



# **AEBN & MinterEllison: Webinar**

*Updates in contaminated land laws from across Australia*

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# Overview of this presentation

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1 Victoria: New framework recap & how to prepare	2 Victoria: Updates	3 New South Wales: Updates	4 Australian Capital Territory: Updates
5 Queensland: Updates	6 South Australia: Updates	7 Northern Territory: Updates	8 Western Australia: Updates
9 Commonwealth: Updates	10 Tasmania: Updates		



Duty to notify

Duty to manage

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## Duty to notify: Overview

1. What is the duty?
2. Who needs to notify?
3. When do I need to comply?
4. What are the relevant thresholds for notification?
5. What contamination am I 'aware' of?
6. What contamination am I 'reasonably aware' of?
7. Do any exemptions apply?
8. How do I notify the EPA and what does the notice need to include?
9. Will the notification be made public?
10. What are the potential consequences of non-compliance?
11. What will happen once I notify the EPA?
12. Can I recover the costs of complying with the duty to notify?
13. How should I prepare for the new duty? **8-step plan**

### Victoria's new duty to notify of land contamination

What is it? How can I prepare?

March 2021

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## What is the duty?

- The duty to notify requires specified people to **notify the EPA** of land and groundwater contamination that exceeds set thresholds

### 40 Duty to notify of contaminated land

- (1) A person in management or control of land must notify the Authority if the land has been contaminated by notifiable contamination as soon as practicable after the person becomes aware of, or reasonably should have become aware of, the notifiable contamination.

Victoria's new duty to notify  
of land contamination

What is it? How can I prepare?

March 2021

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## Duty to notify

## Duty to manage

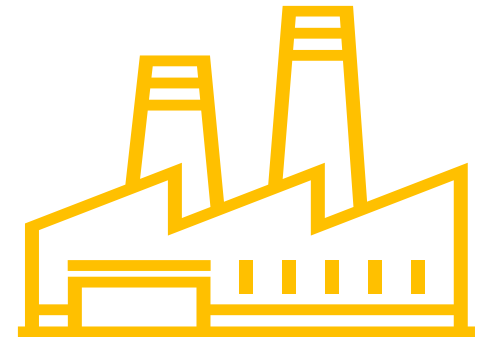
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# Who needs to notify?

- Applies to persons who are in '**management or control**' of land
- 'Management or control' are not defined. Generally relates to whether a person can **exercise power** over the land or **make choices** about the land
- Will be **straightforward** in some cases (eg landowner in occupation clearly manages and controls land, guest or invitee on land does not)
- In other cases, need to look at **contractual rights, facts and circumstances** (eg does a landlord, tenant or contractor have the necessary rights to be in management or control?)
- Where unclear, prudent to **assume** you are in management or control, or otherwise get **legal advice**
- Can be **more than one person** who manages or controls land at any point in time (eg landlord, tenant and contractor)
- Can **come into** management or control (eg when you buy land or become a tenant)



Landlord?

Tenant?

Contractor?

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## When do I need to comply?

- New duty commences on **1 July 2021**
- For notifiable contamination you are **currently aware** of, notification required as soon as practicable after **1 July 2021**
- For notifiable contamination you become (or reasonably should have become) aware of **after 1 July 2021**, then you need to notify as soon as practicable after that point
- It is a **continuing duty**. Just because you discharge on 1 July 2021, doesn't mean that's it (contamination levels may change). Need systems and processes in place in order to **continually discharge** the duty

1 Jul 2021



Duty applies

Duty to notify

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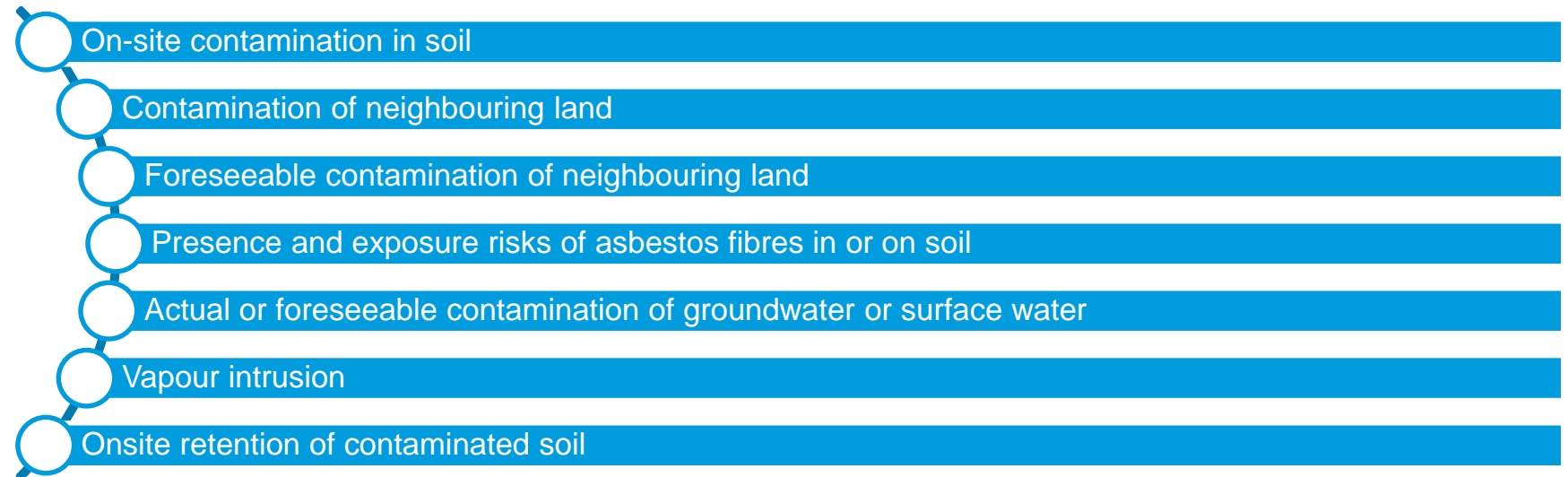
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## What are the relevant thresholds for notification?

- Duty only applies when levels of certain contaminants **exceed the thresholds** in the Regulations
- Largely modelled on requirements in *Contaminated Land Management Act 1997* (NSW)
- Under the Regulations, there are **triggers** for:





# What are the relevant thresholds for notification?

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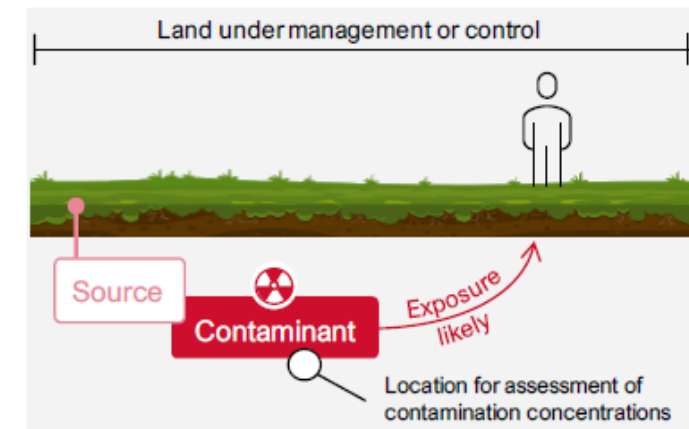
## Threshold – What is notifiable contamination?

### SOIL CONTAMINATION

#### On-site contamination in soil

1. Contamination in or on land under management or control;
2. Contaminant concentrations at following levels:
  - (a) average > HIL; or
  - (b) single sample  $\geq 250\%$  of HIL; and
3. Exposure pathway (or likely exposure pathway) to persons.

*\*NOTE: The HIL for a contaminant is the health investigation level for the contaminant listed in Tables 1A(1) and 1A(2) in Schedule B1 to the NEPM (ASC) for the for the current use of the land*



# What are the relevant thresholds for notification?

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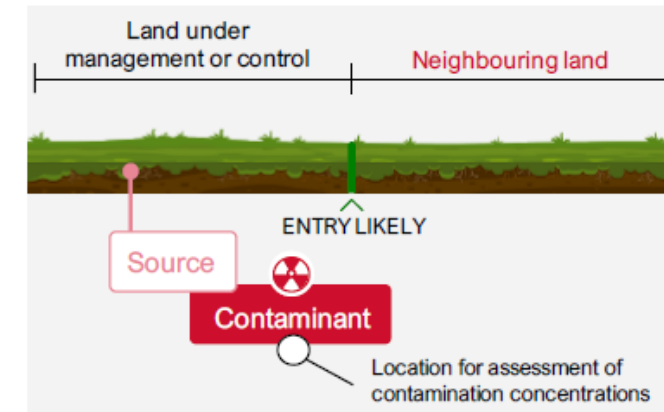
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## Threshold – What is notifiable contamination?

