

HOSPITAL WASTE DISPOSAL AND SEWERAGE INFRASTRUCTURE: LEGISLATIVE FRAMEWORK AND LICENSING

Presented to the Edith Cowan Indo Pacific Ecosystem Health Conference
27 November 2002

*Sandra Boulter
Solicitor
Environmental Defender's Office (WA) Inc*

"...for real change to happen there must be a change in the consciousness of most people... We need to relearn our relationship with the land, and with each other. We need to recognise that environmental problems are closely related with the ills of society and that the answer lies in caring..."¹

THE ENVIRONMENTAL DEFENDER'S OFFICE (WA) INC

The Environmental Defender's Office WA (Inc)² (the EDO) is a non profit independent community legal centre specialising in public interest environmental law. The aim of the EDO is to inform and advise individuals and environmental groups about the operation and implementation of laws and policies pertaining to environmental protection and biodiversity conservation in Western Australia.

INTRODUCTION

It may be trite environmental politics now but David Suzuki's call to arms is as true today as when he first made it.

Think global, act local.

Today we might add a third limb, that is, *live sustainably*.

GENERAL AUSTRALIAN LEGAL FRAMEWORK

1. Outline

Australia has developed an adversarial system of law based on the English system³ which arrived along with the C18th English settlers⁴. Our law is made up of international law⁵, common law, statutes, subsidiary legislation, policies and administrative guidelines. Customary Aboriginal law and its interrelationship with English based Australian law is an

¹ Adele Foot *Pollution in Pristine Perth in Bessie's Brolly: A Celebration of Women and the Environment in Western Australia* Department of Environmental Protection, Government of Western Australia, March 2000.

² The EDO is funded by the Commonwealth and State governments and by charitable grants, sales of publications, donations and membership fees. The objectives of the EDO include facilitation of effective community participation in environmental decision making. The EDO has published two texts: *A Guide to Environmental Law Western Australia* and *The Law of Landcare Western Australia 2002* 2nd edition; and a number of fact sheets.

³ There are other systems of law which include for example an Inquisitorial system.

⁴ 1829. For a history of the development of the law in WA see E Russell, *A History of the Law in Western Australia and its Development from 1829 – 1979* UWA Press, 1980.

⁵ Treaties and International Conventions create international legal obligations but do not create legal rights and obligations in our domestic law without more, for example by enactment in a Statute. See for example the Convention on Biological Diversity to which Australia became a signatory in 1992 and the subsequent enactment of the *Environmental Protection and Biodiversity Conservation Act (1999) (Cth)*.

ongoing (sometimes contentious) issue of integration. All of these areas of law contribute to the legal framework that surrounds our land and waters in Western Australia.

2. The Common Law

2.1 Introduction

Common law principles apply to everyone (including the Crown) unless expressly excluded by an Act of parliament. Common law is often referred to as judge-made law and generally has been made in the following way. In the absence of a written law, a court will determine a matter by looking at the established principles of common law,⁶ custom, tradition and modern convention, and the case law builds up to establish well defined principles of common law.

2.2 Some common law principles

- The bundle of property rights attached to land;
- Cross boundary effects of activities of one landholder on another landholder;
- Negligence;⁷
- Trespass;⁸ and
- Nuisance.⁹

Generally speaking common law principles have been unable to protect general public interests which have no connection with private rights, such as the public interest in protecting our marine and groundwater ecosystems.

3. Statutory Regulation

3.1 Statutes

⁶ Past cases published in law reports, which may be referred to as a precedent, or a case authority.

⁷ The common law principle of negligence comprises the elements of a duty of care, a breach of the requisite standard of care, the type (not amount) of damage which was a foreseeable consequence of the breach, and that the damage was caused by the breach: see *Donoghue v Stevenson* [1932] AC 562 ; *Jaensch v Coffey* (1984) 155 CLR 549.

⁸ *Trespass* to land is described as the intentional or negligent act of an individual which directly interferes with another individual's exclusive possession of land without lawful justification. To make out *trespass* there must be direct physical invasion of private land and the invasion must be intentional. Neither damage nor unreasonableness is required to be made out to establish *trespass*.

⁹ *Nuisance* is the interference with a public or private interest, see *Halsey v Esso Petroleum* [1961] 1 WLR 683. The elements required to succeed in a private nuisance action are that there must be physical injury to land or to a person's use and enjoyment of the land, the interference causing the injury must be unreasonable, and the damage caused must have been foreseeable. Only a person in actual possession of the land can make claim in *nuisance*. When a *nuisance* interferes with a right enjoyed by the public at large it is a public nuisance. Private individuals can take an action in public *nuisance* even if they have no interest in the land the subject of the interference, so long as they have suffered injury over and above the public at large. An activity or state of affairs that causes damage to land might be unreasonable interference with the use or enjoyment of land, see *Hargrave v Goldman* (1963) 110 CLR 40 at 60); or with the health, safety, comfort or convenience of the public at large. Where a *nuisance* is made by an accumulation of actions by a number of persons, an affected landowner might bring an action against all the other landholders contributing to the *nuisance*, see *Pride of Derby & Derbyshire Angling Association v British Celanese Ltd* [1952] 1 All ER 1326.

