



Legislative Assembly for the Australian Capital Territory

## **Environment Protection (Amendment) Bill 1998: Exposure Draft**

Report No.10 of the Standing Committee on Urban Services

October 1998

## **Resolution of appointment**

On 28 April 1998 the Legislative Assembly for the Australian Capital Territory resolved to establish a general purpose standing committee, called the Standing Committee on Urban Services, to inquire into and report on:

planning and lease management, road and transport services, housing and housing assistance, government purchasing and public utilities purchasing, electricity industry and regulation, construction industry policy, parks and forests, private sector employment inspectorate, building services, environment, heritage and municipal services and any other matter under the responsibility of the portfolio minister.

## **Committee Membership**

Mr Harold Hird MLA (Chair)

Mr Dave Rugendyke MLA (Deputy Chair)

Mr Simon Corbell MLA (appointed on 25 June 1998, replacing  
Mr Wayne Berry MLA)

Secretary: Mr Rod Power

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### ***Summary of recommendations***

The committee endorses the purpose and nature of the exposure draft of the Environment Protection (Amendment) Bill with the following specific recommendations:

- the Bill provide for a register of contaminated sites, rather than just 'land'
- that the government, being ultimately responsible for ensuring a safe and healthy environment, pay for the costs associated with remediation of contaminated land in those cases where the polluter cannot be found (or it is impracticable for the Authority to make an order against the person responsible) - accepting always that the government should do all that it possibly can to seek recovery of costs from the polluter
- that all information relating to contaminated sites be made available at no cost to the Commissioner for the Environment for the purpose of that officer compiling State of the Environment reports or such other reports as are required by legislation
- that the definition of "notional lessee" be amended along the lines of the NSW legislation
- that the definition of "contaminated" or "contamination" be amended along the lines of 'a significant risk to human health' and 'a risk of material environmental harm or serious environmental harm'
- that the definition of "land" include 'water on or below the surface of the land and the bed of such water'
- that the government investigate how to incorporate the proposed Register of Contaminated Lands into an existing search process such as the Lease Conveyancing Enquiry, and how to ensure that an order to remediate the land appears on the Certificate of Title rather than on a separate register
- that the proposed requirement to make it obligatory for the environmental auditor of any contaminated site to notify the Authority be amended to exclude voluntarily commissioned assessments
- that the Bill be amended to give the Authority discretion to waive the requirement for an environmental audit for special cases such as the validation of the removal of underground fuel tanks if such work is (a) carried out voluntarily (ie not by direction of the Authority) and (b) in the opinion of the Authority, the validation report prepared by an experienced environmental consultant indicates that the site has been satisfactorily remediated

- that the legislation give the Authority the discretion to exclude from public access reports relating to assessment of land and orders relating to the remediation of land
- that the final Bill take into account the desirability of reducing the number of different people required to be involved in the assessment, audits and remediation
- that the final Bill clarify in what instances an auditor is required to notify the Authority about his or her activity
- that the list of auditors maintained by the Authority be available for public inspection
- that section 125 of the Principal Act should provide for an environmental protection order by the Authority, in relation to land that is not contaminated but which might cause harm if used for a particular purpose, to be incorporated onto the Register
- that the final Bill provide for an individual to volunteer to assess or remediate land on the basis that the Authority does not issue an order
- that the final Bill clarify the extent of the duty to notify the Authority as soon as practicable about land that is likely to be contaminated
- that the government provide information about the standards and procedures to be used by the Authority in relation to an assessment or remediation
- that the Authority provide some guidance to lessees or occupiers of land about what should be contained in their notification, to the Authority, of contamination or possible contamination
- that the government provide further information on the legal position in relation to the liability of trustees
- that the Bill specify what is a “portion” in relation to recovering some of the costs of carrying out the requirements of an order
- that the government continue to apply pressure upon the Commonwealth to accept that it is bound by the provisions of the proposed Bill (and the Principal Act). The committee urges the government to take up this issue with the new Commonwealth Minister for Territories.



