

Risk of Massive Transfer of Liability for Contaminated Land Clean-up

Media Statement – December 7, 2004

A massive transfer of liability to innocent parties is set to take place unless Government puts new measures in place to fund cleanup of contaminated sites.

MFE estimates that the clean up of historic contaminated sites throughout the country will cost around \$1 billion. In absence of new government action, a great deal of this is set to fall on property owners.

In 1995, MFE proposed new law that would have made polluters liable retrospectively and would have exempted from liability property owners who were not aware of contamination when they purchased. It also proposed creating a fund of some hundreds of millions of dollars for the cleanup of sites throughout the country where no other source of funds was available.

This package was not put into law and an alternative package to cover sites nationally has yet to come forward. MFE has instead allocated funding to a few high profile sites on a case by case basis. An overall package is required to remove uncertainty as to what work will be required at each site and who will pay.

MFE's decade-long delay has favoured polluters and the absence of such a package leaves property owners exposed to being compelled to meet clean up costs. How many properties are at risk is unclear as MFE has yet to complete guidelines or set national standards for what constitutes a hazard, and testing is still to be carried out in many places. What is clear is that the West Auckland properties recently in the news are just a microcosm of a wider national picture.

MFE recently reviewed the legislation governing hazardous substances and a bill is soon to come before Parliament to amend the HSNO Act. However, the review did not recommend changes to address liability and funding for historic contaminated sites.

Past experience with land contamination underscores the need for full financial accountability for future activities. While Government has made international commitments to the "polluter pays" principle, only to a limited extent has this been followed through into workable provisions. The current emphasis on holding parties liable for not complying with regulations is a necessary step but leaves unanswered the question of who pays if harm still occurs.

Full financial accountability incentivises due care and through better decisions, reduces the damage caused. Society as a whole makes a gain and the polluter pays, rather than innocent parties. Without financial accountability, hazardous substances are in effect subsidised – disadvantaging less risky options.

At present, the parties making choices about whether to use hazardous substances face only a part of the full potential costs that their decisions could impose on others' financial assets or human health.

- There is no effective liability regime for financial harm caused to others by use of hazardous substances.
- There is also no effective liability regime for harm to human health if ACC does not cover a claim.

Liability for future environmental damage is in principle well covered, but reforms are required to ensure that sufficient funds are at risk to allow costs to be covered.

Sixteen years after Government first determined to bring together coherent regulations for hazardous substances, effective financial accountability for harm caused by these substances remains limited. The response required is a set of comprehensive liability and financial fitness provisions to address the gaps including:

- Developers and users of hazardous substances are made strictly liable for:
 - Economic loss caused to third parties; and
 - At least that harm caused to human health that is not covered by ACC.
- Liability for clean up of historic contaminated sites is addressed through:
 - Completion of registers of contaminated sites;
 - Definition of standards that set thresholds for cleanup;
 - Devising and legislating for a formula to allocate liabilities;
 - A substantially increased national fund for the clean up of orphan sites, as envisaged in 1995 proposals.

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The Council's report *Financial Accountability for Hazardous Substances* is available at www.sustainabilitynz.org