

# TASMANIAN PUBLIC AND ENVIRONMENTAL HEALTH NETWORK

## REGULATION OF CONTAMINATED SITES

### Legislative amendments Options Paper

Updated September 2012

#### *KEY AMENDMENTS OUTLINED IN POLICY PAPER*

1. A free, publicly accessible Contaminated Sites Register
2. Protection of innocent landowners
3. Household audit services
4. Abatement funds to pay for hazard removal and management
5. Mandatory disclosure to tenants and purchasers
6. Community engagement for Level 2 and 3 activities
7. Public and environmental health investigations conducted in collaboration with affected communities
8. Monitoring off-site sediments

The Tasmanian Public and Environmental Health Network policy paper released in September 2011 outlined the key elements that we consider essential to an effective regulatory framework for contaminated sites. This updated position paper outlines our preferred legislative and policy approach to implement such a framework in Tasmania.

## 1. A free, publicly accessible Contaminated Sites Register

The Contaminated Sites Unit currently maintains a number of registers:

- Contaminated Sites Register, including records of land and water contamination;
- Environmentally Relevant Land Use Register, including details of environmentally relevant activities historically undertaken on site;
- New Environmental Licensing and Monitoring System, including a database of EPNs and other management documents; and
- Incidents database, setting out records of complaints, notifications etc made in respect of a property.

At present, these databases are not freely available (the cost to search the register is \$77 per property) and are often not a comprehensive record of actual or potential contamination. To ensure that data in relation to contamination is easily accessible, in obvious locations that will come up using basic internet research skills, TPEHN believe that the government should:

- Undertake further work to improve knowledge regarding the extent of contamination in Tasmania;
- Maintain a comprehensive, on-line Contaminated Sites Register including all the information categories currently held by the Contaminated Sites Unit;
- Ensure that the LIST includes information about whether a property is on the Contaminated Sites Register.

### RECOMMENDED ACTIONS AND AMENDMENTS:

- Government to dedicate resources towards developing comprehensive databases, and making the information available, free of charge, through the LIST. The LIST must also include reference to any health advisory note issued in respect of the property under the *Public Health Act 1997*.
- Insert a new provision in EMPCA establishing a Contaminated Sites Register:

#### **Section 74Z**

(1) The Director is to maintain a register containing:

- (a) details of all notices issued under s.74C;
- (b) a description of the location of each site subject to a notice under s.74C;
- (c) a description of the nature and extent of the known contamination of each site subject to a notice under s.74C;
- (d) any progress report submitted in respect of land subject to a notice under s.74C;
- (e) any Annual Monitoring Review submitted in respect of a use or development undertaken on land identified as an Environmentally Relevant Land Use.

(2) A person is entitled to search the register referred to in subsection (1) and obtain copies of any document (including all attachments) referred to in the register without payment of a fee.

## 2. Innocent landowner provisions for property owners

Section 74B of EMPCA requires the current owner or occupier of land known or suspected to be contaminated to notify the Director regarding the contamination. We are concerned that this provision, in addition to the general environmental duty, will place an undue burden on an owner or occupier who was not responsible for the contamination (and did not reasonably have cause to believe that the land was contaminated). Part 5A of EMPCA currently addresses this in the following ways:

- Notices are to be issued to the person who caused the contamination in the first instance, even if they are no longer the owner of the land. If the person responsible cannot be found or is bankrupt, the Director may only issue a notice to the current owner if s/he
  - Became the owner after the commencement of Part 5A and should not reasonably have been expected to believe that the land was contaminated at the time of purchase; or
  - Has accepted responsibility for contamination issues associated with the site (written documentation of this agreement is required).
- When determining what work should be required under a notice, the Director is to have regard to the period during which all relevant parties were responsible for the land, the use to which each of them put the land and whether they were responsible for any known or likely incident during that time.
- Where a notice is not complied with, the Director can carry out remediation work and recover the costs from the person who should have been responsible for the work (ss.74S and 74T).