### **Introduction**

1. On 25 June 1998 the Minister for Urban Services (Mr Brendan Smyth MLA) presented to the Assembly the Environment Protection (Amendment) Bill: Exposure Draft, and the associated explanatory memorandum.
2. The Bill, explanatory memorandum and the Minister's tabling speech are the key government papers in relation to this inquiry.
3. Also on 25 June 1998, the Assembly resolved to refer the exposure draft to the Standing Committee on Urban Services for inquiry and report by 1 September 1998.
4. It is unusual for the exposure draft of a Bill to be referred to an Assembly committee for inquiry and report. The committee notes the Minister's undertaking to 'consider all comments made and introduce the Bill formally in due course, redrafted as necessary'.<sup>1</sup> The committee expects this report to facilitate that redrafting.
5. However, in essence, the committee - like those who provided submissions to the inquiry - supports the thrust of the Bill. It will significantly supplement the Principal Act (the *Environment Protection Act 1997*), which itself was carefully scrutinised by this committee's predecessor last year.<sup>2</sup>

### **Purpose of the Bill**

6. The Bill provides for the management of contaminated land and its remediation. It will allow for the development of a contaminated sites environment protection policy under the *Environment Protection Act*. Specifically, the Bill will enable the Environment Management Authority to investigate potentially contaminated land and establish a process for its assessment and remediation. Independent auditors will be able to assess all work associated with a contaminated site. The Bill will allow for the recovery of costs of assessment and remediation in most cases from the polluter, but if this person or organisation cannot be found or cannot meet the costs then from the party who stands to gain most from remediation of the land.<sup>3</sup>

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<sup>1</sup> Tabling speech

<sup>2</sup> Standing Committee on Planning and Environment *Report on the Inquiry into the Environment Protection Bill 1997 and the Environment Protection (Consequential Provisions) Bill 1997* (Report No.35, November 1997)

<sup>3</sup> Minister's tabling speech

***Conduct of the inquiry***

7. The committee placed advertisements in the local media on 18 July 1998 (*Canberra Times*) and 21 July 1998 (*Chronicle* and *Valley View*). The committee invited the public to contact it for copies of the key documents.

8. The committee also forwarded information about the inquiry to a number of organisations in the ACT and in other States.

9. On 21 August 1998 the committee decided to ask the Assembly for an extension of time to report on the Bill. This reflected the fact that some businesses and organisations felt they had insufficient time to comment in detail on the Bill. The Assembly agreed to this extension, with the new deadline becoming 22 September 1998.

10. On 2 September 1998 the Assembly referred a further matter to the committee for inquiry and report, namely the existing petrol sites policy in the ACT. The committee considers there is considerable overlap between this inquiry and that into the Environment Protection (Amendment) Bill. The committee therefore placed new advertisements inviting public comment on both matters.

11. On 10 September 1998 the committee decided to seek a further extension of time to report on the Environment Bill. Again, the Assembly agreed to this request; and the new deadline became 27 October 1998.

12. On 16 October 1998 the committee held a public hearing on both the Environment Protection (Amendment) Bill and the petrol sites policy. The committee arranged for *Hansard* to record proceedings, and references to the subsequent *Transcript* appear in this report.

13. The following persons and organisations appeared at the public hearing:

- *Environment ACT*: Mr Burnett;
- *Environmental Defender's Office (ACT) Inc*: Ms Budavari (solicitor);
- *Coffey Geosciences Pty Ltd*: Mr White;
- *Property Council of Australia (ACT Division)*: Ms Cunich (executive director, Property Council) and Ms Ryan (solicitor, Mallesons Stephen Jaques
- *Woolworths Plus Petrol*: Mr Ludlow (National Property Manager Petrol);
- *The Law Society of the ACT*: Mr Bradbury( member of the Society's Planning & Environmental Law Committee); and
- *Motor Trades Association ACT Limited*: Mr Riding-Hill (executive director) and Mr Ross Ellis (proprietor, Shell service station, Manuka).



