

# KELLEHERS AUSTRALIA

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## In-House Memorandum

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## Contamination Clean Up

Ongoing challenges exist for Councils and residents involved in and affected by clean-up works to remove historical contamination from former industrial uses in urban areas. Site contamination may often be compounded by a host of diverse issues, depending on the background to the sites' contamination.

EPA Victoria maintains a register of Priority Sites requiring remediation and ongoing management to address land contamination. Sites listed on the EPA's Priority Sites Register have either been issued with a:

- **Clean-up notice** (under s62A, Environment Protection Act (EPAAct); or
- **Pollution abatement notice** (s31A-B, EPAAct)

Clean Up Notices are an important tool by which EPA enforces site clean-up and ongoing management measures.

The key challenge is to ensure that the chosen methods of remediation do not lead to subsequent problems. For example, when formerly immobilised contaminated soil, buried at a site in earlier efforts to remediate contamination, is subsequently disturbed, new contamination to water, air and land may occur. By disturbing contaminated soil which was previously 'immobilised' it is possible that works, undertaken in the course of clean-up, potentially cause pollution contrary to s27 EPAAct.

Councils frequently rely on the fact that works are conducted in accordance with an EPA Clean Up Notice and so are exempted under s62A EPAAct. However, they still need to assess the potential for works disturbing dormant contamination that potentially extends beyond the land or the terms of that notice and create a new breach event.

The potential for the emission of hazardous material during clean-up may, in turn, warrant the exercise of the EPA's power under s62B EPAAct<sup>1</sup> to direct the removal, dispersal, destruction, disposal of, abatement of, neutralization or treatment of any pollutant, waste, substance, environmental hazard or noise<sup>2</sup>.

Council must also consider any risk to Council employees or contractors and remain alert to duties under the *Occupational Health and Safety Act* and Part 4.3 of the *Occupational Health and Safety Regulations*.

In the absence of express provisions otherwise, Council and EPA must be cautious to ensure that objective scientific analysis is recommended, with a suitable audit trail, to demonstrate that there is no *imminent danger to life and limb and to the environment* associated with proposed works and the handling of hazardous substances.

A question still remains, as to whether a Clean Up Notice constitutes a 'licence' under the EPAAct, thereby permitting pollution. In the absence of a provision specifically providing for this, situations arise where works required under a Clean Up Notice may in fact be contrary to the EPAAct.

Cameron Algie  
Robert Forrester  
1 December 2014

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<sup>1</sup> 'Special powers of authorized officers where imminent danger to life or limb or to the environment', s62B, *Environment Protection Act 1970* (Vic).

<sup>2</sup> S62B(1), s62B, *Environment Protection Act 1970* (Vic).

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KELLEHERS AUSTRALIA: [www.kellehers.com.au](http://www.kellehers.com.au) / e: [kelllegal@kellehers.com.au](mailto:kelllegal@kellehers.com.au)

497 Swan Street, Burnley, 3121, Victoria, Australia