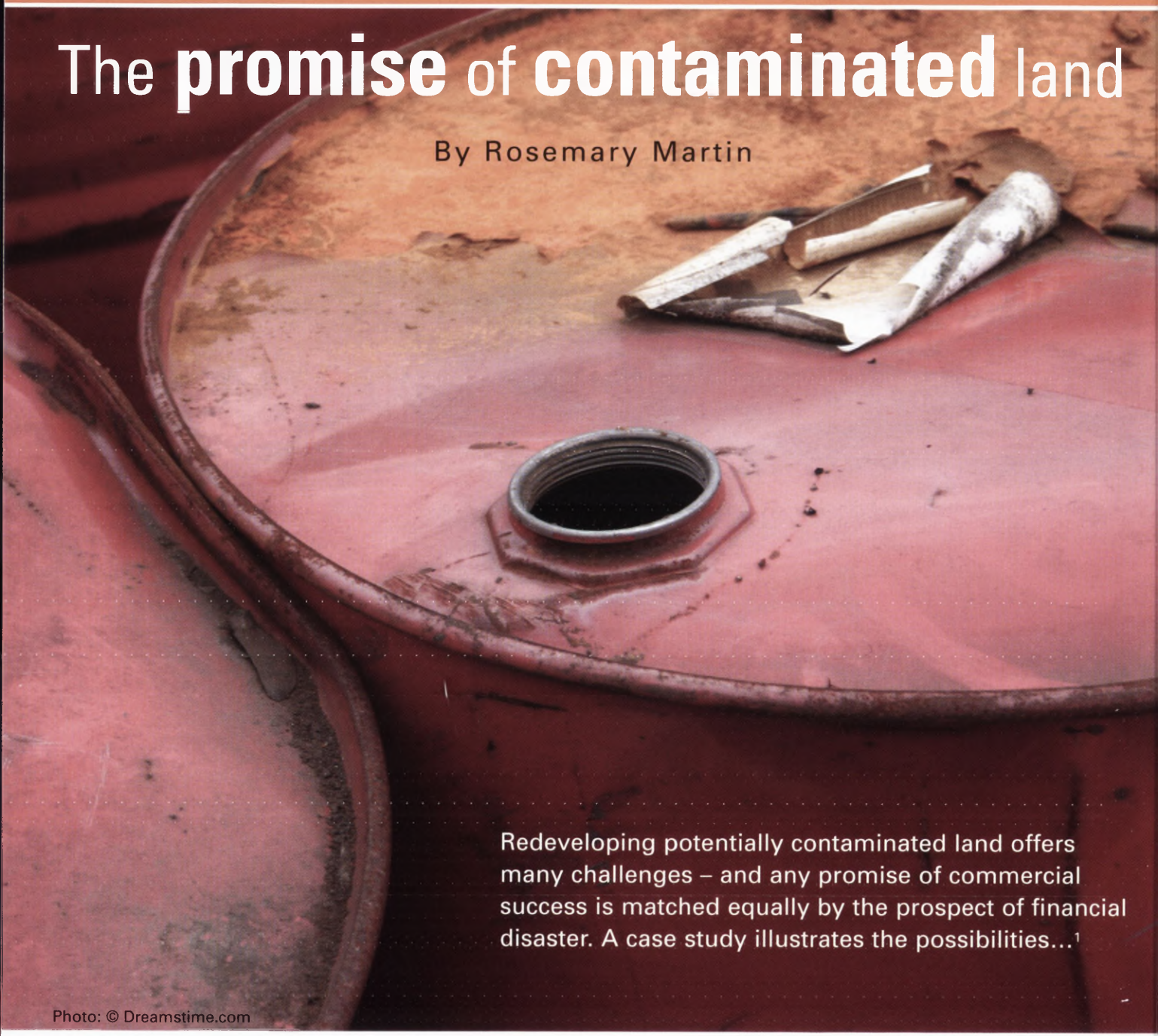
BROWNFIELDS DREAMING

The promise of contaminated land

By Rosemary Martin



Redeveloping potentially contaminated land offers many challenges – and any promise of commercial success is matched equally by the prospect of financial disaster. A case study illustrates the possibilities...[1]

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A 'HIDDEN GEM'

There is a knock on the door. "Come in!" Your land development manager bounces in. "I've just come across a site for sale by tender only two ks from the CBD, five minutes' walk from the train station, around the corner from a new bike track, beautiful views, wonderful heritage features in the main building's elevation, fantastic street address, I reckon we could get it for next to nothing..."

As you try to slow down your over-enthusiastic colleague, you wonder – what's the catch? There has to be one. In fact, over the coming weeks, you find out there are many. The land is located in a formerly dirty industrial area, which is gradually being done up – the old industrial use is giving way to a mixture of residential, retail and light commercial use. Off-the-plan sales of spectacular apartments and warehouse spaces are booming.

