Potentially contaminated land in Victoria – challenges for local government

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In making planning decisions about potentially contaminated land (PCL) councils must decide whether the land is suitable for the proposed use and development. Planning policy encouraging urban consolidation and increasing property values are leading to the transformation of former industrial land to residential and other sensitive uses. However, the potential restrictions on land-use and the costs of investigating, remediating and redeveloping contaminated land can be significant. In making planning decisions about PCL, councils often face significant pressure to be commercial and practical, and to balance other planning objectives in performing legal obligations associated with PCL. At the same time, as a number of cases before the courts have demonstrated, councils can also face significant legal liability (and expensive and time-consuming litigation) if statutory obligations relating to PCL are not properly performed. The regulatory framework for PCL in Victoria is mature, having developed over the past 20 years following amendments to the Planning and Environment Act 1987 (Vic) and the introduction of Ministerial Direction No 1 – Potentially Contaminated Land on 9 October 1989. However, further work is required to improve some aspects of the regulatory framework, give clearer guidance to councils in making decisions about PCL and avoid the uncertainty created by some recent decisions reviewed by the Victorian Civil and Administrative Tribunal.

INTRODUCTION

Much of the recent focus of *Melbourne 2030: Planning for Sustainable Growth* and *Melbourne @ 5 Million* has been on Melbourne's growth areas, review of the urban growth boundary, the precinct structure plan process and improving transport infrastructure.[1] An important part of this policy is also consolidating development and employment around Central Activity Districts (Box Hill, Broadmeadows, Dandenong, Footscray, Frankston and Ringwood), Activity Centres and more intensive development along major transport routes. This includes freeing up surplus industrial land located in these areas for redevelopment.[2] This policy direction is reflected in local government industrial land-use strategies and Activity Centre structure plans supporting rezoning of surplus industrial land to allow business and commercial uses, employment activities and higher density residential development.[3] As property values continue to increase in Melbourne, underwriting

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[1] Department of Planning and Community Development, *Melbourne 2030: Planning for Sustainable Growth* (Victorian Government, October 2002); Department of Planning and Community Development, *Melbourne @ 5 Million* (Victorian Government, December 2008), http://www.dse.vic.gov.au/DSE/nrenpl.nsf/fid/A2EF2115B1FB14E0CA2576A40008BDC6 viewed 5 March 2010; *The Victorian Transport Plan* (Victorian Government, 2008), http://www.transport.vic.gov.au/web23/home.nsf viewed 5 March 2010.

[2] *Melbourne @ 5 Million*, n 1, p 17.

[3] Consider, eg: cll 21.05-2 and 22.05 of the Moreland Planning Scheme; and the *Moreland Industrial Land Use Strategy* and Information Brochure *Rezoning Industrial Land in Moreland* 2009. Good examples of inner urban rezoning of surplus industrial land include: Amendment C107 – Moreland Planning Scheme: Barkly Street/Nicholson Street/Brunswick Precinct; Amendment to rezone underutilised industrial land from an Industrial 3 Zone to a Business 2 Zone; Amendment C101 – Richmond Maltings Site; and Cremorne to rezone the former industrial (brewing and malting) site from a Business 3 Zone to a Comprehensive Development Zone to promote business, retail and residential uses.

clean-up and redevelopment costs, the demand for housing stock grows, and as outward urban expansion is limited by sustainability considerations, the demand for rezoning and redevelopment of former industrial land will continue to increase.[4]

There are many examples of successful rezoning and redevelopment of former industrial land throughout Melbourne including, for example, large-scale gasworks and industrial sites at Docklands and Port Melbourne, former Defence sites (eg the former Albion Explosives Factory developed by VicUrban and now occupied by the Cairnlea residential estate), and both smaller and large-scale industrial infill developments and conversions across the city.

The manufacturing and industrial history of Melbourne during the 19th century and early 20th century included tanneries, clothing, footwear and textiles, flour and sugar milling, breweries, brickworks, wool processing, ferrous and non-ferrous foundries, lime works and quarries, gasworks, paper mills, chemical, rubber and fertiliser industries. The Second World War saw growth in the strategic industries, including engineering, machine tooling, aircraft, arms and ammunition, clothing and rubber. In the post-war period increased consumer demand brought growth in the durable consumer goods industry – in particular, the motor vehicle, home appliances, rubber goods and plastics industries. As the costs of buying, owning and maintaining inner urban locations increased, industries moved outwards towards the outer suburbs of Dandenong and Broadmeadows, and the port infrastructure of Geelong and Westernport.[5]

Many areas of former industrial land in the inner south and south-east of Melbourne have been cleaned up and redeveloped. However, ongoing management of existing sites and future development will bring new challenges. As property values increase in the inner and middle ring suburbs to the north and west of Melbourne, the demand for rezoning and redevelopment of these areas will continue to grow. Making planning decisions in relation to potentially contaminated land (PCL) will present an ongoing challenge for local government in Victoria.[6]

History of Ministerial Direction No 1

The environmental audit system for contaminated land managed by the Victorian Environment Protection Authority (EPA) recently celebrated its 20th anniversary. So did *Ministerial Direction No 1 – Potentially Contaminated Land*[7] (Direction) introduced on 9 October 1989. The Direction, made under the *Planning and Environment Act 1987* (Vic) (PE Act),[8] must be considered by a planning authority in preparing a planning scheme or amendment.[9] In summary, the Direction requires that in preparing a planning scheme amendment that would have the effect of allowing "potentially contaminated land"[10] to be used for a "sensitive use",[11] agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of the land are or will be suitable for that use. The Direction requires that a planning authority must do this by requiring a statutory

[4] See, eg Gelber F, "Rezone Obsolete Inner Industrial Land", *The Australian* (29 October 2009).

[5] Australian Institute of Urban Studies, *Manufacturing in the Port Phillip Region* (Project 46, June 1977) pp 29-32; see also Linge GJR, *Industrial Awakening: A Geography of Australian Manufacturing 1788 to 1890* (Australian National University Press, 1979).

[6] Similar challenges are faced by local government in other States and have been discussed elsewhere. For example, see Desmond J, "Local Government Powers Over Contaminated Land in New South Wales Improved Outcomes through Information Management" (2006) 11 LGLJ 219; Desmond J, "Local Government Powers Over Contaminated Land in New South Wales – Part 2" (2006) 12 LGLJ 36; Leadbeter P, "Site Contamination and the Planning Process in South Australia" (2002) 8 LGLJ 14.

[7] *Ministerial Direction No 1 – Potentially Contaminated Land* (27 September 2001).

[8] *Planning and Environment Act 1987* (Vic), s 7(5).

[9] *Planning and Environment Act 1987* (Vic), s 12(2(a).

[10] In *Ministerial Direction No 1 – Potentially Contaminated Land* (27 September 2001), "potentially contaminated land" is defined to mean land-use or known to have been used for: a) industry; b) mining; or c) the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of the land).

[11] In *Ministerial Direction No 1 – Potentially Contaminated Land* (27 September 2001), "sensitive use" is defined to mean a residential use, a childcare centre, a pre-school centre or a primary school.

environmental audit to be undertaken and a certificate or statement of environmental audit be issued in accordance with Pt IXD of the *Environment Protection Act 1970* (Vic) (EP Act) confirming that the environmental conditions of the land are suitable for the sensitive use. The audit must be undertaken and certificate or statement of environmental audit obtained either before giving notice of a planning scheme amendment[12] or by including this requirement in the amendment itself.[13]

The Direction was introduced following the discovery of lead contamination in soil in a new residential estate at Suspension Street, Ardeer in the former City of Sunshine in 1989. The land had been used for secondary lead smelting and lead-acid battery manufacture. Contamination investigations had been conducted by the council and developer, the planning scheme was amended in 1987 to rezone the land, and the land was subdivided and developed for residential use. When the contamination was discovered, an emergency response was required coordinated by a taskforce involving the EPA, the then Health Department Victoria, Community Services Victoria and Sunshine City Council. Sampling showed lead concentrations up to 264,000 mg/kg (or nearly 1,000 times the investigation level for lead in soil for residential purposes). Nineteen properties required their soil remediated and eight houses that were in varying stages of completion were demolished to allow for clean-up works. A number of the affected families were relocated and the government purchased their properties. Sixty-five surrounding houses were found to be sufficiently contaminated to require clean-up of ceiling dust, soil or wall cavity dust. It was not until the late 1990s that the site was finally remediated, a statement of environmental audit was issued, and the site was returned for use as a community park.[14]

The government's regulatory response to this incident was to establish the environmental audit system, amend the PE Act and introduce the Direction to ensure that a greater level of investigation was undertaken before contaminated land could be used for a sensitive use. In response to pressure about what the government would do to respond to the incident, the then Premier, John Cain, stated in the Victorian Parliament:

> The government intends to ensure that people are protected in situations of rezoning of land from industrial or commercial use to one where there is occupation by people for residential and other purposes…
>
> I assure the House that the government will do everything possible to prevent land that is contaminated from whatever source finding its way after use by industry into residential land use. The government is examining ways of endeavouring to establish at the time when the conversion takes place from one use to another – that is, when the rezoning takes place – a system that detects the previous land use and thus ensures that appropriate steps are taken so that the land is properly treated.[15]

In addition to the introduction of the Direction, ss 12(2)(b) and 60(1)(e) of the PE Act were amended by s 25 of the *Planning and Environment (Amendment) Act 1989* (Vic) to require planning and responsible authorities to consider the effect that the environment (including contamination of the environment) may have on the use and development allowed by the planning scheme amendment or planning permit. In introducing these amendments, the then Minister for Planning and Environment, Tom Roper, stated in the second reading speech for the Bill:

> Following recent events at Ardeer, honourable members will no doubt be aware that it is necessary to introduce two further amendments to make explicit the need to consider not just the effects of a development on the environment, but also the effects of the environment on a proposed development.
>
> At Ardeer, an industrial site which had been unused for some years and was located in a residential area was considered appropriate for rezoning to residential. It might have been considered that this would

[12] Notice of a planning scheme amendment is given under ss 17, 18 and 19 of the *Planning and Environment Act 1987* (Vic).

[13] This is now done by applying to the land an Environmental Audit Overlay at cl 45.03 of the relevant planning scheme.

[14] Victoria, Legislative Assembly, *Debates*, Tom Roper (Minister for Planning and Environment) (6 September 1989) pp 707-708. Environment Protection Authority Victoria, *Prevention and Management of Contaminated Land in Victoria: State Environment Protection Policy – Policy Impact Assessment* (EPA Publication 854, June 2002) p 20.

[15] Victoria, Legislative Assembly, *Debates*, John Cain (Premier) (12 September 1989) p 881.

> have a beneficial effect on the environment, and the Act currently makes provision for these considerations. However, as it now turns out, it was the effects of the environment on the proposed development which have caused the problems.
>
> Clause 26, therefore, amends sections 12 and 60 of the Act to make it quite explicit that consideration must be given to the effects of the environment on the use or development proposed by an amendment or application, as well as the effects of the use or development on the environment.[16]

DEVELOPMENT OF THE PCL REGULATORY FRAMEWORK

There are now more than 20 Victorian Civil and Administrative Tribunal (VCAT) decisions which deal directly with PCL decided between 2002 and February 2010.[17] While some of these decisions provide useful guidance that can assist councils in interpreting the PCL regulatory framework, some decisions have raised questions of interpretation and application and have created some uncertainty in how the regulatory framework should be applied. As a consequence of these decisions and similar issues identified with the implementation of the regulatory framework in recent years, it is likely that the PCL regulatory framework will be further developed and improved to address some of the issues that have arisen.[18]

It is important to remember the purpose of the PCL regulatory framework and the potential consequences for a council if it allows a use or development of land without properly applying, monitoring and enforcing the requirements of that framework. The purpose is to avoid risks to human health and the environment arising from land-use decisions. A failure by a council to properly consider the effect of contamination on the use or development of land, at the time of preparing an amendment to a planning scheme or determining a planning permit application, could expose council to liability in negligence. This was demonstrated in the Federal Court decision of *Alec Finlayson v Armidale Council* (1994) 51 FCR 378; 84 LGERA 225; 123 ALR 155; *Armidale Council v Alec Finlayson* (1999) 104 LGERA 9.

More recent Victorian examples, such as the Victorian Supreme Court decision of *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12)* (2007) 64 ACSR 114 and the landfill gas incident at Brookland Greens Estate which was the subject of an investigation and report by the Victorian Ombudsman[19] and is presently the subject of litigation,[20] also highlight the legal risks for councils making decisions in relation to potentially contaminated land.

