



How the Contaminated Sites Committee makes responsibility for remediation decisions

By Jim Malcolm, Chairman, Contaminated Sites Committee.

In most jurisdictions if you own contaminated land then you are left with the cost of remediating the contamination, though you may not have caused it. The rule of *caveat emptor* (let the buyer beware) prevails.



The Hierarchy

In Western Australia things are different because of the *Contaminated Sites Act 2003* (Act), which takes the unique step of spelling out a hierarchy of responsibility for remediation. Under this hierarchy, from the commencement of the Act in 2006, the person who caused the contamination is responsible for cleaning it up; consistent with the *polluter pays* principle¹.

But the hierarchy goes further, retrospectively making the person who caused contamination before the Act commenced, by an act without lawful authority, responsible for remediating the contamination. (The *Environmental Protection Act 1986* made it an offence to cause pollution, so generally someone who caused contamination between 1987 and 2006 by causing pollution would have done so by “an act without lawful authority” and so could be responsible for remediating that historic contamination—whether or not they knew about it at the time).

In many cases, by referring to the hierarchy, the parties involved can work out who is responsible and arrange for the contamination to be remediated. Where the parties cannot agree, they may ask the Contaminated Sites Committee (Committee) to make a decision about the parties responsible and the shares of responsibility.

The Committee

The Committee is an administrative tribunal, established under Part 3 of the Act to independently determine a number of matters, including responsibility for remediation. The Committee must make a decision on responsibility when requested and may initiate a responsibility decision on its own initiative.

¹ According to section 4A of the *Environmental Protection Act 1986* and section 8 of the *Contaminated Sites Act 2003* the polluter pays principle is that “those who generate pollution and waste should bear the cost of containment, avoidance or abatement”.

The Committee has no specific powers to conduct hearings, swear witnesses or conduct physical examinations so matters are generally decided on documents provided by the various parties.

If the Committee is to make informed, timely decisions it is vital that all parties, when requested, provide all relevant documents and submissions. Failure to do so has led to a party bearing a greater share of responsibility because a relevant document was received after the Committee had made its final decision (see Appeals, below).

All parties are provided with copies of documents and submissions provided by other parties and are given the opportunity to make submissions in response, consistent with the principles of procedural fairness.

The Committee forms a preliminary position and gives the parties notice (under section 37), of its proposed decision. The parties have the opportunity to make further submissions and provide further information. The Committee considers the additional submissions and information and makes a final decision. The parties are notified of the Committee's decision and the notice (under section 39), contains detailed reasons for the decision.

Appeals

The Committee's decision can only be appealed to the Supreme Court on a question of law. For this reason the wording of the Committee's reasons may seem rather legalistic to the lay reader. The Act makes no provision for publishing the Committee's decisions so it is not possible for the general public to know how the Committee reaches its decisions. (This information sheet is intended to help explain the Committee's decision-making process).

Standard of proof

An overarching consideration is the standard of proof required for the Committee to decide that a person is responsible for remediation. Chief Justice Martin, in deciding an appeal to the Supreme Court against a decision made by the Committee², determined that the Committee did not have to be "satisfied beyond reasonable doubt" (the criminal standard of proof).

His Honour noted that "there was much to be said for the view" that the Committee should decide matters on "the balance of probabilities", but made no determination. For the purpose of deciding the responsibility for remediation, the Committee makes its decisions on the balance of probabilities, deciding that an event did or did not occur on its assessment that, on the evidence before it the event was more likely than not to have occurred.

Making decisions

The Act provides little guidance on how the Committee is to make its decisions and, since no other State has comparable legislation, the Committee has had to develop its own procedures for decision making.³

The following information explains some typical situations and how the Committee has considered them.

² BP Australia Pty Ltd v Contaminated Sites Committee [2012] WASC 221, 50-60.

³ Section 34 provides that the Committee "is to conduct its inquiries in any manner it considers appropriate".

Sources

Contamination can be caused in a range of ways. Common contaminants include hydrocarbons (such as petrol, diesel), chemicals (including pesticides), industrial chemicals (such as arsenic) and pollution from the processing or disposal of wastes.

