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Environmental Insights Done Well, By Design.

Setting the industry standard
in quality reports

Capability Statement 2024



LOTSEARCH

Spatial Intelligence | Mapping Risk

Australia's trusted source of land and property information, aiding industry experts to identify potential environmental risks.

Whether you are an Environmental Consultant performing a preliminary site investigation, a Legal professional conducting detailed due diligence or a Government entity undertaking an asset risk assessment, Lotsearch offers the most accurate reports to aid professionals in the identification of potential environmental risks.

Having developed advanced technology and quality processes, we are setting the industry standards with our quality-assured datasets and reports. This delivers you information to the highest level of accuracy on contaminated land, natural hazards, as well as planning and ecological constraints.

- ✓ Due-diligence reports, ordered online and delivered to you within minutes
- ✓ Comprehensive Enviro Pro reports supplied to your deadline
- ✓ Single-site or multi-site reports available
- ✓ All reports are delivered as a digital service, ready for expert analysis

We support professionals by providing the most accurate, timely and up-to-date information in the market.

Founded in 2014, we are a purpose-driven organisation aiming to foster greater environmental awareness in Australia. We take pride in accomplishing this vision by generating comprehensive information to best inform our clients of potential environmental risk.

“Our vision to guide a more environmentally aware Australia, inspires excellence in service and data quality.

Our mission as the pioneers of best in class environmental insights, compels the highest quality assurance of information.”

We recognise the importance of having guiding values which form the foundation upon which we act.

Integrity

We do the right thing, even without supervision. We build trusted relationships with our clients, take ownership, and deliver our commitments.

Collaboration

At Lotsearch, we deliver and celebrate together. We are always supportive, inclusive, and communicate effectively with each other and our clients.

Purposeful

We navigate each day with focus and determination to navigate the unexpected. We believe everything we do matters to helping our clients, and we take on tasks with a challenge-tackling mindset with the goal of achieving an optimal solution.

Customer Centric

Helping our customers win is at the heart of what we do. We strive to put ourselves in the client's shoes to achieve a stronger understanding and make an impact on our clients' lives.

We Care

Caring for the people we work with first and foremost. We act with humility and empathy towards each other and strive to be a genuine, empathetic part of our clients' journey.

Innovation

Finding smarter ways to do things is how we work. We are curious and clever, challenging the status quo and constantly seeking smarter ways to lead the industry.



“As the pioneers of the industry’s information standards, our dedication to quality and service, underpins our values and is integrated within our processes, policies and systems.”

Our Team

Our Leadership



Howard Waldron
General Manager



Peter Rodgers
Head Product & IT



Nola Hocking
Chief Operating Officer



Harley Douglas
Report Delivery & Client Support



Swapnil Bhadale
Data Mapping



Alexa Troedson
Quality Assurance



Nigel Dsouza
Technology & Development



Lachlan Hanley
Product - Contaminated Land

Proud of our highly engaged team of experts

Headquartered in North Sydney, Australia, our team has diverse scientific and technical experience, relevant to the industries we serve.

To work at Lotsearch is to be part of something that matters - everyday. We live our employee value proposition to offer learning, development and growth opportunities for all members of our team, ensuring the highest engagement, satisfaction and expertise across our people.



Learn. Develop. Grow.
Be part of something that matters – everyday

Service Capability

Our software leverages the latest geographical information systems (GIS) and database packages to turn data into meaningful information. Lotsearch empowers our clients to understand potential risks through:

- ✓ Best practice & due diligence reports
- ✓ Digital outputs for efficient interpretation
- ✓ Responsive, timely and expert customer support

As a customer-centric organisation, we work with our clients to become a trusted, extension to their team; playing a key role in delivering the environmental insights they need to meet their project and service goals.

Cyber Security and Technology

The protection and confidentiality of our clients' projects and information is a key priority which we have embedded throughout our organisation. We are committed to continuously measuring and improving our performance in this area, and have formalised processes and training in place to cultivate a culture of protection, security, and risk migration across all of our operations.

Lotsearch is committed to the ongoing development of digital solutions and we work with clients looking to integrate our services into their internal systems in accordance with our security guidelines.

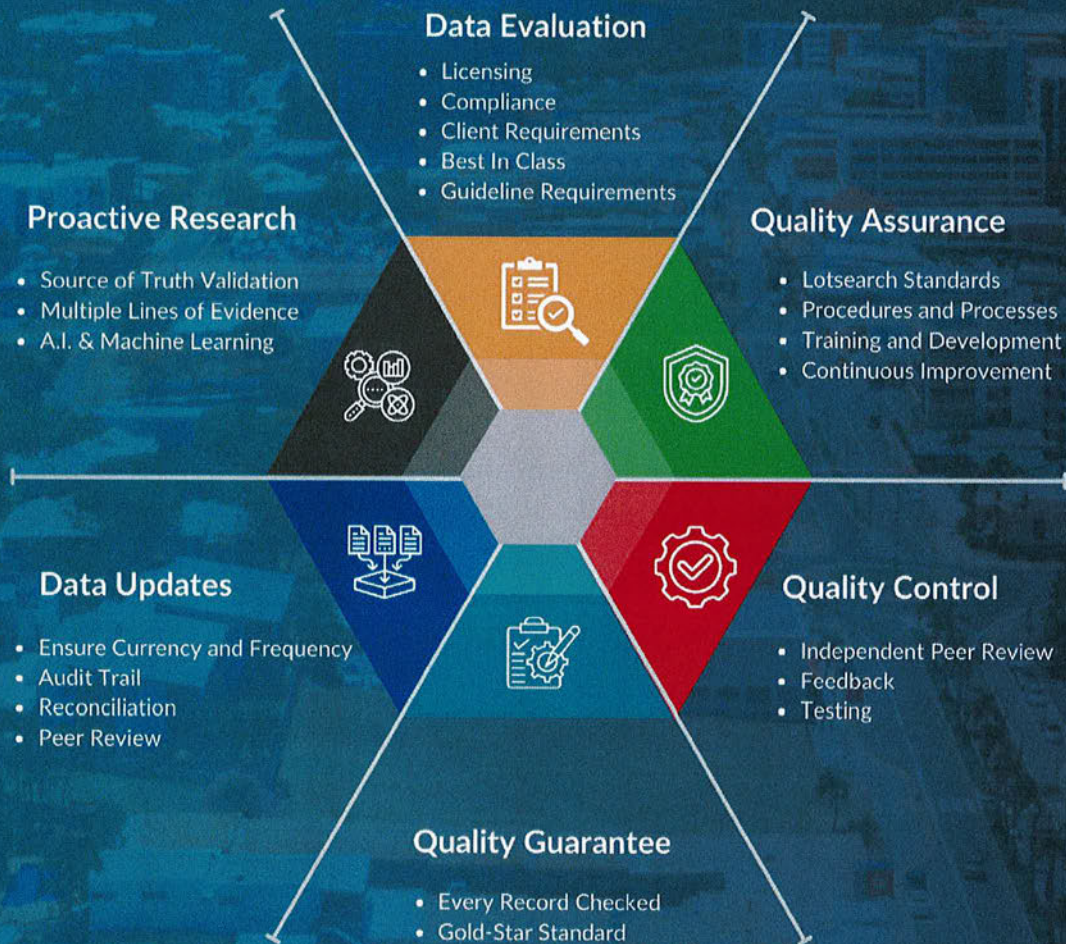
Corporate Social Responsibility

As industry leaders, our commitment revolves around conducting business ethically and responsibly. Our focus includes reducing our environmental impact, advocating for positive social practices, making ethical investment choices, and complying with all local regulations, including laws against slavery.

Quality Assurance

Quality is a core company value and we have developed detailed procedures and training programs to ensure all staff have a continual focus on quality. Overseen by an assigned quality assurance leader, we continually benchmark and monitor our delivery against quality metrics, optimising the quality of our offerings. This feeds a constantly evolving and rigorous quality assurance (QA) and quality control (QC) operations process, underpinned by our quality policy and framework.

Six Quality Pillars



Our Quality Guarantee: Every record mapped, peer reviewed and quality assured.

Lotsearch understands that getting the details right, the first time, is essential for those relying on our reports to make informed decisions.

Our six quality assurance pillars - ensure all data is cross-checked and assured for accuracy prior to landing in your inbox.

Customer Service

Our Commitment

Our commitment to excellence and customer experience drives us to continuously deliver and invest in our top-tier customer service. We constantly strive to enhance our performance in this area, with all our employees and contractors being expected to carry out their responsibilities in accordance with our Customer Service Policy Statement.



"Lotsearch provide an amazing service. The amount of information they include in their reports is remarkable, and great value to consultants and our ultimate clients. Inclusion of Lotsearch reports within our projects has resulted in contamination sources which would not have been found otherwise. The team communicate well and are very helpful..."

Ross Nicolson
Principal Environmental Scientist
at Cavanba Consulting.



"Lotsearch has been a great company to work with over various projects. They are very quick to deliver a high quality result, communicate well and are flexible and attentive to their client's needs. I highly recommend them and look forward to working together again in the near future."

Natalie Tan
Testimonial made when formerly
working as a Senior Environmental
Consultant at Aurecon.

Reports and Services

Delivering a more environmentally aware Australia, requires tailored services for Australia's leading Environmental Professionals, Lawyers and Conveyancers and Government Agencies.



Environmental Professionals Reports

- Lotsearch EnviroPro
- Lotsearch EnviroLite
- Lotsearch Aerials
- Planning & Ecological Constraints



Lawyers & Conveyancers Reports

- Contaminated Land
- Screening Report
- Contaminated Land Search
- EPA Priority Sites Register Plus + (Victoria)
- Bushfire Risk Search



Government Custom Services

Lotsearch works directly and in collaboration with Government and industry partners to deliver a range of bespoke services upon request.

The smartest environmental information and insights

The Trusted Report for Environmental Professionals

The Enviro Pro report supports Environmental Professionals to pinpoint contamination sources, pathways, and sensitive receptors effectively. Underpinned by Lotsearch's quality-assured processes, this report delivers to the highest accuracy of information using multiple lines of evidence.

Sources & Site History

Contaminated Land – Regulatory Data: We source and evaluate data from state environmental regulators and specific federal agencies. This information includes locations of contaminated land, licensed activities with contamination risks, investigations on suspected contamination, and other related issues like penalty and pollution notices, and groundwater restrictions.

Potentially Contaminated Land – Alternative Sources and Research: We have Australia's largest historical land use database, detailing millions of potentially contaminating activities such as service stations, dry cleaners, waste facilities, gasworks, mining, and more, offering insights beyond what is found in regulatory data.

Aerials Imagery: Our products contain high-resolution historical aerial imagery from multiple sources. We aim to provide at least one high-resolution image per decade, spanning from the earliest captured image to the present day.

