

## Transfer of Contaminated Land in South Australia

In addition to South Australia's Mandatory Reporting obligations introduced in 2009, land owners and their agents also need to be aware of stringent Transfer of Liability obligations which were introduced on the 1<sup>st</sup> July 2009.

It is normal commercial practice to deal with land contamination liability by way of indemnities or releases in contract of sale documentation. Under the current provisions of the Environment Protection Act 1993 (EP Act), EPA South Australia (EPA SA) can impose a Site Assessment or Remediation Order on the vendor irrespective of these contractual arrangements. Vendors who wish to transfer this liability need to notify the Authority under section 103E of the Act and lodge an agreement to transfer liability of site contamination with EPA SA.

There is currently some confusion as to whether a vendor ought to undertake an assessment of their site prior to divestment when the vendor is not aware of contamination but may suspect the possibility that the site is contaminated. EPA SA has ruled that if the vendor wishes to transfer the statutory liability of being served with an EPA Order, then an assessment must occur and the contamination subject to the transfer must be delineated.



If contamination is not delineated and notified to the Authority, liability associated with that contamination cannot be transferred and remains with the vendor.

EPA SA has significant penalties available and is increasing the stringency with which it is enforcing these requirements which have now been in place for almost 12 months.

### What if I purchase a site and do not Accept Liability?

If a site is acquired which is unknowingly contaminated, in certain circumstances EPA SA can still issue an Assessment or Remediation Order on you as the owner, however, the Order is limited to contamination on or below the surface of the site and not off-site contamination.

## How detailed does the assessment need to be?

EPA SA advises that an assessment completed in accordance with the National Environment Protection (Assessment of Site Contamination) Measure 1999 should be undertaken when delineating contamination at a site when it is intended that a Transfer of Liability be lodged.

## What must land owners do?

Where you are aware of land contamination which is not trivial and that affects, or threatens groundwater, owners or occupiers must notify EPA SA as soon as reasonably practicable after becoming aware of the contamination. Where you wish to transfer liability to the purchaser when divesting the site, a suitable site assessment must be undertaken and the extent of the liability which is intended to be transferred must be delineated. This includes contamination on the site as well as off-site contamination. A copy of the agreement to transfer liability of site contamination must be lodged with EPA SA.



## Implications for Purchasers

An important implication of this legislation is that unlike other states of Australia, the statutory liability associated with land contamination can be permanently transferred from the polluter. Even in the event the purchaser ceases to exist, the vendor is protected from future claims through the Transfer of Liability process.

## What about Civil Liability?

Under contract law, normal civil proceedings still apply irrespective of the statutory obligations imposed under the EP Act. A polluter or vendor may remain liable for land contamination depending on the nature of the contamination and the agreements entered into within the contract of sale.



## Implications for Vendors

The definition of “the site” in the EP Act is “an area of land whether or not in the same ownership”. Hence, once liability has been assumed, the purchaser would be deemed, for the purposes of the EP Act, to have caused the site contamination, and may also be liable for site contamination on land that is not owned by them. This may result in significant cost as the person is required to assess and/or remediate the off-site contamination for which he or she has accepted liability.

## Does my site Appear on the Public Register?

EPA SA will record on the Public Register details of each agreement for the exclusion or limitation of liability for site contamination to which section 103E applies. The entire agreement that is lodged with EPA SA will also be on the Public Register.

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