

Victorian contaminated land law: *a legal perspective*

Presenter: Stefan Fiedler

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Source of the law and its interpretation

Legislation created by Victorian Parliament

- interpretation of legislation
- interpretation of instruments issued by Victorian Government under legislation
- common law torts (trespass, nuisance, negligence) continue

Legislative provisions commenced on 1 July 2021

- superior court interpretation of legislation does not yet exist
- VCAT decisions on stay and notice to suspend
- superior court interpretation of repealed legislation of limited value
- superior court interpretation of legislation in other jurisdictions is not binding and must be considered in the context of that legislation
- legislation modelled on occupational health and safety legislation in Victoria with superior court interpretation of that legislation of value albeit for a different subject that is a duty to provide a safe workplace

Victorian legislation regulating *Contaminated Land*

Environment Protection Act 2017 (Vic)

- Act last amended 1 October 2021

Environment Protection Regulations 2021 (Vic)

- made on 24 May 2021 and amended:
 - 20 July 2021 (tunnel boring spoil)
 - 1 August 2021 (wind turbine noise)
 - 28 September 2021 (miscellaneous, Victorian guideline for water recycling)
 - 26 October 2021 (fees for operating activity A02a Other waste treatment - incineration)
 - 10 November 2021 (miscellaneous)
 - 14 April 2022 Notice of preparation of RIS (ban single use plastics)
 - 20 September 2022 (waste tyres – silage)
 - 18 October 2022 (wind turbine noise)
 - 1 February 2023 (banning single use plastic items)

Environment Reference Standard 2021 (Vic)

- made on 26 May 2021 and amended:
 - 29 March 2022 (noise and ambient air quality)

Victorian Incorporated Documents

Documents incorporated by the Environment Protection Regulations 2021 (Vic)

- Notice published Victorian Government Gazette (G 26, 1 July 2021)
 - 25 documents listed
 - various Australian Standards
 - Commonwealth subordinate legislation
 - e.g. National Environment Protection (Assessment of Site Contamination) Measure 1999
 - testing methods from Commonwealth Government bodies
 - guidelines published by the Environment Protection Authority (x 5)
 - Noise Protocol (Pub 1826.3)
 - Waste Classification Assessment Protocol (Pub 1827.2)
 - Waste Disposal Categories (Pub 1828.2)
 - Monetary Benefits (Pub 1727.2)
 - Use of Reclaimed Water (Pub 464.2)
 - Victorian Guideline for Water Recycling (Pub 1910.2) replaces 464.2

Victorian Incorporated Documents (cont')

Documents incorporated by the Environment Reference Standard 2021 (Vic)

- Notice published Victorian Government Gazette (G 26, 1 July 2021)
 - 9 documents listed
 - various Australian Standards
 - Commonwealth subordinate legislation
 - e.g. National Environment Protection (Assessment of Site Contamination) Measure 1999, as amended 2013
 - International (NZ) subordinate legislation
 - Victorian Government inventory for wetlands (DELWP)
 - guideline published by the Environment Protection Authority (x 1)
 - Environmental Quality Victorian Lakes (Pub 1302)

Victorian Instruments (orders, codes, determinations)

Instruments issued under environment protection legislation:

- Compliance Code (x 1)
 - Victoria's Big Build
- Designations (x 5 – EPA initiated)
 - Classification of PFAS Impacted Soil
 - Various other waste types, most recent use lead acid batteries
- Determinations (x 11 – EPA initiated)
 - Significant Development Licence Criteria
 - Specification for various waste types
 - Discharge to atmosphere / surface water
 - Modifications to Sewage Treatment Infrastructure
 - Temporary Storage of Oils / Paints / Chemicals
- Exemption (class) – certificate of conformity for sand filters treatment plants

Acts, Rules, Instruments integrating *Contaminated Land*

- Victoria Planning Provisions
 - clause 13.04-1S (Contaminated land and potentially contaminated land)
 - clause 45.03 (Environmental Audit Overlay)
 - clause 65.01 (Approval of an application or plan)
 - clause 73.01 (Meaning of terms) ‘potentially contaminated land’
 - Clause 37.05 (Docklands Zone) ~sensitive use – Melbourne Docklands EMP
 - Clause 37.07 (Urban Growth Zone) ~pre-school centre, primary school, secondary school
- Minister’s Direction No. 1 ‘Potentially Contaminated Land’ (27 August 2021)
 - revokes previous directions 9 October 1989, amended 14 May 1992 and 27 September 2001
- VG Guidance documents
 - Planning Practice Note 30 ‘Potentially Contaminated Land’ (July 2021, DELWP)
- Consultation ‘Planning for Environment Protection’ (Engage Victoria)
 - Report (March 2023)