Historical Maps: Used as an additional line of evidence for identifying potential contamination sources, our historical map series provide context and coverage that aerial imagery alone cannot. Sources include: Geoscience Australia, military surveys, and state-specific map series.

Pathways & Environmental Setting

Landscapes, Geology and Soil: We provide information on surface and sub-surface structures and features, allowing consultants to analyse how contamination may extend beyond its source. Examples include topographic features, elevation contours, soil landscapes, and geological units & structures. Ground hazards such as acid sulfate soils, dryland salinity and mining subsidence are also provided.

Water and Hydrogeology: Our product provides detailed information on surface and underground waterbodies, which can act as pathways for contamination. Our borehole information can also provide the location of previous groundwater monitoring. Data layers include watercourses, lakes, aquifers, depth to groundwater, boreholes, and drill logs.

Current Use: This report contains State and Local level planning zones and overlays to support consultants in understanding the current use of the site from a planning perspective and determining whether any land use changes are occurring.

Environmentally Sensitive Areas and Receptors

Ecology: We reference several information sources to provide details on specific ecological constraints and sensitive sites. Examples include wetlands, native vegetation, threatened species, and protected areas.

People: The report includes other specific land features and points of interest which could identify sensitive receptors, such as schools, parks, and childcare facilities.

Built Environment: Heritage items are places or objects protected under Local, State, National, Commonwealth, or National jurisdictions. Our product contains the location of heritage items and cultural heritage sensitive zones where available. The report details the zones and overlays of planning controls for the property and surrounding area.

Natural Hazards: We provide information that highlights if the site and surrounding area is exposed to any natural hazards. Examples include bushfire prone areas, fire history, flood extent, coastal inundation/erosion, landslide and sea level rise.



Topographic Features
52-62 John Street, Erskineville, NSW 2043



Contaminated Land

52-62 John Street, Erskineville, NSW 2043

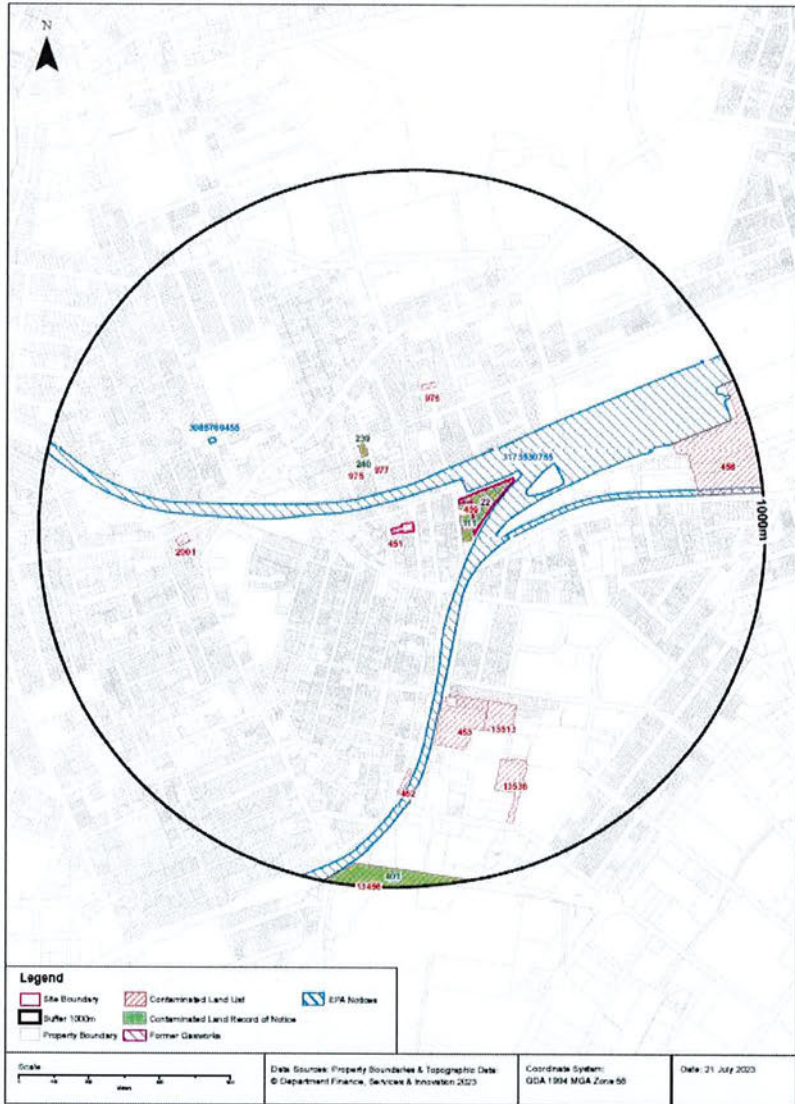
List of NSW contaminated sites notified to EPA

Results from the NSW EPA Contaminated Land Search for the subject site.

Site No.	Address	Status	Category	Contaminated Sites	Notified	Distance
41	100-102 John St	Contaminated	Site	Asbestos	2018	17m
42	100-102 John St	Contaminated	Site	Asbestos	2018	17m
43	100-102 John St	Contaminated	Site	Asbestos	2018	17m
44	100-102 John St	Contaminated	Site	Asbestos	2018	17m
45	100-102 John St	Contaminated	Site	Asbestos	2018	17m
46	100-102 John St	Contaminated	Site	Asbestos	2018	17m
47	100-102 John St	Contaminated	Site	Asbestos	2018	17m
48	100-102 John St	Contaminated	Site	Asbestos	2018	17m
49	100-102 John St	Contaminated	Site	Asbestos	2018	17m
50	100-102 John St	Contaminated	Site	Asbestos	2018	17m
51	100-102 John St	Contaminated	Site	Asbestos	2018	17m
52	100-102 John St	Contaminated	Site	Asbestos	2018	17m
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98	100-102 John St	Contaminated	Site	Asbestos	2018	17m
99	100-102 John St	Contaminated	Site	Asbestos	2018	17m
100	100-102 John St	Contaminated	Site	Asbestos	2018	17m

Contaminated Land

52-62 John Street, Erskineville, NSW 2043



Due Diligence and Duty of Care

Supporting Lawyers and Conveyancers to quickly identify potential environmental risks for any site across Australia.

Our database is the largest, most comprehensive and accurate of its kind in Australia, and provides lawyers, conveyancers, developers and valuers fast access to the latest information on environmental risks, including contamination risk for any site across Australia.

Why its essential to run a Lotsearch report prior to transactions?

Environmental due diligence on contamination hazards is critical for prospective purchasers. Contamination poses risks to human health, the environment, and can have significant legal and financial implications.

Before purchasing or leasing a property, it is important to be aware of the “polluter pays” principle. The “polluter pays” principle is found in all Australian State and Territory laws.

Generally, it means that the person who caused pollution or contamination is the person who is legally liable (meaning responsible) for cleaning it up. However, a lengthy and expensive legal process could be required to find and prove who caused the historical contamination. In addition, contamination could have been caused by an off-site source, so it’s important to know of historical land uses in the surrounding area.

Despite the presence of the “polluter pays” principle, in many jurisdictions owners or occupiers can be issued with statutory notices to clean up contamination (even if they are not the polluter). There are also legal obligations to notify discoveries of contamination to the environmental regulators, which could result in a property being listed on a contaminated land register, impacting the value of the land.

With these material risks in mind, it is important to conduct due diligence in relation to contamination risk, having regard to the latest publicly available information.

Lotsearch has built the largest, most comprehensive and accurate environmental risk database covering all of Australia. Reports can help clients understand the risk of contamination or potential contamination at a site based on searches of publicly available records and proprietary data.



Fast & Cost
Effective
Service



Accurate &
Comprehensive
Data



Easy to
Interpret
Reports

Government Projects at a Glance

Trusted by Government, we regularly deliver custom projects

Lotsearch works directly and in collaboration with Government and industry partners to deliver a range of bespoke services upon request. We have undertaken a number of projects, some of which are highlighted below.

Local Government:

Contaminated Land Baseline Data Acquisition

Lotsearch were engaged to produce a Contaminated Sites Registers for a consortium of regional councils. These registers were built to support the councils in meeting their statutory responsibilities relating to contamination. Leveraging our extensive databases, such as the Historical Business Directory database, the most comprehensive of its kind in Australia, we gathered data on previous land use. This included identifying contaminants of concern associated with the land use and assigning risk levels to various land use activities.

State Government:

Historical Aerial Photo Mapping Project

Lotsearch was awarded orthorectification work as part of a State Government's Coordinated Imagery Program. Historical aerial imagery was orthorectified for a total of about 600km² of metropolitan land, with one orthophoto mosaic produced per decade.

Over 4500 individual images were processed into seven aerial imagery mosaics. All aerial imagery layers exceeded quality standards, with the highest quality historical imagery mosaics having a 15cm resolution and being spatially accurate to within 3 pixels. Delivered to timelines and budgets, the extremely tight timeframe of 6 weeks was met and accuracy requirements exceeded.

Historical database and compilation of a spatial dataset: Gasworks

Lotsearch was engaged to build a database of historical gasworks, based upon our extensive proprietary datasets, as well as publicly available archival and historical material. This included defining the location of known sites not regulated by this government agency, identifying any unknown sites, and mapping each site boundary.

A total of 140 sites across NSW and VIC were successfully identified, validated and mapped as part of the project. Proprietary Lotsearch data was critical to the success of the project, as was our extensive experience with analysis of historical and archival data.

Federal Government:

12-Month Project - Risk Assessment Screening - Sensitive Sites

Lotsearch produced a suite of reports for over 200 sites to assist a federal government agency in their risk assessment screening process.

As a result of this work, the federal government agency was able to make well-informed decisions regarding site and asset management, contributing to our client's commitment to sustainability.



Award Winning Project

Sands & McDougall Historical Business Mapping

Lotsearch and GHD were engaged by the Victorian Department of Environment, Land, Water and Planning (DELWP) to deliver a geocoded dataset of historical business locations derived from the Sands & McDougall Directories (Victoria's original 'phone books') held at State Library Victoria.

Lotsearch had expertise and previous experience geocoding Sands & McDougall historical information and worked closely with the GIS team at GHD to develop the geocoded dataset. Lotsearch managed the complex process of validating data against other historical reference material including their own proprietary historical datasets, ensuring the data provided was high quality and presented minimal risk to DELWP. All work was delivered within acceptable timelines and within budget, and the quantity of geocoded data provided (over 550,000 records) exceeded initial expectations.



Industry Collaboration

Industry Experts

We thank our renowned industry experts for helping us stay updated on the latest developments impacting our clients:



Paul Nathanail
(Contaminated Land Consultant)



Gabrielle Guthrie
(Environment & Planning Lawyer)



Garth Brown
(Conveyancing Expert)

Industry Support

As part of our commitment to supporting our sector, we are very proud to support the following Industry Associations:



Access our Services

Our services are available to [purchase and order online](#).



