NSW Urban Taskforce

The Draft Contaminated Land Management Amendment Bill 2007

Submission to the Hon. Verity Firth MP, Minister Assisting the Minister for the Environment

Prepared by **NSW Urban Taskforce** 6 November 2007

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The **NSW Urban Taskforce** is an industry organisation representing the development sector. Founded in 1999, the NSW Urban Taskforce represents companies involved in planning and development of the urban environment. Current members of the NSW Urban Taskforce include some of Australia's most prominent developers, construction companies, major infrastructure providers, planners, architects, financiers and lawyers involved in urban development.

Executive Summary

The Bill as it stands will mean:

- New South Wales will have the most onerous contaminated land laws in Australia.
- Property owners, vendors, purchasers, and developers will be exposed to greater uncertainties as to:
  - when land is contaminated; and
  - when they can be brought into the remediation process as a person 'responsible'.
- It will be more difficult to get sign-off that land is suitable as there will be no objective standard as to what constitutes unacceptable contamination.
- Landlords responsibility for contamination by its tenants will be increased.
- Property developers will be at risk of management orders (even if there is no significant risk of harm) when the put in an application to redevelop land with contamination from the moment a development application is lodged.
- There will be an increased financing risk for development of land which has been used for industrial purposes.
- There will be fewer checks and balances on the EPA's discretionary powers.
- This will be one more hidden regulatory cost impacting on the property, property development and industrial sectors in NSW.
- The Minister of the day will have inappropriately broad powers to create almost any kind of compensation scheme without seeking the prior approval of Parliament.

1. Why is the Bill necessary?

- The EPA already has all the powers it needs to investigate and remediate contamination.
- It has not needed to issue many remediation orders because in most cases, the polluter does not dispute that the land is contaminated and makes a voluntary remediation agreement with the EPA.
- There have been few cases where anyone has challenged a remediation order and none where an order has been successfully challenged.
- Prior to the introduction of the CLM Act in 1997, there was uncertainty surrounding the management of contaminated land for property owners, financiers and developers and this slowed or restricted development of land.
- The current system has worked successfully for 10 years and everyone now understands how it works. Polluters are only at risk if they were the major polluter; otherwise landowners could be made to clean-up. Purchasers are aware of the risks they are acquiring and will generally act prudently in doing appropriate due diligence before acquiring contaminated land.
- Therefore, there is no justification the change the regime, in such a way as to give the EPA even more extensive powers to intervene and to create more uncertainty, having now bedded down the existing system.
- In the circumstances, the EPA's convenience seems to be the only possible explanation for this major legislative change.

2. What are the fundamental changes?

2.1 The 'significant risk of harm' test disappears

Under the current Act, the EPA needs to have 'reasonable grounds' to believe that a site presents a 'significant risk of harm' to human health on the environment. It did not have jurisdiction to issue a remediation order unless this threshold was met.

Under the Bill, land can be declared to be 'regulated land' if the EPA considers the contamination to be significant enough to warrant regulation. If it is declared to be regulated land, the EPA could serve a preliminary investigation order or a management order. Importantly, 'significant contamination' is essentially whatever the EPA thinks it could be, and (subject only to limited legal recourse to challenging its decision), there is no longer an objective standard as there was with the 'significant risk of harm' test.

By contrast, under the current Act, it was open for a property owner or developer to establish that the land is not contaminated in such a way as to present a 'significant risk of harm', even though the guideline levels for contaminants had been exceeded.

Those who have allocated liability by contract assuming the 'significant risk of harm' test was the basis for risk allocation will now get more (or less) than they bargained for depending on what side of the transaction they were on.

This system gave a property owner or developer protection against arbitrary or discretionary decisions by the EPA as to what constituted contaminated land. The Bill, if passed, will enable the EPA to intervene in circumstances in which it previously could not.

The 'significant risk of harm' test has been applied often and is well-understood by property purchasers, developers and owners. It established a recognised standard which could be used in property purchase and leasing agreements and as the basis for determining when land could be safely

developed and who accepted the contractual risk of future remediation. The established industry practices will now have to change, leading to more uncertainty and therefore, additional costs for doing transactions or development in relation to contaminated land.