### **Appreciation**

14. The committee extends its appreciation to all those who participated in the inquiry. The committee particularly thanks Mr Burnett for his swift and thorough response to issues raised by witnesses at the public hearing.

### **Evidence**

15. The committee received six submissions which are summarised below (in alphabetical order). The summaries highlight some important points. Each submission was authorised for publication.

16. *The committee has commented on certain points in the evidence that is summarised below. These comments are in italics.*

17. **Australian Finance Conference** [AFC] represents 'the national finance industry association'. The AFC's interest in the inquiry relates to 'when, and to what extent, financiers will be liable for the assessment and remediation of contaminated land'.<sup>4</sup>

18. AFC expressed concern 'about the manner in which "notional lessee" is defined'. AFC considers that the present wording 'mirrors that of "notional owner" 'in early NSW legislation which, however, was subsequently amended to improve clarity and certainty. Particular problems include:

- the provision for exclusions should not just 'focus on financial institutions... [but should] be cast more widely, by referring to "a person" - reflecting the fact that individuals also provide secured finance;
- 'it is inappropriate to make a lender liable for the assessment of or remediation of contaminated land as a result of enforcing its security. To do so is to equate the level of control exercised by a lender over the land with that of a lessee [but] unlike a lessee, it is rare for a lender to have management or control over land. The primary exception to this rule is when a lender acts as a mortgagee in possession', in which case the mortgagee in possession fits the category of a "notional lessee"
- the definition in the exposure draft provides an exclusion where land is sold for the purpose of discharging an "obligation in relation to the land that has been approved by the [Environment Management] Authority". But this requirement 'negates the primary benefit of the exclusion [which is to] provide lenders with the certainty necessary to enable them to conduct their business, including the enforcement of securities'. The AFC considers it inappropriate 'to make lenders liable for remediation';

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<sup>4</sup> Correspondence dated 16/9/98 p1

- it is preferable to keep 'definitional consistency with NSW'.<sup>5</sup>

19. *The committee agrees with the substance of the above points.*

20. **Coffey Geosciences Pty Ltd** specialises in environmental engineering and submits that:

- the definition of "contaminated" or "contamination" is too wide and should be amended to refer to 'a significant risk to human health' and 'a risk of material environmental harm or serious environmental harm'.<sup>6</sup>

*The committee agrees with this point;*

- the proposed requirement to make it obligatory for the environmental auditor of any contaminated site to notify the Authority is too wide: 'in NSW, only statutory audits are required to be so notified'. The proposed requirement could mean 'that voluntarily commissioned assessments (ie, assessments not directed by the Authority) will not be audited... We do not consider that removing the requirement to notify voluntary audits would increase the risk of unreported contamination, as a lessee or occupier would still have a duty to notify the existence of contaminated land under [the proposed] Clause 8'.

*The committee agrees with this point;*

- the Bill should be amended to provide 'either for the Authority to prescribe the standards and procedures to be used [in an assessment or remediation] or some other method used to specify the standards and procedures, to reduce the potential for confusion or conflict'

*Environment ACT told the committee that the proposed Amendment Bill will give the Authority and the government 'sufficient power to set standards, either through the regulations or through the environment protection policies or through participating in national environment protection measures'.*

*Environment ACT anticipates these national standards to be established in the near future.<sup>7</sup> The committee therefore considers it is unnecessary to prescribe the standards in the Bill;*

- the Bill should be amended to give the Authority discretion 'to waive the requirement for an environmental audit for special cases such as the validation of the removal of underground fuel tanks if such work is (a) carried out voluntarily (ie not by direction of the Authority) and (b) in the opinion of the Authority, the validation report prepared by an experienced environmental consultant indicates that, if required, the site has been satisfactorily remediated'

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<sup>5</sup> *ibid* pp2-3

<sup>6</sup> Correspondence dated 24/8/98

<sup>7</sup> Transcript

*The committee agrees with this point;*

- the Bill should be amended to distinguish, in relation to the section dealing with liability for losses while carrying out a site assessment or remediation, between ‘the person required to conduct the assessment or remediation under direction of the Authority and persons actually performing such activities, such as assessors or auditors’.

