

## TOPIC 6 - CIVIL LIABILITIES

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## 6.1.1. Liability under EP Act (WA)

### Overview of relevant provisions - EP Act (WA)

1. **ss73 & 73A:** Inspector / CEO can undertake (**s73**) or order another person (**s73A** “prevention notice”) to undertake clean-up, prevention or abatement of pollution / environmental harm:
  - CEO may recover costs from the occupier/polluter.
  - CEO ‘is to’ reimburse ‘any cost’ of an innocent person (i.e. not occupier at time / not polluter).
  - Offences for non-compliance with prevention notice: **s73A(6) & (7)**
  - Distinguish examples of EPN (**s65**) & PN (**s73**)
2. **s73B:** breach of notice > liable for damages.
3. **ss99X & 99Y:** Court powers on conviction:
  - **s99Y(1):** Maximum amount prescribed Regulation 44 (Max CEO can recover is \$2 mill)

### Actual provisions from the EP Act (WA)

#### 1. Section 73

##### **73. Powers to deal with etc. discharges of waste, pollution and environmental harm**

- (1) If an inspector or authorised person reasonably suspects that —
  - (a) any waste has been or is being discharged from any premises otherwise than in accordance with a works approval, licence or requirement contained in a closure notice or an environmental protection notice; or
  - (b) a condition of pollution is likely to arise or has arisen; or
  - (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,

the inspector or authorised person may, with the approval of the CEO, take the action referred to in subsection (1a).

- (1a) The inspector or authorised person may, with such assistance as the inspector or authorised person considers appropriate —
- (a) remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or
  - (b) prevent the condition of pollution from arising or control or abate that condition if it arises; or
  - (c) prevent the act referred to in subsection (1)(c) or control or abate the environmental harm if it arises,

as the case requires.

[(2) *deleted*]

- (3) When an inspector or authorised person has incurred any cost in acting under subsection (1), the CEO may recover that cost from the person who —
- (a) was the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or
  - (b) caused or allowed to be caused —
    - (i) the discharge referred to in paragraph (a); or
    - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
    - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, by action in a court of competent jurisdiction as a debt due to the Crown and shall pay any cost so recovered into the Consolidated Account.

- (4) If —
- (a) any waste has been or is being discharged from any premises otherwise than in accordance with a works

approval, licence or requirement contained in a closure notice or an environmental protection notice; or

- (b) a condition of pollution is likely to arise or has arisen; or
- (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,

the CEO may cause —

- (d) the waste to be removed, dispersed, destroyed, disposed of or otherwise dealt with; or
- (e) the condition of pollution to be prevented from arising or, if that condition arises, that condition to be controlled or abated; or
- (f) the act to be prevented from occurring or, if the environmental harm arises, that environmental harm to be controlled or abated.

- (4a) The CEO may recover the cost of the removal, dispersal, destruction, disposal or other dealing, or of the prevention, control or abatement, as the case requires, referred to in subsection (4) from the person who —

- (a) was the occupier of the premises at the time of the discharge referred to in subsection (4)(a); or
- (b) caused or allowed to be caused —
  - (i) that discharge; or
  - (ii) the likelihood of the relevant condition referred to in subsection (4)(b) arising or the arising of that condition; or
  - (iii) the likelihood of the relevant act referred to in subsection (4)(c) occurring or the occurrence of that act,

by action in a court of competent jurisdiction as a debt due to the Crown.

- (4b) Any cost recovered under subsection (4a) is to be paid into the Consolidated Account.

## 2. Section 73A

### 73A. Prevention notices, issue and effect of

- (1) If an inspector or authorised person reasonably suspects that —
- (a) any waste has been or is being discharged from any premises otherwise than in accordance with a works approval, licence or requirement contained in a closure notice or an environmental protection notice; or
  - (b) a condition of pollution is likely to arise or has arisen; or
  - (c) a person has done, is doing, or is likely to do, an act in contravention of section 50A or 50B,

the inspector or authorised person may, with the approval of the CEO, give a notice (a **prevention notice**) to such person as the inspector or authorised person considers appropriate.

- (2) A prevention notice may require the person to whom the notice is given —
- (a) to remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or
  - (b) to prevent the condition of pollution from arising or control or abate that condition if it arises; or
  - (c) to prevent the act referred to in subsection (1)(c) or control or abate the environmental harm if it arises,

as the case requires and is to describe the action the inspector or authorised person considers appropriate to achieve that result.

- (3) When a person has complied with any requirements contained in a prevention notice given to the person under subsection (1), the CEO is to, if the person was not —
- (a) the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or

- (b) the person who caused or allowed to be caused —
  - (i) the discharge referred to in paragraph (a); or
  - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
  - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, reimburse the person any cost incurred by the person in complying with those requirements.

- (4) When the CEO has reimbursed any cost under subsection (3), the CEO may recover that cost from the person who —
- (a) was the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or
  - (b) caused or allowed to be caused —
    - (i) the discharge referred to in paragraph (a); or
    - (ii) the likelihood of the relevant condition referred to in subsection (1)(b) arising or the arising of that condition; or
    - (iii) the likelihood of the relevant act referred to in subsection (1)(c) occurring or the occurrence of that act,

as the case requires, by action in a court of competent jurisdiction as a debt due to the Crown.

- (5) Any cost recovered under subsection (4) is to be paid into the Consolidated Account.
- (6) A person who intentionally or with criminal negligence does not comply with a requirement contained in a prevention notice given to that person, without reasonable excuse for that contravention, commits an offence.

