

# **PROPOSED REPEAL OF THE UNHEALTHY BUILDING ACT 1990**

## **DISCUSSION PAPER**

**June 2001**



**ENVIRONMENT PROTECTION AUTHORITY**

## Summary

The *Unhealthy Building Land Act 1990* establishes extra planning approval requirements for land which is declared to be unhealthy. It is now rarely used, as the sorts of sites which it covered are dealt with under other legislation and processes (these being the *Protection of the Environment Operations Act 1997*, the *Environmental Planning & Assessment Act 1979* and the *Contaminated Land Management Act 1997*). The issue that now arises is whether NSW requires a separate *Unhealthy Building Land Act*, or whether the task previously performed by the Act is more efficiently handled under these other processes.

If the *Unhealthy Building Land Act* is repealed, one feasible option is for land previously managed under the Act to be fully managed under the *Contaminated Land Management Act* if it poses a significant risk of harm to public health or the environment, or under the land use planning and pollution control systems if it does not pose such a risk. Information on currently declared unhealthy building land would be managed within the land information systems maintained by planning authorities. It would be reported on section 149 certificates issued by planning authorities during conveyancing processes or upon other inquiries.

This discussion paper outlines this proposal and invites public comments on any aspect of it.

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## 1. What is the purpose of the Unhealthy Building Land Act 1990?

The *Unhealthy Building Act 1990* (the UBL Act) is comprised of provisions extracted from the old *Public Health Act 1902*. The purpose of the UBL Act is to restrict development on land regarded as “unhealthy” and to provide a means for potential purchasers to identify such land.

## 2. How does the UBL Act work?

The UBL Act's two main functions and their linkages with other regulatory systems are as follows:

### a) ***Declaration of land***

Under the Act, the EPA may declare land considered to be ‘prejudicial to health’ as ‘unhealthy building land’ (UBL), or revoke declarations. Neither ‘health’ nor ‘UBL’ is defined in the Act. The UBL Act makes it an offence to build on UBL without the EPA’s consent. This extra approval process tends to duplicate the normal development consents required from local councils (or other planning authorities).

### b) ***Records of UBL declarations***

Under the Act, the EPA must maintain a database of UBL declared properties, which may be accessed by anyone requiring information about such land (for example people purchasing properties). This is in addition to the normal planning certificates issued by Councils under section 149 of the *Environmental Planning & Assessment Act 1979* (EP&A Act).

There are currently 394 UBL-declared sites of the following types:

<b><i>Type</i></b>	<b><i>No. of sites</i></b>
Landfill sites	221
Low-lying land	142
Nightsoil depots	21
Chemically contaminated	6
Radioactive	2
Asbestos affected	1
Sawdust affected	1

## 3. Is the UBL Act used very often?

The Act is rarely used now. Most of the declarations in the above table occurred prior to 1990 and between zero and five new declarations are made each year.

Approximately 12,000 UBL inquiries are made every month, mostly through the Central Register of Restrictions (CRR) maintained by the Land Titles Office (LTO). Inquiries cost \$10 to \$15 per transaction and are usually made for property conveyancing. Only 1 in 1,500 sites for which information is requested is finally identified as UBL.

#### 4. Why repeal the UBL Act?

There are a number of reasons why active consideration should be given to repeal of the Act:

**a) *The UBL Act duplicates more modern regulatory systems***

The original provisions were included in the *Public Health Act 1902* when there was little planning and development control legislation and there was a need to control development on low-lying swampy land, flood-prone land and old night-soil depots. The original intention of the Act was to ensure that structures were not erected on land where breeding of mosquitos or other vermin could transmit diseases to humans. These matters have long since been dealt with by mainstream land-use planning and public health programs.

In recent decades the UBL Act has overwhelmingly been used to help control the erection of structures on former waste disposal depots, where gas emissions, leachate or subsidence may be of particular concern. Management of landfills post-closure is now established as a formal process under the *Protection of the Environment Operations Act 1997*.

**b) *The criteria for UBL declaration are unclear***

The criteria for declaring (or revoking) sites as UBL are unclear. The term 'prejudicial to health' is the trigger for adding sites but is not defined in the Act. As a consequence the basis for a declaration tends to lack transparency and consistency over time.

**c) *The database is not comprehensive***

One particular consequence of the above point is that the database of UBL declarations is not comprehensive. This is because the Act provides no formal process for the EPA or any other person to identify parcels of land that may be unsuitable for building and the addition of sites has therefore occurred in an *ad hoc* or opportunistic fashion. Land types which could potentially have been considered 'unhealthy', such as land-slip or bush-fire hazard areas, have not been declared UBL because these are dealt with through the land-use planning system.

**d) *Land may be unhealthy, even if not declared UBL***

There is a public misconception that if a site is not registered as UBL, it is free of any health risks associated with its development. In reality, there is no basis for an assumption that a site that is not on the database is "healthy" and property purchasers must take additional steps to satisfy themselves that the land has no defects that make it unsuitable for development.

