



Government of **Western Australia**
Contaminated Sites Committee

Decision in Respect of Appeal Against Classification

Contaminated Sites Committee (CSC 05/2017)

Contaminated Sites Act 2003, Part 8, Division 2

APPELLANT: Paspaley Pearls Group (Pearls Pty Ltd)
SITE: Lot 435 on Plan 1160124, 8 Chapple Street, Broome.
DATE: 8 April 2019

DECISION

1. This is an appeal by the Appellant against a notice of classification made by the Chief Executive Officer of the Department of Water and Environmental Regulation ('DWER') under s15 of the Contaminated Sites Act 2003 ('the Act') on 23 November 2009. That notice of classification classified the site as *possibly contaminated – investigation required*. The Appellant is the registered proprietor of the site.

Background

2. The site was, and has continued to be, used by the Appellant for the storage of pearl shell baskets, trays and pallets. A fire was lit on the site by a third party on 28 May 2009. A team from Airservices Australia ('ASA') Aviation Rescue and Fire Fighting section attended the site and extinguished the fire, which affected sheds and materials stored on the site. In extinguishing the fire, 600 litres of the firefighting foam Ansulite was used over an area of 30m², and an additional 36,000 litres of water was also applied. Ansulite is a proprietary product which contains per- and poly-fluoroalkyl substances, known generally as PFAS. PFAS has been phased out of firefighting use by ASA from 2003 because of concerns of contamination.
3. Following the fire, ASA commissioned a site investigation to determine the potential impacts of Ansulite upon the site. This report was received by DWER on 22 October 2009. The report indicated that Ansulite was present in the soils at a maximum concentration of 698mg/kg, and was present in soil samples from 8 soil bore locations.
4. The site was classified as *possibly contaminated – investigation required* by DWER on 23 November 2009. The notice of classification noted the possibility of contamination arising from the application of Ansulite and the need for further investigations, including soil and groundwater testing and risk assessment.
5. The reasons for classification were 'updated' on 7 November 2017 to reflect additional information available to DWER as to the nature of firefighting foam. The

updated reasons for classification note that the site had been only partially investigated and that it was not yet possible to determine whether the site remained suitable for its then use. The classification itself remained unchanged.

6. DWER stated in the amended classification notice, under the heading "Actions Required", the investigations believed to be required to enable a proper determination of the contamination status of the site, including a time frame within which those investigations should occur.

Appeal

7. An appeal was lodged by the Appellant under s18 of the Act on 27 December 2017. It appears that the Appellant was made aware of the classification of the site only in late 2016, there being an apparent failure to serve the notice at the correct address of the Appellant as the registered proprietor of the site.
8. The Appellant in its notice of appeal raised a number of preliminary grounds of appeal, which can be summarised as follows:
 - (a) The Appellant did not cause the contamination and has not conducted any investigations in relation to it. The Appellant reserved its rights in relation to the classification.
 - (b) The Contaminated Sites Committee ("the Committee") should set aside that part of the notice which sets out the further investigations (described as 'Action Required' in the notice) as this is not a matter properly included in a notice of classification under the Act. To the extent that the notice is to be construed as an investigation notice, the requirements are uncertain, and the Appellant ought not to be responsible for any investigations.
 - (c) The actions of ASA in carrying out the firefighting on the site were not actions carried out in an emergency to save life, protect property or protect the environment.
9. The Appellant, by letter dated 9 March 2018, elaborated on the issues raised in its original appeal. The elaboration can be summarised as follows: -
 - (d) It was unreasonable to use Ansulite in the circumstances. The Appellant did not request ASA to attend the site to fight the fire.
 - (e) No life was endangered by the fire and the environment was not protected (by the use of Ansulite, not by reference to the fire).
 - (f) Soil investigation undertaken has been limited and any costs associated with investigations and remediation should not be the liability of the Appellant. Offsite investigations should be undertaken by ASA.
 - (g) Any report prepared under s80 of the Act by DWER for the Committee should be amenable to a response from the Appellant, together with any other information available to the Committee.
10. The Committee has been provided by the Appellant with a report prepared by Parsons Brinkerhoff Australia Pty Ltd titled 'Limited Soils Investigation – Paspaley Pearls, Lot 435 Chapple Street Broome WA 8 September 2009'. The report was commissioned by ASA.

The appeal process

11. For the purposes of determining the appeal, the Committee has been required to consider the following issues: -
 - (a) Has the appeal been made within the time specified for appeals of this nature under the Act?
 - (b) If so, is the appeal otherwise competent?
 - (c) Should the notice of classification be deemed to be an investigation notice?
 - (d) What is the correct decision on the issues raised by the appeal?

Time limitation

12. An appeal against a site classification made under s13 of the Act is to be effected in accordance with s 18 of the Act. An appeal is to be brought, dealt with and determined in accordance with Part 8 of the Act. By s79(2), a notice of appeal is to be lodged within 21 days after the day on which an appellant is given the notice or certificate which gives rise to the appeal, or such later time as may be specified in the notice.
13. The notice of classification is dated 23 November 2009 and was amended on 7 November 2017. The appeal is dated 27 December 2017. In its letter of 27 December 2017, incorporated in the notice of appeal, the Appellant notes that it 'became aware' of the notice in late 2016 and that the occupier of the site, a related body corporate, was never appropriately served. Leaving aside the question why the original notice was not correctly served on the Appellant or the occupier, as required by s15(1)(a) and (b), the appeal is now on its face out of time.
14. The Appellant by its notice of appeal purports to appeal against the notice of 13 November 2017, rather than the original notice of 2009. Assuming for the moment that it is appropriate to do so, the appeal is still apparently out of time. However, the letter is addressed to 'Paspaley Pearls Group' at a post office box in Darwin. It is not clear when it was received by the Appellant.
15. Although no power is given to the Committee to extend time, either by the Act or by any other general provision, the Committee has determined that the appeal should be deemed to have been made within time as a consequence of the uncertainties surrounding the service of both the original and amended notices, and as to addressee and date and place of service.
16. The Committee has determined that the 'update' which occurred on 7 November 2017 constituted a new decision, there being no bar created by the Act against a number of decisions being made for a site without there being any necessary difference in the determination. There is no legislative basis for an 'update'.