- (7) A person who does not comply with a requirement contained in a prevention notice given to that person, without reasonable excuse for that contravention, commits an offence.
- (8) A person charged with committing an offence against subsection (6) may be convicted of an offence against subsection (7) which is established by the evidence.

*[Section 73A inserted: No. 54 of 2003 s. 52; amended: No. 77 of 2006 s. 4.]*

### 3. Section 99X & 99Y

#### 99X. Orders for prevention, restoration etc.

- (1) If a court convicts a person of an offence against this Act, the court may order the offender to take such steps as are specified in the order, within such time as is so specified (or such further time as the court on application may allow) —
  - (a) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence; or
  - (b) to make good any resulting environmental damage; or
  - (c) to prevent the continuance or recurrence of the offence.
- (2) A court is not to make an order under subsection (1) unless the prosecutor applies for the order.
- (3) The court may, in an order under this section, impose any other requirements the court considers necessary or expedient for enforcement of the order.
- (4) A person who without lawful excuse, proof of which is on the person, does not comply with an order under this section commits an offence punishable after summary conviction by the court that imposed the order.
- (5) If a court convicts a person under subsection (4) of failing to comply with an order, the court may order that the act required to be done may be done so far as is practicable by the CEO, or some other person appointed by the court, at the cost of the offender.
- (6) Expenses and costs incurred, or to be incurred, by a person under an order under subsection (5) are to be ascertained in such manner as the court may direct and are to be paid by, or recovered from, the offender in such manner as the court orders.

*[Section 99X inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]*

#### 99Y. Orders for costs, expenses and compensation

- (1) If a court convicts a person of an offence against this Act, the court may, if it appears to the court that —
  - (a) the CEO or a public authority has reasonably incurred costs and expenses in connection with —
    - (i) seizing, storing, treating, selling, destroying, disposing of or otherwise dealing with a thing seized under this Act in relation to the offence; or
    - (ii) the prevention, control, abatement or mitigation of any harm to the environment caused by the commission of the offence; or
    - (iii) making good any resulting environmental damage;or
  - (b) a person (including a public authority) has, by reason of the commission of the offence, suffered loss of or damage to property or has reasonably incurred costs and expenses in preventing or mitigating, or in attempting to prevent or mitigate, any such loss or damage,order the offender to pay to the CEO, public authority or person the reasonable costs and expenses so incurred, or compensation for the loss or damage so suffered, as the case may be, in such amount as does not exceed the prescribed amount and is fixed by the order.
- (2) The court may make an order under subsection (1) at the time of imposing a penalty for the offence or upon application at a later time.

*[Section 99Y inserted: No. 14 of 1998 s. 14; amended: No. 54 of 2003 s. 140(2).]*

## 6.1.2. Liability - Cth

### Overview of relevant provisions - EPBC Act (Cth) & NGER Act (Cth)

#### 1. EPBC Act provisions

- **s475:** A range of judicial injunctive powers to prohibit or compel action to secure compliance with the Act.
- **s480A & 480D:** Powers to order remediation, either directly by Court or on testing of Ministerial remediation determination.
- **s499:** Minister's powers of remediation.
- **s500:** Any person may recover loss or damage, including expenses:
  - Recoverable in Court as a debt due to the affected party.
  - Includes Cth Minister's expenses of remediation.

#### 2. NGER Act Provisions

- **s22XF:** Amount of civil penalty designed to reflect extent of non-compliance with SM baseline.

### Deployable Exam Paragraph

- The EPBC Act provides a range of enforcement and remediation mechanisms under Commonwealth environmental law. Section 475 grants courts broad injunctive powers to prohibit unlawful conduct or compel compliance with the Act. Sections 480A and 480D empower courts and the Minister to require remediation of environmental harm, while s 499 separately grants the Minister remediation powers.
- Section 500 reinforces the "polluter pays" principle by allowing affected persons, including the Commonwealth Minister, to recover losses and remediation expenses as a debt. Separately, under the NGER Act, s 22XF imposes civil penalties linked to the extent of non-compliance with Safeguard Mechanism emissions baselines, reflecting the seriousness of greenhouse gas exceedances.

## Actual provisions from the EPBC Act (Cth)

### 1. Section 475

#### **475 Injunctions for contravention of the Act**

##### *Applications for injunctions*

- (1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act or the regulations:
  - (a) the Minister; or
  - (b) an interested person (other than an unincorporated organisation); or
  - (c) a person acting on behalf of an unincorporated organisation that is an interested person;may apply to the Federal Court for an injunction.

##### *Prohibitory injunctions*

- (2) If a person has engaged, is engaging or is proposing to engage in conduct constituting an offence or other contravention of this Act or the regulations, the Court may grant an injunction restraining the person from engaging in the conduct.

##### *Additional orders with prohibitory injunctions*

- (3) If the court grants an injunction restraining a person from engaging in conduct and in the Court's opinion it is desirable to do so, the Court may make an order requiring the person to do something (including repair or mitigate damage to the environment).

##### *Mandatory injunctions*

- (4) If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail to do an act, and the refusal or failure did, does or would constitute an offence or other contravention of this Act or the regulations, the Court may grant an injunction requiring the person to do the act.

##### *Interim injunctions*

- (5) Before deciding an application for an injunction under this section, the Court may grant an interim injunction:
  - (a) restraining a person from engaging in conduct; or
  - (b) requiring a person to do an act.

##### *Meaning of interested person—individuals*

- (6) For the purposes of an application for an injunction relating to conduct or proposed conduct, an individual is an *interested person* if the individual is an Australian citizen or ordinarily resident in Australia or an external Territory, and:
  - (a) the individual's interests have been, are or would be affected by the conduct or proposed conduct; or
  - (b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:
    - (i) the conduct; or
    - (ii) in the case of proposed conduct—making the application for the injunction.