### SOIL CONTAMINATION

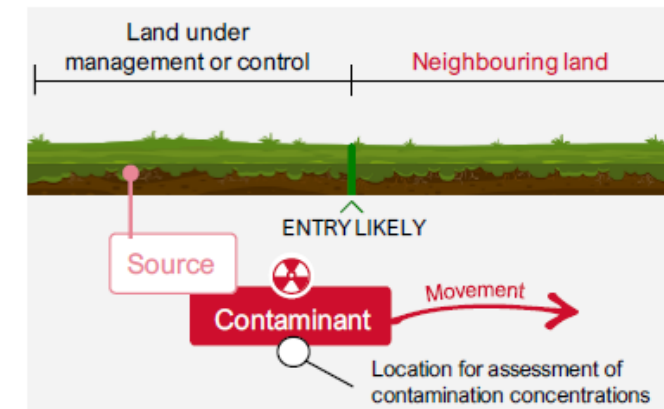
#### Contamination of neighbouring land

1. Contamination in or on land adjacent to land under management or control;
2. Contaminant concentrations at following levels:
  - (a) average > HIL; or
  - (b) single sample  $\geq 250\%$  of HIL; and
3. Contaminant has entered from, or is likely to have entered from, the land under management or control.



#### Foreseeable contamination of neighbouring land

1. Contamination in or on land under management or control;
2. Contamination likely to enter and remain on land adjacent to that land; and
3. Contaminant concentration likely to be > HIL.





# What are the relevant thresholds for notification?

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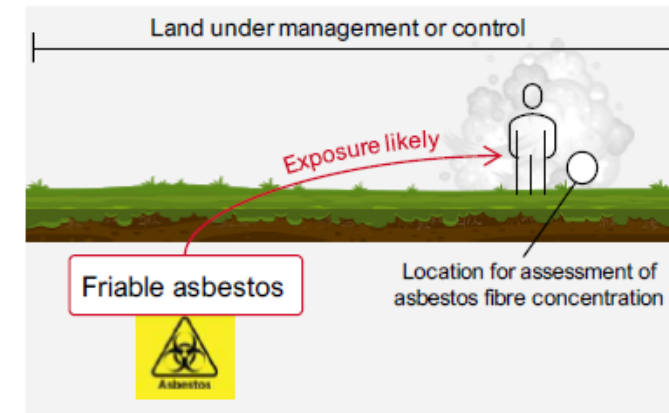
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## Threshold – What is notifiable contamination?

### ASBESTOS IN OR ON SOIL

#### Presence and exposure risks of respirable asbestos fibres in or on soil

1. Presence of friable asbestos in or on soil on land; and
2. A person has been, or is likely to be, exposed to airborne asbestos fibre levels in excess of 0.01 fibres per millilitre by inhalation.



# What are the relevant thresholds for notification?

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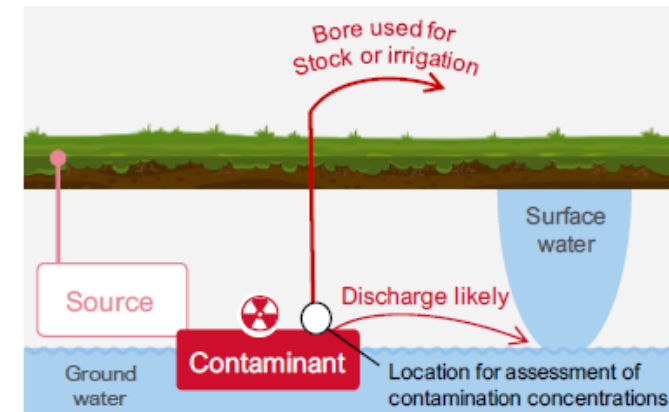
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## Threshold – What is notifiable contamination?

### GROUNDWATER OR SURFACE WATER

#### Actual or foreseeable contamination of groundwater

1. Entry or likely entry of a contaminant into groundwater;
2. The groundwater either:
  - (a) discharges or is likely to discharge to surface water; or
  - (b) is used or may be used for human consumption or contact, stock watering or irrigation; and
3. Contaminant concentration is (or likely to be) above:
  - (a) the default guideline value for that contaminant specified in the ANZG; or
  - (b) the guideline value for that contaminant specified in the ADWG; and
4. Contaminant concentration is likely to remain above that specified concentration.





# What are the relevant thresholds for notification?

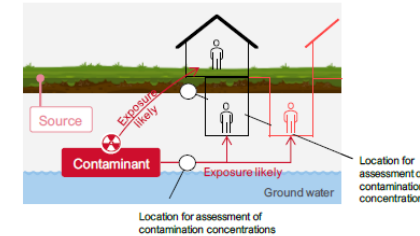
## Threshold – What is notifiable contamination?

### VAPOUR INHALATION PATHWAY

#### Vapour intrusion

1. Contaminant concentration is at following levels:
  - (a) average concentration in soil vapour sample > soil vapour HIL for volatile organic chlorinated compounds for the current use of the land;
  - (b) concentration in single soil vapour sample  $\geq 250\%$  of HIL for volatile organic chlorinated compounds for the current use of the land or any land adjacent to the land;
  - (c) average concentration in soil vapour sample > soil vapour HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
  - (d) concentration in single soil vapour sample  $\geq 250\%$  of soil vapour HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
  - (e) average concentration in soil sample > soil HSL for vapour intrusion for the current use of the land;
  - (f) concentration in single soil sample  $\geq 250\%$  of soil HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
  - (g) average concentration in groundwater sample > groundwater HSL for vapour intrusion for the current use of the land or any land adjacent to that land; or
  - (h) concentration in single groundwater sample  $\geq 250\%$  of groundwater HSL for vapour intrusion for the current use of the land; and
2. Exposure pathway (or likely exposure pathway) to persons for contaminant or by-product of contaminant; and
3. Contaminant concentration is likely to remain above the specified concentration.

\* NOTE: The HILs (health investigation levels) and the HSLs (health screening levels) outlined above are contained in section 6 of Schedule B1 to the NEPM (ASC).



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# What are the relevant thresholds for notification?

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## Threshold – What is notifiable contamination?

### ONSITE RETENTION

Onsite retention of contaminated soils

1. Onsite retention of contaminated soil sourced from onsite (excluding fill material); and
2. Not an activity for which a permission is required.





# What contamination am I 'aware' of?

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The duty to notify requires notification in respect of contamination that is **actually known** by the person or the organisation



**Conduct a review of historical soil and groundwater reports** in possession or control and consider whether these reports identify contamination above the thresholds



If they identify contamination above the thresholds (and there has been no change in contamination levels), then the duty to notify will **crystallise once** the new environmental protection regulatory framework commences



In relation to **awareness of corporations**, a corporation is normally taken to know what its officers and agents know as a result of carrying out their authorised functions or duties. Courts are generally hesitant to conclude that knowledge acquired by a corporation has been forgotten. Therefore, it is important to consider historical reports commissioned by **past management teams**

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## What contamination am I 'reasonably aware' of?



The duty to notify requires notification in respect of contamination that you **reasonably should be aware of**. This is an **objective test** (not what you actually know, but what you reasonably should know)



**Scalable.** More onerous for organisations with skills, knowledge, experience etc  
**Don't go straight to intrusive investigations.** Recommend you take a **staged** approach:



**Keep records** showing the analysis and decision-making process underpinning your assessment



**Periodically review** suitability of decision-making processes and record-keeping



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# Do any exemptions apply?

### Prior notification

- Where the EPA has **already been notified** in accordance with the Act
- Useful where:
  - a person is **coming into management of control of the land** – eg under a lease or by purchasing the land – and a prior notification has been made. Tenant or purchaser don't need to notify
  - multiple persons in manage or control land – eg where a contractor **identifies contamination and makes a notification**, then landowner doesn't need to notify (consider simultaneous notification)
- **Does not apply** where the EPA is only informally aware of the presence of contamination at a site

### Industrial waste stockpile

- Where there is a **stockpile** of most types of industrial waste

### Prior notice

- A **PAN or CUN** previously served in respect of the contamination; and
- There has been **no material change** in the condition of the land after the notice was served or revoked.

