

Contaminated land reform in Victoria

How to prepare for the new contaminated land duties and audit system under the *Environment Protection Amendment Act 2018*



Introduction

The new *Environment Protection Act 2017 (Vic)* (amended by the *Environment Protection Amendment Act 2018 (Vic)* (**New Act**) and the *Environment Protection Regulations (Regulations)*¹ will take effect from 1 July 2021. The New Act will significantly reform the environment protection regime in Victoria. The new regime shifts the focus from a responsive and reactive approach to a preventative risk based approach.

[Our previous legal updates](#) have outlined some of the key changes that will occur when the New Act comes into effect. In this update, we examine the two new duties related to contaminated land that will apply from 1 July 2021.

The EPA has recently released a new contaminated land policy ([Contaminated Land Policy](#)), which provides guidance about the new contaminated land duties introduced by the New Act, as well as how the EPA plans to implement the duties and how duty holders should approach compliance with the new duties.

What is contamination?

Land² is contaminated if waste, a contaminated substance, or a prescribed substance is present on or under the surface of the land, and the waste, chemical substance or prescribed substance:

- is present in a concentration above the background level; and
- creates a risk of harm to human health or the environment.³

Background levels are specified in either:

- the Regulations; or
- the Environmental Reference Standard (ERS).⁴

If the Regulations or the ERS do not specify the background level, and do not set out how to determine the background level, the background level is the naturally occurring concentration of the chemical substance on or under the surface of land near the land.⁵

The EPA will be able to make determinations that set out the background level of chemical substances in relation to land⁶ and we understand that the EPA is developing a determination that sets out the methodology for deriving the background level of specified naturally occurring chemical substances that will be available prior to 1 July 2021.⁷

In the meantime, the EPA has recently published the *Proposed methodology for deriving background level concentration when assessing potentially contaminated land (Proposed Methodology)*, which sets out the requirements that must be met to substantiate that chemical substances are not present at a concentration above background levels. The Proposed Methodology can be accessed [here](#).

Land is not contaminated:

- merely because waste, a chemical substance, or a prescribed substance is present in a concentration above the background level in water that is on or above the surface of the land; or
- if any prescribed circumstances apply to the land.⁸

The EPA has recently published the [Contaminated land: Understanding section 35 of the Environment Protection Act 2017, Publication 1940 \(Understanding Contaminated Land\)](#) which provides further information about the definition of contaminated land and the principles EPA considers applicable in identifying land that is contaminated within the meaning of the New Act.

¹ The proposed final Environment Protection Regulations (Second Exposure Draft) have been released but the final Regulations have not yet been made by the Governor in Council.

² Land is defined in section 3 of the New Act to include any land whether publicly or privately owned and includes any building or other structures permanently affixed to the land; and groundwater.

³ New Act, section 35(1).

⁴ New Act, section 36.

⁵ New Act, section 36(b).

⁶ Regulations, regulation 5(1).

⁷ Contaminated Land: understanding section 35 of the Environment Protection Act 2017, Publication 1940 February 2021 page 13.

⁸ New Act, section 35(2).

What are the new duties related to contaminated land?

The New Act establishes two key duties associated with contaminated land:

1. duty to manage contaminated land;⁹ and
2. duty to notify of contaminated land.¹⁰

These duties are designed to reduce the risk of harm to human health and the environment by ensuring that:

- proactive action is taken so risks are not left unmanaged which can result in increased complexity and costs to address over time;
- the EPA has knowledge of contaminated land that may pose a risk and potentially require EPA's oversight/regulation.

Who must comply with the contaminated land duties?

Both duties apply to persons in "management or control" of land.

The New Act does not define what management or control means however if a person can exercise power over land they are considered to be in 'management or control.' For example, a person is likely to be in management or control of land if the person has a legal interest in the land by:

- owning or occupying the land;
- Having exclusive possession under a lease; or
- Is the appointed Committee of Management.