##### *Meaning of interested person—organisations*

- (7) For the purposes of an application for an injunction relating to conduct or proposed conduct, an organisation (whether incorporated or not) is an *interested person* if it is incorporated (or was otherwise established) in Australia or an external Territory and one or more of the following conditions are met:
  - (a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct;
  - (b) if the application relates to conduct—at any time during the 2 years immediately before the conduct:
    - (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and
    - (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;
  - (c) if the application relates to proposed conduct—at any time during the 2 years immediately before the making of the application:
    - (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and
    - (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

## 2. Section 480A & 480D

### 480A Remediation orders

- (1) If, after the commencement of this section, a person has engaged, or is engaging, in conduct constituting an offence or other contravention of this Act or the regulations, the Federal Court may make an order (a *remediation order*) requiring the person to take action (the *remediation action*) to repair or mitigate damage that may or will be, or that has been, caused to the environment by the contravention.
- (2) In considering whether to grant a remediation order, the matters to which the Federal Court may have regard include (but are not limited to) the following:
  - (a) the nature and extent of the contravention;
  - (b) the nature and extent of the damage to the environment that may or will be, or that has been, caused by the contravention;
  - (c) the circumstances in which the contravention took place;
  - (d) whether the person has previously been found by a court in proceedings under this Act or the regulations to have engaged in any similar conduct;
  - (e) the cost to the person of taking the remediation action.
- (3) The description in a remediation order of the remediation action may either be in general terms (for example, requiring the person to take whatever action is necessary to repair or mitigate the damage), or it may require the person to take particular action to repair or mitigate the damage.
- (4) If the Federal Court makes a remediation order, it may also make an order requiring the person to provide security for the due taking of the remediation action.
- (5) Application to the Federal Court for a remediation order may only be made by the Minister.

### 480D Minister may make remediation determination

- (1) If:
  - (a) the Minister considers that an action taken by a person after the commencement of this section contravened a civil penalty provision of Part 3; and
  - (b) the Minister considers it desirable to make an order under this section in relation to the action;the Minister may make a written determination (a *remediation determination*) requiring the person to take action to repair or mitigate damage that may or will be, or that has been, caused by the contravention, to the matter protected by the provision of Part 3.
- (2) The Minister cannot make a remediation determination at a time that is more than 6 years after the time when the person took the action referred to in paragraph (1)(a).
- (3) A remediation determination is not a legislative instrument.

### 3. Section 499

#### 499 Commonwealth powers to remedy environmental damage

- (1) This section applies if the Minister suspects that an act or omission constitutes a contravention of this Act or the regulations (whether or not the act or omission is an offence against this Act or the regulations).
- (2) On behalf of the Commonwealth, the Minister may cause to be taken such steps as he or she thinks proper:
  - (a) to repair or remove any condition that arises from the act or omission and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision; or
  - (b) to mitigate any damage that arises from the act or omission and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision; or
  - (c) to prevent any damage that is likely to arise from the act or omission and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision.
- (3) If:
  - (a) a person provided false or misleading information in contravention of section 489; and
  - (b) as a result of the contravention the Minister granted an environmental authority to a person, or set conditions relating to the environmental authority, unaware of the certainty or likelihood of the action covered by the authority:
    - (i) resulting in damage to the environment or to a matter protected by a provision of Part 3; or
    - (ii) giving rise to a condition relating to the environment or to a matter protected by a provision of Part 3; and
  - (c) the action results in damage to the environment or gives rise to a condition relating to the environment;then, for the purposes of this section and section 500, the damage or condition is taken to arise from the provision of false or misleading information in contravention of section 489.
- (4) This section does not affect the exercise by the Commonwealth or the Minister of powers under another provision of this Act or under any other law.

### 4. Section 500

#### 500 Liability for loss or damage caused by contravention

- (1) A person (the *wrongdoer*) who contravenes this Act or the regulations is liable to pay to another person (the *affected party*) who suffers loss or damage arising from the contravention an amount equal to the other person's loss or damage.
- (2) Without limiting the amount payable under subsection (1), the loss or damage a person suffers from a contravention of this Act or the regulations includes the expenses and liabilities (if any) reasonably incurred by the affected party to:
  - (a) repair or remove any condition that arises from the act or omission constituting the contravention and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision; or
  - (b) mitigate any damage that arises from the act or omission constituting the contravention and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision; or
  - (c) prevent any damage likely to arise from the act or omission constituting the contravention and relates to:
    - (i) the environment; or
    - (ii) if the contravention was of a provision of Part 3—the matter protected by the provision.

**Note:** This makes the person who contravenes the Act liable to pay the Commonwealth the expenses reasonably incurred in taking steps under section 499 in relation to the contravention.

- (3) An amount payable under subsection (1) is a debt due to the affected party, recoverable in a court of competent jurisdiction.
- (4) If 2 or more persons are liable under subsection (1) to pay an amount in respect of the same loss or damage, those persons are jointly and severally liable to pay the sum.
- (5) A finding by a court in criminal proceedings or civil proceedings that the wrongdoer contravened this Act or the regulations is admissible as evidence of that fact in proceedings to recover an amount payable under subsection (1).
- (6) This section applies:
  - (a) whether or not the contravention was an offence; and
  - (b) whether or not the provision contravened is a civil penalty provision.
- (7) This section does not apply to a decision (or a failure to make a decision or conduct for the purposes of making a decision) purportedly under this Act or the regulations that contravenes this Act or the regulations.