Councils have a duty of care to perform the statutory role of planning authority (in respect of planning scheme amendments) and responsible authority (in respect of planning permit applications) in accordance with the obligations under the PE Act and the policies and guidelines developed in relation to PCL. Before outlining the key statutory obligations on councils relevant to PCL and how

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[16] Victoria, Legislative Assembly, *Debates*, Tom Roper (Minister for Planning and Environment) (12 October 1989) p 1514.

[17] *Refshauge v Yarra CC* [2002] VCAT 1230 (4 October 2002); *EQ Property v Moreland CC* [2002] VCAT 1245 (9 October 2002); *Melbourne CC v Min for Planning and Baulderstone Hornibrook PL* [2003] VCAT 516 (17 April 2003); *Bird de la Coeur Architects v Yarra CC* [2003] VCAT 1720 (17 November 2003); *Aussie Invest Corporation Pty Ltd v Hobsons Bay City Council* [2004] VCAT 93 (19 January 2004); *Ninth Grenjo Pty Ltd v Monash CC* [2004] VCAT 844 (5 May 2004); *Waverley Holdings Pty Ltd v Monash CC* [2004] VCAT 1036 (31 May 2004); *Waverley Holdings Pty Ltd v Monash CC* [2004] VCAT 1328 (2 July 2004); *Heavenly Queen Temple Society Inc v Maribyrnong City Council* [2005] VCAT 875 (12 May 2005); *E Caon and R Denney v Colac Otway Shire Council* [2005] VCAT 1908 (2 September 2005); *Gemstar Pty Ltd v Mansfield SC* [2006] VCAT 368 (14 March 2006); *Pong Property Development Pty Ltd v Monash CC* [2006] VCAT 1686 (15 August 2006); *Domsal Pty Ltd v Moreland CC* [2007] VCAT 968 (4 June 2007); *Norman & Tinney v Yarra CC (Red Dot)* [2008] VCAT 309 (19 February 2008); *Yang Kuan Pty Ltd v Boroondara CC* [2008] VCAT 2524 (9 December 2008); *Oxford Street Oakleigh Pty Ltd v Monash CC* [2009] VCAT 112 (28 January 2009); *Junction One Pty Ltd v Darebin CC* [2009] VCAT 277 (20 February 2009); *Architype Australia Pty Ltd v Yarra CC* [2009] VCAT 662 (15 April 2009); *Architype Australia Pty Ltd v Yarra CC* [2009] VCAT 1437 (24 July 2009); *Lancaster v Yarra CC* [2009] VCAT 1574 (7 August 2009); *Architype Australia Pty Ltd v Yarra CC* [2010] VCAT 170.

[18] Personal communication, Jean Meaklim, Project Manager – Risk Assessment, Environmental Audit and Contaminated Land Programs, EPA Victoria (17 March 2010).

[19] Ombudsman, *Brookland Greens Estate – Investigation into Methane Gas Leaks* (Victorian Government, October 2009).

[20] Cafagna J, "Council Apology for Cranbourne Methane Gas Emergency", *ABC Stateline* (Broadcast 9 October 2009), http://www.abc.net.au/stateline/vic/content/2006/s2709880.htm viewed 5 March 2010.

VCAT has interpreted them, the next section of this article considers what is meant by "contamination" and "potentially contaminated land" in Victoria.

WHAT IS CONTAMINATION?

The *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPM) defines "contamination" to mean:

> [T]he condition of land or water where any chemical substance or waste has been added at above background level and represents, or potentially represents, an adverse health or environment impact.[21]

A similar definition is used in most environment protection or contaminated land legislation in Australia. For example, the *Contaminated Land Management Act 1997* (NSW) defines "contamination" to mean:

> [T]he presence in, on or under land of a substance at a concentration above the concentration at which the substance is normally present in, on, or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.[22]

This is a widely-used definition and variations are often included in contracts dealing with the contamination (eg contracts relating to remediation, property or business sales concerning land subject to contamination).

In Victoria, the EP Act does not include a definition of contamination. Instead it deals with polluted land. Clause 21 of the *State Environment Protection Policy (Prevention and Management of Contamination of Land) 2002*[23] (SEPP) provides that a state of pollution exists where the level of contamination at a site precludes a protected beneficial use of the relevant land-use and the land must be cleaned up and/or managed so that:

- there is no immediate threat to human health onsite or off-site or the environment off-site;
- contamination does not preclude the protected beneficial uses of the relevant land-use; and
- the risk of contamination from the site adversely affecting any beneficial use protected under any State environment protection policy off-site is reduced to a level acceptable to the EPA.

The term "beneficial use" is defined in the EP Act to mean:

> [A] use of the environment or any element of the environment which –
>
> (a) is conducive to public benefit, welfare, safety, health or aesthetic enjoyment and which requires protection from the effects of waste discharges, emissions or deposits or of the emission of noise; or
>
> (b) is declared in State environment protection policy to be a beneficial use.[24]

The beneficial uses of land protected by the SEPP are described in cl 10 and Table 1 in relation to various land-use categories (ie Parks and Reserves, Agricultural, Sensitive Use – High Density and other, Recreation/Open Space, Commercial and Industrial). The protected beneficial uses are:

- maintenance of ecosystems;
- human health;
- buildings and structures;
- aesthetics; and
- production of food, flora and fibre.

Table 2 of the SEPP sets out indicators and objectives that the EPA has regard to in determining whether the level of any contamination at any site poses an unacceptable risk to protected beneficial

[21] *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPM), p 2. The NEPM is made under s 14(1) of the *National Environment Protection Council Act 1994* (Cth), and in particular, paragraph (d) of that section, and the equivalent provisions of corresponding Acts in participating States and Territories.

[22] *Contaminated Land Management Act 1997* (NSW), s 5.

[23] *State Environment Protection Policy (Prevention and Management of Contamination of Land) 2002* is made pursuant to ss 16(1) and 17A of the *Environment Protection Act 1970* (Vic).

[24] *Environment Protection Act 1970* (Vic), s 4.

uses listed in Table 1. Table 2, in turn, refers to the Ecological Investigation Levels (EILs) and Human Health Investigation Levels (HHILs) developed in accordance with the NEPM.

The *General Practice Note – Potentially Contaminated Land* (Practice Note) was prepared by the then Department of Sustainability and Environment, the EPA and a number of key stakeholder councils (including town planning local government representatives from Moreland, Maribyrnong, Banyule, Yarra and the Municipal Association of Victoria).[25] The Practice Note provides guidance about the types of activities likely to have contaminated land.[26] A list of 58 activities that are designated as having a "high potential" for contamination is included, as well as a list of activities with medium potential for contamination. These uses may give rise to potentially significant risks and liabilities, and caution should be exercised whenever dealing with such land. The list is not exhaustive of the uses which may present contamination risks and site contamination needs to be considered on a case-by-case basis.

Land pollution (like water and air pollution) is an offence under the EP Act.[27] When a pollution incident occurs, the EPA has a range of enforcement mechanisms available to it, including criminal prosecution in the Magistrates' Court and administrative mechanisms such as Pollution Abatement Notices[28] and Clean-up Notices.[29]

PCL REGULATORY FRAMEWORK

The statutory sources of councils' legal obligations and guidance related to PCL as planning authorities are:

- s 12(2)(b) of the PE Act (planning scheme amendments);
- cl 15.06 of the *State Planning Policy Framework* (SPPF) (soil contamination);
- *Ministerial Direction No 1 – Potentially Contaminated Land* (2001) (Direction);
- *State Environmental Protection Policy (Prevention and Management of Contamination of Land) 2002* (SEPP), cll 13, 14; and
- *General Practice Note – Potentially Contaminated Land* (Department of Sustainability and Environment, 2005) (Practice Note).

The sources of councils' obligations and guidance related to PCL as responsible authorities are:

- s 60(1)(e) of the PE Act (permit application considerations);
- cl 15.06 of the SPPF (soil contamination);
- cll 13, 14 of the SEPP; and
- the Practice Note.[30]

As noted above, the statutory obligation on councils in the PE Act as planning and responsible authorities was amended in 1989 to include the obligation to consider the effect of the environment

[25] Personal communication, Jean Meaklim, Project Manager – Risk Assessment, Environmental Audit and Contaminated Land Programs, EPA Victoria (17 March 2010).

[26] Department of Sustainability and Environment, *General Practice Note – Potentially Contaminated Land* (Victorian Government, June 2005) pp 3-4, Table 1. Table 1 provides a list of 58 activities which have a "high potential" for contamination, which includes land used for automotive repair/engine works, battery manufacturing/recycling, brickworks, chemical manufacturing, dry cleaning, foundries, fuel storage depots, gasworks, landfill, service stations, tanneries, underground storage tanks and waste treatment. Activities which are listed as having a "medium potential" for contamination include chemical storage, fuel storage, underground storage tanks, waste disposal and filling.

[27] *Environment Protection Act 1970* (Vic), s 45.

[28] *Environment Protection Act 1970* (Vic), ss 31A, 31B.

[29] *Environment Protection Act 1970* (Vic), s 62A.

[30] In addition to the PCL regulatory framework addressed in the *Planning and Environment Act 1987* (Vic), soil assessments are required by the Department of Education and Early Childhood Development, pursuant to the *Children's Services Act 1996* (Vic), to ensure that children's service sites are suitable for their purpose from an environmental perspective.

(including contamination of the environment) on the proposed use and development allowed under the planning scheme amendment or planning permit application.[31]

When preparing an amendment to a planning scheme, s 12(2)(b) of the PE Act requires a council, as a planning authority, to:

> take into account any significant effects which it considers the environment might have on any use or development envisaged in the amendment.[32]

The requirement under s 12(2)(b) of the PE Act is mirrored in a council's responsibilities as a responsible authority when deciding on a planning permit application. Section 60(1)(e) of the PE Act requires a council, as responsible authority, to consider:

> any significant effects which it considers the environment may have on the use or development.[33]

Clause 15 (Environment) and, in particular, cl 15.06 (soil contamination) of the SPPF in each planning scheme includes the policy objective to ensure that PCL is suitable for its intended future use and development, and that contaminated land is used safely. This policy objective is to be implemented by planning authorities complying with the Direction.

The policy also requires responsible authorities, when considering applications for use of land known to have been used for industry, mining, or the storage of chemicals, gas, wastes or liquid fuel, to require permit applicants to provide adequate information on the potential for contamination to have adverse effects on the future land-use. The policy also encourages planning and responsible authorities to have regard to the SEPP and NEPM and other relevant documents published by the EPA when making decisions regarding contaminated land.

MINISTERIAL DIRECTION NO 1 AND THE ENVIRONMENTAL AUDIT SYSTEM

The history of the introduction of *Ministerial Direction No 1 – Potentially Contaminated Land* is described above. The Direction states:

> In preparing an amendment which would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of that land are or will be suitable for that use.[34]

"Potentially contaminated land" is defined to mean land used or known to have been used for industry, mining, or the storage of chemicals, gas, wastes and liquid fuel (if not ancillary to another use of the land). "Sensitive use" is defined to mean a residential use, a childcare centre, a pre-school centre or a primary school.

To be satisfied in relation to an amendment allowing a sensitive use, councils must either:

- obtain a certificate or a statement of environmental audit in accordance with Pt IXD of the EP Act before the amendment is exhibited; or
- include in the amendment a requirement to obtain a certificate or a statement of Environmental Audit before a sensitive use commences or before the construction or carrying out of buildings or works in association with a sensitive use commences (eg through the use of an Environmental Audit Overlay (EAO)).

There are two types of statutory environmental audits that can be undertaken under Pt IXD of the EP Act. These are:

[31] Sections 12(2)(b) and 60(1)(e) of the *Planning and Environment Act 1987* (Vic) were amended in 1989 by s 25 of the *Planning and Environment (Amendment) Act 1989* (Vic) as follows: s 12(2)(b) – after "environment" insert "or which it considers the environment might have on any use or development envisaged in the scheme or amendment"; and s 60(a)(iii) – after "environment" insert "or which the responsible authority considers the environment may have on the use or development".

[32] *Planning and Environment Act 1987* (Vic), s 12(2)(b).

[33] *Planning and Environment Act 1987* (Vic), s 60(1)(e).

[34] *Ministerial Direction No 1 – Potentially Contaminated Land* (27 September 2001), cl 4.

- An audit under s 53V of the EP Act – this assesses the risk of any possible harm or detriment to land that has been caused by any industrial process or activity, waste, substance or noise. The auditor must specify the industrial process or activity that has occurred and specify the results of the environmental audit (53V Audit).
- An audit under s 53X of the EP Act (which is more commonly encountered in the planning context) – this assesses the condition of land, evaluates the environmental quality of the land, advises whether any clean-up is required and specifies any recommendations for carrying out of the clean-up (53X Audit).