This approach provides some protection for 'innocent landowners', but still allows some situations in which a landowner who has inadvertently purchased contaminated land to be subject to remediation costs in order to make their property liveable. TPEHN believe that further protection should be offered to ensure that people who unwittingly purchase contaminated sites are not subject to unfair clean-up costs.

The approach adopted in jurisdictions which have innocent landowner provisions is generally to allow a 'grace' period in which people on properties which they know or suspect may be contaminated can apply for an exemption certificate.

We note that innocent landowner provisions work most effectively in jurisdictions with comprehensive and accessible databases of contaminated sites. This is because it is easier for a potential purchaser to determine whether a site is subject to contamination, rather than to 'innocently' discover after purchase that they will be subject to considerable clean-up costs.

### RECOMMENDED AMENDMENTS:

- Insert a new section 74BA of EMPCA:

#### **Section 74BA Exemption certificates**

- (1) *An owner of land who gives notice to the Director under section 74B within 2 years of the commencement of this section may apply for an exemption certificate.*
- (2) *An application for an exemption certificate must be made in the prescribed form.*
- (3) *Within 28 days of receiving an application, the Director must issue an exemption certificate to the owner if satisfied that:*
  - (a) *the land is a contaminated site;*

(b) the person is not wholly or partly responsible for causing or possibly causing the area of land to be a contaminated site;

(c) the person did not fail to prevent any pollutant from escaping, being discharged, emitted or released on, onto or under the land, as far as it was reasonably within the person's control to prevent or minimise the escape, discharge, emission or release of a pollutant; and

(d) the land was a contaminated site at the time the person became an owner of the land and, at that time, the person did not know, or suspect, and could not reasonably have known or suspected, that the land was a contaminated site.

(4) If not satisfied of the matters in subsection (3), the Director may refuse to grant an exemption certificate in respect of the land.

(5) Within 14 days of receiving an application under subsection (1), the Director may request such further information as the Director considers necessary to make a determination under subsection (3).

(6) If further information is requested under subsection (5), the period of time referred to in subsection (3) does not run while the request for information has not been answered to the satisfaction of the Director.

(7) If an application for an exemption certificate is refused under subsection (4), the applicant may, within 14 days after the day on which notice of the decision is served, appeal to the Appeal Tribunal.

- Replace s.74C of EMPCA with the following:

**Section 74C Contaminated Site Notices**

(1) Subject to subsection (2), the Director may issue one or more of the following notices in accordance with this Division:

(a) an investigation notice;

(b) a remediation notice;

(c) a site management notice.

(2) A notice under subsection (1) cannot be issued to a person to whom an exemption certificate has been granted under section 74BA, to the extent provided for in the exemption certificate.

### **3. EPA to fund household audit services for any person residing on contaminated property**

### **4. EPA to fund costs of removal of any relevant hazards found during household audits**

The Environment Protection Fund established under s.97 of EMPCA is managed by the EPA Board and is currently able to be used to:

- Pay out financial assurances and amounts due under environmental agreements;
- Cover the costs of dealing with environmental emergencies;
- Undertake education and training programmes in relation to the "protection, restoration or enhancement of the environment";
- Investigate, research or conduct pilot projects relating to the "protection, restoration or enhancement of the environment"; and

- Make grants for environmental improvement purposes (defined in s.99 to include acquiring and applying knowledge for improving the environment, training people to carry out research, provision of advice and assistance to people carrying out environmental activities, publication of reports etc).

Arguably, these objectives are broad enough to allow the Fund to be used to provide for audit services and an abatement fund in respect of contaminated land. However, to ensure that money can be made available for that purpose, TPEHM recommend that the legislation be amended to explicitly allow funds to be allocated to those activities.