## 1. Section 22X

### 22X Reporting obligations transferred to member of corporate group

#### *Scope*

- (1) This section applies if:
- (a) a facility is under the operational control of a member (the *responsible member*) of a controlling corporation's group during the whole or a part of a financial year; and
  - (b) the controlling corporation and the responsible member have agreed to transfer reporting obligations for the facility to the responsible member; and
  - (c) before the end of the financial year, the controlling corporation and the responsible member have jointly notified the Regulator, in writing, of:
    - (i) the agreement; and
    - (ii) the facility to which the agreement relates.

#### *Obligation to report*

- (2) The responsible member must, in accordance with this section and in respect of the financial year, provide a report to the Regulator relating to the:
- (a) greenhouse gas emissions; and
  - (b) energy production; and
  - (c) energy consumption;
- from the operation of the facility during the whole, or the part, as the case may be, of the financial year.

Civil penalty: 2,000 penalty units.

Note 1: Under Division 137 of the *Criminal Code*, it may be an offence to provide false or misleading information or documents to the Regulator in purported compliance with this Act.

Note 2: Under section 30, a responsible member may be liable for an additional civil penalty for each day after the end of the period mentioned in paragraph (4)(d) for which the responsible member fails to provide a report in accordance with this section.

- (3) Subsection (1) does not apply to:
- (a) greenhouse gas emissions; or
  - (b) energy production; or
  - (c) energy consumption;
- unless the Minister has, under subsection 10(3), determined:
- (d) methods by which the amounts of the emissions, production or consumption, as the case may be, are to be measured; or
  - (e) criteria for methods by which the amounts of emissions, production or consumption, as the case may be, are to be measured.

Note: Paragraph (4)(b) requires that a report under this section must be based on methods, or methods which meet criteria, determined under subsection 10(3).

- (4) A report under this section must:
- (a) be given in a manner and form approved by the Regulator; and
  - (b) be based on:
    - (i) methods determined by the Minister under subsection 10(3); or
    - (ii) methods which meet criteria determined by the Minister under that subsection;where the use of those methods satisfies any conditions specified in the determination under that subsection; and
  - (c) include any information specified by the regulations for the purposes of this paragraph; and
  - (d) be given to the Regulator before the end of 4 months after the end of each financial year.
- (5) Regulations made for the purposes of paragraph (4)(c) may specify different requirements for different circumstances.
- (6) Regulations made for the purposes of paragraph (4)(c) may also specify information that a State or Territory has requested the Regulator to collect.

## 6.2.1 Statutory Preservation of Common Law Rights

### Overview of relevant provisions

#### **s111 - EP Act (WA)**

- Nothing in this Act in any way affects any right any person has at law to prevent, control or abate pollution or environmental harm or to obtain damages.

#### **s73B(2) - EP Act (WA)**

- Confers right of civil action in tort on a person harmed by failure of another to comply with an EP Act notice.

#### **s9(4) - Contaminated Sites Act 2003 (WA)**

- Nothing in this Act affects any right a person has at law to prevent, control or abate contamination or to obtain damages.

#### **s160 - Mining Act 1978**

- "... nothing in this Act shall prejudice, abridge or take away any right of action that any person may have in respect of any act or omission of another unless the act or omission occurs in pursuance of any authority lawfully given under this Act."

### Deployable Exam Paragraph

- Several WA environmental statutes expressly preserve common law rights despite the existence of statutory environmental regulation. Section 111 of the EP Act and s 9(4) of the Contaminated Sites Act confirm that statutory environmental schemes do not remove a person's right at common law to prevent, control, or seek damages for pollution or contamination.
- Similarly, s 73B(2) of the EP Act preserves civil actions in tort for harm caused by non-compliance with EP Act notices, while s 160 of the Mining Act preserves private rights of action unless the conduct was specifically authorised under the Act. Collectively, these provisions demonstrate that statutory environmental regulation generally operates alongside, rather than replacing, common law remedies such as nuisance, negligence, and trespass.

## 6.2.2. Contaminated Sites – Principles of Tort

### Case 1: Noor Al Houda Islamic College (2005, NSWSC)

#### **Facts:**

- Federal Airports Corporation (FAC) leased airport land to a school.
- FAC already knew there was contamination risk on the land.
- Environmental reports showed:
  - increasing contamination concerns,
  - further testing was needed.
- **BUT:** the school was not told before entering the lease.

#### **Problem:**

- The land was unsafe for permanent school buildings, especially where soil disturbance would occur.

#### **Issue:**

- Did FAC owe the school a duty of care to disclose the contamination risk?

#### **Held:**

- **Yes — FAC breached its duty of care.**
- **The Court held:**
  - FAC knew about the contamination risk,
  - knew the land would be used as a school,
  - and should have warned the college.
- Failure to disclose the contamination risk was negligent.

#### **Why the Duty of Care Existed:**

##### **1. Foreseeable Harm**

- FAC could foresee possible harm/loss to the school if contamination existed.

##### **2. Proximity Between Parties**

- There was a close relationship between lessor (FAC) and lessee (school).

##### **3. FAC Had Control & Knowledge**

- FAC: owned the land, controlled the information, knew about contamination risks.

##### **4. School Was Vulnerable**

- The school: had no reason to suspect contamination, relied on FAC's knowledge, and was in a weaker position.

### Case 1: Link to WA Civil Liability Act

#### **1. s 5B — Duty to Take Reasonable Precautions**

- A person may be liable if they fail to take reasonable precautions against foreseeable harm.
- Here, the reasonable precaution was to warn the school.