The outcome of a 53X Audit may result in the issue of either:

- A certificate of environmental audit indicating that the auditor is of the opinion that the site is suitable for any beneficial use and that there is no restriction on use of the site due to its environmental condition.[35]
- A statement of environmental audit indicating that the auditor is of the opinion that there is, or may be, some restriction on the use of the site due to its environmental condition. A statement may include conditions that prevent certain works, require auditor's signoff before works are undertaken, require compliance with an environmental management plan, require remediation works to be undertaken or places ongoing management or monitoring requirements on the site.[36] A statement might also indicate that a site is not suitable for any use, in which case the EPA will usually issue a notice to require clean-up or management of that site.

The environmental audit system has operated in Victoria since 1989. Environmental auditors are accredited by the EPA and must comply with obligations under Pt IXD of the EP Act and Environmental Auditor Guidelines published by the EPA.[37] The list of EPA accredited environmental auditors is available on the EPA Victoria website.[38]

Importantly, when requested to undertake an audit to issue a certificate of environmental audit, the environmental auditor must notify the EPA and provide a copy of the completed audit report to the EPA and council.[39] An environmental auditor must also notify the EPA of any imminent environmental hazard[40] as soon as practicable after becoming aware of the hazard in the course of conducting an environmental audit.[41] This has the potential to trigger EPA regulatory action (where an audit is being undertaken voluntarily, as a planning requirement under an EAO, or at the request of a council) or further regulatory action (where an audit is being undertaken pursuant to a Pollution Abatement Notice or Clean-Up Notice).

ENVIRONMENTAL AUDIT OVERLAY (EAO)

The EAO at cl 45.03 of all planning schemes, requires, that a 53X Audit must be completed and either a certificate or a statement of environmental audit is issued before a sensitive use or building and works associated with a sensitive use can commence. In addition to the purpose of implementing the State Planning Policy Framework and Local Planning Policy Framework, the EAO includes the

[35] *Environment Protection Act 1970* (Vic), s 53Y.

[36] *Environment Protection Act 1970* (Vic), s 53Z.

[37] For example, Environment Protection Authority Victoria, *Environmental Auditing in Victoria* (EPA Publication 902), *Environmental Auditing of Contaminated Land* (EPA Publication 860.1), *Environmental Auditor Guidelines for Conducting Environmental Audits* (EPA Publication 953.2), *Environmental Auditor Guidelines – Provision of Environmental Audit Reports, Certificates and Statements* (EPA Publication 1147), *Environmental Auditor Guidelines for Appointment and Conduct* (EPA Publication 865.7), *Environmental Auditor Guidelines for the Preparation of Environmental Audit Reports on Risk to the Environment* (EPA Publication 952.1).

[38] The list of EPA Accredited Environmental Auditors – Contaminated Land is available on the EPA Victoria website, http://www.epanote2.epa.vic.gov.au/4a25664a0023448e/clcurrent?openview&count=100 viewed 15 February 2010.

[39] *Environment Protection Act 1970* (Vic), s 53ZB.

[40] The term "environmental hazard" is defined in s 4 of the *Environment Protection Act 1970* (Vic) to mean "a state of danger to human beings or the environment whether imminent or otherwise resulting from the location, storage or handling of any substance having toxic, corrosive, flammable, explosive, infectious or otherwise dangerous characteristics".

[41] *Environment Protection Act 1970* (Vic), s 53ZB(3).

purpose:

> To ensure that potentially contaminated land is suitable for a use which could be significantly adversely affected by any contamination.

Clause 45.03-1 includes the following as a "Requirement":

> Before a sensitive use (residential use, child care centre, pre-school centre or primary school) commences or before the construction or carrying out of buildings and works in association with a sensitive use commences, either:
>
> - A certificate of environmental audit must be issued for the land in accordance with Part IXD of the *Environment Protection Act 1970*, or
> - An environmental auditor appointed under the *Environment Protection Act 1970* must make a statement in accordance with Part IXD of that Act that the environmental conditions of the land are suitable for the sensitive use.

Where a council has assessed land as PCL, an EAO can be applied over that land through an amendment to the planning scheme. The use of an EAO essentially defers the requirements of the Direction. The Explanatory Statement to the Direction suggests that it may only be appropriate to defer the audit requirement if testing of the land before notice of an amendment is given is difficult or inappropriate, eg where the rezoning relates to a large strategic exercise or involves multiple sites in separate ownership.[42]

Application of EAO at time of planning scheme amendment

There are many examples of planning scheme amendments which involve the application of the Direction and the use of an EAO to defer the requirement for an audit. One recent example, where the Planning Panels Victoria (Panel) discussed the application of the EAO at some length, is Amendment C36 to the Greater Dandenong Planning Scheme, which was considered by the Panel in September 2007.[43]

The Amendment proposed to rezone Stages 2 and 3 of the Keysborough South Local Planning Policy area from Rural Zone to Residential 1 Zone (R1Z). It also proposed to make changes to the Clause 22.06 Local Planning Policy Framework and to apply the EAO, a Development Plan Overlay and a Development Contributions Plan Overlay. The exhibited Amendment applied the EAO to all land proposed to be rezoned R1Z. Council received opposition from landowners who submitted that their properties were not "potentially contaminated". In particular, one property – the former Keysborough State School – had been used as a school until 1990 and was a private residence at the time of the Panel hearing.

At the Panel hearing, council submitted that:

> The application of an EAO depends on whether Direction No. 1 is triggered. If it is triggered, the planning authority is bound to satisfy itself that the environmental conditions of the land will be suitable for a sensitive use.[44]

Council did not have detailed knowledge of former uses in the Amendment area but knew that land had been used for market gardening with the likelihood of machinery repairs, storage of fuel and chemicals associated with or ancillary to agricultural uses. In the absence of evidence that a site is not potentially contaminated, council adopted the position that it is required to act in accordance with the Direction.

The Panel sought advice from the EPA. The EPA advice highlighted the following guidance provided in the Practice Note:

[42] Explanatory Statement, *Ministerial Direction No 1 – Potentially Contaminated Land* (27 September 2001) p 3.

[43] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007).

[44] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007) p 97.

> Where sensitive uses already exist on a site the planning authority, before applying an EAO, should satisfy itself that these sites are potentially contaminated (through site history records). If there is no evidence of potentially contaminated land it may not be appropriate to apply the EAO to these sites.[45]

The EPA advised that it does not support the blanket placement of an EAO on an established sensitive-use land without good reason, noting that:

> Planning authorities should be careful in applying the overlay (EAO). All buildings and works associated with a sensitive use (irrespective of how minor) will trigger the need to undertake an environmental audit.[46]

The Panel went on to consider the purpose of the Direction, the general duties under the PE Act and the guidance in the Practice Note. The Panel acknowledged that councils are likely to adopt a conservative view when land is converted to sensitive uses given the issues of public health and liability involved. However, the Panel was also mindful of the EPA's concerns that the EAO was being applied too broadly, with the consequence that full audits are required where the circumstances do not justify the comprehensive process (eg the circumstances that gave rise to the VCAT decisions in *Norman & Tinney v Yarra CC (Red Dot)* [2008] VCAT 309 (19 February 2008) and *Architype Australia Pty Ltd v Yarra CC* [2009] VCAT 1437 (24 July 2009), which are discussed below).

The Panel concluded that a site assessment by a suitably-qualified person should be a standard requirement before exhibition where a rezoning for sensitive uses is proposed on land with a medium risk of contamination and an EAO is contemplated. This would determine whether a full audit is required and could avoid the unnecessary application of the EAO.

In its submissions, the council stated that in relation to institutional uses (such as a school):

> [I]t is difficult to see how they can be excluded from the Direction and at the same time rezone the land. It is regrettable that the EAO does not have a schedule which gives the ability to exclude certain land from the control or exclude certain applications from the ambit of the control.[47]

The material before the Panel did not indicate that the school (now residential) property in dispute, which had been used for a sensitive purpose for more than 100 years, was "potentially contaminated". The Panel considered that, even under the general duty under s 12(2)(b) of the PE Act, application of the EAO did not appear to be warranted. The Panel did not agree with council that there is a need for a schedule to the EAO to exempt properties from the overlay requirements. Rather, the EAO should not be applied to properties where contamination is not considered to be a risk to future sensitive uses. With regard to other sites in the Amendment area, it was a matter for the planning authority to determine whether the history and current uses of these sites warranted the application of the EAO.[48]

The reasoning and decision of the Panel on the application of the EAO in this case is, in the author's opinion, correct. That is, an EAO should not be applied if contamination is not considered to be a risk for future sensitive uses (and there is evidence of this). However, council's view about the lack of flexibility in the EAO is understandable. In particular, the view that the EAO should have a schedule which gives the ability to "exclude certain applications from the ambit of the control" warrants further consideration. For example, the facts of the recent *Norman & Tinney* and *Architype* cases discussed below support this.

The Practice Note advises councils that an EAO should be removed if land is determined not to be PCL, a certificate is issued or if a statement is issued and the conditions are minor and have been complied with.[49] Some councils are currently undertaking a strategic review of the coverage of the EAO in their areas and determining whether, in particular cases, the EAO can be removed because it was applied too broadly when EAOs were first introduced with the Victoria Planning Provisions

[45] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007) p 98. See also Department of Sustainability and Environment, n 26, p 7.

[46] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007) p 98.

[47] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007) p 98.

[48] *Greater Dandenong C36 (PSA)* [2007] PPV 78 (18 September 2007) p 99.

[49] Department of Sustainability and Environment, n 26, p 8.

(VPP) new format planning schemes, or where properties have been investigated and/or cleaned up in accordance with a statutory environmental audit, a certificate or statement of environmental audit issued and any statement conditions have been complied with. These reviews will also consider whether there are areas to which an EAO should be applied but is not currently in place.

Problems with the application of the EAO

The EAO does not trigger a permit requirement and it operates regardless of whether the proposed buildings and works or use trigger permit requirements under the provisions of the planning scheme. The Practice Note cautions that planning authorities should be careful in applying the EAO because all buildings and works associated with a sensitive use (irrespective of how minor) will trigger the need to undertake an environmental audit.[50] The application of an EAO can lead to significant practical problems and cost consequences for owners of land affected by an EAO (particularly where an EAO applies to existing residential land and only minor works are proposed). This issue has arisen in a number of VCAT cases, most of which have concerned permit applications for renovation works to existing dwellings in the fashionable and high-value inner-city suburbs of Richmond and Fitzroy in the City of Yarra.[51]

For example, *Norman & Tinney* concerned an application for review of a permit condition requiring a statutory environmental audit in relation to minor renovation works associated with a residential use (the works included demolition of a carport, installation of a new roller door, increasing the height of fences and construction of a shed and pergola). The permit applicant sought retrospective approval of minor works involving alterations and additions to a dwelling. An EAO applied to the land, but there was no evidence of PCL. The evidence was that the land had always been used for residential purposes, although the surrounding area did include some industrial uses. The tribunal deleted the condition requiring the audit.

The tribunal held that even though an EAO applied to the land, there is some discretion in the application of its requirements where there is no history of a contaminating use and the works involved were only minor. The tribunal stated:

> [I]t was conceded by Council at the hearing that the EAO was imposed over a relatively large section of Fitzroy as part of the introduction of the new format Planning Scheme for Yarra. Furthermore, during the hearing Council did not tender any environmental report or other information indicating any known material risk that *this particular site* is contaminated. In the circumstances, my impression is that the appeal site is affected by the EAO where Council has apparently taken a "precinct approach" to implementing the EAO, rather than there being any known risk of contamination at this particular site…
>
> I note that the pertinent purpose of the EAO is "To ensure that potentially contaminated land is suitable for a use which could be significantly affected by contamination". Given that the works in question are fairly minor, involve minimal disturbance to the soil on the property and are part of the on-going residential use of the property over many decades, I am satisfied that the purposes of the EAO are met without needing to apply Condition 3.[52] [emphasis in original?]

The tribunal went on to state that it might have looked more favourably at a permit condition requiring environmental investigation work where:

- the site has a current residential use but was used for commercial/industrial purposes at an earlier stage;
- there has been a history of commercial/industrial use of a neighbouring site, that might create a risk of contamination migrating on to or underneath the appeal site;
- the works on an appeal site affected by an EAO involve major disturbance to or exposure of the soil over a significant area of the site (e.g. demolishing all or a substantial part of a period dwelling, or clearing a substantial sealed court yard or concrete area that has existed for a long period); or

[50] Department of Sustainability and Environment, n 26, p 7.