#### **RECOMMENDED ACTIONS AND AMENDMENTS:**

- The government should allocate money from the Environment Protection Fund for the purposes of conducting household audits and assisting affected households to take remediation measures, internally or under contract to an appropriate organisation.
- Amend s.97(3) of EMPCA by adding the following subsections:
  - (g) for the purposes of conducting investigations relating to the identification and remediation of contamination;*
  - (h) for the purposes of assisting any person to whom an exemption certificate has been granted under section 74BA to take action to minimise the impact of contamination on their property.*

## **5. Mandatory disclosure to tenants and purchasers of contaminated properties**

### **Potential purchasers**

TPEHN note that the best protection will be offered to potential purchasers by ensuring that the contaminated sites register is comprehensive, readily available, easy to search and widely publicised. However, we recommend several additional amendments to provide greater assurance that purchasers are made aware of actual or potential contamination on residential properties.

### **Vendor disclosure**

Part 10 of the *Property Agents and Land Transactions Act 2005*, which has yet to commence, requires a vendor (including an agent) to ensure that "relevant disclosure documents" are available for any potential purchaser to inspect. It is an offence not to provide the disclosure documents, or to provide false or misleading information in the disclosure documents. A purchaser can rescind a contract of sale (prior to settlement) if the vendor did not comply with the disclosure obligations.

The *Property Agents and Land Transactions Amendment Regulations 2010* set out in detail the information to be included in the "relevant disclosure documents" for any sale of residential land. Regulation 41C requires a vendor to complete a statement relating to his/her period of ownership which includes details of "any notices received in relation to soil contamination" and whether building materials are likely to have contained asbestos.

Commencement of the proposed regulations will address some of TPEHN's concerns relating to disclosure of information regarding contamination.

In addition to the specific requirements of the vendor disclosure statement, s.196 of the *Property Agents and Land Transactions Act 2005* (which is also yet to commence) states:

**196. Liability of agent**

- (1) *In addition to any disclosure of information required of a vendor under this Part, an agent of the vendor must disclose to a prospective purchaser any information that the agent knows or ought reasonably to know is likely to affect the purchaser's decision to purchase the residential land.*
- (2) *An agent of a vendor is liable for any loss or damage arising from a failure to disclose to a purchaser any information which the agent knew or ought reasonably to have known was likely to affect the purchaser's decision to purchase the residential land.*

**RECOMMENDED ACTIONS:**

- Include links to the Contaminated Sites Register (once established) and the CSU search request forms from the Consumer Affairs and the REIT websites;
- Commence Part 10 of the *Property Agents and Land Transactions Act 2005*;
- Insert Part 5A (Disclosure Documents) into the *Property Agents and Land Transactions Regulations 2006* (as proposed by the draft *Property Agents and Land Transactions Amendment Regulations 2010*, but amended to include "any health advisory note issued under the *Public Health Act 1997*" in the disclosure documents referred to in r.41C.

**Local government certificates**

During most conveyancing transactions, a potential purchaser will obtain a Land Information Certificate from the local council under s.337 of the *Local Government Act 1993*. Pursuant to r.44A of the *Local Government (General) Regulations 2005*, a council land information certificate is to:

- Be in the form set out in Schedule 6 of the Regulations; and
- Answer the questions prescribed in Schedule 7.

Section 74H of EMPCA requires copies of any contaminated site notice to be served on the council for the area in which the land is situated, therefore TPEHN consider it appropriate to require information regarding such notices to be included in the land information certificate.

**RECOMMENDED AMENDMENTS:**

- Amend Schedule 7, Part 2 ("Public Health and Environmental Matters") of the *Local Government (General) Regulations 2005* by inserting the following after No. 10:

***Environmental Management and Pollution Control Act 1994***

<b>No.</b>	<b>Question</b>	<b>Answer</b>
10A.	<p><i>Contaminated Sites Notice</i></p> <p><i>(a) Has the council a record of an investigation notice, a remediation notice or a site management notice being issued under <u>Part 5A, Division 3</u> of the Act in relation to the specified land?</i></p> <p><i>(b) If YES to (a), provide particulars.</i></p>	

### Public Health Act 1997

No.	Question	Answer
10B.	Health Advisory Note <i>(a) Has the council a record of any health advisory notes issued in relation to the specified land?  (b) If YES to (a), provide particulars.</i>	

## Tenants

There are not currently any legislated disclosure requirements in respect of rental properties, other than in respect of the condition report. There are two options for ensuring that any notifications regarding contamination are disclosed to tenants:

1. A stand-alone duty of disclosure; or
2. Requiring the condition report to include details of any contaminated site notice issued in respect of the property.

