

should be borne in mind when acquiring tenements to which an exemption appears to have been granted. It may be prudent to make some inquiries as to the regularity of the grant. This is consistent with the view that the system of registration and the maintenance of the register under the Act⁸ only confers a “limited indefeasibility” and that it is not sufficient for a purchaser of a tenement to simply rely on the register.⁹

Further, the findings and comments of the Warden as to the dealings of the Department in relation to this exemption application may encourage challenges to the grant of exemption applications on the grounds of denial of natural justice and procedural fairness. However, such challenges will need to be based on the factual circumstances of each case.

THE CONTAMINATED SITES ACT 2003 (WA)*

Introduction

The *Contaminated Sites Act 2003 (WA)* (Act) was finally passed by the Parliament of Western Australia after several years of development and was assented to on 7 November 2003. It has not yet been proclaimed.

The Act creates a regime for the identification, reporting, management and remediation of contaminated land. It is the most comprehensive legislation of its type in Australia.

The new regime will have practical and legal consequences for, amongst others, companies operating in the mining, oil and gas industry.

Overview

The Act casts a broad net as to who are responsible for all or part of the cost of rehabilitating contaminated land. Retrospective liability for remediation can be imposed.

The object of the Act is to protect human health and the environment¹. It does so by requiring the identification of contaminated sites so they can be recorded on a public database². It gives the Crown the ability to place a Memorial on the title of any contaminated land³. It facilitates management and remediation of contaminated sites⁴ and sets out notification procedures so no one should acquire a contaminated site without knowing it is contaminated⁵. The Act requires sites posing a threat to human health to be cleaned up.

⁸ See particularly section 116(2) of the Act which provides that, except in the case of fraud, a mining tenement granted or renewed shall not be impeached or defeasible by reason of any informality prior to the grant or renewal and does not have to inquire into the circumstances of registration; see also s 103A(4).

⁹ M Hunt, *Mining Law in Western Australia* (Federation Press, 2001) at pp 205-206.

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¹ Section 8 of the Act.

² Section 11 of the Act.

³ Section 58 of the Act.

⁴ Parts 3 to 5 of the Act.

⁵ Section 68 of the Act.

The definition of “contaminated” is a risk-based definition. A substance must pose a risk to human health or the environment in order for the land to be considered “contaminated”⁶.

The Act operates by requiring notification of contamination of sites⁷. The Department of Environmental Protection (DEP) then classifies the level of contamination (if any) on the site⁸, and enforces decontamination (remediation) of the site⁹. Failure to comply with the notification requirements under the Act constitutes an offence. The penalty is a fine of up to \$250,000 with a daily maximum penalty of \$50,000¹⁰. There are also criminal sanctions for certain breaches of the Act¹¹.

The Act establishes a hierarchy of responsibility for remediating the site, starting with the polluter and ending with the State (where an owner of the land cannot be found)¹².

After the commencement of the Act, a person who becomes an owner of land will be responsible for remediation to the extent that, after reasonable attempts have been made, the person responsible cannot be found or where that person is insolvent¹³.

The State will also be able to place a charge on titles to land, which will rank in priority over any other encumbrances, to ensure remediation of a site and/or secure recovery of costs for remediation undertaken by the State¹⁴.

The public will also have access to a contaminated sites database operated by the DEP¹⁵.

The following entities may be responsible (depending on the circumstances):

- **The person who has caused or contributed to the contamination will be responsible**¹⁶

Where contamination is caused after the commencement of the Act, a person who caused or contributed to the contamination will be responsible for remediation. Where contamination occurred before the commencement of the Act, a person who caused or contributed to the contamination will only be responsible for remediation if the contamination results from an act which was done without lawful authority at the time it was carried out.

- **The owner or occupier of the land who changes the land’s use**¹⁷

An owner, mortgagee in possession or occupier who changes or proposes to change the use of their land is responsible to the extent that remediation is required due to the change in use. This responsibility is connected to the “risk-based” definition of “contamination”. Land may not be “contaminated” for the purposes of the Act where it is to be used for an industrial purpose, but where that use is changed to residential, as an example, the land may be considered to be “contaminated” because the contamination now poses a risk to human health.

⁶ Section 4 of the Act.

⁷ Section 11 of the Act.

⁸ Division 2 of Part 2.

⁹ Parts 3 to 5 of the Act.

¹⁰ Section 11(3) of the Act.

¹¹ An example is section 95 of the Act which prohibits the victimisation of a person who, for example, may be intending to make a report under section 11 or 12 of the Act.

¹² Sections 24 to 29 of the Act.

¹³ Section 27(2) of the Act.

¹⁴ Section 58(1)(b) of the Act.

¹⁵ Section 21 of the Act.

¹⁶ Section 25 of the Act.

¹⁷ Section 26 of the Act.

- **The owner of the site**¹⁸

The owner will be responsible for remediation if a person who caused or contributed to the contamination cannot be found or is insolvent and the landowner has not gained exemption through a disclosure statement (see below).