### Statement or certificate

- Contamination for which a **statement of environmental audit** or a **certificate of environmental audit** has been issued, provided that:
  - there has been **no potentially contaminating activities** on the land or **material change** in the land since; and
  - there are no **adverse effects on adjacent land**

### Other contaminants

- The contamination is **not covered** by the scope of the duty to notify. This means that emerging contaminants, such as PFAS, are not required to be notified

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# How do I notify the EPA and what does the notice need to include?

- Use form **approved by the EPA** (exact form is yet to be released)
- Notice **must** include:
  - the location of the land;
  - the activity that caused, or is suspected to have caused, the contamination;
  - the nature and extent of the contamination;
  - the nature of the risk of harm to human health and the environment; and
  - information on the actual or **proposed management response** to the contamination.
- If the required information is not known at the time you make the notification, it must be provided to the EPA as soon as practicable **after you become aware of it**
- Is the '**land**' the land within the cadastral boundaries or land within management and control?
- Notification may have a **direct impact on land value**. Consider whether review or approval rights are appropriate in contractual documentation





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# Will the notification be made public?



The intent of the duty is to **inform the EPA** of significant and high-risk instances of contamination that may warrant the EPA's involvement in the management of the contamination



Consistent with this approach, notifications will **not be publicly available** on the public register



Potentially available through **FOI** request



Purchaser / tenant etc will need to **specifically request** prior notices from the person currently managing or controlling the land



**Non-provision** may be a breach of duty to manage but will not necessarily give rights to rescind or terminate land sale contract or lease

# What are the potential consequences of non-compliance?

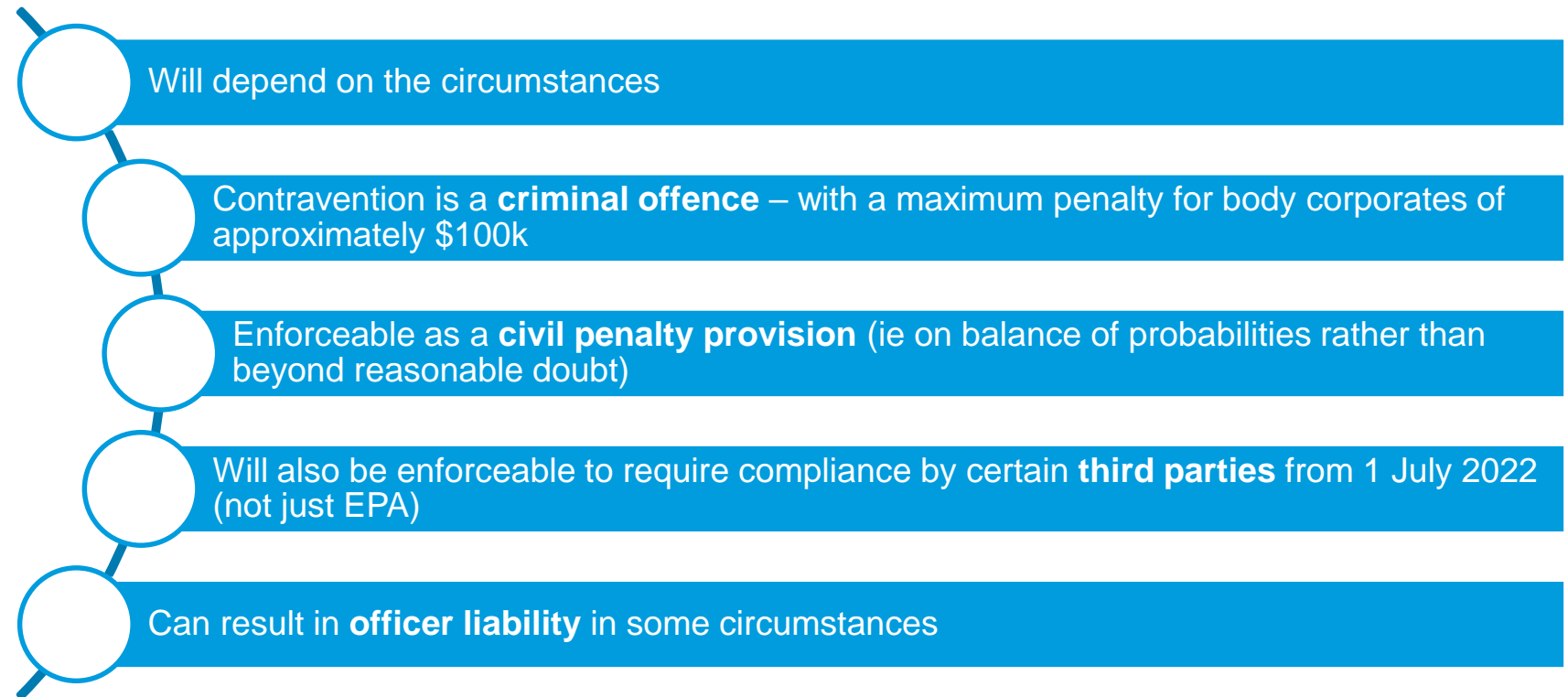
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# What will happen once I notify the EPA?



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Notification **does not** necessarily mean there is a significant risk of harm or that action needs to be taken

However, where notifiable contamination exists:

- it will need to be managed in accordance with the new **duty to manage** contaminated land
- if the contamination is caused by **non-aqueous phase liquids**, such as oils or petroleum products, you will be required to clean up the contamination. If the source of the non-aqueous phase liquid is located on the land, you will need to remove or control it
- the EPA may take **further action** in order to ensure that risks of harm from the contamination are appropriately managed. For example, by issuing:
  - a notice to investigate (requiring investigation into any harm or risk of harm from the contamination);
  - an environmental action notice (requiring specified clean up measures to be taken); or
  - a site management order (requiring long-term management actions to address the contamination)
- the contamination will also need to be managed in accordance with **other relevant duties** under statute, common law and contract

In most cases, information given 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

# Can I recover the costs of complying with the duty to notify?

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- The Act includes a **right to recover any reasonable costs** you incur in complying with the duty to notify
- These costs are recoverable from the **person responsible for causing or contributing to contamination** of the land

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1 The person will need to be **in existence** and of sufficient financial standing in order for this right to be of value

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2 The right can only be actioned in an appropriate **Court**

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3 Proving that a person is responsible for causing or contributing to contamination is generally **difficult**, particularly if multiple persons occupied the land over time and there is a lack of historical documentation

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4 The right is for costs incurred **after** the Act commences. Therefore, if you are intending to claim, the timing of any further assessment work is important

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5 The right can be exercised by persons who come into management or control **long after** the person responsible for causing or contributing to the contamination leaves or sells the land. Contractual bars on claims may not be effective in nullifying the right

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6 One practical measure you can take to **limit your exposure** under this right is to assess contamination at the time you leave or sell the land to provide evidence that you did not cause or contribute to any contamination the subject of a future claim

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7 The right only covers **reasonable costs** incurred in complying with the duty to notify. Therefore, if you are intending to make a claim, you will need to show that the costs you have incurred are reasonable. For example, by obtaining multiple quotes





# How should I prepare for the new duty?

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No.	Step	Action
1	Management or control	<ul style="list-style-type: none"><li>• <b>Identify the sites</b> for which you will have <b>management or control</b> on and after 1 July 2021.</li><li>• This may need to include reviewing leases, licences or other contractual documents to determine whether you are in management or control of land for the purposes of the Act.</li></ul>
2	Subjective awareness	<ul style="list-style-type: none"><li>• Identify any <b>historical reports</b> which indicate the site is or may be contaminated.</li><li>• The <b>timing</b> for completing this step (and the following steps) should depend on whether you may seek to recover costs from the person who is responsible for causing or contributing to the contamination. If so, then these steps should be delayed until 1 July 2021 and records kept of costs incurred in complying with the duty to notify.<ul style="list-style-type: none"><li>• <b>Compare</b> the contamination levels identified in those reports to the notification thresholds in the Regulations.</li><li>• If the notification thresholds are exceeded:<ul style="list-style-type: none"><li>• consider whether the contamination report is likely to represent the <b>current contamination</b> levels of the land. If not – for example, because the report is old or remediation or development activities have occurred since the date of the report – then a contamination assessment may be required;</li><li>• consider whether any <b>exemptions</b> to notification apply; and</li><li>• if no further work is required and no exemptions apply, <b>prepare the relevant notice</b> (including the intended management response). This should be done as soon as reasonably practicable after you become aware of the contamination. If you are currently aware of the contamination, this means as soon as reasonably practicable after 1 July 2021.</li></ul></li></ul></li></ul>