'State of Knowledge'

Minimise, so far as reasonably practicable, risks of harm to human health and the environment → eliminate, where cannot minimise

Determine what was reasonably practicable, must have regard to:

- likelihood of risk eventuating
- degree of harm if risk eventuated
- what the person knows, or ought reasonably know, about the harm or risk of harm and any ways of eliminating or reducing those risks → **'STATE OF KNOWLEDGE'**
- availability and suitability of ways to reduce risks
- cost of eliminating or reducing risks

State of Knowledge

- dynamic concept that changes over time
- relevance of knowledge to issue and integrity of the source of knowledge

Published guidance for *contaminated land*

Guidance published by EPA

- **Pub 2041 ‘Guidelines for conducting environmental audits’ February 2022 [s203 Act]**
- **Pub 2021 ‘Guideline for conducting preliminary risk screen assessments’ February 2022 [s203 Act]**
- Information Sheet 2009 ‘Information sheet for environmental audits and preliminary risk screen assessments’ June 2021
- Pub 2002 ‘Financial assurance for permissions and contaminated land management’ June 2021
- Pub 1821.1 ‘Local Government – Guide to preventing harm to people and the environment’ June 2021 [section 8, pages 33-35]
- Pub 1915 ‘Contaminated Land Policy’ February 2021
- Pub 1936 ‘Proposed methodology for deriving background level contamination when assessing potentially contaminated land’ February 2021
- Pub 1940 ‘Contaminated Land: understanding section 35 of the Environment Protection Act 2017’ February 2021

Published draft guidance for *contaminated land*

Guidance published by EPA (cont')

- Pub 2041 'Guidelines for conducting environmental audits' February 2022 [s203 Act]
- Pub 2008.2 'Guide to the duty to notify of contaminated land' October 2022 and attachment B1 and B2
 - *Attachment B1 – Word template for Part B of contaminated land notification completion*
 - *Attachment B2 – Drop down lists (for online notification form)*
- Pub 1977.1 'Guide to the duty to manage contaminated land' October 2022
- Pub 2001 (Proposed) 'Guidance for the clean up and management of contaminated groundwater' August 2021
- Pub 668.1 'Hydrogeological assessment guidelines for groundwater quality' December 2022
- Pub 2049 'Summary of PFAS concentrations detected in the environment' October 2022

‘regard should be given to’

Environment Protection Act 2017 (Vic), s 11

“It is the intention of Parliament that in the administration of this Act and the regulations **regard should be given to** the principles specified in this Chapter.”

- ‘should’ is not mandatory (‘shall’ or ‘must’ is mandatory)
- the principles are instructions/directions the authority is to be guided by in exercising powers under the Act
- unless a compelling reason is provided otherwise, where the exercise of power is instructed by the word “should”, then the decision maker “ought to” exercise the power as instructed
- discretion permitted is far more limited than where the term “may” is used in the exercise of power
- ‘should’ is a direction/instruction of Parliament that must be displaced

Statutory duties for *contaminated land* in Victoria

General environmental duty

- indictable criminal offence when conducting a business or undertaking
- civil penalties
- civil remedies

Duty to manage contaminated land

- civil remedies

Duty to notify of notifiable contamination

- summary criminal offence
- civil penalties
- civil remedies

General Environmental Duty

“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** must **minimise** those risks, so far as **reasonably practicable**.”

- **Mandatory standards (will be applied by courts)**
 - for any business or undertaking
 - for design, manufacture, installation or supply of a substance, plant, equipment or structure
- **conducts a business or undertaking**
 - Whether or not for profit or financial gain
 - Whether or not a company (private or public) or government body
- **Person does not ‘conduct’ business or undertaking**
 - where primarily for domestic or private purpose and not for profit or financial gain
 - solely in capacity as employee, officer or volunteer
- **Compliance Codes will prescribe further detail (none yet released)**
 - likely by industry sector and for particular activity / waste / substance

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*.”

