

Victoria's new duty to notify of land contamination

What is it? How can I prepare?

March 2021

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DISCLAIMER

The attached contains a high level summary of the operation of Australian insolvency laws. It contains statements about the general effect of those laws, which may be subject to exceptions or qualifications which are not outlined. This is not intended to provide a comprehensive study, nor to provide legal advice, and should not be taken as a substitute for legal advice in particular situations. Legal advice should always be sought before taking action based on the information provided.

Victoria's new environmental protection regulatory framework is slated to commence on 1 July 2021.

The new risk-based, preventive framework is underpinned by a number of duties – including a new mandatory duty to notify the EPA of 'notifiable contamination'. This duty is designed to reduce the risk of harm to human health and the environment by ensuring the EPA is aware of higher-risk contamination that may warrant EPA's involvement.

The duty will impact on landowners (including landlords) and occupiers (including tenants and licensees) in a number of unique and significant ways.

In this explainer, we provide an overview of the new duty and outline how to prepare for its commencement.

1. What is the duty?

The duty to notify requires specified people to **notify the EPA** of land and groundwater contamination that exceeds set thresholds.

2. Am I required to notify the EPA?

The duty to notify applies to persons who are in '**management or control**' of land that is contaminated above set thresholds.

'Management or control' is not defined in the *Environment Protection Amendment Act 2018* (Vic) (**Act**), nor the supporting regulations. However, it relates to whether a person can exercise power over the land in a relevant way.

In many cases this will be straightforward. For example, a person is likely to be in 'management or control' of land if they:

- own and occupy the land;
- have exclusive possession of the land under a lease; or
- are appointed as the Committee of Management in respect of the land.

In other cases, whether:

- a particular legal interest in land;
- specific reservations to the landlord;
- contractual rights granting occupation, access or other rights; or

- an ability to make decisions or exercise control in respect of the land,

are sufficient to place a person in 'management or control' of land will depend on the circumstances. Specific legal advice should be sought in these situations.

KEY POINTS

- There may be **more than one person** who manages or controls land at any point in time.
- You need to consider whether the terms of **existing leases, licences or other contractual documentation** are sufficient to give you 'management or control' of land for the purposes of the Act.
- For **future** leases, licences and other contractual documentation, you need to specifically consider **who should be in management or control** of the land for the purposes of the duty to notify. If you are the tenant or licensee and you do not intend to take the risk and liability associated with the duty to notify, then there are a number of practical and contractual steps you can take to achieve this. Equally, if you are a landlord or a licensor and wish to ensure that tenant takes full risk and liability in respect of the duty to notify, then you need to make sure the terms of your lease or licence achieve this outcome.

3. When do I need to comply?

The duty is intended to start from **1 July 2021**. Unless an exemption applies, the EPA must be notified as soon as practicable after:

- 1 July 2021, if you are aware of contamination above the thresholds; and
- as soon as practicable after you become aware of, or reasonably should be aware of, contamination above the thresholds.

It is important to note that this is a **continuing duty**. Therefore, the duty will still apply if, after 1 July 2021, you:

- **become aware** of notifiable contamination. For example, because you discover a historical report which identifies notifiable contamination or you conduct an intrusive investigation as part of a pre-lease commencement baseline, or to prepare a site for development or sale; or
- **reasonably should have become aware** of notifiable contamination. For example, because the Victoria Unearthed database identifies the land or nearby land as having historically contaminating activities located on it.

4. What are the relevant thresholds for notification?

The duty only applies when levels of certain contaminants exceed the thresholds in the

Regulations. Under the Regulations, there are **triggers** for:

- on-site contamination in soil;
- contamination of neighbouring land;
- foreseeable contamination of neighbouring land;
- presence and exposure risks of respirable asbestos fibres in or on soil;
- actual or foreseeable contamination of groundwater or surface water;
- vapour intrusion; and
- onsite retention of contaminated soil.

These thresholds are largely based on relevant investigation levels contained in the *National Environment Protection (Assessment of Site Contamination) Measure 1999 (NEPM ASC)* and are modelled on the provisions of NSW's *Contaminated Land Management Act 1997* (NSW).

The concentration above which notification is required are either outlined in the NEPM ASC, the Australian and New Zealand Guidelines for Fresh and Marine Water Quality (**ANZG**), the Australian Drinking Water Guidelines (**ADWG**), or the Regulations, for asbestos or non-aqueous phase liquids.