In other instances where a person has:

- a contractual right permitting occupation or access rights; or
- a practical ability to make decisions or exercise control in relation to land (e.g. such as a contractor)

that person could be considered in management or control of land but it will depend on the circumstances and regard should be had to the relevant facts and scope of the person's power in relation to the relevant land.¹¹

⁹ New Act, section 39.

¹⁰ New Act, section 40.

¹¹ Contaminated Land Policy, p7.

¹² New Act, section 39.

¹³ New Act, section 39(2)(a)-(e).

It may be the case that multiple people could be considered in "management or control" of land and the extent of their management or control will determine the scope of the duty that a person may hold. For example, an owner of land and a contractor working on that land may both be in "management or control" of the land.

Duty to manage contaminated land

What is the duty?

The duty to manage contaminated land establishes an obligation on persons in management or control of contaminated land, to minimise the risks of harm to human health or the environment from the contaminated land, so far as reasonably practicable.¹²

What is required to manage the risks?

The New Act sets out a non-exhaustive list of actions which are relevant to minimising risk of harm to human health and the environment from contaminated land¹³:

- identifying any contamination that the person knows or suspects is present;
- investigating and assessing the contamination;
- providing and maintaining reasonably practicable measures to minimise risks of harm to human health and the environment from the contamination. This can include undertaking clean-up activities such as minimising exposure or removing the source where reasonably practicable but could involve other measures such as physical or administrative site controls;
- providing adequate information to any person that may be affected by the contamination, such as an adjoining landowner who may be impacted by groundwater migrating offsite, including:
 - sufficient information to identify the contamination;
 - the results of investigation and assessment;
 - the risk of harm to human health and the environment from the contamination; and

- providing adequate information to enable any person who is reasonably expected to become a person in management or control of the contaminated land to comply with the duty to manage the contaminated land (e.g. such as a future occupier or owner).

Importantly the duty requires a proportionate risk management response, where the level of action required is proportionate to the risk posed by the contamination. The EPA notes in the Contaminated Land Policy that the management of the risk of harm from contamination starts with elimination of risk but where elimination is not possible, it must, "as a minimum, be minimised to a level that makes the land safe for its current use and that ensures that contamination does not migrate offsite."

Where it is reasonably practicable to reduce the risk further, the duty holder must take that action. The EPA also notes that where the original polluter can be established, the EPA can require that person to bear the costs of abatement, which may involve a higher clean up standard than that set by the duty to manage.

As such the standard required to discharge the duty to manage will be limited by what is reasonably practicable to minimise risk of harm for current use, such as considering the nature of the contamination, its capacity to cause harm (e.g. migration of contaminants, vapour intrusion, or inhalation of asbestos) and the degree of harm it could cause.

Does the duty apply to only known contamination?

The duty to manage requires people in management or control to consider:

1. What they actually know about the contamination – i.e. direct knowledge they have about the condition of their land.
2. What they ought reasonably to know about contamination when considering what others in a similar position would know – i.e. indirect knowledge about the potential for their land to be contaminated.

Direct and indirect knowledge can come from sources such as:

- previous site assessments prepared including those disclosed during the purchase of land;

- objective evidence of past activities on the land or near the land known to cause contamination;
- site records of historical incidents and activities;
- visual observations of contamination, activities or infrastructure (e.g. tanks, stained soil or leaked substances);
- odours; and
- public records such as information contained on the Victoria Unearthed website.

Action will be required where the risk of harm from contamination is reasonably foreseeable which relates to both direct and indirect knowledge.

When do you need to start managing contaminated land?

The new duty will apply from 1 July 2021 and importantly, while prospective in nature, it will apply to contamination on or of land which existed prior to the commencement of the New Act, not just to land on which contamination occurs following the commencement of the New Act.

Importantly, the duty is ongoing, as greater subjective and objective knowledge about risks associated with contamination or means to minimise those risks increases, the scope of the duty will increase.

Further, where there is a change proposed to a contaminated site, i.e. a change in land use which would alter the risk profile or control measure which might be in place, the contamination status will need to be reviewed. For example, where excavation is proposed which would expose contaminated soil, appropriate short and long term risk control measures will need to be put in place.

