

Duty to Manage Contaminated Land



Introduction

On 1 July 2021 the *Environment Protection Act 2017 (Vic)* established a **duty to manage** contaminated land, clarifying the obligation on a person in management or control to ensure it is safe for its current or planned future use and to prevent harm to neighbours.¹

The *duty to manage* is actionable by an eligible person for civil remedies and by the Environment Protection Authority by remedial notice and site management orders. There is no criminal offence provision for the *duty to manage* contaminated land.

Civil Remedies

Civil remedies including restraining conduct, requiring a specific act, provision of financial assurance, payment of compensation and other ancillary matters are available to an eligible person whose interests are affected and who has leave of the court.²

In order to become eligible, a person whose interests are affected by a contravention of the *duty to manage* must request the Environment Protection Authority take enforcement action or compliance action. If no action is taken within a reasonable time the criteria is satisfied with ultimate discretion with the court to grant leave or not.³

Contamination caused before 1 July 2021

The duty to manage contaminated land applies to all contamination irrespective of when it was caused.⁴

Land contaminated by historical practices often referred to as 'legacy sites' will be subject to the *duty to manage* where a person is in management or control.

Management or control

A person in 'management or control' of contaminated land is not defined with the ordinary meaning applying.

Whether a person is in management or control will be determined by examination of rights, whether exercised or not, over the use and development of the contaminated land.

In relation to occupational health and safety law and the duty to provide a safe workplace Victorian courts have carefully examined contracts, statutory instruments and legislation to identify an actual right to control rather than a general responsibility for, or control over, the workplace.

Management or control is not limited to a property interest and will be examined in the same way by the court.

Site Management Orders

A site management order may be issued where the Environment Protection Authority reasonably believes that long-term management of the site is necessary because land on the site is contaminated, or there is harm or a risk of harm to human health or the environment from pollution or waste. Site Management Orders have been issued for closed landfills during aftercare.

Environment Reference Standard

The Environment Reference Standard 2021 as amended is not a compliance standard or compliance code. Its primary function is to provide an environmental assessment and reporting framework, which is relevant to the *National Environment Protection (Assessment of Site Contamination) Measure 1999, as amended 2013 (Cth)*.

¹ Explanatory Memorandum – Environment Protection Amendment Bill 2018, pg 2, 3.

² *Environment Protection Act 2017 (Vic)* s 308.

³ *Environment Protection Act 2017 (Vic)* s 308(2).

⁴ *Environment Protection Act 2017 (Vic)* s 38.

DUTY TO MANAGE CONTAMINATED LAND

“A person in **management or control** of **contaminated land** must **minimise** risks of **harm** to **human health** or the **environment** from the **contaminated land** so far as **reasonably practicable**.”

“Management or Control” not defined for **contaminated land**, so ordinary meaning applies.

‘Management’ means:

- the act or manner of managing; handling, direction, or control;
- skill in managing; executive ability;
- the person or persons managing an institution or business, executives collectively

‘Control’ means:

- ‘in control’ means in command;
- to exercise restraint or direction over; dominate; command
- to hold in check; curb
- the act or power of controlling; regulation; domination or command
- check or restraint

“LAND” inclusive definition [s 3(1)]

means any land, public or private:

- any buildings or structures permanently affixed to the land; and
- groundwater

“groundwater” exhaustive definition [s 3(1)]

means any water contained in or occurring in a geological structure / formation or artificial landfill below the land surface.

“ENVIRONMENT” exhaustive definition [s 3(1)]

means -

- physical factors of surroundings of human beings
- land, waters, atmosphere, climate,
- sound, odour and taste;
- biological factor of animals and plants;
- social factor of aesthetics.

“site” exhaustive definition [s 3(1)]

means specified land or a specified parcel of land.

“CONTAMINATED” exhaustive definition [s 35(1)]

Land is contaminated if waste, a chemical 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.

Land is not contaminated merely because water on the surface of the land is contaminated or if prescribed circumstances apply. None are prescribed. [s 35(2)]

“background” exhaustive definition [s 36]

Background level of waste, a chemical substance or a prescribed substance in relation to land is:

- the background level specified or determined by regulations or an environmental reference standard;
- for all other, the naturally occurring concentration of the waste, chemical substance or prescribed substance on or under the surface of the land in the vicinity of the land.

