GREENWAY CHAMBERS

Is Contamination Under the Planning Law Also Waste?

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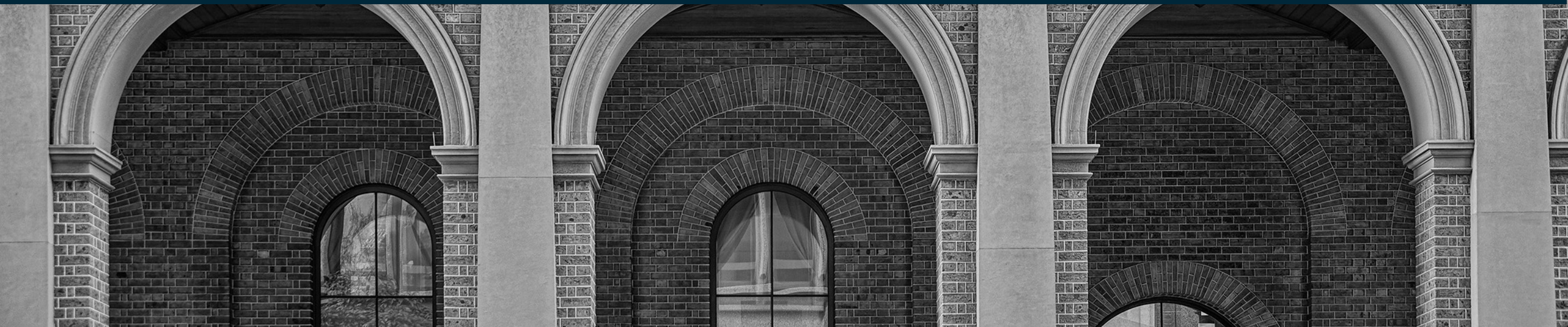

Time to talk about asbestos

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Is Contamination Under Planning Law Also Waste?

1. The Muscat Litigation
2. The POEO Act and the EPA Act
3. Preston CJ's decision in *Muscat Developments Pty Ltd v Wollondilly Shire Council* [2023] NSWLEC 121
4. Why seek development consent for work that is unlawful?

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The (never ending) Muscat Litigation

The details

On site at the Cawdor Road property were:

