



New South Wales

# Lake Macquarie Smelter Site (Perpetual Care of Land) Act 2019 No 9

## Contents

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	Page
<b>Part 1 Preliminary</b>	
1 Name of Act	2
2 Commencement	2
3 Definitions	2
4 Meaning of “owner”	3
<b>Part 2 Acquisition of site</b>	
5 Vesting of former smelter site	4
6 Application of Land Acquisition Act	4
<b>Part 3 Management of site</b>	
7 Ongoing management of containment cell and site	6
8 Ongoing management of contaminated land other than containment cell site	7
9 Development of land	7
<b>Part 4 Miscellaneous</b>	
10 Containment Cell Perpetual Care Fund	9
11 Displacement of Corporations legislation	9
12 Delegation	10
13 Arrangements	10

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	Page
14 Regulations	10
<b>Schedule 1 Transfer of land</b>	<b>11</b>
<b>Schedule 2 Savings, transitional and other provisions</b>	<b>13</b>



New South Wales

# Lake Macquarie Smelter Site (Perpetual Care of Land) Act 2019 No 9

Act No 9, 2019

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An Act to provide for the long-term management of certain contaminated land at Lake Macquarie; and for other purposes. [Assented to 28 August 2019]

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The Legislature of New South Wales enacts—

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Lake Macquarie Smelter Site (Perpetual Care of Land) Act 2019*.

### 2 Commencement

This Act commences on a day or days to be appointed by proclamation.

### 3 Definitions

(1) In this Act—

**containment cell** means the containment cell of around 20 hectares on Lot 599 DP 1228699 that contains material contaminated with heavy metals including lead.

**containment cell site** means that part of the former smelter site on which the containment cell and associated water treatment plant are located.

**contaminated land** means the following—

- (a) the containment cell site,
- (b) land forming part of the former smelter site that, immediately before 31 August 2018, was within Zone E2 Environmental Conservation under *Lake Macquarie Local Environmental Plan 2014*,
- (c) any land forming part of the former smelter site that has not been remediated by—
  - (i) removing, dispersing, destroying, reducing, mitigating or containing any contamination of the land, or
  - (ii) eliminating or reducing any hazard arising from any contamination of the land (including by preventing the entry of persons or animals onto the land).

**contamination** of land has the same meaning as in the *Contaminated Land Management Act 1997*.

**Development Corporation** means the Hunter and Central Coast Development Corporation constituted under the *Growth Centres (Development Corporations) Act 1974*.

**former smelter site** means land at Lake Macquarie, being Lot 599 DP 1228699, Lot 1 DP 225720, Lot 51 DP 1229360 and Lot 23 DP 251322.

**function** includes a power, authority or duty, and **exercise** a function includes perform a duty.

**government agency** means—

- (a) a Public Service agency within the meaning of the *Government Sector Employment Act 2013*, or
- (b) a NSW Government agency, or
- (c) a State owned corporation within the meaning of the *State Owned Corporations Act 1989*, or
- (d) a council, county council or joint organisation within the meaning of the *Local Government Act 1993*, or
- (e) any other public or local authority constituted by or under an Act, or
- (f) any person or body declared by the regulations to be a government agency.

**notification day** means the day on which a notice of motion to introduce the *Lake Macquarie Smelter Site (Perpetual Care of Land) Bill 2019* was first given in a House of Parliament.

**owner**—see section 4.

**Planning Secretary** has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

**vesting day** means the day on which section 5 commences.

**Note.** The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Notes included in this Act do not form part of this Act.

#### **4 Meaning of “owner”**

In this Act, **owner** of land at the former smelter site means—

- (a) the Development Corporation, or
- (b) for land transferred to a government agency under Schedule 1, that government agency.

## Part 2 Acquisition of site

### 5 Vesting of former smelter site

- (1) On the vesting day the former smelter site—
  - (a) is vested in the Development Corporation, and
  - (b) is freed and discharged from all estates, interests, trusts, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land other than a preserved interest.
- (2) The Development Corporation is entitled to vacant possession of the former smelter site on the vesting day and a person is entitled to remain in occupation only with the written agreement of the Development Corporation.
- (3) No compensation is payable to any person or body in connection with the operation of subsection (1) or (2), except as provided by section 6.
- (4) In this section—

**preserved interest** means any of the following interests shown on the title of land forming part of the former smelter site immediately before the notification day—

  - (a) an easement,
  - (b) an access right,
  - (c) a covenant,
  - (d) a restriction on use,
  - (e) a leasehold interest.

