



Update

Property & Projects

March 2010

Duty to Report under Contaminated Land Management Act 1997

The Contaminated Land Management Act 1997 (CLMA) was significantly amended on 1 July 2009. A fundamental change has been made to the duty to report contamination. This duty can now be triggered regardless of the actual knowledge of the person required to report. The environmental regulator (Regulator) now has powers to require the assessment and remediation of sites where contamination is considered to be significant enough to warrant regulation. The previously used "significant risk of harm" trigger for reporting contaminated land no longer applies. Persons with an interest in any land in NSW which has a history of potentially contaminative uses should now seek legal advice in relation to the statutory duty to report and the new expectations of the Regulator in this regard.

1. Duty to report

A person whose activities have contaminated land or the owner of land that has been contaminated is required to notify the Regulator when becoming aware of contamination in the following circumstances:

- the level of the contaminant in, or on, soil exceed the level of contamination set out in new guidelines on the duty to report (which became effective on 1 December 2009 (Guidelines)) with respect to a current or approved use of the land, and people have been, or foreseeably will be, exposed to the contaminant, or
- the contamination meets a criterion prescribed by regulations, or
- the contaminant has entered, or will foreseeably enter, neighbouring land, the atmosphere, ground water or surface water, and the contamination exceeds, or will foreseeably exceed, a level of contamination set out in the Guidelines and will foreseeably continue to remain above that level.

The Guidelines contain more information on the notification triggers and how they should be used in determining whether contamination should be reported to the Regulator.

2. When does the duty to report arise?

The duty to report arises when a person whose activities have contaminated the land or the owner of contaminated land:

- is aware of the contamination, or
- should reasonably have become aware of the contamination.

The following factors are to be taken into account in determining when a person should reasonably have become aware of the contamination:

- the person's abilities, including his or her experience, qualifications and training;
- whether the person could reasonably have sought advice that would have made the person aware of the contamination;
- the circumstances of the contamination.

As a result anyone who either has expertise in the area or who has the financial resources to retain a consultant may be expected by the Regulator to proactively investigate potential contamination. The Regulator can also now issue a preliminary investigation to determine whether land should be regulated.

3. Failure to report

Failure to report is an offence and carries a fine of up to \$165,000 for a corporation (and \$77,000 for each day that the offence continues), and \$77,000 for an individual (and \$33,000 for each day that the offence continues).

If a corporation contravenes, whether by act or omission, any provision of the CLMA or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision, unless the person satisfies the court that:

- the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- the person, if in such position, used all due diligence to prevent the contravention by the corporation.



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