“waste” inclusive definition [s 3(1)]

- matter (solid, liquid, gas, radioactive) deposited, discharged, emitted or disposed into the environment in manner that alters environment;
- greenhouse gas;
- matter discarded, rejected, abandoned, unwanted or surplus (may have potential use or value);
- matter for resource recovery;
- anything prescribed (nothing prescribed to date).

“pollution”[s 3 (1) inclusive definition]

any emission, discharge, deposit, disturbance or escape of:

- solid, liquid or gas, or combination of, including smoke, dust, fumes or odour;
- noise;
- heat;
- anything prescribed (nothing prescribed).

“HUMAN HEALTH” inclusive definition [s 3(1)]

- psychological health

“HARM” exhaustive definition [s 4]

means adverse effect on human health or the environment, of whatever degree or duration, and includes:

- adverse effect on amenity of a place or premises that unreasonably interferes with or is likely to unreasonably interfere with enjoyment of the place or premises [s 4(1)(a)]
- a change to the condition of the environment so as to make it offensive to the senses of human beings [s 4(1)(b)]
- anything prescribed (nothing prescribed).

Harm may arise as a result of cumulative effect. [s 4(2)]

“place” inclusive definition [s 3(1)]

means land, waters, a location, an area or a region.

“premises” exhaustive definition [s 3(1)]

means a structure, building or vehicle.

“MINIMISE” exhaustive definition [s 6(1)]

- eliminate [s 6(1)(a)]
- reduce (if cannot eliminate) [s 6(1)(b)]

risk of harm to human health or the environment so far as reasonably practicable.

“REASONABLY PRACTICABLE” [s 6(2) considerations]

to determine must consider:

- likelihood of risks eventuating; [s 6(2)(a)]
- degree of harm that would eventuate; [s 6(2)(b)]
- knowledge of harm, risk and way to eliminate/reduce (**“State of Knowledge”**); [s 6(2)(c)]
- availability and suitability of ways to eliminate/reduce; [s 6(2)(d)]
- cost to eliminate/reduce. [s 6(2)(e)]

“clean up” inclusive definition [s 3(1)]

means measures or activities:

- investigate and assess:
 - nature and extent of pollution or waste;
 - harm or risk of harm to human health or environment arising from pollution or waste;
- remove, disperse, destroy, dispose or, abate, neutralise or treat pollution or waste;
- restore the environment to a state as close as practicable to the state it was in immediately before the discharge or emission of pollution or the deposit of waste, or any other state, for the purpose of Part 10.9;
- for remediation of contaminated land;
- for the ongoing management of pollution or waste;
- to do anything necessary for, in connection with, or in relation to, the above.

Required standard

Minimising risk of harm to human health and the environment from contaminated land includes carrying out:⁵

- (a) identification of any contamination that the person knows of, or ought reasonably to know of;
- (b) investigation and assessment of the contamination;
- (c) provision and maintenance of reasonably practicable measures to minimise risks of harm to human health and the environment from the contamination, including undertaking clean up activities where reasonably practicable;
- (d) provision of adequate information to any person that the person in management or control of the contaminated land reasonably believes may be affected by the contamination, including—
 - i. sufficient information to identify the contamination;
 - ii. the results of investigation and assessment referred to in paragraph (b); and
 - iii. the risks of harm to human health and the environment from the contamination;
- (e) provision of 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 contaminated land.

A person in management or control of land where non-aqueous phase liquid is in soil or groundwater must, so far as reasonably practicable:⁶

- (a) clean up the non-aqueous phase liquid; and
- (b) if the source of the non-aqueous phase liquid is located on the land, remove or control the source of the liquid.

Cost Recovery

A person in management or control of land may recover in court as a debt any reasonable costs incurred complying with the duty to manage, including the cost of taking cost recovery proceedings, against and person responsible for:⁷

- (a) causing; or
- (b) contributing to;

the contamination of the land.

Further information

The Victorian Government confirmed that the Environment Protection Authority will provide education, support and guidance addressing compliance with the duty to manage.⁸

Guidance has been published indicating the Environment Protection Authority's interpretation and approach to compliance and enforcement.

⁵Environment Protection Act 2017 (Vic) s 39(2).

⁶Environment Protection Regulations 2021 (Vic) r 15.

⁷Environment Protection Act 2017 (Vic) s 39(3).

⁸Fact Sheet – Environment Protection Amendment Act 2018 (Department of Environment, Land, Water and Planning) April 2019.

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Stefan has been recognised by Best Lawyers for expertise in Land Use and Zoning Law (since 2014), and is currently ranked as Leading by Doyle's Guide, in the area of Environment and Climate Change.

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