carried out and that a written report be prepared. Such orders may specify that a person with special qualifications be engaged to carry out the assessments or to write the reports. They may also include a requirement for a site contamination audit to be carried out.

2. Site remediation orders

Site remediation orders can be issued by the EPA if it is satisfied there is site contamination and if it considers remediation is required, taking into account current or proposed land uses. Such orders could include requirements for remediation to be carried out within a specified period, for preparing a plan of remediation, for a written report of the remediation to be submitted to the EPA or for a site contamination audit to be carried out.

3. Liability upon sale of land

After the commencement of these provisions, if a party purchases land that is contaminated and they agree (in writing) to assume liability for the site contamination then the provisions apply as if they had caused the site contamination.

If there is no such agreement in writing but a party sold land (in a genuine arm's length sale) before the commencement of these provisions for a price (as a result of knowledge or suspicion of the presence of chemical substances) fixed on the basis that the purchaser might incur costs associated with remediation, then the vendor can apply to the EPA for a determination that they are not liable for the site contamination.

4. Registration of orders

The EPA can apply to the Registrar-General for registration of assessment or remediation orders on the register book held by the Lands Titles Registration Office. Once an application is made the Registrar-General must register the order. A registered order is binding on each owner from time to time. The EPA can apply for notation on the register of a site contamination audit report.

5. Liability for property damage

Persons required to enter or do anything on land in order to carry out the requirements of a site contamination assessment order or site remediation order can be liable to the occupier or owner of the land for any damage including loss suffered because of interruption to the occupier's business and where it is not practicable to make good the loss, compensation may be payable.

6. Notification of contamination to underground water

An owner, occupier, site contamination auditor or consultant is required to notify the EPA upon becoming aware of any contamination that affects or threatens ground water.

7. Land use planning

Site contamination will also be addressed through the land use planning process under the current Development Act 1993. When an application is made to the relevant development authority such as a local council for a sensitive land use on a site that has a history of prescribed contaminating activity having occurred, the application will need to be supported by a site contamination audit undertaken by an accredited auditor.

VICTORIA

ROYALTIES AND INJUNCTION*

Golden Sands Pty Ltd v Excel Quarries Pty Ltd (No 2) [2007] VSC 157 (7 May 2007)

Royalties – Injunction – Lower risk of injustice – Change in circumstance

Background

In 2001, Golden Sands Pty Ltd was granted the right to extract sand from and use the equipment at a quarry located at Darra in Victoria.

In November 2006, Golden Sands brought action in the Supreme Court of Victoria alleging that some of the equipment at the site was faulty and that the defendants engaged in misleading conduct and breached both express and implied warranties arising from a Royalty Agreement relating to the equipment. Golden Sands withheld royalty payments to the defendants on the basis of set-off, claiming no payment was due. The defendants counterclaimed for the royalty amounts.

At the close of the time allotted for the trial, approximately only half of the case had been argued and continuation of the trial was not going to be possible for a period of several months. In the interim, Whelan J ordered that Golden Sands not enter the site, extract any sand, or use any of the production equipment without paying the ‘minimum monthly royalty payments’ of \$41,800 from 28 December 2006 (the ‘2006 Order’).

On 15 December 2006, Golden Sands appealed the decision to the Court of Appeal. The appeal was heard on 5 March 2007 and was dismissed.

New Application by Golden Sands

On 22 March 2007, Golden Sands filed an application to have the previous order vacated or varied on the basis that Golden Sands could not meet the minimum monthly royalty payments and pay its legal costs relating to the proceedings as well.

Golden Sands also gave an undertaking to vacate the Darra site by 1 May 2007, and that they would not remove any more sand from the site as of that day. Golden Sands argued that this in itself would achieve what had been sought by the defendants in the first hearing.

Reasons for the 2006 Order

Four matters were relied upon in determining that minimum monthly royalty payments should resume:

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