

EPA cleanup and cost recovery under the Environment Protection Act

Guidance



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Introduction

The *Environment Protection Act 1970* (the Act) contains a range of principles and powers dealing with the cleaning up of polluted or contaminated sites in Victoria.

This document details the parties that the Environment Protection Authority (EPA or the Authority) may pursue to recover the costs of any cleanup it conducts.

This document also outlines what EPA can do to recover cleanup costs and what EPA will consider when deciding whether to recover costs. Where costs cannot be recovered from a liable party, EPA can place a charge on the land concerned, which is registered on the property title. If the cleanup costs remain unrecovered, EPA has the power to sell the land in order to recover these costs.

Purpose

This guideline:

- outlines EPA's broad powers to clean up a site, and to recover the costs of that cleanup from the party who caused the pollution, or the occupier of the site
- outlines what factors EPA will consider when using its powers to recover cleanup costs
- describes the circumstances where EPA may place a charge on property that it has cleaned up
- informs property owners, business operators, landlords, tenants and sub-lessees of their potential liability for costs associated with an EPA cleanup of a site to which they are connected.

Legal status

EPA's cleanup and cost recovery powers are discretionary. This guidance outlines what EPA will consider when deciding to use these powers.

What powers does EPA have to conduct a cleanup of a site?

EPA has broad powers under the Act to direct a polluter or occupier to undertake a cleanup at a site. These powers are contained in section 62A. EPA's Remedial Notices Policy (EPA publication 1418.1) outlines how EPA uses these notices. The Act also states at section 62C that where pollution occurs as a result of discharges or emissions from a premises where a commercial or industrial activity is being conducted, the occupier of the premises is deemed to be responsible for that pollution, unless they can demonstrate that the discharge was unrelated to the commercial or industrial activity.

The principle of improved valuation, pricing and incentive mechanisms

This principle, stated at section 1F of the Act, is sometimes called the 'polluter pays principle'. It says that those parties that generate pollution and waste should bear the costs of cleaning it up - by containing, avoiding and/or stopping it.

The principle also states that environmental factors should be included in the valuation of assets and services. This statement is important because, as outlined further in this guidance, owners of land including future purchasers can be held liable for its cleanup and should recognise that potential liability in valuing the land.

The polluter pays principle is not to be applied in isolation, but must be balanced with other relevant principles.

In some situations, where identifying or pursuing a polluter or occupier to clean up the site is not possible or practical, the Act allows EPA to intervene. EPA is only likely to use this power if an imminent risk to the environment or human health exists.

In these circumstances, EPA will consider whether liable parties, such as the property owner or a subsequent purchaser, should bear or contribute to the cost of the cleanup. For example, this scenario could arise where the contamination is a result of historical activity and there is no polluter to pursue or it is impractical to do so.

In addition to its broad powers allowing EPA to direct the cleanup of a site, the Act at section 62 allows EPA itself to step in and clean up a site. Section 62 states:

Notwithstanding anything to the contrary in this Act, where—

- a) pollutants have been or are being discharged;*
- b) a condition of pollution is likely to arise;*
- c) any substantial noise is being emitted;*
- d) any industrial waste or potentially hazardous substance appears to have been abandoned or dumped; or*
- e) any industrial waste or potentially hazardous substance is being handled in a manner which is likely to cause an environmental hazard—*

the Authority may conduct a cleanup or cause a cleanup to be conducted as the Authority considers necessary.

EPA will in the first instance have the polluter or other liable party/ies conduct the cleanup. EPA does this by issuing cleanup notices to them under section 62A.

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However, if liable party/ies cannot be found, or cannot conduct the cleanup, EPA may use its powers under section 62 to clean up the site.

EPA is more likely to clean up sites when circumstances require immediate action and where efforts to make third parties (the polluter or occupier) clean up the site have not been successful. EPA will decide to clean up a site after considering the risks posed by that site, particularly whether it poses an imminent risk to the environment or human health.

EPA will not necessarily completely clean up the site and in some cases EPA will only investigate the site to better understand the risk. Depending on the circumstances, EPA may partially clean up the site to, for example, make the site safe, or remove the imminent risk.

Where a site poses only a low risk, EPA is unlikely to conduct any cleanup. In these situations, the site and the contamination remains the responsibility of the occupier/owner.

Who is liable for cleanup costs incurred by the Authority?

A range of parties are potentially liable for cleanup costs incurred by EPA.

