

Transferring responsibility to remediate a contaminated site

Anyone in the business of buying, selling or leasing contaminated land in Western Australia should ensure they are familiar with the obligations under the *Contaminated Sites Act 2003* (CS Act). Failure to determine if land contains contamination prior to a sale can have potentially disastrous consequences for both the buyer and the seller in relation to potential prosecution and in potentially incurring responsibility to remediate land in the future.

Responsibility to remediate

The core premise of the duty to remediate a contaminated site is set out at section 25 of the CS Act, which states that a person who caused or contributed to the contamination of a site is the person responsible for the remediation of that site.

In the event there is no person responsible under section 25, the person responsible cannot be identified or does not have the financial capacity to conduct the remediation works then the following hierarchy will apply:

1. A director or mortgagee in possession of an insolvent body corporate who caused or contributed to the contamination of the site (see section 27(2)(e)(ii) and 31 of the CS Act).
2. A person who owned the site before the commencement of the CS Act (see section 27(1) and (2)(a) of the CS Act).
3. A person who became the owner of the site after the commencement of the CS Act (see section 27(2)(b) of the CS Act).
4. A person who is an owner of the site and was an owner of that site at the time the contamination was caused (see section 27(2)(c) of the CS Act).
5. The State, provided they did not cause or contribute to the contaminated site (section 29(1)(c) and (d) of the CS Act).

The responsibility to remediate is potentially onerous and may require considerable expenditure to resolve. Consequently, the opportunity to transfer any liability to remediate a contaminated site is a very important consideration to any buyer or seller of a contaminated site. Liability to remediate a contaminated site can be transferred from the seller to the buyer upon the sale of the land in the following ways:

- transfer of responsibility under an indemnity clause;
- transfer of responsibility under section 30 of the CS Act; or
- transfer of responsibility under section 26 of the CS Act.

Transfer of responsibility under indemnity clause

Historically parties have solely relied on an indemnity clause in the contract of sale for the site to secure the transfer of responsibility to remediate. The problem with this is that such a clause does not actually transfer a party's liability to remediate a contaminated site (and indeed, cannot), but instead provides the buyer with a right to recover costs from the seller for all third party liabilities associated with the contaminated site.

Further, indemnity provisions are only as good as the entities that provide them and the contractual provisions that secure them. Consequently, the fact that an indemnity clause is included in a contract for sale of land does not completely remove the risk of liability to remediate a contaminated site in the future and it does not exempt a buyer from liability under the CS Act.

Transfer of responsibility under section 30

A person responsible for the remediation of a contaminated site under the CS Act may formally transfer that responsibility or part of that responsibility to another party pursuant to section 30 of the Act.

To do this the parties must enter into a written agreement, which has been approved by the CEO of the Department of Environment and Conservation (DEC). Seeking such an approval under this section can be a long and onerous process, which requires the disclosure of sensitive financial information. However, the benefit of this transfer is that responsibility to remediate a contaminated site is formally transferred and the hierarchy of responsibility will no longer apply. Having said this, a section 30 transfer is not known to have occurred in Western Australia to date and accordingly, it is unclear how long the process is likely to take or indeed what level of information the DEC is likely to require to approve such a transfer.

Transfer of responsibility under section 26

It may be possible to transfer responsibility for remediation of contamination by virtue of a potential purchase or lease of land from a person that has contaminated the land (and is responsible for the contamination pursuant to section 25). Many landowners or occupiers may not be aware that section 26 of the CS Act operates as an informal means of transferring liability to remediate and takes effect after the contract of sale has concluded.

A transfer of responsibility to remediate a contaminated site under section 26 is triggered when an owner or occupier of a contaminated site has 'changed' or 'proposes to change' the use of the land in which the site is located. This is an opportunity for the person who has caused or contributed to the pollution to transfer the risk to remediate to an owner or occupier of the land in perpetuity.

The difficulty with the operation of this section is that the seller has to wait until the buyer has taken the necessary action to trigger section 26 before they can be excluded from liability under the CS Act. Importantly, this section poses a greater risk to potential buyers because once triggered, a buyer becomes liable for the remediation of the site and it is unlikely they will be able to recover any costs from the seller. As a consequence, a prospective buyer of contaminated land with intentions to redevelop must undertake appropriate due diligence before purchasing the land.

It is also important to note that the operation of section 26 also poses risk to lessees of land. The reason for this is that section 26 also extends to include 'occupiers' of land who 'change' or 'propose to change' the use of the land. As a consequence, a prospective lessee of contaminated land with intentions to change the land use should also conduct appropriate due diligence before entering into a lease because this too may take on more responsibility than anticipated.

There is however, uncertainty as to what constitutes a 'proposed change', as this is not defined in the CS Act nor are there any published guidelines, cases or policies on the definition. Therefore, it is possible that the mere application for a change of the activities being conducted on the land could be construed as a 'proposed change' for the purposes of section 26 of the CS Act. This in turn could result in the lessee being liable for the remediation of the contaminated site without actually being in receipt of an approval to that change of use.

On the other hand, sellers need to give careful consideration to their responsibilities particularly in relation to giving notice where required under the CS Act and considering prospects for limiting the risks of a transaction. For these reasons it is recommended that legal advice be sought prior to entering into any contractual obligations.

Summary

There are a number of options available to polluters, sellers and buyers of land to transfer responsibility to remediate contaminated land. Each method outlined above has its pros and cons and careful consideration of the circumstances a person or entity finds themselves in is essential to minimise potential risk.

Please note that independent legal advice should be sought in regards to the transfer of liability under the CS Act as circumstances may differ depending on the contaminated site. Further, if a person is deemed to be responsible for remediation under the CS Act they are not excluded from liability under other legislation such as the *Environment Protection Act 1986*.

If you would like to know more about obligations under the CS Act or to discuss opportunities to transfer liability under that legislation, please contact Paul McQueen, Partner or Shauna Mounsey, Associate.

Environmental Focus Group

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