

# CONTAMINATED LAND IN NEW SOUTH WALES

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The liability for land holders, purchasers, sellers, business operators and developers of contaminated land has the potential to make an initially attractive investment commercially unviable or unattractive. It is therefore critical that contaminated land issues be at the forefront of the minds of persons who own land which is used for, or who operate businesses with, environmentally sensitive operations.

The legislative framework in New South Wales is particularly onerous in regard to reporting obligations and the potential for a person who did not cause contamination to be held responsible is far higher than in other jurisdictions. It is due to this that all businesses, but particularly the downstream petroleum industry and land developers, should be aware of the compliance requirements for contaminated land.

In this guide, Alexandra Geelan of [Moulis Legal](#) considers the key risks, obligations and liabilities affecting owners and occupiers of contaminated land in New South Wales. Contact our specialised [property and downstream petroleum lawyers](#) for further information and assistance on these issues.

## THE REGULATION OF CONTAMINATED LAND IN NEW SOUTH WALES

Contaminated land in New South Wales is managed by the Environment Protection Authority ('EPA') exercising its powers under the Contaminated Land Management Act 1997 (NSW) which establishes a process for investigating and remediating significantly contaminated land.

The EPA maintains two lists for contaminated land. Sites listed on the 'List of NSW contaminated sites notified to the EPA' indicate that the notifier considers that the site is contaminated but the EPA has not reviewed, or finished reviewing the site and the contamination may or may not warrant regulation. Sites listed on the 'Contaminated Land: Record of Notices' have been issued with a regulatory notice under the Contaminated Land Management Act 1997 (NSW).

## REPORTING AND NOTIFICATION OBLIGATIONS

### *Duty to notify of land contamination*

A person whose activities have contaminated land, and owners of land that has been contaminated, have a duty to notify the EPA, in writing and as soon as practicable, that the land has been contaminated. The duty to notify will arise if contamination has or is likely to migrate to neighbouring sites, or meets or exceeds any criteria set out in the Contaminated Land Management Regulation 2013 and any applicable guidelines.

Under the Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997 released in July 2015, whether or not a person is obligated to notify of contamination will depend on a range of factors including the person's background, circumstances of the contamination and whether the person could have reasonably sought advice that would have made the person aware of the contamination. When in doubt, it would be prudent for land owners and occupiers to seek advice from land contamination experts and, in some cases, business operators may have a positive duty to proactively investigate land.

### *Duty to notify EPA of change of ownership*

If a person is issued with an order under the Contaminated Land Management Act 1997 (NSW), the order may contain a condition that the person inform the EPA of any change in the ownership or occupancy of the land. If a person fails to comply with an order, they may be committing an offence and be liable for significant financial penalties.

### *Reporting to EPA*

The EPA is transitioning in new reporting requirements and from 1 July 2017, all reports submitted to the EPA to comply with the Contaminated Land Management Act 1997 must be prepared, or reviewed and approved by a certified contaminated land consultant.

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## INVESTIGATION OF CONTAMINATED LAND

If the EPA reasonably believes that land is contaminated, and that the contamination is significant enough to warrant regulation, the EPA may declare the land to be 'significantly contaminated land' by publishing a notice in the Gazette. Any person may then make submissions to the EPA on whether a management order should be served (see further information below).

### *Land that is not 'significantly' contaminated*

If the EPA determines that a contaminated site does not present a risk to human health or the environment and therefore, does not warrant regulation under the Contaminated Land Management Act 1997 (NSW), the contamination issues should be addressed by the owner or occupier and the local council under the Protection of the Environment (Operations) Act 1997 (NSW).

The Protection of the Environment (Operations) Act 1997 imposes a duty on land owners, occupiers, employees and agents to notify the relevant authority (i.e. the EPA, local authority or other public authorities) if a pollution incident occurs and enables local councils to investigate pollution and issue prevention notices and clean-up notices.

Councils can also require environmental audits and remediation work to be carried out as a condition of a licence or development approval.

### *Preliminary investigation order*

The EPA may issue a preliminary investigation order ('PIO') on a person for the purpose of determining whether land should be declared regulated land. A PIO directs the person to investigate whether the land is contaminated with the substances specified in the order, and the nature and extent of any such contamination and requires that the person report back to the EPA with the results of the investigation.

### *Site Audits*

A statutory site audit is a review of actual or possibly contaminated land for the purpose of determining the nature and extent of any contamination, the suitable use of the land, what management is required and the suitability of a plan of management.

A site audit is carried out in order to secure compliance with the regulatory framework and must be carried out by an accredited site auditor. At the conclusion of the audit, the site auditor will produce a site audit statement outlining the conclusions of the audit and provide an accompanying report.

## REMEDIATION AND MANAGEMENT OF CONTAMINATED LAND

### *Voluntary management proposals*

A person may submit a voluntary management proposal to the EPA for approval which outlines the actions the person proposes to take to remediate or manage significantly contaminated land. The EPA can either approve the proposal as submitted or impose additional conditions. If the terms of the approved proposal are not carried out, the EPA may then serve a management order on the person.

### *Management Orders and Ongoing Management Orders*

If the EPA is satisfied that land is significantly contaminated, it may by order in writing, direct a person to carry out any action in relation to the management of the land as specified in the order and/or submit a plan of management to the EPA for approval. The order can also require the person to provide a financial assurance or guarantee of funding for carrying out the required action. Once served with a management order, the person must not, without reasonable excuse, fail to comply with the order.

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The EPA may also serve an ongoing management order on a person requiring them to carry out ongoing monitoring and maintenance of the land, provide reports and inform the EPA of any changes in occupancy, and/or not use the land for specified purposes.

More than one order or notice may be served on the same person or in respect of the same land.

### LIABILITY FOR LAND CONTAMINATION

As with other jurisdictions in Australia, contaminated land liability in New South Wales is premised on the polluter pays principle whereby the business or individual responsible for contamination is liable for any associated costs including remediation, compensation and any penalties.

However, the Contaminated Land Management Act 1997 (NSW) provides that, where the polluter cannot be identified or located, or it is not practicable to hold the polluter responsible, liability can be shifted to the owner or notional owner (in that order).

A person will be responsible for contamination of land if, unless it is proved otherwise, that person:

1. caused the contamination;
2. performed an act that resulted in conversion of a substance that did not cause contamination into a substance that did;
3. the person is the owner or occupier and knew, or ought reasonably to have known that contamination would occur and failed to take reasonable steps to prevent contamination; or
4. carried on activities that generate or consume the same substance(s) that caused the contamination or substances that can be converted into substances the same as those that caused the contamination.

Tenants or occupiers in particular should note point 4 above as occupiers who take over or continue a business from a previous occupier would be carrying on activities that generate or consume the same substance as the contamination. Therefore, they may be deemed a person responsible for contamination even where the contamination actually occurred before their occupancy (unless they can prove they did not cause the contamination). Incoming occupiers should consider obtaining a baseline report at the start of a lease and should carefully consider indemnity and warranty provisions in any transaction involving actual or suspected contaminated land.

#### *Contracting out of contaminated land liability*

The Contaminated Land Management Act 1997 (NSW) expressly states that a person responsible for contamination will remain responsible regardless of any contract or arrangement to the contrary. It is, therefore, vital that all purchasers of potentially contaminated land conduct thorough due diligence, ensure adequate disclosure and negotiate warranties and indemnities to reduce their potential liability and increase their likelihood of successfully claiming some or all losses from the vendor.

*This guide presents an overview and commentary of the subject matter. It is not provided in the context of a solicitor-client relationship and no duty of care is assumed or accepted. It does not constitute legal advice.*



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