1. 6 existing sheds;
2. Three existing dwellings;
3. A poultry farm

and…

4. At least two mounds of fill:
    a. unlawfully placed on the site;
    b. containing asbestos.

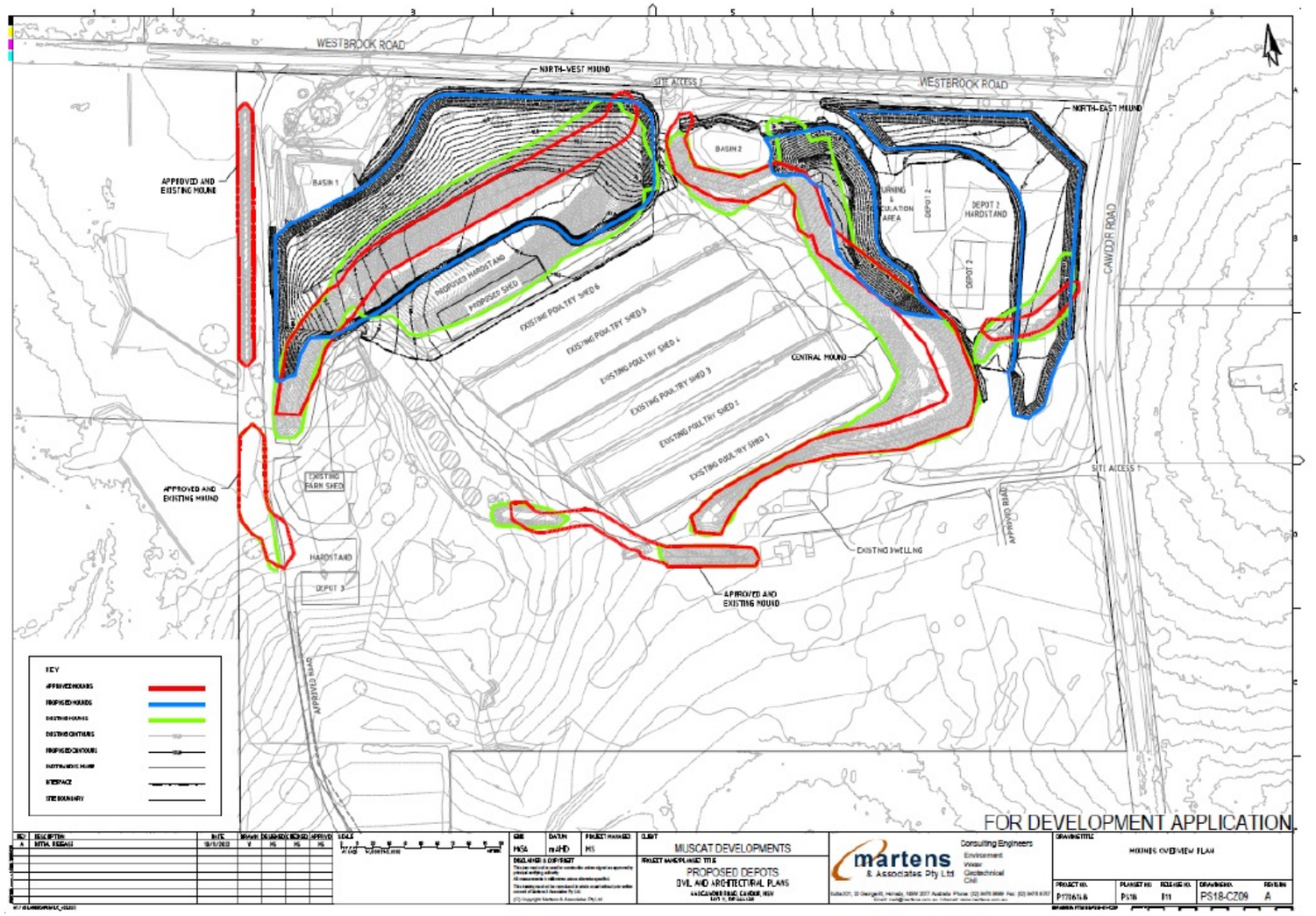
The (never ending) Muscat Litigation

The details

The development application sought consent for:

1. Change of use of some sheds: poultry farm to depot
2. Construct a new farm building for the poultry farm;
3. Remediation work to the mounds
4. Consent to use the mounds for the purposes of the poultry farm

The remediation work



How was the POEO Act relevant?

1. Not integrated development
2. Question as to whether the work would be breach of two provisions of the POEO Act- pollution.
3. Council argued:
    a. The remediation would be unlawful under s 142A and s 144AB of the POEO Act;
    b. Development consent should not be granted to sanction an unlawful activity.

142A Pollution of land

(1) A person who pollutes land is guilty of an offence.

(2) In this section--

"pollute land" includes cause or permit any land to be polluted.

"**land pollution**" or

"**pollution of land**" means placing in or on, or otherwise introducing into or onto, the land (whether through an act or omission) any matter, whether solid, liquid or gaseous--

(a) that causes or is likely to cause degradation of the land, resulting in actual or potential harm to the health or safety of human beings, animals or other terrestrial life or ecosystems, or actual or potential loss or property damage, that is not trivial, or

(b) that is of a prescribed nature, description or class or that does not comply with any standard prescribed in respect of that matter, but does not include placing in or on, or otherwise introducing into or onto, land any substance excluded from this definition by the regulations.

How can remediation be pollution?

1. Degrade the land- spreading the asbestos contamination over a wider area;
2. Cause “actual or potential harm”- by exposing residents and workers on the land to potential asbestos contamination.

Accepted by Bish C at first instance:

> To approve consent to the amended application, could lead to pollution of the land and potentially expose the applicant to liability, pursuant to s 142A of the PoEO Act.
>
> …
>
> Based on the evidence and my assessment above, namely the potential risk to human health, I find that the amended application is not in the public interest and contrary to s 4.15(1)(e) of the EPA Act.