Competency

17. The Appellant notes in point 1 of its letter of 27 December 2017 that 'it is not in a position at the present time to challenge the classification itself, and reserves its rights in that regard'.
18. Apart from a challenge to the 'Action Required' section of the notice, the balance of the grounds of appeal deal with issues of causation and attribution of responsibility for investigation and remediation.

19. Dealing first with the 'reservation of rights', the Appellant has not provided any further information or submissions to the Committee to deal with the essence of the appeal itself, the classification of the site. However, the Appellant by its letter of 3 October 2018 advised the Committee that it did not intend to make any further submissions in relation to its appeal. The Committee has determined, as a consequence, that it holds all relevant material sufficient to enable it to deal with this appeal.

Investigation notice

20. The Appellant seeks to delete that part of the notice headed 'Actions Required', as that does not properly form part of a notice of classification under the Act.

21. Dealing first with the proper content of a notice of classification, s15(5) of the Act specifies those matters to be included in a notice of that nature. Paragraphs (a) to (e) are apposite. Nowhere in s15 is there provision to set out, whether in a directive manner or otherwise, steps required to be taken by any party, including the recipient of the notice. However, paragraph (d) allows a notice to include 'other information taken into account under section 13(4)'. That section requires DWER, when classifying a site, to take into account guidelines, standards and 'other information' which is considered relevant with respect to 'the identification, assessment, classification or management of contamination'.

22. Construed liberally, the 'Actions Required' may be interpreted to mean actions associated with the assessment and management of the contamination believed to affect the site. That interpretation, however, does not extend, nor could it extend, to a direction to the Appellant to undertake any assessment or other works. The notice of classification is not, nor should it be construed to be, an investigation notice made under s49 of the Act. The letter of 11 October 2016 refers to an investigation notice, with a clear inference that it is a separate course of action open to DWER. In any event, the notice of classification does not on its terms purport to be an investigation notice and in the view of the Committee it cannot be treated as one. The Committee considers the matters contained under the heading "Actions Required" are matters included under s13(4) of the Act, and of themselves do not require the Appellant to undertake any work.

23. In concluding this part, the Committee notes that the classification *possibly contaminated – investigation required* is intended by the Act to be an interim measure until a further classification is effected under s16. The practical effect is for records to be adjusted in accordance with s17 or further steps are taken, such as the issue of an investigation notice under s49.

Substantive grounds

24. The Committee has determined the additional grounds raised by the Appellant as follows (following the lettering adopted above under the heading 'Appeal'): -

- (a) This ground should be dismissed. An appeal against classification does not and cannot encompass issues associated with causation and allocation of liability for investigation, assessment or remediation. The classification of the site relates to the state of the site itself. It is important to note, in this context, the manner in which classification and appeals against classification in Part 2

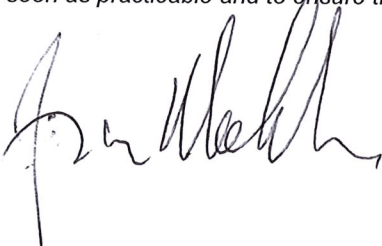
Division 3 of Act are dealt with. Where a site is classified as *possibly contaminated – investigation required*, it must remain so classified until an alternate classification under s16 is determined or the Committee makes a decision under 82(c).

- (b) This ground is dealt with under the heading 'Investigation Notice' above. This ground should be dismissed, for the reasons there stated.
- (c) This ground should be dismissed, for the same reasons as (a) above.
- (d) This ground should be dismissed, for the same reasons as (a) above.
- (e) This ground should be dismissed, for the same reasons as (a) above.
- (f) This ground should be dismissed. As set out in (a) above, it is clearly the case that a substance containing PFAS was used in fighting the fire on the site. As a consequence, and based on the information made available by ASA, the site is likely contaminated by PFAS. That being the case, and for the reasons set out in (a) above, it is not appropriate for the Committee to determine that the site should receive any of the other classifications set out in s16. The present classification refers to 'possible contamination', which is clearly supported by the evidence of the application of Ansulite, the known properties of PFAS and the presence of PFAS confirmed by the preliminary investigation. The classification is therefore appropriate. To the extent that this ground seeks to attribute responsibility to another entity, it should be dismissed for the same reasons as (a) above.
- (g) This is, strictly speaking, not a ground of appeal but a request for the provision of information made available to the Committee under sections 80 and 81 of the Act. Although there is nothing in those sections which requires the Committee to disseminate those materials, in the interests of procedural fairness the Committee has ensured that all materials made available to it and which are relevant to the exercise of its powers in this context were made available to the Appellant.

Conclusion

25. For the reasons stated above, the appeal is dismissed.

Note: section 82(2) of the Act provides that the Committee's decision under that section is final and without appeal. Section 83 of the Act provides that the CEO of the Department is to give effect to the outcome of the appeal as soon as practicable and to ensure that the details are published in the prescribed manner.



Jim Malcolm
Chairman

and as agent for and on behalf of
the Contaminated Sites Committee

