

CONTAMINATED LAND IN VICTORIA

Compliance with contaminated land regulations is a key issue for all businesses operating environmentally sensitive operations. Owners or occupiers who fail to understand their obligations may find themselves liable for not only extensive remediation work but also for heavy penalties.

Business owners and operators within the downstream petroleum industry are particularly vulnerable to contaminated land liability and can find they are directly liable for historical contamination. It is therefore vital that all business involved in the storage, handling and distribution of fuel products ensure that they have appropriate risk management strategies and contractual protections.

In this guide, Alexandra Geelan of [Moulis Legal](#) provides an overview of the key risks, obligations and liabilities relating to contaminated land in Victoria. Contact our specialised [property and downstream petroleum lawyers](#) for further information and assistance relating to your particular circumstances.

THE REGULATION OF CONTAMINATED LAND IN VICTORIA

The key piece of environmental legislation in Victoria is the *Environment Protection Act 1970* (Vic) ('the EP Act') which establishes the Environment Protection Authority ('the EPA'). The EPA, together with local councils, is responsible for the investigation, remediation and management of contaminated sites.

The EP Act is complemented by the *State Environment Protection Policy (Prevention and Management of Contamination of Land) 2002* (Vic) ('the SEPP') which details the requirements for the prevention, management and remediation of contamination in Victoria. The SEPP contains six categories of land use (such as agricultural, industrial, commercial) and the EPA will determine which land use category a site belongs to.

For each land use category, there are a number of beneficial uses (such as production of food, aesthetics, maintenance of ecosystems) that are considered appropriate, and desirable, uses for the land and these beneficial uses are to be protected.

A site will be considered contaminated when the level of any contaminant at the site precludes one or more of the protected beneficial uses of the land.

Priority Sites Register

The Priority Sites Register is maintained by the EPA and lists sites for which the EPA has issued a clean-up or pollution abatement notice. Sites on the Priority Sites Register are considered to be incompatible with the current or proposed land use due to the risk that they pose to human health or the environment and these sites require active management.

HIERARCHY OF LIABILITY AND BUSINESS RISKS

Similar to the other Australian jurisdictions, contaminated land liability in Victoria is governed by the overarching *polluter pays* principle whereby the person who generates pollution or waste and causes contamination is responsible for the cost of containment, avoidance and abatement.

However, in Victoria, primary liability is with the occupier. The presumption is that if the environment is polluted as a result of discharge or emission from any premises conducting commercial or industrial business, the occupier caused the pollution unless they can prove otherwise. This presumption poses a significant risk to owners and occupiers irrespective of whether they caused the contamination.

The *hierarchy of liability* in Victoria is contained in section 31A of the EP Act which states that the EPA may serve a pollution abatement notice on:

1. the occupier of the premises;
2. the person responsible for the process or activity carried on or proposed to be carried on; or
3. the person responsible for the use or proposed use of the premises.

‘Occupier’ means any person who is in occupation or control of the premises regardless of whether that person is the owner of the premises. This is important for tenants and, in certain circumstances, mortgagees in possession who fall within this definition and may be presumed to be liable for contamination.

Contracting out of environmental liability

A vendor in Victoria is not prohibited from contracting out of all historical or future environmental and contamination liability like some other Australian jurisdictions.

It is critical for purchasers and lessees of potentially contaminated land, such as service stations and fuel depots, to undertake thorough due diligence, ensure adequate disclosure and negotiate effective warranties and indemnities to reduce their potential liability.

REPORTING AND NOTIFICATION OBLIGATIONS

There is no mandatory requirement for owners, occupiers or third parties to report an event which may result in contamination or constitute a risk to human health or the environment to the EPA. Anyone, including members of the public, can report pollution to the EPA however, they are not obligated to.

The only mandatory reporting obligation is on contaminated land auditors who are required to notify a contaminated site to the EPA within 7 days of being engaged to conduct an audit or as soon as practicable after becoming aware of contamination or a significant environmental hazard.

Duty of notify potential occupier

Where an owner or occupier agrees, or proposes, to sell or lease their premises and they have been served with notice from the EPA which is still in force, they must notify the potential new owner or occupier of the notice. The notice must advise the potential occupier of the compliance requirements and any steps that have been taken to comply with the notice.

In addition, where an occupier has received a Statement of Environmental Audit (discussed below), they must provide a copy of the Statement to any person who proposes to become the occupier of the premises.

If a prior site occupier fails to provide the notice, the new occupier may, within 12 months of becoming the occupier, recover from the previous occupier any reasonable costs incurred in compliance with the terms and conditions of the Statement or notice.

INVESTIGATION OF CONTAMINATED LAND

The EPA may, either as a condition of a works approval or licence or by written notice, require the occupier of a premise to undertake or commission a site contamination assessment. The purpose of the assessment is to determine the nature, extent and levels of existing contamination as well as the risk to the protected beneficial uses associated with the site and the surrounding sites.

Following the assessment, if the contaminated land auditor considers that the condition of the site is not detrimental to any protected beneficial use, the auditor will produce a Certificate of Environmental Audit clearing the site for continued use. Otherwise, the auditor will provide a Statement of Environmental Audit which outlines the reasons the auditor considers that the current condition of the land is detrimental to a beneficial use and the conditions that need to be complied with before a Certificate may be issued.

Where contamination precludes a protected beneficial use of the land, a state of pollution is deemed to exist and the land must be cleaned up or managed to eliminate any threat to human health and allow the protected beneficial uses.

CLEAN-UP AND MANAGEMENT OF CONTAMINATED LAND

Clean-up and ongoing management measures may be undertaken either voluntarily or may be required by the EPA or local council.

Pollution abatement notices

The EPA may serve a pollution abatement notice (or a minor works pollution abatement notice where the costs of compliance are estimated to be under \$50,000 and urgent action is required) on the occupier of a premises or the person responsible for an activity which has or is likely to cause pollution or has created an environmental

hazard. The notice specifies the actions the EPA requires the person to take including but not limited to ceasing or modifying any process or activity, carrying out a monitoring programme, reporting to the EPA or complying with an improvement plan.

Clean-up and ongoing management notices

The EPA may also serve a notice directing the occupier of a premises or the person responsible for an activity involving industrial waste or a potentially hazardous substance to take the clean-up and ongoing management measures as specified in the notice such as undertaking remediation works, stopping works or changing a process or activity. Again, non-compliance with the notice is an offence.

The EPA's *Compliance and Enforcement Policy* emphasises a risk-based model whereby it priorities its compliance and monitoring towards sites or operations that pose the largest risk of harm to human health or the environment and those operators most likely to breach a duty or obligation under the law. The Policy encourages occupiers and business operators to work with the EPA towards resolution of a non-compliance issue.

A decision by the EPA to issue a licence, permit or notice may be appealed by the affected person to the Victorian Civil and Administrative Tribunal and the Tribunal has broad powers to vary, revoke or affirm a decision of the EPA.

Business operators should ensure that they regularly communicate with the EPA and are transparent in their dealings with the authorities to ensure the issues are managed in a way that reduces their costs of and liability for remediation.

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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