

# Environmental Risk Part 2



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The Liberty White Paper Series



The Liberty White Paper Series is thought leadership material for those who manage risk. In this three part series we look at some major environmental risks and how ever tougher environmental legislation could affect Australian businesses and the people who manage them.

## Executive Summary

- When it comes to pollution and environmental issues companies face a wide range of legal risk – from State and Federal statute law, existing Common Law causes of action and continual Common Law legal developments. These legal risks are in addition to the heavy clean-up costs that may be involved in a pollution incident.
- State law increasingly gives regulators the power to mandate clean-up and remediation. In some cases this action may be forced on companies who are not the ‘source’ of the pollution.
- Rules about disclosure of pollution – or potential pollution – are getting tighter and individual directors and officers may face greater liability.

## Part two: Environmental risks – the legal issues

Given global concerns about issues like climate change, environmental law is increasingly in the spotlight. In this arena, business managers need to understand environmental issues and the legal risks involved. In Part One of this White Paper Series we detailed the importance of protection against “gradual pollution”, and the onus of clean-up obligations and costs. This White Paper looks at the current legal landscape and trends in environmental law in Australia. In White Paper Three, we examine trends in North America, Europe and Asia and discuss what that could mean for local businesses.

### Who pays?

Who pays for the consequences of pollution?

Much of the environmental protection legislation now enacted around the world begins with the principle of ‘polluter pays’. However, regulators are increasingly broadening the scope of liability for pollution and contamination. Businesses can face liability for environmental investigation and remediation costs even if the actual polluter was a tenant or the previous landowner.

Partly, this is because governments around the world don’t have the funds to pay for a clean-up where the polluting party cannot. Whatever the underlying logic, increasing efforts to ‘pierce the corporate veil’ mean liability may now also extend from a subsidiary up to a parent company. Importantly, companies may also face legal risks if they don’t disclose potential pollution.

### Who do you pay?

Of course, the fines and other penalties imposed by regulators and governments are only part of the risk. If you cause pollution or are associated with causing pollution, a range of other parties could attempt to make you pay.

Under Common Law, a person or company affected by your actions – such as the release of a pollutant onto their property or into their drinking water – could seek a remedy (compensation) under the Common Law cause of action, **negligence**. The broad Common Law principle is that: “*You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure....*”

A polluter could also face action under a Common Law cause of action called **nuisance** – where an action “*involves interference with the right of a property owner to experience quiet enjoyment of their premises.*” For example, a person or company affected by spray drift, odour, or dust emissions from a factory or manufacturing plant might have a basis to sue for damages in reliance on the legal concept of “nuisance”.

In April 2011, the UK High Court determined that the tort of nuisance could be used to claim damages for odours emanating from a landfill site. Their action was against the operator of the landfill site. Residents of a UK County had been complaining for 5 years of offensive odours escaping from the site. The landfill operator defended the claim on the basis that it had complied with all requirements of its operating permits and licences. The High Court held that although in that particular case the operator was not liable to the residents, there was a legal right to claim damages for the tort of nuisance in similar circumstances. The landfill operator was “therefore, potentially liable for claims in nuisance” in different factual circumstances.

### Statute Law

There is also pollution-related risk under **statute law**. A statute regulates behaviour in commerce, industry and private activity. A company or individual could face pollution-related actions under a wide range of statute laws including those covering OH&S, Corporations and Workers’ Compensation.

In summary, the pollution-related risks a company faces are not limited to actions by environmental regulators or governments. Neighbours, staff, the public and government bodies regulating business and employment could seek redress under Common Law or statute law.

## Case Study 1: Lucas Heights

**In January 2005, a pump accidentally left on overnight resulted in more than 115,000 litres of leachate from a Waste Management Centre flowing into Mill Creek near Lucas Heights in NSW.**

The Centre was owned by a state owned water recycling corporation. They had sub-contracted the operation of the plant to a construction services company.

The Land and Environment court ordered the construction services company to meet cleanup costs of \$82,000 and pay the prosecution’s investigation and legal fees of \$111,000. It also fined the company \$16,000, a fine it had discounted for the company’s prompt actions in fixing the leak and minimising its effects. However, this company’s financial pain was further aggravated as the state owned corporation withheld payments worth more than \$400,000.

In this case, the court decided that the construction services company was not the only party responsible for the pollution. The water recycling corporation was fined \$75,000 and ordered to pay costs of more than \$45,000 as it had failed to implement several pollution prevention measures suggested by its own risk assessment and work it had commissioned on a leak-preventing bund had failed.

In addition to highlighting the major financial cost of pollution prosecutions, this case highlights how responsibility falls on a number of parties. This creates the potential for further disruption of normal commercial operations and for costly legal disputes.

## The legislative environment

In addition to the financial risks involved in the clean-up of contaminated sites (See Part One of this White Paper Series) recent legislation in various States of Australia has increased legislative risk as well.

In the following section, we take a very brief look at changes to the State legislation that could affect Australian business.

## Environmental Legislation – State by State snapshot

### Queensland

From 1 January 2009, Queensland's Environmental Protection Act 1994 was overhauled.

It is significantly tougher than the previous legislation, now containing a range of measures including:

- **Direction** notices that set out how a contravention of the law has occurred and mandate a timetable for remedying that contravention. It may set out the steps the company needs to take – such as stopping further pollution or cleaning up an existing spill.
- **Clean-up** notices that can require a business to:
  - o prevent or minimise contamination;
  - o rehabilitate the environment;
  - o assess the nature and extent of environmental harm; or
  - o provide information to the administering authority.
- **Cost recovery** notices that claim for costs incurred performing clean-up or emergency action or for monitoring compliance by the recipient of the notice. Payment must be made within 30 days or the EPA may claim the amount as a debt.