#### **2. s 5C — Causation**

- Plaintiff must prove the defendant's fault caused the harm.
- Important in contamination cases because:
  - contamination may come from multiple sources,
  - contamination can migrate between properties,
  - multiple parties may contribute to the harm.

### Case 1: Deployable Exam Paragraph

- In *Noor Al Houda Islamic College* (2005), the Court held that the Federal Airports Corporation breached its duty of care by failing to disclose known contamination risks before leasing airport land to a school.
- The Court found the harm was foreseeable, the lessor had superior knowledge and control over the land, and the school was in a vulnerable position with no reason to suspect contamination. The case demonstrates how negligence principles apply in contaminated land disputes, particularly where a party fails to take reasonable precautions against foreseeable harm. It also highlights the complexity of contamination litigation, especially where contamination may migrate between sites or involve multiple contributors.

## Case 2: Metro Fire & Emergency Services Board v Yarra City Council (2015)

### **Facts:**

- Yarra City Council (YCC) was the successor to the old City of Richmond.
- The old council had carried out contaminating activities on the land from 1916–1961.
- The State later owned the land.
- In 2004, the Metro Fire & Emergency Services Board purchased the land from the State.

### **Important Point:**

- The Board already knew there was some contamination risk.
- After settlement, the Board discovered the FULL extent of contamination.
- EPA ordered the Board to clean up the site.

### **Issues**

- Did Yarra City Council owe the Board a duty of care:
  - not to contaminate the land?
  - to disclose the condition of the land?

### **Held:**

- **No duty of care owed.**
- The Court held: YCC did NOT owe the Board a duty not to pollute the land, or to disclose contamination.

### **Why?**

#### **1. Buyer Was Not Vulnerable**

- Unlike *Noor Al Houda*: the Board was commercially sophisticated, aware contamination was possible, and capable of investigating further.
- So no vulnerable relationship existed.

#### **2. Buyer Beware (Caveat Emptor)**

- The Court applied the principle: caveat emptor = “buyer beware.”
- Meaning: purchasers assume risk unless they protect themselves contractually.

#### **3. Facts Different from Noor Al Houda**

- **Noor Al Houda**
  - vulnerable school.
  - unequal relationship.
  - no reason to suspect contamination.
- **Metro Fire Case**
  - commercial transaction.
  - contamination risk already known.
  - purchaser could investigate.

### Case 2: You Cannot Ignore Known Risk

- The Court suggested:
  - If past land use indicates possible contamination, buyers should conduct proper due diligence.
  - A purchaser cannot simply claim “we didn’t know” where there were obvious warning signs.

### Case 2: Deployable Exam Paragraph

- In *Metro Fire & Emergency Services Board v Yarra City Council* (2015), the Court rejected claims that the council owed a duty of care to disclose contamination affecting land purchased by the Board. Unlike *Noor Al Houda*, the purchaser was a sophisticated commercial entity aware of potential contamination risks arising from the site’s historical use.
- The Court applied the principle of caveat emptor (“buyer beware”), holding that the purchaser should have undertaken further investigations before acquiring the land. The case demonstrates the limits of common law negligence in contaminated land transactions and highlights the importance of environmental due diligence in property acquisitions.

### 6.3.1. Contaminated Sites Act - Introduction

#### 1. Origins of Land Contamination

- **Land contamination:** A legacy of industrial activities, mining, fuel storage, agriculture, chemical use
- **Common Example:** Underground fuel tanks can leak hydrocarbons into soil and groundwater and contamination may only be discovered years later.

#### 2. Risks of Land Contamination

##### **(a) Human Health Risks**

- Contamination can affect drinking water, expose people to toxic chemicals, and create health risks during redevelopment.
- **Example:** Building houses or schools on contaminated land.

##### **(b) Environmental Risks**

- Contamination may damage ecosystems waterways groundwater environmental values.
- The Contaminated Sites Act uses the EP Act concept of “**environmental value**”, including ecosystem health, beneficial uses of the environment, and human uses of land/water.

#### 3. Non-Toxic Consequences

- Even where contamination is manageable, land use may still be restricted.
- **Examples:** Land may be suitable for industrial/commercial use BUT NOT residential housing schools.
- **Economic Consequences:** Contamination can lower land values and affect neighbouring properties, creating major cleanup costs.

#### 4. Point Source vs Diffuse Source Contamination

- **Point Source:** comes from a specific source.
- **Example:** leaking underground fuel tank.
- **Diffuse Source:** is more spread out and indirect.
- **Example:** agricultural runoff entering waterways.

## 5. Problems of Identification & Responsibility

- **A major issue:** contamination is often discovered long after the polluting activity ends.
- **Problems include:** polluters may no longer exist, companies may be liquidated, contamination may have migrated, and multiple sites may contribute.

## 6. Nature of Contamination in WA

- **Contamination may be:** toxic persistent mobile, meaning it can remain in soil/water for decades spread through groundwater migrate beyond property boundaries.
- **Example:** PFAS (forever chemicals) contamination may arise from industrial activities, firefighting foam, and large-scale composting.
- **Possible consequence:** contamination of drinking water.
- **Scale of the Problem in WA:** By 2015, ~3500 sites reported; ~2700 sites classified; shows that contamination is widespread and significant.

