

Environment and Planning Alert

20 October 2009

**Contaminated Land in Victoria
Optimising Value and Mitigating Liability**

Land owners, managers and occupiers may generally mitigate risk and liability, and in turn optimise land value, associated with potentially contaminated land by implementing a strategy that creates certainty.

1. Identify the nature, characteristic and source of any contamination (soil and groundwater);
2. Quantify the cost associated with:
 - 2.1 assessment of the contamination;
 - 2.2 remediation of the contamination;
 - 2.3 ongoing management of residual contamination after clean up; and
 - 2.4 potential damage caused by the contamination;
3. Identify and assess measures to mitigate risk (social, economic and environmental criteria); and
4. Implement optimal mitigation measures.

The *National Environment Protection Measure (Site Contamination Assessment)* 1999 (Cth) establishes a framework for the assessment of soil and groundwater contamination across Australia. In Victoria, the *Environment Protection Act 1970*, State Environment Protection Policies and the Measure allow an incremental approach to assessment of potential contamination.

1. Preliminary investigation (assessment of existing information and site inspection)
2. Detailed site assessment (sampling of soil and groundwater)
3. Environmental audit (detailed site investigation, including remediation work where necessary, undertaken by the site assessor, and independent supervision of those works by an appointed auditor; where groundwater is polluted determination that *clean up to the extent practicable* has been achieved will also be required)

Certainty of outcome, time required and cost of assessment, increase with the level of assessment.

Time and financial constraints may necessitate a lower level of assessment. In these circumstances, reliance is placed on contractual terms to allocate potential and known liability.

Contractual terms may also be negotiated to provide for a higher level of assessment to be completed after the transaction completion date or as a trigger for the completion date with liability attributed on the outcome of the assessment. For instance, a contract for the sale of land may provide for settlement upon the issue of a statement of environmental audit, where completing the audit is an obligation of the vendor and compliance with the statement in the future is the obligation of the purchaser. This approach may not necessarily create certainty at the time of entering the contract, as ongoing management required by a statement of environmental audit will be unknown at that time of negotiating the contract, and in many instances, compliance with the statement once issued, will impose substantial ongoing costs on the purchaser which are difficult to predict with certainty.

In preparing tender documents or negotiating contracts, various “standard” conditions exist, however, for each different circumstance the precise arrangement will depend upon the particular facts.

If you require any assistance or have any queries regarding these provisions, please contact:



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