[51] *Norman & Tinney v Yarra CC (Red Dot)* [2008] VCAT 309 (19 February 2008); *Yang Kuan Pty Ltd v Boroondara CC* [2008] VCAT 2524 (9 December 2008); *Architype Australia Pty Ltd v Yarra CC* [2009] VCAT 1437 (24 July 2009); *Lancaster v Yarra CC* [2009] VCAT 1574 (7 August 2009); *Architype Australia Pty Ltd v Yarra CC* [2010] VCAT 170.

[52] *Norman & Tinney v Yarra CC (Red Dot)* [2008] VCAT 309 at [25]-[26].

- some credible environmental investigations have been carried out which indicate that, despite the long term residential use of the property, there is nevertheless a real degree of risk that the site might be contaminated.[53]

However, this decision should be treated with caution as there is no discretion available to councils in applying the requirements of the EAO. The requirements of the EAO can be deferred by the use of permit conditions (as was done in later VCAT decisions), but ultimately the council will need to make a decision whether to enforce the planning scheme and require an environmental audit in accordance with cl 45.03-1 of the planning scheme.

A later VCAT decision, *Architype*, also provided a practical outcome for a landowner seeking to carry out works on an existing residential dwelling where an audit would otherwise have been required. The works included part demolition and conversion of two double-storey terraces for office and residential use. The land was subject to an EAO. A permit condition was imposed requiring a statutory environmental audit. The tribunal stated:

> [T]he works are of a minor nature and will not result in any ongoing exposure to any soil on the land and in such circumstances the condition is onerous and unnecessary and should be removed.[54]

The tribunal accepted that, regardless of whether or not a permit condition is included requiring a statutory environmental audit, where the EAO applies to the land cl 45.03-1 specifies that it is "a requirement" to obtain a certificate or statement of environmental audit before the construction or carrying out of buildings and works in association with a sensitive use commences.[55] The tribunal, however, amended the permit condition to require a soil validation test prior to construction and only if the soil test confirmed the site to be unreasonably contaminated for the proposed residential use should a certificate or statement be required. The tribunal went on to state that if a soil test showed the site was not unreasonably contaminated and the responsible authority still required a certificate or statement of environmental audit, then it may be that a declaration would be required under s 149B of the PE Act.[56]

In the *Architype* decision the tribunal attempted to find a practical way of avoiding the application of the EAO to the particular case. Essentially, the tribunal deferred the requirement of the EAO by imposing an additional condition requiring a soil validation test, without having to decide whether the EAO requirements must be complied with. Ultimately council would need to weigh the risk and determine whether it should enforce the requirements of the EAO in this case.

While responsible authorities have a statutory obligation to enforce the planning scheme,[57] they have discretion as to how they enforce it.[58] Assuming that council obtained a soil test and independent advice from an auditor or contaminated land consultant about whether the site was suitable for the proposed use and development based on that information, council could exercise its discretion not to enforce the scheme. However, the lack of flexibility in the EAO means that such decisions will continue to present some risk for councils that should be carefully managed.

The alternative, and understandable, option is for councils to take a conservative approach to such risks and apply the letter of the EAO. As the tribunal stated in *Yang Kuan Pty Ltd v Boroondara CC* [2008] VCAT 2524 at [20]:

> The *State Environment Protection Policy - Prevention and Management of Contamination of Land* (June 2002) explains the costs of meeting these types of obligations may be minor when contrasted with

[53] *Norman & Tinney v Yarra CC (Red Dot)* [2008] VCAT 309 at [27].

[54] *Architype Pty Ltd v Yarra CC* [2009] VCAT 1437 at [14].

[55] *Architype Pty Ltd v Yarra CC* [2009] VCAT 1437 at [15].

[56] *Architype Pty Ltd v Yarra CC* [2009] VCAT 1437 at [16].

[57] *Planning and Environment Act 1987* (Vic), s 14(a). See *Westfield Management Pty Ltd v Gazcorp Pty Ltd* (2004) 135 LGERA 220 at 226; *Egan v Glenelg SC* (2006) VPR 292.

[58] While a responsible authority cannot ignore its statutory duty, it cannot be forced or compelled to take enforcement action. See, eg: *Spicer v Mt Alexander SC* [2006] VCAT 565 at [12]; *Macedon Ranges SC v Peel* [2006] VCAT 2422 at [30]; *Moorabool SC v Ramsay* [2006] VCAT 2425 at [29].

> the social and financial costs of failing to meet the necessary requirements. In the site's circumstances [in that particular case] it would be preferable to err on the side of caution.[59]

Similar decisions are likely to be made by VCAT, and risk management decisions will confront responsible authorities, until either councils strategically review the application of EAOs to some properties and areas (a process which itself needs to be undertaken carefully and have risks managed), or the State government amends the EAO and Practice Note to provide councils with some flexibility in relation to the application of the requirement for an audit in circumstances such as those in the *Norman & Tinney* and *Architype* cases.

Following the *Norman & Tinney* and *Architype* cases, in *Lancaster v Yarra CC* [2009] VCAT 1574, the tribunal was again required to consider whether an audit is necessary where the land is affected by an EAO, has only been used for residential purposes, but is nearby or adjacent to potentially contaminating industrial land-uses. (In this case the evidence of no contaminating uses was less compelling and the works proposed were more significant that in the *Norman & Tinney case*.) Without directly addressing whether the earlier decision in the *Norman & Tinney case* was correct, in *Lancaster* the tribunal accepted that it was not clear what status the kinds of informal testing arrangements (approved in the *Norman & Tinney* and *Architype* cases) would have if, at a later stage, the owner of the property is forced to comply with the requirements of an EAO.[60]

As noted above, the results of a more informal testing arrangement would merely provide some risk mitigation for councils in the event that it did not enforce the planning scheme and require an environmental audit in accordance with the EAO. Councils should be careful when relying on such informal testing to ensure that:

- the informal assessment is undertaken by an appropriately-qualified environmental professional with experience in the investigation, assessment and remediation of contamination and appropriate professional indemnity insurance;
- the assessment clearly includes an opinion that an environmental audit is not required despite the application of the EAO to the relevant land; and
- council obtains its own advice and peer review from an appropriately-qualified environmental professional/accredited EPA auditor that the site is suitable for the proposed use without the need for an environmental audit.

Councils should be aware of and refer to the guidance in the Practice Note which states that council can require permit applicants to pay for the cost of council obtaining a peer review. The Practice Note states:

> Where an applicant submits and environmental assessment of the land, the planning or responsible authority may require the applicant to contribute financially to an independent review of the information by a suitably qualified environmental professional.[61]

The risk to council is that if the land is used and developed on the basis of the more informal testing arrangement, and someone subsequently suffers an injury, loss or damage as a consequence of the contamination present at the site, council may face an action in negligence for failing to properly enforce the planning scheme and require an environmental audit in accordance with the EAO in the planning scheme.[62] While it is open to council to exercise discretion and make a risk-based decision and mitigate this risk in the manner described above, it is important that councils clearly understand the risks of doing so.

Even where council takes a more conservative approach and requires an audit in accordance with the EAO, and this approach is subsequently varied by VCAT to require an environmental assessment first, council must still carefully make a decision about whether to enforce the planning scheme EAO

[59] See Environment Protection Authority Victoria, *Policy Impact Assessment: State Environmental Protection Policy; Prevention and Management of Contamination of Land in Victoria* (EPA Publication 854) p 40.

[60] *Lancaster v Yarra CC* [2009] VCAT 1574 at [43].

[61] Department of Sustainability and Environment, n 26, p 3.

[62] See discussion of the potential common law liability for councils below.

requirements based on the information available to it about the potential risks associated with any potential contamination and the proposed use and development of the land.

Further uncertainty about the application of the EAO has been created by the recent VCAT decision in *Architype Australia Pty Ltd v Yarra CC* [2010] VCAT 170 (9 February 2010). The case concerned a challenge to permit conditions requiring an audit prior to the commencement of development. The permit allowed demolition and additions to an existing dwelling. The subject land was located in a Residential 1 Zone and affected by an EAO. The evidence was that the subject land had been in residential use for a long period of time but that there were some surrounding industrial land-uses.

The tribunal referred to its earlier decisions in *Norman & Tinney* and *Lancaster* but found that this case fell somewhere between the facts in those cases; ie the facts in this case were not as "benevolent" as *Norman & Tinney*, nor "raising contamination alarm bells as loudly" as the facts in *Lancaster*.[63]

The tribunal took the opportunity to reflect on the purpose of the EAO and raised the question whether the EAO only applied to building and works associated with "new" sensitive uses rather than existing sensitive uses. The tribunal referred to the following evidence in support of this position:

> Contrast this with the relevant guidance provided in the "Manual for the Victoria Planning Provisions". The "Practice Notes" section dealing with "Environmental Audit Overlay – Where should the Environmental Audit Overlay be used" (with my highlighting) states as follows.
>
> > Minister's Direction No. 1 requires that "In preparing an amendment that would have the effect of allowing (whether or not subject to the grant of a permit) potentially contaminated land to be used for a sensitive use, agriculture or public open space, a planning authority must satisfy itself that the environmental conditions of the land are or will be suitable for that use".
> >
> > The preparation of a new format scheme is an amendment for the purpose of the Direction and should be complied with. The Direction defines "sensitive use" and "potentially contaminated land" and requires that a planning authority either:
> > - Satisfy itself that the land is suitable for the proposed use.
> > - Impose specified requirements in the amendment that require environmental examination of the land before a sensitive use is commenced.
> >
> > The Environmental Audit Overlay is intended only as a tool that enables the second requirement above to be met; that is, to identify land where the requirements of Direction No. 1 are being deferred until the use is to commence rather than being met at the time of amendment.
> >
> > …
> >
> > For all new format planning schemes, the Direction may be considered to apply only to situations where the scheme allows **for the first time** potentially contaminated land to be used for a sensitive use, agriculture or public open space. The phrase "known to have been used" can be taken to mean past land use within the actual knowledge of the planning authority, either from a reasonable examination of the available records or because of advice provided by a land owner or other person. A planning authority should seek its own legal advice if there is doubt about how a particular situation should be addressed.
>
> This emphasis on the EAO applying where a new sensitive use is proposed is echoed in the statement at page 2 of the June 2005 Practice Note (my emphasis) that:
>
> > The Environmental Audit Overlay (AEP) *(sic)* is a mechanism provided in the Victoria Planning Provisions and planning schemes to ensure the requirement for an environmental audit under Direction No. 1 is met before the **commencement** of the sensitive use or any buildings and works **associated with that use**.[64] [emphasis in original]

The tribunal raised this matter as a legal question for further consideration about the interpretation of the EAO and sought further legal submissions from the parties. At the time of writing, submissions have been filed by the parties and a determination of the tribunal on this question is expected shortly.[65]

[63] *Architype Australia Pty Ltd v Yarra CC* [2010] VCAT 170 at [23].

[64] *Architype Australia Pty Ltd v Yarra CC* [2010] VCAT 170 at [28], [29].

[65] Personal communication with the legal representative for the responsible authority on 2 March 2010.

Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that a construction that would promote the purpose or object underlying the Act or subordinate instrument shall be preferred to a construction that does not promote that purpose or objective. Section 35(b) then goes on to specify certain extraneous documents that may be considered to determine the purpose or object. While the Manual for the Victoria Planning Provisions may be considered to determine this purpose or object, in the author's view it does not assist in interpreting cl 45.03 of the planning scheme.

The purpose of the clause is "to ensure that potentially contaminated land is suitable for a use which could be significantly adversely affected by any contamination". From a statutory interpretation perspective, the question arises whether the use of "or" in the sentence "Before a sensitive use…commences or before the construction or carrying out buildings and works in association with a sensitive use commences" [emphasis added] should be read disjunctively or conjunctively. In other words, should the commencement of a sensitive use be linked with the construction or carrying out of building and works in association with a sensitive use? Taking a purposive approach to interpretation, in the author's view, it is equally important that existing sensitive uses which may be potentially contaminated (eg by prior industrial land-uses or surrounding contaminating activities) are assessed prior to allowing building and works which may interact with the contamination, as it is for potentially contaminated land to be assessed before allowing a sensitive use to be established for the first time. Further, not only is it arguable that the "or" should be read disjunctively, but also that the references to sensitive use are not linked. That is, the clause does not read "Before a sensitive use…commences or before the construction or carrying out buildings and works in association with **that** sensitive use commences".

