

# Duty to Notify of Notifiable Contamination



## Introduction

On 1 July 2021 the *Environment Protection Act 2017* (Vic) established a **duty to notify** the Environment Protection Authority of significant contamination discovered by a person in management or control to ensure risks posed by the site are managed.<sup>1</sup>

The *duty to notify* is actionable by eligible persons for civil remedies and by the Environment Protection Authority as a civil penalty and a summary criminal offence.

## 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.<sup>2</sup>

In order to become eligible, a person whose interests are affected by a contravention of the *duty to notify* 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.<sup>3</sup>

## Criminal Offence (criminal penalty or civil penalty)

Contravention of the *duty to notify* is a summary criminal offence with a maximum criminal penalty<sup>4</sup> and maximum civil penalty<sup>5</sup> of 600 penalty units and 120 penalty units for a body corporate and natural person, respectively. Contravention of the duty to notify is not an infringement notice offence<sup>6</sup> meaning the Authority must initiate proceedings in court to enforce the *duty to notify*.

## Contamination caused before 1 July 2021

The duty to notify applies to all notifiable contamination irrespective of when it was caused.<sup>7</sup>

How this information is recorded, verified and maintained by the Authority is unclear and there is no mechanism to access the information or otherwise perform a search.

The Environment Protection Authority must maintain a public register<sup>8</sup> disclosing various decisions made exercising a power under the *Environment Protection Act 2017* (Vic), including recording site management orders and environmental audit statements.<sup>9</sup>

Intervention by the Environment Protection Authority on disclosure of notifiable contamination may require an environmental audit by notice or a site management order.

## 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.

<sup>1</sup> Explanatory Memorandum – Environment Protection Amendment Bill 2018, pg 2, 3.

<sup>2</sup> *Environment Protection Act 2017* (Vic) s 308.

<sup>3</sup> *Environment Protection Act 2017* (Vic) s 308(2).

<sup>4</sup> *Environment Protection Act 2017* (Vic) s 40(2).

<sup>5</sup> *Environment Protection Act 2017* (Vic) s 314(3).

<sup>6</sup> *Environment Protection Act 2017* (Vic) s 307; *Environment Protection Regulations 2021* (Vic) r 169 and Schedule 10.

<sup>7</sup> *Environment Protection Act 2017* (Vic) s 38.

<sup>8</sup> *Environment Protection Act 2017* (Vic) s 455.

<sup>9</sup> *Environment Protection Act 2017* (Vic) s 456(1)(e) and (h).

# 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**.”

“**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).

“**NOTIFIABLE CONTAMINATION**” exhaustive definition [s 37]

means contamination that is:

- prescribed notifiable contamination by regulations;
- if not prescribed, contamination for which the reasonable cost of action to remediate the land is likely to exceed **\$50,000** or other prescribed amount (no amount is prescribed).

“**prescribed notifiable contamination**” [rr 8 - 11]

for **soil** in or on land under management or control:

- a contaminant likely to be exposed to a person and > the average threshold for that contaminant or ≥ localised elevated threshold;
- a contaminant that is likely to enter adjoining land and remain there and that is > a HIL
- presence of friable asbestos if a person is likely to be exposed to 0.01 fibres per milliliter by inhalation

for **soil** in or on land adjacent to land under management or control:

- a contaminant that has entered from that land and the concentration is or is likely to remain > the average threshold for that contaminant or ≥ localised elevated threshold;

for **groundwater**:

- where likely to discharge to surface water or may be used for human consumption, stock watering or irrigation above the default ANZG guideline value or ADWG;
- the presence of non-aqueous phase liquid;

for **surface water** above the default ANZG guideline value;

for **soil vapour**, 95% UCL or 250% sample, on land / adjoining land:

- interim HILs for soil vapour for chlorinated VOCs;
- soil vapour HSLs;
- soil HSLs for vapour intrusion of current use;
- groundwater HSLs for vapour intrusion of current use.

See end note for references.

“**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.

## 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.

## Notification to the Environment Protection Authority

A person is not required to notify the Environment Protection Authority where the person is aware that a notification has already been made or the prescribed notifiable contamination exemption applies.<sup>10</sup>

Prescribed notifiable contamination exemption includes:<sup>11</sup>

- (a) a stockpile of industrial waste at a place or premises authorised to receive industrial waste;
- (b) where a remedial notice was in force on 30 June 2021 or had been revoked prior to 30 June 2021 addressing the land or groundwater contamination and the conditions have not changed;
- (c) where a certificate of environmental audit or a statement of environmental audit applied at 30 June 2021 and no potentially contaminating activities have occurred on the land since, there is no material change in the condition of the land and there are no adverse effects on the adjacent land; and
- (d) contamination of land from a waste or chemical substance not listed in section 6 of schedule B1 of the *National Environment Protection (Assessment of Site Contamination) Measure 1999 amended 2013* (Cth).

Per- and poly-fluoroalkyl substances are not currently listed.

Prescribed information for disclosure is information on the management response, or proposed management response, to the notifiable contamination by the person in management or control.<sup>12</sup>

## Knowledge (actual or constructive)

Whether a person in management or control of land becomes aware of, or reasonably should have become aware of, notifiable contamination is determined having regard to:<sup>13</sup>

- (a) the persons skills, knowledge and experience; and
- (b) whether the person could practicably seek advice regarding the contamination; and
- (c) any other circumstances of the contamination.

## 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 notify, including the cost of taking cost recovery proceedings, against and person responsible for:

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

the contamination of the land.<sup>14</sup>

The Victorian Government confirmed that the Environment Protection Authority will provide education, support and guidance has been published addressing compliance with the duty to notify.<sup>15</sup>

**End note:** Health Investigation Levels (HILs), Health Screening Levels (HSLs) and guideline values are derived from the *National Environment Protection Measure (Assessment of Site Contamination) 1999 amended 2013* (Cth) section 6 schedule B1, Australian and New Zealand Guidelines for Fresh and Marine Water Quality (ANZG) and Australian Drinking Water Guidelines Paper 6 – National Water Quality Management Strategy 2011 published by the National Health and Medical Research Council, National Resource Management Ministerial Council, Commonwealth of Australia.

<sup>10</sup>*Environment Protection Act 2017* (Vic) s 40(4).

<sup>11</sup>*Environment Protection Regulations 2021* (Vic) r 13.

<sup>12</sup>*Environment Protection Regulations 2021* (Vic) r 14.

<sup>13</sup>*Environment Protection Act 2017* (Vic) s 40(3).

<sup>14</sup>*Environment Protection Act 2017* (Vic) s 39(3).

<sup>15</sup>Fact Sheet – *Environment Protection Amendment Act 2018* (Department of Environment, Land, Water and Planning) April 2019.

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Stefan is a leading environmental lawyer who acts for local government, the Victorian Government, water corporations, waste and resource recovery corporations across various sectors including waste management, resource recovery, infrastructure, manufacturing, organics, rendering, logistics and agriculture.

His practice involves landfills, solid waste management, contaminated land and groundwater, statutory permissioning, statutory and strategic planning, trade waste, reclaimed water, stormwater drainage and enforcement. Prior to practicing law, Stefan worked as an environmental engineer for the Environment Protection Authority.

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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