

# CONTAMINATED LAND IN TASMANIA

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Contaminated land is a critical issue for owners or occupiers of land on which environmentally sensitive operations take place. The storage, handling and distribution of petroleum products, in particular, exposes businesses and land holders to liability for historical and current contamination and can restrict their use and enjoyment of the land.

It is therefore vital that businesses consider their regulatory compliance, risk management procedures and contractual protections in place to ensure that any issues are dealt with efficiently and without disrupting the operation of their business.

In this guide, Alexandra Geelan of [Moulis Legal](#) considers the key risks, obligations and liabilities affecting owners and occupiers of contaminated land in Tasmania. Contact our specialised [property and downstream petroleum lawyers](#) for further information and assistance on these issues.

## REGULATION OF CONTAMINATED LAND IN TASMANIA

Contaminated land is managed and regulated by the Environment Protection Authority ('EPA') and local councils under the *Environmental Management and Pollution Control Act 1994* (Tas) ('EMPCA').

Section 74A(2) of the EMPCA provides that an area of land is contaminated if there is a pollutant at the site in a concentration above background levels that is causing or is likely to cause serious or material environmental harm.

The EMPCA imposes a 'general environmental duty' on all persons conducting an activity which is likely to cause environmental harm or nuisance to take all reasonable and practicable steps to prevent or minimise harm.

The EPA maintains a public register with particulars of any environmental agreements, audits, authorisations, improvements programmes, protection notices, financial assurances or any other notice issued in respect of a contaminated site.

## REPORTING AND NOTIFICATION REQUIREMENTS

'Environmental harm' is defined in section 5 of the EMPCA as any adverse effect on the environment (of whatever degree or duration) and includes environmental nuisance.

The EMPCA contains different 'levels' of activity along with specific notification obligations and regulators for each level:

- level 1 activities may cause environmental harm and require a permit under the Land Use Planning and Approvals Act 1993;
- level 2 activities are listed in Schedule 2 of the EMPCA and include chemical works, oil refineries, abattoirs and other environmentally sensitive operations; and
- level 3 activities are projects of State significance under the State Policies and Projects Act 1993.

For level 1 activities, the responsible authority is the local council. For level 2 and 3 activities, the responsible authority is the EPA.

### *Duty to notify of environmental harm*

If a pollutant is released and is likely to cause environmental nuisance, the person responsible for the release must notify the relevant authority as soon as reasonably practicable but no later than 24 hours after becoming aware of the release.

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There are different reporting authorities for different events. The person responsible must consider the likely effect and severity of the contamination, in order to determine which authority to report to. When in doubt, the event should be reported to the EPA as soon as reasonably practicable to ensure compliance with the notification obligations. Failure to notify can result in substantial financial penalties.

The owner or occupier of a site also has a duty to notify the EPA if they reasonably believe, or should in the circumstances, reasonably believe that the land is likely to be contaminated within 24 hours of first becoming aware or reasonably believing that the land is likely to be contaminated. They must not commence or continue any activity that may directly or indirectly cause further pollution or harm. Failure to comply with this requirement exposes the owner or occupier to substantial financial penalties.

#### *Duty to notify of sale or lease of contaminated land*

If an owner of land is served with a notice under the EMPCA, the owner must notify the EPA in writing of any sale or disposal of, or any agreement to sell or otherwise dispose of, the land as soon as possible after making the sale, disposal or agreement.

#### *Liability for contaminated land*

Throughout Australia, liability for contaminated land is premised on the polluter pays principle whereby the person who is responsible for pollution is liable for any associated costs including clean-up costs, ongoing management, compensation and any penalties.

The assumption in section 6 of the EMPCA is that the occupier or person in charge of a place from which a pollutant is emitted is responsible for polluting the environment.