### 6 Application of Land Acquisition Act

- (1) The vesting of the former smelter site under this Act is taken to be a compulsory acquisition by the Development Corporation by acquisition notice under the Land Acquisition Act.
- (2) The acquisition notice is taken to be published on the vesting day.
- (3) Only Part 3 of the Land Acquisition Act applies to the acquisition and that Part applies subject to this section and the regulations.
- (4) Subsections (5)–(10) apply when determining, for the purposes of the Land Acquisition Act, the amount of compensation to which a person is entitled for the acquisition of an interest in land at the former smelter site.
- (5) The date of acquisition is taken to be the day immediately before the notification day.
- (6) Each of the following is taken to be nil—
  - (a) the matters set out in section 55(c) and (f) of the Land Acquisition Act,
  - (b) the loss attributable to disturbance of land under paragraph (f) of the definition of **loss attributable to disturbance** in section 59 of the Land Acquisition Act.
- (7) The following (the **future costs of managing contamination** of the former smelter site) must be taken into account when determining the market value or special value of an interest in land at the former smelter site—
  - (a) the net present value of the cost of exercising the functions of the owner of the containment cell site under section 7 in perpetuity,
  - (b) the net present value of the cost of exercising the function of the owner of contaminated land other than the containment cell site under section 8 in perpetuity.

- (8) Any limitation (a **legislative limitation**) on the use of land at the former smelter site by or under an Act (including any of the following Acts) must be taken into account when determining the market value or special value of an interest in land at the former smelter site—
- (a) the *Contaminated Land Management Act 1997*,
  - (b) the *Environmental Planning and Assessment Act 1979*,
  - (c) the *Local Government Act 1993*,
  - (d) the *Protection of the Environment Operations Act 1997*.
- (9) The future costs of managing contamination of the former smelter site and any legislative limitations on the use of land at the former smelter site are taken to be costs affecting the value of all interests in land at the former smelter site regardless of whether—
- (a) the land is contaminated land, or
  - (b) the legislative limitation applies to the land.
- (10) A person or a court or tribunal, in determining the amount of compensation, must have regard to, and is entitled to rely on, estimates provided by a government agency (including in reports obtained by a government agency) of the matters set out in subsection (7)(a) and (b).
- (11) In this section—  
**Land Acquisition Act** means the *Land Acquisition (Just Terms Compensation) Act 1991*.

## Part 3 Management of site

### 7 Ongoing management of containment cell and site

- (1) The owner of the containment cell site has the functions of—
  - (a) monitoring, maintaining and repairing the containment cell and associated infrastructure, and
  - (b) when necessary, replacing all or part of the containment cell and associated infrastructure, and
  - (c) managing the land to protect the environment and the public from any risk from contamination of the land.
- (2) The Planning Secretary and the EPA may approve a management plan for the ongoing management of the containment cell and associated infrastructure and the containment cell site.
- (3) The management plan must not be approved unless it includes the following—
  - (a) the requirements for the monitoring, maintenance and repair of the containment cell and associated infrastructure,
  - (b) the requirements for replacing all or part of the containment cell and associated infrastructure,
  - (c) the requirements for managing water on the containment cell site and minimising the discharge of pollutants from the site, including—
    - (i) requirements to maintain and operate a water treatment plant for the site, and
    - (ii) requirements to maintain and operate groundwater pumping systems and other water management systems, and
    - (iii) requirements to manage surface water, groundwater and leachates, and
    - (iv) requirements to monitor the quality of water and leachates,
  - (d) the requirements for vegetation on the containment cell site, including planting and maintaining vegetation,
  - (e) the restrictions on the uses of the containment cell site,
  - (f) the actions to be taken to prevent contamination of surrounding land, air or water,
  - (g) any other matter prescribed by the regulations.
- (4) The owner of the containment cell site—
  - (a) may amend or replace an approved management plan with the approval of the Planning Secretary and the EPA, and
  - (b) must, if directed to do so by the Planning Secretary and the EPA, amend or replace an approved management plan in accordance with the direction.
- (5) The owner of the containment cell site—
  - (a) must exercise its functions under subsection (1) in accordance with an approved management plan, and
  - (b) must otherwise ensure that an approved management plan is implemented.
- (6) In this section—

***approved management plan*** means a management plan approved by the Planning Secretary and the EPA, as amended or replaced from time to time in accordance with this section.



*EPA* means the Environment Protection Authority constituted by the *Protection of the Environment Administration Act 1991*.