Statutory law establishes and regulates the operation of our various levels of government and government agencies. A statute¹⁰ is a written law made by an Act of Parliament to pass a Bill before it.¹¹ Statutes cover specific areas of law. Statutes prevail over the common law and can limit or modify common law rights.¹² For example, the liability of the Crown and management authorities¹³ responsible for management of Crown land is limited in certain circumstances by provisions of the *Land Administration Act 1997*.¹⁴

Statutes may impose restrictions on our activities, create obligations or provide sanctions against certain actions.

When there are a number of statutes regulating one particular activity, the principles of statutory interpretation apply to determine which statute will prevail in the face of inconsistent provisions. Some of these principles include:

- the Crown is presumed to not be bound by a statute;
- where Acts are not inconsistent both will operate and a number of approvals might be required;
- a later Act will prevail over an earlier Act; and
- a specific Act will prevail over a general Act.

When there is doubt about the meaning of certain sections of legislation we look to case law to see if a court has considered the section. For example section 99 of the *Health Act 1911* provides that houses must have sanitary conveniences. In *Atyeo v Aboriginal Lands Trust* (1996) 93 LGERA 57 it was held that section 99 was not binding on Aboriginal Lands Trust because the Trust being an - Instrumentality of Crown - could not be compelled to provide sanitary conveniences on Trust land.

Certain terms are defined in statutes, so for example a *public hospital* under the *Hospitals and Health Services Act*¹⁵ means any hospital that is,

- (a) conducted or managed by —
 - (i) a board constituted under this Act; or
 - (ii) the Minister under this Act;
 or
- (b) declared to be a public hospital under section 3 of the Act.

3.2 Subsidiary legislation

10 Often referred to as an 'Act'.

11 A Bill is the draft of a statute presented to parliament. The Bill progresses through the Parliament. When the Bill is passed by both Houses of Parliament, it is referred to as an Act of Parliament. The Act becomes operative on the date as proclaimed and recorded in the Government Gazette. The date of the Act may not be indicative of the contemporary relevance of the Act because it may have been amended numerous times since it was first passed by the Parliament.

12 *British Railways Board v Pickin* [1974] AC 765 at 789, 793, 798; see for example the *Blood Donation (Limitation of Liability) Act 1985* which is an Act to limit liability in respect of the transmission of the disease known as acquired immune deficiency syndrome through the transfusion of blood and blood products and for purposes connected therewith or incidental thereto.

13 For example Main Roads and local governments.

14 Land Administration Act 1997 sections 66 and 264.

15 Hospitals and Health Services Act 1927 section 2

A statute may authorise a certain person or body to make subsidiary legislation, which are often known as regulations, by-laws or local laws. Subsidiary legislation¹⁶ is generally binding in the same way as the statute which authorises it. Some statutes or regulations provide model provisions to guide the making of delegated legislation, see for example the *Hospitals (Administration of Public Hospitals) Regulations 1940*¹⁷ which provide model by-laws for the guidance of boards of management of public hospitals in respect of the matters regarding which such boards may make by-laws.

3.3 Offence provisions

Statutes may make some actions punishable by a fine or imprisonment. Specific persons may be nominated to prosecute certain offences and provide such persons or bodies with a discretion not to prosecute.¹⁸ For example, only the Chief Executive Officer of the Department of Conservation and Land Management can authorise a prosecution under the *Wildlife Conservation Act 1950*.¹⁹

Where a restriction on private prosecution is not expressed in an Act, it is likely that the common law, which entitles private persons to take a prosecution, will prevail.

There is an extraordinarily strong presumption that the Crown is not liable to prosecution for criminal offences.²⁰ This presumption is rebuttable by the express language of a statute.²¹ However, if the Crown through its agent or employee commits an offence of vital significance to a particular section of the community, and the employee works for a government corporation, the presumption of immunity would be little more than a starting point from which a court would determine the matter.²²

3.4. Civil Enforcement

The power to enforce statutory or regulatory obligations may be reside in one person, for example only the Water Corporation can decide if the waste disposed of through the sewer network complies or does not comply with an industrial waste permit.

3.5 Policies, codes of conduct, management plans, memoranda of understanding, intergovernmental government agreements and administrative guidelines

The provisions of policies, codes of conduct, management plans, memoranda of understanding and administrative guidelines are not generally enforceable by the parties to them or by third parties, without more. Furthermore, these instruments cannot change the effect of statutes, regulations or by - laws without more. They will carry more or less weight according to their nature. However, proper consideration of these instruments (or even draft instruments) may be enforceable, if they are a relevant consideration to be taken into account in administrative decision making which is discretionary.

3.5.1 Policies

¹⁶ See the *Interpretation Act 1984* section 5 and Part VI.

¹⁷ Made under the *Hospitals And Health Services Act 1927*.

¹⁸ For example a prosecution under the *Wildlife Conservation Act 1950* can only be authorised by the Executive Director of CALM, see section 26(3) of that Act.

¹⁹ *Wildlife Conservation Act 1950*, section 26(3).

²⁰ *Bropho v Western Australia* (1990) 171 CLR 1.

²¹ See *Cain v Doyle* (1946) 72 CLR 409 at 417 – 8, in respect of the liability of the Crown in the right of the Commonwealth for a penalty for a criminal offence.

²² *Bropho v Western Australia* (1990) 171 CLR 1.

There are two types of regulatory decisions that a government agency might make.

First a statute might require an agency to make a decision as to whether a person has undertaken an action prohibited by the statute. There is no discretion in such a decision. Either the proposed action is prohibited or it is not.