Non-aqueous phase liquid (**NAPL**) is one particular contaminant that can be a significant and ongoing source of contamination to soil, groundwater and soil vapour. The Regulations provide that NAPL must be managed in a particular way (i.e. cleaned up and the source removed by a person in management and control).

The EPA expects that persons who are in management or control of land where there is polluting activity occurring, polluting activity has occurred or waste is present, to stay on top of new types of contamination, risk controls and remediation activities. In other words, it will not be acceptable to bury your head in the sand.

Is there recourse against the original polluter where it is not the person in management or control?

One of the changes to be introduced by the New Act is that a person in management or control will be able to recover the reasonable costs in complying with the duty to manage from the person who caused the pollution without the need for a remedial notice issued by the EPA to be in place.¹⁴

What is penalty for not complying with the management duty?

Failure to comply with the duty to manage contaminated land is not an offence under the New Act. This means, the EPA cannot prosecute or commence civil penalty proceedings for breaching the duty to manage contaminated land. That said, failing to comply with the duty to manage contaminated land may be a breach of the general environmental duty (which is an offence under the New Act) if the person fails to minimise the risks of harm posed by contamination. Alternatively, it may be open to the EPA to take action in accordance with its compliance and enforcement policy such as issuing an environmental action notice.

Duty to notify of contaminated land

What is the duty?

The duty to notify of contaminated land requires a person in management or control of land to notify the EPA as soon as practicable after the person becomes aware of, or reasonably should have become aware of, the notifiable contamination.¹⁵

When do I need to notify?

The duty will commence on 1 July 2021.

Therefore, unless there is an applicable exemption, the EPA must be notified as soon practicable after:

- 1 Jul 2021 if you are aware of contamination which already exists above the notification triggers; and
- You become aware of, or reasonably should be aware of, contamination above the notification triggers.

The EPA expects that duty holders will comply with the new scheme from its commencement, particularly where duty

holders are already aware of notifiable contaminants from historical assessments.¹⁶

Does the duty have on going effect?

The duty to notify of contaminated land continues to apply while a person is in management or control of land.¹⁷

In other words, it may not be sufficient to notify just once after 1 July 2021. For example:

- if you become aware of the existence of a historical assessment identifying notifiable contamination, a pre-lease baseline investigation is undertaken or pre-development / pre-sale investigations are carried out; or
- if you reasonably should have become aware of notifiable contamination because objective sources such as Victoria Unearthed identify potentially contaminating activities that have occurred on the land or land nearby

then the duty to notify will be triggered at that time.

What is contamination that you are aware of and must notify?

The notification duty is concerned with contamination which is actually known about by a person or organisation. As such, historical investigations that identify contamination above the thresholds will be relevant and will trigger the new duty from 1 July 2021.

Therefore, it is critical for organisations to review historical contamination reports to determine if they identify contamination above the thresholds such as:

- baseline/due diligence reports obtained prior to lease or sale of a site;
- end of lease exit reports;
- pre-development reports (i.e. investigations undertaken during planning permit or planning scheme amendment processes); and
- reports prepared during compliance with EPA remedial notices.

In the case of corporations, corporate memory will be important. A company's awareness is usually based on knowledge held by officers or agents include whether they have generated or commissioned any of the above material.

¹⁴ See New Act, section 40 which departs from section 62A of the 1970 Act which requires there to be a clean up notice in place.

¹⁵ New Act, section 40(1).

¹⁶ Contaminated Land Policy, p17.

¹⁷ New Act, section 41(4).

What is contamination that you should you be aware of and must notify?

The duty to notify requires notification of contamination that you should reasonably be aware of. Given this is an objective test, it will not be acceptable to ignore potential contamination.

The New Act contains the following factors that are to be considered in determining whether someone should be aware of notifiable contamination:¹⁸

- the person's skill, knowledge and experience; and
- whether the person could practicably seek advice regarding the contamination; and
- any other circumstances of the contamination.

The duty will therefore be scalable, such that a land owner who is a large corporation or government entity with greater skills, financial resources and capacity to understand contamination, will be held to a higher standard than individuals without those skills, capacity and resources.