**21. Environmental Defender’s Office [EDO] submits that:**

- the Bill should be amended to require the Authority ‘to examine and respond to information that it receives of actual and possible contamination of land and address any significant risk of harm posed’.<sup>8</sup>

*The committee was told by Environment ACT that this ‘could be a very onerous requirement administratively’.<sup>9</sup> The committee notes that the Authority can choose to investigate any matter that is brought to its attention. On balance, the committee considers that the discretion should be left to the Authority about what complaints to pursue;*

- the government should apply pressure upon the Commonwealth to accept that it is bound by the provisions of the proposed Bill. This is in order to ensure that the Commonwealth takes responsibility for any contaminated “national” land.

*The committee concurs with this viewpoint. The committee notes that its predecessor in the last Assembly (the Standing Committee on Planning and Environment) drew attention to this issue in its consideration of the Principal Act.<sup>10</sup>*

- the Bill should be amended to include a definition of “substance”;
- the Bill should be amended to define “land” as including ‘water on or below the surface of the land and the bed of such water’. This would ensure that contaminated groundwater is covered by the proposed legislation.

*The committee agrees with this point. The committee notes the statement by Environment ACT that ‘certainly the policy intention is that ground water should be covered’;<sup>11</sup>*

- the Bill should be amended to provide for “persons” to be considered as “notional lessees”.

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<sup>8</sup> Correspondence dated 25/8/98

<sup>9</sup> Transcript

<sup>10</sup> Standing Committee on Planning and Environment *Report on the Inquiry into the Environment Protection Bill 1997 and the Environment Protection (Consequential Provisions) Bill 1997* Report No.35 October 1997 p75

<sup>11</sup> Transcript

*The committee agrees with this point;*

- the Bill should be amended to make the proposed Register of Contaminated Lands 'more comprehensive than just remediation orders, so that all details about contaminated or possibly contaminated land can be accessed at one point'. This includes information about land that was formerly contaminated and which has been remediated.

*The committee's attention was drawn to the experience of both Queensland and NSW in respect of information placed on their respective registers (QLD has a very detailed register, NSW less so). The committee appreciates the point made by Environment ACT that there is a very fine judgement 'to be made about balancing the public's right to know [against] imposing too onerous a requirement on land owners, and perhaps attaching a stigma on the land'.<sup>12</sup> At this time, the committee considers that an appropriate balance has been struck in the exposure draft of the Bill [one member of the committee has commented further on this issue in his 'Additional comments' appended to this report];*

- the Bill should stipulate mandatory requirement for public notification of assessment and remediation orders.

*Environment ACT told the committee that requiring an order to be published in the newspaper appears to be unnecessary given that 'the information is on the public record and in almost all cases, if an order is issued, one of [its] requirements will be at least to consult with neighbouring property owners and probably to convey them information on a regular basis'.<sup>13</sup> Given this information, the committee does not consider that mandatory requirement is warranted;*

- the Bill 'should require the Authority to notify and consult the public if it undertakes assessment and remediation itself';
- the government should consider following some US legislation which creates 'a fund from taxes on the use of certain chemicals to finance remediation...';
- the Bill should contain a definition of "occupier" along the lines of 'the person having management or control of the land';
- 'the list of auditors maintained by the Authority should be available for public inspection and that approval of auditors also be a matter for review by the AAT'.

*The committee agrees that the list of auditors maintained by the Authority should be available for public inspection;*

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<sup>12</sup> Transcript

<sup>13</sup> Transcript

- the Bill should enable 'concerned individuals, special interest or neighbourhood groups, who become aware of possible contamination' to apply for a review of an Authority decision not to make assessment, remediation and audit orders.