# How should I prepare for the new duty?

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No.	Step	Action
3	Objective awareness	<ul style="list-style-type: none"><li>Depending on the circumstances, consider <b>current and historical uses</b> of the land (and proximate land), previous reports and relevant databases to identify whether the land is potentially contaminated.</li><li>If the land is <b>potentially contaminated</b>, conduct <b>targeted investigations</b> and assess whether any of the notification thresholds have been met.</li><li>If the notification thresholds are <b>exceeded</b>:<ul style="list-style-type: none"><li>consider whether any <b>exemptions</b> to notification apply; and</li><li>if no exemptions apply, <b>prepare the relevant notice</b>, including the intended management response. This should be done as soon as reasonably practicable after you become aware of the contamination.</li></ul></li></ul>
4	Record keeping	<b>Keep a record</b> of relevant searches, assessments and decision-making processes.
5	Cost recovery	If appropriate, seek to <b>recover reasonable costs</b> of complying with the duty from the person responsible for causing or contributing to the contamination.
6	Contractual review	Ensure <b>future contracts</b> , such as leases, licences, works contracts and sale documents, appropriately allocate the risks and liabilities associated with the duty to notify. Ensure that you <b>properly assess</b> risks associated with the duty to notify in future transactions (eg ask for any prior notices).
7	Management system update	Ensure <b>organisational policies and management systems</b> are updated so that notifications can be made as soon as practicable after a contamination event, such as after a chemical spill.
8	Periodic review	<b>Periodically review</b> land under your management or control to confirm whether the duty to notify arises – for example, because of a change in circumstances.



# Contaminated land



## Duty to manage contaminated land

Who does it  
apply to?

Applies to a person in **management or control** of contaminated land

What does it  
require?

Requires that person to eliminate or otherwise minimise risks of harm to human health or the environment so far as is reasonably practicable

- **Identify, investigate & assess** contamination
- Provide **measures** to minimise risk of harm (including clean-up)
- Must **clean-up** NAPL & remove source where located on land
- **Provide information** to people affected + person coming into management or control etc

Key points (3)

1. Must be **above background** + create a **risk of harm**
2. Statutory right to **recover costs** of complying with duty from person who caused or contributed to contamination (creates an opportunity + need to ensure measures are adopted to minimise risk of liability post-exit)
3. Non-compliance may result in a **statutory notice** (no civil penalty or criminal offence until non-compliance with notice)



Contaminated land:  
understanding section 35 of the  
*Environment Protection Act 2017*  
Publication 1640 February 2021



# Environmental audits



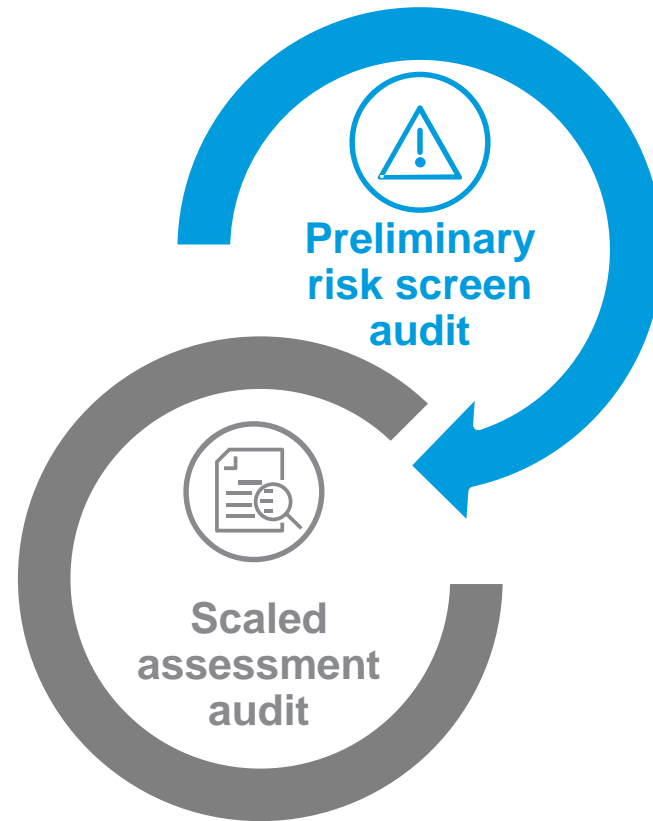
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## Objective

- Reformed audit process which increases flexibility and reduces cost
- Also increases scope of what can be audited (eg verification of matters required by improvement notices, notices to investigate, site management orders, permissions, financial assurance etc)

## Preliminary risk screen audit

- Purpose is to determine if a detailed audit is necessary and if so to recommend scope
- Based on a desktop study and site inspection (may include sampling)

## Scaled assessment audit

- Purpose is to assess risk of harm and recommend measures to manage the risk

## PRSA & audit to be provided

- To EPA and local council (in most cases)
- To person who proposes to come into management or control to avoid cost consequences (**even though on public register**)



# Environmental audits

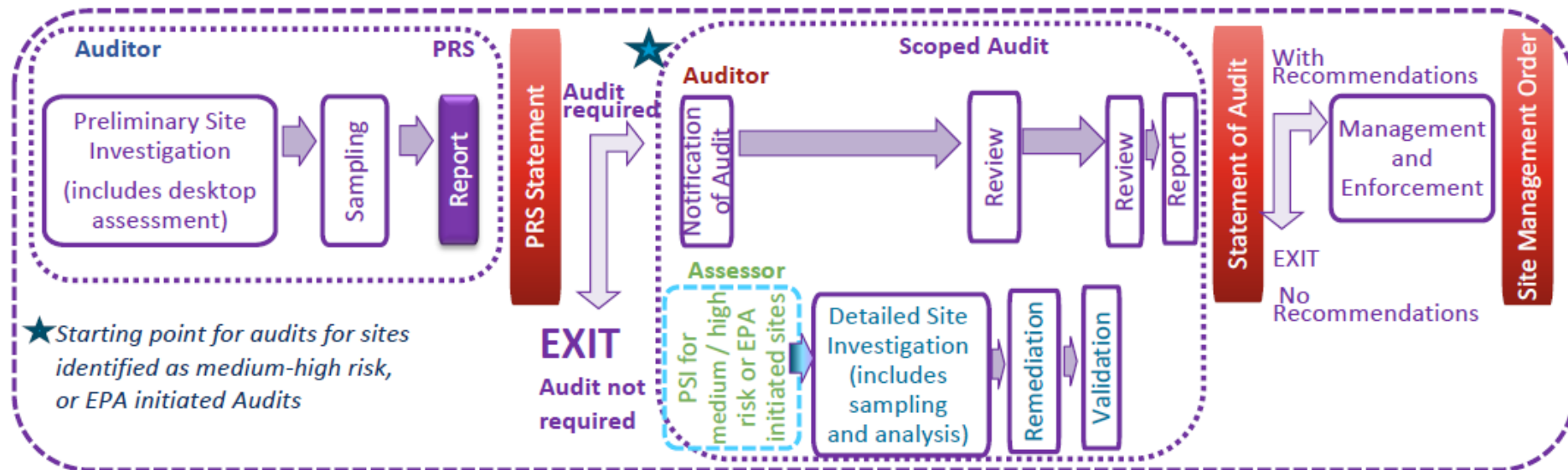
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# Notices



## Overview

- EPA has a much more **tailored** set of regulatory notices at its disposal
- **Includes** improvement notices, prohibition notices, notices to investigate, environmental action notices & site management orders

## Environmental action notice

- Can be **issued to** person who caused or permitted circumstances, current owner or occupier, previous owner or occupier
- Costs of compliance can be **recovered** from the polluter
- Compliance with an EAN can be directed to a **related entity** or **officer** in limited circumstances

## Site management order

- Can **be issued** to current owner or occupier
- Costs of compliance can be **recovered** from the polluter
- Compliance with a SMO can be directed to a **related entity** or **officer** in limited circumstances
- The order is binding on each **subsequent owner, occupier** or **person in management or control** of the land and operates as a 'statutory charge' on the land

A financial assurance may be required as a condition of a EAN or SMO

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# General environmental duty



Who does it  
apply to?