Alternatively, some of our services are also available via the following providers:



Are you interested in becoming a reseller?

Contact us at support@lotsearch.com.au for further details.

**“We are grateful to our
Clients, Partners
and Collaborators.**

**Together, we are
delivering our vision for
a more environmentally
aware Australia.”**



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lotsearch.com.au

Real estate lawyers' duties and responsibilities in relation to contaminated land

Advice provided to Lotsearch Pty Ltd

Elizabeth Wild

Partner

On behalf of Norton Rose Fulbright Australia

23 August 2024

Executive Summary

Section	Title	Executive Summary
1.	'Real estate lawyers and their professional duties in legal practice'	<p>This section provides an overview of the typical practice of a real estate lawyer, and the professional duties that real estate lawyers must discharge in advising clients, noting that real estate lawyers owe a range of duties to their clients arising from common law, contract law, and the law of misleading and deceptive conduct.</p> <p>This section also details the duties real estate lawyers owe in reviewing due diligence documents and reports and their requirements to advise on the results of those reports.</p>
2.	'The professional duties which arise in relation to contaminated land'	<p>This section discusses the duties that are owed by real estate lawyers to their clients in the context of contamination risks in their real estate transactions.</p> <p>Whilst there is no legislation imposing an express obligation on lawyers to advise their clients on contamination risks, such an obligation may exist in certain circumstances, including where such a risk is known or advising on that risk is within the scope of the agreed legal services. However, this obligation may also be owed in circumstances where contamination is not included in the retainer.</p>
3.	'The role of site-specific reports in discharging professional duties with respect to contaminated land'	<p>This section discusses the role of public databases and bespoke contaminated land reports in providing legal advice to a client, specifically, that bespoke contaminated land reports are a useful step in discharging a solicitor's professional duties in relation to contamination risks and can 'fill the gaps' that other sources of information, such as 10.7 Certificates and Public Contamination Records, have in relation to individual sites.</p>
4.	'The risks of failure to discharge a professional duty'	<p>This section discusses the risks to real estate lawyers in failing to discharge their professional duties. These risks include possible litigation by that client, disciplinary action from the Office of the Legal Services Commission, and/or reputational damage.</p>

Scope of Advice

Contamination of land has long posed risks to human health, the environment, and the development potential of property in New South Wales.¹ Our understanding of contamination and the remediation strategies needed to manage it are evolving and becoming increasingly sophisticated.² Whilst there is a well-established regulatory framework for the management of contaminated land,³ neither legislation nor case law nor industry bodies provide up-to-date comprehensive guidance for real estate lawyers to enable them to determine their obligations when advising prospective property purchaser clients on the risks posed by contamination.

'Contamination' in the context of real property refers to the presence on or under land of chemical substances which have been introduced into the property, usually by industrial or other human activities. Contamination is generally present as either soil, soil vapour or groundwater contamination, and can render land unsuitable for particular types of activities. Depending on the natural and anthropogenic processes contamination can migrate to surrounding properties, thereby also impacting those properties and their development potential.

Properties impacted by contamination will often require remediation, which can be costly, cause development delays and lead to a reduction in the developable area of the site. In some cases, complete remediation is not possible, which means that a level of contamination may remain on site and require management into the future, which can also be costly.

This advice reviews the available case law and legislation to provide guidance for real estate lawyers when advising clients on the purchase of land which may be affected by contamination. This advice also contemplates the role of specialist lawyers in advising both purchasers and vendors on contaminated land issues.

In preparing this advice, we note that a professional's duties are not fixed in time.⁴ A real estate lawyer's obligations with respect to contaminated land must necessarily evolve as the general knowledge and understanding of contamination also evolves. Real estate lawyers should continue to consider whether certain risks are 'reasonably foreseeable' in the context of the legal advice they provide and adapt to ensure that their advice adequately considers new and emerging risks.⁵

Background

Contaminated land is currently regulated by both the New South Wales Environment Protection Authority (EPA) and the relevant planning authority for land on which the contamination is found.⁶ This regulatory framework broadly operates as follows:

- (1) **EPA Regulation:** The EPA regulates contaminated land under the *Contaminated Land Management Act 1997* (NSW) (**CLM Act**). The CLM Act establishes a framework to regulate "significantly contaminated land", including publication of information regarding contaminated land.⁷
- (2) **Planning Authorities:** Planning Authorities address contamination through the development of land process contained within the *Environmental Planning and Assessment Act 1979*⁸, including policies made under that Act including the *State Environmental Planning Policy (Resilience and Hazards) 2021*⁹ and the *Managing Land Contamination – Planning Guidelines*.¹⁰ This can

¹ NSW EPA, 'Contaminated Land' (Web Page) <<https://www.epa.nsw.gov.au/your-environment/contaminated-land>>.

² NSW EPA, *Contaminated Land Management: Guidelines for the NSW Site Auditor Scheme* (Guidelines, 3rd ed, 2017) <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/contaminated-land/17p0269-guidelines-for-the-nsw-site-auditor-scheme-third-edition.pdf>> 32-33.

³ NSW EPA (n 1).

⁴ Penelope Crossley et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) 254.

⁵ *Civil Liability Act 2002* (NSW) s 5O; See also: *Balkin & Davis Law of Torts* (n 4)

⁶ NSW EPA (n 1).

⁷ *Contaminated Land Management Act 1997* (NSW) s 46; NSW Environment Protection Authority, 'Contaminated Land Record of Notices' (Web Page) <https://app.epa.nsw.gov.au/prclmapp/searchregister.aspx>.

⁸ *Environmental Planning and Assessment Act 1979* (NSW)

⁹ *State Environmental Planning Policy (Resilience and Hazards) 2021* (NSW).

¹⁰ NSW EPA, 'Managing Land Contamination: Planning Guidelines' (Guidelines, 1998) <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/clm/managing-contaminated-land-guidelines-remediation.pdf>>.

include drafting development conditions requiring specific remediation actions to occur before land is developed.

Whilst the Law Society of the United Kingdom has provided some guidance to lawyers, in the form of a Contaminated Land Practice Note (formerly the Contaminated Land Warning Card)¹¹, this guidance has not led to any similar guidance in Australia either from the state or territory law societies or from the Law Council of Australia. This leaves real estate lawyers in a position where they are likely subject to a duty to advise on contamination and need to identify a way to access information to enable them to discharge this obligation. This advice considers the nature and extent of the duty and provides some suggestions as to how it can be fulfilled.

¹¹ The Law Society of England and Wales has produced contaminated land guidance to practitioners since 2001. Its current contaminated land practice note is dated 2020. This guidance is not enforceable, rather it aims to provide lawyers with 'the Law Society's view of best practice in this area'.

1 Real estate lawyers and their professional duties in legal practice

All lawyers in NSW owe certain duties to their clients when providing legal services. These duties are found in legislation and common law, including under the tort of negligence, the law of contract, and the law of misleading and deceptive conduct. Lawyers are also recognised as having a fiduciary relationship with their clients, enshrined in the Legal Profession Uniform Law Australian Solicitors Conduct Rules.

1.1 Overview

Lawyers in NSW are subject to a range of professional obligations imposed under:

- (1) the Solicitors' Conduct Rules;¹²
- (2) the common law and statutory duty of care;
- (3) the law of contract generally concerning the lawyer's retainer; and
- (4) the law of misleading or deceptive conduct.¹³

These duties are owed by all lawyers irrespective of their areas of practice. For the purposes of this advice, the duties that real estate lawyers owe to their clients will be assessed having regard to the "usual" scope of a real estate lawyer's practice, including the negotiation of sale of land contracts, review of due diligence documents and reports, and the provision of advice in the course of property transactions.

1.2 What duties does a real estate lawyer owe their clients?

Broadly speaking, a real estate lawyer is obligated to provide their client with advice which clearly, accurately, and comprehensively explains the transaction, identifies the risks, outlines ways to control or manage any risks and, above all, ensures that the client is fully informed of all relevant aspects of the transaction. For example, a real estate lawyer acting for a purchaser has an obligation to review the contract of sale and any other due diligence documents provided by the vendor and/or their solicitor. The real estate lawyer is then obligated to advise the purchaser of the content of these documents and any further reports or information that may be required.

The principle of *caveat emptor* (or 'buyer beware') applies to individuals who are purchasing land, and it is at the purchaser's discretion whether further information or reports are obtained. However, it is a lawyer's responsibility to alert the purchaser of any risks associated with the sale and any risks which are posed by not obtaining further information.¹⁴ The specific circumstances which give rise to this obligation in circumstances where there is an actual or implied risk of contamination on property which is the subject of a transaction are discussed below.

1.3 Interaction between the Solicitors' Conduct Rules, the law of contract, the tort of negligence, and the law of misleading or deceptive conduct

It is commonplace for a complainant to plead all the above areas of law when suing a lawyer for an alleged failure to discharge their duties. These areas of law interact in the following ways:

- (1) The Court will usually first determine whether the plaintiff may succeed in tort, or contract, or misleading or deceptive conduct.¹⁵ This would involve an analysis of the retainer between lawyer and client, where one exists, to inform the Court of the scope of the duty owed.
- (2) The retainer will also inform the Court of whether a client had a reasonable expectation to be informed or advised by the lawyer of certain matters.

¹² *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) (ASCR)*.

¹³ *Australian Consumer Law ('ACL')*, including ss 18 and 30 of Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*.

¹⁴ *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

¹⁵ *Marcolongo v Mattiussi* [2000] NSWSC 834 [39].

- (3) Where the retainer is silent on certain matters, or where certain matters fall outside the scope of works specified in the retainer, the Court will undertake a "case by case" analysis to consider all the relevant factors to inform its decision on whether those matters are captured in the scope of duty.¹⁶
- (4) After the Court has determined whether the lawyer has failed to discharge their duty of care and has made a preliminary assessment of damages, the Court will determine, considering any breach of fiduciary duty, whether that calculation of damages is adequate. If it is not, then the Court may additionally award an equitable remedy.¹⁷

1.4 Solicitors' Conduct Rules

The Solicitors' Conduct Rules outline obligations that are owed by all lawyers to their clients. These duties include the duties of lawyers to "deliver legal services competently, diligently and as promptly as reasonably possible"¹⁸ and to "provide clear and timely advice"¹⁹ to assist their clients.

1.5 Duty of care in negligence

There is a duty of care owed by lawyers to their client which is primarily governed by the *Civil Liability Act 2002 (NSW) (CLA)* and, where ambiguity exists in this legislation, the common law. This duty of care runs alongside a lawyer's retainer with their client and is not dependant on the existence of a retainer. However, the terms of a retainer can be used to define and potentially narrow the scope of a lawyer's duty of care.