Section 62 states that reasonable costs incurred by EPA when cleaning up a site may be recovered from the person who caused the pollution, or the occupier of the premises, whether or not they caused the pollution.

The Act defines an occupier in broad terms as the person who is in occupation or control of the premises. This can apply whether or not they are the owner of the premises. This means that site owners, tenants, landlords and future purchasers may be pursued for costs incurred by EPA.

The Act excludes financial institutions from this definition where they act solely as the holder of a security interest in the land. However, financiers may become exposed when they take steps to enforce that security and become a person in control of the premises.

Liability of financial institutions

Financial institutions are treated as a special class of occupier. Generally, where a financial institution is a passive lender, it is excluded from the definition of occupier under the Act and will not be liable for cleanup, cleanup costs or offences under the Act.

The liability of financial institutions which act as mortgagees in possession, controllers or managing controllers is limited to abating an existing environmental hazard and ensuring any further operation does not cause pollution.

How can EPA recover costs associated with the cleanup?

Where EPA cleans up a site, the Act lets it recover reasonable costs associated with the cleanup from the polluter, or from the occupier of the premises. Cleanup

costs can include, for example, labour, administrative and overhead costs.

Initially, EPA may recover these costs from a liable party, by any court of appropriate jurisdiction, as a debt due to the Authority.

Where EPA has been unable to recover that debt through the courts, the debt becomes a charge on the property of the occupier. In general, a charge operates to grant one party a security over another party's assets for a debt owed. Where the debt is not paid, the holder of the charge is entitled to sell the other party's assets to recover that debt.

In relation to EPA's cleanup costs, this charge may occur on the land that was cleaned up. Where EPA wants to secure a charge on the cleaned-up land, it must ensure a notice is first placed in a newspaper in the locality of the premises. That notice must specify its purpose, the amount for which the charge is imposed and the land on which the charge is to be imposed. The charge must also be registered with the Land Registrar and recorded against the certificate of title.

After at least 12 months from the date of registration, and if the debt has not been repaid, EPA may publicly indicate its intention to sell the property to recover all or some of its costs. One month after publishing a notice outlining this intention, EPA is entitled to sell the property and to recover its cleanup costs as if the charge was a registered first mortgage and having priority over other registered encumbrances.

EPA may choose to register a charge on land and have it remain in place beyond 12 months. A charge on the land could remain in place for many years. Further information on charges is outlined below.

What will EPA consider when using its powers to recover costs and/or place a charge on property?

Although the Act provides wide discretion for EPA to recover costs for cleanup, it does not prescribe what EPA should consider when using that discretion. Outlined below are a number of factors EPA will consider when making these decisions.

Cost recovery - general principles

EPA will:

- seek to recover reasonable costs incurred when it has to clean up a site
- consider the 'polluter pays' principle so that the costs of remediating pollution are borne by the polluter or other liable parties (e.g. owners and occupiers)
- aim for an overall result, which is fair and equitable to all who may have to meet the costs of remediation, including taxpayers
- have due regard to any unreasonable hardship that the recovery of costs may cause a liable occupier
- use its powers to place a charge on land in order to:

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- enable the future recovery of costs and
- through its registration on the land title, ensure that parties who may deal with the land in the future are made aware of the issue and potential liability
- consider all circumstances of the cleanup and the history of the site, including those matters outlined below, noting that no single factor will determine EPA's final course of action.

Who is responsible for, or has contributed to, the pollution or contamination?

The 'polluter pays' principle, states that those who cause environmental impacts should pay for remediation.

In applying this principle, EPA will consider the party or parties that directly allowed or caused the pollution. EPA will also consider whether the current occupier of the site is the most appropriate party to bear the cost, including whether the occupier's actions – for example, negligence, lack of due diligence or acquiescence – have contributed to the pollution (see next section).

To what extent have the actions or inaction of occupiers contributed to the pollution?

When EPA considers recovering costs from an occupier, it will determine what an occupier has done to ensure that the relevant property is free of pollution. This is particularly relevant where an occupier is the owner and/or landlord.

For example, if a landlord could have avoided or minimised the risk of pollution or contamination through improved due diligence, inspections, oversight or contractual arrangements, but a tenant causes pollution or contamination during its commercial lease arrangement, EPA is more likely to pursue the owner or landlord for costs. Similarly, where the owner had an opportunity to identify the pollution or contamination at the time of the purchase or other transfer of the land, EPA is more likely to pursue them for costs. As outlined in more detail below, this may ultimately result in a charge over the land and its subsequent sale to recover the cleanup costs.