How do you demonstrate compliance with the duty to notify?

To demonstrate compliance with this aspect of the duty, we recommend a staged approach where the outcomes and resources available will determine the next step. Potential actions include:

- physical inspection – is there any physical evidence of contamination;
- existing contaminating activities – are there any existing activities on the land or adjacent land that have or may have contaminated the land in question;
- historical contaminating activities – what historical land uses may have contaminated the land on and offsite;
- objective sources of information – conduct searches of databases such as Victoria Unearthed which provides a mapping tool regarding potential and existing contaminated land based on Sands and McDougall historical business directories, EPA data including (Priority sites register, EPA groundwater quality restricted use zones, environmental audits, landfill register);

- expert assistance - where the above steps suggest land is or may be contaminated, consider whether a contaminated land consultant's advice is required regarding further investigations or determining whether any of the notification triggers apply.

We are expecting the EPA to issue guidance on determining assessment of risk and when to conduct investigations. Additional guidance from the EPA will increase the state of knowledge such that more will be expected of duty holders.

What are the notification triggers?

Part 2.1, Division 1 of the Regulations determines what is prescribed notifiable contamination.

Importantly, not all contamination must be notified, only contaminants that exceed the thresholds specified in the Regulations.

These comprise:

- on-site contamination in soil;
- contamination of adjacent land;
- contamination which is foreseeable on adjacent land;
- the presence and exposure to the friable asbestos in or on soil;
- actual or foreseeable contamination of groundwater or surface water;
- vapour intrusion; and
- onsite retention of contaminated soil.

There are three common features for the notification triggers:

1. They are either based on one or more of the contaminants contained in Section 6, Schedule B1 of the National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPM);
2. The concentrations outlined in the NEPM, the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (ANZG) or the Australian Drinking Water Guidelines (ADWG) are applicable; and
3. There is an exposure pathway or migration.

¹⁸ New Act, section 40(3)(a)-(c).

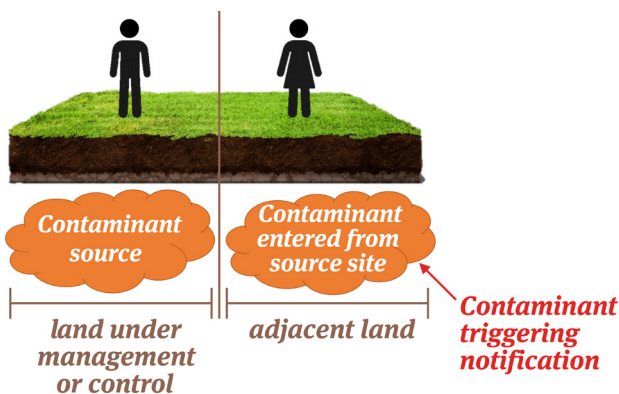
The table below contains the types of notifiable contamination which must be reported to the EPA.

Soil contamination



Onsite contamination in soil

- The contaminant is in or on soil on land under the management or control of a person;
- A person is, or is likely to be, exposed to the contaminant; and
- The concentration of the contaminant is, and is likely to remain, at a concentration that is:
 - above the average threshold¹⁹ for that contaminant; or
 - equal to or above localised elevated value threshold for that contaminant.²⁰



Contamination of adjacent land

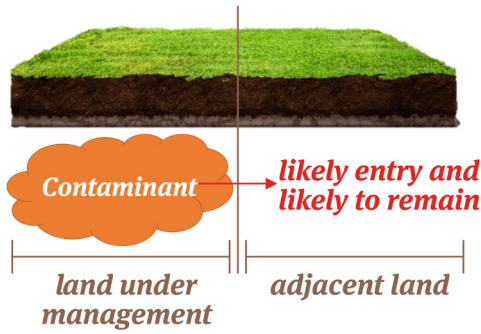
- The contaminant is in or on soil on land adjacent to land under the management or control of a person;
- The contaminant has entered / is likely to have entered from land under the management or control of the person;
- The concentration is or likely to remain, at a concentration:
 - above the average threshold for that contaminant; or
 - equal to or above the localised elevated value threshold for that contaminant.²¹

¹⁹ Average threshold means the 95% upper confidence limit on the arithmetic average concentration of a contaminant.