If a lawyer has breached their duty of care, a client may pursue a claim against that lawyer in negligence. The three key elements which need to be satisfied before a finding of negligence can be made are the following:

- (1) the existence of a duty of care;²⁰
- (2) breach of that duty of care; and
- (3) damage suffered by the affected party.²¹

The Existence of a Duty of Care

It is well-established by the Courts that a duty of care is owed by lawyers, including real estate lawyers, when providing legal services to their clients.²²

The Court in *Hatzitanos & Ors v Jordan* clarified that:

*[i]n tort... the test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his/her profession.*²³

In the case of real estate lawyers, the standard would be that adopted by the reasonably competent real estate lawyer "to exercise reasonable care in the provision of legal services pursuant to their retainer".²⁴

¹⁶ *Hawkins v Clayton* (1988) 164 CLR 539.

¹⁷ *Ibid.*

¹⁸ ASCR r 4.1.3.

¹⁹ ASCR r 7.1.

²⁰ See *Astley v Austrust Ltd* (1999) 197 CLR 1, [47]-[48]; *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, [2394].

²¹ See *Perre v Apand Pty Ltd* (1999) 164 ALR 606, 719-20 [423].

²² See *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, 819

²³ *Hatzitanos & Ors v Jordan* [2005] NSWSC 763, [26], citing *Heydon v NRMA* (2001) 51 NSWLR 1, [146] and *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] 1 Ch 384, 402-03.

²⁴ *Humphries v Cooke* [2009] NSWSC 1250, [74].

The standard of care owed by lawyers is enshrined in Section 5O of the CLA as follows:

5O *Standard of care for professionals*

- (1) *A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.*
- (2) *However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.*
- (3) *The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.*
- (4) *Peer professional opinion does not have to be universally accepted to be considered widely accepted.*

Where a lawyer professes to have special expertise in a particular area of law, the standard of care will be higher compared to the standard of care of a non-specialist. In the case of real estate lawyers, specifically, the standard of care would be, for example, that "expected of a reasonably skilled solicitor acting for a party in the sale of land",²⁵ or, more generally, "the ordinary skilled person exercising and professing to have that special skill [of real estate law]".²⁶

Therefore, a real estate lawyer, in providing advice to their clients, would be expected by their clients to:

- (1) provide advice of a higher quality in relation to real estate transactions and issues, including the outcomes of due diligence procedures, than that which a general practitioner could be expected to provide; and
- (2) possess a greater level of foresight and depth of insight as to the issues pertaining to those real estate transactions.

The Court made this clear in the case of *Humphries v Cooke*.²⁷ In this case, the defendant solicitors were expected to have correctly advised the plaintiffs regarding the last day which the development consent of the contract could be contemplated, as they professed to be reasonably skilled in property transactions:

...it was Mr Cooke's duty to exercise the reasonable care and skill of a solicitor who was acting for the vendors in the sale of the property. A paramount consideration was that Mr Cooke's clients understood that the last day for the development consent under cl 10.1 of the contract was 21 June 2006. Unfortunately, Mr Cooke failed in the duty of care which he owed to the plaintiffs, and they understood that the last day was 22 June 2006.

In addition to section 5O, section 5B of the CLA outlines the general principles which are used to determine whether an individual, including a real estate lawyer, has an obligation to take precautions against a risk of harm. In this context, 'taking precautions' includes advising a client on the risks of contamination²⁸. Section 5B states (emphasis added):

5B General principles

²⁵ See *Heydon v NRMA Limited* (2000) 51 NSWLR 1,[146] (Malcolm AJA), as discussed in *Humphries v Cooke* [2009] NSWSC 1250, [75].

²⁶ *Hatzitanos & Ors v Jordan* [2005] NSWSC 763, [27].

²⁷ [2009] NSWSC 1250, [76].

²⁸ *Civil Liability Act 2002* (NSW) s 5B

(1) A person is not negligent in failing to take precautions against a risk of harm unless—

- (a) the risk was **foreseeable** (that is, it is a risk of which the person knew or ought to have known), and
- (b) the risk was **not insignificant**, and
- (c) in the circumstances, **a reasonable person in the person's position would have taken those precautions**.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—

- (a) the probability that the harm would occur if care were not taken,
- (b) the likely seriousness of the harm,
- (c) the burden of taking precautions to avoid the risk of harm,
- (d) the social utility of the activity that creates the risk of harm.²⁹

Determining whether a risk is 'foreseeable' will be an interpretation of the facts available to the Court and will often include a "commonsense conclusion" about foreseeability.³⁰ A risk will be said to be "not insignificant" if it is "not far-fetched or fanciful".³¹

Considering the wording of section 5O and section 5B of the CLA, the scope of duty owed by real estate lawyers extends to warning their clients of:

- (1) any general risks associated with the real estate transactions; and
- (2) the need to obtain independent advice from external advisers.³²

Breach of a duty of care

Where the lawyer fails in their exercise of reasonable care and skill to perform their legal duties, there will be a breach of their duty of care to their client in negligence. More specifically, where the risk was "foreseeable"³³ and "not insignificant"³⁴ and the lawyer failed to warn their client of the risk or advise accordingly and "in the circumstances [where] a reasonable person ... would have taken those precautions",³⁵ there will be a breach.

Damage arising from the breach of duty of care

For negligence to be established against the lawyer, there must be resulting damage or loss suffered by the client which was caused by the lawyer's negligence. The negligence must have been a "necessary condition of the occurrence of the harm (factual causation)"³⁶ and it must be "appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability)"³⁷. A breach of a lawyer's duty to advise on contamination may result in damages that could extend to diminution in property value, development and remediation costs not contemplated in dealing with contamination and/or inability to use the land for a particular purpose. The types of damages are broad and would be determined on a case-by-case basis.

1.6 Duties in contract

²⁹ *Civil Liability Act 2002* (NSW) s 5B.

³⁰ *Roads and Traffic Authority of NSW v Chandler* (2007) Aust Torts Reports 81-945, [47].

³¹ David Andrew Ipp et al, *Review of the Law of Negligence* (Final Report, September 2002), 105.

³² [2005] NSWSC 763. [37]

³³ *Civil Liability Act 2002* (NSW) s 5B(1)(a).

³⁴ *Ibid* s 5B(1)(b).

³⁵ *Ibid* s 5B(1)(c).

³⁶ *Ibid* s 5D(1)(a).

³⁷ *Ibid* s 5D(1)(b).

The contract, known as the retainer, between lawyer and client will expressly set out the duties owed by the lawyer to the client. For example, if the retainer included a provision which obliged the lawyer to advise of any risks of contamination associated with the land the subject of the transaction, then the lawyer would be compelled to do so by the law of contract.

There may be implied duties imposed upon the lawyer beyond the explicit words of the retainer. For example, the NSW Court of Appeal in the case of *David v David*, articulated the following principle:

*If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party.*³⁸

That is, even in circumstances where the retainer is limited in its scope, if a lawyer becomes aware of additional facts and/or circumstances outside that scope which may impact their client, the lawyer should inform the client of any new risks posed by those new facts, and the steps which should be taken to mitigate these risks.

This position was further confirmed in the case of *Provident Capital Ltd v Papa*, which concerned the failure of a solicitor to warn his client of the obvious financial risks associated with taking out a mortgage over her own home, the NSW Court of Appeal stated:

*A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client's entry into a transaction the subject of advice.*³⁹

1.7 Duties in misleading and deceptive conduct

Lawyers are subject to the Australian Consumer Law (ACL), including sections 18 and 30 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth). Specifically prohibited are the following:

- (1) engaging "...in conduct that is misleading or deceptive, or it likely to mislead or deceive"; and
- (2) the making of false or misleading statements regarding the "characteristics of land" and "uses to which land is capable of being put or may lawfully be put".

Therefore, real estate lawyers must not make false or misleading representations to their client in relation to land. Liability for misleading or deceptive conduct may arise where the lawyer makes inaccurate statements or is silent about matters affecting a property, in circumstances where there would be a reasonable expectation that those matters should be disclosed to the client, including when vendors and/or their lawyers undertake due diligence in relation to the preparation of a contract for sale of land.⁴⁰

1.8 Other Circumstances – Client Vulnerability and Inexperience

In determining the scope of a lawyer's duty to their client, the court will also consider whether the client falls within the category of a 'vulnerable' client. This refers to the client's ability to take steps to protect themselves from any risks associated with the matter requiring legal advice. A client can be described as vulnerable if they lack access to information, are socially isolated, or are economically constrained.

In determining a client's vulnerability, Australian Courts have regard to the decision of the case of *Carradine Properties Ltd v D J Freeman & Co*, this principle was framed as follows:

... the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and be entitled to

³⁸ *David v David* [2009] NSWCA 8, [76].

³⁹ *Provident Capital Ltd v Papa* [2013] NSWCA 36, [80].

⁴⁰ See generally *Vitek v Estate Homes Pty Ltd* [2010] NSWSC 237; *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625.

*expect a solicitor to take a much broader view of the scope of his retainer and his duties than will be the case with an experienced client.*⁴¹

Hence, the scope of the duty owed by the lawyer may be expanded where he or she is or should be aware that the client lacks relevant experience or knowledge.

A lawyer must be aware and adaptable to the bespoke needs of their clients and consider that the needs of a client will be greater if a client has a lack of experience engaging with lawyers or dealing with the circumstances that have led them to seek legal advice. In some circumstances, a lawyer may be required to "...step in front of their client. They must provide advice to them against the follies of plans having a legal character, the full legal ramifications of which the client may not understand."⁴²

In the context of a real estate transaction, if a lawyer is aware that a client has little or no experience in real estate transactions, the lawyer is under a higher duty to ensure that all aspects, and in particular the risks of, the transaction, are comprehensively explained.

⁴¹ (1982) 126 SJ 157.

⁴² *Cousins v Cousins* [1991] ANZ Conv R 245, 248.

2 The professional duties which arise in relation to contaminated land

Whilst there is no explicit duty in legislation or case law which requires a real estate lawyer to advise on contaminated land when providing real estate advice, a duty may be inferred in certain circumstances, namely where such a risk is known or can be reasonably suspected, where advising on that risk is within the scope of the agreed legal services or where the lawyer professes to have special expertise in contaminated land.

2.1 Overview

There is no specific duty at law for a real estate lawyer to advise their client in relation to contaminated land or of the risks associated with contaminated land when undertaking a property transaction.

However, if contamination is known (or ought to reasonably be known) to affect the land subject of the legal advice, a lawyer is obligated to inform their client of the risks posed by that contamination. Whilst the potential for contamination to exist may be obvious in some cases (e.g. if a heavy industry or other known contaminating activity has been undertaken on the property), there will be many properties where the lawyer will not be in a position to advise on the potential existence of contamination without making further enquiries or undertaking further investigation. As it can be difficult to know when contamination affects the land, a lawyer should undertake necessary searches, like obtaining - contaminated land - reports as discussed in part 3 of this advice.

