

## Transfer of liability

Updated October 2010<sup>1</sup>

*EPA 854/10: This information sheet is for vendors and purchasers intending to transfer or accept liability for site contamination with the sale or purchase of a property. It details the effects of transferring liability and the need to assess the extent of site contamination by qualified and experienced professionals before entering into a sale agreement. Attached is the form referred to in section 103E(2)(a)(i) of the Environment Protection Act 1993.*

### Introduction

If site contamination exists, section 103E of the *Environment Protection Act 1993* (the EP Act) provides for the transfer of liability for site contamination in certain circumstances set out in the EP Act. The liability may be transferred for all, or a specified part of the site contamination at the site. For example, the liability may include or exclude soils, groundwater, and onsite or offsite contamination.

### Assessment of site contamination

In order to transfer liability, site contamination must be known to exist. In this context the EPA must be satisfied that the legislative definition of 'site contamination' is met.

This can be achieved by including all relevant information about the site contamination (for which liability is proposed to be transferred) in the agreement which is lodged with the EPA in accordance with section 103E(2)(ii) of the EP Act.

If the agreement does not demonstrate that site contamination exists and does not define the site contamination to which the agreement relates, the requirements of section 103E will not have been satisfied and the agreement will be returned without being recorded on the EPA Public Register.

### Definition of site contamination

Section 5B of the EP Act defines site contamination as follows:

For the purposes of this Act, site contamination exists at a site if—

- (a) chemical substances are present on or below the surface of the site in concentrations above the background concentrations (if any); and
- (b) the chemical substances have, at least in part, come to be present there as a result of an activity at the site or elsewhere; and

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<sup>1</sup> Issued May 2009.

- (c) the presence of the chemical substances in those concentrations has resulted in—
  - (i) actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land uses; or
  - (ii) actual or potential harm to water that is not trivial; or
  - (iii) other actual or potential environmental harm that is not trivial, taking into account current or proposed land uses.

The definition of site contamination and the concept of 'trivial' are discussed in further detail in EPA Information Sheet, *Site contamination: What is site contamination?*

## Professional advice

A person who is proposing to enter into an agreement to transfer with a sale of land, liability for any contamination on that land, should ensure that he or she obtains advice as to the nature and extent of contamination on the land from a suitably qualified and experienced professional. The nature and extent of any contamination should be assessed using appropriate techniques provided in the *National Environment Protection (Assessment of site contamination) Measure*.

Section 3(1) of the EP Act states that:

liability for site contamination means—

- (a) liability to be issued with an order under Part 10A in respect of the site contamination; or
- (b) liability to pay an amount ordered by the Court under Part 11 in respect of the site contamination.

The liability for site contamination can translate into significant amounts of money. In some cases, the cost to assess or remediate a site can far exceed the value of the land and the assets established on the land.

The EPA recommends that both parties obtain independent legal counsel before entering into an agreement for transfer of liability for site contamination.

In the case of agreements to transfer liability of site contamination entered into after the commencement of the site contamination provisions and for such an agreement to be recognised by the EPA, the person must first give the purchaser or transferee a notice in a form approved by the EPA setting out the legal effect of the agreement. A copy is attached to this information sheet and available electronically from the website <[www.epa.sa.gov.au](http://www.epa.sa.gov.au)>.

## Section 103E of the EP Act

Section 103E of the EP Act states the following:

103E—Liability for site contamination subject to certain agreements

- (1) If—
  - (a) site contamination exists at a site; and
  - (b) land that is all or portion of the site has been sold or transferred (whether before or after the commencement of this Part or this Act) subject to an agreement in writing under which the purchaser or transferee will assume liability for all or a specified part of the site contamination at the site, the purchaser or transferee is to be taken to have assumed the vendor's or transferor's liability for the site contamination in accordance with the agreement and this Act applies as if the purchaser or transferee (and not the vendor or transferor) had caused the site contamination or, as the case may be, the specified part of the site contamination.