The other type of decision requires an exercise of discretion, for example to grant or refuse a particular licence to a hospital to discharge its industrial waste into the reticulated sewerage system. When a government or its agent wishes to guide or influence the way discretionary decisions are made, it may develop policies or administrative guidelines for that purpose.

One of the questions I am often asked is: *How can the provisions of a policy be enforced?* The short answer is that generally speaking,²³ a policy is not enforceable, however the appropriate consideration of a policy by the material decision maker may be enforceable. Policies and administrative guidelines are developed to guide (but not predetermine) a decision based on the exercise of the discretion of the decision maker.²⁴ The weight (or importance) to be given to a particular policy varies.

Legislative policy, (a policy adopted under an Act or subsidiary legislation) carries the greatest weight. An example of such legislative policies is a State Planning Policy (SPP) made under section 5AA of the *Town Planning and Development Act 1928*.

Other government policies (of progressively less weight) include cabinet endorsed, State government agency endorsed, local government endorsed and local government ad hoc policies.

It may be possible to amend legislation (or subsidiary legislation) to make certain provisions of a particular policy enforceable. So for example a certain policy could be incorporated into town planning schemes.

Policies do not always show the authority under which they are made or describe their legal effect. Such clarification is essential for their effective implementation, acceptance and efficacy.

It is important to note that an Environmental Protection Policy (EPP) made under the *Environmental Protection Act 1986* carries the greatest weight because EPPs have statutory force and regulations can be made to enforce them. Indeed the nomenclature of EPPs can lead to a misunderstanding of the legal effect of policies generally.

3.5.2 Codes of Conduct

Codes of conduct are rather like management plans and usually created with a particular activity in mind.

3.5.3 Management Plans

²³ But an Environmental Protection Policy made under the *Environmental Protection Act 1986* (EP Act) is binding on the world at large. EPPs could also be described as subsidiary legislation because they can make offences: see sections 35(1) (c) and 123(3)(a) of the EP Act.

²⁴ French and Drummond JJ in *Minister for Immigration, Local Government & Ethnic Affairs v Gray* (1994) 50 FCR 189 at 208.

The enforceability of a management plan is in the main prescribed by its statutory foundation that is, by the legal nature of the plan.

3.5.4 Memoranda of Understanding

A memorandum of understanding (MOU) may be entered into between government agencies to streamline the way the agencies process certain proposals that come before them.²⁵ An MOU cannot alter or amend the effect of legislation without more, it is unlikely to be binding on the signatories to it nor is it likely to be enforceable by third parties.

3.5.5 Intergovernmental Agreements

Intergovernmental agreements²⁶ are not generally enforceable by the parties to them or by third parties without more. They act at the Commonwealth level rather like memoranda of understanding do at the state level.

3.5.6 Administrative Guidelines

Administrative guidelines may be published by an agency of government to describe how one or more of the functions of that agency will be administered. An example of Administrative Guidelines are those published by the Environmental Protection Authority for the process of environmental impact assessment under the *Environmental Protection Act 1986*; or the Administrative Guidelines published under the *Environmental and Protection and Biodiversity Conservation Act 1999 (Cth)* to aid the assessment procedure for referrals under that Act.

4. The Crown

The Crown includes Ministers and certain State government agencies, but not local governments.

The question of whether a body or person is a servant or agent of the Crown is determined by reference to the character of the relevant statute, and whether the statute indicates an intention that the relevant body or person forms part of the Crown.²⁸ This intention may be indicated by an express statement. Where there is no such statement the functions and duties of the relevant body or person may give rise to an inference that the body or person is the Crown.²⁹ Furthermore, courts will consider the extent or degree of ministerial control over the person or body, whether the person or body hold property on behalf of the Crown.³⁰ Where a person is entitled to claim Crown immunity for a particular purpose, then

25 See for example the government of Western Australia Memorandum of Understanding for the Protection of Remnant Vegetation on Private Land in the Agricultural Region of Western Australia between the Commissioner for Soil and Land Conservation, Environmental Protection Authority, Department of Environmental Protection, Department of Agriculture, Department of Conservation and Land Management and the Water and Rivers Commission, Perth 1997.

26 For example see the Intergovernmental Agreement on the Environment to which the Commonwealth and the Western Australian State governments are parties.

27 At page 18.

28 Halsbury's Laws of Australia para 90-3020

29 *Grain Elevators Board (Vic) v President Counsellors and Ratepayers of the Shire of Dunmunkle* (1946) 73 CLR 70, at 75 & 80.

30 *Bradken Consolidated Limited and Another v the Broken Hill Proprietary Company Limited and Ors* [1979] 145 CLR 107, at 115.

any persons or bodies who are contractors of the relevant person or body involved in effecting that purpose³¹ may also claim such immunity.

Common law principles bind the Crown.³² Statutes are presumed not to bind the Crown and do not unless there is an express or implied provision in a particular statute to the contrary.³³ Even if there is a provision in a particular statute that the Crown is bound by it, this may not be the last word if there is an overriding Act such as a State Agreement Act.³⁴

The other important distinction between the Crown and other parties is in respect of civil liability for certain actions. The time³⁵ in which a complainant has to commence an action against the Crown, is generally much shorter than it would be against some other party unless leave to commence an action is granted by the Supreme Court.³⁶ Furthermore, there is a statutory obligation to provide prior notice to the Crown of a possible civil action against it.