Would the cleanup, if costs were not recovered, represent a windfall gain to the owner/occupier?

Regarding the cleanup of a site, a 'windfall gain' occurs when a party (such as the site owner) receives an unjustified benefit because the site has been cleaned up.

In many circumstances, cleanup costs can approach and sometimes exceed the cleaned up value of the land. If EPA has borne the costs of cleaning up a site and has restored its full value, this would represent a windfall gain for the site's owner. Note that as indicated previously, EPA's initial focus when stepping in to clean up a site is to make the site safe by removing any imminent risk, rather than restoring the site completely.

Where to not recover costs would represent a clear and unjustified windfall gain for the cleaned up site's owner or occupier, EPA will usually seek to recover costs.

As an alternative to seeking the recovery of costs in the short term, EPA may place and maintain a charge over the land until the cleanup costs are repaid, or until it becomes viable to sell the land to recover those costs (see below).

Would the recovery of costs represent an unreasonable hardship for the occupier?

EPA will consider whether the recovery of costs would represent an unreasonable hardship for a liable occupier. However, given that if not pursuing costs means that the expense is borne by Victorian taxpayers, clear and unreasonable hardship must be established to demonstrate that it is in the public interest for costs not to be recovered.

EPA will use its powers to place a charge on land to enable the future recovery of costs and to ensure parties that deal with the land in the future are aware of the issues and potential liability.

In some circumstances, EPA may not immediately seek to recover costs through its powers to force the sale of property. This could be the case particularly where it would cause an unreasonable hardship to the occupier or if the remaining cleanup costs are more than the current value of the land, making its sale unviable.

In these circumstances, EPA may still place a charge on the land and leave the charge in place. This allows EPA to sell the land if and when circumstances change that make the sale viable. It also serves to place on notice any party that may have future dealings with the land because it is noted on the land title.

A charge on land may exist for an extended period of time before land values increase, or the cost of cleanup decreases or that the situation of the occupier or owner changes so that the sale of land is viable or reasonable. This means EPA has options to recover its costs in the future.

What can owners and occupiers do to minimise their potential liability?

Dumped waste, pollution or contamination can reduce the value of property and may result in substantial cleanup costs for owners and occupiers.

In order to minimise such potential liability, EPA encourages all parties involved in land transactions to do appropriate due diligence investigations prior to buying or leasing land. This applies particularly to property intended for, or with a history of, industrial use.

Landlords

Landlords in commercial lease arrangements may consider hiring an environmental consultant to help them gather and examine relevant information about the property, and obtain legal advice about what potential liabilities might arise, including:

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- understanding the current state of the property, which might involve
 - a site investigation
 - reviewing public records, including EPA's Priority Sites Register
 - researching the site's historical uses, activities, known contamination and previous remediation and ownership history
 - understanding how close the property is to sensitive receiving environments such as waterways and to neighbouring properties, which might be affected by (or the source of) migrating contaminants
 - any environmental non-compliance by the previous occupiers
- depending on the above investigations, it may be sensible to sample and test soil, waters and groundwater at the site for pollutants and contaminants
- confirming the financial ability of the other party (i.e. the potential lessee or tenant) to address environmental concerns or meet potential liabilities
- confirm the history of compliance with environmental and other laws by the other party (including its directors and officers if that party is a company)
- what activities and operations are likely take place at the property

- whether a sub-lease of, or improvements or alterations to, the property are likely and the details of such arrangements.

This list is not exhaustive and depending on the circumstances more or less due diligence may be considered prudent.

The purpose of due diligence is to assess the degree of risk posed to the property and the landlord by the prospective tenant. Effective due diligence helps the landlord to make an informed decision about whether to agree to the tenancy and what environmental requirements or other conditions to impose on the tenant through the lease.

Purchasers

In Victoria, there is currently no overarching statutory obligation on vendors to report the existence of contamination to the EPA. EPA maintains a publicly available Priority Sites Register that lists known contaminated sites which can be searched by prospective purchasers, financiers or other interested parties. However, it is not a complete or extensive list of properties because of the lack of any statutory obligation to report contaminated sites.

In performing due diligence before purchasing a site, a potential purchaser should consider investigating the site's current state similar to that outlined above, especially where the site has known historical industrial uses, or is located near current or historical industrial sites.