## 8 Ongoing management of contaminated land other than containment cell site

- (1) The owner of contaminated land other than the containment cell site has the function of managing the land to protect the environment and the public from any risk from contamination of the land.
- (2) The Planning Secretary may approve a management plan for the ongoing management of contaminated land other than the containment cell site.
- (3) The management plan must not be approved unless it includes the following—
  - (a) a clear description of the land to which it applies,
  - (b) a description of the extent of the contamination that exists on the land,
  - (c) the environmental measures and controls that are to be applied to the land,
  - (d) an outline of how public health will be protected from contamination of the land,
  - (e) the measures to ensure access to the land is restricted,
  - (f) the measures to manage surface water, erosion and sedimentation,
  - (g) the requirements for vegetation on the land, including planting and maintaining vegetation,
  - (h) any other matter prescribed by the regulations.
- (4) Different management plans may be approved for different land.
- (5) The owner of land—
  - (a) may amend or replace an approved management plan for the land with the approval of the Planning Secretary, and
  - (b) must, if directed to do so by the Planning Secretary, amend or replace an approved management plan for the land in accordance with the direction.
- (6) The owner of land—
  - (a) must exercise its function under subsection (1) in accordance with an approved management plan for the land, and
  - (b) must otherwise ensure that an approved management plan is implemented.
- (7) In this section—

***approved management plan*** means a management plan approved by the Planning Secretary, as amended or replaced from time to time in accordance with this section.

## 9 Development of land

- (1) This section does not apply to contaminated land.
- (2) The owner of land that is part of the former smelter site—
  - (a) is to facilitate the development of the land, and
  - (b) if the owner is not a development corporation, has and may exercise development corporation functions in relation to the land, and
  - (c) even if the owner is a development corporation, does not require an approval under section 11 of the *Growth Centres (Development Corporations) Act 1974* to exercise any development corporation function in relation to the land.

- (3) An owner of land that is part of the former smelter site may enter into an agreement with a person to sell the land to that person without first making the land available for public sale if the person—
- (a) had, immediately before the notification day, a contract to purchase land forming part of the former smelter site, or
  - (b) had, before the notification day, engaged in negotiations to purchase land forming part of the former smelter site with the owner of the land.
- (4) In this section—
- development corporation functions***, in relation to land, means the functions that a development corporation has under the *Growth Centres (Development Corporations) Act 1974* in relation to land forming part of the growth centre in respect of which the development corporation is constituted.

## Part 4 Miscellaneous

### 10 Containment Cell Perpetual Care Fund

- (1) There is to be established in the Special Deposits Account a Containment Cell Perpetual Care Fund (the *Fund*).
- (2) The Fund is to be administered by the *Fund Administrator*, being—
  - (a) the Development Corporation, or
  - (b) if the regulations prescribe another owner as the Fund Administrator, that owner.
- (3) The following are to be paid into the Fund—
  - (a) the proceeds of the sale by an owner of any part of the former smelter site (less any amount that the owner would be entitled to be paid from the Fund under subsection (4)(a) or (b)),
  - (b) any money received by an owner for the grant of an interest or other right in relation to the former smelter site,
  - (c) any money paid to the Crown or a government agency as a result of legal proceedings (including damages or compensation or an amount paid in settlement of a claim) for obligations in relation to the former smelter site (less any relevant legal costs),
  - (d) any money appropriated by Parliament for the purposes of the Fund,
  - (e) the proceeds of the investment of money in the Fund,
  - (f) any money required or authorised to be paid into the Fund by or under this or any other Act.
- (4) The following are to be paid from the Fund—
  - (a) all amounts required to meet expenditure incurred by an owner in exercising its functions under this Act,
  - (b) any compensation payable as a consequence of the vesting of the former smelter site under Part 2,
  - (c) expenses incurred in administering the Fund,
  - (d) all other payments required by or under this or any other Act to be paid from the Fund.
- (5) The Fund Administrator may invest money in the Fund—
  - (a) if the Fund Administrator is a GSF agency for the purposes of Part 6 of the *Government Sector Finance Act 2018*—in any way that the Fund Administrator is permitted to invest money under that Part, or
  - (b) if the Fund Administrator is not a GSF agency for the purposes of Part 6 of the *Government Sector Finance Act 2018*—in any way approved by the Minister with the concurrence of the Treasurer.

### 11 Displacement of Corporations legislation

Sections 5, 6 and 10 are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth in relation to the provisions of the Corporations legislation generally.

**Note.** Section 5G of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

## **12 Delegation**

- (1) An owner may delegate the exercise of any function of the owner under this Act (other than this power of delegation) to—
  - (a) an employee of the owner, or
  - (b) an employee of a government agency, or
  - (c) any person, or any class of persons, authorised for the purposes of this section by the regulations.
- (2) The Planning Secretary may delegate the exercise of any function of the Planning Secretary under this Act (other than this power of delegation) to any person or body to whom the Planning Secretary is authorised to delegate a function under the *Environmental Planning and Assessment Act 1979*.

## **13 Arrangements**

- (1) A government agency may exercise a function of an owner under this Act in accordance with an arrangement between the government agency and the owner.
- (2) The owner is to ensure that the Planning Secretary is notified of the arrangement.

## **14 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

## Schedule 1 Transfer of land

### Part 1 Transfer of land

#### 1 Definitions

In this Schedule—

**transfer day**, in relation to land described in Part 2 of this Schedule, means the day specified in that Part in relation to the land.