²⁰ Regulations, regulation 8(a).

²¹ Regulations, regulation 8(b).

Soil contamination



Forseeable contamination of adjacent land

- The contaminant is in or on soil on land under the management or control of a person;
- The contaminant is likely to enter and remain on land adjacent to that land; and
- The concentration is likely to be above the health investigation levels (HIL) listed in Schedule B1 to the NEPM for that contaminant for the current use of the adjacent land.²²

Asbestos in or on soil



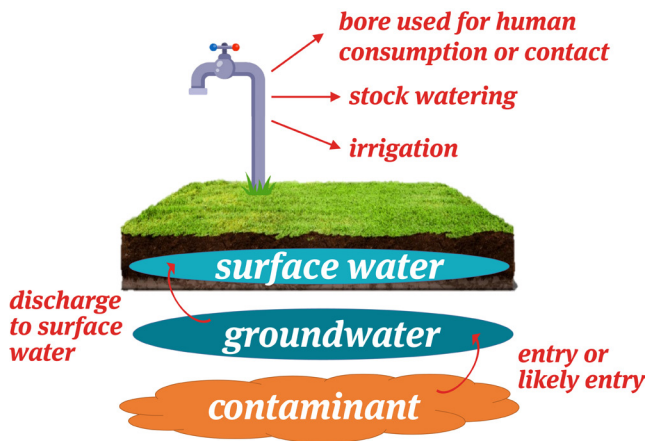
Asbestos and exposure to airborne fibres

- There is the presence of friable asbestos in or on soil on land under the management or control of a person; and
- A person is, or is likely to be, exposed to airborne asbestos fibre levels above 0.01 fibres / mL by means of inhalation.²³

²² Regulations, regulation 8(c).

²³ Regulations, regulation 9.

Groundwater or surface water



Actual or foreseeable groundwater contamination

- Entry or likely entry of a contaminant into groundwater from land that is under the management or control of a person;
- The groundwater either:
 - discharges, or is likely to discharge, to surface water; or
 - is used, or may be used, for:
 - human consumption or contact; or
 - stock watering; or
 - Irrigation; and
- The contaminant concentration in the groundwater:
 - Is, or is likely to be, above the default guideline value / the guideline value for that contaminant²⁴; and
 - Is likely to remain above the specified concentration.²⁵

Actual or foreseeable contamination of surface water

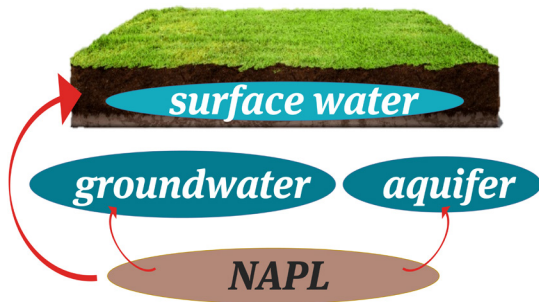
- Entry or likely entry of a contaminant into surface water from land that is under the management or control of a person; and
- The contaminant in the surface water:
 - Is, or is likely to be, above the default guideline value / the guideline value for that contaminant²⁶; and
 - Is likely to continue to remain above the specified concentration.

²⁴ The default guideline value must be specified in either the ANZG or the guideline value must be specified in the ADWG.

²⁵ Regulations, regulation 10(1).

²⁶ The default guideline value must be specified in either the ANZG or the guideline value must be specified in the ADWG.