2.2 Activities Associated with Contamination and Types of Contamination which can affect a property

There is a common misconception that contamination can only occur on industrial sites, or commercial land on which contaminating material is dealt with, such as a petrol station. Of course, contamination does occur on these kinds of sites and a range of sites where similar activities have been undertaken, such as, airports, dry cleaning establishments,⁴³ rail yards and scrap yards.⁴⁴

However, contamination can affect any site, even if there is no history (or known history) of contaminating activities on that site. This can be or a range of reasons, including the following:

- An adjoining site may be, or may have been, contaminated and contamination from that site may be migrated onto the site in relation to which the lawyer is giving advice through natural or anthropogenic processes;
- Land boundaries or land zoning may have changed over time and land which is now being used for a residential (or other more sensitive use) may previously have been used for industrial purposes; and
- A contamination event may have occurred in the past.

Whilst a solicitor is not required to be an expert on all the kinds of contamination which exist, nor all the circumstances in which contamination may occur on a property, a solicitor should be alive to obvious indicators of contamination and undertake investigations while advising on a property transaction to ensure that the risk of contamination is properly assessed. As noted above, it is good practice to also enquire about surrounding land uses, given the potential for contamination to migrate. The nature of these enquiries is explored further in paragraphs 2.3 – 2.6 of this advice. We also provide an assessment of the types of information a lawyer may consider when they inform themselves about the contamination status of a prospective property in part 3 of this advice.

2.3 When should a Solicitor be aware?

While advising on a property transaction, a real estate lawyer should undertake necessary investigations to understand the contamination which may exist on the land which is the subject of the transaction. As discussed below, a 10.7 Certificate and the EPA Contaminated Land Register may be a

⁴³ *Jeffman Pty Ltd and Lawrence Dry Cleaners Pty Ltd v Environment Protection Authority of NSW, Sydney Water Corporation and Douglas and Hilary Hutchinson* [2011] NSWLEC 89

⁴⁴ [Cover.p65 \(nsw.gov.au\)](https://www.nsw.gov.au/cover-p65)

useful preliminary step in the real estate lawyer's due diligence process. However, these investigations are inconsistent in the level of information that they provide in relation to contamination. Therefore, a real estate lawyer should also consider undertaking enquiries which are specific to the site, this is discussed further in part 3 of this advice.

If any of the real estate lawyer's due diligence reveals the presence or potential presence of contamination on or near the subject property, they are required to advise their client of this and its potential impacts. These impacts may include constraints on how the land may be developed, including where the land may require remediation in order to be developed, and any risk of regulatory action (for example, where the EPA may issue an environment protection licence).⁴⁵ This obligation exists despite the content of the retainer agreement between the solicitor and their client. That is, even if a retainer is drafted in a way which excludes a consideration of contamination, a lawyer may still be obligated to raise the issue of contamination in circumstances where they discover information relating to contamination or ought to reasonably know that a contamination risk existed.⁴⁶

This obligation does not require that a solicitor has a sophisticated understanding of contamination, rather that they are able to identify the circumstances in which contamination is likely to be, or pose a risk of being, present. This may occur in a range of circumstances, such as, when a lawyer is reviewing the documents annexed to a contract for sale and these documents reference contamination, or the location or the specie of property has been linked to the presence of, or potential presence of contamination (i.e. the land was previously used as a landfill or as an industrial site). This can also occur where the solicitor has obtained a site-specific report (of the kind discussed in part 3 of this advice) and this report identifies a risk of contamination on the subject property.

The Courts have not yet considered the extent to which real estate lawyers acting on property transactions should advise their clients with respect to in-ground contamination risks. Specifically, there has been little consideration about what circumstances would lead to a risk concerning contamination in relation to the transaction being perceived as 'foreseeable', 'significant' and one in relation to which a 'reasonable' real estate lawyer should be required in to advise. On this basis, the obligations that solicitors owe to their clients in light of 'known' or 'obvious' contamination should be identified with reference to the general case law position in this area (as discussed in paragraph 1.5 of this advice).

This position is as described by the NSW Supreme Court in the case of *Hatzitanos & Ors v Jordan*,⁴⁷ a case in which the defendant solicitor acted for the plaintiffs in their property transaction:

*Whilst it would ... be altogether too onerous to impose a duty on solicitors to warn of every theoretical possibility that may affect a proposed plan, it would be appropriate to require a solicitor to inform the would-be purchaser (who was not known to be experienced in these matters) of the general risk and to suggest he or she seek the advice of an architect, town planner, or the Council.*⁴⁸

That is, a lawyer who has identified the presence of actual or suspected contamination should inform their client about such a risk and provide them with information regarding the appropriate next steps to fully appreciate the nature and extent of the risks posed by the contamination. This is discussed further in Part 3 of this advice.

2.4 Contamination within the Scope of a Retainer

As discussed in 1.6 above, the contractual relationship between a lawyer and their client is a 'retainer'. Where there is a retainer between the lawyer and the client which includes an explicit and specific

⁴⁵ *David v David* [2009] NSWCA 8, [74].

⁴⁶ *Kumar v Sydney Western Realty Pty Ltd & Anor* (No 2) [2021] NSWDC 446.

⁴⁷ *Hatzitanos & Ors v Jordan* [2005] NSWSC 763 at [37] (emphasis added).

⁴⁸ *Ibid.*

obligation upon the lawyer to advise of contamination risks in a real estate transaction - a failure to do so would result in a breach of contract and the lawyer being liable for any resulting damages.

2.5 Specialised Knowledge

Where a solicitor is retained due to their expertise in an area of law, including where the lawyer is a specialist contamination lawyer, the Courts have long held that the standard of care required for that lawyer to discharge their obligations to their client, will be higher.⁴⁹

The decision of *Montague Mining Pty Ltd v Gore* specifies the standard of care expected of a specialist solicitor in the following terms:

*Where a client engaged a solicitor who possesses special expertise in a particular field of law to do work within that field, the relevant standard of care is that of the ordinary skilled solicitor exercising and professing special expertise in that field.*⁵⁰

Accordingly, if a solicitor professes expertise in relation to contaminated land (which could include a solicitor who has expertise in environment and planning law), then a client can rightly expect to receive more detailed and comprehensive advice which thoroughly considers any planning and environmental law issues which may arise. Further, a client can expect a solicitor with expertise in environmental and planning law to be more alert to issues which may affect a property, including the presence of contamination. This does not absolve a real estate lawyer from being alert to reasonably foreseeable contamination during a property transaction, however an environment and planning lawyer would be expected to have a greater understanding of the implications of contamination.

2.6 Vendor Obligations

Vendors and their solicitors are obligated to annex to a contract for sale, the information required by the *Conveyancing (Sale of Land) Regulation 2022*. Further, a vendor should not provide documents which are false, misleading, or contain deceptive representations about the property (as discussed in paragraph 1.6 above).⁵¹ A vendor also should not withhold information, if to do so would mislead a purchaser about the state of the property.⁵² Whilst there is some conflicting case law regarding whether withholding information can be misleading, generally speaking, if a vendor or their lawyer knows that the relevant site is contaminated and the contamination will impact the value, developability or safety of the land, this should be disclosed or, at the very least, the purchaser should be advised to make their own enquiries regarding the potential presence of contamination.⁵³

2.7 'Cooling Off' Periods and Contamination Risks

If a prospective purchaser has entered a contract for sale, the Conveyancing Act provides a 'cooling-off period' of 5 days within which the purchaser may back out of the contract without owing a penalty amount to the vendor.⁵⁴ During this time, the prospective purchaser may seek to further investigate any potential contamination on the land and may, without penalty, rescind the contract for sale.⁵⁵

In circumstances where a purchaser has signed a 66W certificate (waiving the cooling off period upon completion of the sale⁵⁶), they have no such rights and are bound by the contract from the date of signing. That is, if contamination is found, the recourse that the purchaser has available is only under misleading and deceptive conduct (see paragraph 2.6). Contamination is considered a 'quality defect'

⁴⁹ *Yates v Property Corporation (In Liq) v Boland* (1998) FCR 84,[105]

⁵⁰ *Ibid.*

⁵¹ *Conveyancing (Sale of Land) Regulation 2022* (NSW) sch 1.

⁵² *Competition and Consumer Act 2010* (Cth), Sch 2, s 30

⁵³ See: *Williams v Pisano* (2015) 90 NSWLR 342, 33, 79.

⁵⁴ *Conveyancing Act 1919* s 66S

⁵⁵ *Ibid.* s 66U (1)

⁵⁶ *Ibid.* s 66S (5) and s 66W.

and therefore falls within the category of 'buyer beware' unless the purchaser can establish the requirements necessary to make out a misleading and deceptive conduct claim.⁵⁷

⁵⁷ See: *Wood v Balfour* [2011] NSWCA 382 as an example of a quality defect where it did not amount to misleading and deceptive conduct for the vendor.

3 The role of site-specific reports/investigations in discharging professional duties with respect to contaminated land

Procuring a site-specific contaminated land assessment or report is an effective way to discharge the duty owed by a real estate lawyer to their client in the context of a property transaction.

Discharging professional duties with respect to contaminated land

Broadly speaking, a real estate lawyer will have discharged this duty where they have:

- (1) Made appropriate enquiries to determine if contamination may be present e.g. review of site history, previous activities carried out at the site and on surrounding sites, and an examination of EPA public registers;
- (2) Determined their client's intended use for the site, and considered whether that use is compatible with the contamination profile of the site;
- (3) Where a contamination risk is identified, advised their client of the need to obtain further information in relation to the contamination.

Various options exist for obtaining further information in relation to contamination risk. The level of information that may be appropriate will depend on a range of factors including the level of information already available in relation to contamination, the risks associated with known or suspected contamination, and the client's intended use of the site.

There are three common methods for investigating possible contamination risk in relation to property transactions, being:

- (1) A legal **review of the publicly available data** in relation to the property, including any information on EPA public registers. Whilst this information is publicly available, it requires analysis to determine the nature and extent of the risk, which can be difficult for lawyers who do not regularly advise on contamination.
- (2) Obtaining **reports from specialist data aggregators**, such as LotSearch, who produce three levels of contaminated land reports, which increase in detail and complexity:

- (i) The base report is referred to as a Contaminated Land Search. This report is a comprehensive search of the public registers related to contaminated land held by state environmental regulators and select federal government agencies.