Due to these deficiencies, the continued existence of the UBL Act exposes industry and the community to unjustifiably higher costs and delays. It also gives purchasers a false sense of security that a site has no defects if it is not UBL-declared.

There is a direct cost to the community of over \$1 million per year arising from the special inquiry needed during conveyancing to determine whether land is UBL-declared. There are also costs for developers and local councils arising from having to seek an additional concurrence from the EPA before development on UBL-declared land can go ahead.

## 5. What solution is proposed?

For greater efficiency and to remove duplication, the most viable solution would be to repeal the UBL Act, and to ensure that the site problems which may have previously led to declaration as unhealthy building land are properly dealt with through:

- effective use of the contemporary land use planning and contamination management regimes; and
- more effective information management on unhealthy building land.

### 5.1 How would “unhealthy” land be regulated after repeal?

Development on declared land (or types of land that could potentially be declared unhealthy) can be more effectively handled under other legislation. In particular, more integrated and comprehensive mechanisms for land assessment and management are now available through:

- the *Contaminated Land Management Act 1997* (CLM Act),
- the EP&A Act,
- the 1998 *Managing Land Contamination: Planning Guidelines* (Department of Urban Affairs & Planning [DUAP]/EPA) and
- the *Protection of the Environment Operations Act 1997*.

It is proposed that sites which are currently or potentially unhealthy be managed as follows.

**a) *Contaminated sites* (landfills; nightsoil depots; chemical, radioactive, asbestos or sawdust affected)**

Where a site is judged to pose a “significant risk of harm” to human health or the environment (ie the site is not suitable for the current or approved use) regulation by the EPA under the CLM Act is proposed. This would involve such measures as orders, notices, voluntary agreements or community strategies.

Where a site is contaminated but not posing a significant risk of harm under current use, planning authorities would be guided by *SEPP 55 – Remediation of Land* and the *Managing Land Contamination: Planning Guidelines*, when considering contamination issues relevant to development applications and rezoning proposals.

The *Protection of the Environment Operations Act 1997* provides mechanisms for the EPA to control future management and remediation of currently licensed landfills and sites subject to asbestos disposal, effectively preventing these becoming ‘unhealthy’.

**b) *Low lying land***

Should land be ‘unhealthy’ because of other characteristics, such as being flood-prone or subject to inundation, planning authorities already need to meet the requirements of section 79C(1) of the EP&A Act. This section includes a requirement to consider the “suitability of the site for development” and “the public interest” when carrying out development approval. Local councils also have the power to make orders controlling activities on land

where there are concerns regarding surface water flow or public health under section 124 of the *Local Government Act 1993*.

Further community protection would be provided by provisions of the *Environmental Planning & Assessment Regulation 2000* (EP&A Regulation). Clause 144 precludes interim occupation certificates being issued for any building that may constitute a hazard to the health or safety of the occupants. For example, this covers situations where flammable gas emissions from an old landfill site may be a problem. Clauses 126 and 135 require that all development consents must comply with the *Building Code of Australia* (and the Australian Standards it refers to). For example, this covers geotechnical and foundation matters in situations where subsidence may be a concern.

## **5.2 How would information on “unhealthy” land be dealt with after repeal?**

It is essential that there be no reduction in public information about unhealthy sites and that there is an ongoing mechanism for new sites to be properly recorded. The following arrangement would apply.

### **a) *Where contamination poses a significant risk of harm***

Where a site is contaminated to the point where it poses a significant risk of harm to human health or the environment and is being regulated by the EPA, it will now automatically appear on the public record under the *Contaminated Land Management Act 1997*. This record includes all declarations, orders and notations of voluntary agreements for site investigation and remediation and the EPA is required to ensure open public access to it.

### **b) *Where contamination does not pose a significant risk of harm***

Where sites are **not** considered to pose a significant risk of harm, but there is a need to have the current status of the site considered or addressed prior to a change of use or redevelopment, an appropriate mechanism for accessing relevant information must be available. The planning certificates issued by local councils under section 149 of the EP&A Act are the recognised mechanism to access information relating to a specific parcel of land. Councils are obliged to record under s.149(2) of the EP&A Act information prescribed by Schedule 4 of the EP&A Regulation. Additional factual information not prescribed in Schedule 4 can be recorded on certificates issued under s.149(5) of the EP&A Act.

The section 149 certificate mechanism is already used to report information about land regulated under the *Contaminated Land Management Act*. Councils are notified of declarations, orders and voluntary agreements to be recorded on section 149 certificates issued for that particular parcel of land. Where a site auditor accredited under the *Contaminated Land Management Act* has produced a formal Site Audit Statement, these also are required to be noted on the section 149 certificate when received by council (these Statements report on what the auditor has reviewed and may indicate what the site is suitable for).

