CONTAMINATED LAND IN QUEENSLAND

Complying with regulations and managing contaminated land is a critical issue for businesses that use or impact on land. Land holders, land purchasers and sellers and businesses with environmentally sensitive operations need to be aware of their key risks, obligations and liabilities.

Businesses operating in the downstream petroleum industry are especially affected by contaminated land issues. The storage, handling and distribution of fuel products exposes petroleum businesses to potential contamination and environmental management issues.

In this guide Moulis Legal overview the key risks, obligations and liabilities relating to contaminated land in Queensland. Contact our specialised property and downstream petroleum lawyers for further information and assistance relating to your particular circumstances.

THE REGULATION OF CONTAMINATED LAND IN QUEENSLAND

Contaminated land in Queensland is regulated by and managed under the Environmental Protection Act 1994 (Qld) which seeks to monitor and manage activities which may, or contamination which does, pose a risk to human health or the environment.

The Act establishes two public registers which contain land use and planning information: the Environmental Management Register ('EMR') and the Contaminated Land Register ('CLR').

Environmental Management Register

A site recorded on the EMR has been, or is being used for a "notifiable activity" – such as service stations or fuel storage facilities – or have been contaminated but don't pose a significant risk to human health or the environment under their current use. Immediate action is not required to remediate the land or stop the land use.

Contaminated Land Register

The CLR contains information about sites with proven contamination which are causing or may cause serious harm to the environment or public health. Action must be taken remediate or manage the site.

REPORTING AND NOTIFICATION OBLIGATIONS

Duty to report environmental harm

"Environmental harm" is broadly defined in section 14 of the Environmental Protection Act to include any temporary or permanent adverse effect on the environment, including environmental nuisance.

Where a land owner, occupier or/and third party becomes aware of an environmental harm event, they are obligated to notify the administering authority. The administering authority will be the Department of Environmental and Heritage Protection, the Department of Agriculture and Fisheries or the local government. Written notice of the event, including its nature and the circumstances, must be sent within 24 hours of the person becoming aware of the event.

The duty to notify extends to employees who must notify their employer, or the administering authority, of an environmental harm event within 24 hours of becoming aware of the event.

Duty to notify occupier

Where a land owner enters into, or proposes to enter into, an agreement with another person about the occupancy of a site recorded in the CLR or EMR, they must give written notice to the potential occupier that the land is on the CLR or EMR. This includes the sale of the land, leasing the land or a usage or occupation licence.

If the site owner fails to provide the notice, the proposed occupier may rescind the agreement before completion or possession with a full refund of any moneys paid. This notice requirement cannot be contracted out of and prevails over any agreement to the contrary between the parties.

NOTICES AND REMEDIATION OF CONTAMINATED LAND

Show cause notice

If the administering authority intends to include a site on the CLR or EMR, the administering authority must issue a 'show cause notice' to the owner.

If a site owner receives a show cause notice, the owner can make written submissions to the authority outlining why the site should not be recorded on the CLR or EMR. The administering authority will then consider the owner's submission and make a final determination as to whether the land should be recorded on the relevant register.

A decision by the administering authority to include a site on the CLR or EMR may be appealed by the site owner in the Land Court.

Remediation

If a site is included on the EMR or CLR the remediation activities required may be either voluntarily or under a remeditaion notice from the administering authority.

A person may, at any time, conduct a site investigation to scientifically assess whether a site is contaminated and submit a site investigation report to the administering authority. After a site investigation report is submitted to the administering authority, the person may voluntarily conduct or commission remediation work.

The person may then submit a validation report to the administering authority and request that the site be either removed, transferred from the CLR to the EMR, or removed from the EMR.

Alternatively, the administering authority can issue a remediation notice outlining the remediation work to be conducted and requiring the owner to submit a validation report after completing the work. Subject to the satisfactory completion of the remediation report the site may be either removed, transferred from the CLR to the EMR, or removed from the EMR.

Site management plan

If a site is recorded on the EMR and it is not practicable to remove all contamination from a site, the administering authority may prepare, or require a person to prepare, a site management plan.

A site management plan manages actual or potential environmental harm by applying conditions on activities that may be conducted on the land. The site management plan must be recorded on the EMR.

All contaminated land investigation documents – including site investigation reports, validation reports and draft site management plans – must be certified by a contaminated land auditor prior to submission with the administering authority.

HIERARCHY OF LIABILITY AND BUSINESS RISKS

Contaminated land laws in Queensland – and across Australia – are based on the principle of *polluter pays*. That is, the business or individual that causes the contamination is liable for the remediation and any penalties.

However, in practice if the actual polluter cannot be identified or located then liability will be imposed on another business, individual or government authority. Queensland uses a *hierarchy of liability* to determine who will be liable if the actual polluter cannot be identified or located.

The Queensland hierarchy of liability is described in section 391 of the *Environmental Protection Act:*

1. The polluter is primarily liable if they are known and can be located; or

2. the local government or council that gave approval for the activity which resulted in contamination is liable – if the approval was contrary to legislative requirements and the local government or council should have known that contamination would result; or

3. the owner of the land if:

   (a) the land was contaminated before 1 January 1992; or

   (b) the land was listed in the CLR or EMR at the time it was purchased; or

   (c) contamination occurred after the land was purchased by the owner.

Notifiable activities

Business operators undertaking "notifiable activities" on land must ensure that they regularly communicate with the administering authority. This will allow for early intervention to manage contamination which may reduce liability for causing environmental harm and reduce costs of remediation.

Notifiable activities include a wide range of industrial activities that are set out in schedule 3 of the *Environmental Protection Act.*

Some relevant notifiable activities for the petroleum industry include:

- operating a petrol depot, terminal or refinery;
- operating a facility for the recovery, reprocessing or recycling of petroleum-based materials; and
- storing petroleum products or oil in certain quantities and classes.

Contracting out of environmental liability

A vendor selling a contaminated site in Queensland is not prevented from contracting out of all historical or future environmental and contamination liability. In some jurisdictions the law prevents a vendor from contacting out of certain historical environmental and contamination liability.

All purchasers of potentially contaminated land – especially downstream petroleum assets, such as service stations and fuel depots – should conduct thorough due diligence, ensure adequate disclosure and negotiate effective warranties and indemnities to reduce potential liability.

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