However, looking back at the history of the Direction, it is clear that the objective was to ensure that new sensitive uses were protected against the adverse affects of contamination from past activities. It may be that at the time the VPP new format planning schemes were introduced, the EAO was applied too broadly having regard to the definition of PCL in the Direction and the commentary in the Manual for the Victoria Planning Provisions referred to by the tribunal in this *Architype* decision. In the Direction, the definition of "potentially contaminated land" was limited to "land used or known to have been used for: a) industry, b) mining, or c) the storage of chemicals, gas, wastes or liquid fuel". This then would not include existing residential land unless the land had a known history of one of these uses. The fact the EAO was applied conservatively on a precinct basis which included some residential land is now suggested to be an incorrect application of the EAO.

However, in the author's opinion, from a policy perspective, whatever interpretation of the current EAO provisions prevails, the EAO should not be limited in this way. As recognised in the Practice Note, PCL can include contamination from surrounding land-uses.[66] Where residential land is located in an industrial area, there is a potential for contamination from surrounding land-uses. Depending on the nature and extent of buildings and works proposed, the potential for contamination could present a risk that should be assessed and managed in relation to those buildings and works.[67]

[66] Department of Sustainability and Environment, n 26, p 3.

[67] It is acknowledged that the identification of PCL should include off-site sources. However, if land is affected by an off-site source the responsibility and cost of managing an off-site source should not rest with the affected landowner, but rather the polluter in accordance with the "polluter pays principle" (see s 1F(2) of the *Environment Protection Act 1970* (Vic)). In practice, to use and develop the affected land for a sensitive use the owner will be required to address the contamination in accordance with the PCL regulatory framework by undertaking an environmental assessment or audit and remediating the contamination so that the land is suitable for that use. The owner may attempt to recover its losses from the polluter (if the polluter can be identified and is solvent) by a common law action in negligence or nuisance or possibly a contractual or trade practices claim against the vendor. Alternatively, the owner may notify the EPA and request the EPA take regulatory action against the polluter (eg issuing a clean-up notice under s 62A of the *Environment Protection Act 1970* (Vic)). However, if the polluter cannot be identified or is insolvent, the EPA may issue a clean-up notice against the owner and the owner would be left to attempt to recover against the polluter under s 62A(2).

In Victoria, planning decisions relating to land-use and development are often the trigger for dealing with such contamination. There is no duty to report contamination to the EPA of contamination which presents a risk of harm in Victoria, except where an auditor becomes aware of an environmental hazard in the course of undertaking an audit (s 53ZB(3) of the *Environment Protection Act 1970* (Vic)). In other States it is a requirement to notify the EPA of contamination or a significant risk of harm presented by contamination as soon as practicable after becoming aware (eg s 11 of the *Contaminated Sites Act 2003* (WA) and

The problem with the EAO is not that it applies to existing sensitive uses, but rather that it applies to "all building and works associated with a sensitive use (irrespective of how minor)".[68] Risk-based flexibility needs to be included in the EAO to allow certain works to proceed without an environmental audit and either require no environmental assessment at all (because the works will not affect or create any exposure to potential contamination), or a more limited form of environmental assessment and environmental management (because the potential risks can be managed without the significant expense of completing a full statutory environmental audit).

There are many other examples of scenarios, such as those in the *Norman & Tinney* and *Architype* cases that have not reached the tribunal, where the application of the requirements of the EAO is clearly onerous and excessive. Until the EAO is amended and further guidance is provided to councils, these scenarios are likely to continue to arise.[69]

THE SEPP

The SEPP (cll 13 and 14) essentially restates the requirements and obligations on planning authorities contained under the Direction and the PE Act when considering a request for and preparing a planning scheme amendment.[70] The SEPP, however, goes further than the Direction (which relates only to planning scheme amendments) and is specific about requirements for councils as responsible authorities to consider contamination in relation to planning permit applications to use and development land.[71]

In particular, the SEPP requires a responsible authority, in accordance with s 60(1)(a)(iii) of the PE Act, to consider any significant effects that the use or development may have on the environment and impose any necessary permit conditions related to the prevention and/or management of contamination of land.[72] In considering an application for a planning permit, the SEPP sets out the following general obligations on responsible authorities:

> In considering an application for a planning permit in relation to potentially contaminated land… responsible authorities:
>
> (a) should require the applicant to provide sufficient information on the potential for existing contamination to have adverse effects on the future land use, to enable a decision regarding the suitability of the site for the proposed use and development;
>
> (b) must consider any significant effects the environment, including any contamination of land, might have on the use and development, in accordance with…section 60(1)(a)(iii) of the *Planning and Environment Act 1987*;
>
> (c) should impose any conditions as it considers necessary to ensure any existing contamination identified in subclause (b) is managed such the site is suitable for the permitted use(s);
>
> (d) should have regard to guidelines or guidance documents prepared by the Authority or the Department of Infrastructure [then relevantly the Department of Sustainability at the time the Practice Note was issued, and now the Department of Planning and Community Development], in fulfilling any obligations under this clause.[73]

s 60 of the *Contaminated Land Management Act 1997* (NSW)). In theory, such a duty to report should enable the earlier identification and management of contamination which is moving off-site rather than awaiting the change of use or development of the neighbouring affected site.

[68] Department of Sustainability and Environment, n 26, p 7.

[69] The author is familiar with a number of examples of audits being required under the EAO for relatively minor works, eg renovations to add a pergola to the balcony of a seventh floor apartment. Other examples have been provided to the author by David Lam, site auditor and referred to in Lam's submission dated 12 February 2010 to the draft *Planning and Environment Amendment (General) Bill 2009*. Examples include: a flat above a milk bar undergoing renovation; a house built in the 1890s; a flat above a restaurant (a terrace house building from late 1800s or early 1900s) undergoing renovation to the upper floor roof; a house having a shed replaced; a house having a broken swing gate replaced by narrow roller-door type gate.

[70] *State Environment Protection Policy (Prevention and Management of Contamination of Land)*, cl 13, 14(2) and (3).

[71] *State Environment Protection Policy (Prevention and Management of Contamination of Land)*, cll 13, 14.

[72] *State Environment Protection Policy (Prevention and Management of Contamination of Land)*, cl 14(1).

[73] *State Environment Protection Policy (Prevention and Management of Contamination of Land)*, cl 14(2).

In meeting the general obligations set out above, the SEPP provides guidance on how a responsible authority should consider any significant effects contamination may have on a sensitive use. The SEPP provides that councils may do this by, where appropriate:

(a) requiring that a certificate of environmental audit be issued before any building or works associated with the sensitive use has commenced;

(b) requiring that:

(i) a statement of environmental audit indicating that the environmental conditions of the site are suitable for the sensitive use, be issued before any building and works associated with the sensitive use has commenced and either

(ii) the permit applicant satisfies the responsible authority that the statement of environmental audit (including any relevant conditions included in the statement) has been complied with before any building or works associated with the sensitive use commence; or

(iii) the permit applicant satisfies the responsible authority that the statement of environmental audit (including any relevant conditions included in the statement) will be complied with on completion of the permitted development.[74]

THE PRACTICE NOTE

The *General Practice Note – Potentially Contaminated Land* takes the general obligations and guidance in the SEPP further. It provides guidance to planning and responsible authorities on:

- how to identify if land is potentially contaminated;
- the appropriate level of assessment of contamination for a planning scheme amendment or planning permit application;
- the appropriate conditions on planning permits; and
- circumstances where the EAO should be applied or removed.

The Practice Note summarises the regulatory background on PCL in the PE Act, the Direction and the SEPP.[75] It provides guidance on what an environmental audit is and the difference between a certificate and statement of environmental audit. It provides practical guidance on how to identify potentially contaminated land and the land-uses and activities which might indicate potential contamination.[76] The most critical, and most often debated, part of the Practice Note is the guidance provided on what level of assessment should be required and at what stage of the planning scheme amendment or planning permit application process the level of assessment must be completed.

When is an environmental audit required?

Where land is potentially contaminated and a planning scheme amendment is prepared that would allow the land to be used for a sensitive use, the Direction applies and there is no choice but to require a statutory environmental audit, which leads to a certificate or statement of environmental audit confirming that that land is suitable for the proposed use.

However, what level of assessment is required if the planning scheme amendment would allow a non-sensitive use (eg retail, commercial or industrial)? If an EAO applies to the land, then it is clear that a certificate or statement of environmental audit is required before the use commences or buildings and works associated with that use commences, despite the flexibility VCAT has attempted to introduce in the *Norman & Tinney* and *Architype* decisions. However, if any EAO does not apply to the land, and it is potentially contaminated, what level of assessment should be required before the land can be used as a sensitive use or a non-sensitive use?

The Practice Note distinguishes two main forms of assessment:

- An environmental audit – a statutory environmental audit undertaken by an environmental auditor under the EP Act. The outcome is either a certificate or statement of environmental audit.

[74] *State Environment Protection Policy (Prevention and Management of Contamination of Land)*, cl 14(4).

[75] Department of Sustainability and Environment, n 26, pp 1-2.

[76] Department of Sustainability and Environment, n 26, pp 2-3.

- An environmental site assessment – a preliminary review of the site history (including current and previous uses and activities) by a suitably-qualified environmental professional.[77]

The Practice Note could also benefit from a fuller definition of environmental site assessment. An environmental site assessment will generally not be restricted to a "preliminary review of site history" (often called "Phase 1 investigations"), but will often include "Phase 2 investigations" involving some limited intrusive investigations including sampling of soil and groundwater to investigate, assess and characterise contamination affecting the site.

In deciding which form of assessment to require, the Practice Note provides councils with an assessment matrix (see Table 1) which indicates the appropriate level of assessment based on proposed land use and current or historical land uses or activities carried out on the site and the potential of those uses or activities for contamination.

TABLE 1 Assessment matrix

PROPOSED LAND-USE	POTENTIAL FOR CONTAMINATION		
	High	**Medium**	**Low**
Sensitive Uses			
Child care centre, pre-school or primary school	*A*	*B*	*C*
Dwellings, residential buildings, etc	*A*	*B*	*C*
Other Uses			
Open space	*B*	*C*	*C*
Agriculture	*B*	*C*	*C*
Retail or office	*B*	*C*	*C*
Industry or warehouse	*B*	*C*	*C*

Source: Department of Sustainability and Environment, *General Practice Note – Potentially Contaminated Land* (Victorian Government, June 2005) p 4, Table 2.

The references in the assessment matrix to "A", "B" and "C" relate to the following guide provided in the Practice Note:

A: Require an environmental audit as required by Ministerial Direction No. 1 or the Environmental Audit Overlay when a planning scheme amendment or planning permit application would allow a sensitive use to establish on potentially contaminated land.
An environmental audit is also strongly recommended by the SEPP where a planning permit application would allow a sensitive use to be established on land with "high potential" for contamination.

B: Require a site assessment from a suitably qualified environmental professional if insufficient information is available to determine if an audit is appropriate. If advised that an audit is not required, then default to C.

C: General duty under section 12(2)(b) and Section 60(1)(a)(iii) of the *Planning and Environment Act 1987*.[78]

The guidance provided in "A" is clear enough. It reflects the position under the Direction, EAO and the SEPP – in relation to a planning scheme amendment or planning permit application to use PCL for a sensitive use an environmental audit is required. The guidance provided in "B", however, is less clear and deals with a new category of contaminating activity and land-use. The Category "B" deals with two scenarios: first, activities which have a medium potential for contamination where land is to

[77] Department of Sustainability and Environment, n 26, p 4.

[78] Department of Sustainability and Environment, n 26, p 4, Table 2.

be used for a sensitive use; and secondly, activities which have a high potential for contamination where land is to be used for other uses including open space, agriculture, retail or offices, industry or warehouses.

In these scenarios, the Practice Note recommends that the planning or responsible authority require an environmental site assessment "if insufficient information is available to determine if an audit is appropriate". So if there is "sufficient information", council should require an audit. However, no guidance is provided as to what a council should consider sufficient information; an example could be that the available information (such as assisting environmental reports) showed some significant contamination that might have an impact on the proposed use and development. The guidance for category "B" then goes on to state "if advised that an audit is not required, default to C". So clearly this leaves open the possibility that an environmental site assessment may assess the level of contamination in relation to the proposed use and development and then recommend that either an environmental audit is or is not necessary.

If advised that an audit is not required, then council has enough information to exercise its statutory duties under either ss 12(2)(b) or 60(1)(a)(iii) of the PE Act. However, if advised that an audit is required, to properly exercise its statutory duties, council must require an audit. This needs to be addressed prior to determining the application in the further information requests to the permit applicant, or council needs to reserve its rights in a permit condition to require an environmental audit after completion of an environmental site assessment.