## Deployable Exam Paragraph

- The Contaminated Sites Act addresses the significant environmental and commercial risks posed by legacy land contamination in Western Australia. Contamination commonly arises from historical industrial, mining, agricultural, and fuel storage activities, including leaking underground fuel tanks and chemical seepage.
- Risks extend beyond human health impacts to broader environmental values such as ecosystem health and groundwater quality. Contamination may also create non-toxic consequences, including restrictions on land use and reductions in land value. A major challenge is that contamination is often discovered long after the original polluting activity ceased, making identification of responsible parties difficult. The Act therefore provides a specialised statutory framework for classification, remediation, and management of contaminated sites.

## 6.3.2 Contaminated Sites Act - Purpose and Scope & Identification of Sites

### Overview of relevant provisions

- **Long title:** An Act providing for the identification, recording, management and remediation of contaminated sites, to consequentially amend certain other Acts and for related purposes.
- **s4(1): contaminated**, in relation to land, water or a site, means **having a substance present in or on that land, water or site at above background concentrations** that presents, or has the potential to present, a **risk of harm to human health, the environment or any environmental value**:
  - **s4(2):** exemption by regulation - Reg 5(2)
  - DWER Guideline for the Assessment and management of contaminated sites – Nov 2021
  - National Environment Protection (Assessment of Site Contamination) Measure 1999
- **s7:** Act binds the State.
- **s8:** object... is to **protect human health, the environment and environmental values** by providing for the **identification, recording, management, and remediation of contaminated sites** by having regard to ... **'polluter pays'** principle...
- **s9:** Act does not derogate from other laws.
- **s10(1):** Minister may be exempt from the Act with the Governor's approval.
- **s11:** Reporting of known or suspected contaminated sites:
  - (1) Any person may report such sites to the CEO.
  - (4) Duty to report such sites to the CEO falls on:
    - a) **Owner** or occupier of the site.
    - b) **Polluter** – person who knows or suspects that they have contributed to the contamination.
    - c) **Auditor** engaged to report on site for purposes of Act.
  - (5) Defence to charge under (3) that person believed the site was already reported/being reported.
  - (7) CEO to notify owner / occupier within 14 days.
- **ss13-14:** CEO [of DWER] to classify site within 45 days:
  - According to Schedule 1;
  - Having regard to relevant guidelines;
  - After consulting the CEO of the Health Department and any other public authority or person who has a 'direct interest';
  - Ministers for Env't & Health to appoint an arbitrator if CEOs cannot **agree on classification**.

- **ss14-15:** CEO to notify classification within 45 days:
  - To owner/occupier/relevant public authority.
  - To person who made the report or other particular person.
  - To persons responsible for remediation.
- **s18:** Rights of appeal against **classification**.

### Deployable Exam Paragraph

- The Contaminated Sites Act establishes a statutory framework for the identification, recording, management, and remediation of contaminated land in Western Australia. Under s 4(1), land is contaminated where substances are present above background concentrations and present, or potentially present, a risk to human health, the environment, or environmental values. The Act incorporates the “polluter pays” principle under s 8 and imposes reporting obligations on owners, occupiers, polluters, and environmental auditors under s 11. The CEO of DWER must classify reported sites within 45 days having regard to statutory guidelines and consultation requirements. Classification decisions may then trigger notification, investigation, remediation obligations, and appeal rights. The Act operates alongside common law and other statutory regimes rather than replacing them.

### Greenland Resources v Contaminated Sites Committee [2024]

#### **Facts:**

- Greenland operated a garden supplies/composting business.
- Concern arose that compost stockpiles were contaminating land and groundwater.
- The CEO and Contaminated Sites Committee classified the site as “possibly contaminated - investigation required.”
- A memorial of the classification was also placed on the land title.

#### **Why the Owner Objected:**

- **The classification:** could affect land value, discourage purchasers, and impact future sales/development.
- **Greenland argued:** the Committee failed to properly consider the evidence, and there were no reasonable grounds for classification.

#### **Issue:**

- Did the Committee make a legal error in classifying the land as: “possibly contaminated - investigation required”?

#### **Held:**

- **No —** the Committee acted lawfully.
- **The Court held:** the statutory threshold was low, the Committee properly considered the material before it, and the classification decision was reasonable.

## Key Reasoning:

### 1. “Possibly Contaminated” Is a Low Bar

- **The Court emphasised:** the classification is preliminary only.
- **It does NOT mean:** contamination is definitively proven.
- **It only means:** there is enough concern to justify further investigation.

### 2. Committee Did NOT Need Definitive Proof

- **The Committee:** did not need to conclusively identify the contamination source, or definitively prove contamination existed.
- **At this stage:** investigation was the purpose.

### 3. Specialist Expertise Matters

- The Contaminated Sites Committee is a specialist technical body.
- Therefore, courts show restraint in judicial review, especially regarding scientific/technical assessments.
- The Court had limited ability to re-evaluate competing scientific evidence.

### 4. Importance of Evidence Before the Committee

- The Court noted that Greenland later produced expert evidence, but had not properly presented it to the Committee earlier.
- Judicial review is generally about legality of decision-making, NOT re-running the factual merits.

## Greenland Deployable Exam Paragraph

- In *Greenland Resources v Contaminated Sites Committee* [2024], the Court upheld a decision classifying land as “possibly contaminated — investigation required” under the Contaminated Sites Act. The applicant argued the Committee failed to properly consider the evidence and lacked reasonable grounds for the classification.
- However, the Court held that the statutory threshold for this classification is intentionally low and precautionary in nature. The Committee did not need to definitively establish the source or existence of contamination, only that sufficient material existed to justify further investigation. The case also demonstrates judicial deference toward specialist environmental decision-making bodies, particularly where scientific and technical assessments are involved.

