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Site Contamination – the Legal Position in SA

University of South Australia / Environmental Defenders Office
Site Contamination and the Law

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8 November 2012

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Today's presentation

- Environment Protection Act regime
 - Key elements
 - Worked examples
- Use of Site Contamination Audits
- Planning approvals and rezoning

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Environment Protection Act regime

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Site contamination

- Chemicals present above background concentrations
- Introduced as a result of an activity
- Levels and exposure pathways give rise to risk of actual or potential harm that is not trivial:
 - to human health (current and proposed land uses)
 - to water (including surface water and groundwater)
 - to the environment (current and proposed land uses)

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EPA Powers

- Issue Site Assessment Order
- Issue Remediation Order



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Key Elements

- Retrospective
- Remediation
 - Eliminate or prevent harm to human health
 - Eliminate or prevent harm to water/envt AFARP

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Key Elements

- “Cause” contamination
 - Occupy land when activity results in discharge
 - Change use to create risk



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Liability for Site Contamination

- Hierarchy of Liability
 1. Person who caused contamination (where practicable)
 2. Current owner if aware of contamination at time of purchase
- Potential for no-one to be liable
 - Polluter not practicable and current owner 'unknowing'
- Transfer by contract



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Consequences of Order

- Offence to fail to comply with Order (max fine \$120,000)
- EPA remediate and recover costs (debt or charge)
- Registered on title – site
– all other land owned by person

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Personal Liability of Managers

- Where a company has been issued with an order or grounds exist for an order to be issued
and
- Scheme implemented to avoid obligations under the order or avoid the issuing of an order
eg company wound up or stripped of assets;

Court may order that a person managing the company (or holding company) at the time the scheme was devised can be issued with the order personally

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Duty to report site contamination that affects or threatens underground water

- Owner or occupier of the site (whether they caused it or not)
- Site contamination consultant
- Only where first identified after 1 July 2009

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Worked Examples

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Industrial site

- Metalbits Pty Ltd operated a chrome plating shop on the land from the 1970s
- The land and business was bought by Shinythings Pty Ltd in 2010
- Shinythings Pty Ltd tests groundwater in 2012 and identifies chemicals above background concentrations

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Industrial site

- Is “site contamination” present?
 - Harm to humans, water or the environment?
Chemicals in the groundwater below thresholds in the Environment Protection (Water Quality) Policy
- no harm to humans, water or the environment
- no site contamination present
- no further action

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Industrial site

- Is “site contamination” present?
 - Harm to humans, water or the environment?
Chemicals in the groundwater above thresholds in the Environment Protection (Water Quality) Policy
 - deemed by EPA to amount to harm to water that is not trivial
 - site contamination present

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Industrial site

- Who caused the site contamination?
 - Activity on the site that introduced chemical substances?
 - Chrome plating operations on the site since 1970s
 - Site was undeveloped prior to chrome plating business
 - Nature of contaminants same as those associated with chrome plating
 - Metalbits Pty Ltd was the only operator
 - Metalbits Pty Ltd caused the contamination

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Industrial site

- Is it practicable to issue an order to the person who caused the site contamination?
 - Identifiable?
 - Still exists?
 - Able to pay costs associated with compliance?

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Industrial site

- Is it practicable to issue an order to the person who caused the site contamination?
 - Identifiable? **Yes**
 - Still exists? **Metalbits Pty Ltd**
 - Able to pay costs associated with compliance? **Yes**

→ Order would be issued to Metalbits Pty Ltd

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Industrial site

- Is it practicable to issue an order to the person who caused the site contamination?
 - Identifiable? **Yes**
 - Still exists? **No - Metalbits Pty Ltd has been wound up**
 - Able to pay costs associated with compliance? **No**
- **Shinythings Pty Ltd aware of “prescribed contaminating activity” at time of purchase (potential also to be directly responsible)**
- **Order would be issued to Shinythings Pty Ltd**

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Former industrial site

- Metalbits Pty Ltd operated a chrome plating shop on the land from the 1970s
- The land was bought by Newhouse Developments in 2002
- Newhouse Developments subdivided and built 4 houses
- 4 lots with houses sold to 4 purchasers

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Former industrial site

- Is “site contamination” present?
 - Harm to humans, water or the environment?
 - Chemicals in the soil pose potential harm to humans in houses
 - Chemicals in the groundwater deemed to pose harm to water

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Former industrial site

- Who caused the site contamination?
 - Activity on the site that introduced chemical substances?
 - Chrome plating operations on the site since 1970s
 - Site was undeveloped prior to chrome plating business
 - Nature of contaminants same as those associated with chrome plating
 - Metalbits Pty Ltd caused the contamination...
(by releasing the contaminants)

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Former industrial site

- Who caused the site contamination?
 - Change in use?

Development of the industrial site for residential use created exposure risk for humans to vapours from the soil

→ Newhouse Developments caused the contamination in the soil
(by changing to a more sensitive land use)

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Former industrial site

- Is it practicable to issue an order to the person who caused the site contamination?
 - Identifiable?
 - Still exists?
 - Able to pay costs associated with compliance?

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Former industrial site

- Is it practicable to issue an order to the person who caused the site contamination? (soil)
 - Identifiable? **Yes**
 - Still exists? **Newhouse Developments**
 - Able to pay costs associated with compliance? **Yes**

→ Order would be issued to Newhouse Developments re soil

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Former industrial site

- Is it practicable to issue an order to the person who caused the site contamination? (groundwater)
 - Identifiable? Yes
 - Still exists? No - Metalbits Pty Ltd has been wound up
 - Able to pay costs associated with compliance? No
- Order would be issued to purchaser if aware of chrome plating
- No order possible if purchaser not aware of chrome plating

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Use of Site Contamination Audits

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Site contamination audit

- Accredited third party review
- Auditor prepares Audit Report + Audit Statement (summary)
= “Sign off”:
 - site is suitable for stated use
 - what remediation/measures necessary for site to be suitable for stated use
- Report & Statement are publicly available

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Site contamination audit

- Not automatically required
- Can be ordered by EPA (Assessment Order, Remediation Order)
- Can undertake voluntarily
- Can be required as part of planning approval process

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Planning approvals and rezoning

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Site contamination assessments and audits not automatically required for planning applications

- Council may require site contamination assessment or audit
- Planning Advisory + EPA guidelines recommend audit:
 - where site contamination exists
or a contaminating activity has occurred
- + a sensitive use is proposed (residential, school, child care)

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Upon referral of planning applications to EPA

- EPA may recommend that Council request an assessment or audit
 - Council not bound to follow recommendation
- EPA may request assessment/audit itself

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Rezoning

- No automatic obligation to consider site contamination
- Planning Advisory / EPA Guidelines recommend:
 - Assess suitability of existing industrial or commercial land (or land with known history of contaminating activity) before rezoning
 - Where contamination identified or suspected, include relevant zone policies in the Development Plan to manage use of the rezoned land

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Key Points – Site Contamination in SA

- Management of site contamination is risk-based
- EPA has powers to require investigation / clean-up
- Within planning approval process, EPA and Council have powers to require investigation /clean-up
- No automatic requirements to investigate / clean-up