Section 144AAB

144AAB Re-use and recycling of asbestos waste prohibited

A person must not cause or permit asbestos waste in any form to be re-used or recycled.

Re-use is not defined.

The Protection of the Environment Operations Act 1997

How can remediation be a re-use of asbestos waste?

Muscat Developments Pty Ltd trading as Muscat Developments v Wollondilly Shire Council [2021] NSWLEC 1758, [176-7] (Clay C)

> The proper meaning of "re-used" takes its colour from its immediate and broader context within the POEO Act. In its immediate context I accept the Applicant's argument that the section is directed to **advantageous second use** of the asbestos waste, rather than its remediation. It is true that here the asbestos waste is being "used" in that a consequence of its remediation is a change in the landform of the site, but the development is properly characterised as including the remediation of the asbestos waste.
>
> It would appear to be the case that any remediation of asbestos waste by the common method of "capping" will inevitably involve the change in landform of the site at which it is disposed and so could be said to be "used" or "re-used". I accept the Applicant's submission that the legislature could not have intended that remediation in those circumstances would result in the commission of an offence.

How can remediation be a re-use of asbestos waste?

Muscat Developments Pty Ltd v Wollondilly Shire Council [2022] NSWLEC 1682 (Bish C)

1. Expressly disagreed with the approach of Clay C.
2. “Mr White defines ‘re-use’ as described in the Australian Oxford Dictionary as being to ‘use again or more than once’. He therefore submits that the proposed reshaping/re-working of the existing unauthorised fill on the site, which is known to be contaminated with asbestos waste, is effectively re-using the asbestos waste, consistent with what is described (and prohibited) in s 144AAB of the PoEO Act.” [81]
3. “I prefer the definition of re-use adopted by Mr White and find that the term ‘re-working’ (of the fill), in this context, is a ‘re-use’ of asbestos waste on the site, consistent with s 144AAB of the PoEO Act. There is no evidence or in my reading of the PoEO Act that makes the distinction of re-use (of the asbestos waste) having to be for ‘advantageous second use’.” [86]

Relationship between the POEO Act and the EPA Act?

Some Truisms

1. Consent/Approval under the EPA Act ≠ Licence under the POEO Act.
   a. See Rozelle
2. Licence ≠ Consent

> **7 General relationship with other Acts**
>
> **(1) Other Acts not affected** Nothing in this Act affects any of the provisions of any other Act or any statutory rules, or takes away any powers vested in any person or body by any other Act or statutory rules.

3. *Land and Environment Court Act 1979*, s 39(4):

> In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

Consent to unlawful activity

1. How can it ever be in the public interest?
2. What is the point of granting consent to something that cannot be carried out anyway?
3. What about coherence?

Muscat Developments Pty Ltd v Wollondilly Shire Council [2023] NSWLEC 121

Preston CJ

1. Appeal of decision of Bish C
2. 27 grounds… refined immediately prior to hearing to… 27 grounds
3. 5 of those grounds concerned the Commissioner's consideration of the POEO Act.
    a. 11: The Commissioner erred in not following Clay C's decision as a matter of comity.
    b. 12: The Commissioner erred in accepting that the Court **could not** grant development consent for works that would amount to a criminal activity under s 144AAB of the POEO Act;
    c. 13: The Commissioner misconstrued s 144AAB in concluding that remediation was a re-use of asbestos waste;
    d. 14: The Commissioner erred in concluding that the proposed remediation works would breach s 142A of the POEO Act.
    e. 15: The Commissioner misdirected herself in finding that the proposed remediation works were required to satisfy the objects in s 3 of the POEO Act.