- (2) Subsection (1) does not apply to an agreement—
- (a) unless, in the case of an agreement entered into after the commencement of this Part—
- (i) the person has first given the purchaser or transferee a notice in a form approved by the Authority for the purposes of this section setting out the legal effect of the agreement under this section; and
- (ii) a copy of the agreement is lodged with the Authority; or
- (b) if the Environment Resources and Development Court determines, on application by the Authority, that the purchaser or transferee did not acquire the land in a genuine arms length transaction.

## Lodgement of agreements with the EPA

In accordance with s103E, a copy of an agreement to transfer liability of site contamination, entered into after the commencement of the section, must be lodged with the EPA.

In the event the agreement is written into a sale agreement and not a separate document, then the whole sale agreement must be lodged. Upon receipt, the EPA will acknowledge receipt of the agreement.

As noted above, if, however, the information provided in the agreement is not sufficient to satisfy the EPA that site contamination exists, the requirements of section 103E of the EP Act will not have been satisfied and the agreement will be returned without being recorded on the EPA Public Register.

If the agreement is returned, the EPA will write to the vendor, the purchaser and the relevant legal counsel, providing the reasons for its decision.

Section 103E commenced on 1 July 2009.

## Genuine arms length agreement

If the Environment Resources and Development Court determines, on application by the EPA, that the purchaser or transferee did not acquire the land in a genuine arms length transaction then the purchaser or transferee will not be taken by the EPA to have assumed liability for site contamination<sup>2</sup>.

Put simply, a 'genuine arms length' transaction is one in which there is no special duty, obligation or relationship between the parties to the transaction in which one party is under a duty to act for the benefit of the other.

There are several formal definitions of the general arms length transaction. As a guide two are provided:

- Of or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship—*Black's Law Dictionary (2004)*
- A transaction in which the parties act severally and independently in forming the bargain and in which neither of the parties has the ability to exert personal influence or control over the other—see *Branby Pty Ltd v. FCT (1995) 129 ALR 503; Australian Trade Commission v. WA Meat Exports Pty Ltd (1987) 11 ALD 52; 75 ALR 287 from Butterworths Australian Law Dictionary 1997.*

## Extent of liability

Site contamination can extend off the site on which the original (contaminating) activity occurred. This typically occurs where underground water has caused the migration of the chemical substances. In such cases, many allotments can be affected by the contamination.

<sup>2</sup> See section 103E(2)(b) of the EP Act.

Section 103E of the EP Act states that the transfer works ‘as if the purchaser or transferee (and not the vendor or transferor) had caused<sup>3</sup> the site contamination or, as the case may be, the specified part of the site contamination’.

Section 103C(1) of the EP Act states ‘the appropriate person to be issued with a site contamination assessment order or a site remediation order in respect of a site under Division 3 is— (a) the person who caused<sup>4</sup> the site contamination at the site’.

Section 103H(3) of the EP Act states ‘if the order is issued to an appropriate person as an owner of the site as distinct from a person who caused<sup>5</sup> the site contamination, the order must be limited in its application to site contamination on or below the surface of the site’.

So by default, a person agreeing to acceptance of liability for site contamination is agreeing to have caused the site contamination. This means that liability can be assumed for both on and offsite contamination. A person acquiring liability should determine the extent of liability that is being acquired.

Again the EPA recommends that **before** entering into an agreement for the transfer of liability for site contamination, both parties should seek independent legal counsel. Once liability has been assumed liability for site contamination, the purchaser/transferee 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 site contamination for which he or she has accepted liability.

Specifically and as a minimum, the following factors should be considered:

- the extent of the liability being transferred (on and offsite)
- the nature and extent of all site contamination (including soil, groundwater and vapour)
- the lateral and vertical extent of contamination (on and offsite)
- whether the nature and extent of the site contamination has been fully characterised
- the qualifications and experience of the person(s) who have provided an opinion in relation to the nature, extent and financial liability of the site contamination
- the independence of the person who provides an opinion in relation to the nature, extent and financial liability of the site contamination
- the age and relevance of any reports that is relied on in making decisions on site contamination
- the cost to remediate<sup>6</sup> the chemical substances.