Councils need to play an active role in making such decisions and determining whether they have sufficient information to require an audit or not. Councils that do not obtain evidence to justify the requirement for an audit and actively defend that position on review will find that VCAT will be likely to favour the position supported by the evidence. If a council fails to presents its own submissions and evidence in support of the requirement for an audit (or other level of environmental assessment), and does not test the evidence of the proponent through cross-examination, VCAT will be unlikely to support the council's position. This has been commented upon in a number of VCAT decisions.[79]

For a planning scheme amendment, where PCL is to be used and developed for a sensitive use, an environmental audit is always required in accordance with the Direction, unless the Minister has granted an exemption from its application.[80] An environmental audit can also be required by a planning authority for a proposal to redevelop PCL for a use other than a sensitive use (eg retail premises or office use), if the planning authority considers it appropriate.[81]

For a planning permit application, where PCL is to be used and developed for a sensitive use and if an EAO applies to the subject land, in accordance with cl 43.01 of the Planning Scheme an environmental audit should always be undertaken, despite the flexibility introduced by the VCAT decisions in the *Norman & Tinney* and *Architype* cases. However, where an EAO does not apply, even in the scenario where PCL is to be used and developed for a sensitive use, the Practice Note states that an audit may not be required if:

> the proponent can demonstrate to the satisfaction of the responsible authority that the site has never been used for a potentially contaminating activity, or that other strategies or programs are in place to effectively manage any contamination.[82]

[79] See, eg *Ninth Grenjo Pty Ltd v Monash CC* [2004] VCAT 844/2118; *Waverley Holdings Pty Ltd v Monash City Council* [2004] VCAT 1328; *Heavenly Queen Temple Society v Maribyrnong City Council (Red Dot)* [2005] VCAT 875 – in this decision, VCAT made particular note that council put forward no alternative evidence and failed to test the permit applicant's evidence "through informed and proactive cross-examination" (at [48]); *Oxford Street Oakleigh Pty Ltd v Monash CC* [2009] VCAT 112.

[80] The Direction provides that an exemption from the Direction may be appropriate where: potentially contaminated land is already used for a sensitive use, agriculture or open space; prior industry use of the land was benign and unlikely to result in any contamination; if there is a regional strategy to manage the contamination (eg former gold mining activity). Department of Sustainability and Environment, n 26, p 5.

[81] Department of Sustainability and Environment, n 26, p 5.

[82] Department of Sustainability and Environment, n 26, p 5.

There are a number of VCAT decisions which have determined that an environmental audit is not required where a proponent has a strategy or program in place to effectively manage the contamination (eg an environmental management plan). For example, *Bird De la Coeur Architects v Yarra CC* [2003] VCAT 1720 concerned land at Brunswick Place, Fitzroy not affected by an EAO. A permit condition was imposed requiring production of a letter from an auditor on whether the site was suitable for residential development or whether any remediation was required. The permit applicant argued that there was no evidence the land was contaminated and that, on the contrary, aerial photos showed the land had been used for housing and an unsealed car park and there was no evidence that the car park use may have caused contamination. The tribunal was satisfied that a construction management plan, which was required to address contamination and disposal of contaminated matter, was sufficient to address PCL. The tribunal stated at [11]-[12]:

> It is not inherently unreasonable to require an environmental audit in relation to land when there is no direct evidence that it is contaminated. But environmental audits are an expensive process, and the widespread use of environmental audits has the potential to add substantially to the cost of housing an important social consideration [sic].
>
> As Ms Dowsey observed, most urban environments are contaminated to some degree, if only with lead from vehicle emissions. The legislative framework does not appear to intend the application of environmental audits on a universal basis in urban environments. In this context I think where the history of land use is known, there needs to be some evidence that a historic land use can result in dangerous levels of contamination, where the history of land use is unknown, an audit may be necessary and the decision would need to be based on the history of land use in the area generally.

Similar comments were made by the tribunal in *E Caon and R Denney v Colac Otway Shire Council* [2005] VCAT 1908. A permit had been granted to use land for accommodation units on the Great Ocean Road at Glenaire. In that case, an environmental assessment undertaken on a neighbouring site identified that the subject site contained an underground storage tank. The site was not affected by an EAO. The objector argued that a statutory audit should be required. The tribunal did not agree, stating at [13]-[14]:

> To require the applicant for permit to undertake a detailed environmental audit prior to establishing where the location of the underground tank actually is and its likely impact, appears to me a little like using a sledge hammer to kill an ant…I find it appropriate to first require a preliminary site contamination assessment to be undertaken to determine whether the tank is within an area that may result in a high potential for contamination within land proposed to be used for a sensitive use…Clearly, if the underground tank is within such an area a detailed environmental audit will be required.

In *Heavenly Queen Temple Society v Maribyrnong City Council (Red Dot)* [2005] VCAT 875, a permit had been granted for use of land in Footscray near the Maribyrnong River for a place of worship. The subject land was not affected by an EAO. The history of the local area indicated the site had fill placed on it sourced from local tanneries in the 1940s and 1950s and was possibly once the location of a glue factory.

An environmental assessment report had been prepared by the permit applicant, which identified contamination and recommended a capping strategy (a sealed area or 300 mm of clean fill) with an environmental management plan for the site. An earlier environmental assessment report had been undertaken for council which identified contamination, but council had not undertaken any remediation for construction of an adjacent bike path. Council received a letter from the EPA, which stated that the permit applicant's assessment was not adequate to make a determination about whether the site was suitable for its proposed use, and stated that it was appropriate for council to determine whether an environmental audit was required. However, the EPA provided no conclusive advice. Council sought to require a statutory environmental audit in the permit conditions. The tribunal deleted this condition and replaced it with conditions implementing the capping strategy. The tribunal stated at [38]-[39]:

> While (following the "precautionary principle") I accept that all stakeholders need to be proactive in dealing with contamination issues, equally it is the case that there are different levels of environmental risks and different types of new uses, with the practical result that each situation needs to be assessed on its own merit in terms of an appropriate way of managing any contamination and the associated risks.

> What we need to avoid in this process is Councils being unrealistically conservative in requiring a full statutory audit in situations where there is no objective evidence to justify such an expensive and time-consuming process…Councils need to meaningfully assess and grapple with these contamination issues on a "case-by-case" basis, and to resist the temptation to use a simplistic approach in deciding when a full statutory audit is required.

Where the EAO does not apply to the subject land and the use proposed is not a sensitive use, VCAT will be reluctant to require a statutory audit if an alternative management strategy is available, unless the council provides evidence that such a strategy is not appropriate. Councils need to consider whether it should obtain a peer review of management strategy (at the cost of the permit applicant) or rely on the applicant's expert evidence. In the *Heavenly Queen* decision, the tribunal emphasised the need for a case-by-case assessment of contamination risks. VCAT made particular note that in this case council put forward no alternative evidence and failed to test permit applicant's evidence "through informed and proactive cross-examination".[83]

The scenarios in which PCL must be considered and when an environmental audit is required have changed over time with the development of the PCL regulatory framework (see Table 2 below).

TABLE 2 When is an environmental audit required?

	Direction/EAO (1989)	**SEPP (2002)**	**Practice Note (2005)**
Planning Scheme Amendment	PCL# > sensitive use*	PCL# > sensitive use* SEPP, cl 14(3)	PCL# > sensitive use* PCL# > other uses** If there is sufficient information or if recommended by an environmental site assessment. *But* not required if the proponent demonstrates that the site has never been used for a potentially contaminating activity *or* that other strategies are in place to effectively manage any contamination.
Planning Permit Application	PCL# > sensitive use*	PCL# > sensitive use* SEPP, cl 14(4)	PCL# > sensitive use* PCL# > other uses** If sufficient information or recommended by an environmental site assessment. *But* not required if proponent demonstrates that the site has never been used for a potentially contaminating activity *or* that other strategies are in place to effectively manage any contamination.

PCL (potentially contaminated land) is defined in the Direction and the SEPP to mean land-use or land known to have been used for: a) industry, b) mining, or c) the storage of chemicals, gas, wastes or liquid fuel (if not ancillary to another use of the land. The Practice Note takes this definition further to list 58 activities with high potential for contamination and then other activities with medium potential for contamination. Importantly, the Practice Note sets out the guidance for identifying potentially contaminated land, including identifying "any potential contamination from sounding land uses (for example, an adjacent service station known to be causing off-site contamination)".[84]

* "sensitive use" is defined as residential use, childcare centre, a pre-school or a primary school. The Direction goes further to describe residential use to include "dwellings, residential buildings". Careful consideration should be given to the types of residential use. A good guide are the uses in the "Accommodation" nesting diagram of cl 75.01 of the planning scheme, including camping and caravan park, corrective institution, dependent person's unit, dwelling (including bed and breakfast and caretaker's residence), group accommodation, host farm, residential building (including backpackers' lodge, boarding house, hostel, nurses' home, residential aged care facility – nursing home, residential college, residential hotel – motel, residential village, retirement village).

[83] *Heavenly Queen Temple Society v Maribyrnong City Council (Red Dot)* [2005] VCAT 875 at [48].

[84] Department of Sustainability and Environment, n 26, p 3.

** "other uses" is defined in the Direction to include public open space and agriculture. The Practice Note includes retail or office, industry or warehouse.

It is clear from the outline above that the guidance on PCL has developed over time. Since 1989 there has been a requirement in the PE Act for planning and responsible authorities to consider any significant effects that the environment (including contamination) might have on the use and development allowed under a planning scheme amendment or planning permit.[85] However, the guidance in relation to how planning and responsible authorities should exercise this discretion, what is potentially contaminated land and when an environmental audit is required, has evolved. While the definition of sensitive use has been relatively consistent, the meaning of potentially contaminated land has expanded considerably, and now includes consideration of surrounding land-uses from which contamination may migrate. While the requirement to consider surrounding contaminating activities that may impact on the subject land was arguably within the scope of consideration under ss 12(2)(b) and 60(1)(e) of the PE Act, it was not until the Practice Note that this was made explicit.

Timing of environmental audit or environmental site assessment

The Practice Note also states that an environmental assessment or environmental audit should be required as early as possible in the planning process. In particular, the Practice Note states:

> There may be other circumstances where the land is known to be contaminated and it would be appropriate for the level of contamination to be fully assessed as part of the application process.
>
> Generally an environmental audit should be provided as early as possible in the planning process. This may not always be possible or reasonable and requiring an environmental audit as a condition of the permit may be acceptable if the responsible authority is satisfied that the level of contamination will not prevent the use of the site.[86]

The questions for responsible authorities in applying this guidance are: when is it important to obtain an environmental audit or assessment early in the permit application process before the decision to grant or refuse the permit is made? What level of contamination may affect the decision whether a permit should be granted at all for the proposed use and development? When is it not "possible or reasonable" to require an audit or assessment prior to deciding on a permit and the requirement for this be deferred to a permit condition?

These questions were considered in *Domsal Pty Ltd v Moreland CC* [2007] VCAT 968. This case involved an application for a review of council's request for further information in the permit application process, which required an environmental site assessment confirming the site was suitable for its intended use and payment for the independent review of the site assessment. The application was to use land for mixed-use development including dwellings and offices. The land had a history of industrial uses and underground storage tanks. The land was also affected by an EAO. An earlier permit had been granted (but had expired) with no requirement for this information as part of the permit application process. There was no evidence that contamination could affect land-use such that council would not consider granting a permit.

The tribunal held that where an EAO is in place, facts (and evidence) peculiar to the development or the contamination issues will be required to justify requiring an environmental site assessment as part of a permit application, prior to making a decision incorporating a requirement for a statement or certificate of environmental audit before commencement of use or works.

Similarly, *Junction One Pty Ltd v Darebin CC* [2009] VCAT 277 concerned an application for the review of council's request for further information in the permit application process, which required an environmental site assessment confirming the site was suitable for intended use. The subject land was in a Business 1 Zone and was not affected by an EAO. The land had previously been used for auto accessories and motor repairs and was proposed to be redeveloped as a multi-dwelling development. A permit had been previously issued without the need for early investigation of contamination.

[85] See n 31.

[86] Department of Sustainability and Environment, n 26, p 5.

The tribunal stated at [11]:

> Given the state and context of the subject site, the knowledge of the past history and the fact that there has been a previous permit issued that allows for the uses contemplated without the need for such early investigation leads me to conclude that in this case it is unnecessary to require such further information at this stage of the permit process. This does not mean to say that the imposition of a condition [requiring a certificate or statement of environmental audit] such as that found in the existing permit is not inappropriate. It is considered that in circumstances such as this that the imposition of a permit condition is the appropriate way to proceed.