*Environment ACT drew the committee's attention to the fact that 'open standing' provisions were 'debated extensively in the context of the main Act last year'. Further, the Amendment Bill will automatically pick up the provisions already existing in the Principal Act.*

*In addition, Environment ACT stated: 'While it is true that the provisions in the ACT legislation do not go as far as NSW and do not create open standing in terms of court actions, we on the other hand have what are probably the most generous third party appeal rights in the country for AAT appeal - so if people want to challenge a decision on the merits rather than on the legalities in the court, the appeal rights in the Environment Protection Act and the ability to take the matter to the AAT on the merits are extremely broad'.<sup>14</sup>*

*On balance, the committee considers the proposed provisions are appropriate [one member of the committee has commented further on this issue in his 'Additional comments' appended to this report];*

- the Bill should 'acknowledge' the function of the Commissioner for the Environment in reporting on contaminated lands, and also require the Authority to respond to the Commissioner's reports.

**22. Law Society of the Australian Capital Territory (Planning & Environmental Law Committee) submits that:**

- the definition of "notional lessee" should be broadened.<sup>15</sup>

*The committee agrees with this point;*

- the proposed Register of Contaminated Lands should be 'incorporated into an existing search process such as the Lease Conveyancing Enquiry'; and
- the Bill should ensure that an order to remediate the land appears on the Certificate of Title rather than on a separate register.

*The committee agrees with the substance of these two points. It is desirable that all relevant information appear on the one register. The committee considers that the government should investigate how this can be accomplished;*

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<sup>14</sup> Transcript

<sup>15</sup> Correspondence dated 26/8/98

- the proposed Register of Contaminated Lands should record ‘all orders that are current, ie not only remediation orders, so that prospective purchasers and lessees are on notice’.

*This matter raises the issue of striking an appropriate balance referred to earlier. The committee certainly considers that details of environment protection orders should be placed on the register;*

- it is not clear how the Authority will be able to enforce ‘an obligation on the lessee or occupier of land to notify the Authority as soon as practicable after becoming aware that land “is or is likely to be contaminated”’. There should be some ‘guidance as to what should be contained in the notice notifying the Authority’.

*The committee agrees with this point. The committee notes that such guidance may be provided by means other than legislation (for example, it might be provided by way of an environment protection order);*

- the Bill should be amended to provide that ‘any information provided by a person for the purpose of complying with [the above section] is not admissible as evidence in any proceedings against that person for an offence under the Act’ - though it ‘should not prevent the Authority from carrying out an order’.

*In commenting on this point, Environment ACT observed that, to notify ‘an event or your knowledge of something, does not necessarily incriminate you. It is not a requirement to disclose, for example, your own possible part in what might have occurred’. The committee agrees with Environment ACT on this point. The provision in the exposure draft corresponds to what is in the Principal Act, which itself reflects the viewpoint of this committee’s predecessor in 1997 (when it examined this issue);*

- the Society is concerned about ‘the number of different people required to be involved in the assessment, audits and remediation’.

*The committee also is concerned about this point;*

- the Bill should be amended to include an outline of ‘what constitutes a conflict of interest [by an auditor] and prohibit an auditor from carrying out an audit when there is such a conflict’;
- the Bill should clarify ‘in what instances an auditor is required to notify the Authority’ about his or her activity;
- the Bill should provide for the Authority to pay the assessment costs in circumstances where, having made an order to conduct an assessment, that assessment shows that the land is not contaminated.

*It is the view of Environment ACT that the Authority would be influenced in its actions by any requirement for it to pay for assessment costs in such a*

*situation. Again, this is a difficult issue about which to strike a balance. At this time, the committee simply notes that ‘there is an appeal right against a decision by the Authority to order an assessment’;<sup>16</sup>*

- the Bill should clearly distinguish between an audit and an assessment;
- the Bill should stipulate that an order may be made against the ACT government ‘for contamination that originates from the uses of the land prior to issue of the current lease’ (such as contamination that originates from old sheep dip sites).

*The committee comments on this issue overleaf;*

- section 91I does not quantify what is a “portion” in relation to recovering some of the costs of carrying out the requirements of the order. The Society ‘recommends that the Bill state that a portion reflects what is reasonable and just in the circumstances’.