The owner can avoid responsibility by disclosing the identity of the person who caused the contamination and make them responsible for remediation.

A party responsible for remediation of a site may transfer that responsibility to another person (with that person's written consent). However, such an agreement must be approved in writing by the Chief Executive Officer of the DEP.

Impact on the Mining and Petroleum Industry

Given that mining and petroleum joint ventures are usually conducted under lawful authority (ie pursuant to the terms of an exploration licence, mining lease or permit) contamination caused prior to the commencement of the Act will not necessarily give rise to liability. If the contamination was within the scope of the lawful authority of the mining lease, production licence, etc, then retrospective liability will not arise. However, readers would anticipate that in many large and complex resources projects, some events may occur which are beyond the lawful authority provided. For example, a mining lease and/or environmental approval may specify the use of tailings dams. If these dams leaked, then any contamination caused by that leak may be unlawful and, therefore, give rise to a retrospective liability.

Other examples of the contamination that is most likely to arise in the context of a mining or petroleum joint venture include the escape of chemicals or harmful by-products from pipelines and the storage and use of chemicals in the production process.

There is no protection for contamination caused after the commencement of the Act. Whilst a mining or petroleum joint venture may be conducting operations in accordance with its licence, lease or permit, *any* contamination caused after the commencement of the Act will fall within the ambit of the Act.

The impact of the Act on mining and petroleum joint ventures is therefore significant and wide ranging. As already discussed, the Act imposes liability for remediation on a person who has caused, or contributed to, the contamination of a site after the commencement of the Act. For example, after the commencement of the Act, if a mining joint venture meets its obligations (imposed pursuant to the grant of any mining tenement) to rehabilitate land contaminated as a result of its activities, this will not prevent the company from being found liable in the future for any remaining contamination on the land that was not previously identified and which is attributable to their activities (regardless of whether or not that activity was lawful).

In order to limit environmental liability, mining and petroleum joint ventures will need to undertake contamination audits over their tenements to identify and report on any contamination that is found. Additionally, companies that wish to acquire an interest in a mining tenement will need to ensure that contamination audits are undertaken in respect of that tenement to identify whether any contamination exists and to ascertain who is responsible for remediation.

Commencement of the Act

The Act was scheduled to be proclaimed by the middle of this year. However, the DEP is still in the process of putting in place the necessary administrative systems required for monitoring and

¹⁸ Section 27 of the Act.

enforcing compliance with the Act. It is now believed that the Act will not be proclaimed until late 2004. The Act will not become law until it is proclaimed.

In the meantime, the DEP proposes to release draft regulations for comment by the general public. The mining and petroleum industry should closely consider these draft regulations and provide their comments on any aspects of the regulations that they feel will impact upon their business.

VALIDITY OF BARRISTER'S SIGNATURE ON PLAINT*

Goldstream Minerals & Exploration Pty Ltd v Newmont Duketon Pty Ltd & Ors ([2004] WAMW 5, Kalgoorlie Warden's Court, 9 June 2004, Warden Sharratt SM)

Plaint – Strike out – Regulation 122 (1) – Signature by barrister

Facts

The plaintiff lodged three complaints seeking forfeiture of mining leases. The complaints were signed by a barrister in the barrister's name and the signature was annotated "counsel for the Plaintiff".

The defendants applied to strike out the complaints on the basis that they did not comply with regulation 122(1) of the *Mining Regulations 1981 (WA)*. Regulation 122(1) provides, inter alia, that "every complaint shall be signed by the plaintiff or his solicitor".

Submissions

The defendants relied upon the authority of *Exmin Pty Ltd v Australian Gold Resources Ltd*,¹ wherein complaints which were signed by a tenement manager under a power of attorney were struck out, as authority for the proposition that a complaint which did not comply with regulation 122 was a nullity which should be struck out.

The defendants submitted that in view of the traditional distinction between a "barrister" and a "solicitor", the reference to "solicitor" in regulation 122(1) should be construed strictly so as to exclude a "barrister and solicitor" under the *Legal Practitioners Act 1893 (WA)* who had been admitted to the bar and had undertaken not to carry on the traditional work of a "solicitor".

The defendants further submitted that policy reasons supported this conclusion because the retainer between a solicitor and a plaintiff made it reasonable to assume that a solicitor had authority to issue a complaint whereas a barrister does not have a direct relationship of retainer with the plaintiff.

The plaintiffs disputed that the complaints were irregular, denied that any irregularity rendered the complaints a nullity and argued that any irregularity could be cured under section 142 of the *Mining Act 1978 (WA)*.

Held

Warden Sharratt SM noted that he was sitting administratively and that the same considerations that apply in judicial proceedings may not apply. He concluded that it was reasonably safe to assume, in all the circumstances, that the barrister had authority to issue the complaints even though there was no direct agency relationship between the barrister and the plaintiff.

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¹ Exmin Pty Ltd has issued a writ of certiorari and mandamus in respect of the decision in *Exmin Pty Ltd v Australian Gold Resources Ltd* [2002] WAMW 29 but as at the date of writing it had not been heard.