ENVIRONMENTAL REGULATION

1. Awareness

1.1 Waste disposal and pollution

It can reasonably be said that hospitals produce large quantities of waste. In metropolitan³⁷ and country,³⁸ sewerage and drainage areas, the Water Corporation, the Water and Rivers Commission and the relevant local government authority administer drainage and sewerage services.

The *Environmental Protection Act 1986* and the regulations made pursuant to it contain the means to:

- prevent the generation of waste;

31 *Bradken Consolidated Limited and Another v the Broken Hill Proprietary Company Limited and Ors* [1979] 145 CLR 107.

32 The *Crown Suits Act 1947* provides that the Crown is not immune from the common law.

33 The test of whether or not a statute binds the Crown, depends on whether the statute was enacted prior to *Province of Bombay v Bombay Municipal Council* [1947] AC 58; between the Bombay case and *Bropho v Western Australia* (1990) 171 CLR 1; or after the *Bropho* case. For statutes in the middle period the Crown is not bound unless by express words or necessary implication. The rule is not so inflexible in the other periods. If an Act is not stated to bind the Crown, then it is presumed that the Crown is not bound unless this presumption may be rebutted by judicial interpretation of the provisions of the material Act, see *Bropho v Western Australia* (1990) 171 CLR 1; and *Bridgetown/Greenbushes Friends of the Forest Inc. v Executive Director of the Department of Conservation and Land Management and Ors* (1997) 18 WAR 126.

34 State Agreement Acts have been a tool often used by successive Western Australian governments for example, to avoid the provisions of certain Acts applying to the Crown, private persons or companies when large infrastructure agreements are made. State Agreement Acts which were enacted prior to 1 January 1972 (before enactment of the first *Environmental Protection Act 1971*) may prevail over the *Environmental Protection Act 1986*: the EP Act section 5.

35 Generally referred to as the limitation period. For example, in respect of negligence, the limitation period generally commences to run after the damage is known or ought reasonable have been known to have occurred.

36 The *Crown Suits Act 1947* section 6.

37 The Metropolitan Water, Sewerage and Drainage Area is constituted by the *Metropolitan Water Supply, Sewerage and Drainage Act 1909* section 6.

38 In areas outside the boundaries of the Metropolitan Water, Sewerage and Drainage Area, sewerage areas may be constituted, modified or dissolved, see *Country Towns Sewerage Act 1948* section 4; and see Halsbury's Laws of Australia 440 - Water (5) Drainage and Sewerage (i) Western Australia 4408155 Administration.

- recover the resources from waste;
- dispose of waste properly; and
- manage the consequences of waste disposal.³⁹

Regulatory prevention has a number of elements which include:

- a general statutory duty to take all reasonable and practicable measures to prevent or minimise harm;
- environmental protection policies (EPPs);
- specific environmental improvement programs;
- carrots for best practice pollution reduction initiatives;⁴⁰ and
- ensuring that facilities for the disposal of waste use best practice;
- the use of National Environmental Protection Measures (NEPMs);⁴¹ and
- enter a waste reduction agreement.⁴²

Recovery of resources can be promoted by:

- legislation which has been passed in other States⁴³ but as yet there is not an Act in Western Australia;
- establishing regional waste management groups;
- observing material NEPMs such as the *National Environmental Protection Measure on Used Packaging Materials*;
- segregation of wet and dry garbage;
- prohibition against disposal of waste (that is not garbage) in garbage bins;
- encourage litter recycling; and
- reuse liquid waste.⁴⁴

1.2 The liability of occupiers

³⁹ Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths, at page 236.

⁴⁰ See the *International Convention for the Prevention of Pollution from Ships 1973 (MARPOL)*, and see Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths, at page 237.

⁴¹ See for example the National Environment Protection Measure for the National Inventory which requires a database, the *National Pollutant Inventory* to be established, to promote and assist the facilitation of waste minimisation and cleaner production program for industry, government and the community, see clause 7 of the *National Environment Protection Measure for the National Inventory*; and see Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths, at page 237.

⁴² Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths, at pages 236 – 237.

⁴³ See for example, the *Waste Management and Pollution Control Act 1998 (NT)*.

⁴⁴ Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths, at page 239 -240.

In Western Australia the occupier of premises must comply with any prescribed standard and must take all reasonable and practicable measures to prevent or minimise the discharge of waste from premises.⁴⁵ The board of a hospital may be an occupier which is liable for unlawful discharges of waste. Hospital waste may include general, industrial, hazardous⁴⁶ and clinical waste⁴⁷.

1.3 Public hospitals as an entity do not require a licence or works approval

Perth public hospitals are not,

- *prescribed premises* under the *Environmental Protection Act 1986* and accordingly do require licensing under Part V of the EP Act (A licence must be obtained from the Department of Environmental Protection to discharge waste from prescribed premises);⁴⁸
- *offensive trades* described specifically under the Schedule 2 of the Health Act 1911; or

⁴⁵ See Regulation 5, and Schedule 1 of the *Environmental Protection Regulations 1987*.

⁴⁶ Hazardous waste is waste that is ignitable, corrosive, reactive, toxic or infectious. At Sir Charles Gardiner Gardner Hospital each department has the control of the disposal of its own hazardous waste but there is no overall policy in respect of the disposal of hazardous waste, personal comment Mr Roy Aitken, Facilities Manager North Metropolitan Health Service 1 August 2002.