Whilst each state environmental regulator operates under different legislation, have different registers and administer them under different policy frameworks, the registers typically include:

- (A) Records of land notified to the regulator as being contaminated and / or contaminated land being managed by the regulator.
 - (B) The licensing of businesses and entities to conduct certain prescribed activities that may cause pollution including contamination.
 - (C) Investigations into suspected contamination issues
 - (D) Other contamination issues which could include but are not limited to pollution, penalty or clean up notices and groundwater use restrictions.
- (ii) The next most detailed report being a Contaminated Land Screening Report, which considers a broader set of information sources in relation to contaminated land and includes further information as to the historical land uses, including previous business activities carried out at the site and the immediate surrounding area, that may have resulted in legacy contamination e.g. former drycleaners, service stations, old waste sites.

Sites that are potentially contaminated may not have been investigated, tested and/or notified to the state environmental regulator, and therefore will not appear on a public register. Therefore, having information relevant to historic land uses and business activities provides additional context within which the potential for contamination can be assessed.

- (iii) Finally, the most detailed report called the Enviro Pro Reports which are targeted towards environmental consultants and specialist environment and planning lawyers. This report helps to identify known and potential contamination sources, pathways and receptors, whilst conducting preliminary site investigations, phase 1 environmental assessments and/or due diligence projects.
- (3) Obtaining the **services of an expert environmental consultant** to undertake a desktop review of the available information and/or to undertake a physical site investigation to identify and characterise contamination. The reports referred to in paragraph (2) above is a useful screening tool to identify whether an assessment and/or physical investigation by an environmental consultant is warranted.

3.2 Publicly Available Data - Regulator records and Council reports on Contamination

As a preliminary step during the due diligence phase of a transaction, a lawyer may wish to consult the EPA Record of Contaminated Sites and carefully review the 10.7 Certificate which is provided by the Local Council for the subject property. Whilst these documents may assist in determining the contamination status of a prospective property, as discussed below, these reports can be inconsistent and do not always provide the most comprehensive information about contamination which may affect a specific site.

10.7 Certificate

During the due diligence phase of a real estate transaction, a real estate lawyer will obtain a planning certificate, otherwise known as a **10.7 Certificate**.⁵⁸ A 10.7 Certificate is prepared by the local council for the municipality in which the property is located. It must include those things that are prescribed in the relevant regulations, including the zoning of the land and any portion of the land which is reserved for acquisition.⁵⁹

Relevant to contamination, the 10.7 Certificate must record any loose-fill asbestos insulation that is recorded on the residential property register for loose-fill asbestos.⁶⁰ Further, a 10.7 certificate is required to identify any policies from the Council (or a public authority like the EPA) which "restricts the development of land because of the likelihood of land slip, bush fire, tidal inundation, subsidence, *acid sulfate soils, contamination*, aircraft noise, salinity, coastal hazards, sea level risk or another risk, other than flooding".⁶¹ However, a large number of councils do not have policies that restrict development of land because of the likelihood of contamination so this information is largely absent from 10.7 Certificates.

Whilst a 10.7 Certificate can contain some useful information in relation to contamination, it does not provide a complete picture of the contamination which can possibly affect land. Lawyers should be cautious to rely exclusively on a 10.7 certificate and should consider obtaining a site-specific report as described in part 3 of this advice.

Contaminated Land Record

The NSW EPA regulates a list of contaminated sites which are recorded on the Contaminated Land Record (the **Record**).⁶² The Record is publicly available, and searches are a necessary action for real estate lawyer to assess whether contamination may exist on the land which is the subject of their

⁵⁸ *Conveyancing (Sale of Land) Regulation 2022* (NSW)

⁵⁹ *Environment Planning and Assessment Regulation 2021* (NSW) Schedule 2,

⁶⁰ *Ibid.* Schedule 2 section 12.

⁶¹ EP&A Regs Sch 2 s 10.

⁶² CLM Act s 58, the record is accessible here: [OEHL Contaminated land - record of EPA notices \(nsw.gov.au\)](https://www.oeh.gov.au/contaminated-land-record)

advice. However, this Record is limited because it only records contamination which has come to the attention of the EPA, and which is determined to be "significant".⁶³ Further, the EPA has an internal practice of not recording contamination which exists on a residential site. For these reasons, the Record should not be the only search undertaken by a real estate lawyer in the course of assessing contamination in a property transaction.

3.3 **Role of a contaminated land screening report in providing legal advice to client**

A contaminated land screening report, including the Reports described in section 3.1 above information about a specific property and the properties in a buffer zone around the specific property, noting that contamination can migrate from one property to another. The purpose of contaminated land screening reports is to offer an understanding of the property's contamination profile to aid in decision-making, negotiation of the transaction documents (e.g. drafting appropriate warranties and indemnities for the sale of land contract) and the provision of appropriate legal advice regarding the risks of the transaction. The Reports will contain the following information:

- (1) *physical characteristics*: a description of the property's physical features such as size, shape, topography, and any structures present;
- (2) *historical site use and potential contamination issues*: information relevant to the site's history, including previous business activities carried out at the site which may be associated with contamination e.g. drycleaners, waste storage;
- (3) *surrounding land uses*: information regarding current and previous activities carried out on neighbouring sites, which could indicate that contamination may have migrated on to the site being purchased, or which identifies that the site is abutted by sensitive receptors (such as schools, or areas of sensitive ecology) which may mean that the risk of third party claims for any contamination impacts associated with the site being purchased may be heightened; and
- (4) *legal notices*: including any environmental penalty notices, licences, licence applications, or enforceable undertakings which may apply to the property.

More detailed reports, like the LotSearch Contaminated Land Screening Report and Enviro Pro Report, can also include a wider range of datasets in the above categories, particularly with respect to historical datasets and water and hydrology data.

Lawyers can select which level of report they wish to obtain. This will depend on:

- (1) The complexity of the property transaction;
- (2) The outcome of previous property searches or reports, including where previous reports have indicated a high likelihood of contamination on or near the property; and
- (3) The needs of any expert consultants which have been instructed to advise on the property transaction.

The information contained in the reports will assist a purchaser's lawyer to provide more targeted advice regarding the land contamination risks and will help identify whether a client may need further advice from a specialist contaminated land lawyer and/or an environmental consultant. For a vendor's solicitor, such reports are useful to ensure that no misleading or deceptive statements are made in any information supplied by the vendor.

⁶³ CLM Act s 11

4 The risks of failure to discharge a professional duty

There are significant risks if a breach is found of a solicitor's obligations owed at law or to a client concerning the disclosure of contaminated land. These risks include professional and reputational risks, possible litigation brought by the client, and disciplinary action by the Office of the Legal Services Commissioner.

4.1 Client litigation

As outlined in section 1, a real estate lawyer's duty of care is founded in solicitor conduct rules, the tort of negligence, contract law and laws concerning misleading or deceptive conduct. If a client or third party is successful in establishing a breach in relation to any of these causes of action, the lawyer will be held liable to compensate that client for any resulting losses. In real estate matters, this can include payment of damages for:

- (a) Diminution of property value arising from the 'stigma' associated with the contamination;
- (b) Costs associated with the need to remediate the site, including additional construction costs and the costs of an environmental consultant and/or contaminated site auditor;
- (c) Loss of profit associated with an inability to develop the property as intended (e.g. contaminated groundwater may preclude the use of any below-ground areas of the site);
- (d) Managing any claims from adjacent owners for contamination emanating from the site

In general, damages are calculated on a case-by-case basis. Courts may rely on precedents and case law to determine the appropriate amount of damages. Past judgments with similar circumstances can serve as guidance for calculating damages, but each case is ultimately decided based on its unique facts and circumstances.

In addition to economic losses, clients or third parties may also seek non-economic damages for intangible harm such as emotional distress, pain and suffering, and loss of enjoyment of life. While these damages are typically more challenging to quantify, they are still a potential option for clients or third parties to pursue.

4.2 Disciplinary action from the Office of the Legal Services Commissioner

A lawyer's conduct in NSW is governed by the Solicitors' Conduct Rules. Specifically, lawyers "*must provide clear and timely advice to assist a client to understand relevant legal issues and to make **informed choices** about action to be taken during the course of a matter, consistent with the terms of the engagement*" [emphasis added].⁶⁴

If a lawyer fails to discharge their duty of care, the Office of the NSW Legal Services Commissioner (OLSC) can pursue any breach by a lawyer under the Solicitors' Conduct Rules.

If the OLSC finds a lawyer has engaged in unsatisfactory professional conduct, for example by failing to properly advise their clients of a relevant risk, the OLSC may, amongst other things:

- (1) Caution the lawyer;
- (2) Reprimand the lawyer;
- (3) Order the lawyer redo the work at no cost or waive or reduce fees for the work; and
- (4) Fine the lawyer up to \$25,000.⁶⁵

⁶⁴ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) s 71.*

⁶⁵ *Legal Profession Uniform Law 2014 (NSW) section 299 (1)(a)(f)*

Alternatively, the OLSC may initiate and prosecute disciplinary proceedings against a lawyer in the Occupational Division of the NSW Civil and Administrative Tribunal.⁶⁶

4.3 Reputational Damage

Lawyers who fail to discharge their duty of care may also suffer considerable reputational damage and business losses, including as a result of the following:

- (1) Publication of the judicial decision where the lawyer was found to be negligent, breached their contractual obligations and/or engaged in misleading or deceptive conduct. Any such decision will be publicly accessible and, depending on the severity of the lawyer's conduct, may result in additional publication online or in newspapers;
- (2) An increase in the lawyer's professional indemnity insurance premiums;
- (3) An inability to tender for certain work. Certain clients, and in particular, government clients, may refuse to accept tenders from practitioners or law firms where key personnel have been found to have engaged in negligent or other forms of unprofessional conduct; and
- (4) Current and potential future clients deciding to cease to engage the services of the lawyer.

⁶⁶ *Legal Profession Uniform Law 2014* (NSW) section 300(1)(a)

Conclusion

Contamination is a physical risk which can impact a range of properties not just industrial sites but also residential and commercial properties.

It is clear that lawyers in NSW owe a duty to their clients to warn them of risks associated with purchasing a property, including any physical affectations on the property, such as contamination. The scope and breadth of this duty is not static and will continue to evolve as our understanding of various risks continues to expand.

The documents which real estate lawyers typically review in the course of a property transaction – such as 10.7 Certificates and EPA Record Searches – are limited in their usefulness, and will fail to identify most contamination, other than very significant contamination. Lawyers should therefore consider making special enquiries, for example in the form of the contaminated land reports described in section 3.1(2), which will assess not only the property being acquired by also surrounding properties, and other useful information such as the previous activities and businesses carried out/undertaken on the subject site or surrounding sites.



Environment Protection Authority

Review of contaminated land information on planning certificates in NSW



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Local councils are responsible for preparing planning certificates and ensuring they contain the information that is required by law. The EPA has reviewed the information about contamination found on a selected range of planning certificates and surveyed councils about their processes for preparing this information.

This report sets out the findings of that review and survey, and makes 13 recommendations for improving how contaminated land information is provided.