*The committee agrees with this point;*

- section 125 of the Principal Act should provide for an environmental protection order made by the Authority, in relation to land that is not contaminated but which might cause harm if used for a particular purpose, to be incorporated onto the Register.

*The committee agrees with this point. Though such an order by the Authority is publicly available, it still appears desirable to place the information upon the Register;*

- the final Bill should ‘contain a section that limits representatives or trustees’ liability to the value of assets they may realise’.

*The committee understands that this may be the existing legal position in relation to trustee’s liability, but it would be helpful if the government provided further advice to the Assembly on this point;*

- the Bill should provide for an individual to ‘volunteer to assess or remediate land on the basis that the Authority does not issue an order’.

*The committee agrees with the substance of this point.*

- the Bill should ‘set out what the Authority should do [after an assessment, remediation or audit, when it is satisfied that the land is not contaminated] and ensure that the change is noted on the chosen Register’.

**23. Property Council of Australia (ACT Division) submits that:**

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<sup>16</sup> Transcript

- clause 23A be amended to clarify the extent of the duty to notify the Authority as soon as practicable about land that is likely to be contaminated. The Council suggests words such as: 'A lessee or occupier of land is not required to notify the Authority of likely contamination if the lessee or occupier of land has reasonable grounds for believing that the contamination has already come to the notice of an authorised officer'.<sup>17</sup>

*The committee agrees with this point. In this regard, the committee notes the statement by Environment ACT that 'the existing provisions in the Principal Act for public notification of environmental harm [do state] that if you have got reason to believe that the authorities already know about it, then obviously the obligation does not apply'.<sup>18</sup> The Amending Bill should be similar;*

- the Bill should limit the power of the Authority to 'require a person to commission an environmental audit of contaminated land' by providing that this take place 'only after an assessment under section 91A has confirmed that the land is contaminated';
- the Bill should provide for the Authority to have the power to exclude from public access some reports relating to assessment of land and orders relating to the remediation of land. This can be done by amending section 21(1) of the Principal Act.

*The committee agrees that there may be circumstances in which the Authority may decide that public access to orders may be inappropriate. Again, the Principal Act does allow 'a person to apply to the Authority to keep certain information confidential if they can make out the grounds that it would harm their business or otherwise'<sup>19</sup> - and the Amending Bill should be similar;*

- the Bill should permit a lessee to 'transfer or sublet land while a remediation order is in force in respect of that land' provided that 'the terms of the remediation order are explained to the person to whom the land is being transferred or sublet'.

*The committee strongly disagrees with the Property Council on this matter.*

*The committee notes, however, that - as the Authority is required to give its agreement for a transfer or subletting - there may be a case for inserting a provision permitting a right of appeal against an (alleged) unreasonable decision by the Authority;*

- the Bill should 'scrap' the notion of "notional lessee".

*The committee has commented on this point (see above);*

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<sup>17</sup> Correspondence dated 1/9/98

<sup>18</sup> Transcript

<sup>19</sup> Transcript



- the Bill should provide for an assessment or remediation order to be made only against 'the person responsible for the contamination of the land. Where it is not "practicable" for the Authority to make such an order against the person responsible, the Authority should pay for the costs associated with assessment or remediation and then seek recovery of costs under clause 91I from the person responsible'.

*The committee acknowledges this is a difficult area. The committee agrees with the statement by Environment ACT that, 'if you cannot find or cannot nail the polluter..., it is going to have to be one of the innocent parties [that pays the remediation costs], either the landowner or the [government]'.*

*However, the committee does not agree with the following comment by Environment ACT: 'the government has made the appropriate choice in choosing the landowner because they stand to gain the most from the remediation'.<sup>20</sup>*

*The committee considers there are compelling reasons for recognising that the government is ultimately responsible for ensuring a safe and healthy environment. If the polluter cannot be identified (or it is impracticable for the Authority to make an order against that person), then it is the government which should bear the cost of assessment and remediation. (The committee certainly considers that the government should do all that it possibly can to seek recovery of costs from the polluter.)*

