

# CONTAMINATED LAND IN SOUTH AUSTRALIA

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Contaminated land is a critical issue for land holders, purchasers, sellers, business operators and developers of actual or potentially contaminated land. Compliance with contaminated land regulations should be at the forefront of the minds of owners or occupiers of land on which environmentally sensitive processes are carried out.

The storage, handling and distribution of fuel products exposes the downstream petroleum industry in particular to contaminated land issues and businesses must ensure that they have appropriate risk management strategies and contractual protections in place.

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

## REGULATION OF CONTAMINATED LAND IN SOUTH AUSTRALIA

Contaminated land in South Australia is governed under the *Environment Protection Act 1993 (SA)* ('EP Act') which seeks to ensure all reasonable and practicable measures are implemented to safeguard human health and the environment.

The EP Act established the Environment Protection Authority ('EPA') which collaborates with other government departments and local councils to conduct site assessments and manage contaminated land.

### *Public Register*

The EP Act requires the EPA to maintain a Public Register with a wide range of information including details of environmental authorisations, licenses, prosecutions and penalties as well as details of site contamination and environmental protection orders. New information must be recorded on the Register as soon as practicable but, in any case, within at least three months of the information becoming available.

The Public Register should be a starting place for any person who is interested in acquiring an interest in land. This however should not be a substitute for carrying out thorough due diligence, and potential purchasers and lessees should always carry out their own extensive enquiries.

### *Changes to contaminated land regulation in South Australia*

In response to recent contaminated land incidents, the Site Contamination Review Committee was formed in 2014 to review the procedures governing contaminated land in South Australia. The Committee released their report on 29 January 2015, and as a result, there are likely to be changes to the EPA's procedures and protocols. These changes will focus on interagency coordination, community engagement and transparency in the coming months and years to reflect the recommendations of the Committee.

## REPORTING AND NOTIFICATION OBLIGATIONS

The EP Act broadly defines 'environmental harm' as 'any harm, or potential harm, to the environment and includes environmental nuisance.'

If environmental harm from pollution is caused or threatened by an activity taking place on the land, the person conducting the activity must, as soon as reasonably practicable, notify the EPA of the harm, its nature, the circumstances in which it occurred and any action that has been taken to manage or contain the harm.

Owners, occupiers and site contamination auditors engaged to assess site contamination also have a mandatory obligation to notify the EPA as soon as reasonably practicable after becoming aware of non-trivial contamination that threatens to contaminate groundwater.

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## LIABILITY FOR CONTAMINATED LAND

Liability for contaminated land in South Australia – and throughout Australia – is assigned in accordance with the *polluter pays principle* which states that the person responsible for pollution should pay all costs associated with the management and remediation of the site. However, the majority of site contamination issues are historical in nature meaning that the event that caused the contamination resulted from a previous use of the site when environmental management and waste disposal practices were less controlled. The EP Act provides that another ‘appropriate person’ may be liable for management and remediation of contaminated land where it is not practicable to hold the person who caused the contamination responsible.

It is considered to be impracticable to issue an order to a person if the person has died (or ceased to exist in the case of a company), cannot be identified or located or would be unable to carry out or meet the costs of the actions required under the order.

Section 103C of the EP Act provides the circumstances where a person will be considered an ‘appropriate person’ to be issued with a site contamination assessment order or a site remediation order:

1. the person who caused the contamination at the site (a person is taken to have caused contamination if they were the occupier of the site); or
2. if it is not practicable to issue the order to that person, the owner of the site provided that:
  - (a) before the person acquired the site, the person knew, or ought reasonably to have known that substances were or were likely to be present that may necessitate remediation; or
  - (b) the person knew or ought reasonably to have been aware that the activity that caused the contamination was being carried out at the site and is prescribed as a ‘potentially contaminating activity’.

### *Potentially contaminating activity*

Potentially contaminated activities are set out in schedule 3 of the *Environment Protection Regulations 2009* including operating retail fuel outlets or operating works for refining or recycling crude petroleum oil or shale.

Business operators, and land owners of land on which such potentially contaminating activities are or have taken place should regularly monitor and test the land for contamination and communicate with the EPA to ensure that any issues are dealt with quickly and efficiently to reduce liability and minimise costs of management or remediation.

### *Contracting out of or transferring liability*

Land in South Australia can be sold or transferred under an agreement in which the purchaser or transferee assumes liability for all or a specified part of the contamination. If parties agree to accept liability under such an agreement, the EP Act applies to the purchaser or transferee as if they had caused the contamination.

In order for the transfer of liability to have legal effect, there are specific requirements that must be complied with such as providing notice in the approved form and lodging a copy the agreement with the EPA. Sellers or landlords who intend to rely on an agreement which transfers liability should ensure that they seek appropriate legal advice to ensure that the agreement complies with requirements in the EP Act and the transfer is effective.

## INVESTIGATION OF CONTAMINATED LAND

Generally, site contamination is investigated voluntarily either when contamination is discovered, or when the land is sold, leased or developed. However, the EPA has the power to require that a site assessment be carried out in certain circumstances.

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If the EPA is satisfied, or suspects, that site contamination exists at a site because a potentially contaminating activity is or has taken place, it may issue a 'site contamination assessment order'. The order may require, among other things, that an assessment or audit be carried out and a written report be submitted to the EPA.

If the EPA requires a site contamination audit to be conducted, an accredited site contamination auditor should be engaged to undertake an independent review of the assessment and of the work done by a site contamination consultant. The auditor will provide a site contamination audit report to the person who commissioned the audit and provide a copy to the EPA and local council.

## REMEDICATION AND MANAGEMENT OF CONTAMINATED LAND

### *Site remediation order*

If, after an assessment is complete, the EPA is satisfied that contamination exists and considers that remediation is required, it may issue a 'site remediation order' to an appropriate person. The order may require the person to prepare and comply with a remediation plan and conduct other monitoring and reporting obligations as the EPA sees fit and specifies in the order.

### *Clean up order*

More broadly, the EPA or another administering agency may issue a 'clean-up order' to any person if it is satisfied that the person has caused environmental harm by contravention of any section of the EP Act. The clean-up order may require the person to take specified action including preparing and complying with a plan of action to prevent or mitigate further harm and ongoing monitoring requirements.

Once a site contamination assessment order, site remediation order or clean-up order has been issued, the EPA can apply to the Registrar-General for registration of the order on the title of the site. Once the order is registered, it is binding on any successive owner as if the order had been issued to them directly. Any person who ceases to be the owner of the site must, as soon as reasonably practicable, notify the EPA in writing with new owner's details.

### *Voluntary site remediation*

If a person undertakes to carry out remediation in accordance with an approved 'voluntary site remediation proposal', the EPA can agree not to issue a site remediation order. A proposal must only be approved if the EPA is satisfied that the terms are appropriate and the agreement must be in writing.

Once the remediation has been carried out in accordance with the approved proposal, the EPA must notify the person in writing that it is satisfied with the remediation.

### *Appeals*

A person aggrieved by a decision of the EPA to issue an order may appeal to the Environment, Resources and Development Court ('the Court') within 14 days of being issued with the order. The Court may confirm, vary or reverse a decision or order of the EPA and make any other such orders or directions as the Court thinks fit.

*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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