1. Introduction

Planning certificates, issued under the Environmental Planning and Assessment Act 1979 (EP&A Act), can provide useful information to prospective home buyers. They should include information on land or water contamination – whether the contamination is current, remediated or has never occurred on the site – allowing purchasers to make informed decisions.

In 2020 the NSW Environment Protection Authority (EPA) conducted a review of contaminated land information on planning certificates in NSW (**the review**), to better understand how NSW local councils present contaminated land information on their planning certificates. The review was undertaken with a view to making recommendations, if necessary, that would make such information clearer and more consistent.

The review focused on the provision of information as it relates to section 59(2) of the Contaminated Land Management Act 1997 (CLM Act), but it also looked at contaminated land information in general. The EPA regulates significantly contaminated land in NSW under the CLM Act.

The EPA has made 13 recommendations to help councils present information on contaminated land in planning certificates. They are set out in this document, which is intended for the advice of NSW local councils only.

1.1. Background

This review was conducted to address a recommendation, made by Professor Mark Taylor and Isabella Cosenza in their Review of the New South Wales Environment Protection Authority's Management of Contaminated Sites, about the range and consistency of information provided to purchasers of land that may be contaminated.

Recommendation 30 in Taylor and Cosenza's review was that:

The NSW Government should consider auditing local councils on a regular basis to ensure that they are appropriately making notations of contamination of land on certificates issued under s 149 of the *Environmental Planning and Assessment Act 1979* (NSW).

Taylor and Cosenza also noted the absence of a single cross-government platform for storing contaminated-site information, and made a series of recommendations aimed at consolidating and improving public access to information. The NSW Government accepted these recommendations and the EPA is leading the implementation of the responses.

Regular auditing of planning certificates is not feasible, due to cost. The EPA's review of contaminated land information on planning certificates was designed to gather enough information about the contents of planning certificates to allow it to recommend to councils a clear and consistent approach to presenting information about contaminated land.

1.1.1. Relevant legislation and guidelines

The main legislation and guidelines relevant to contaminated land information on planning certificates are:

- Environmental Planning and Assessment Act 1979 (EP&A Act)
Section 10.7 introduces planning certificates as an instrument to provide information on any land within a council area. As stated under section 10.7(2), the certificates must specify matters relating to the land that are prescribed either by the EP&A Act or arise in connection with another Act.
- Contaminated Land Management Act 1997 (CLM Act)
Section 59(2) prescribes matters to be included on an EP&A Act planning certificate that are

additional to those specified in section 10.7 of that Act (including by any regulations under that section). The matters which section 59(2) of the CLM Act require to be provided on a planning certificate relate to the key regulatory actions of the EPA; that is, whether the site is:

- declared to be significantly contaminated
- subject to a management order, a voluntary management proposal or an ongoing maintenance order
- the subject of a site audit statement
- Contaminated land planning guidelines¹
These guidelines, published by Department of Planning and Environment (DPE) and updated from time to time, describe the information that is required on planning certificates and additional information that DPE recommends be included.

Other instruments may require other contaminated land information to be placed on planning certificates.

1.1.2. Importance of contaminated land information on planning certificates

Under the current contaminated land management framework, planning certificates are the primary way land purchasers are advised about information held by a council regarding actual or potential contamination on the land they may be buying. This allows buyers to make informed decisions about the land they are purchasing (or looking to purchase).

In addition to the information regarding significantly contaminated land set out in section 59(2) of the CLM Act, under section 10.7(5) of the EP&A Act a council may include advice on other relevant matters affecting the land of which it may be aware. This allows information to be provided about:

- potentially contaminating activities that are known to have occurred on the land (as set out in DPE's *Contaminated Land Planning Guidelines*)
- the results of any site investigations held by the council
- any notifications of remediation
- if there is a long-term Environmental Management Plan for residual contamination on the land that must be complied with
- copies of any site audit statements held by the council.

Councils do not incur any liability for advice provided in good faith under section 10.7(2) or section 10.7(5) of the EP&A Act relating to contaminated land.

The EPA may also, under section 88E of the *Conveyancing Act 1919*, impose restrictions on the use of, or impose public positive covenants on, any land to which this section applies for the purpose of the ongoing management of the land and may release or vary any such restriction or covenant. This information can be obtained by purchasing land title certificates, but an evaluation of this information was outside the scope of this review.

¹ The current guidelines are the *Managing Land Contamination Planning Guidelines SEPP 55 – Remediation of Land* (1998). They can be found via www.epa.nsw.gov.au/your-environment/contaminated-land.

1.2. Review process

To better understand how contaminated land information is recorded and presented on planning certificates across NSW, the EPA engaged with 69 local councils through:

- a **survey** with questions on the councils' notation and contaminated land information processes
- a sample of sections **10.7(2) and 10.7(5) planning certificates** purchased from selected councils.

1.2.1. Survey sent to councils

All 128 NSW councils were asked to complete a survey developed by the EPA to ascertain the type of contaminated land information they record and/or include on their planning certificates. This survey contained a series of questions regarding:

- council's process for obtaining contaminated land information published by the EPA
- notations placed on sections 10.7(2) and 10.7(5) planning certificates with respect to section 59 of the CLM Act
- additional contaminated land policies a council may have in place.

Sixty-nine councils returned the survey form to the EPA. Information provided by councils, including copies of their policies and procedures, has been treated confidentially.

See Appendix 1 for a copy of the survey that the EPA sent to councils.

1.2.2. Planning certificates purchased

The EPA purchased 92 planning certificates from 52 councils to gain a better understanding of the information provided to members of the public, including potential buyers of contaminated land, in that local government area. Section 10.7(2) and (5) certificates were mostly purchased from councils for sites that:

- are currently regulated by the EPA
- were formerly regulated by the EPA
- had been notified to, and assessed by, the EPA to determine whether the contamination was significant enough to warrant regulation, but for which the EPA had determined that regulation under the CLM Act was not required.

Where sites contained multiple lots within a Deposited Plan, only one representative lot was selected for the purchase of the certificate.

The councils and planning certificates were chosen to provide a diverse sample across urban and regional NSW.

2. Findings and recommendations

2.1. Summary

The planning certificates and council survey responses were reviewed and, where relevant, compared with one another to give a better understanding of how information is presented.

Councils varied greatly in how they provided contaminated land information on planning certificates.

The EPA understands that some councils do not have dedicated contaminated land staff or policies, and funding and resourcing may affect the quality of information recorded and presented. The findings given below do not apply to all councils, and each council should reflect on its own processes and decide which recommendations are appropriate for it.

All recommendations below are advice only unless otherwise stated. They are aimed at improving the quality and consistency of contaminated land information on planning certificates.

The following findings and recommendations identify both general and specific issues highlighted by the review. Councils have not been identified by name and feedback has not been provided to individual councils.

2.2. Recommendations for councils

2.2.1. Information required under section 59(2) of the CLM Act

- a. **Finding:** The planning certificates reviewed had a wide variety of formats, ranging from a clear list of each of the items in section 59(2)(a)–(e) followed by a 'yes' or 'no' for each, to no mention at all of section 59 CLM Act matters. Some councils responded in the survey that they do not include the prescribed matters under section 59 of the CLM Act because they do not have a contaminated land policy in place to help guide them, or that council has not needed to include this because it has not had a significantly contaminated site.

Recommendation (a)

Items under section 59(2)(a)–(e) of the CLM Act are prescribed matters for the purposes of the EP&A Act and must be included on section 10.7(2) EP&A Act planning certificates. Councils should make every effort to complete this when producing planning certificates as it is a legislative requirement. When sites are not regulated by the EPA and section 59(2)(a)–(e) is not applicable, councils should still list each of the matters and clearly indicate that the item does not apply to the site.

- b. **Finding:** Many planning certificates showed inconsistencies with the prescribed matters in section 59(2) of the CLM Act as recorded on the EPA's *Record of notices*. For example, some certificates stated that there was no management order attached to the site (item (2)(b)), even though there is one in place as listed on the EPA's *Record of notices*. Only half of councils surveyed reported that they check the EPA's *Record of notices* as part of their process when preparing a planning certificate. The *Record of notices* can be checked on the EPA's website. Listing the matters in section 59(2) of the CLM Act on the planning certificate is a legal requirement and is vital to providing the land purchaser with the correct information.

Section 3 of this document, *Guidance for section 59 CLM Act matters on EP&A Act planning certificates*, provides examples of how to clearly and accurately present contaminated land information on a planning certificate.

Recommendation (b)

Councils should check the EPA's Record of notices register when creating planning certificates, to confirm the status of a site. Furthermore, if a council is unsure of a site's regulatory status (or if a Notice/Order does not match council records), then it should contact the EPA.

- c. **Finding:** Councils provide varying levels of guidance on how to search for contamination information. Some councils provide contextual information and links to relevant information sources, as in the example below.

Note: This information was sourced from the record under section 58 of the Contaminated Land Management Act 1997, < <http://www.environment.nsw.gov.au/prclmapp/searchregister.aspx> >. If the land does not appear on the record it may still be affected by contamination. For example:

Contamination may be present, but the site has not been regulated by the EPA under the Contaminated Land Management Act 1997.

The EPA may be regulating contamination at the site through a licence or notice under the Protection of the Environment Operations Act 1997.

Contamination at the site may be being managed under the *State Environmental Planning Policy No 55-Remediation of Land*.

Recommendation (c)

Councils should consider providing as much guidance as possible to help people search for any potential contamination information about a site. Where practicable, guidance similar to that provided above should be included as a minimum.

2.2.2. Information recommended by section 10.7(5) of the EP&A Act

- d. **Finding:** Most councils did not include any of this information on their planning certificates; a few did provide some of the information. The EPA understands that this information is not compulsory for inclusion on planning certificates and that it may not be available for every site. However, the EPA's view is that, where possible, it is useful to include such information on the planning certificate to provide relevant site information and transparency for potential buyers.

Recommendation (d)

Where available, councils should consider including site information relevant under section 10.7(5) of the EP&A Act, such as potentially contaminating activities, council site investigations, notifications of remediation and council-held audit statements.

- e. **Finding:** When surveyed, most councils did not say that they provided additional reports, site audit statements or information about potentially contaminating activities on a site. However, some said that this was available if asked for. To reduce time and increase information flow, the EPA considers that councils could provide copies upfront of documents pertaining to section 10.7(5) of the EP&A Act with the planning certificate. The EPA understands that for some sites with a lengthy regulated history, organising these attachments could be very time-consuming, and so councils should use their judgement as to when it is appropriate to offer a notation instead.

Recommendation (e)

Where practicable, councils should provide copies of reports, statements and further information about the site under section 10.7(5) of the EP&A Act with the planning certificate when it is issued. This will provide transparency and reduce the risk of a contaminated land notation being overlooked.