## Public Register

The EPA 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 the EPA will also be on the Public Register.

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<sup>3</sup> Underline added.

<sup>4</sup> Underline added.

<sup>5</sup> Underline added.

<sup>6</sup> The *EP Act* defines remediate a site as “treat, contain, remove or manage chemical substances on or below the surface of the site so as to—

- (a) eliminate or prevent actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land uses; and
- (b) eliminate or prevent, as far as reasonably practicable—
  - (i) actual or potential harm to water that is not trivial; and
  - (ii) any other actual or potential environmental harm that is not trivial, taking into account current or proposed land uses.

## Consequences of assuming liability

The EPA has substantial powers to address site contamination. A person with liability for site contamination may be required to assess and/or remediate the site contamination under a site contamination assessment and/or site remediation order.

### Site contamination assessment orders and site remediation orders

The EP Act (sections 103H and 103J) allows the EPA to order a person to assess or remediate site contamination.

If a new owner is deemed to have caused site contamination, then the EPA can require the assessment and remediation to be both on and offsite unless this is **specifically limited by the agreement**.

It is a criminal offence to not comply with an order and the penalties for non-compliance are significant.

If a person does not comply with a site contamination assessment or site remediation order, the EPA can undertake the work itself or engage someone else to undertake the work on its behalf (section 103Q). The EPA can then recover all reasonable costs and expenses incurred in taking such action, as a debt from the person to whom the order was issued. Specifically the EPA can recover ‘... the amount, together with any interest charge so payable, is until paid, a charge in favour of the EPA on **any** land owned by the person in relation to which the site contamination assessment order or site remediation order...<sup>7</sup>’. The current interest rate is 24% per annum.

Section 103R of the Act states:

A charge imposed on land by this section has priority over—

- (a) any prior charge imposed on the land (whether or not registered) that operates in favour of a person who is an associate of the owner of the land; and
- (b) any other charge on the land other than a charge registered prior to registration of the site contamination assessment order or site remediation order in relation to the land”.

### Voluntary proposals

A person may, by agreement with the EPA, enter into a voluntary proposal for the assessment or remediation of site contamination.

Voluntary proposals are legislative tool (sections 103I and 103K of the EP Act) that provides the EPA and the person who has liability for site contamination with an alternative to an order. The legislation provides a clear framework for how the proposals are established and how they operate. In addition, voluntary proposals provide an excellent way to undertake work on a voluntary basis and at the same time, providing certainty as to the EPA’s expectations and actions. If a person enters into an approved voluntary proposal, the Authority cannot issue an order if the person undertakes the work in accordance with the proposal.

Non-compliance with a voluntary proposal can result in the EPA issuing an order.

### Further reading

Available at [www.epa.sa.gov.au](http://www.epa.sa.gov.au).

EPA Information Sheet, *Site contamination: What is site contamination?* (2009).

EPA Information Sheet, *Site contamination: Prescribed potentially contaminating activities* (to be published).

<sup>7</sup> Section 103R(4)(b) of the EP Act.

EPA Information Sheet, *Site contamination: Responsibility for site contamination* (2009).

EPA Information sheet, *Site contamination: Voluntary proposals* (to be published).

## Disclaimer

This publication is a guide only and does not necessarily provide adequate information in relation to every situation. This publication seeks to explain your possible obligations in a helpful and accessible way. In doing so, however, some detail may not be captured. It is important, therefore, that you seek information from the EPA itself regarding your possible obligations and, where appropriate, that you seek your own legal advice.

