

CONTAMINATED LAND IN THE AUSTRALIAN CAPITAL TERRITORY

Individuals and businesses undertaking environmentally sensitive activities should be aware of the legislative regime that applies to contaminated sites. This awareness will allow parties to consider the potential effect that any remediation costs and/or penalties may have on the commercial viability of their business. Further, an awareness and understanding of the legislative regime will allow businesses and individuals to develop and implement risk management strategies, regulatory compliance and contractual protections.

In particular, the storage, handling and distribution of fuel products exposes businesses operating in the downstream petroleum industry to potential historical and future contamination and environmental management issues.

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

THE REGULATION OF CONTAMINATED LAND IN THE AUSTRALIAN CAPITAL TERRITORY

Contaminated land in the Australian Capital Territory is regulated by and managed under the *Environment Protection Act 1997* (ACT) ('EP Act') which is administered by the Environment Protection Authority ('EPA').

The *Contaminated Sites Environment Protection Policy 2009* clarifies the application of the EP Act and provides guidelines for assessing and remediating contaminated land.

Under the EP Act, a contaminated site is a site at which a substance occurs at concentrations above background levels which causes, or is likely to cause, a risk of harm to human health and/or the environment.

REPORTING AND NOTIFICATION OBLIGATIONS

Public Records

The EPA maintains the Register of Contaminated Sites which contains details of sites which have been issued with an Environment Protection Order relating to the assessment, remediation and/or ongoing management of the site.

The EPA also records information for sites that are known to be, or have the potential to be contaminated and allows public inspection of a range of documents including environmental authorisations, results of monitoring or testing, environmental audit reports, and other key documents.

Purchasers or potential tenants should ensure that they consult all the EPA's records as a key part of their due diligence and should be careful not to confine their investigations to the Register only.

Duty to report actual or threatened environmental harm

The EP Act imposes a 'general environmental duty' on all persons carrying on activities to take all steps that are practicable and reasonable to prevent or minimise environmental harm or nuisance.

'Environmental harm' is broadly defined in the EP Act as any impact on the environment as a result of human activity that has the effect of degrading the environment whether temporarily or permanently.

If a person conducting an activity becomes aware that the activity has caused, is causing or is likely to cause environmental harm, that person must as soon as reasonably practicable, notify the EPA of the environmental situation, its nature, any action that has been taken to manage the situation and any environmental harm that has resulted.

The occupier, including a sublessee or underlessee of the land, also has a duty to notify the EPA in writing as soon as practicable after becoming aware that land is contaminated in such a way as to present a significant risk of harm to human health or a risk of material or serious environmental harm.

HIERARCHY OF LIABILITY FOR CONTAMINATED LAND

The EP Act introduces the concept of an 'appropriate person' to provide the hierarchy of liability for contaminated land in line with the *polluter pays* principle. This principle broadly provides that where a person is responsible for causing contamination, they are liable for all associated costs including remediation, compensation and any penalties.

The appropriate person is chosen from the following people in the following order:

1. the person who was responsible for contamination of the land or if not practicable;
2. either the Crown lessee of the land, or if the land is subleased, then the sublessee of the land (irrespective of whether the person had a responsibility for contamination) or if not practicable;
3. the notional lessee of the land (irrespective of whether the person had an responsibility for contamination).

It is not practicable to choose a person as the appropriate person if the person cannot be identified or located, or does not have adequate resources to remediate the contamination.

A 'notional lessee' is any person who has vested rights in relation to land that carries an entitlement to have the Crown lease (or sublease) transferred to them or enables them to dispose of or otherwise deal with the land so that the person is able to benefit from the transfer, disposal or dealing and can include a mortgagee in possession.

Contracting out of environmental liability

The EP Act does not preclude a person from transferring all historical or future liability for contaminated land to incoming purchasers and tenants.

The majority of contaminated land issues are historical in nature and therefore, all purchasers and prospective tenants of potentially contaminated land should have a thorough understanding of the extent of liability being assumed. Conducting comprehensive due diligence, ensuring adequate disclosure and negotiating effective warranties and indemnities are all key steps to minimise liability and safeguard the long-term commercial and financial viability of a business.

ASSESSMENT, MANAGEMENT AND REMEDIATION OF CONTAMINATED LAND

Voluntary Assessment and Remediation

Generally, a site assessment would be required if there is a proposed change to the land use where the past land use may have caused contamination. If so, assessment (and, if required, remediation) is generally undertaken voluntarily by the Crown lessee or developer who would be the beneficiary of the change and would be overseen by the ACT Planning and Land Authority as part of the development approval process.

An assessment may also be required where the EPA has received notification of the existence of contamination at a site in accordance with the reporting requirements above.

If the EPA considers that a site assessment is required, the EPA initially seeks to enter into an environmental protection agreement with the person conducting a relevant activity. The agreement may contain any terms the parties consider appropriate including terms related to assessment and remediation of land and will usually require a party to the agreement to manage the site in accordance with a Site Audit Statement and/or Site Management Plan.

Mandatory Assessment and Remediation

If an agreement cannot be reached, the EPA may serve a written assessment order on the appropriate person requiring them to conduct or commission an assessment and report back to the EPA. It may also require a person to commission an environmental audit which is an independent review of an assessment or remediation by an accredited contaminated land auditor.

Following the completion of the assessment and/or audit, if the EPA has reasonable grounds for believing that the land is contaminated so as to present a risk to human health or the environment, it may serve a remediation order on the relevant person ordering them to remediate the land.

Where the EPA is satisfied that land is contaminated but that the current or proposed land use does not or is not likely to cause harm to human health or the environment either in its current condition, or if certain conditions or containment measures are complied with, the EPA may serve an environment protection order on the person. The EPA may impose such requirements it considers reasonably required including that the person stop or not begin an activity, take specified action to remedy, prevent or mitigate environmental harm and/or provide specified information to the EPA.

For most decisions made by the EPA under the EP Act (including the decision to order a person to conduct an assessment or remediation), the person whose interests are affected by the decision may apply to the EPA for internal review of the decision or may apply to the ACT Civil and Administrative Tribunal for review. The EPA must review the decision within 28 days after receiving an application for review and can either confirm the decision, vary the decision or set aside the decision and substitute another decision.

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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