What about the site itself? Preliminary enquiries reveal that it has been unoccupied for around ten years, it contains asbestos and corroding drums of an unidentified pungent liquid, homeless people have been sleeping rough on the site, the EPA has some kind of notice on it and the liquidator's last three attempts to sell it have fallen through. And someone is trying to *sell* you this property?

The former use of the land (a chemical plant) seriously under-utilises it at a time when land close to the city, near excellent transport links, is highly desirable to a demanding, mobile, climate-change conscious workforce. In fact, there is small fortune to be made, if you have the intestinal fortitude to see the project through.

BROWNFIELDS REDEVELOPMENT

This kind of scenario is not at all fanciful,[2] and is one that has been playing itself out in urban regions for over 20 years as the trend continues for former industrial sites to be redeveloped for residential use. Known as 'brownfields'[3] sites, they throw up a range of challenging legal, planning[4] and commercial sensitivities. The regulation of land contamination is underpinned by a complex web of law, policy and science, which can of itself make compliance a challenge.

Will a brownfields site always be a contaminated site? A contaminated site has been defined in the guidelines published by the Australian and New Zealand Environment and Conservation Council as 'a site at which hazardous substances occur at concentrations above background or local levels and which is likely to pose an immediate or long-term hazard to human health or the environment.' So, based on that definition, not all brownfields sites will *necessarily* be contaminated sites.

There are thus two elements within the concept of contamination: the element of hazard to human health or the environment, in addition to the presence, at elevated levels, of hazardous substances.

This definition neatly encapsulates the policy thrust of land contamination management in Australia. On the one hand, protecting public health and the environment (and giving assurances as to public safety) is paramount. On the other hand, care has been taken to avoid developing a system that compels the clean-up of land where there is no actual or imminent harm. Moreover, the creation of a system that keeps lawyers fully occupied litigating over liability is not, in the opinion of this writer, the way to advance the public good.

WHO PAYS?

Who should pay to clean up, or 'remediate', contaminated land? At the national level, the broad policy position (reflected in most state legislation) rests upon the 'polluter pays' principle which, as the name suggests, sheets home responsibility to the person causing the pollution. Over time, more responsibility seems to have fallen to the occupier.

In Victoria, liability for clean-up is set out in s62A of the *Environment Protection Act* 1970. A clean-up notice can be issued to any one of the following: the occupier of the premises where pollution has occurred (or been permitted to occur); the person who caused or permitted the pollution (in other words, the 'polluter'); a person who abandoned or dumped waste; or a person handling waste in such a way as to be likely to cause an environmental hazard.[5]

In practice, there are many instances where the polluter is in fact not targeted: it may have disappeared, become insolvent, or not be able to be identified. In such a case, the occupier of a contaminated site is next in the firing line.[6] Even more complex issues arise in the case of an abandoned site, where there may be many parties theoretically liable for clean-up costs. Despite a proliferation of parties, there may not be any money available for the expensive and sometimes open-ended task, leading to the undesirable outcome of an orphan site.

HOW CLEAN IS CLEAN?

Having identified who might be liable to do the clean-up, how 'clean' does the site have to be? And who decides when it is clean? There are standards and guidelines setting out various limits for particular chemicals and other substances. This is where technical experts come into their own. Many states have introduced a system whereby technical specialists are accredited (by the environmental regulator) to conduct an environmental audit of a property, and to 'sign off' where appropriate. The sign-off may state that the site is 'clean' and suitable for any use, including the highest use, residential >>

development. Alternatively, the land may be suitable for lesser uses, such as commercial or industrial. In addition, the environmental auditor may suggest particular conditions regarding the management of the site (such as the requirement for the land to be capped – covered with a secure layer of material).

The system is designed to allow a range of stakeholders (the regulator, purchasers and vendors, planners, financiers, and the public at large) to rely, with full confidence, on the independent expert. The expert's reputation and professional standing are dependent on the demonstration of competence and impartiality.

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Returning to our hypothetical property developer, who is attempting to develop the company's national approach to these kinds of developments, the bad news is that it will not be a straightforward task. As with many areas of the law, environmental law is largely regulated at the state level. (The 'environment' was not considered at the time that the provisions of the Commonwealth Constitution were hammered out in the 1890s.) Each state and territory has its own suite of laws and policies to deal with such issues. While there are similarities in policy and approach, there are unique requirements in each jurisdiction.

There has been an attempt to encourage a national approach to the assessment of site contamination, through the National Environment Protection Measure on Site Contamination.[7] NEPMs are statutory instruments created by the National Environment Protection Council, a body created by Commonwealth legislation in 1994.[8] The intent behind NEPMs is to create an even playing field in environmental regulation, to reduce the possibility that so-called 'pollution havens' might be created.