The EMPCA states that the EPA may serve a notice on either:

1. the person who they reasonably believe is, or is likely to be, wholly or partly responsible for causing contamination; or
2. if the person who caused the contamination cannot be identified or located, or are insolvent, the owner of the land (provided that they become the owner after 25 August 1994 and at the time they become the owner, they knew, suspected or should have reasonably suspected that the land was or was likely to be contaminated).

#### *Transferring out of liability*

The EMPCA allows for liability to be transferred, either by a specific agreement or as part of a more general acceptance of responsibility (such as a contract for sale of land). The parties will be required to provide the EPA with written documentation of the transfer.

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## INVESTIGATION OF CONTAMINATED LAND

Most environmental investigations arise voluntarily either in the development approvals process or as a result of the EPA being notified of a contamination incident.

### *Environmental Audits*

An environmental audit is an objective assessment of a range of matters including:

- the ability of management systems to manage and control pollution;
- the extent to which actions taken have achieved pollution control;
- the adequacy of safeguards in preventing pollution incidents;
- the degree of compliance with development approval conditions;
- any other requirements of the EMPCA; or
- any other related matters.

If the EPA considers that an activity has caused or is likely to cause environmental harm, they may require the person responsible to undertake an environmental audit and prepare and submit a report to the EPA on the results of the audit.

A person may also choose to undertake a voluntary environmental audit and if they do so, they may apply to the EPA to obtain protection for the information produced in the report. If the EPA grants protection, the report is not admissible in evidence against the person in any proceedings under the EMPCA.

### *Investigation Notices*

If the EPA reasonably believes that a site is contaminated, they may serve an investigation notice on the person responsible for the contamination to determine whether the land is contaminated. If the investigation determines that the land is contaminated, it will assess the type of pollutant, the extent of the pollution, the possibility of the pollutant affecting another site or body of water, the extent of environmental harm caused, and whether the contamination is being appropriately managed.

## MANAGEMENT AND REMEDIATION OF CONTAMINATED LAND

Once the existence and extent of contamination has been fully investigated, the EPA has a range of options for requiring remediation and management of contamination.

### *Environmental improvement programme*

An environmental improvement programme is a programme intended to achieve compliance with the EMPCA by reducing environmental harm or detailing the transition to a new environmental standard. The programme specifies the objectives to be achieved and maintained, specifies a timetable to achieve the objectives and provides for monitoring compliance with the programme.

The EPA may, by written notice, require a person to prepare and submit a draft environmental improvement programme if it is satisfied that an activity may cause serious or material environmental harm. Once the EPA has received a draft they will advertise receipt of the programme, and make it available to inspection by the public. After receiving and considering any submissions on the draft programme, the EPA may either approve the programme with or without amendments or refuse to approve the programme.

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## Notices

Under the EMPCA, the EPA has a range of notices that it can serve on the person responsible for remediation or management of contaminated land (whether that be the person responsible for contamination, the owner, or a person who has accepted responsibility). These notices include:

1. Environment protection notice which requires a person to take such measures as specified in the notice to prevent, control, reduce or remediate environmental harm;
2. Remediation notice which requires that a person take such measures as specified in the notice to ensure the land is suitable for the current or proposed land use; or
3. Site management notice which requires that a person take such measures as specified in the notice to ensure safe management of the contaminated site.

The notices will specify measures that the EPA requires to be undertaken and may require actions such as the erection of a fence or barrier, the removal or dispersal of the pollutant, the removal or treatment of any soil or other material, the vacation by the occupier of the whole or any part of the site, ongoing monitoring and testing, public consultation and signage requirements and/or the making of progress reports to the EPA.

The EPA may also require that a person who has been served with a notice pay the whole or part of the reasonable costs and expenses incurred by the EPA for issuing and ensuring compliance with the notice. As such, it may be beneficial for owners or occupiers of a contaminated site to voluntarily undertake investigation and remediation work with the approval of the EPA to avoid the additional costs that can be imposed by the EPA.

A person who has been served with a notice under the EMPCA may appeal to the Appeals Tribunal in relation to the notice.

*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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