Here are a few scenarios which illustrate the consequences of removing the 'significant risk of harm' test:

- When a person buys a property which may or does have contamination, what kind of comfort or sign off can the purchaser obtain from its environmental or legal advisers whether it could be exposed to a 'management order' even though the site does not pose a significant risk of harm? The answer is 'none'.
- When a property owner seeks to develop land with contaminants, even at low levels, what happens? Under s11(2) of the Bill, the mere act of lodging a development application (or having a DA approved) a more sensitive use can cause the EPA to declare the land 'regulated land' even if the contaminant levels do not change, and whether or not there is a significant risk of harm. (The developer can be a 'person with responsibility' under s6(2)(b) of the Bill and thus responsible for the contamination who can then be subject to an investigation or management order-see below).
- When an accredited auditor is asked to give a sign off on land, the current sign off assumes that the land is suitable for its intended use because it does not present a significant risk of harm. If an auditor gives the same sign off , will that mean that the EPA could not declare the land to be 'regulated land' if the Bill passes? No.
- Can an accredited auditor give an unqualified sign off that the land will not become 'regulated land'? No, the EPA has discretion to declare any land with contamination to be 'regulated land'. It will be impossible for an auditor to give any sign-off that land will not be 'regulated land'.
- What will this mean to banks financing property acquisition or development? It has taken them many years to get comfortable with financing land which has a history of contamination, mainly because they are comfortable that the 'significant risk of harm' test enables them to evaluate the borrower's risk and the value of their security. It is an objective test. The risk that the EPA may intervene to declare land to be 'regulated' and the uncertainty as to what clean-up standard it requires will now be matters of uncertainty. That will add complexity to financing land sales or land development projects.

The current Act and the years of experience has enabled contaminated land to be put to productive use by redevelopment and established a reasonable degree of certainty about how contaminated land liability could be fairly allocated, with reasonable certainty as to the scope of the EPA's power to issue declarations and orders. The 'significant risk of harm' test provided reasonable certainty as to when land was contaminated and what provided an acceptable standard for clean up. Its replacement with discretionary system with no objective standard as to what constitutes contamination (free from any meaningful ability to challenge the EPA's jurisdiction to declare land as 'regulated land') is a retrograde step.

2.2 Removal of 'Principal Responsibility' Test

The EPA's stated aim is 'to clarify that more than one person may be responsible for contamination of land".

As far as we are aware, there has never been a decision of the Land and Environment Court decision which says that the EPA cannot determine more than one person to be 'a person with principal responsibility' who can therefore be subject to an investigation order or a remediation order. Moreover, section 12(4) of the current Act makes it sufficiently clear that more than one person can have 'principal responsibility'.

Under the current Act, the EPA can serve investigation and remediation orders on any or all persons with 'principal responsibility' - section 12(4). If that is not practicable due to insolvency, the owner or notional owner be served with such orders.

The current Act, therefore, imposes liability on the major polluters, a proper reflection of the 'polluter pays' principle. If the EPA's merely wanted to clarify that more than one person could have 'principal responsibility', it could have done that alone. However, it has fixed the (non-existent) problem by getting rid of the concept of 'principal responsibility' altogether: the only conclusion that can be drawn is that it wants to be able to serve the order on anyone with 'deep pockets' as anyone who deposited any contaminants at a site are 'responsible' as is any owner who permitted it, even if it occurred long in the past.

The Bill now gives the EPA the party to impose investigation orders or management orders on persons with any responsibility for contamination, no matter how insignificant it may be. This is a move towards the much criticised United States CERCLA/Superfund system which has shifted major liability risks to unsuspecting parties and which created a new industry for lawyers, a system which has fortunately been avoided in NSW to date. The US system makes any responsible party liable jointly and severally liable for the full cost of clean up, with the prospect of:

- litigating against other parties for recovery of amounts paid; and
- if those parties cannot be found or are insolvent, the party ordered to clean up bears the missing or insolvent party's share of responsibility.

The attachment to this submission (extracted from the US EPA's website) sets out how the US system works.

The Bill will, in effect, introduce a similar system in NSW, allowing the EPA to order investigation and clean up on the party with deepest pockets regardless how small their share of responsibility. They and their lawyers will then have to seek contribution, because the EPA no longer has to find the major polluter to serve the order.

The current Act leaves the property owner as the party which gets the investigation or remediation order if the party with 'principal responsibility' cannot be found. A property owner may be attracted to the idea that the person with 'responsibility' for the contamination will now be subject to a management order rather than the owner. However, on a closer reading, that attraction will be superficial. Although the NSW Land and Environment Court has never had occasion to consider what 'principal responsibility' means in the current Act (because the matter has never been contested leading to a decision), the Bill could make the owner responsible, and subject to a management order if:

- contamination occurred because the owner or occupier of the land failed to take reasonable steps to prevent the contamination of the land – section 6(1)(c);
- an act of the owner or occupier (such as excavation on site to construct a building etc) resulted in some change to pre existing contamination – section 6(2)(c);
- a person applies for, or obtains, development approval which changed the approved use of the land to a more sensitive use – section 6(2)(b) and s6(4).