In Victoria, the NEPM has been implemented in the State Environment Protection Policy on Land Contamination (the Policy).[9] Among other things, the Policy provides that EPA Victoria will have regard, *inter alia*, to indicators identified in the NEPM to assist it to determine whether the level of any contaminant at any site poses an unacceptable risk to certain protected uses of land.[10] The Policy also imposes specific obligations on responsible authorities (typically, local councils) when they are considering planning permit applications, planning scheme amendments and changes to land use.[11]

TROUBLESHOOTING

If our property developer is still considering whether to proceed, s/he should be advised of the potential trouble spots before committing. Problems – and costly litigation – could occur in the following areas:

- the normal issues connected with sale/purchase of property, particularly the requirements for full disclosure (more of a concern in this case for the vendor, but the purchaser needs to be diligent as well – consider the *Charben Haulage* case below);
- ascertaining the appropriate allocation of risk and liability – could there be an ongoing liability, depending on the structure of the commercial arrangements?;
- is there the potential for personal, as opposed to corporate, liability, because of the nature of environment protection laws?;[12]
- the cost of remediation: the whole project could become non-viable due to clean-up costs, and the requirements to meet the specified standard;
- the capacity to comply with regulatory requirements, in

cases where regulators have issued a formal notice on the site;
- any problems that might emerge during the environmental auditing or sign-off phase;
- if there has been off-site impact from the contamination, potential for action from adjoining landowners or occupiers; and
- the willingness of financiers to become involved in such an undertaking.

As well as this range of largely civil issues, falling foul of environment protection legislation could lead to criminal prosecution for non-compliance. There are significant penalties for land pollution or contamination offences, as well as for failing to comply with clean-up requirements.[13]

These regulatory requirements are not hypothetical – they are actively enforced. Prosecutions by the various regulatory agencies for the failure to comply with a clean-up notice are not uncommon, while environmental agencies are able to pursue clean-up costs when they have had to take responsibility for a clean-up.[14] Environmental auditors have been pursued for providing incorrect information to the EPA, while one auditor had his appointment revoked for issuing an incorrect certificate of environmental audit.

Away from the regulatory sphere, parties may find themselves litigating over allocation of liability. One of the more infamous cases is that of *Caltex Australia Petroleum Pty Limited v Charben Haulage Pty Ltd*.[15]

The complex *Charben Haulage* case has had a lengthy litigation history. Charben, the purchaser of a former service station, brought a case against Caltex, the vendor, and its environmental consultants, Environmental & Earth Sciences Pty Ltd. Charben was successful at first instance, but was subsequently defeated before the full Federal Court.

Charben purchased the site from Caltex in the belief that the land was clean and suitable for the proposed residential/commercial development. However, after settlement, groundwater contamination was discovered, which the council required to be remediated, at great cost. The environmental expert ultimately escaped liability, despite producing an incorrect report. On appeal, the court found that there had been no reliance on the environmental report, as Charben's directors had not read the report themselves, and their lawyer, who had, did not read the guidelines that the report considered.

The case highlights the importance of undertaking comprehensive due diligence, and being aware of the purpose of environmental reports. It also points to the need to have suitably qualified consultants review reports. Another important issue was being clear as to the identity of the audience for whom the report was prepared. Experts need to be clearly instructed in this regard.

CONCLUSION

It is impossible to say whether our property developer will go ahead with the project – s/he is still balancing the risks and rewards. In making a decision, s/he will need to bear in mind the complexity of the area, as well as the potential for litigation at many stages along the way. ■

Notes: **1** Reference is made primarily to the law in Victoria, although similar provisions apply in other Australian jurisdictions. **2** The scenario described draws together several elements of various contaminated sites of which the writer is aware. **3** Defined by the US EPA as 'real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.' **4** Local councils play an important role in administering relevant planning controls. **5** Section 62A(1)(a) – (d). **6** In recognition of this fact, there is a statutory right of recovery in Victoria which allows an occupier to sue the person responsible for the pollution for the costs of complying with a clean-up notice: s62A(3). **7** Made in December 1999. **8** *National Environment Protection Council Act* 1994 (Cth). Complementary legislation was passed by all states. Each state has discretion as to how the national measures are implemented. **9** See *Special Gazette S95*, 4 June 2002. **10** *Ibid*, cl 11. **11** *Ibid*, cl 14. **12** Environment protection law typically holds directors and managers automatically liable for the actions of their corporations, unless they are able to make out one of an extremely limited range of defences. **13** These vary from state to state. **14** The writer has experience of one case where EPA Victoria was awarded $200,000 in clean-up costs relating to the clean-up of a former electroplating site: Northam, Broadmeadows Magistrates Court, 24 August 1998. **15** [2005] FCAFC 271.

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