

The background of the slide is a close-up photograph of a wooden surface, showing concentric growth rings and a natural wood grain pattern in shades of light brown and tan. Overlaid on this background are two horizontal bars: a teal bar on the left and a maroon bar on the right, which together form a dark green bar containing the title. A thin light blue horizontal line is positioned above the teal bar.

HENRY DAVIS YORK

# Asbestos Waste and Contamination

Gavin Shapiro Senior Associate 23 June 2017

# Scenario 1



## Facts

- Owner of site
- Lessee insolvent
- Lessee imported stockpiles
- Origin of stockpile uncertain
- Asbestos located in 2 of 5



# Scenario 1



## Issues

- Can the stockpiles be re-used?
- Can the stockpiles be buried onsite?
- Will authorities accept any levels of asbestos?
- If asbestos is found, is the stockpile all asbestos waste?



# Contamination vs pollution vs waste



## Contamination - Contaminated Land Management Act

- Above normal concentration and risk to human health or environment (prescribed levels)
- Contamination in situ/onsite

## Land Pollution - POEO Act

- Extremely broad. Also some relation to either risk to human health or environment, or property loss or damage that is not trivial
- Pollution either in situ or fluid

## Waste – POEO Act

- Harm/risk irrelevant
- From offsite only

# What is waste?



- POEO Act:

**waste** includes:

(a) any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or

(b) any discarded, rejected, unwanted, surplus or abandoned substance, or

(c) any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or....(d)...(e)...

...A substance is not precluded from being waste for the purposes of this Act merely because it is or may be processed, recycled, re-used or recovered.

# What is asbestos waste?



- Waste Classification Guidelines, POEO Act and Regulation
  - *Asbestos waste* means any waste that contains asbestos
- Foxman and VISY cases
- AS 4964-2004
- Draft Minimum Standards for RR C&D Waste
- NEPM?

# Scenario 2



## Facts

- Owner leases to sporting association
- Sub-lease to dirt bike club
- Dirt bike club imports “fill”
- Years later, fill found to contain asbestos



# Scenario 2



## Issues

- Who is liable?
- Can it be left in situ or is bulk removal required?
- What if lease has expired?





# Scenario 3

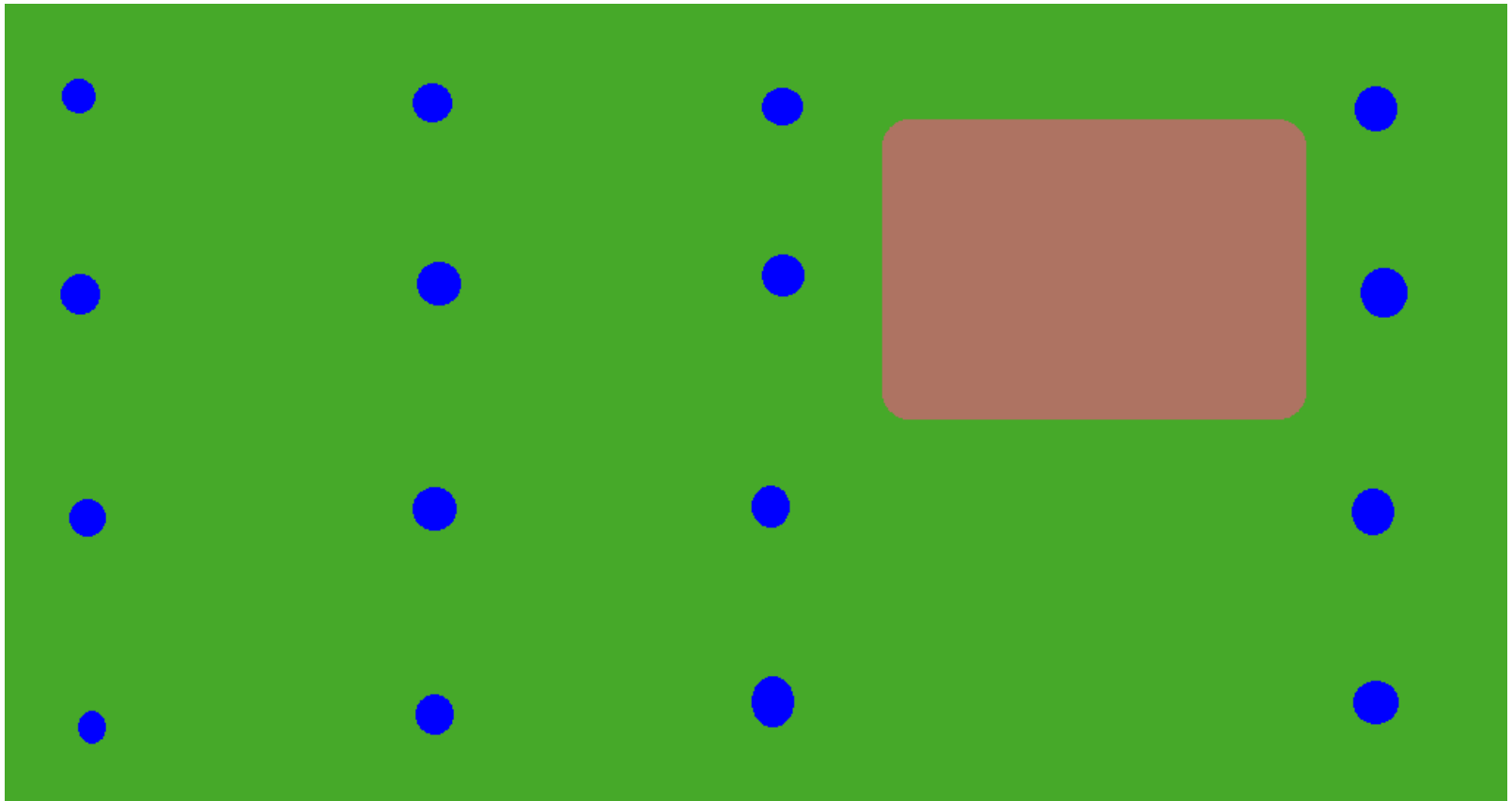


## Facts

- Purchaser
- Sale contracts (put call, etc) include investigation reports and requires remediation per RAP pre settlement
- Post settlement asbestos contaminated fill discovered  
asbestos contamination  
and geotechnical instability



# Scenario 3



# Scenario 3



## Issues

- Who is liable to remediate?
- What if required remediation doesn't suit redevelopment?
- Does purchaser have reliance on reports?
- Can report authors be sued?
- Misleading & deceptive conduct?
- Other remedies?



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# Lessons learned



- Is it waste? CLM or POEO?
- Be sure of the origin and classification
- Are there appropriate levels of asbestos?
- Does one asbestos find “ruin” an entire stockpile?
- Do lease/licence/sale terms cover:
  - Contamination (known and unknown)
  - Proposed use/fitness for purpose
  - When need to remediate/acceptable level of contamination
  - Import of “fill”/stockpiles
- Who can rely on a report? What can it be relied on for?

# Patterns in fines and enforcement



- ICAC RID Squad Officer Report – June 2017
- EPA very active in investigations
- Using investigations as the punishment
- Fines, publicity and alternative actions increasing
- Continued focus on asbestos in C&D (also new land pollution offence and new tracking system)
- Draft Minimum Standards for C&D Waste
- Kempsey Shire Council v Slade [2015] NSWLEC 135
- Dib Hanna – bringing it full circle....

**Any questions?**



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