Groundwater or surface water



NAPL

- The presence of any NAPL; and
- The NAPL is located in groundwater, surface water or an aquifer on or in land

Vapour intrusion



Vapour inhalation pathway

- The contaminant concentration:²⁷
 - on average, in soil vapour samples from the land, is above the interim soil vapour HIL for volatile organic chlorinated compounds for the current use of the land;
 - in an individual soil vapour sample from the land, is equal to or above 250% of the interim soil vapour HIL for volatile organic chlorinated compounds for the current use of the land or any land adjacent to the land;
 - in soil vapour samples from the land, is above the soil vapour health screening levels listed in Schedule B1 to the NEPM (**HSL**) for vapour intrusion for the current use of the land or any land adjacent to the land;
 - in an individual soil vapour sample from the land, is equal to or above 250% the soil vapour HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
 - on average in soil samples from the land, is above the soil HSL for vapour intrusion for the current use of the land;

²⁷ Regulations, regulation 11(a)-(h).

Vapour intrusion

- in an individual soil sample from the land is equal to or above 250% of the soil HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
- on average in groundwater samples from the land, is above the groundwater HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
- in an individual groundwater sample from the land that is equal to or above 250% of the groundwater HSL for vapour intrusion for the current use of the land; and
- The contaminant concentration remains, or is likely to remain, above the concentration specified above; and
- A person is, or is likely to be, exposed to the contaminant or any by-product of the contaminant.

Onsite retention of soil

Retention of soil onsite



On-site retention of contaminated soils

- The on-site retention of contaminated soil (other than fill material) sourced from on-site on land that is under the management and control of a person; and
- The retention is not an activity for which a permission is required.²⁸

²⁸ Regulations, regulation 12.

Is there any contamination that does not need to be notified?

The EPA is not concerned (in the notification context) with:

- contamination which is at levels below the notification triggers; or
- contamination not referred to in the Regulations, for example emerging contaminants which are not in the NEPM Schedule B1, such as PFAS

Determining whether a contaminant meets the notification trigger requires technical assessment as well as judgment as to whether exposure is 'likely.'

Are there exemptions to the notification triggers?

The Regulations prescribe certain exemptions to the duty to notify.

The prescribed exemptions are²⁹:

- **prior notification** – where the EPA has been notified in accordance with the New Act.
 - This will assist persons who come into management or control such as under a lease or as a new purchaser. It may be prudent for contracts to include a warranty that the landlord or seller has to notify the EPA if required and provide copies of the notification to the incoming person who will be in management or control.
 - This will also assist where there is more than one person in management or control such as a construction contractor who is conducting works on a site. Only one person will need to notify the EPA unless there is additional information to share. We suggest that information be shared where there is shared management and control of land such that where a person becomes aware of notifiable contamination they should notify both the other person in management or control and the EPA at the same time.

- Informal awareness by the EPA of notifiable contamination will not satisfy the exemption e.g. where there has been investigations or compliance by the EPA.

- **stockpile of industrial waste** – at a place or premises authorised to receive industrial waste, other than retention of soil described in Regulation 12.³⁰
- **remedial notice** – if a pollution abatement notice or clean up notice has been issued by the EPA and there has been no material change in the condition of the land after the notice was served or revoked.³¹
- **previous environmental audit** – if a certificate or statement of environmental audit has been issued under the *Environment Protection Act 1970 (Vic) (1970 Act)*, provided there have been no potentially contaminating activities or material changes since it was issued, and no adverse impacts on adjacent land.³²
- **non-NEPM Schedule B1 contaminants**, other than asbestos or NAPL in some circumstances.³³

What information must be provided to the EPA?

A notification must be made in a manner and form approved by the EPA (there is no approved form yet)³⁴ and include the information below:³⁵

- location of the land;
- the activity resulting, or suspected as resulting, in the contamination;
- the nature and extent of the contamination;
- the nature of the risk of harm to human health and the environment from the contamination; and
- any other prescribed information, which includes information on the management response, or proposed management response, to the notifiable contamination.

²⁹ Regulations, regulation 13.

³⁰ Regulations, regulation 13(a).

³¹ Regulations, regulation 13(b).

³² Regulations, regulation 13(c).

³³ Regulations, regulation 13(d).

³⁴ New Act, section 41(1).

³⁵ New Act, section 41(2).

If not all of the prescribed information is available at the time of making a notification, it must be provided as soon as reasonably practicable after the duty holder becomes aware of it.