In either situation, a tenant should be entitled to terminate a tenancy agreement where the landlord has failed to comply with disclosure obligations.

### RECOMMENDED ACTIONS AND AMENDMENTS:

- Include links to the Contaminated Sites Register (once established) and the CSU search request forms from the Consumer Affairs and the REIT websites;
- Insert a new provision 14A in the *Residential Tenancy Act 1997*:

#### **14A. Property Owner Disclosure Statement**

**(1)** A residential tenancy agreement must include a signed disclosure statement from the owner of the residential premises (or an agent of the owner) in the prescribed form.

**(2)** Any person signing a disclosure statement must not knowingly or recklessly

(a) supply false, inaccurate or misleading information; or

(b) fail to supply all the information required to be included in disclosure statement.

**Penalty:** Fine not exceeding 50 penalty units

- Insert a new Regulation 12 and Schedule 3 in the *Residential Tenancy Regulations 2005*:

#### **12. Property Owner Disclosure Statement**

For the purposes of section 14A of the Act, a disclosure statement is to be in accordance with Schedule 3.

**Schedule 3** should include similar information to that required to be disclosed in a vendor disclosure statement under the draft *Property Agents and Land Transactions Regulations 2010*, including any contaminated sites notices and whether the building is likely to contain asbestos and any health advisory notes in respect of the property.

- Amend s.38 of the Act by inserting a new (1)(d)-(e):
  - (d) *the owner failed to provide a signed disclosure statement in accordance with section 14A; or*
  - (e) *the tenant becomes aware that the owner provided false information, or failed to disclose relevant information in the disclosure statement provided under section 14A.*

## **6. Community engagement for Level 2 and 3 activities**

The recent experience of residents in Copping in relation to the proposed hazardous waste facility demonstrates the inadequacy of current public notification provisions as a means of informing the community regarding proposed developments. Where a development is likely to have a significant impact on the environment, economy or the local community, more active community engagement is required.

The EIA Principles outlined in s.74 of EMPCA require an opportunity for “public consultation on the proposal before the assessment process is complete”. However, there is currently nothing which requires any active community engagement beyond small notices in the newspaper, letters to immediately adjoining owners and signs on the site. Where, like the Copping waste depot, the site is not on a main thoroughfare, the minimum statutory notification requirements provide no guarantee that affected community members will be aware of a proposal, or of their right to participate in its assessment.

Community engagement is needed to ensure that an affected community is aware of development proposals, including potential risks and proposed management responses. More effective community engagement will also facilitate more constructive feedback during the public comment period, and may result in developments that are more acceptable to the community.

TPEHN consider that the following use and development should be subject to mandatory community engagement activities:

- Level 2 activities under EMPCA;
- Projects of Regional Significance under LUPAA; and
- Projects of State Significance under the *State Policies and Projects Act 1993*.

TPEHN recommend that amendments be made to require the Director of the EPA to direct a proponent to undertake community engagement activities prior to the formal comment period in respect of one of these developments. The extent of necessary community engagement will differ for each project, and should be determined by the EPA. Community engagement activities must include, at a minimum, an information sheet regarding the proposal (and opportunities to comment) delivered to all homes in a specified area, and at least one of the following:

- Public meetings
- Information stall at local shopping centre
- Advertisements in local publications (e.g. local newspaper, school newsletter)
- Invitation to specified community organisations to meet with the proponent for a briefing regarding the proposal.