⁴⁷ The DEP have not developed a Code of Practice for managing clinical waste but for the time being have adopted the national *Code of Practice for the Management of Clinical and Related Wastes*. The DEP are presently meeting with stakeholders preparatory to implementing the *Environmental Protection (Liquid Waste) Regulations 1996* in respect of transport of hospital waste that is not disposed of into the sewerage system. I understand that 4 nurses from the Infection Control Units of certain hospitals represent the nursing profession in the stakeholder forum. I further understand that any submissions about the regulation of clinical waste can be made through them. To date the issues requiring consideration are seen to be:

- Terminology
- Infection Control
- Pathology department management
- Transport
- Disposal points.

The issue to be decided first is what is clinical waste? The term clinical waste needs to be clearly defined because it is regulated. The disposal of clinical waste is much more expensive for the hospital than general waste disposal. This leads to the tension between the producer, the hospital (which wants as much of its waste classed as general waste as possible) and the regulators (who want to ensure environmentally sound waste disposal). It is the grey area where the two meet which might lead to litigation in the courts if there is not a clear definition with legal force. There have been calls for a nationally accepted definition made as an NEPM. "NEPM" means a national environment protection measure within the meaning of the *National Environment Protection Council (Western Australia) Act 1996*, see the *Environmental Protection Act 1986* section 3; and *Environmental Protection (NEPM -NPI) Regulations 1998*. The Minister for the Environment may, by notice published in the Gazette, declare that an NEPM specified in the declaration is, for the purposes specified in the declaration, to be taken to be an approved policy with the force of law, and the declaration has effect accordingly, see *Environmental Protection Act 1986* section 37A (1). One example of concern that has been put to me as a good example is the decision whether or not the contents of sanitary disposal units maintained in public toilet cubicles should be classified as clinical waste or general waste because of the likelihood of finding syringes and needles amongst the contents.

Another major decision to be made is how we monitor the way hospitals dispose of their clinical waste. Options include:

- Track clinical waste from origin to final disposal;
- Monitoring (external or internal);
- Audits (regular or random); or
- Permit or licence.

⁴⁸ See Part V of the *Environmental Protection Act 1986*.

- *noxious industries* under the model scheme provisions to be found in Appendix B of the *Town Planning Regulations 1967* made pursuant to the *Town Planning and Development Act 1928*.

Accordingly, the works approvals or licences required under those Acts are not required for public hospitals.⁴⁹

1.4 Waste classification

There are a number of waste classifications and licence requirements in Western Australia.⁵⁰ Statutory requirements for:

- licences (or other environmental authorisations) for the discharge, disposal and transport of waste;
- provisions for environmental management; and
- offences and penalties,

generally depend on how waste is classified.⁵¹ *Industrial waste* is generally distinguished from other waste by definitions in the regulatory framework that governs their disposal.

1.5 Industrial Waste

Liquid *industrial waste* is generally disposed of from our metropolitan public hospitals through the sewer network. However, some untreated liquid waste may be prohibited from discharge to a drain or sewer.⁵²

There are a number of problems associated with the discharge of industrial waste including:

- Environmental pollution from overflows or leakage from the system;
- High organic strength waste may encourage generation of hydrogen sulphide in the sewerage system and overload the treatment plants;
- High levels of suspended solids causing blockage in the system;
- High levels of grease which can reduce the treatment plant effectiveness;
- Excessive pH variations corrode the pipes and fittings;
- Inflammable liquids can cause fires and explosions in the system; or

⁴⁹ However, various other activities undertaken at hospitals for example laundries (prescribed premises), grease traps and oil traps will need licences from the Department of Environmental Protection. Grease and oil traps are cleaned out 2 – 4 weekly as required by the licence, pers comment Mr Roy Aitken, Facilities Manager North Metropolitan Health Service, 1 August 2002.

⁵⁰ See Halsbury's Laws of Australia 180- Environment 1 Pollution Control and Waste Disposal (8) Waste Management 180 – 3515 Classification and licence requirements.

⁵¹ See Halsbury's Laws of Australia 180- Environment 1 Pollution Control and Waste Disposal (8) Waste Management 180 – 3515 Classification and licence requirements.

⁵² Section 110L of the *Environmental Protection Act 1986* provides for the establishment of Waste Management WA which carries on waste management operations at or in relation to the intractable waste disposal facility at Mount Walton East and the Forrestdale Industrial Liquid Waste Treatment Plant.

- Metallic contaminants interfere with the biological processes and build up in sludge. (Metallic contamination of sludge that is used as soil improver can have a toxic effect on vegetation and grazing animals).

1.6 Disposal of industrial liquid waste

The Water Corporation⁵³ regulates liquid waste that is discharged into the reticulated sewerage system in the metropolitan area. I understand that the major metropolitan public hospitals are all connected to the metropolitan reticulated sewerage system.

1.7 Permit to dispose of liquid industrial waste

Prior to its commencement a hospital that seeks to discharge its *industrial waste* into the sewerage system must obtain approval from the Water Corporation.⁵⁴ In making the application the hospital must give details of all the types of effluent and pre-treatment works, and may be required to install special monitoring equipment. The approval will be in the form of an *industrial waste*⁵⁵ permit.⁵⁶

In addition hospitals attract quality and quantity (QQ)⁵⁷ charges, to reflect the load which they add to the system and to determine the cost of the service provided by the Water Corporation.