For sites not regulated by the EPA, the 1998 *Managing Land Contamination: Planning Guidelines*, prepared by DUAP and the EPA, guide local council decision making and information management. This includes recommending council adoption of a formal policy to note restrictions on land use where

there is suspected or actual historical evidence of previous potentially contaminating activities. The *Planning Guidelines* also recommend councils to record additional historical factual information relating to land use. This provides a well established one-stop mechanism for purchasers of land to find out about most types of land that could potentially be declared UBL because of the identified presence of some form of waste or contamination (ie landfills, night soil depots, chemical contamination).

**c) *Information on low-lying land***

For low-lying land, relevant information is gained from the normal inquiries, such as section 149 certificates and other title searches and surveys, that are undertaken on behalf of prospective purchasers. Where the natural characteristics of such land prevent development, this is also commonly reflected by appropriate zoning in the local environmental plan, which must be noted on the section 149 certificate.

If information is properly recorded on section 149 certificates and reflected in the land zoning, then councils will already have to consider the factors which arise when processing development applications. This obviates the need for parallel consideration of the same matters by the EPA.

### **5.3 How would information on existing UBL declarations be accessed?**

Recognising the importance of robust records of existing UBL declarations, the preferred option for achieving the transition from the old system to the section 149 based system is to vary Schedule 4 of the EP&A Regulation to include section 149 certificate notation for all UBL declarations in force at the time of repeal of the UBL Act. Many councils effectively use Schedule 4 as a checklist for what should be included on section 149 certificates. Addition of UBL declarations would be consistent with other statutory affectations already required to be noted such as those dealing with roads, mine subsidence and coastal protection.

There would no longer be a need for an “extra” UBL inquiry, and the EPA would no longer maintain a register of UBL declarations. The notation could be removed by the planning authority when it is satisfied that the declaration is no longer necessary because works have been done to address the risk.

This approach would efficiently utilise the existing conveyancing mechanism of using section 149 certificates to access information regarding restrictions on land-use. There would be lower conveyancing costs for purchasers, landowners, and land developers, as a separate UBL inquiry would no longer be needed. The use of the section 149 mechanism would assist in a smooth transition to the new system because councils, the legal profession, conveyancers and the wider community are familiar with it and there would be minimal additional costs for councils.

Councils already have well developed land information systems and the cost of updating land information databases to include information about UBL would be a negligible one-off requirement. As shown in the following table, there is only one local council with more than twenty sites (Gosford LGA, the majority being low-lying land). The expected cost of administering the new arrangements per council area would therefore be negligible.



<b>No. of UBL Sites</b>	<b>No. of LGAs</b>
0	75
1-2	55
3-5	28
6-10	14
11-20	4
20+	1

It should also be noted that the EPA has provided this information to councils in the past, so in many cases it may already have been recorded.

#### **5.4 What support is available for councils?**

Should an individual council feel the need for expert advice to help deal with development proposals for UBL-declared land, the *Contaminated Land Management Act 1997* sets up a scheme of accredited site auditors to provide technical advice on such matters. Guidance on the use of the scheme is available in the 1998 NSW EPA *Guidelines for the NSW Site Auditor Scheme*.

#### **6. Who would benefit from repeal of the UBL Act?**

Particular beneficiaries of this proposal would be home purchasers, developers and planning authorities.

##### ***Home purchasers***

The biggest proportion of the estimated \$1.1 million per year spent on UBL searches of the CRR is for the sale and purchase of domestic dwellings. This reform would reduce the burden on a particularly cost-sensitive part of the community.

##### ***Developers***

Efficiencies and advantages for developers arise because there would no longer be any need for development “concurrence” from the EPA on UBL-declared properties. This would reduce costs incurred through delays and having to duplicate submission of necessary information to both councils and the EPA.

##### ***Planning authorities***

Councils and other planning authorities would also have reduced administration costs for development approval on UBL-declared properties through no longer having to seek the EPA’s concurrence before development could proceed. Consistent with the system already established by the contaminated land reform package, councils could require the proponent to engage an EPA accredited contaminated site auditor where councils required independent technical review of information provided by the proponent and assurance that the site was suitable for the proposed use. This can be included as a condition on the development consent.

## **7. Would you like to make a submission on this proposal?**

These proposals have been developed for public consideration, prior to any final Government decision on the matter.

Please comment on any aspect of this proposal that you choose. Comments and more detailed submissions can be sent to:

### ***Written submissions***

These should be sent to:

“Unhealthy Building Land Act”  
c/- Director Contaminated Sites  
Environment Protection Authority  
PO Box A290  
SYDNEY SOUTH NSW 1232

### ***Electronic submissions***

Copies of your submission can also be sent by email to: [ublreview@epa.nsw.gov.au](mailto:ublreview@epa.nsw.gov.au)

THE CLOSING DATE FOR SUBMISSIONS is 28 September 2001.

### ***Additional copies***

Additional copies of this discussion paper are available from the EPA Pollution Line on 131 555. It may also be accessed at the EPA website on <http://www.epa.nsw.gov.au/consult.htm>