A brief **overview of the thresholds** is provided in the table on the below.

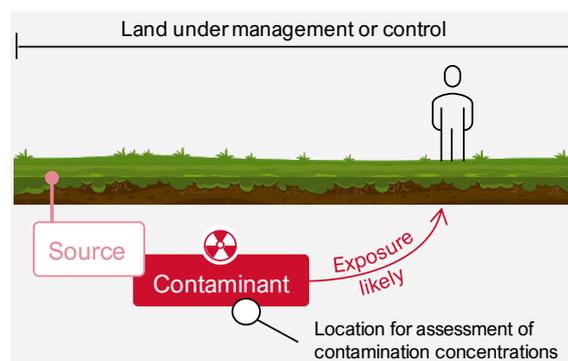
Threshold – What is notifiable contamination?

SOIL CONTAMINATION

On-site contamination in soil

1. Contamination in or on land under management or control;
2. Contaminant concentrations at following levels:
 - (a) average > HIL; or
 - (b) single sample $\geq 250\%$ of HIL; and
3. Exposure pathway (or likely exposure pathway) to persons.

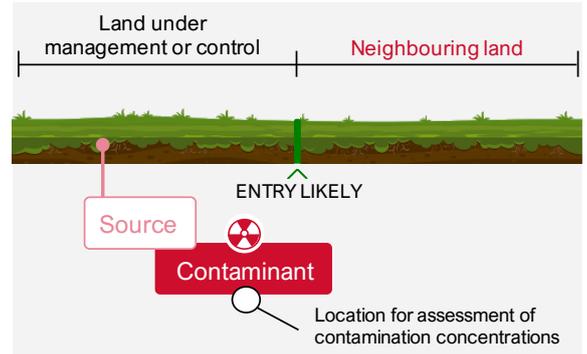
*NOTE: The HIL for a contaminant is the health investigation level for the contaminant listed in Tables 1A(1) and 1A(2) in Schedule B1 to the NEPM (ASC) for the for the current use of the land



Threshold – What is notifiable contamination?

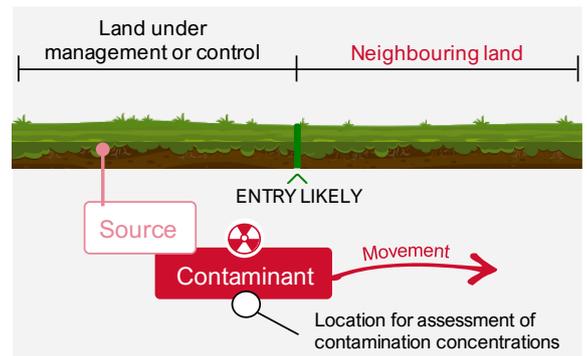
Contamination of neighbouring land

1. Contamination in or on land adjacent to land under management or control;
2. Contaminant concentrations at following levels:
 - (a) average > HIL; or
 - (b) single sample \geq 250% of HIL; and
3. Contaminant has entered from, or is likely to have entered from, the land under management or control.



Foreseeable contamination of neighbouring land

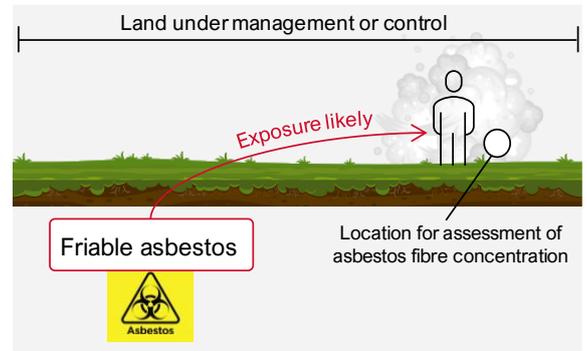
1. Contamination in or on land under management or control;
2. Contamination likely to enter and remain on land adjacent to that land; and
3. Contaminant concentration likely to be > HIL.