Notwithstanding, the fact that a number of our public hospitals were built some time ago, I understand that all have been required to submit an application within the last 10 years to comply with this new licensing system.⁵⁸

The conditions of the permit to discharge into the sewer are to be found in the *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981*, by-law 28.

1.8 Policies about liquid waste disposal

53 See Halsbury's Laws of Australia 440 –Water (5) Drainage and Sewerage (i) Western Australia 440 -8155 Administration. The Water Corporation is a body corporate established by the *Water Corporation Act 1995* section 4. It is an independent person separate from the public service and the Crown, and it is required to operate in accordance with prudent commercial principles: see the *Water Corporation Act 1995* sections 5, 6(1)(& 30(1). If the Minister responsible for the *Water Corporation Act 1995* lawfully directs the Water Corporation to act in a certain way the Corporation must follow that direction: see the *Water Corporation Act 1995* section 30(2). *Sewer* generally means a conduit for the carriageway of any sewerage or wastewater, see *Health Act 1911* section 3(1); and includes drains, see the *Water Agencies (Powers) Act 1984* section 3(1). Sewerage and wastewater both mean liquid waste, including faecal matter and urine, see *Health Act 1911* section 3(1); and includes nightsoil, see the *Water Agencies (Powers) Act 1984* section 3(1). The Water Corporation is responsible for the control and management of main drains within the Metropolitan Water, Sewerage and Drainage Area, see the *Metropolitan Water Authority Act 1982* section 100.

⁵⁴ For example at the Sir Charles Gardiner hospital area there are several such permits each relating to each entity that resides in the hospital vicinity.

⁵⁵ *Industrial Waste* is defined as liquid, solid or gaseous refuse from any business, industry, warehouse or manufacturing premises other than domestic swage, stormwater, or unpolluted water. Industrial waste may also be referred as trade waste

⁵⁶ See Water Corporation *Industrial Waste Information Brochure Hospital – IW PUB35* published 17 December 2001, on the Water Corporation website, www.watercorporation.com.au

⁵⁷ See Water Corporation *Industrial Waste Information Brochure Hospital – IW PUB35* published 17 December 2001, on the Water Corporation website, www.watercorporation.com.au, for the main hospital waste producing processes identified by the Water Corporation

⁵⁸ See the *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981* as amended, by-law 28 Industrial wastes

There are a number of policies to guide producers (the hospitals) and the Water Corporation which include:

- Explanation of Policy for Industrial Waste Discharges – IW PUB01;
- Hospitals – IW PUB35;
- Laboratory Chemical Waste Disposal To Sewer – IW PUB28;
- Acceptance Criteria for Industrial Wastes – IW PUB06; or
- Industrial Waste Permits – IW PUB100.

There are also *National Guidelines for Waste Management in the Health Care Industry* (non-binding without more) published by the National Health and Medical Research Council.⁵⁹

1.9 Reports

On 8 May 2001 a report commissioned by the Licensing Standards and Review Unit of the Health Department entitled, *Report on National and International Approaches to the Licensing/Regulation of Facilities Providing Healthcare and Supported Accommodation* was released. This report deals only with licensing private facilities but even more interesting is that in developing a rationale for a facility as a whole described on page 3 of the Report, the environmental impact of a hospital is not mentioned.

1.10 Offences

1.10.1 Metropolitan Water Supply, Sewerage and Drainage By-laws 1981

Whether or not a particular hospital is complying with its obligations is unlikely to be discovered unless a major polluting event discovered at the treatment plant can be tracked back to the offending hospital.

The Water Corporation is the sole judge of the quality, quantity and rate of industrial waste discharge and whether a discharge complies with a permit issued by it.⁶⁰

As I understand it,⁶¹ there is no regular audit or monitoring of that which a hospital discharges into the sewer because hospitals are generally considered to *tow the line*.⁶² Accordingly, as long as a public hospital pays the annual licence fee and complies with any conditions attached to the permit it will be left alone.⁶³

If the Water Corporation suspects a breach of an *industrial waste* permit, it may:

- issue a notice to the occupier to make good the damage;

59 Cat.No. 9817470 available from the Government Information bookshop

60 See the *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981* as amended, Industrial wastes by-law 28.1(c).

61 Personal comment, Mr Peter Wilmot of the Water Corporation, 26 July 2002.

62 Personal comment, Mr Peter Addison, Manager Industrial Waste, Water Corporation, 29 July 2002

63 Where there is a release of certain contaminants pre-treatment fixtures may be required to be or ought to be put into place such as grease arresters, petrol/oil arresters, sand arresters, neutralisers and dilution pits. An occupier of premises in which grease traps and oil interceptors must be registered with the DEP, see regulation 15 of the *Environmental Protection (Liquid Waste) Regulations 1996* and the requirement for registration is a prescribed standard for the purpose of section 51 of the *EP Act*

- may terminate the permit; or
- recover costs from the occupier for remediation works done by the Water Corporation.

