

Petrol stations, property development and hidden liabilities

Many commercial developers see having a petrol service station site within a shopping precinct as a benefit for attracting prospective lessees to the precinct. However, more often than not, there are a number of hidden environmental liabilities connected with service station sites, which may not come to fruition until years down the track.

Contaminated Sites Act

The most obvious environmental liability connected with service station sites is the issue of hydrocarbon contamination, which triggers a range of liabilities under the *Contaminated Sites Act 2003 (CS Act)*. Under section 25 of the CS Act, the person who caused or contributed to the contamination is the person responsible for the remediation of the site. Further, a person who caused or contributed to the contamination prior to the commencement of the CS Act can also be held responsible for the remediation of a site, even if subsequent parties had caused or contributed to the contamination of the site, and liability can arise several years down the track (see sections 22 and 25(3) of the CS Act).

Case study

Lavan Legal (**Lavan**) recently acted for clients who had entered into a sublease with Caltex for the purposes of operating a petrol service station that was part of a shopping complex (**Site**). The clients operated the service station between 2000 until 2002, in which the service station ceased to operate and the site was decommissioned by the land owner. Prior to the clients' occupation of the Site, the service station had been operated on the Site for more than 20 years.

Since then the land owner of the Site has lodged an application with the Contaminated Sites Committee (**Committee**) pursuant to section 36(2)(a) of the CS Act requesting the Committee make a decision to attribute responsibility for remediation of the site. In early 2011, the Committee made a preliminary determination to apportion a degree of responsibility to the following parties:

- landowner;
- Caltex;
- the clients;
- previous service station operators; and
- the State.

Legal position

Pursuant to section 25(3) of the CS Act, a person who caused or contributed to the contamination of a site 'before the commencement' of the CS Act is responsible for remediation of that site only to the extent that the person caused, or contributed to, that contamination by an act that was done 'without lawful authority'.

However, section 25(5) of the CS Act states that an act that was done 'without lawful authority', includes an act:

- that constituted an offence for which the person was convicted or;
- that contravened:
 - (a) any written law in force at the time the act occurred; or
 - (b) any contract, permit, lease, licence, standard, policy, direction, exemption, authority, approval or requirement that was given or made under a written law in force at the time the act occurred.

In applying this legal position to the case study above, it was submitted to the Committee that the clients were not responsible for remediation of the Site even if they caused or contributed to the contamination as they had not acted 'without lawful authority'.

The reason for this was based on the following:

- they had complied with their environmental obligations under the sublease they had;

- they had not breached any licence/permit; and
- they had not been found to have contravened any law in force at the time of the offence.

Although it was noted that section 25(3) may be triggered at a later date if found guilty of an offence under Division 1 of the *Environmental Protection Act 1986 (EP Act)* for causing or allowing the Site to become contaminated. However, such an action would need to be brought against the clients by the Department of Environment and Conservation and proved beyond reasonable doubt that the clients caused or allowed the Site to become contaminated.

In the absence of the clients being found guilty of an offence or prosecuted for contravention of the EP Act or any other written law at the time the contamination occurred, the clients cannot be deemed to have acted 'without lawful authority'. Therefore, their portion of responsibility should revert back to the next party in the hierarchy of responsibility in the CS Act.

Summary

There are a number of issues that can arise under the CS Act in respect of operating, owning and leasing service stations. However, responsibility attributed to each site will be different depending on the number of parties involved, franchising and leasing agreements in place and periods of occupation.

Therefore, current or existing operators, landowners or primary lessees of sites with active or inactive services stations should seek independent legal advice regarding their responsibility for remediating the site.

If you would like to know more about apportioned responsibility under the CS Act or to discuss opportunities for transferring responsibility, please contact partner Paul McQueen or associate Shauna Mounsey.

Environmental Focus Group

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