ASBESTOS IN OR ON SOIL

Presence and exposure risks of respirable asbestos fibres in or on soil

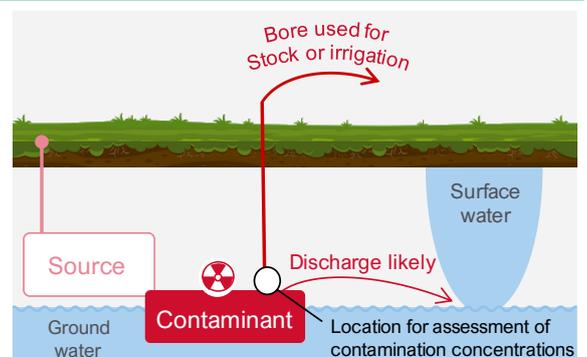
1. Presence of friable asbestos in or on soil on land; and
2. A person has been, or is likely to be, exposed to airborne asbestos fibre levels in excess of 0.01 fibres per millilitre by inhalation.



GROUNDWATER OR SURFACE WATER

Actual or foreseeable contamination of groundwater

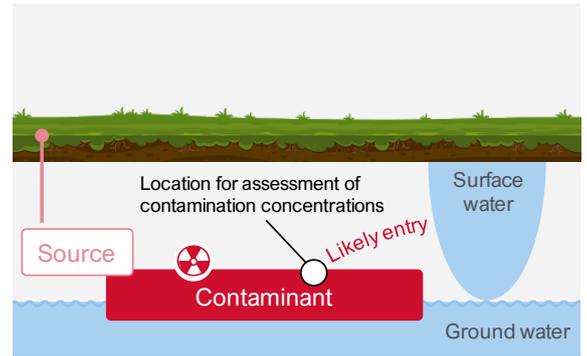
1. Entry or likely entry of a contaminant into groundwater;
2. The groundwater either:
 - (a) discharges or is likely to discharge to surface water; or
 - (b) is used or may be used for human consumption or contact, stock watering or irrigation; and
3. Contaminant concentration is (or likely to be) above:
 - (a) the default guideline value for that contaminant specified in the ANZG; or
 - (b) the guideline value for that contaminant specified in the ADWG; and
4. Contaminant concentration is likely to remain above that specified concentration.



Threshold – What is notifiable contamination?

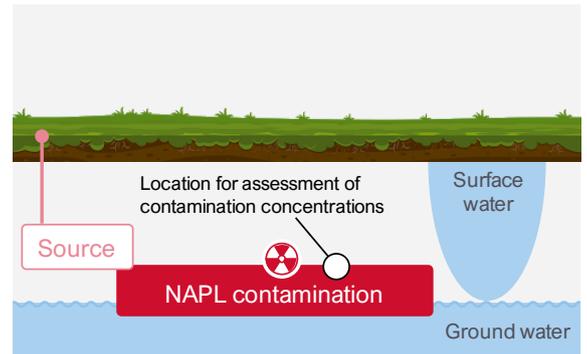
Actual or foreseeable contamination of surface water

1. Entry or likely entry of a contaminant into surface water;
2. Contaminant concentration is (or likely to be) above:
 - (a) the default guideline value for that contaminant specified in the ANZG; or
 - (b) the guideline value for that contaminant specified in the ADWG; and
3. Contaminant concentration is likely to remain above that specified concentration.



NAPLs

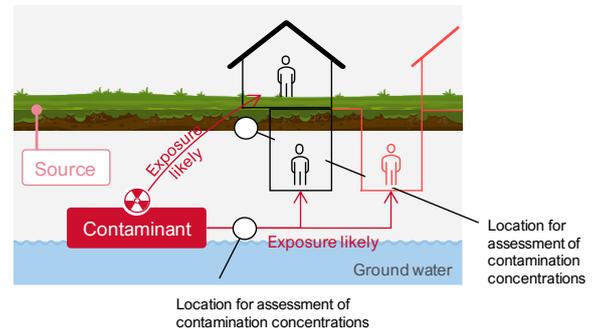
1. Presence of any non-aqueous phase liquid; and
2. Located in groundwater, surface water or an aquifer on or in land.