- in ‘management or control’
 - examine titles, instruments, contracts and legislation
- Mandatory standards (will be applied by courts)
 - identify contamination known or ought reasonably know
 - investigate and assess the contamination
 - provide and maintain reasonably practicable measures to minimise risk o human health or the environment from the contamination, including *clean up* where reasonably practicable
 - provide adequate information to any person that may be affected by the contaminated land
- Important matters
 - duty to manage applies to historical contamination regardless of who caused or contributed
 - must *clean up* non-aqueous phase liquid (NAPL)
 - *land* includes groundwater, buildings and structures permanently affixed
 - cost recovery from person who caused or contributed

Duty to notify of *notifiable contamination*

“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 the *notifiable contamination*.”

- in ‘management or control’
 - examine titles, instruments, contracts and legislation
- Notifiable contamination
 - prescribed notifiable contamination → Regulations adopting NEPM (ASC)
 - threshold concentrations for soil, groundwater, asbestos in soil and soil vapour
 - characterisation of land use for purpose of NEPM (ASC)
 - not prescribed, then remediation likely to exceed \$50k
 - exemptions apply – SEA, remedial notice, stockpile at lawful place
- ‘becomes aware of, or reasonably should have become aware of’
 - persons skills, knowledge and experience
 - whether persons could practicably seek advice regarding contamination (e.g. expert)
 - any other circumstances of contamination
- Cost recovery from person that caused or contributed

How will the statutory duties apply?

Regulatory application and intervention

- enforcement of criminal offence
- where a criminal offence a court may impose criminal sanction or civil penalty
- compliance action by EPA issue remedial notice or site management order
 - Improvement Notice / Prohibition Notice / Environmental Action Notice / Notice to Investigate
 - right to apply for internal EPA review and VCAT merits review
 - Information Gathering Notice (no VCAT review) – may compel interview
 - Site Management Order
 - EPA reasonably believes that long-term management of the site is necessary because land on the site is contaminated, or there is a harm or risk of harm to human health or the environment from pollution or waste
 - binds future owner/occupier or person in ‘management or control’ → VCAT review

Civil intervention

- Eligible person where EPA does not intervene within reasonable time of request to do so
- must have leave of Court → Court’s discretion to hear claim
- Remedies → restrain conduct / require specific act / **compensation** / financial assurance

in ‘*management or control*’

- no statutory definition so ordinary meaning applies
 - ‘*management*’ means handling, direction or control; management skill, executive ability
 - ‘*control*’ means in command; exercise restraint or direction over; dominate or command
 - determined by examination of rights, whether exercised or not, over the use and development of the contaminated land
 - defined for industrial waste to be ‘exercising management functions, or control over’
- courts will examine instruments, contracts and legislation to determine rights
 - must be actual right to control, whether exercised or not, rather than a general responsibility for, or control over
 - court will examine context of other persons, such as a principal and contractor, in relation to actual control of the subject
- property rights
 - ownership, lease
 - easement, licence [EPA contends are within ambit – Publication 1821.1 at pg 34]
- instruments under statute
 - extractive industry licence
- Statute appointed manager
 - appointment as committee of management
 - public land ‘administrator’ – Site Management Order

Resource allocation, budget management & LPP

- require information to make informed decisions for resource allocation and budget
- gathering information may be protected by legal professional privilege allowing receipt of legal advice to make informed decisions with disclosure of the information at discretion
- allows sufficient time to prepare a program to work through development of site specific strategies, as appropriate
- Crown land management as an appointed committee of management or ‘administrator’ should be reviewed
- an application to the Minister for revocation of an appointment as a committee of management under the *Crown Land (Reserves) Act 1978 (Vic)* if adequate funding is not provided by the Victorian Government to discharge the statutory duties
- duties impose positive obligations to act, which are now actionable by eligible persons without any enforcement action or compliance action by the Environment Protection Authority
- sector wide advocacy may be appropriate (e.g. shooting ranges)

Questions?

- Any questions welcome
 - now in open forum (AEBN facilitated)
 - Q&A Panel Session at end of Conference (AEBN facilitated)
 - directly enquiry (contact details at end of presentation)

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Contacts



Stefan Fiedler
Principal

+61 3 9609 1672
+(0)437 734 742
sfiedler@rk.com.au



Russell Kennedy Pty Ltd
info@rk.com.au
russellkennedy.com.au

Melbourne

Level 12, 469 La Trobe Street
Melbourne VIC 3000
PO Box 5146
Melbourne VIC 3001 DX 494 Melbourne
T +61 3 9609 1555 **F** +61 3 9609 1600

Sydney

Level 6, 75 Elizabeth Street
Sydney NSW 2000
Postal GPO Box 1520
Sydney NSW 2001
T +61 2 8987 0000 **F** +61 2 8987 0077

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russellkennedy.com.au