### Western Australia

The Western Australian *Contaminated Sites Act 2003 (Act)* came into effect in December 2006. It contains a series of tough provisions for reporting, investigation and pollution clean-up. Owners, occupiers and polluters are required to report known or suspected contamination. Failure to report can cost a company up to \$1.25 million in one-off fines and there may be daily fines as well.

The WA law gives the regulator power to require investigation or remediation work to be carried out by the “person responsible for contamination” (determined by the hierarchy in the Act). That ‘person’ will eventually be liable for the investigation and remediation costs, but other parties can be required to take action in the short term.

### South Australia

Significant changes to the *Environment Protection Act 1993* took effect on 1 July 2009.

The Act already contained the provision for environmental protection orders, clean-up orders and reporting requirements similar to those in other States. The 2009 changes to the law gave South Australia a specific regulatory regime for historically contaminated sites.

The SA EPA can now issue site contamination assessment orders (SCAOs) and site remediation orders (SROs) to ‘appropriate persons’ (polluters and owners – in that order).

The new law also allows for voluntary investigation and clean-up arrangements with the EPA.

### Victoria

During 2009, the Victorian EPA introduced “enforceable undertakings” that can be used as an alternative to prosecution. An enforceable undertaking, though voluntary, binds an organisation to carry out certain activities relating to the breach of environmental law. Enterprises may choose to accept an enforceable undertaking in preference to the risk of the time, legal costs, increased penalties and reputational damage that may come with fighting legal prosecution.

## Case Study 2: Meat Rendering Company

In December 2008, a meat rendering company was prosecuted for polluting a waterway with rendered animal effluent via illegal discharges issuing from a drain on their own premises into a storm water drain.

The Victorian EPA directed the meat rendering company to block the drain and undertake an environmental audit. Further action included diverting flows and preventing drainage from the stockyard and rendering plant into the storm water system.

No conviction was recorded. However, the Court ordered the company to pay \$200,000 to fund three environmental projects and pay the EPA's costs of \$30,000. This approach is increasingly common – and not just in Victoria. In addition to payments to the regulator and for remediating the environmental damage, the courts may order penalty payments directed to environmental projects.

## Case Study 3: Petroleum & Petrochemical Company

In 2006, a petroleum company discovered a petrol leak from a hole in a steel pipeline near one of its refineries. The leak caused approximately 486,000 litres of unleaded petrol to seep through the ground and contaminate 16 hectares over a period of more than two years.

The company was prosecuted by the Victorian EPA in 2008 and ordered to pay a total penalty of \$510,000, which included an alternative penalty order for \$350,000 for three community environmental projects in the area where the leak occurred. It also included the EPA's legal costs (\$160,000). At the time of the hearing, the petroleum company had already spent more than \$660,000 on the pipeline repair and clean-up operation, which was expected to cost them around \$13 million and last until 2012.

This penalty was the highest penalty ever awarded by Victorian courts for a land-based pollution incident.

Under Victorian Contaminated Site law, the regulator can now also require financial assurance - for future cost of the clean-up and other expenses - from businesses on sites where there is contaminated groundwater or where contamination remains in place.

The Victorian experience highlights the rising cost of environmental prosecutions. During 2008/9, the largest corporate penalty imposed by Victorian EPA's was \$510,000. That compares to a maximum penalty of just \$161,000 in 2007/2008.

## New South Wales

In 2008, NSW overhauled the *Contaminated Land Management Act 1997* – and it is considerably more stringent:

- Under the previous Act, owners or operators of contaminated land were expected to notify authorities if they “became aware” of a contamination issue. The new standard is “ought reasonably have been aware” – imposing a significantly higher onus on companies and individuals to investigate possible contamination.
- Under previous legislation, the Department of Environment, Climate Change & Water (DECCW) needed to prove ‘significant risk of harm’ before a site could be declared ‘regulated land’. Now a Preliminary Investigation Order (PIO) is issued if the DECCW suspects the land is contaminated. The DECCW has the sole right to nominate which party – owner, tenant, notional owner – incurs that cost and responsibility. There is no regulated ‘hierarchy’. As a result, landowners may be responsible for cleaning up contamination caused by their tenants or by former owners.
- The ‘no knowledge’ defence no longer protects directors and officers from liability for their company's actions.

## Summary

In this brief look at the regulation of environmental and pollution issues, a number of things become clear. First, businesses face a range of legal threats in relation to environmental issues – under Common Law as well as from the various State and Federal environmental Legislatures.

Secondly, State regulation is getting tougher. Many states have given their EPAs the ability to mandate clean-up and remediation and the onus on disclosure is significantly tighter. Importantly, individual directors and officers are now more likely to be held accountable for breaches and penalised for breaching environmental laws by failing to voluntarily report their company's pollution events.

Last, and perhaps most importantly, environmental regulators are increasingly likely to impose remediation costs not just on the original polluter but also on new owners, parent companies and even tenants.

All these trends have major risk management implications. Companies need to bear these in mind when buying, selling, renting or using facilities that have some pollution risk, and especially when purchasing environmental insurance.

Like to know more?

**In Part One of Liberty's Environmental Risks White Paper Series we looked at the often neglected issues of gradual pollution and at the insurance issues associated with this risk.**

**In Part Three we look at international legal trends that increase companies' environmental risks and examine their potential future impact on Australian businesses.**

**If you would like more information about Environmental Risks or about the relevant insurance issues please contact Cami Mok on (02) 8298 5853 or at [cami.mok@libertyiu.com](mailto:cami.mok@libertyiu.com).**