VAPOUR INHALATION PATHWAY

Vapour intrusion

1. Contaminant concentration is at following levels:
 - (a) average concentration in soil vapour sample > soil vapour HIL for volatile organic chlorinated compounds for the current use of the land;
 - (b) concentration in single soil vapour sample $\geq 250\%$ of HIL for volatile organic chlorinated compounds for the current use of the land or any land adjacent to the land;
 - (c) average concentration in soil vapour sample > soil vapour HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
 - (d) concentration in single soil vapour sample $\geq 250\%$ of soil vapour HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
 - (e) average concentration in soil sample > soil HSL for vapour intrusion for the current use of the land;
 - (f) concentration in single soil sample $\geq 250\%$ of soil HSL for vapour intrusion for the current use of the land or any land adjacent to the land;
 - (g) average concentration in groundwater sample > groundwater HSL for vapour intrusion for the current use of the land or any land adjacent to that land; or
 - (h) concentration in single groundwater sample $\geq 250\%$ of groundwater HSL for vapour intrusion for the current use of the land; and



Threshold – What is notifiable contamination?

2. Exposure pathway (or likely exposure pathway) to persons for contaminant or by-product of contaminant; and
3. Contaminant concentration is likely to remain above the specified concentration.

* NOTE: The HILs (health investigation levels) and the HSLs (health screening levels) outlined above are contained in section 6 of Schedule B1 to the NEPM (ASC).

ONSITE RETENTION

Onsite retention of contaminated soils

1. Onsite retention of contaminated soil sourced from onsite (excluding fill material); and
2. Not an activity for which a permission is required.



IMPORTANTLY

These matters **do not** need to be brought to the EPA's attention if:

- contamination at levels below the thresholds; and
- contamination by contaminants that are not referred to in the Regulations. Emerging contaminants (such as PFAS) are not caught by the duty to notify, unless and until they are listed in the NEPM ASC or otherwise prescribed in the Regulations.

As can be seen, whether specific contaminants exceed the thresholds requires a technical assessment and in some cases **specialist judgement** – for example, whether something is 'likely'.

We recommend that you engage a **contaminated land expert** to conduct relevant investigations and assessments to determine whether the relevant thresholds have been met in any particular circumstance.

5. What contamination am I 'aware' of?

The duty to notify requires notification in respect of contamination that is **actually known** by the person or the organisation. Therefore, if previous investigations or reports identify contamination above the thresholds, then the duty to notify will crystallise once the new environmental protection regulatory framework commences.

In light of this, it is important that organisations conduct a review of historical soil and groundwater reports in their possession or control and consider whether these reports identify contamination above

the thresholds. Documents that should be evaluated as part of this review include:

- pre-lease and pre-acquisition contamination investigation and assessment reports and baseline reports;
- post-lease contamination exit reports;
- pre-construction contamination investigation reports, including any prepared during the planning approval process; and
- contamination investigation and assessment reports conducted in response to regulator notices.

IMPORTANTLY

- If you **need help** understanding whether any contamination identified in historical reports is above the thresholds for notifiable contamination, you should engage a contaminated land expert.
- In relation to the **awareness of corporations**, a corporation is normally taken to know what its officers and agents know as a result of carrying out their authorised functions or duties. Courts are generally hesitant to conclude that knowledge acquired by a corporation has been forgotten. Therefore, it is important to consider historical reports commissioned by past management teams.
- What you are **actually aware of** may change over time. Because the duty to notify is a continuing obligation, if you become aware of notifiable contamination in the future, then the duty to notify will be triggered at that point in time.

6. What contamination am I 'reasonably aware' of?

The duty to notify also requires notification in respect of contamination that you should **reasonably be aware** of. This is an objective test and therefore you cannot simply 'bury your head in the sand' or 'fail to look' for contamination.

In determining whether a person should have been aware of notifiable contamination, the following factors will be taken into consideration:

- the person's skills, knowledge and experience;
- whether the person could practicably seek advice regarding the contamination; and
- other circumstances of the contamination.

The intention is to create a **scalable duty**, so that organisations with greater skills, capacity and resources, such as large corporations and government entities, will be held to a higher standard than individuals with less resources.

In order to ensure that you can show you have complied with this component of the statutory duty, we recommend you take a **staged approach**, depending on the outcomes of each step and the skills and resources available to you:

1. Physical assessment:

Consider whether there are any physical attributes of the land which suggest it is or may be contaminated. For example, stains or strange colours on the soil; strong odours; abnormal water colours; stockpiles of imported soil; bare patches of lawn/limited plant growth; the presence of underground storage tanks, metal pipes, solder, paint flecks, ash or fragments of fibre cement sheeting; or distress in flora and fauna.