*The committee cites the Territory's experience in relation to contamination from old sheep dips. In this case, the cost of remediation was borne by the government and not the individual landowner;*

- the Bill should not give the Authority the power 'to require a person to pay the reasonable costs incurred by the Authority in undertaking the remediation of contaminated land or undertaking an assessment of land to ascertain whether it is contaminated' unless that person is 'the "appropriate person", that is the person responsible';
- the Bill should not contain the present provision enabling the Authority to have 'priority over any other creditors in relation to land disclaimed as onerous property in the course of proceedings for winding up or bankruptcy';
- the present provision (clause 91K) providing that a person may be liable to an occupier of land for any loss suffered due to assessment/remediation activity should 'be limited to circumstances where the person undertaking the assessment or remediation does not have the permission of the occupier of land or lease.

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<sup>20</sup> Transcript

24. **Trustee Corporations Association of Australia** is primarily interested in 'when and to what extent trustees will be liable for the assessment and remediation of contaminated land'.<sup>21</sup> The Association submits that:

- the definition of "notional lessee" should be broadened to include a "legal person" and should be made consistent with that used in NSW.

*The committee agrees with the substance of this point;*

- clause 91L and 91M of the proposed Bill 'should be amended so that orders can only be made against the directors of the company which is responsible for the contamination, not against directors of the owner or notional owner which is not responsible for the contamination'. In addition, 'the requirement for the director to prove that he is innocent [of an offence against the legislation] is objectionable and should be deleted'.

*The committee notes that this matter is addressed in the Principal Act and, in the view of the committee, those provisions should continue to apply to the amending Bill;*

- the final Bill should 'limit the liability of a legal representative of an estate or of a trustee of property' in relation to reporting, damage control and clean-up; and 'should be so limited to the assets of the estate or trust respectively' (as in NSW).

*The committee has already commented on this issue (above).*

### **Recommendations**

25. The committee endorses the purpose and nature of the exposure draft of the Environment Protection (Amendment) Bill with the following specific recommendations:

- that the government, being ultimately responsible for ensuring a safe and healthy environment, pay for the costs associated with remediation of contaminated land in those cases where the polluter cannot be found (or it is impracticable for the Authority to make an order against the person responsible) - accepting always that the government should do all that it possibly can to seek recovery of costs from the polluter
- that the definition of "notional lessee" be amended along the lines of the NSW legislation
- that the definition of "contaminated" or "contamination" be amended along the lines of 'a significant risk to human health' and 'a risk of material environmental harm or serious environmental harm'

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<sup>21</sup> Correspondence dated 13/10/98

- that the definition of “land” include ‘water on or below the surface of the land and the bed of such water’
- that the government investigate how to incorporate the proposed Register of Contaminated Lands into an existing search process such as the Lease Conveyancing Enquiry, and how to ensure that an order to remediate the land appears on the Certificate of Title rather than on a separate register
- that the proposed requirement to make it obligatory for the environmental auditor of any contaminated site to notify the Authority be amended to exclude voluntarily commissioned assessments
- that the Bill be amended to give the Authority discretion to waive the requirement for an environmental audit for special cases such as the validation of the removal of underground fuel tanks if such work is (a) carried out voluntarily (ie not by direction of the Authority) and (b) in the opinion of the Authority, the validation report prepared by an experienced environmental consultant indicates that the site has been satisfactorily remediated
- that the legislation give the Authority the discretion to exclude from public access reports relating to assessment of land and orders relating to the remediation of land
- that the final Bill take into account the desirability of reducing the number of different people required to be involved in the assessment, audits and remediation
- that the final Bill clarify in what instances an auditor is required to notify the Authority about his or her activity
- that the list of auditors maintained by the Authority be available for public inspection
- that section 125 of the Principal Act should provide for an environmental protection order by the Authority, in relation to land that is not contaminated but which might cause harm if used for a particular purpose, to be incorporated onto the Register
- that the final Bill provide for an individual to volunteer to assess or remediate land on the basis that the Authority does not issue an order
- that the final Bill clarify the extent of the duty to notify the Authority as soon as practicable about land that is likely to be contaminated
- that the government provide information about the standards and procedures to be used by the Authority in relation to an assessment or remediation

