

Seller Liability for Contaminated Land

Introduction

Our recent experiences with land sales have uncovered some recurring issues relating to the risks associated with selling land which may or may not be contaminated.

In certain circumstances sellers of land may be legally obliged to pay for the decontamination of contaminated land. Costs associated with the decontamination of land will vary depending on the type and level of contamination. These costs have the potential to completely consume the profit margin from a sale and may even result in a loss for a seller.

This article addresses the following issues relating to contaminated land:

1. Identifying the risk associated with selling land which may be contaminated;
2. The potential liability arising from selling contaminated land with a contamination clause; and
3. Traps relating to the wording of contamination clauses.

Identifying the Risk

The *Contaminated Sites Act 2003 (WA)* (the “**Act**”) imposes liability to remediate contaminated land. It also sets out a hierarchy of liability.

Generally speaking, where land is contaminated, the Act imposes liability to remediate the land in the following circumstances and order:

1. Upon the owner or occupant of the land if the owner or occupant changes the use of the land, for example from rural to residential, and that change requires the land to be remediated;
2. Upon the person who caused the contamination of the land;
3. Upon the owner of the land, if the person who caused the contamination cannot be found or is insolvent; and
4. If neither the person who caused the contamination nor the owner can be found responsible under the Act, the State will remediate the land.

Dealing with Contamination in Contracts for the Sale of Land

Buyers will often demand the inclusion of a contamination clause in a contract for sale of land. Typically, buyers will demand that such a clause incorporates an indemnity from the seller to pay for the land to be remediated if it is found to be contaminated. It is not advisable for sellers to give buyers such an indemnity, as the potential for liability could be huge.

However, it is advisable for sellers to include a contamination clause in contracts for the sale of land to clarify and contain the potential liability under the Act.

The first position that a seller should take in relation to negotiating a contamination clause is that the buyer must take the land on an “as is” basis, without providing any liability to the buyer to remediate contaminated land or to indemnify the buyer.

However, commercial buyers can be expected to negotiate hard on this point and will often demand that the seller provide the land free of contamination and that if contamination is found on the land the seller must pay for the land to be remediated.

From a buyer’s perspective this is entirely reasonable, as buyers cannot be expected to willingly take on a liability to remediate contaminated land. Equally however, sellers cannot be expected to pay for remediation required because a buyer intends to develop the land for a different use.

Accordingly, to protect the seller from unreasonable liability under the Act it is suggested that the contamination clause contain the following elements:

1. **Due diligence and information sharing:** prior to settlement, allow the buyer’s consultants onto the land to conduct testing for contamination and include an obligation on the buyer to share any consultant reports it receives prior to settlement;
2. **Cap the potential liability:** include a maximum amount that the seller is required to pay to cure any contamination;
3. **Seller’s right to carry out remediation:** if remediation of the land is required, ensure that the seller has the option to carry out the remediation work itself, rather than allowing the buyer to carry out the remediation works and recover the costs from the seller. This will give the seller control over the cost and scope of the remediation works;
4. **Provide an “out”:** if the cost of remediating the contamination is above the capped amount or is for other reasons commercially unacceptable, ensure that the seller may opt out of the contract prior to settlement; and
5. **Pass the risk:** from settlement the risk that the land is contaminated should pass to the buyer and the seller should not have any further liability to remediate the land under the contract. Notably, the seller may still be liable under the Act if it caused the contamination.

Traps

Recently, some buyers have requested a contamination clause containing a covenant from the seller to pay, “all reasonable costs for remediating the land”.

On the surface this may sound like a fair and “reasonable” approach. However a closer inspection reveals that the term, “all reasonable costs for remediating”, means that the seller is obliged to pay the full cost of remediating the land, rather than what the seller might consider to be a reasonable amount for the remediation. Care should be taken in drafting the right clause to minimise the seller’s liability.

For additional information in relation to this Property Law Update please contact Paul McWilliams, Senior Lawyer, on 9422 8968 or via email at pmcwilliams@youngandconnell.com.au. Alternatively, further information about the Act, the contaminated sites database can be obtained from the WA government website www.dec.wa.gov.au

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