2. Current contaminating activities:

Identify whether there are any current activities on the land that have contaminated or may contaminate the land. This should include uses of the land and other land that is proximate to it. Discussions with current site management may be required to get a complete picture of any potentially contaminating activities.

3. Historical contaminating activities:

Consider whether there are any historical land uses that may have contaminated the land. Review historical uses of the land and other land that is proximate to it. Discussions with previous site management or previous owners may be necessary.

4. Desktop searches:

Search relevant databases and information sources to supplement the above data sources. These should include:

- (a) **Victoria Unearthed**: This database provides geospatial information on potential and existing contaminated land and groundwater. It has been developed from a range of sources, including:
 - (i) historical business listings (from Sands and McDougall directories);
 - (ii) EPA Priority Sites Register;
 - (iii) EPA groundwater quality restricted use zone maps;
 - (iv) EPA licensed sites;
 - (v) Environmental audits; and
 - (vi) Victorian Landfill Register.
- (b) **VicPlan**: This is an interactive map that can be used to search for planning information concerning a property or area. It can help identify if environmental audit overlays apply to the land, which may suggest that the land is contaminated.

5. Intrusive investigations

If the above assessments indicate the land is or may be contaminated, engage a contaminated land consultant to identify whether any contamination present on the land meets or exceeds relevant notification thresholds.

You can also engage a contaminated land consultant to assist with any or all of steps 1-5 if appropriate.

IMPORTANTLY

- **Records should be kept** showing the analysis and decision-making process underpinning your assessment. Given the ongoing nature of the duty to notify, the **suitability of your decision-making processes** and record-keeping should be reviewed periodically.
- Not all contamination will require a detailed investigation by a contaminated land consultant. The EPA has indicated that it will produce guidance on when and how to conduct investigations. As the guidance is released, the EPA will expect more of organisations.

7. Do any exemptions apply?

There are a range of **exemptions** to the duty to notify. They are:

▪ **Prior notification:**

Where the EPA has already been notified in accordance with the Act. This exemption is particularly useful in the following circumstances:

- Where a person is coming into management of control of the land – for example, under a lease or by purchasing the land – and a prior notification has been made. Given this, we are increasingly seeing warranties inserted into contractual documents that require the outgoing manager or controller, such as the landlord or the vendor, to warrant they have notified the EPA where necessary and provided relevant notifications to the incoming manager or controller; and
- Where multiple persons manage or control land – for example, where a contractor has an exclusive right to conduct works on land. Only one person needs to notify the EPA, unless there is additional information to provide. To this end, duty holders who share management and control of land should consult with one another and share information. For example, a contractual obligation can be placed on the person who becomes aware of the contamination to simultaneously notify the EPA and the other people who are, or might be, in management or control of the land.
- However, the prior notification exemption **does not apply** where the EPA is only informally aware of the presence of contamination at a site. For example, because of past licencing or compliance interactions. Persons in management of control of land must still formally notify the EPA of the contamination, and should include information on how the risk of harm from contamination is being, or is proposed to be, managed;

▪ **Industrial waste:**

Where there is a stockpile of most types of industrial waste;

▪ **Prior notice:**

An EPA pollution abatement notice or clean up notice was previously served in respect of the contamination, and there has been no material change in the condition of the land after the notice was served or revoked. The EPA has indicated that it will release guidance on what 'no material change' means in these circumstances;

▪ **Statement or certificate:**

Contamination for which a statement of environmental audit or a certificate of environmental audit has been issued, provided that there has been no potentially contaminating activities on the land or material change in the land since, and there are no adverse effects on adjacent land; or

▪ **Other contaminants:**

The contamination is not covered by the scope of the duty to notify. This means that emerging contaminants, such as PFAS, are not required to be notified.

Whether you can rely on any exemptions needs to be carefully assessed in the relevant circumstances and advice should be sought where appropriate.

8. How do I notify the EPA and what does the notice need to include?

Notice must be given in a form approved by the EPA, although the exact form is yet to be released.

The notice must include the following information:

- the location of the land;
- the activity that caused, or is suspected to have caused, the contamination;
- the nature and extent of the contamination;
- the nature of the risk of harm to human health and the environment; and
- information on the actual or proposed management response to the contamination.

If the required information is not known at the time you make the notification, it must be provided to the EPA as soon as practicable after you become aware of it.