It is an offence not to comply with a notice.⁶⁴

1.10.2 Health Act 1911

It is an offence under the *Health Act 1911* for a person to allow or cause chemical refuse, waste or any liquid over a temperature of 43 degrees into a sewer of, or any drain communicating with a sewer of a local government where that matter causes a nuisance, is injurious to health or interferes with the disposal of sewage.⁶⁵

1.10.3 Metropolitan Water Authority Act 1982

It is an offence under the *Metropolitan Water Authority Act 1982* to cause or permit sediment or other pollutant to enter a *main drain* in the Metropolitan Water, Sewerage and Drainage Area.⁶⁶ The Water Corporation may give a notice to any person or corporation who commits an offence to repair any damage and remove any cause of pollution. Failure to comply with the notice is an offence.⁶⁷

1.10.4 Environmental Protection Act 1986

Under the *Environmental Protection Act 1986*, Western Australia has a tiered licensing system with three types of licences for emissions to air, land and water, which are,

- regulated;
- monitored; and
- best practice licences.⁶⁸

Fees vary depending on the level of emission monitoring firms choose to follow. Firms or businesses who,

- do not accurately monitor discharges hold regulated licences;
- monitor discharges may hold monitored licences; and

⁶⁴ *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981* as amended, Industrial wastes by-law 28.2.3

⁶⁵ See the *Health Act 1911* section 94, and see *Farlodge Pty Ltd (T/as All Clean Septics) v Rough* (unreported decision of the Supreme Court of Western Australia, Murray J No 1131 of 1992, 12 January 1993 BC9301188, for the vicarious liability of an employer for breach of section 94 by its employees. Also see *Clements (on behalf of Lane Cove Council) v Dixon* (1997) 97 LGERA 399 where in the context of New South Wales legislation, the *Environmental Offences and Penalties Act 1989 (NSW)* section 51 and the *Land and Environment Court Act 1979 (NSW)* section 52(1) where the offence of wilful disposal of waste in a manner likely to harm the environment was established on the facts that disclosed the liquid waste had been discharged from a garbage collection truck into a storm water drain and the offence was aggravated by the fact of the disposal being done clandestinely under cover of night by a person who knew it was wrong but who was acting under the instruction of a supervisor.

⁶⁶ See the *Metropolitan Water Authority Act 1982* sections 101(1)(b) & 101 (1)(c).

⁶⁷ See the *Metropolitan Water Supply, Sewerage and Drainage By-laws 1981* by-law 4.9.

⁶⁸ Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths , at page 73

- hold best practice licences have an approved environmental management system, an approved continuous improvement plan and conduct audits.⁶⁹

Under section 50(1) of the *Environmental Protection Act 1986*, a person commits an offence if he, she or it, intentionally or with criminal negligence:

- (a) *causes waste to be placed; or*
- (b) *allows waste to be placed, in any position from which the waste —*
- (c) *could reasonably be expected to gain access to any portion of the environment; and*
- (d) *would in so gaining access be likely to result in pollution...*

A person also commits an offence if she, he or it causes or allows waste to be placed in any position from which the waste,

- (a) *could reasonably be expected to gain access to any portion of the environment; and*
- (b) *would in so gaining access be likely to result in pollution...*

Furthermore, by section 51 of the EP Act, the occupier of any premises commits an offence if it does not,

- (a) *comply with any prescribed standard for the discharge of waste or the emission of noise, odour or electromagnetic radiation; and*
- (b) *take all reasonable and practicable measures to prevent or minimize the discharge of waste and the emission of noise, odour or electromagnetic radiation, from those premises.*

Under section 72 of the EP Act If a discharge of waste,⁷⁰

- (1) (a) *occurs as a result of an emergency, accident or malfunction;*
 (b) *occurs otherwise than in accordance with a works approval or licence or with a requirement contained in a pollution abatement notice; or*
 (c) *is of a prescribed kind or a kind notified in writing to the occupier concerned,*
and has caused or is likely to cause pollution, the occupier of the premises on or from which that discharge took place who does not, as soon as practicable after that discharge, notify the Chief Executive Officer of the prescribed details of that discharge commits an offence.
- (2) *Subsection (1) does not apply to or in relation to a discharge of waste which is of a kind prescribed for the purposes of this subsection.*
- (3) *The occupier of premises from which a discharge of waste of a kind specified in a relevant NEPM occurs is to notify the Chief Executive Officer in the prescribed manner of the prescribed details of that discharge.*
- (4) *An occupier who contravenes subsection (3) commits an offence.*
- (5) *In subsection (3) —*
“relevant NEPM” means an NEPM that is —

⁶⁹ Bates G M and Lipman Zada *Pollution Law in Australia* 2002 Butterworths , at page 73

⁷⁰ Subject to subsection (2)

- (a) *taken to be an approved policy under section 37A; or*
- (b) *specified by regulation to be a relevant NEPM.*