Often there are several possible sources of contamination at a site. Typically for hydrocarbon contamination at a petrol station the contamination may have been caused by a failure to install the equipment correctly, damage to the equipment, corrosion of the equipment or a spill of product. Soil and groundwater sampling reports give some indication of the condition of equipment nearest to the contamination.

The history of the site provides information about any past major spills or incidents that may have damaged the equipment. It also tells the Committee when various parts of the equipment (underground tanks, pipe work and bowsers) were installed. Older tanks and pipes that have been in the ground a long time are more likely to have suffered corrosion. If contamination seems to have commenced around the date new equipment was installed, the Committee may conclude that a failure at installation to ensure the equipment was made tight caused the contamination.

Causes of contamination - maintenance vs use

Contamination can be caused by faulty installation of equipment, in which case the person who arranged for the installation is likely to be responsible for the fact that the equipment is leaky. Sometimes contamination is due to spills during filling, usually due to faulty practices by the company providing the product.

Frequently the Committee must determine shares of responsibility where the evidence suggests that equipment was leaky. The existence of leaky equipment is only likely to lead to contamination if the equipment is used, so the Committee generally regards the responsibility for remediation as shared between the party who should have ensured the equipment was installed or maintained so it did not leak, and the party who used the equipment while leaky. The shares will depend upon the circumstances.

Conflicting evidence

Sometimes different parties' recollections of past events are not consistent and the Committee must decide which party's view is the more credible. Where this happens, the Committee (in its section 37 notice to the parties) makes plain its proposed view, and all parties are able to make submissions on why a different view should be taken.

Agreements between the parties - significance of lease provisions and indemnities

Chief Justice Martin has offered the tentative conclusion that the breach of an obligation arising under an agreement of lease would only amount to "an act without lawful authority"⁴ "if the agreement or lease was given or made under a written law, and not otherwise"⁵. Consequently the Committee does not, in its allocation of responsibility give regard to whether a condition of a lease has been breached or whether it contains a provision indemnifying one or other of the parties. The Committee's decision is based on the hierarchy of responsibility in the Act. It is up to the parties to seek civil remedies for any agreement conditions or indemnities.

⁴ S 25 (5) of the CS Act.

⁵ BP Australia Pty Ltd v Contaminated Sites Committee [2012] WASC 221, 84.

Missing documents

Occasionally relevant documents, such as lease or franchise agreements, are not available, or only available in an unsigned, unregistered form. In such circumstances, unless evidence is presented to the contrary, the Committee generally concludes that the agreement did exist, but without further evidence the Committee would not assume the existence of a provision of the missing document (such as an assignment of the responsibility for maintenance).

Knowledge of contamination

It is frequently the case that the parties involved have no knowledge of contamination until equipment is replaced or decommissioned. Since the commencement of the *Environmental Protection Act 1986* on 20 February 1987, it has been an offence to cause pollution. There is no requirement for the person to have known of the pollution—simply causing it is an offence. However, the Committee may give consideration to a party's ability to know of or do something about the leak in allocating shares of responsibility—between the party who failed to maintain the equipment and the party who used it while leaky.

Record-keeping and integrity testing

Independent integrity tests of the equipment are particularly useful in identifying parts of the equipment that may be leaking. Frequently such tests identify repairs that are required and after repairs are done further tests may give confirmation that the leak has been fixed.

A normal part of operating a petrol station is the keeping of records. One purpose of this is to identify possible losses of product that may indicate a leak in the storage and vending equipment. While this record keeping and reconciliation process can indicate major leaks experience has shown that small leaks continuing for a long time can lead to major contamination while remaining undetected by reconciliation. While the Committee would expect a conscientious operator to keep detailed records, it cannot accept such records as evidence of no losses in the face of evidence of contamination.

Oral hearings

The Act does not prevent the Committee from holding hearings, but it provides none of the usual powers (the ability to summon parties and swear them in), so the Committee usually only considers matters on the papers provided by the parties. Papers are circulated to all parties and submissions are invited, providing an opportunity to respond in writing instead of the cross-examination that might occur in an oral hearing.

