

CONTAMINATED LAND IN WESTERN AUSTRALIA

Contaminated land is a critical issue for all businesses that use or impact on land, or operate environmentally sensitive operations. Land holders, land purchasers and sellers and business operators need to be aware of their obligations and liabilities or they may find themselves liable for not only extensive remediation work but also for heavy penalties and compensation claims.

Businesses engaging in the storage, handling and distribution of fuel products are particularly vulnerable to contamination and environmental management issues. It is vital that such businesses implement 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 Western Australia. Contact our specialised [property and downstream petroleum lawyers](#) for further information and assistance relating to your particular circumstances.

THE REGULATION OF CONTAMINATED LAND IN WESTERN AUSTRALIA

Contaminated land in Western Australia is managed under and regulated by two key pieces of legislation: the *Contaminated Sites Act 2003 (WA)* ('CS Act') and the *Environment Protection Act 1986 (WA)*. The Department of Environment Regulation ('DER') and the Environment Protection Authority ('EPA') work together to administer the legislation.

After receiving notification of a contaminated or potentially contaminated site in accordance with the notification obligations (discussed below), the DER will make enquiries and classify the site under one on the following classifications:

1. not contaminated – unrestricted use;
2. contaminated – restricted use;
3. remediated for restricted use;

4. contaminated – remediation required;
5. decontaminated;
6. possibly contaminated – investigation required; or
7. report not substantiated.

Sites classified as 'contaminated' or 'remediated for restricted use' are recorded on the *Contaminated Sites Database* which is maintained by the DER.

Contaminated Sites Committee

The Contaminated Sites Committee is tasked with determining responsibility for remediation of contaminated sites and determining appeals against certain decisions made by the DER. If the Committee determines an appeal on classifications and regulatory notices, their decision is final.

If a person is unhappy with a decision of the Committee, they may, in certain circumstances, appeal the decision to the Supreme Court of Western Australia.

REPORTING AND DISCLOSURE OBLIGATIONS

Under the CS Act, the owner or occupier of a site, any person who knows or suspects they have caused contamination and any auditor engaged to provide a report under the CS Act have a mandatory obligation to report contamination to the DER.

If a person with a mandatory reporting obligation knows the site is contaminated, they must notify the DER, in writing, within 21 days after becoming aware of the contamination. Otherwise, if the person suspects a site is contaminated, they must report the contamination as soon as reasonably practicable. Failure to notify the DER within the relevant time frame is an offence and exposes the person to heavy financial penalties.

Disclosure to potential owners

Where a person proposes to complete a transaction which would result in another person becoming an owner, mortgagee or lessee of land that is classified as 'contaminated' or 'remediated for restricted use', the owner must give written disclosure (in the prescribed form) to the proposed owner, mortgagee or lessee. Disclosure must be made at least 14 days before completion of the transaction and a copy of the disclosure must be given to the DER.

Failure to provide adequate disclosure is a breach of duty and is actionable by a party who has sustained loss or damage as a result of that breach.

INVESTIGATION OF CONTAMINATED LAND

A site assessment is used to determine whether land has been contaminated and may be conducted voluntarily (generally as part of a development application) or as required by notice under the CS Act or the *Planning and Development Act 2005 (WA)*.

The DER may serve an investigation notice where it has grounds to indicate that a site is possibly contaminated and appropriate action to investigate, monitor or assess the contamination has not been taken. The investigation notice may require the person to take measures to investigate the nature and extent of the contamination, prepare a management plan, monitor the effectiveness of actions taken, conduct community engagement and/or report to the DER.

A person who is the subject of a binding regulatory notice under the CS Act may request from the DER a Certificate of Contamination Audit which, if granted, states that all the contamination on the land has been identified and confirms that clean-up of the site has been successful. These Certificates provide certainty to purchasers or lessees of land that the land is suitable for certain uses and, if the DER overlooks any contamination when issuing a Certificate, the State Government will be liable for any clean up that is required as a result of the error.

Under the *Contaminated Sites Regulations 2006 (WA)*, every report provided to the DER containing information as to the investigation, assessment, monitoring or remediation of a site must be accompanied by a contaminated site auditor's report.

LIABILITY FOR CONTAMINATED LAND

As with other Australian jurisdictions, the presumption in Western Australia is that the person who generates pollution or waste should bear the costs of containment, avoidance or abatement (commonly known as the *polluter pays principle*).

In practice, if the polluter cannot be identified or located, or it is not practicable to hold a person responsible then liability will be imposed on another business, individual or, in certain circumstances, the State Government.

Section 24 of the CS Act provides the following *hierarchy of liability*:

1. the person who caused or contributed to the contamination of the site;
2. the owner or occupier of the site who has changed or proposes to change the use of the land; and/or
3. the owner of a site (or of a source site if the contamination has migrated off-site).

It is important for tenants and land developers to note point two above as they effectively accept liability for remediation of a site if they change or propose to change the use of the site. The person who caused the contamination will no longer be held responsible for the remediation work. Therefore, it is critical that tenants and land developers conduct thorough due diligence and ensure that they have a comprehensive understanding of the extent of liability that they are assuming.

Where no other person is responsible for remediation under the hierarchy, or the Contaminated Sites Committee decides that the person responsible for remediation cannot be identified, found or cannot be made to assume responsibility for remediation, the State will be responsible for remediation.

Contracting out of or transferring liability

Under the CS Act, responsibility for remediation can be transferred to another person with that person's written agreement and the written approval of the Minister. The Minister will only provide approval where it is satisfied that the transferee has sufficient financial capacity to carry out the remediation.

MANAGEMENT AND REMEDIATION OF CONTAMINATED LAND

Only sites classified as 'contaminated – remediation required' are required to be remediated under the CS Act. Remediation of contaminated sites generally includes three stages:

1. development of a remedial action plan ('RAP') which outlines the remediation work to be conducted and how its success will be evaluated;
2. implementation of the RAP and measures to validate the success of the remediation work conducted; and
3. if contamination cannot be completely cleaned up, management of residual contamination through a site management plan to identify ongoing site management measures to be implemented to reduce the risk to humans and the environment.

At stage two, if remediation is successful, the person responsible must submit a site remediation validation report and, if appropriate, the DER will reclassify the site to reflect the remediation.

Clean up notices

The DER may issue a clean-up notice in respect of sites classified as 'contaminated – remediation required' if it reasonably believes that appropriate action to remediate the site is not being taken.

The clean-up notice may require a person to prepare a management plan and submit it to the DER, comply with any approved management plan or policy, monitor compliance with a management plan and report to the DER of any actions taken and their outcomes.

Hazard abatement notice

The DER may issue a hazard abatement notice if it considers that a site is contaminated and there is an immediate and serious risk of harm to human health or the environment. The notice must set out the requirements to be complied with to immediately control or reduce the hazard and for informing or consulting with the community regarding the hazard and any abatement action that has been taken.

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.

The logo for moulislegal, featuring the word "moulislegal" in a lowercase, sans-serif font, centered within a white, irregular, teardrop-shaped background.

moulislegal

We are Australia-based commercial + international legal advisors. We are client-centric, fully committed, focused on success, and service-driven.

CANBERRA

6/2 Brindabella Circuit
Canberra International
Airport
ACT 2609

BRISBANE

Level 4, Kings Row Two
235 Coronation Drive
Milton QLD 4000

AUSTRALIA

T +61 2 6163 1000
F +61 2 6162 0606
E info@moulislegal.com