The first of those provisions is completely new.

The latter two provisions were in similar form in the current Act. However, with the 'significant risk of harm' threshold and the concept of 'principal responsibility' about to disappear an owner can now in many circumstances be the person 'responsible' for contamination, no matter how minor its share of responsibility may have been. Thus, the polluter may now, in fact, be able to escape an order under the Bill with the landowner being the easier target with the deepest pockets.

One of the biggest risks for property owners is the long-tail nature of liability. The Bill specifically refuses to accept that risk for contamination can passed by contract to a new owner once sold. Section 6(6) says that:

A person who is responsible for that contamination continues to be responsible for that contamination whether or not the person has entered a contract or other arrangement that provides for some other person to be responsible for the contamination or for any harm caused by the contamination.

A property vendor thus bears the risk insolvency of the purchaser if it has had any responsibility at any time for contamination.

3. Other Changes

- The circumstances in which there is a duty to report contamination to the EPA, while appearing to have been clarified, in fact imposes a more onerous requirement onto land users and owners to establish, as a fact, whether and to what extent land is contaminated by reference to prescribed criteria
- There is no longer any recognition for a general site audit to be conducted in respect of a site. Instead, the EPA has confined site audits to statutory site audits, being audits conducted for the purpose of ensuring compliance with the Act, a voluntary remediation proposal or a planning instrument. It appears that the days of accredited contaminated land auditors doing non-statutory audits may now be over. This has been one aspect of the existing system which property owners and developers have been able to rely on in transactions involving contaminated land.
- The proposed section 112 (2A) which provides a wide power to the Minister of the day to establish almost any kind of compensation scheme.

  The CLM Bill does not identify or define a number of essential elements of this section such as what a scheme is, what a community is and who are its members, what constitutes environmental damage or resources, and the nature in which compensation is to be provided. These are essential elements of the provision that should not be left to be detailed in some as yet to be exhibited regulations. The explanatory note accompanying the CLM Bill does not provide any further detail on how the "schemes" are to be constituted or implemented.

  The NSW Urban Taskforce believes it is inappropriate for such a substantive matter to be dealt with by regulations. This provision should either be deleted from the CLM Bill or the draft Bill should be amended to detail the essential elements of the constitution and administration and liability for the schemes and then the CLM Bill should be re-exhibited so that informed consideration and debate if necessary can occur.

4. Questions for the EPA?

- As contaminated land laws in NSW are already the most stringent in Australia: why must NSW always lead the way in regulation with expensive consequences?
- The EPA can already regulate sites with a 'significant risk of harm': why is it seeking to make it even easier to pursue polluters and owners.
- Is this extra convenience worth the extra uncertainty and the increased scope of liability?
- Has the EPA taken the necessary time to consider the impact of the Bill on all the past property transactions, site audits, development applications and past remediation projects which have proceeded:
  - using the 'significant risk of harm test'; or
  - on the assumption that only a significant polluter was at risk of a remediation order?
- Why is the legislation being pushed through so quickly without proper consultation?
- Why is the NSW property and development industry being saddled with yet another regulatory measure to increase costs and risks?

Attachment

US CERCLA 'Superfund' System

http://www.epa.gov/compliance/cleanup/superfund/liability.html#liability

Superfund liability is triggered if:

- Hazardous substances are present at a facility,
- There is a release (or a release may occur unless something is done to prevent it) of these hazardous substances,
- Response costs have been or will be incurred, and
- The defendant is a liable party.

There are 4 classes of Superfund liable parties:

1. Current owners and operators of a facility,
2. Past owners and operators of a facility at the time hazardous wastes were disposed,
3. Generators and parties that arranged for the disposal or transport of the hazardous substances, and
4. Transporters of hazardous waste that selected the site where the hazardous substances were brought.

Potentially responsible parties are liable for:

- The costs the government has incurred for cleanup,
- Damages to natural resources (for example, to a fishery),
- The costs of certain health assessments, and
- Injunctive relief (i.e ., performing a cleanup) where a site may present an imminent and substantial endangerment.

CERCLA liability is retroactive - Parties may be held liable for acts that happened before Superfund's enactment in 1980.

CERCLA liability is joint and several - Any one potentially responsible party may be held liable for the entire cleanup of the site (when the harm caused by multiple parties cannot be separated).

CERCLA liability is strict - A potentially responsible party cannot simply say that it was not negligent or that it was operating according to industry standards. If it is determined that the potentially responsible party sent some amount of the hazardous waste found at the site, it is liable.