### 6.3.3. Recording of Contaminated Sites

#### Overview of relevant provisions

- **s19:** CEO to maintain a free public database listing sites with confirmed contamination, showing their location & character of contamination:
  - 3 classes of contaminated sites –
    - Contaminated – remediation required;
    - Contaminated. – restricted use;
    - Remediated for restricted use.
- **s20:** CEO to maintain other up-to-date records of:
  - Groundwater contamination.
  - Numerous records of reports, notices, certificates, approvals & agreements, and disclosures associated with administration of the Act.
- **s21:** Any person may obtain access to, or copy or summary of these records upon payment of prescribed fee.

#### Deployable Exam Paragraph

Sections 19–21 of the Contaminated Sites Act establish a public information and transparency regime for contaminated land in Western Australia. Section 19 requires the CEO to maintain a free public database identifying contaminated sites and their classification, including categories such as “contaminated — remediation required,” “contaminated — restricted use,” and “remediated for restricted use.” Section 20 requires the maintenance of additional records relating to groundwater contamination, reports, notices, approvals, and remediation documentation. Under s 21, members of the public may access or obtain copies of these records upon payment of a prescribed fee. Collectively, these provisions promote environmental transparency, facilitate due diligence in land transactions, and support informed decision-making regarding contaminated land use.

### 6.3.4 Responsibility for Remediation Part I

#### Overview of relevant provisions

- **s22:** Responsibility for remediation can be shared.
- **s23:** Only sites classed as “contaminated – remediation required” are required to be remediated.
- **s24:** Hierarchy of responsibility under **ss25-27**.
- **s25:** Person who caused or contributed to contamination:
  - if its **after the commencement** of the Act = strict liability;
  - if its **before commencement** of the Act = only if its by an “act ... without lawful authority”;
  - **polluter** is exempt if contamination from a reasonable act in an emergency;
  - operation of **s25** is subject to **ss26 & 27**.
- **s25(3):** The basis of “polluter’s” liability for contamination caused by acts before commencement.
- **s25(5):** Definition of “an act done without lawful authority”.
- **s26:** A current owner/occupier may become responsible if they change land use, AND remediation becomes necessary because of that change.
- **s27:** If there is no polluter available, and no land use changer, then owners may become liable.
  - **Key Factors Court looks at:**
    - Did the owner know/suspect contamination?
    - Was the owner “innocent”?
    - Are others available under ss 25–26?
- **Three Categories of Owners Potentially Liable** - If no polluter/land use changer exists:
  - **Pre-Act Innocent Owner** - Owner who acquired land before the Act and did not know about contamination.
  - **Post-Act Acquiring Owner** - Owner who bought land after the Act commenced.
  - **Current Owner at Time of Contamination** - Owner who owned land while contamination occurred.
- **ss 64–65 (important protection for innocent owners):** Pre-Act innocent owners may avoid liability if they disclosed contamination within 2 years of the Act.  
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- **Source Sites (Land where contamination originated):** Owner may be responsible for contamination spreading elsewhere.
- **Affected Site (Neighbouring land contaminated by migration from another site):** Affected site owners are generally NOT responsible for remediation.

## Simple Flowchart

### **Who pays for remediation?**

- **Step 1**
  - Polluter? → s 25
    - If unavailable →
- **Step 2**
  - Land use changer? → s 26
    - If unavailable →
- **Step 3**
  - Owner liability? → s 27

## Deployable Exam Paragraph

- The Contaminated Sites Act establishes a hierarchy of responsibility for remediation of contaminated land under ss 22–27. Under s 22, responsibility for remediation may be shared between multiple parties, although under s 23 only sites classified as “contaminated — remediation required” must actually be remediated.
- Section 24 establishes the hierarchy of responsibility, with primary liability generally falling on the polluter under s 25. For contamination occurring after commencement of the Act, liability is effectively strict, while pre-Act contamination only attracts liability where it resulted from an act done “without lawful authority.” Polluters are exempt where contamination arose from a reasonable act during an emergency.
- Under s 26, current owners or occupiers may become liable where they change land use in a way that triggers the need for remediation, such as converting industrial land into residential use. Where no polluter or land use changer is available, s 27 may impose liability on owners depending on factors such as their knowledge or suspicion of contamination, whether they were “innocent” owners, and whether other responsible parties exist.
- The Act distinguishes between pre-Act innocent owners, post-Act acquiring owners, and owners at the time contamination occurred. Importantly, ss 64–65 provide protection for innocent pre-Act owners who disclosed contamination within two years of the Act commencing.
- The Act also distinguishes between “source sites,” whose owners may be responsible for contamination migrating elsewhere, and “affected sites,” whose owners are generally not responsible for remediation.

### 6.3.4. Responsibility for Remediation Part II

#### Overview of relevant provisions

- **s28:** Insolvent body corporates & potential directors' liability.
- **ss29 & 32:** State is responsible for Gov't orders & 'orphan' sites.
- **s30:** A person responsible for remediation of a site may transfer all or part of that responsibility:
  - To another private person, with approval of CEO;
  - To the State with approval of the Minister.
- **s31:** Mortgagee in possession can transfer responsibility as "owner" to the State.
- **s32:** Definition of "orphan" sites & process.
- **ss49, 50, 51:** CEO may issue notices to investigate, remediate, or abate hazard.