- f. **Finding:** The survey results suggest that for most sites with known potentially contaminating activities, these activities are not included as a section 10.7 (5) additional relevant matter on planning certificates. The certificates that best included this information cited specific previous activities and the potential for contamination. Some other certificates made generic statements, such as:

Council's records show that because of previous use the land may be contaminated. The services of a suitably qualified consultant should be sought to ascertain the degree of contamination, if any, on the land, and its likely effect on the land.

Recommendation (f)

When potentially contaminating activities are known to council, they should be included on the planning certificate.

- g. **Finding:** Some certificates noted only that site audit statements could be provided if requested. It was unclear if this was the type of standard text inserted on every planning certificate, or if there was a specific statement prepared for that site. To reduce confusion, it is recommended that the text clearly state whether a site audit statement for that specific site is available on request.

Recommendation (g)

Where practicable, councils should clearly state if there is a site audit statement available for a site.

- h. **Finding:** Where council policy on contaminated land restricts the use of land, many councils have adopted the following suggested text from the *Managing Land Contamination Planning Guidelines SEPP 55 – Remediation of Land* (1998):

Council has adopted by resolution a policy on contaminated land which may restrict the development of the land. This policy is implemented when zoning or land use changes are proposed on lands which have previously been used for certain purposes. Consideration of council's adopted policy and the application of provisions under relevant State legislation is warranted.

The meaning of this may be unclear for the general reader without further context, so it is recommended that councils provide explanation, such as:

- why the policy has been adopted for the land in question
- a weblink to the contaminated land policy
- ways to contact the relevant council so that an officer can discuss the site.

Recommendation (h)

Where practicable, councils should provide adequate context when using the suggested Remediation of Land SEPP guideline text around contaminated land policy that restricts development.

2.2.3. Council policies and records

- i. **Finding:** Around a third of councils surveyed did not have a contaminated land policy in place. In some instances, this appears to be a legacy from council amalgamations. Therefore, where available and appropriate, councils could adopt a policy that had been developed by one of the pre-amalgamation councils. The EPA understands that developing policies can be costly and time-consuming: this may be a barrier for some councils, especially those that have very few contaminated sites in their area. At the very least, where a detailed policy is not possible or needed, guidelines should be developed to ensure that a minimum level of site investigation is carried out, and that the required contaminated land information is captured on the planning certificate. These guidelines should be consistent with the current version of DPE's contaminated land planning guidelines (as updated from time to time) and the Remediation of Land SEPP.

Recommendation (i)

Councils should consider developing a contaminated land policy or guidelines where practicable.

- j. **Finding:** Some councils reported having their own contaminated land registers from which they extract information for planning certificates. Such registers give good oversight of contaminated sites within the local government area, and information extraction can be automated to save time. But creating a register can also be costly and time-consuming, and may not be feasible for all councils. Even where a council has its own database of contaminated sites, the EPA still recommends that it check the EPA *Record of notices*, to ensure that it has the most up-to-date site status and does not overlook any Orders or Notices. Council may also wish to refer to the EPA's *List of notified sites* (see section 3.1.1). This list, updated monthly, contains all sites that have been brought to the EPA's attention as potentially contaminated and are being, or have been, assessed. That a site is on this list could be an additional piece of information to include on planning certificates.

Recommendation (j)

Where financially and logistically possible, councils should consider maintaining their own databases of contaminated land, for better oversight of contaminated sites within their local government areas.

2.2.4. Other information

- k. **Finding:** Some certificates did not include an explanation as to who the responsible authority is and where members of the public should go for more information or questions about the site. By including only relevant section 59(2) information, there is no way to make it clear to the general reader that the NSW EPA is the appropriate regulatory authority (ARA). We suggest that simple wording such as the following should be included for clarity:

This site is regulated by XXX [insert Council or the NSW EPA as relevant] and contaminated land enquiries should be directed to it on XXX [insert relevant contact details].

Recommendation (k)

Planning certificates should clarify the appropriate entity to direct enquiries to.

- i. **Finding:** A number of certificates incorrectly used either 'Environmental' or 'Agency' in the EPA's title, or referred to old titles including the 'Department of Environment and Heritage'. The EPA's full statutory name is the NSW Environment Protection Authority. It is a standalone statutory authority established by the Protection of the Environment Administration Act 1991.

Recommendation (l)

Planning certificates should correctly name the NSW Environment Protection Authority, to enable members of the public to identify it easily and ensure document integrity.

- m. **Finding:** Some planning certificates contained spelling and/or grammatical errors as well as what appeared to be editing errors, such as including the list of the items in section 59(2)(a)–(e) of the CLM Act, but without a 'yes' or 'no' after each item to indicate its relevance to the site.

Recommendation (m)

Councils should edit planning certificates before publication to make them easy to understand, help avoid misinterpretation and maintain document integrity.

3. Guidance for section 59 CLM Act matters on EP&A Act planning certificates

3.1. Investigating EPA records

The EPA makes available, free of charge, a public register of notices and orders, and a *List of notified sites*. These can be easily searched by local government area and/or suburb. Councils should check them, both as part of their initial evaluation of a site and before preparing a planning certificate, to ensure that planning certificates contain the latest contaminated land information regarding matters prescribed under section 59(2) of the CLM Act.

3.1.1. List of notified sites

The List of notified sites, which is updated monthly, contains all sites that have been notified to the EPA as being potentially contaminated. Each site includes a regulatory status such as 'contamination currently regulated under CLM Act', 'contamination formerly regulated under the CLM Act', or 'regulation under CLM Act not required'. The list also includes sites that are currently being assessed.

If this is relevant to a site under investigation or for which a planning certificate is being prepared, it may be worth contacting the EPA for further information and noting the following on the planning certificate:

This site appears on the EPA's *List of notified sites* for possible contamination. For more information visit the EPA's website or call 131 555.

3.1.2. Record of notices

The Record of notices is a searchable database maintained by the EPA on its website that contains key regulatory actions taken under the CLM Act, including:

- preliminary investigation orders
- notices of declared contaminated land
- approved voluntary management proposals
- management orders
- ongoing maintenance orders
- site audit statements.

The database specifies which of the notices and orders are current or have been repealed. Section 59(2)(a)–(d) of the CLM Act requires councils to note any prescribed matter that currently applies, and therefore there is no requirement to list former notices and orders. However, under section 59(2)(e) of the CLM Act, any site audit statement provided at any time to the local authority issuing the planning certificate (i.e. council) must be noted. Section 59(3) provides that if advice was provided under section 59(2) on a matter that no longer applies to the land, this must be specified on the planning certificate.

If, in searching either of these databases, council identifies any potential issue with the records of a site, please contact the EPA so we can investigate.

3.2. Notations for prescribed matters on section 10.7(2) EP&A Act planning certificates

Section 59(2) of the CLM Act states:

For the purposes of section 10.7 of the Environmental Planning and Assessment Act 1979, the following matters are prescribed in addition to any other matters, prescribed by the regulations under that section, to be specified in a certificate under that section:

- (a) that the land to which the certificate relates is significantly contaminated land—if the land (or part of the land) is significantly contaminated land at the date when the certificate is issued,*
- (b) that the land to which the certificate relates is subject to a management order—if it is subject to such an order at the date when the certificate is issued,*
- (c) that the land to which the certificate relates is the subject of an approved voluntary management proposal—if it is the subject of such an approved proposal at the date when the certificate is issued,*
- (d) that the land to which the certificate relates is subject to an ongoing maintenance order—if it is subject to such an order at the date when the certificate is issued,*
- (e) that the land to which the certificate relates is the subject of a site audit statement—if a copy of such a statement has been provided at any time to the local authority issuing the certificate.*

To avoid ambiguity, these matters (a)–(e) should ideally be listed on all planning certificates, whether the site includes contamination or not, and each item should be clearly labelled with a bolded 'yes' or a 'no' to indicate whether it applies to the site. The following format is recommended:

At the date at when this certificate is issued, under section 59 (2) of the Contaminated Land Management Act 1997:

- a. the land (or part of the land) to which the certificate relates is significantly contaminated land
[insert either 'YES' or 'NO']
- b. the land to which the certificate relates is subject to a management order
[insert either 'YES' or 'NO']
- c. the land to which the certificate relates is the subject of an approved voluntary management proposal
[insert either 'YES' or 'NO']
- d. the land to which the certificate relates is subject to an ongoing maintenance order
[insert either 'YES' or 'NO']
- e. the land to which the certificate relates is the subject of a site audit statement
[insert either 'YES' or 'NO'].

In the case where none of the prescribed matters apply, planning certificates could simply note the following, although this is not as clear for people who are not familiar with the CLM Act and may lead to enquiries:

Prescribed matters arising under section 59(2) of the Contaminated Land Management Act 1997: Not applicable.

If a notice or order exists, a copy of the document could be attached to the planning certificate. If this is not feasible, include a link to the EPA's [Record of notices](#) and state that copies of the document(s) are available to view online.

4. Next steps

4.1. Assistance for councils

For regional councils, the EPA's *Council Regional Capacity Building (CRCB)* grants program provides funding to eligible groups of regional councils to employ a skilled contaminated land professional to help develop contaminated land resources such as policies and procedures, improve their technical capacity in contaminated land management, and provide a local source of advice.

Councils that do not have access to a CRCB Officer, and which are seeking more information on any of the recommendations or guidance in this document, should contact the EPA on 131 555.

Appendix 1: Survey



Survey

Contaminated land information on planning certificates

1. Which Council are you from?

Click or tap here to enter text.

2. Has Council got a contaminated land policy document in place?

- No
- Yes

If yes, please briefly describe what it covers. Please provide a URL link if the policy is available online or attach the document to your return email if it's internal and you have permission.

Click or tap here to enter text.

3. What notations does Council use to describe the matters with respect to significantly contaminated land set out in section 59 of the *Contaminated Land Management Act 1997*?

Click or tap here to enter text.

4. Does Council's process include checking the EPA's public 'list of notified sites' and 'record of notices' when preparing certificates?

- No
- Yes

If yes, is there a process for advising the EPA if there are differences between the EPA's and Council's records? (e.g. if Lot and DP have changed, or remediation has been completed)

- No
- Yes

If yes, please briefly specify the process

Click or tap here to enter text.

5. If Council records indicate additional information is available that could be provided under s 10.7(5), does the 10.7(2) certificate contain a notation that further information is available if the more detailed certificate is purchased?

- No
- Yes

If yes, please specify the standard notation used

Click or tap here to enter text.

6. With regard to additional information under s 10.7(5), does Council:

- Provide information on previously remediated sites?
Does this include copies of site investigations and notifications of remediation?

Click or tap here to enter text.

- Provide information on potentially contaminating activities, if known?
What wording is used to denote this?

Click or tap here to enter text.

- Provide copies of any site audit statements held by council?

Thank you for participating in this survey.