A person who is **engaging in an activity** that may give rise to **risks of harm to human health** or the **environment** from **pollution or waste**

What does it  
require?

Requires that person to eliminate or otherwise minimise those risks, **so far as reasonably practicable**

Key points (6)

1. Scalable (applies to everyone)
2. 'So far as **reasonably practicable**' requires a consideration of potential risks, their likelihood, possible consequences and the cost/availability of risk control methods. Guidance available
3. This consideration will evolve with the '**state of knowledge**' (what is known or ought to be reasonably known at the time)
4. Does not **require** harm, and harm does not mean breach
5. Criminal **offence** (unique to Victoria)
6. Compliance will require duty holders to:
  - a) detect possible risks;
  - b) identify methods of control; and
  - c) implement reasonably practicable measures to eliminate or otherwise reduce the risk of harm.

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# General environmental duty



Who does it apply to?

A person who is **engaging in an activity** that may give rise to **risks of harm to human health or the environment** from **pollution or waste**

What does it require?

Requires that person to eliminate or otherwise minimise those risks, **so far as reasonably practicable**

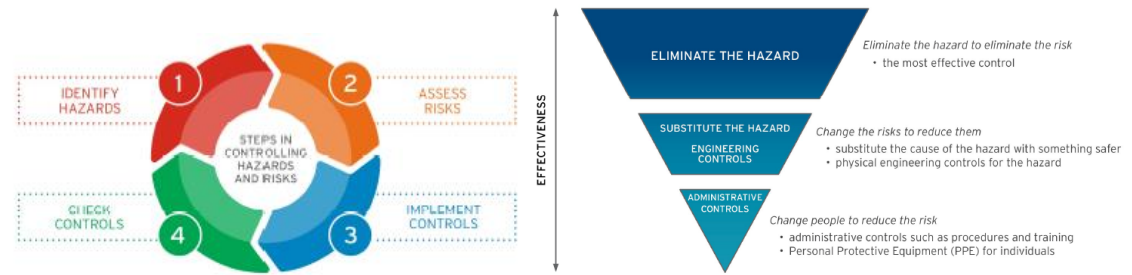
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**Industry guidance:**  
supporting you to comply  
with the general  
environmental duty

EPA VICTORIA | Environment Protection Authority Victoria | VICTORIA State Government

Publication 1741.1 October 2020  
\*This replaces publication 1741 issued April 2019

**Fact sheet**

A new legal framework is intended to come into effect on 1 July 2021 that will help drive environmental improvements by ensuring everyone takes responsibility for the risks they pose to the environment. The cornerstone of the *Environment Protection Amendment Act 2018* (the Act) is the general environmental duty (GED), which requires Victorians to understand and minimise their risks of harm to human health and the environment, from pollution and waste.

EPA will work with industry to help them understand how to fulfil their obligations, by providing guidance, advice and other support. Complying with the GED is about taking reasonable proactive steps and employing good environmental work practices.

**Working under the general environmental duty**

Generally speaking, most businesses would not have to do anything differently. Most businesses already follow good management practices under OHS laws, meeting industry standards, adopting industry better management practices, and following other relevant legislation related to the environment. In effect, the GED just makes it clear that it is your responsibility to manage your business to reduce risk to the environment.

For businesses that may not be clear on what they should be doing to protect the environment, the GED also helps. By focusing on how you operate, the GED provides a clear framework that EPA and you can follow to understand risks and take steps to address them.

For those few who choose not to do the right thing, the Act not only clarifies their obligations, it also provides EPA with tools to pick up wrong-doing and bring people into compliance, levelling the playing field for everyone.

What is the GED?





# Victoria's new EP Act: Our Roadmap

**December 2020**  
Release of final Regs, ERS etc

**1 July 2021**  
New framework commences



## SCOPING & PREPARATION

### Legal advice/scoping

- Understand applicability, scope & extent of new statutory duties and new regulatory framework
- Understand implications for current or proposed activities

### Gap analysis/benchmarking

- Compare current operations, systems and processes to requirements under new framework
- Identify compliance gaps and improvements
- Prioritise focus areas

### Resourcing plan and Budget

- Prepare resourcing plan & budget based on identified gaps
- Obtain senior leadership approval for resourcing plan and budget

### Working Group establishment

- Create intra-group team with responsibility for implementation

### Duty to notify

- Identify sites for which organisation has management or control
- Collect previous contamination reports & conduct desktop review to identify 'known' contamination above notification thresholds and confirm whether any exemptions apply
- Conduct further desktop / intrusive investigations where appropriate to identify any notifiable contamination you should reasonably be aware of
- Prepare notices & management plans where required

## IMPLEMENTATION

### Policy, procedure and management system updates

- Update governance systems to reflect new framework (eg to ensure effective implementation of GED, ensure pollution incident response and reporting reflects statutory requirement etc)

### Capacity building

- Senior leadership team
- Board
- Whole of organisation
- Third parties and contractors

### Risk control updates

- Upgrade risk controls to eliminate or otherwise minimise risk so far as is reasonably practicable (incl. operational controls, capital works to update physical controls where required etc.)

### Change management roll-out

- Training & toolbox talks (site-based & with specific areas of the organisation)
- Updates to systems, processes and tools

### Contract reviews / risk allocation

- Review current contracts to see who has responsibility for statutory duty to notify contamination, GED, pollution incidents etc
- Review new contracts where term extends beyond 1 July 2021 to ensure they achieve their purposes in light of the new framework, particularly where a change in management or control is proposed (eg leases, licences or contracts of sale), the contract involves waste or where the contract involves third parties doing works which may give rise to environmental risks
- Update precedents to ensure responsibility for compliance with new statutory duties is appropriately allocated, risk of non-compliance and long-term legacy risks are managed

### Working Group meetings

- Working Group to meet regularly drive change management, ensure milestones achieved, manage budget and report to senior leadership team / Board on progress

## GOVERNANCE, RISK MANAGEMENT & ASSURANCE

### Internal reviews

- Operational compliance
- Governance framework
- Management systems
- Resourcing capacity & capability
- Availability of director and senior officer due diligence defence

### Assurance (internal / external audits)

- Operational compliance
- Governance framework
- Management systems
- Availability of director and senior officer due diligence defence

### Duty to notify (implementation)

- Submit notifications
- Conduct further desktop / intrusive investigations where appropriate
- Conduct further work (eg for NAPLs) to manage contamination
- Seek cost recovery from polluter
- Maintain register & implement system for periodic review & for new site acquisitions / leases etc

# Victoria: Additional updates





# Compliance changes: Victoria

## *Draft amendments to Victorian Planning Provisions*

- **Purpose:** to align the planning system with the new EP Act's environment protection framework
  - Provide a **risk-based** and **proportionate** process for assessing and dealing with contamination

Public consultation closed:  
2 June 2020

Expected finalisation of  
changes: **Timing to be  
advised**

Changes come into effect:  
1 July 2021

### Key proposed changes

#### New definitions

- **Potentially contaminated land** now includes land where **known past or present activities or events on the land or offsite** have the **potential to have caused contamination**
- **Sensitive use** is defined as a '*residential use, child care centre, **kindergarten**, pre-school centre, primary school, **secondary school** and **children's playground**, even if ancillary to another use*

#### Assessing contamination - PRSAs and environmental audits

- If an **EAO applies** to the land, an **environmental audit** will be required for a **sensitive, agriculture or public open space use**
  - Any recommendations **must** be included as **permit conditions**
- If an EAO does not apply, responsible authorities may still require PRSAs and/or environmental audits early in the application process
  - Particularly for **sensitive, agriculture or public open space uses** or where the state of land contamination is **unknown**

#### Key points

- Responsible authorities will have heightened focus on contamination issues – applicants and proponents should adopt a **proactive response**
  - Contamination issues should be **addressed early in the planning process** (i.e. before or during the planning application/amendment stage)

# Compliance changes: Victoria



## ***VCAT Environment and Resources List***

### **What is it?**

As of 1 July 2020, the Environment and Resources list operates as a **separate** list within the Planning and Environment Division.