#### Deployable Exam Paragraph

- The Contaminated Sites Act contains additional mechanisms for allocating and managing remediation responsibility where ordinary polluter liability is impractical or insufficient. Under s 28, directors of insolvent corporations may potentially become liable for remediation obligations associated with contaminated sites.
- Sections 29 and 32 recognise that the State may ultimately bear responsibility for remediation in certain circumstances, including where contamination relates to historical government activities or where a site is classified as an "orphan" site because no viable responsible party can be identified.
- Sections 30 and 31 permit responsibility for remediation to be transferred, either between private parties with CEO approval or to the State with Ministerial approval, including situations involving mortgagees in possession. The Act also grants significant enforcement powers to the CEO under ss 49–51, including the ability to issue notices requiring investigation, remediation, or hazard abatement.
- Collectively, these provisions ensure that contaminated sites can still be managed and remediated even where polluters are insolvent, unknown, or otherwise unavailable, reflecting the Act's broader protective and practical objectives.

## BP Australia v Contaminated Sites Committee (2012) WASC

### **Facts:**

- BP leased a service station site to a franchisee.
- New equipment installed in 1992 caused a fuel leak.
- **Under the lease:** BP was responsible for maintaining the pipework.
- The Contaminated Sites Committee found BP contributed to contamination because it failed to fulfil its lease obligations regarding the pipes.

### **BP's Argument:**

- BP argued it had not committed a "pollution offence," and therefore its conduct was not "without lawful authority."

### **Issue:**

- Did BP's conduct amount to "**an act done without lawful authority**" under s 25(3) and s 25(5)?
- This mattered because contamination occurred BEFORE the Contaminated Sites Act commenced (before 1 Dec 2006).

### **Held:**

- **The Court held:** BP could still be liable.
- **The phrase:** "without lawful authority" is interpreted broadly.
- **The Court said:** s 25(5) is inclusive, not exhaustive.
  - **Meaning:** The listed examples do not limit the meaning, "without lawful authority" may extend beyond the exact examples listed.

### **Key Principle:**

- An act done "without lawful authority" can include:
  - breach of legislation,
  - breach of licences/permits,
  - breach of contractual obligations, or other legal/civil contraventions.
- It is NOT limited only to criminal offences or mere absence of authorisation.

### **Why BP Was Liable:**

- BP had responsibility for the pipework under the lease, failed to comply with those obligations, and contamination resulted.
- Therefore, the contamination could be treated as arising from conduct "without lawful authority."

## Deployable Exam Paragraph

In *BP Australia v Contaminated Sites Committee* (2012) WASC, the Court considered the meaning of "an act done without lawful authority" under s 25(3) and s 25(5) of the Contaminated Sites Act in relation to pre-commencement contamination. BP leased a service station site and was responsible under the lease for maintaining the pipework. A fuel leak from newly installed equipment caused contamination in 1992, and the Committee found BP responsible because it failed to fulfil its lease obligations regarding the pipes. The Court held that the phrase "without lawful authority" is interpreted broadly and is not limited to criminal offences. It may include contraventions of legislation, licences, permits, contracts, or other civil obligations. Accordingly, BP's breach of its lease responsibilities could support a finding that the contamination arose from conduct "without lawful authority," making BP liable for remediation despite the contamination occurring before commencement of the Act.

### 6.3.5. Management of Contaminated Sites

#### Overview of relevant provisions

- **s33:** Contaminated Sites Committee: constituted under s33.
- **s34:** Committee's procedures.
- **s36:** Committee decides who is responsible for remediation and extent of responsibility.
  - **Caltex (2017)**
    - **Facts:** A contaminated site required remediation. The landowner wanted the site cleaned up quickly. The landowner told the Contaminated Sites Committee it wanted a determination of who was responsible for remediation costs. However, the landowner never properly applied for a formal responsibility determination under the regulations. The site was then reclassified from: "contaminated - remediation required" to "remediated for restricted use." After reclassification, the Committee attempted to determine responsibility anyway. Caltex challenged this in court.
    - **Issue:** Could the Contaminated Sites Committee still determine responsibility for remediation after the site had already been reclassified?
    - **Held:** No. Once the site was reclassified as "remediated for restricted use," the Committee no longer had jurisdiction to determine responsibility for remediation. The Court granted a writ of prohibition preventing the Committee from making the determination.
- **ss37-39:** Process & considerations for making a decision, including whether act without lawful authority.
  - **On balance of probabilities: BP case**
    - No need for criminal standard of BYD if it's in a civil context for the standard of proof of acting without lawful authority.
  - **Range of challenges: Coffey (2014)**
    - Appeals from Contaminated Sites Committee decisions to the Supreme Court are limited to narrow questions of law, not factual or scientific disagreements, meaning parties often struggle to challenge technical contamination findings unless they can identify a genuine legal error.
- **ss40, 77-78:** Appeal from Committee's decision to Supreme Court.
- **s58:** Memorial of contamination on land title - **Greenland case**
- **s68:** Disclosure before sale, mortgage, lease.

### Deployable Exam Paragraph

- The Contaminated Sites Act establishes a specialist framework for managing contaminated sites through the Contaminated Sites Committee under ss 33–39. The Committee determines who is responsible for remediation and the extent of each party’s responsibility, often involving complex historical, scientific, and legal considerations.
- Decisions are made on the balance of probabilities and may involve determining whether contamination resulted from conduct “without lawful authority,” as illustrated in cases such as BP Australia and Viva. Committee decisions may be appealed to the Supreme Court under ss 40 and 77–78. The Act also promotes transparency through mechanisms such as memorials on land titles under s 58, warning future purchasers and lenders of contamination risks, as seen in Greenland (2024).
- Further, s 68 imposes disclosure obligations before the sale, mortgage, or lease of contaminated land, reflecting the Act’s broader objectives of public awareness, environmental accountability, and informed land transactions.