The Practice Note also provides guidance to responsible authorities in relation to addressing ongoing conditions of management.[87] A statement of environmental audit will usually contain conditions that must be implemented for the site to be suitable for the proposed use. These include:

- use-related conditions – restricting the suitable uses to, for example, open space, commercial and industrial use; and,
- works-related conditions – requiring, for example, restrictions on the type of works allowed, prohibiting excavation to certain depths, maintenance of a cap, ongoing groundwater monitoring, compliance with an environmental management plan and obtaining signoff from a site auditor.

The Practice Note states that a planning or responsible authority must consider any conditions in a statement and:

- include provisions in a planning scheme amendment or conditions in a planning permit that reflect the requirements of the conditions of the Statement
- require the applicant to demonstrate that the conditions included in the Statement have been or will be met before the use commences
- liaise with other agencies of appropriate jurisdiction where the nature of the conditions means that they are more properly considered by that agency (for example, liaise with the EPA about conditions requiring ongoing management of groundwater).[88]

The Practice Note states that conditions of an ongoing nature (particularly those requiring ongoing maintenance and monitoring, for example of a cap or groundwater monitoring) are appropriate to be included in an agreement under s 173 of the PE Act (s 173 agreement). Such conditions require careful consideration where land is proposed to be subdivided for high-density development or apartments. Consideration needs to be given to who will be responsible for the ongoing management conditions and what funds will be available for this work. An owners corporation formed under the *Owners Corporation Act 2006* (Vic) is often used. However, consideration should also be given to securing existing or future management or potential future remediation by way of an environmental assurance from the developer (such as a bank guarantee, environmental insurance, or funds to be held on trust for this purpose).

While a number of VCAT decisions have found that the provisions of the EAO do not need to be repeated in a permit condition and have, in some cases, deleted those conditions, this ignores the need to consider the implementation of statement conditions should an environmental audit result in a statement rather than a certificate.[89] As set out in the Practice Note, a permit condition should provide for a mechanism for requiring compliance with the statement conditions in the permit condition itself or requiring the applicant to enter into a s 173 agreement.[90]

[87] Department of Sustainability and Environment, n 26, p 6.

[88] Department of Sustainability and Environment, n 26, p 6.

[89] See, eg *Refshauge v Yarra CC* [2002] VCAT 1230 (4 October 2002); *EQ Property v Moreland CC* [2002] VCAT 1245 (9 October 2002); *Melbourne CC v Min for Planning and Baulderstone Hornibrook PL* [2003] VCAT 516 (17 April 2003); *Aussie Invest Corporation Pty Ltd v Hobsons Bay City Council* [2004] VCAT 93 (19 January 2004); *Yang Kuan Pty Ltd v Boroondara CC* [2008] VCAT 2524 (9 December 2008).

[90] Department of Sustainability and Environment, n 26, p 7.

PLANNING DECISIONS ON PCL – RISK AND LIABILITY

In addition to potential challenges to councils' planning decisions in VCAT, when interpreting and applying the PCL regulatory framework councils need to consider potential common law liability. Consequently, it is not surprising that councils have generally taken quite a conservative approach to interpreting and applying this framework.

As noted above, the Direction was first introduced in 1989 as a response to residential subdivision of a former lead-acid battery factory in Ardeer which resulted at the time in intense scrutiny of council planning decisions relating to contaminated land. More contemporary examples of council planning decisions being the subject of intense scrutiny and litigation include the City of Moreland's involvement in the recent Supreme Court decision in *Premier Building & Consulting v Spotless Group (No 12)* (2007) 64 ACSR 114 relating to the development of contaminated land in Barkly Street, Brunswick, and the involvement of the City of Casey and the City of Frankston in the landfill gas issues associated with the Brookland Greens development in Cranbourne.[91]

The common law recognises that a public authority may be subject, in appropriate circumstances, to a duty of care in the exercise of its statutory powers.[92] The courts have, however, recognised that special problems exist in applying the law of negligence to statutory authorities. These arise from the fact that public authorities are entrusted by statute with functions to be performed in the public interest or for public purposes. In general, limited resources will be available for the execution of these functions and often the resources will be insufficient to cover completely all statutory responsibility, in which event policy choices as to their application will need to be made.

Accordingly, the courts, and subsequently the legislatures, have recognised the need for some accommodation to be made in adjusting the application and concepts of negligence law to the conduct of public authorities.[93] This accommodation was reflected in the "tort law reform" measures, which were enacted in broadly common form in each Australian jurisdiction.[94] However, before that, some protection was provided to councils when making planning decisions on contaminated land, as a consequence of the decision of the Full Federal Court in *Armidale Council v Alec Finlayson* (1999) 104 LGERA 9. At the time, the decision caused concerns among local council managers and councillors as to the extent of their liability.[95] This case, the facts of which are discussed below, resulted in amendment to Pt 7A of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), which specifically addresses the potential liability of councils making decisions in relation to contaminated land.[96] To obtain the benefit of the exemption from liability, council must exercise the relevant planning functions in good faith by acting in accordance with the *Planning Guidelines for Contaminated Land*.[97] Many councils have adopted formal policies in accordance with these Guidelines relevant to the contaminated land issues in their municipalities.[98]

The "tort law reform" measures enacted provisions in broadly common form, which sets out principles that are to be applied in "determining whether a public or other authority has a duty of care or has breached a duty of care". The principles are:

(a) the functions required to be exercised by the authority are limited by financial and other resources that are reasonably available to the authority for the purpose of exercising those functions;
(b) the general allocation of those resources by the authority is not open to challenge;

[91] See Ombudsman, n 19.

[92] Balkin RP and Davis JLR, *Law of Torts* (4th ed, LexisNexis Butterworths, 2009) p 217.

[93] Balkin and Davis, n 92, p 218.

[94] See generally, *Review of the Law of Negligence* (Final Report, Australian Government, September 2002).

[95] Desmond, n 6a at 232.

[96] *Environmental Planning and Assessment Act 1979* (NSW), s 145B.

[97] Department of Urban Affairs and Planning and Environment Protection Authority, *Managing Land Contamination, Planning Guidelines – SEPP 55 – Remediation of Land* (Victorian Government, 1998).

[98] See, eg Blacktown City Council, *Blacktown Development Control Plan 2006 Part Q Contaminated Land Guidelines* (as of 2 July 2008).

(c) the functions required to be exercised are to be determined by reference to a broad range of its activities (and not merely by reference to the matter to which the proceedings relate); and
(d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its function in the matter to which the proceedings relate.[99]

The last point (d) underlines the importance of councils having clear guidance (eg through the Practice Note) in relation to the exercise of their statutory functions in this area.

It is difficult to define a single overall approach in the principal High Court authorities in this area.[100] Each decision and each justice has further developed, or questioned, the formulation of requirements for a duty of care for statutory authorities, including concepts of proximity and vulnerability and the need to look at the totality of the relationship between the statutory authority and the plaintiff.[101] The principles outlined by McHugh J in *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [93] provides a useful outline of the considerations relevant to the existence of a duty of care in the exercise of a statutory power:

1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm. If no, then there is no duty.
3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If so, then there is no duty.
4. Did the defendant know, or ought the defendant have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If not, then there is not duty.
5. Would such a duty impose liability with respect to the defendant's exercise of "core-policy making" or "quasi-legislative" functions? If yes, then there is no duty.
6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of the principles in that field deny the existence of a duty)? If yes, then there is no duty.

Finlayson v Armidale City Council

The decision of the Federal Court in *Alec Finlayson v Armidale City Council* (1994) 51 FCR 378; 84 LGERA 225; 123 ALR 155 and the Full Federal Court in *Armidale City Council v Alec Finlayson* (1999) 104 LGERA 9, considered the negligence of a council making a planning decision about the use and development of contaminated land.

Finlayson was a builder in Armidale. The company purchased land in 1985 and constructed a number of houses for sale. During the construction works undertaken in 1990, contamination was discovered and the company brought proceedings against the council. The company alleged council had been negligent in rezoning the land for residential use and subsequently approving a subdivision for the construction of houses, without dealing with the contamination.

The land in question had been used since 1968 as a site for a timber treatment industry, involving substantial quantities of creosote and copper chrome arsenate. During this period, and as a result of these operations (including the systematic dumping of chemical waste on the land and the escape of

[99] *Civil Law (Wrongs) Act 2002* (ACT), s 110; *Civil Liability Act 2002* (NSW), s 42; *Civil Liability Act 2003* (Qld), s 35; *Civil Liability Act 2002* (Tas), s 38; *Wrongs Act 1958* (Vic), s 83; *Civil Liability Act 2002* (WA), s 5W.

[100] For example, see *Sutherland Shire Council v Heyman* (1985) 157 CLR 424; 56 LGRA 120; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; 96 LGERA 330; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; 114 LGERA 235; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; 125 LGERA 1; *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22; 153 LGERA 55; and *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

[101] Balkin and Davis, n 92, p 227.

chemicals on the land), the land became significantly contaminated. During the period of industrial use, numerous complaints had been received by council regarding spills and escape to adjoining waterways. A number of visits to the site were made by council officers who ordered various pollution control measures to be taken, although it appears they were never enforced. There was evidence that certain council officers were aware of the contamination. Finlayson suffered loss and damage as a consequence of the cancellation of its building contract (the residential development was suspended) and being unable to use the land it purchased without significant remediation.

At first instance, the Federal Court held council owed Finlayson a relevant duty of care by virtue of council's knowledge, through its officers, of the potential danger of contamination at the site.[102] Under s 90(1)(g) the EPA Act council was required to take into consideration whether the land was unsuitable for that development by reason of its being, or being likely to be, subject to any risk. Other relevant factors giving rise to council's liability were: the requirements of professional practice on council's town planner; Finlayson's reasonable reliance upon council's approval as indicating that the land was appropriate to be built upon for residential purposes; and council's active role in the rezoning of the land to residential.[103]

Council appealed to the Full Federal Court, challenging the trial judge's finding that council owed Finlayson a duty of care.[104] The Full Court upheld Finlayson's claim in negligence, and found that at the time of the rezoning and at the time of approval of the first development application, council, through its officers, was well aware of the contamination of the land. These officers simply failed to apply their minds to the question of whether the contamination ought to be investigated in order to ascertain its extent and to determine whether it required remediation. If it had been, some action would and should certainly have followed given the known history of the site. This obligation arises from the ordinary proper practice of responsible council officers but also from the terms of s 90(1)(g) of the EPA Act. Damages were eventually assessed in the sum of approximately $1.5 million.[105]

Premier v Spotless

Another decided case involving a planning decision relating to contaminated land was the recent Victorian Supreme Court decision in *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12)* (2007) 64 ACSR 114. Moreland City Council was initially a party to the *Premier v Spotless* litigation but ultimately settled on a confidential basis.[106] In that case, Premier purchased an industrial site at Barkly Street, Brunswick. The land was rezoned in 2000 to mixed use with an EAO. Premier therefore had a statutory obligation under cl 45.03 of the Moreland Planning Scheme to obtain a certificate or statement of environmental audit before building and works commenced associated with a sensitive use. Premier was granted a planning permit for residential use and development. The permit included a condition repeating the EAO requirements, requiring a certificate or statement of environmental audit prior to the commencement of any works, use or development. Premier proceeded to demolish existing buildings, construct an underground car park and 49 residential units, most of which had been pre-sold. No certificate or statement had then been issued. Council refused an occupancy permit and statement of compliance for the subdivision of the apartments until a certificate or statement was obtained. Site investigations revealed the land was contaminated with chemicals including white spirit, PCE and TCE associated with a dry-cleaning business operated by Spotless companies in the past. The EPA issued a clean-up notice under the EP Act. As a consequence Premier suffered considerable loss and damage.

Council had initially required a certificate or statement of environmental audit as part of the development application. Instead Premier only provided an environmental assessment. The permit was issued with a condition requiring a certificate or statement prior to any works commencing and

[102] *Alec Finlayson v Armidale Council* (1994) 51 FCR 378; 84 LGERA 225; 123 ALR 155.

[103] *Alec Finlayson v Armidale Council* (1994) 51 FCR 378; 84 LGERA 225; 123 ALR 155 at 189 (ALR).

[104] *Armidale Council v Alec Finlayson* (1999) 104 LGERA 9.

[105] *Armidale Council v Alec Finlayson* (1999) 104 LGERA 9 at [33].