The EPA is yet to clarify whether notification must be made separately for land within cadastral boundaries or whether a notification could relate to all land within a person's management or control. We anticipate this will be clarified in upcoming publications to be released by the EPA.

Will the notification information be publicly accessible?

The information provided to the EPA in compliance with the notification duty will not be placed on the EPA's public register. The rationale for the duty is to provide a mechanism for the EPA to be informed of significant / high risk sites which may warrant EPA involvement, such as the issuance of a remedial notice.

As such, it will be important for incoming purchasers or tenants to make a request for any prior notifications made by the landlord, seller or a previous tenant.

What will be the next steps following notification?

Notification does not necessarily mean that there is a significant risk to human health or the environment, however where contamination is present the following may be relevant:

- the related duty to manage contaminated land may need to be complied with given it applies to all contaminants falling within the new definition of contamination (not just notifiable contamination). In other words, sometimes just notifying (without also managing the contamination) will not be enough.
- if the contamination is caused by NAPL, clean up will also be undertaken, including removal or control of the source if it is on the duty holder's land.
- the EPA may decide to take further action to ensure risks of harm to human health or the environment are appropriately managed. Action could include issuing a notice to investigate harm or risk for the environment,

issuing an environmental action notice or a site management order (SMO).

Can costs be recovered in complying with the notification duty from the original polluter?

The duty to notify the EPA of contaminated land imposed by the New Act, can apply to historic contamination. A person presently in management or control of the land is required to notify the EPA about the contaminated land, and potentially remediate the land, even if that contamination previously occurred and was caused by another person.

The New Act provides a person in management or control of land recourse to recover in a court or competent jurisdiction, as a debt due to the person, any reasonable costs incurred in complying with a duty to manage contaminated land or duty to notify of contaminated land.³⁶

Importantly, the costs recovery mechanism applies after the commencement of the New Act so work done to fulfil requirements of the notification duty should be timed appropriately.

What is the penalty for not notifying?

Failure to notify gives rise to a criminal offence punishable by a maximum penalty of approximately \$99,132³⁷ and is also enforceable under the civil penalty regime (i.e. the EPA must only prove the contravention to the lower burden of proof on the balance of probabilities).³⁸

Further, it is not an excuse not to notify on the grounds that the information provided by the person as part of a notification might tend to incriminate the person or make the person liable to a penalty.³⁹ In other words, there is no privilege against self-incrimination relating to the notification duty.

Any information provided as part of a notification, is not admissible in evidence against the person in a proceeding for an offence or for the imposition of a penalty, other than in a proceeding that relates to false or misleading information that is provided by the person in relation to a notification of contamination.⁴⁰

³⁶ New Act, section 39(3).

³⁷ Based on the Victorian penalty units applicable as at 1 July 2020.

³⁸ New Act, section 40(1) and 40(2).

³⁹ New Act, section 42(1).

⁴⁰ New Act, section 42(1).

From 1 July 2022 the duty to notify will also be enforceable through the commencement of enforcement proceedings by third parties⁴¹ and failure to notify is also an offence for which officer liability applies. In other words, an officer of a corporation can also be guilty of failing to tell the EPA of notifiable contamination where the company fails to do so.⁴²

The Environmental Audit System

Under the new regime, the two currently types of audits, commonly known as section 53V and section 53X audits will no longer exist.

A phased approach to contamination assessment is being introduced involving:

- preliminary risk screen assessment (**PRSA**) – considers the likelihood that land is contaminated; and
- an environmental audit – considers the nature and extent of the risk of harm from contaminated land,

with the objective of having assessments which are proportionate to the risks posed by contamination.