### **Aim**

Provides a **specialised approach** to deal with environmental disputes

### **Key points (3)**

1. **Jurisdiction:** decisions under various pieces of environment legislation, including the new EP Act in 2021
2. Deals with **two** types of applications:
  - a) Applications for review of a decision (e.g. EPA decisions regarding permissions)
  - b) Applications for orders (e.g. enforcement orders or declarations)
3. Created in response to the new EP Act and the *Melbourne Strategic Assessment (Environment Mitigation Levy) Act 2020*. Both provide for a number of review rights





## Case law updates: Victoria

### *LPG Laverton Property No 5 Pty Ltd v Australian Vinyls Corporation Pty Ltd & Anor* [2020] VSC 689

#### Key points

- Where works are proposed following the service of a clean-up notice, it is a matter of jurisdictional fact for the Tribunal to determine whether the works amount to ***clean up and ongoing management measures directed and specified in the notice***.
  - If they are, then s.62A(1B) overrides the PE Act and Building Act.
  - If they are not, then planning and building controls apply in the usual way.
- **On the facts:** The permit concerned works that were **not specified in the clean-up notice**, thus the Tribunal had jurisdiction to review them.
- **Implications:** Recipients of clean-up notices should understand what works the notice requires, identify what other works/whether a permit is required.

### *EPA & Anor v Australian Sawmilling Company Pty Ltd (in liq) & Ors* [2020] VSC 550

#### Key points

- Liquidators can amount to ‘occupiers’ under the EP Act, and may therefore have responsibilities with respect to **contaminated land**.
- For example, liquidators could be required to:
  - comply with the EPA’s **abatement and clean up notices** (ss 28B & 62A);
  - pay the EPA’s **reasonable clean-up costs** (s 62(2)); and
  - **furnish information** to the EPA (s 54).

# Case law updates: Victoria

## *West Gate Tunnel Project – PFAS & contamination issues*

JUNE 2020

AUGUST 2020

MAR-APR 2021

### **Legislation**

- Introduction of the *Environment Protection (Management of Tunnel Boring Machine Spoil) Regulations 2020* (Vic)
- Response to issues associated with transporting and managing PFAS contaminated tunnel boring machine spoil

### **Supreme Court decision**

*Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476

- CPB discovered PFAS contaminated soil to be removed during tunnelling on the West Gate Tunnel Project
- Lyons J refused Transurban's application for a declaration and injunction, that would have frozen the arbitration of the dispute

### **Current status**

EPA approved EMP's:

- Hi-Quality (Bulla)
- Western Soil Treatment (Maddingley Brown Coal landfill)





# Planning Panel Reports: Victoria



## *Golden Beach EES Project Inquiry (EES) [2021] PPV 13*

### Key points (3)

- **Contaminated land** issues at the Golden Beach Gas Project
- Disturbance of soil or groundwater contamination held to be **unlikely to pose an unacceptable level of risk** if appropriate environmental management measures applied
- Recommendation for **condition requiring further investigation** of soil contamination or acid sulfate soils to the EPA's satisfaction prior to construction

## *Crib Point Project Inquiry (EES) [2021] PPV 11*

### Key points (3)

- **Contamination** of soil and groundwater was identified at the Crib Point Gas Import Jetty and Crib Point – Pakenham Gas Pipeline
- The Inquiry Advisory Committee held that the soil and groundwater contamination impacts could be **adequately managed** by various recommended **mitigation measures**
- For example, intrusive soil contamination sampling could assist in mitigating contamination impacts

# New South Wales & ACT: Updates





## Key legislation – overview of provisions

Responsibility for management of contaminated land in NSW sits with two authorities:

- a) the EPA, which uses its powers under the *Contaminated Land Management Act 1997* (NSW) (CLM Act) to deal with significantly contaminated land.
- a) planning authorities, who deal with contamination which does not pose an unacceptable risk - *State Environmental Planning Policy No. 55 - Remediation of Land* (SEPP 55)

The EPA may also use the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act) to issue and enforce licences that regulate pollution (ie contamination).

## CLM Act

The EPA can:

- order a person to undertake a preliminary investigation of suspected contaminated land (section 10)
- declare land to be significantly contaminated land (section 11)
- order a person to take management action (section 14),
  - a type of action could include the person entering into a Voluntary Management Plan (VMP) to manage the contamination

The EPA may direct the following people (in this order) to take action:

- 1) the person responsible for the contamination
- 2) the owner of the contaminated land (note that the definition of owner does not include a person *just because* the person has an interest in the land under a lease, licence or permit)
- 3) the notional owner of the contaminated land (a notional owner can mean a mortgagee in possession or a person who has a vested interest in land – ie a freehold type interest)



## CLM Act

### Duty to Notify under the CLM Act

- Landowners (of land that has been contaminated) and/or parties (whose activities have contaminated the land) must report the contamination to the EPA (under section 60 of the Act). This allows the EPA to know of sites and take action if required.
  - An example of where a DUTY TO REPORT may arise is where a
    - site is currently used for industrial purposes.
    - there are underground storage systems at the site.
    - there is phase separated hydrocarbons present on the site, and it is unclear whether a plume is migrating off site, and
    - concentrations of contaminants in the groundwater are unknown.

## CLM Act – Amendments/Updates

The most recent amendments to the CLM Act came into force on 11 December 2020.

No other changes to the CLM Act (or any amendments to SEPP 55) since the last Contaminated Land Webinar.



## POEO (Underground Petroleum Storage Systems) Regulation 2019

One of the main sources of land and groundwater contamination are leaking Underground petroleum storage systems (UPSSs).

Many of the contaminated sites notified to the EPA under s60 of the CLM Act are sites on which these types of facilities are located.

The *Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2019* require operators to monitor for leaks and have documented management procedures for their UPSSs.



## POEO (Underground Petroleum Storage Systems) Regulation 2019

The New Guidelines summarise best-practice equipment and procedures to help minimise leaks and reduce environmental risk, they:

- Provide details on the environmental requirements for operating UPSSs
- Specify what level of performance is expected of operators of a UPSS; and
- Assist with achieving compliance with the requirements of the Regulation.





# ACT

## Environment Protection Act 1997 (ACT)

The EPA's Register of contaminated sites, records land if the EPA has:

- issued an Environment Protection Order (**Order**) under 91C(1) of the Environment Protection Act to assess whether land is contaminated;
- issued an Order under subsection 91D(1) to remediate contaminated land;
- issued an Order under subsection 125(2) or subsection 125(3) to manage contaminated land;
- required an environmental audit of a site under subsection 76(2); or,
- received a notice under section 76A(1) that an auditor has been engaged to undertake an audit under the Act or another Act - this will typically be under the Planning and Development Act as a condition of planning consent

## Environment Protection Act 1997 (ACT)

Like in NSW there is a hierarchy of people to which the EPA can issue an Order under 91C and 91D (known as the choice of appropriate person):

- 1) the person responsible for the contamination
- 2) the lessee (or if not practicable the notional lessee) or sublessee (of if not practicable the sublessor or the notional lessee) of the contaminated land – Noting that a sublessor, under a land sublease, is the lessee under the Crown lease under which the sublease is granted
- 3) the notional owner of the contaminated land (a notional owner can mean a mortgagee in possession or and like in NSW can be a person who has a vested interest in land)

There have been no significant amendments to the management of contaminated land in the ACT since the last Contaminated Land Webinar.

# Queensland: Updates







## Amendment to section 320A of the Environmental Protection Act

### Previous

(2) Also, this division applies to a person who—

(a) is—

- (i) the owner or occupier of contaminated land; or
- (ii) an auditor performing an auditor's function mentioned in section 568(b); or
- (iii) a rehabilitation auditor conducting an audit of a PRCP schedule under chapter 5, part 12; and

(b) becomes aware of—

- (i) the happening of an event involving a hazardous contaminant on the contaminated land; or
- (ii) a change in the condition of the contaminated land; or
- (iii) a notifiable activity having been carried out, or being carried out, on the contaminated land; that is causing, or is reasonably likely to cause, serious or material environmental harm.

Note—

See subdivision 3A about the duty of a person mentioned in subsection (2).