## RECOMMENDED AMENDMENTS:

- Insert new s.74AA of the *Environmental Management and Pollution Control Act 1994*:  
**74AA. Community Engagement Directions**
  - (1) If the Director is required under this Act or any law to issue a Community Engagement Direction, the Director is to cause a Community Engagement Direction to be issued and served on the proponent in accordance with this section.
  - (2) Unless section 74AA(3) applies, the Community Engagement Direction -
    - (a) is to specify the use or development to which it relates; and
    - (b) is to require the proponent to take specified community engagement activities in relation to that use or development, which must include the activity described in subsection (5)(a); and
    - (c) may require the community engagement activities to be carried out in a specified manner; and
    - (d) is to contain a statement that the proponent may, within 14 days from the date on which the direction is issued, appeal to the Appeal Tribunal against the direction or any requirement contained in the direction.
  - (3) If the Director is satisfied that no community engagement activities are necessary in respect of the use or development, the Community Engagement Direction is to state that the proponent is not required to carry out community engagement activities and provide reasons for that decision.
  - (4) The Director may only be satisfied under section 74AA(3) if the Director reasonably believes that any person who may be affected by the use or development is already aware of the activity.
  - (5) For the purposes of this section, "**community engagement activities**" includes, but is not limited to, the following activities:
    - (a) information sheet provided to all owners and occupiers of properties within a specified distance of the land that is the subject of the application ;
    - (b) holding a public meeting;
    - (c) advertisement in a local publication, including a local or regional newspaper, Council Bulletin or school newsletter;
    - (d) invitation to specified local organisations to meet with the proponent to discuss the application.
- Amend s.74 of EMPCA by inserting the following paragraph after (6):  
**(6A)** if required by the Director pursuant to section 25(2)(ab), 25A(1) or 27(3A), an environmental impact assessment must be carried out in accordance with any Community Engagement Direction issued under section 74AA.
- Amend s.25 of EMPCA by replacing s.25(2)(b) with the following:
  - (ab)** the Director is to issue a Community Engagement Direction to the proponent in accordance with section 74AA;
  - (b)** the planning authority is not to advertise the application in accordance with section 27G until it has received written notice from the Director that the Board has received sufficient information to satisfy the requirements of section 74(3), and the requirements of any Community Engagement Direction have been met; and

- Amend s.25A(1) of EMPCA by inserting a new paragraph:
  - (ab)** *is to direct the Director is to issue a Community Engagement Direction to the proponent in accordance with section 74AA:*
  
- Amend s.25A of EMPCA by inserting a new subsection:
  - (2A)** *If a Community Engagement Direction is issued under section 74AA, the period referred to in subsection (3) does not run while the requirements of the Community Engagement Direction have not been met to the satisfaction of the Board.*
  
- Replace s.26 of EMPCA with the following:
  - 26. Assessment of level 3 activities**
  - (1)** *Where an order has been made under section 18(2) of the State Policies and Projects Act 1993 declaring a project to be a project of State significance, a direction under section 20(1) must require the Tasmanian Planning Commission established under the Tasmanian Planning Commission Act 1997 to undertake the integrated assessment of the project of State significance in accordance with the Environmental Impact Assessment Principles.*
  - (2)** *The Tasmanian Planning Commission may direct the Director to issue a Community Engagement Direction to the proponent of the project of State significance in accordance with section 74AA, and the Director must comply with that direction as if it was a direction given by the Board under section 27(3A).*
  
- Amend s.27 of EMPCA by inserting a subsection:
  - (3A)** *Without limiting subsection (3), and subject to subsection (4), the Board is to direct the Director is to issue a Community Engagement Direction to the proponent in accordance with section 74AA:*
  
- Amend s.20 of the *State Policies and Projects Act 1993* by inserting new subsections (3)(ab) and (6):
  - (3)(ab)** *community engagement activities to be required in relation to the integrated assessment;*
  - and
  - (6)** *“Community engagement activities” has the same meaning as in section 74AA of the Environmental Management and Pollution Control Act 1994*

## **7. Public and Environmental Health investigations to be conducted in collaboration with affected communities**

Any public health or environmental investigation in respect of a “proposed environmentally relevant activity” is to be undertaken in accordance with the Environmental Impact Assessment Principles in s.74 of EMPCA. However, though the EIA Principles require an opportunity for “public consultation on the proposal before the assessment process is complete”, they do not actively require community involvement in all stages of the assessment process.