- that the Authority provide some guidance to lessees or occupiers of land about what should be contained in their notification, to the Authority, of contamination or possible contamination
- that the government provide further information on the legal position in relation to the liability of trustees
- that the Bill specify what is a “portion” in relation to recovering some of the costs of carrying out the requirements of an order
- that the government continue to apply pressure upon the Commonwealth to accept that it is bound by the provisions of the proposed Bill (and the Principal Act). The committee urges the government to take up this issue with the new Commonwealth Minister for Territories.

26. The committee raises several further issues.

27. Even the wider definition of “land” that is recommended above may not encompass all possible cases of “contamination” which should be placed on a Register. The committee notes that the definition of “environment” in the Principal Act includes ‘the components of the earth, including soil, the atmosphere and water; any organic or inorganic matter...; human-made or modified structures...; ecosystems and their constituent parts, including people and communities; the qualities and characteristics of places and areas that contribute to their biological diversity and ecological integrity, scientific value, and amenity...’

28. Rather than a ‘contaminated land register’, it seems to the committee that it would be more in keeping with the Principal Act to have a ‘contaminated sites register’. This would provide the flexibility, if ever it was required in the future, for an area of the atmosphere or an area of ‘human-made structure’ to be identified as ‘contaminated. In the latter case, the committee has in mind the possibility that, for example, land may be ‘contaminated’ by rising salt-rich water tables that might even cause structural damage to ‘human-made structures’.

29. Therefore, the committee recommends that the final Bill provide for a register of contaminated sites, rather than just ‘land’.

30. The second issue of concern to the committee is access by the Commissioner for the Environment to all information relating to contaminated sites. It appears to the committee that it is essential such information is made available free of charge to the Commissioner, so that it might be incorporated into that officer’s State of the Environment reports or such other reports as are required by legislation.

31. The committee recommends that all information relating to contaminated sites be made available at no cost to the Commissioner for the Environment for the purpose of that officer compiling State of the Environment reports or such other reports as are required by legislation.

32. The committee became concerned during the public hearing that the existing and proposed environmental controls may be avoided by small backyard operators (such as motor workshops). The committee strongly considers that the same environmental controls and standards should apply across the board. It appears that there may be a need for greater monitoring of these small operators.

33. The committee was impressed with what it heard about the improved safety of new technology for tanks and pipes in service stations such as those constructed by Woolworths Plus. This is a matter that the committee will pursue further in its inquiry into the existing petrol sites policy.

Harold Hird MLA  
Chair

23 October 1998

***Additional Comments by Mr Simon Corbell, MLA on the Environment Protection (Amendment) Bill 1998 Exposure Draft***

There are two areas of concern in the majority report where I believe it is appropriate to make some additional comments.

The first is in relation to what information is available on the proposed Register of Contaminated Lands. The majority report has accepted the Government's position on what information should be available through the register. In particular it has accepted that once land has been remediated it should no longer be listed on the register.

I believe there is merit in including this material on the register as there is a clear possibility that such land, whilst understood to have been remediated and longer contaminated according to today's standards, may be found to still be contaminated as expertise and knowledge in this area continues to improve.

This is a position the Government should consider closely, the public's right to know and the precautionary principle both highlight the need for open information on previously contaminated sites.

The second area where I wish to make additional comments is in relation to provisions to allow for 'open standing' for individuals and other groups to apply for a review of an Authority decision not to make assessment, remediation and audit orders.

As a matter of principle I believe it is appropriate that as a community we allow citizens to appeal the decisions of Government authorities where they believe they have interpreted the law incorrectly. This provides for an additional 'watchdog' role over the actions of Government departments and other bodies.

**SIMON CORBELL, MLA**  
26 October 1998