### Current

(2) Also, this division applies to a person who—

(a) is—

- (i) the owner or occupier of land; or
- (ii) an auditor performing an auditor's function mentioned in section 568(b); or
- (iii) a rehabilitation auditor conducting an audit of a PRCP schedule under chapter 5, part 12; and

(b) becomes aware of—

- (i) the happening of an event involving a hazardous contaminant on the land that is causing, or is reasonably likely to cause, serious or material environmental harm; or
- (ii) if the land is contaminated land—a change in the condition of the land that is causing, or is reasonably likely to cause, serious or material environmental harm; or
- (iii) a notifiable activity having been carried out, or being carried out, on the land.

Note—

See subdivision 3A about the duty of a person mentioned in subsection (2).



## Department of Environment and Science waste enforcement priority

### ■ **Waste management and waste levy compliance**

- There is a risk that some people and operators may not take their waste to landfill in order to avoid the waste levy, leading to an increase in illegal dumping and unlicensed waste management operations, and ultimately, contamination of land and waters.

### ■ **Target industries and activities**

- Industry: Unlicensed waste management operations.
- Activity: Unlawfully undertaking environmentally relevant activities including transport, stockpiling and disposal of wastes.

### ■ **Outcomes**

- Poor performing and unlicensed waste operators are held to account.
- Illegal dumping is deterred through investigation and enforcement in collaboration

with local governments under the Local Government Illegal Dumping Partnerships Program.

### ■ **Targets**

- 90% of alleged unlicensed waste operations are inspected within four weeks of coming to the department's attention.
- 90% of illegal dumping incidents reported to the department have had investigations commenced or referred to local government within four weeks of receiving the report.

### ■ **Late 2020 – early 2021 prosecutions**

- Unlawfully causing serious environmental harm and contravening a condition of an EA – release of alkaline bauxite slurry
- Contravening an EPO – failure to remove regulated waste from premises



# Queensland



## Linc Energy – still going, but what's new?

- Sufficient evidence to commit the former officers of Linc to stand trial
  - Trial in the District Court expected this year
- State management of the land
- Precautionary approach to other activities near the site that may exacerbate contamination issues





# South Australia: Updates





- **Environment Protection (Disposal of PFAS Contaminated Substances) Amendment Bill 2020**
  - Bill introduced in September 2020
  - Not yet passed by Parliament
  - Referred to Environment, Resources and Development Committee in March 2021
- **EPA approval:**
  - In February 2021, EPA refused Southern Waste ResourceCo's application for PFAS disposal licence
  - Currently no locations in SA to lawfully dispose of PFAS





- **Single-use and Other Plastic Products (Waste Avoidance) Act 2020**
  - Prohibits supply and distribution of single-use plastic straws, stirrers and cutlery from March 2021
  - Prohibits supply and distribution of polystyrene cups, bowls, plates and containers from March 2022
- Enforced by Environment Protection Authority



# Northern Territory: Updates





- **Environment Protection Act 2019 (NT)**
  - Commenced June 2020
- **Environment Protection Regulations 2020 (NT)**
  - Commenced November 2020
  - Provides for referrals, penalties, definitions
- **Guidance Documents**
  - EPA publishing guidance documents to provide advice on the operation of the Act:
    - *‘Preparing a supplementary environment report’*
    - *‘Preparing an environmental impact statement’*
    - *‘Referring a proposal to the NT EPA’*





- **Katherine PFAS contamination**
  - Long-term usage of firefighting foam at Katherine RAAF Base resulting in PFAS contamination of nearby properties
  - Class action brought against Department of Defence by 2,500 Katherine residents
  - Received \$56m compensation from Commonwealth Government in March 2021
- Darwin RAAF Base PFAS contamination class action ongoing



# Western Australia: Updates



# Western Australia: Contaminated Sites



## Contaminated Sites Act 2003 (WA)

- CS Act came into effect on 1 December 2006.
- CS Act is separate to the *Environmental Protection Act 1986* (WA)
- Last review of the CS Act conducted in 2015, which recommended that no substantive amendments be made to the CS Act.

## Recent Amendments to the CS Act

- Minor COVID-19 related amendments.
- Minor amendments relating to proving matters in a prosecution.

## Leading case authorities on interpretation of the CS Act

- *Viva Energy Australia Pty Ltd v Contaminated Sites Committee* [2018] WASC 89
- *Caltex Australia Petroleum Pty Ltd v Contaminated Sites Committee* [2017] WASC 155
- *Coffey LPM Pty Ltd v The Contaminated Sites Committee* [2014] WASC 504
- *Coffey LPM Pty Ltd v The Contaminated Sites Committee* [2013] WASC 98

## Endorsement of PFAS NEPM 2.0

- Interim PFAS guidelines published in 2017 under review.
- WA Minister for Environment has endorsed the PFAS National Environmental Management Plan 2.0, which was released in 2020.





# Proposed reform: environmental protection and waste

## *Environmental Protection Amendment Act 2020*

### Key points

1. A suite of amendments to the *Environmental Protection Act 1986* (WA) came into effect on 3 February 2021. More substantive changes are still to come.
2. **Relevant amendments** include:
  - a. an increase to the threshold amount for causing:
    - i. 'material environment harm' from \$20,000 to \$100,000; and
    - ii. 'serious environmental harm' from \$100,000 to \$500,000;
  - b. changes to the defence provisions to clarify that an environmental licence does not provide a defence for an emission that is not regulated by that licence.

## *Waste reform*

### Key points

1. Government discussion paper: 'Waste not, want not: Valuing waste as a resource', which propose amendments to the *Environmental Protection Act 1986* (WA), *Waste Avoidance and Resource Recovery Act 2007* (WA), and the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA).
2. **Relevant amendments** include:
  - a. amending definition of waste so that 'waste derived materials' are no longer waste;
  - b. a regime for determinations to be made by the Director General of the DWER which consist of:
    - i. a product specification, which applies to the producer; and
    - ii. a declaration, which applies to the user.



## Other waste reform projects



**Gazetted 28 June 2019:** Amendments to the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) to require record keeping and reporting of waste and recycling data from local governments, waste recyclers and licensees of major regional landfills



**Commenced 1 October 2020:**  
Western Australia's Container Deposit Scheme –  
Containers for Change



**Gazetted 9 June 2020:**  
Amendments to the *Environmental Protection  
(Controlled Waste) Regulations 2004* (WA)



**Amended December 2019:**  
Uncontaminated fill thresholds in the Landfill Waste Classification  
and Waste Definitions 1996  
(as amended 2018)



Proposed amendments to the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA) to require the use of weighbridges for Category 63, 64 and 65 landfill premises to calculate leviable waste

# Commonwealth: Updates







# Compliance changes: Commonwealth

## *PFAS National Environmental Management Plan 2.0 (PFAS NEMP 2.0)*

*Published 5 May 2020*

### What is it?

PFAS NEMP 2.0 provides nationally agreed guidance on the environmental management of PFAS contamination

- Focuses on the **prevention** and **management** of PFAS contamination

### Aim

To recognise the need for **adaptable, jurisdiction-based regulation**

- Victoria is yet to implement the revised plan

### Key changes (4)

1. New decision tree for soil reuse – outlines the process for a screening risk assessment
2. Updates to environmental guideline values
3. Updated guidance for on-site containment of PFAS-contaminated material
4. Updated guidance on wastewater management





# Compliance changes: Commonwealth

## *National Remediation Framework (NRF)*

### What is it?

The NRF was designed to complement the National Environment Protection (assessment of Site Contamination) Measure (**ASC NEPM**)

**ASC NEPM** provides a **national process** for **assessing** whether a site is **contaminated**

The **NRF** provides a **nationally consistent approach** to **remediating** and **managing contaminated sites**

### Key points (4)

1. Has been endorsed as best practice by **all jurisdictions**
2. It is non-binding. Compliance with State-based legislation and regulations is still necessary (the NRF **does not supersede** these requirements)
3. Provides guidance on the entire remediation process, including:
  - a. Remediation action plan **development**
  - b. Remediation action plan **implementation**
  - c. **Post-remediation** considerations



# Compliance changes: Commonwealth

## *Commonwealth Environment Protection Authority Bill 2021*

*Introduced 22 March 2021*

### What is it?

- A Bill that establishes the Commonwealth EPA
- The Commonwealth EPA will exercise administrative functions with respect to federal environmental legislation

### Aim

- To promote the proper administration of the *Environment Protection and Biodiversity Conservation Act 1999* and other commonwealth legislation

### Key changes (3)

1. Formation of a new statutory body – Commonwealth EPA
2. Establishing the Parliamentary Joint Committee on Environment and Energy
3. Clarify the functions of the statutory body – with respect to assessing environment impacts of activities, granting or withholding approvals for regulated activities, monitoring, compliance, enforcement, and assurance functions.