Ground 12: Jurisdiction

1. "… the Council had contended, and the Commissioner accepted, that whether the proposed onsite remediation of asbestos waste by reworking is lawful under s 144AAB of the POEO Act was a jurisdictional requirement for the grant of development consent under the EPA Act for the remediation"

2. "I find that the Commissioner did err in her consideration of the provisions of the POEO Act by asking herself the wrong questions. The Commissioner was entitled, at least by s 39(4) of the Court Act, to have regard to the POEO Act in making a decision in respect of the appeal, as to whether to grant or refuse consent to Muscat's development application. **The issue was how the Commissioner could have regard to the POEO Act**." [152]

Muscat Developments Pty Ltd v Wollondilly Shire Council [2023] NSWLEC 121

The Commissioner set up the issue as one of jurisdiction

1. The Commissioner framed her consideration of the POEO Act in terms of jurisdiction to determine the development application under the EPA Act.
2. “But whatever was the prompt, the Commissioner understood that the lawfulness of the proposed remediation works under the POEO Act was “a jurisdictional consideration of the Court” (at [37]). The Commissioner entitled a part of her reasons for judgment as “jurisdictional requirements”. The first jurisdictional requirements she referred to in this part were ss 142A and 144AAB: [54].”
3. “the Commissioner first put aside any consideration of the lawfulness of the original placement of the unauthorised fill on the land. She accepted that that “is not the jurisdictional test in consideration of the amended application currently before the Court”: at [78]. Rather, the jurisdictional test “in consideration of” the development application was whether the proposed onsite reworking of asbestos waste was lawful under s 142A and s 144AAB of the POEO Act.”
4. By framing the question as jurisdictional, the Commissioner asked herself the wrong question…

Muscat Developments Pty Ltd v Wollondilly Shire Council [2023] NSWLEC 121

Why was that an error?

Three related points at [156]

1. The power in s 4.16 of the EPA Act to determine a development application seeking consent for remediation works is not conditioned on the lawfulness of the remediation works under the POEO Act.
2. The jurisdictional requirements for the determination of such a development application are only to be found in the EPA Act and regulations and environmental planning instruments made under that Act.
3. The POEO Act does not fix any jurisdictional requirement for the determination of such a development application under the EPA Act.

Why was that an error?

Corroborated by:

1. Section 7(1) of the POEO Act;
2. The jurisdictional requirements for the determination of such a development application are only to be found in the EPA Act and regulations and environmental planning instruments made under that Act.
3. Each statutory scheme establishes a separate process for making and determining applications for some form of approval to undertake activity regulated by the scheme.
    a. The EPA Act establishes a process for making and determining development applications seeking consent to carry out development.
    b. The POEO Act establishes a process for making and determining applications for environment protection licences authorising scheduled activities.

    Each statutory scheme operates independently from the other statutory schemes.

    [157-158]

How was the error material?

1. "…the consideration and findings under one statutory regime shaped the consideration and findings under another statutory regime. For example, the Commissioner's findings on the proposed reworking of the mounds of unauthorised fill containing asbestos waste to form new mounds, made when addressing the provisions of ss 3, 142A and 144AAB of the POEO Act, influenced the Commissioner's consideration of and findings on the provisions of the SEPP Resilience, especially ss 4.6(1) and 4.10(1), and both the consideration and findings on the POEO Act and SEPP Resilience influenced the Commissioner's consideration and findings on s 4.15(1)(e) of the EPA Act and cl 2.3 and cl 7.5(3) of the LEP."
2. The error in considering the POEO Act as a jurisdictional consideration (along with other errors) therefore infected the entirety of the judgment.

Outstanding Questions

1. How can unlawfulness under another act ever be taken into account?
2. What is re-use of asbestos waste?

Outstanding Questions

How can unlawfulness under another act ever be taken into account?

1. Do not frame the issue as jurisdictional.
2. Whether conduct is unlawful under another statute can be relevant:
   a. to a consideration of the public interest in s 4.15(e) and s 39(4) of the EPA Act; and
   b. as a matter of discretion as to whether development consent should be granted: *McDougall v Warringah Shire Council* (1993) 30 NSWLR 258, 276-7.
3. Why grant consent to development that can never lawfully be carried out?

Outstanding Questions

What is re-use of asbestos waste?

1. Preston CJ did not determine the issue.
2. Left with a conflict between:
    a. Craig AC: places weight on the context- advantageous second use; and
    b. Bish C: emphasises the natural and ordinary meaning of the words- to use again.