Furthermore, as the requirement for investigations to comply with the EIA Principles is limited to "proposed" activities, it may not capture investigations regarding the impact of existing operations or particular incidents.

Under s.24 of the *Public Health Act 1997*, the Director of Public Health may carry out investigations in relation to public health issues. For the investigation, the Director may require any person to give evidence and answer relevant questions, and may require the production of any relevant documents. There is no provision for community involvement in the conduct of these investigations.

TPEHN recommend that amendments be made to establish an Investigation Panel for public health investigations related to contamination of land or water. The Panel could include representatives of the Director of Public Health, the EPA, the affected community and any relevant industry body (depending on the nature of the contamination). The Panel would have all powers of the Director in respect of investigations.

#### **RECOMMENDED AMENDMENTS:**

- Insert the following definition in s.3, following 'contaminant':  
*"contaminated site" has the meaning given by section 74A of the Environmental Management and Pollution Control Act 1994;*

- Replace s.24 of the *Public Health Act 1997* with the following provision:

#### **24. Investigation**

- (1) Subject to subsection (3), if a matter does not, in the opinion of the Director, justify an inquiry, the Director may carry out any necessary investigation into the matter.*
- (2) In carrying out an investigation, the Director –*
  - (a) has the powers specified in section 22; and*
  - (b) may take any action the Director considers necessary to protect public health.*
- (3) Where an investigation relates to land that is, or is likely to be, a contaminated site, the Director must refer the investigation to an Investigation Panel established under section 39A.*
- (4) For investigations referred under subsection (3), the Investigation Panel is to conduct the investigation in accordance with section 39B.*

- Insert the following provisions after s.39 of the *Public Health Act 1997*:

#### **Division 7 – Investigation Panel**

##### **39A. Investigation Panel to be established for public health investigations on contaminated sites**

- (1) Where the Director intends to carry out an investigation under section 24 in respect of any land that is, or is likely to be, a contaminated site, the Director is to establish an Investigation Panel to conduct the investigation.*
- (2) The Investigation Panel is to consist of –*
  - (a) the Director, or a person nominated by the Director, who is the chairperson of the Panel; and*
  - (b) the Director of the EPA Board under the Environmental Management and Pollution Control Act 1994, or a person nominated by the Director of the EPA Board; and*
  - (c) a representative of the community adversely affected by the public health issues being investigated as part of the investigation; and*

- (d) a person with appropriate qualifications and experience in relation to contaminated sites, to be agreed on by the persons appointed under subsections (2)(a), (b) and (c); and
- (e) two persons who, in the opinion of the Director, has qualifications or experience relevant to the investigation<sup>1</sup>
- (3) At least one of the persons appointed under section (2)(e) is to be nominated by the person appointed under subsection (2)(c).

**39B. Investigation of contaminated sites**

- (1) In carrying out an investigation under section 39A, the Investigation Panel -
- (a) has all the power of the Director specified in section 22;
- (b) must provide opportunities for public consultation;
- (c) may request the Director to take any action the Panel considers necessary to protect public health.
- (2) Subject to subsection (1), the Panel is to determine its own proceedings.

## **8. Monitoring off-site sediments**

TPEHN remains concerned that monitoring in relation to industrial activities is limited to monitoring emissions from the site, rather than monitoring sediment quality off-site, within a radius in which particulate emissions would settle.

### **RECOMMENDED ACTIONS**

- All permit conditions in respect of monitoring should ensure that an adequate sample of offsite sediments is regularly monitored to assess and manage off-site impacts.

---

<sup>1</sup> For example, if the contamination relates to mining, someone with expertise in relation to rehabilitation of mining sites.