# Compliance changes: Commonwealth

## *Commonwealth Environment Protection Authority Bill 2021*

### Key points

1. Proposes to create a Commonwealth EPA to promote the proper administration of Commonwealth environment protection legislation
2. **Status:** Bill introduced into parliament on 22 March 2021.
3. **Relevant amendments** include:
  - a. Formation of the Commonwealth EPA and the Parliamentary Joint Committee on Environment and Energy
  - b. Clarify the functions of the EPA – with respect to assessing environment impacts of activities, granting or withholding approvals, monitoring, compliance, enforcement, and assurance functions (could be undertaken in response to contaminated land).

## Other amendments to the *EPBC Act*

### Key points

1. ***Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020***
  - Seeks to expand and clarify provisions which allow the Commonwealth to delegate environmental approval powers to the States/Territories through bilateral agreements ('single touch' environmental approvals).
  - Not specific to contamination – but approvals may be with respect to contaminated land
2. ***Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021***
  - establishes a framework for making, varying, revoking and application of NES





# Management of Industrial Chemicals and PFAS

# Stockholm Convention on Persistent Organic Pollutants



- Australia ratified the Stockholm Convention in 2004.
- PFOS and PFOA were listed on the Convention *after* Australia signed up.
- Australia has not yet ratified the changes. Before doing so, Australia must meet the associated management obligations.
- To meet these obligations, the Federal Government is establishing a National Standard for the management of industrial chemicals.



# National Standard for the management of industrial chemicals / Stockholm Convention

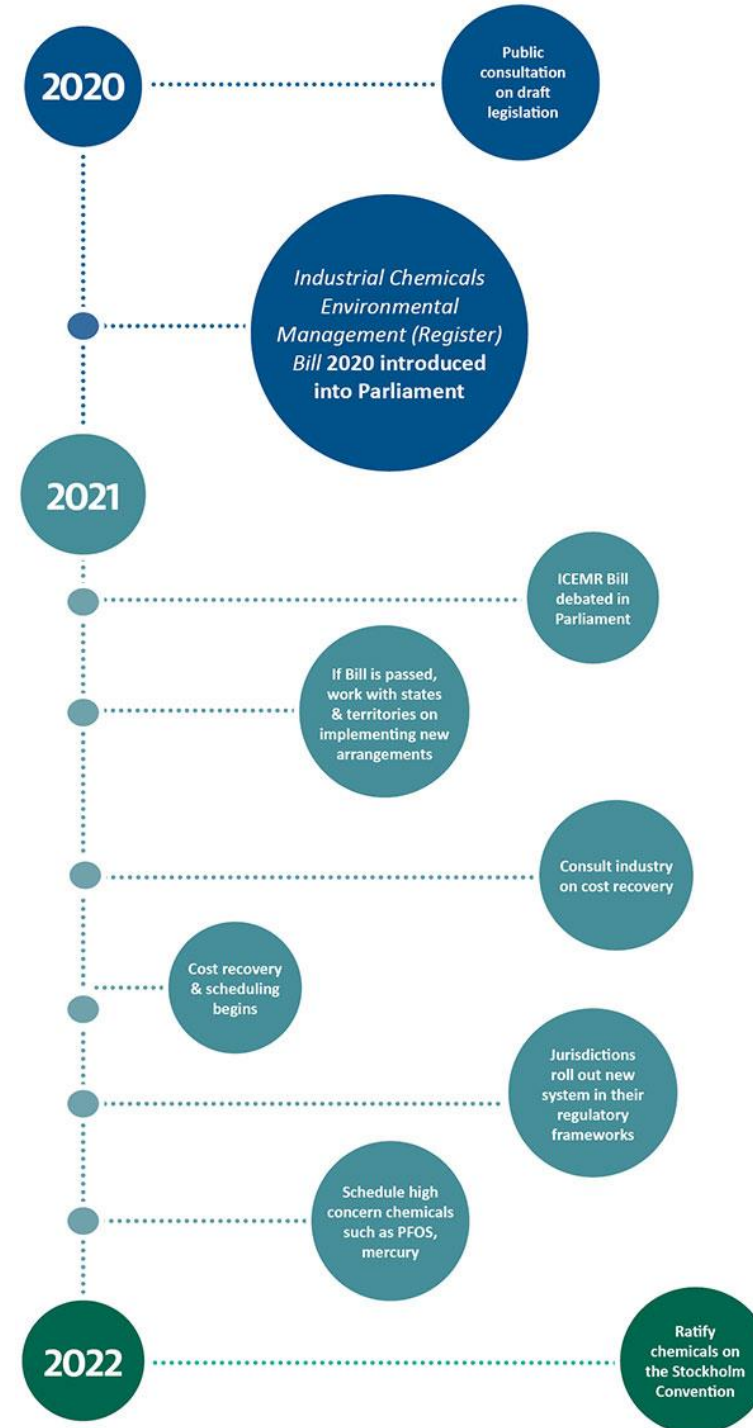


- The National Standard will be introduced in 3 parts:
  1. Passage of *Industrial Chemicals Environmental Management (Register) Bill 2020*
  2. Implementation of the changes in state law, to ensure a consistent framework
  3. Introduction of a cost recovery and scheduling framework
- The Government will then ratify the amended Stockholm Convention.
- It is expected ratification will occur in **2022**.





## *Expected timeline for new industrial chemicals framework*



# Industrial Chemicals Environmental Management (Register) Act 2021



- As the first step in creating the national framework, the Government introduced the *Industrial Chemicals Environmental Management (Register) Bill* in December 2020.
- It received royal assent and became an Act on 26 March 2021.
- The Act establishes a National Register to manage the ongoing use, handling and disposal of industrial chemicals.
- The Register is a single consistent source of information on how chemicals should be managed.





# Industrial Chemicals Environmental Management (Register) Act 2021



## Overview

### Ministerial powers

- Cth Environment Minister may establish:
  - decision-making principles for categorising chemicals;
  - categories of industrial chemicals; and
  - controls for the use and disposal of each category.

### National Register

- Chemical categories and scheduling decisions will be recorded on a National Register.
- States and territories will incorporate the Register in their own legislation, to ensure national consistency.

### Advisory Committee

- New Advisory Committee on the Environmental Management of Industrial Chemicals established.
- The Committee will advise the Minister on the making, variation or revocation of scheduling decisions, the Register or the decision-making principles.



# Inquiry into PFAS remediation in and around Defence bases – second progress report



- The Parliament of the Commonwealth of Australia, PFAS Subcommittee released a second progress report on the inquiry into PFAS remediation in and around Defence bases.
- The report made various recommendations, including:
  - The government expedite the work to ban the use of, contain, and ultimately safely destroy, long chain PFAS-based firefighting foams, to ratify the listing of PFOS and expedite the process for PFOA and PFHxS in the event they are listed under the Stockholm Convention on Persistent Organic Pollutants.

# Tasmania: Updates





# Compliance changes: Tasmania



## *Environmental Management and Pollution Control (Underground Petroleum Storage Systems) Regulations 2020*

### Key points (3)

1. Amended the 2010 regulations to prevent or limit, to the greatest extent practicable, the release of petroleum product into the environment from underground petroleum storage systems.
2. **Status:** Came into force on 3 February 2020.
3. **Key provisions** provide that:
  - a. a director must be notified where contamination is detected in Groundwater Monitoring Wells in Groundwater Protection Zones
  - b. monitoring for losses of petroleum must be undertaken to reduce contamination and remediation costs;
  - c. an environmental site assessment to be carried out if petroleum contamination in soil or groundwater is detected;
  - d. the presence of LNAPL/inferred LNAPL (which is an indicator of contamination) to be notified to the EPA Director by any person who becomes aware of the LNAPL/inferred LNAPL; and
  - e. penalties are incurred when the UPSS regulations are not followed.



# MinterEllison



The contents of this presentation provides general information only and should not be used as a substitute for legal advice