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Real Estate and The Law

The Spotless Case: There are no shortcuts when developing contaminated land!

The following material was presented by Jo Robinson of Rigby Cooke Lawyers at Enviro 08, Australasia's Environmental & Sustainability conference and exhibition, held in Melbourne in May 2008.

A parent company's historic operations involving the storage of potential contaminants in underground storage tanks could today be held financially liable for clean up costs incurred by the current day occupier of contaminated land.

The Supreme Court of Victoria handed down its decision in the *Spotless* case in late 2007. The decision is significant in that it is the first superior court decision to deal with the operation of the clean up notice provisions in the *Environment Protection Act 1970* ("the Act") in a substantial way and also because this was complex litigation in which numerous causes of action were brought against a parent company in respect of polluting activities undertaken by its subsidiary entities. (This decision has been appealed by both Spotless Group and Premier.)

This Update looks at the consequences of the Spotless case for parent companies and recent amendments to the Act that empower EPA to serve clean up notices on companies that have the requisite control over the conduct of subsidiary, related or associated entities in certain circumstances.

Facts

In the 1960s and 70s, dry cleaning activities conducted by subsidiaries of the Spotless Group resulted in contamination of the land on which those activities were undertaken at 225 Barkly Street, Brunswick ("the **Spotless Land**") and also on adjoining land which was purchased by Premier Consulting Pty Ltd ("Premier") in 1999 at 227-231 Barkly Street, Brunswick ("the **Premier Land**").

Premier developed 49 residential units and sold those units off the plan prior to having obtained a certificate or statement of



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The Spotless Case Continued

environmental audit as was required by both the planning controls affecting the land and the planning permit that had issued in respect of the development. As a result, Council refused to issue occupancy permits in respect of the units and as a consequence, the pre-sales were lost and litigation ensued.

Premier sued Spotless Group pleading various causes of action. The only cause of action that Premier was successful in was the recovery proceedings under the Act whereby Premier sought compensation from Spotless Group for monies it had expended in complying with three clean up notices that the Environment Protection Authority (EPA) had issued on it in respect of the contaminated land that Premier had developed.

Clean up notices under the Environment Protection Act

Under section 62A of the Act, EPA can serve a clean up notice on a range of persons including the occupier of polluted premises and a person who has caused or permitted the pollution to occur.

In this case, Premier alleged that Spotless Group had caused the pollution of the Premier land and sought to recover the cost of complying with the clean up notice from Spotless Group.

The Court upheld this claim and in doing so considered the concept of “cause” under the Act. The Court held that the parent entity had “caused” the pollution because it accepted evidence that underground storage tanks (USTs) that contained potentially contaminating chemicals would, as a matter of course, leak as a natural consequence of the passage of time (given the state of tank technology as it then existed).

The Court also held that the parent entity exercised absolute control over the subsidiary entities that had operated the dry cleaning operations at the relevant time and therefore could properly be said to have “caused” the pollution.

Retrospectivity

The Court held that the fact that the pollution occurred prior to the clean up notice provisions in the Act coming into force did not expunge liability for entities upon which clean up notices were served since the commencement of those provisions.

Recent amendments to the Environment Protection Act

Section 62A(1AA) was inserted into the Act and came into operation on 30 August 2006. Essentially, this provision empowers EPA to serve a clean up notice on companies to take clean up and ongoing management measures in respect of activities undertaken by a **subsidiary, related entity or associated entity** over which the company had a requisite level of control at the relevant time – and - having regard to that control, either:

1. The company (or one or more of the directors) were aware of the conduct; or
2. It is reasonable to expect the company (or one or more of the directors) would have been aware of the conduct.

AND

EPA is not reasonably satisfied that the company (or one or more of the directors) took all reasonable steps to prevent the conduct.

Accordingly, a parent company can avail itself of a defence if it can demonstrate that it “took all reasonable steps to prevent the conduct”.

Practically speaking, this might require more than simply documenting the procedures and guidelines as to how the business is to operate and may extend to a level of supervision or auditing by the parent in order that it can be said that the parent “took all reasonable steps”.

Whilst EPA will typically issue a clean up notice on an occupier of premises and not concern itself with evidential issues in relation to identifying who the polluter is for the purposes of serving a clean up notice, this broadened power of EPA does extend the liability of parent companies in respect of historic operations over which the parent can be shown to have the requisite control at the relevant time.

Accordingly, even though the Spotless case is on appeal, the outcome of the appeal – irrespective of which way it goes – may not have a significant impact on the exposure of parent companies in view of these recent amendments to the Act.

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