[106] *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12)* (2007) 64 ACSR 114 at [26].

requiring compliance with any statement conditions (including a s 173 agreement to implement those conditions).[107] Building permits for demolition, construction of the underground car park and the apartments were issued by private building surveyors, apparently unaware of the requirement for the audit. Following the construction and sale of 49 apartments, council threatened to bring enforcement proceedings against Premier for failure to comply with the permit condition relating to the requirement for the audit. It was only then that Premier appointed a site auditor to undertake the audit, stating that it had been under the impression it had already complied with the condition by providing council with an environmental assessment.[108] Although the basis of the claim against council is not discussed in the decision and the settlement terms were confidential, if council can be criticised at all it is for not bringing enforcement proceedings earlier at the time the works first commenced on the site.

Brookland Greens Estate, Cranbourne

Following the identification of methane gas at dangerous levels in houses in the Brookland Greens Estate, reportedly leaking from the adjacent Stevensons Road landfill, emergency management arrangements were put in place by the EPA and residents were evacuated. Given the seriousness of the issue and its impact, the Victorian Ombudsman initiated an own-motion investigation in accordance with s 14(1) of the *Ombudsman Act 1973* (Vic) into the circumstances surrounding the presence of the methane gas in the estate. The Ombudsman's investigation was concerned not only with the declaration of the emergency and the current state of the landfill, but also with: the administrative process that allowed the landfill to be created in the first place; the oversight of the landfill during its operation life by the City of Casey, the Frankston City Council and the EPA; and the process that allowed the housing estate to be built adjacent to the landfill. The Ombudsman published its report on the results of its investigation in October 2009.[109] The circumstances surrounding this incident are currently the subject of class action litigation brought by the affected residents.

Much of the Ombudsman's report focuses on the failures of the EPA and councils to properly perform statutory duties in relation to the approval of the landfill (including the adequacy of the design and landfill liner) and the management and monitoring of the landfill operation and its closure. The Ombudsman was critical of the EPA in relation to: the skills/resources of the EPA at the time of approval and its willingness to compromise environmental standards (namely the requirement for a landfill liner); the EPA's failure to defend and properly resource its position at VCAT (following loss of an earlier AAT hearing, *City of Camberwell v EPA* 1991 AAT); the EPA's failure to properly enforce works approval conditions (eg the works approval issued was valid for three years before works commenced even though it was only intended to remain current for 12 months; in that time there was a consensus in the industry relating to the use of landfill liners to manage leach and landfill gas); and delay in issuing and inadequate monitoring of a pollution abatement notice.[110]

In relation to council, the Ombudsman was critical of: council's approach of attempting to lower environmental standards because of cost considerations (in 1992 the landfill liner was estimated to cost an additional $500,000; in 2008-2009 council had committed $21 million to mitigating risks associated with the landfill gas which ultimately is expected to cost more than $100 million);[111] poorly written contracts with lack of well-defined responsibilities, which did not hold relevant parties accountable, and did not match the regulatory requirements of the EPA; performance measures and consequences which were unclear; poor contract management, inadequate contract supervision and overreliance on expertise of the contractors; and poor record keeping/knowledge management and lack of records of design and features of the landfill and its operation.[112]

[107] *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12)* (2007) 64 ACSR 114 at [291].

[108] *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No 12)* (2007) 64 ACSR 114 at [313].

[109] Ombudsman, n 19, p 8.

[110] Ombudsman, n 19, pp 125-157.

[111] Ombudsman, n 19, p 27 at [133].

[112] Ombudsman, n 19, pp 36-122.

While there is much to learn from this incident in relation to the design, approval, management and regulation of landfills, what is interesting for this article is the process by which the land adjacent to the landfill came to be rezoned for residential use and a permit granted to subdivide the land and construct residential dwellings. The Ombudsman's report, perhaps surprisingly given what we now know in hindsight, makes no mention of the PCL regulatory framework. Further, from reading the report, it was not considered at the planning scheme amendment stage or permit application stage or by VCAT in its consideration of the planning permit application on appeal.[113] However, unlike the *Finlayson case* and the *Premier case*, the land which was the subject of the residential development at the Brookland Greens Estate was not itself potentially contaminated land. Instead, it was adjacent to a landfill that was leaking methane gas.

As noted above, the guidance in relation to how planning and responsible authorities should exercise their discretion for planning decisions concerning PCL, what is potentially contaminated land and when an environmental audit is required, has evolved. While the definition of "sensitive use" has been relatively consistent, the meaning of "potentially contaminated land" has expanded considerably, to now include consideration of surrounding land-uses from which contamination may migrate. The requirement to consider surrounding contaminating activities that may impact on the subject land was arguably within the scope of consideration under ss 12(2)(b) and 60(1)(e) of the PE Act, which have been part of the Act since 1989. However, it was not until the Practice Note published in 2005 that this was made explicit.

This may be the reason why legal obligations relating to PCL did not appear to figure prominently in the planning decisions made in relation to the Brookland Greens Estate in Cranbourne (or at least in the Ombudsman's report of his investigation into these planning decisions). Had the potential for contamination (including landfill gas) on the neighbouring landfill site been considered (landfill sites are listed as having a high potential for contamination in the Practice Note) and an environmental assessment or even environmental audit required at the stage of the planning scheme amendment to rezone the land for residential use and the permit application stage to allow subdivision and residential use and development, the outcome may have been different. The planning scheme amendment (Amendment C6 to the Casey Panning Scheme) to rezone the land to residential was prepared, considered by a Planning Panel and decided in the period 1999-2000. The planning permit application for Stage 10 of the estate (adjacent to the landfill site and within the buffer area) was lodged with council, refused and subject to VCAT review between 2002 and 2004. The permit was granted by VCAT in May 2004.[114]

All the critical planning decisions on this site were made, therefore, without the benefit of the Practice Note. The argument at the time (during the panel hearing for the planning scheme amendment, when council refused the permit application and at the VCAT hearing) appears from the Ombudsman's report to have been mainly concerned with an appropriate buffer largely for odour and amenity concerns.[115] This involved interpretation of EPA Publication AQ2/86 *Recommended Buffer Distances for Industrial Residual Air Emissions* and the *State Environment Protection Policy (Siting and Management of Landfills Receiving Municipal Waste)* (Landfill SEPP) (which required a buffer of 200 m) and the later EPA publication *Best Practice Environmental Management – Siting, Design, Operation and Rehabilitation of Landfills* (which recommended a buffer of 500 m) and where the buffer should be measured from (ie from the "active tipping face" or the "tipping area" as defined in the Landfill SEPP).[116]

CONCLUDING REMARKS

Planning decisions involving PCL are high risk for a number of reasons. If PCL is allowed to be used and developed (whether for a sensitive or non-sensitive use) without contamination being properly

[113] Ombudsman, n 19, pp 160-206.

[114] Ombudsman, n 19, p 160ff. See, in particular, Ch 4 – "Planning decisions affecting the site".

[115] Ombudsman, n 19, p 160ff. See, in particular, Ch 4 – "Planning decisions affecting the site".

[116] Ombudsman, n 19, pp 163-194.

managed, then there is a risk of injury, property or financial damage to individuals or businesses using or developing that land. If a person is injured or suffers loss and damage as a consequence of council's planning decision, council may be subject to a civil claim in negligence leading to expensive and time-consuming litigation. Making a wrong decision in relation to PCL can also be a potential political and reputation issue, attracting adverse community and media attention.

There are a number of actions councils can take to improve decision-making in respect of PCL and to reduce the risk of legal liability. The *Policy Impact Assessment* prepared for the SEPP in June 2002 summarised the steps councils should take to comply with their statutory obligations as follows:

> Consistent with their statutory powers, duties and functions, planning and responsible authorities should:
> - demonstrate due diligence and exercise duty of care with respect to the land environment in all planning decision and actions through good land use planning that recognises the potential for land contamination to adversely affect some land uses;
> - develop procedures to ensure that decisions made have considered the effects of land contamination;
> - help prevent, mitigate and manage contamination through the use of conditions on permits;
> - ensure strategic plans and planning schemes properly address land contamination issues; and
> - provide ongoing education and training to maintain and enhance the competence of its own staff to recognise and deal appropriately with land contamination.[117]

In addition to following that guidance, councils should consider taking the following practical steps to improve decision-making on PCL and reduce the risk of legal liability:

- Given the potentially high risk of planning decisions on PCL, councils should consider implementing a peer review process within the council's planning department in relation to making such decisions (eg a senior planner reviewing a junior planner's decision on PCL). Where council is uncertain about the legal requirements relating to PCL, council should seek legal advice.
- Councils need to monitor training and awareness on PCL issues throughout the council (in all departments including, for example, the planning, risk, property, works and maintenance departments).
- Councils need to keep accurate and accessible records of information, data and documents relating to PCL and any known contaminated land within the municipality, including properties on the EPA Priority Site Register,[118] copies of environmental reports, certificates and statements of environmental audit relating to particular sites and any agreements under s 173 of the PE Act (s 173 agreements) which address PCL (eg in relation to implementation of statement conditions relating to ongoing monitoring). Where possible, this information should be linked with council's Geographic Information System.[119]

[117] Environment Protection Authority Victoria, n 59, pp 40-41.

[118] "Priority sites" are sites for which the EPA has issued a clean-up notice pursuant to s 62A or a pollution abatement notice pursuant to ss 31A or 31B (relevant to land and/or groundwater) of the *Environment Protection Act 1970* (Vic). The Register can be accessed at the EPA Victoria website, http://www.epa.vic.gov.au/land/contam_site_info.asp last viewed 5 March 2010.

[119] Councils should carefully manage this information from a risks management perspective. However, there is a real question about the proper provision of information on contaminated sites. This has been considered elsewhere. See Deegan C and S Ji, "Finding Information about Contaminated Sites in Australia: There Has To Be a Better Way!" (2008) 25 EPLJ 284. In Victoria, in addition to the Priority Sites Register, the EPA keeps a list of certificates and statements of environmental audits issued in accordance with Pt IXD of the *Environment Protection Act 1970* (Vic). However, there is no statutory obligation on the EPA to maintain the list and it contains the following disclaimer: "Environmental auditors who have conducted an audit pursuant to section IXD of the Act provide the information contained in this list to EPA. EPA does not conduct independent checks on the accuracy of this information. Anyone with a particular interest in a property should make his or her own further enquiries. EPA does not accept any responsibility for any claims, loss or damage of whatsoever kind arising out of any party's reliance on any information contained in or omitted from this list, nor does EPA accept responsibility for any claims, loss or damage arising out of the inclusion of any property on this list." There is also an obligation under s 53ZE of the *Environment Protection Act 1970* (Vic) on an occupier to provide a statement of environmental audit to any person who proposes to become the owner of the premises.

Contrast the position in South Australia where Site Contamination Assessment Orders and Site Remediation Orders can be recorded on title and the EPA can request that a notation be included on title of any site contamination audit report prepared in

- Council officers need to be aware of the important difference between a certificate of environmental audit and a statement of environmental audit. Statement conditions need to be carefully considered in relation to all planning decisions relating to the land. Councils need to be satisfied that statement conditions have been implemented or require this in a permit condition or a s 173 agreement.
- Where a statement relates to land owned or occupied by a council, the council needs to be particularly careful to ensure that statement conditions are complied with in relation to the use and development of that land. This includes land used, maintained and developed by the council as public open space, sports fields, gardens and community recreation areas.

Making planning decisions on PCL will continue to be an important risk management issue for councils in Victoria. The current guidance provided to councils to assist in making such decisions requires improvement. In particular, it is suggested that consideration be given to updating the Direction to include a broader definition of "potentially contaminated land" as set out in the Practice Note to include a broader range of contaminated activities, in particular contamination from surrounding land-uses.

In light of the uncertainty created by recent VCAT decisions, the EAO and Practice Note should be amended to incorporate some risk-based flexibility for particular buildings and works (eg minor and non-intrusive works which will not impact on any existing contamination at the subject land) and alternative methods for managing potential contamination (such as environmental site assessments and environmental management plans, instead of a full statutory environmental audit).

Such amendments should avoid the onerous and excessive requirements of applying the current EAO in circumstances such as the *Norman & Tinney, Lancaster* and *Architype* cases, and the significant costs associated with conducting an environmental audit or bringing proceedings in VCAT to challenge those requirements. These amendments would also reduce uncertainty for councils as to potential risk and liability if the existing requirements of the EAO are not enforced.

respect of land (s 103O(1) and s 103P of the *Environment Protection Act 1993* (SA). The author is aware of at least one instance where the information included on the EPA Victoria list of certificates and statements of environmental audit was not complete. Further, the author is also aware of an example where a council required in a planning permit condition an environmental audit to be undertaken on land which had already been issued with a statement of environmental audit. The council had no record of that statement and the land description of the audit area had changed following the subdivision of the audit area land. Had the statement been noted on the title, this could have been quickly determined and avoided unnecessary costs being incurred by the land owner.