PRSA

A PRSA can be undertaken in order to:

- assess the likelihood of contamination on land (based on its current or proposed use);
- determine whether an environmental audit is required; and
- to make recommendations as to the scope of an audit (if required).⁴³

The environmental auditor must prepare a PRSA statement and a preliminary risk screen report.⁴⁴

If the environmental auditor does recommend a full environmental audit, the EPA may review the proposed scope of the recommended audit, and either endorse the scope or determine a revised scope for the audit.⁴⁵

Environmental Audit

A person may engage an environmental auditor to conduct an environmental audit in order to assess the nature and extent of contamination on land, and to recommend approaches to manage the risks of harm to human health or the environment from contaminated land, waste, pollution or activity, or to make recommendations to manage the contaminated land generally.⁴⁶

The environmental audit can be conducted whether or not a preliminary risk screen assessment has been conducted.⁴⁷ If a preliminary assessment has not been done, the environmental auditor must establish the scope of the audit.⁴⁸ Unlike the current system, where only section 53V audits are scoped, under the new audit framework, all audits will be scoped by an auditor.

The auditor must submit the proposed audit scope to the EPA prior to commencement of the audit which must include:

- the identity of the site or activity the audit covers;
- the elements of the environment the audit assesses, such as land, water, air and noise;
- consideration of the standards and reference documents in the audit;
- any exclusion from the audit and the reason known at the time of scoping the audit; and
- when audits are specifically for land use considerations, the current or proposed site use. This extra requirement is for audits that support land use planning decisions and aligns with the current 53X audit process.

⁴¹ New Act, section 308(3).

⁴² New Act, section 249(2)(a).

⁴³ New Act, s 204.

⁴⁴ New Act, ss 205–207.

⁴⁵ New Act, s 208(5).

⁴⁶ New Act, s 208(1), (2).

⁴⁷ New Act, s 208(3), (4).

⁴⁸ New Act, s 208(3).

What are the outcomes of an environmental audit?

At the conclusion of the audit, the environmental auditor must complete:

- an environmental audit statement;⁴⁹ and
- an environmental audit report.⁵⁰

What will the environmental audit statement include?

The environmental audit statement will include:

- all the matters set out in the audit's scope;
- the use or proposed use of a site if part of the audit scope;
- any assumptions the auditor makes during the audit, or any limitations on the audit;
- any additional considerations of the standards and reference documents in the audit;
- any further exclusions from the audit, as well as those in the scope, and the reason for these extra exclusions;
- the results of the audit and any recommendations;
- the name of the person requesting the auditor's services; and
- the auditor's signature and contact details.

Where the audit relates to an assessment of a proposed use (in the context of a site redevelopment), the auditor will need to include a statement about the site's suitability for use (i.e. whether it is suitable for the purposes specified, suitable for use provided the recommendations are complied with or the site is not suitable at the time the statement is prepared).

The report will include:

- a review of all relevant information the environmental audit collected; and
- the reasons for the findings and any recommendations in the environmental audit statement.

A copy of the statement and report are required to be sent to the EPA and relevant planning and responsible authorities within 5 business days of completing the statement and report.⁵¹

The 1970 Act is currently limited in terms of mechanisms to implement audit conditions. One significant improvement to address this gap, is the provision of SMOs that can be used as a legal tool to see long term management measures carried out on a site where contamination exists.

A SMO can be issued by the EPA in relation to any site (which may be more than one site). A SMO is issued to the current owner or occupier of the land or the manager of Crown Land.⁵²

Importantly, a SMO will bind the owner, occupier or manager of the land and subsequent owners, occupiers or managers and can operate indefinitely.⁵³ For these reasons, SMOs will provide the EPA and land owners with a more appropriate tool to implement the outcomes of an audit.

The New Act contains transitional provisions such that audits which are underway under the 1970 Act can continue to be finalised under the New Act or can transfer to the New Act.

The EPA is yet to release environmental auditor guidelines under Part 8.3 of the Act on scoping audits so it is yet to be seen how current practices such as determination of clean up to the extent practicable will be incorporated into the new regime.

How can we help?

Please contact a member of the Environment and Planning team if you would like further information on the New Act or Regulations. We can also offer tailored training sessions on the New Act and Regulations.

⁴⁹ New Act, s 210(1).

⁵⁰ New Act, ss 210(1), 211 and 212.

⁵¹ New Act, s 210(2).

⁵² New Act, s275(2).

⁵³ New Act, s276(1).

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