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## Further information

### **Legislation**

Legislation may be viewed on the Internet at: <[www.parliament.sa.gov.au/dbsearch/legsearch.htm](http://www.parliament.sa.gov.au/dbsearch/legsearch.htm)>

Copies of legislation are available for purchase from:

Service SA Government Legislation Outlet	Telephone:	13 23 24
Adelaide Service SA Centre	Fax:	(08) 8204 1909
108 North Terrace	Internet:	< <a href="http://shop.service.sa.gov.au">shop.service.sa.gov.au</a> >
Adelaide SA 5000		

### **For general information please contact:**

Environment Protection Authority	Telephone:	(08) 8204 2004
GPO Box 2607	Facsimile:	(08) 8124 4670
Adelaide SA 5001	Freecall (country):	1800 623 445
	Internet:	< <a href="http://www.epa.sa.gov.au">www.epa.sa.gov.au</a> >
	Email:	< <a href="mailto:epainfo@epa.sa.gov.au">epainfo@epa.sa.gov.au</a> >

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The EPA welcomes written comments on and suggestions for improvements to any of its site contamination publications. These should be addressed to the Manager Site Contamination at the above address for the EPA.

## Notice of legal effect of agreement to assume liability for site contamination



Notice for the purposes of section 103E(2)(a)(i) of the *Environment Protection Act 1993* (SA).

Use BLOCK LETTERS and all sections must be completed

### Type of transaction

Please mark one box only:

sale

transfer

Vendor/transferor details	Purchaser/transferee details
Full name and address	Full name and address
Contact details Tel: Fax: Email:	Contact details Tel: Fax: Email:

### Site Information

Site name (if applicable):

Site address:

Certificate of Title number(s):

(**must be** correct at the time of transaction)

Provide details of all existing site contamination (as defined by the EP Act) for which liability is being transferred. (Note that the requirements of section 103E will not be met and subsequently the EPA will not record an agreement on the Public Register unless it is satisfied that definition of 'site contamination' in s 5B of the EP Act is met.)

**Responsibility and liability for site contamination (VERY IMPORTANT)**

The cost to assess and/or remediate site contamination can far exceed the property value.

Where an agreement is made under section 103E(1) of the *Environment Protection Act 1993*, the purchaser or transferee is to be taken to have assumed the vendor's or transferor's liability for the site contamination in accordance with the agreement and the Act applies as if the purchaser or transferee (and not the vendor or transferor) had caused the site contamination or, as the case may be, the specified part of the site contamination

The legislation allows for you to accept all liability for site contamination—both in soils and in groundwater and both on and offsite. The EPA recommends that you seek independent legal counsel before signing the agreement.

If you are liable for site contamination, the EPA can, where site contamination exists:

- order you to assess the site contamination,
- order you to remediate site contamination,
- assess or remediate the site and recover the costs from you,
- register the costs incurred by the Authority, together with any interest (at 24%pa) so payable, in assessing or remediating the site contamination against this land and any other land that you own in relation to which the site contamination assessment order or site remediation order.

**Declaration**

I/we, as purchaser / transferee hereby declare that I/we have been given and have read both the EPA Information Sheet, *Site contamination: Transfer of liability for site contamination* and this form. I/we understand that the Environment Protection Authority has powers to enforce a person's liability for site contamination.

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Date: \_\_\_\_\_

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**NOTE:** The provisions of section 103E(1) of the EP Act do not apply to an agreement—

- (a) unless, in the case of an agreement entered into on or after the commencement of Part 10A of the EP Act (1 July 2009) —
  - (i) the person has first given the purchaser or transferee a notice in a form approved by the Authority for the purposes of section 103E(2)(i) setting out the legal effect of the agreement under section 103E; and
  - (ii) a copy of the agreement is lodged with the Authority; or
- (b) if the Environment Resources and Development Court determines, on application by the Authority, that the purchaser or transferee did not acquire the land in a genuine arms length transaction.

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**EPA use only**

Date received:

EPA reference number:

Received by (print name and sign):