**transferee**, in relation to land described in Part 2 of this Schedule, means the government agency specified in that Part in relation to the land.

**transferor**, in relation to land described in Part 2 of this Schedule, means the government agency in which the land was vested immediately before the transfer day.

#### 2 Transfer of land described in Part 2 of this Schedule

- (1) On the transfer day relating to land described in Part 2 of this Schedule, the land vests in the transferee for an estate in fee simple—
  - (a) without the need for any further conveyance, transfer, assignment or assurance, and
  - (b) subject to any trusts, estates, interests, dedications, conditions, restrictions and covenants to which the land was subject immediately before the transfer day.
- (2) On the transfer day relating to land described in Part 2 of this Schedule, the following provisions have effect—
  - (a) the rights or liabilities of the transferor in relation to the land become by virtue of this clause the rights or liabilities of the transferee,
  - (b) all proceedings relating to the land commenced before the transfer day by or against the transferor and pending immediately before the transfer day are taken to be proceedings pending by or against the transferee,
  - (c) any act, matter or thing done or omitted to be done in relation to the land before the transfer day by, to or in respect of the transferor is (to the extent to which that act, matter or thing has any force or effect) taken to have been done or omitted to be done by, to or in respect of the transferee,
  - (d) a reference in any Act, in any instrument made under any Act or in any document of any kind to the transferor is (to the extent that it relates to that land or those rights or liabilities but subject to the regulations) to be read as, or as including, a reference to the transferee.

#### 3 Order of the Governor

- (1) The Governor may, by order published on the NSW legislation website, amend Part 2 of this Schedule by inserting the description of land and by specifying the government agency that is to be the transferee and the day that is to be the transfer day.
- (2) Land is authorised to be included in Part 2 of this Schedule by order under this clause only if—
  - (a) it is land forming part of the former smelter site, and
  - (b) the appropriate consent has been obtained to the land being included in the order.
- (3) For the purposes of subclause (2), the appropriate consent is—

- (a) where the government agency to be specified is not a local authority—the consent of the Minister responsible for the government agency, or
  - (b) where the government agency to be specified is a local authority—the consent of the local authority.
- (4) Subject to the other provisions of this clause, land may be transferred under this Schedule despite any requirement of any other Act or law that relates to dealing with or disposing of the land.
- (5) The Governor may make more than one order under this clause for the same land.

#### **4 Effect of transfer of land under this Schedule**

- (1) No compensation is payable to any person or body in connection with the operation of this Schedule.
- (2) The operation of this Schedule is not to be regarded—
- (a) as a breach of contract or confidence or otherwise as a civil wrong, or
  - (b) as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities, or
  - (c) as giving rise to any remedy by a party to an instrument, or as causing or permitting the termination of any instrument, because of a change in the beneficial or legal ownership of any asset, right or liability.
- (3) The operation of this Schedule is not to be regarded as an event of default under any contract or other instrument.
- (4) No attornment to the transferee by a lessee from a transferor is required.

#### **5 State taxes not chargeable**

State tax is not chargeable in relation to—

- (a) a transfer of land under this Schedule, or
- (b) anything certified by the Minister as having been done in consequence of a transfer of land under this Schedule.

## **Part 2 Land transferred**

<b>Land</b>	<b>Transferee</b>	<b>Transfer day</b>
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## **Schedule 2 Savings, transitional and other provisions**

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on—
  - (a) the enactment of this Act or any Act that amends this Act, or
  - (b) the making of any order that amends Part 2 of Schedule 1.
- (2) Any such provision—
  - (a) may, if the regulations so provide, take effect from the date of assent to the Act (or the making of the order) concerned or a later date, and
  - (b) has effect despite anything to the contrary in this Schedule.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as—
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.
- (4) Without limiting subclauses (1) and (2), regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

### **Part 2 Provisions consequent on enactment of this Act**

#### **2 Existing environment protection licence**

- (1) Environment protection licence number 5042 under the *Protection of the Environment Operations Act 1997* is on the vesting day, and despite section 54 of that Act, transferred to the Development Corporation.
- (2) The Development Corporation holds the licence on the same terms as the licence was held immediately before the vesting day.
- (3) If the person holding the licence has paid any annual fee in advance for a period that includes a period after the vesting day, the Development Corporation is to pay the person the portion of the fee that is equivalent to the period for which the Development Corporation obtains the benefit of that fee.
- (4) No compensation is payable to any person or body in connection with the operation of this clause, except as provided by subclause (3).

### **3 Existing contaminated land management orders**

The Development Corporation is taken to be specified as an appropriate person in a management order under the *Contaminated Land Management Act 1997* and to be subject to the management order if the management order is in force in relation to the contaminated land immediately before the vesting day.

[Second reading speech made in—  
Legislative Assembly on 20 August 2019  
Legislative Council on 21 August 2019]