Under section 73 of the EP Act,

- (1) *If any waste has been or is being discharged from any premises otherwise than in accordance with a works approval or licence or a requirement contained in a pollution abatement notice, or a condition of pollution is likely to arise or has arisen, an inspector or authorized person may, with the approval of the Chief Executive Officer —*
 - (a) *give such directions in writing as the inspector or authorized person considers necessary to such person as the inspector or authorized person considers appropriate —*
 - (i) *to remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or*
 - (ii) *to prevent the condition of pollution from arising or control or abate that condition if it arises,*
as the case requires; or
 - (b) *with such assistance as he considers appropriate —*
 - (i) *remove, disperse, destroy, dispose of or otherwise deal with the waste which has been or is being discharged; or*
 - (ii) *prevent the condition of pollution from arising or control or abate that condition if it arises,*
as the case requires.
- (2) *When a person has complied with any directions given to him under subsection (1)(a), the Chief Executive Officer shall, if the person was not —*
 - (a) *the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or*
 - (b) *the person who caused or allowed to be caused the discharge referred to in paragraph (a) or the likelihood of the relevant condition of pollution arising or the arising of that condition,*
as the case requires, reimburse the person any cost incurred by the person in complying with those directions.
- (3) *When an inspector or authorized person has incurred any cost in acting under subsection (1)(b) or the Chief Executive Officer has reimbursed any cost under subsection (2), the Chief Executive Officer may recover that cost from the person who —*
 - (a) *was the occupier of the premises from which the relevant waste was discharged at the time of that discharge; or*
 - (b) *caused or allowed to be caused the discharge referred to in paragraph (a) or the likelihood of the relevant condition of pollution arising or the arising of that condition,*
as the case requires, by action in a court of competent jurisdiction as a debt due to the Crown and shall pay any cost so recovered into the Consolidated Fund.
- (4) *If any waste has been or is being discharged from any premises or a condition of pollution is likely to arise or has arisen, the Chief Executive Officer may —*
 - (a) *cause the waste to be removed, dispersed, destroyed, disposed of or otherwise dealt with, or the condition of pollution to be prevented from arising or, if that condition arises, that condition to be controlled or abated; and*

- (b) *recover the cost of the removal, dispersal, destruction, disposal or other dealing, or of the prevention, control or abatement, as the case requires, referred to in paragraph (a) from the person who —*
- (i) *was the occupier of the premises at the time of that discharge;*
or
 - (ii) *caused or allowed to be caused that discharge or the likelihood of the condition of pollution arising or the arising of that condition, as the case requires,*
by action in a court of competent jurisdiction as a debt due to the Crown and shall pay any cost so recovered into the Consolidated Fund.
- (5) *A person who intentionally or with criminal negligence contravenes a direction given to that person under subsection (1), without reasonable excuse for that contravention, commits an offence.*
- (6) *A person who contravenes a direction given to that person under subsection (1), without reasonable excuse for that contravention, commits an offence.*
- (7) *A person charged with committing an offence against subsection (5) may be convicted of an offence against subsection (6) which is established by the evidence.*

1.10.5 Environmental Protection (Liquid Waste) Regulations 1996

The *Environmental Protection (Liquid Waste) Regulations 1996* apply to carriers of liquid waste disposed by transport from the hospitals in the municipalities of local government districts specified in Schedule 2 to sites listed in Schedule 4.⁷¹

⁷¹ The liquid waste must be discharged at the Forrestfield Liquid Waste Treatment Plant unless the Chief Executive Officer of the DEP has directed otherwise, see regulation 39; and see Bates G M and Lipman *Zada Pollution Law in Australia* 2002 Butterworths, at page 252.

LIQUID WASTE to which these regulations apply is described in Schedule 1 to the Regulations

Category Number	Waste Category Examples
1. Animal waste	processing waste from meat, dairy foods and smallgoods; tallow
2. Waste from an apparatus for the treatment of sewage	Septic tank waste, leach drains, french drains, soak wells, holding tanks
3. Grease waste	Waste resulting from food preparation processes
4. Vegetable oils and Vegetable and fruit processing derivatives and organic wastes, starch wastes waste other than waste referred to in categories 1, 2 and 3	
5. Paints and resins	
6.(a) Oil interceptor waste	
(b) Oils and emulsions	
7. Solvents	
8. Organic chemicals other than organic chemicals referred to in categories 5 to 7	
9. Acids	
10. Alkalis	
11. Chromium waste	
12. Cyanide	
13. Inorganic chemicals other than inorganic chemicals referred to in categories 9 to 12	

1.11 Other information

Having developed a working knowledge of the liquid waste disposal system, what can go wrong and how it is regulated might lead to inquiry about whether or not, all the waste that finds its way into the sewerage system from a hospital is authorised to do so. One way of finding this out would be to compare the hospital purchasing orders with the actual disposal that occurs and making each department as responsible for its environmental impact as it is for its financial auditing.

I understand that the Water Corporation has a *Legal and Risk Management Division* and an *Industrial Waste Division*. The Water Corporation has a policy of not prosecuting offenders but issues warnings to 'cease and desist' to polluters of the sewerage system.

Any person can refer proposals that might cause significant harm to the environment to the Environmental Protection Authority: see section 38 of the *Environmental Protection Act 1986*. For example, I understand that the Water Corporation policy *Acceptance Criteria for Industrial Wastes – IW PUB06* has not been assessed by the *Environmental Protection Authority* and it is arguable that it is a proposal that can and should be assessed under the *Environmental Protection Act 1986*.

CONCLUSION

Even taking into account the shortcomings in environmental regulation in Western Australia,⁷² it is to be hoped that the application or the laws that we do have, is applied equally across society, and administered to achieve a sustainable use of our resources. Any premises, including hospitals, which **could** discharge hazardous waste, that is hazardous to the receiving environment and its inhabitants, should be regulated by environmentally acceptable criteria and an effective, and pro-active licensing system. Furthermore, in terms of hospital waste, education of the personnel likely to be disposing of hazardous substances is a crucial tool in minimising the environmental impact of the disposal of those substances.

14.Low strength waste water

Pond water, cooling tower
water, wash waters

⁷² *Watching over the Watch-Dogs: Regulatory Theory and Practice, with Particular Reference to Environmental Regulation* (2002) Dr Hannes Schoombée of Frances Burt Bar Chambers in Perth and Ms Lee McIntosh solicitor at the Environmental Defender's Office.