When making a notification, it is not currently clear whether land parcels within cadastral boundaries need to be notified, or whether 'land' has a different meaning in the context of the duty to notify. For example, the land within the person's management or control. We expect this will be clarified by the EPA in due course and notifications will need to be made accordingly.

A notification may have a **direct impact on land value**. Therefore, in circumstances where the notification must be made by a person who does not own the land – for example, by a contractor or a tenant – it may be appropriate for the landowner to include within contractual documentation specific review or approval rights in relation to the notification's content.

9. Will the notification be made public?

The intent of the duty is to inform the EPA of significant and high-risk instances of contamination that may warrant the EPA's involvement in the management of the contamination. For example, by providing advice or by issuing a remedial notice. Consistent with this approach, notifications will **not be publicly available**.

Therefore, in relation to due diligence for commercial transactions, persons coming into management or control of land – for example, purchasers or tenants – will need to specifically request prior notices from the person currently managing or controlling the land – for example, the vendor or the landlord. In circumstances where a vendor does not provide a purchaser with a prior notification that has been made, it is likely that they will have breached their statutory duty to notify. However, whether this will give the purchaser a right to rescind or terminate a contract will depend on the circumstances.

It may be possible for members of the public to obtain notifications that have been made through a freedom of information request – though relevant exemptions are likely to be relied on to prevent disclosure

10. What are the potential consequences of non-compliance?

The consequences for contravening the duty will depend on the circumstances.

However, contravention is a **criminal offence** – with a maximum penalty for body corporates of approximately \$100k – and is enforceable as a civil penalty provision. This means that the EPA can prove contravention on the balance of probabilities rather than beyond reasonable doubt.

The duty to notify will also be enforceable by certain **third parties** from 1 July 2022 and can result in officer liability in some circumstances.

11. What will happen once I notify the EPA?

Notification does not necessarily mean there is a significant risk of harm or that action needs to be taken. However, where contamination exists:

- it will need to be managed in accordance with the new **duty to manage** contaminated land. This duty requires the person in management or control of contaminated land to minimise risks of harm to human health and the environment so far as reasonably practicable. It applies to all contaminants and is not restricted to notifiable contaminants, unlike the duty to notify;
- the contamination will also need to be managed in accordance with **other relevant duties** under statute, common law and contract;
- if the contamination is caused by **non-aqueous phase liquids**, such as oils and petroleum products, you will be required to clean up the contamination. If the source of the non-aqueous phase liquid is located on the land, you will need to remove or control it; and
- the EPA may take **further action** in order to ensure that risks of harm from the contamination are appropriately managed. For example, by issuing a notice to investigate (requiring investigation into any harm or risk of harm from the contamination), an environmental action notice (requiring specified clean up measures to be taken), or a site management order (requiring long-term management actions to address the contamination).

In most cases, information given as part of a notification is not admissible in evidence against the person in a proceeding for an offence or for the imposition of a penalty.

12. I did not cause or contribute to the contamination. Can I recover the costs of complying with the duty to notify?

The Act includes a **right to recover any reasonable costs** you incur in complying with the duty to notify. These costs are recoverable from the person responsible for causing or contributing to contamination of the land.

KEY POINTS

- The person will need to be **in existence** and of sufficient financial standing in order for this right to be of value.
- The right can only be actioned in an appropriate **Court**.
- Proving that a person is responsible for causing or contributing to contamination is generally **difficult**, particularly if multiple persons occupied the land over time and there is a lack of historical documentation.
- The right is for costs incurred **after** the Act commences. Therefore, if you are intending to claim, the timing of any further assessment work is important.
- The right can be exercised by persons who come into management or control **long after** the person responsible for causing or contributing to the contamination leaves or sells the land. Contractual bars on claims may not be effective in nullifying the right.
- One practical measure you can take to **limit your exposure** under this right is to assess contamination at the time you leave or sell the land to demonstrate and provide evidence that you did not cause or contribute to any contamination the subject of a future claim.
- The right only covers **reasonable costs** incurred in complying with the duty to notify. Therefore, if you are intending to make a claim, you will need to show that the costs you have incurred are reasonable. For example, by obtaining multiple quotes.

13. How should I prepare for the new duty?

Our **step-by-step** guide on how to prepare for the duty to notify is outlined below:

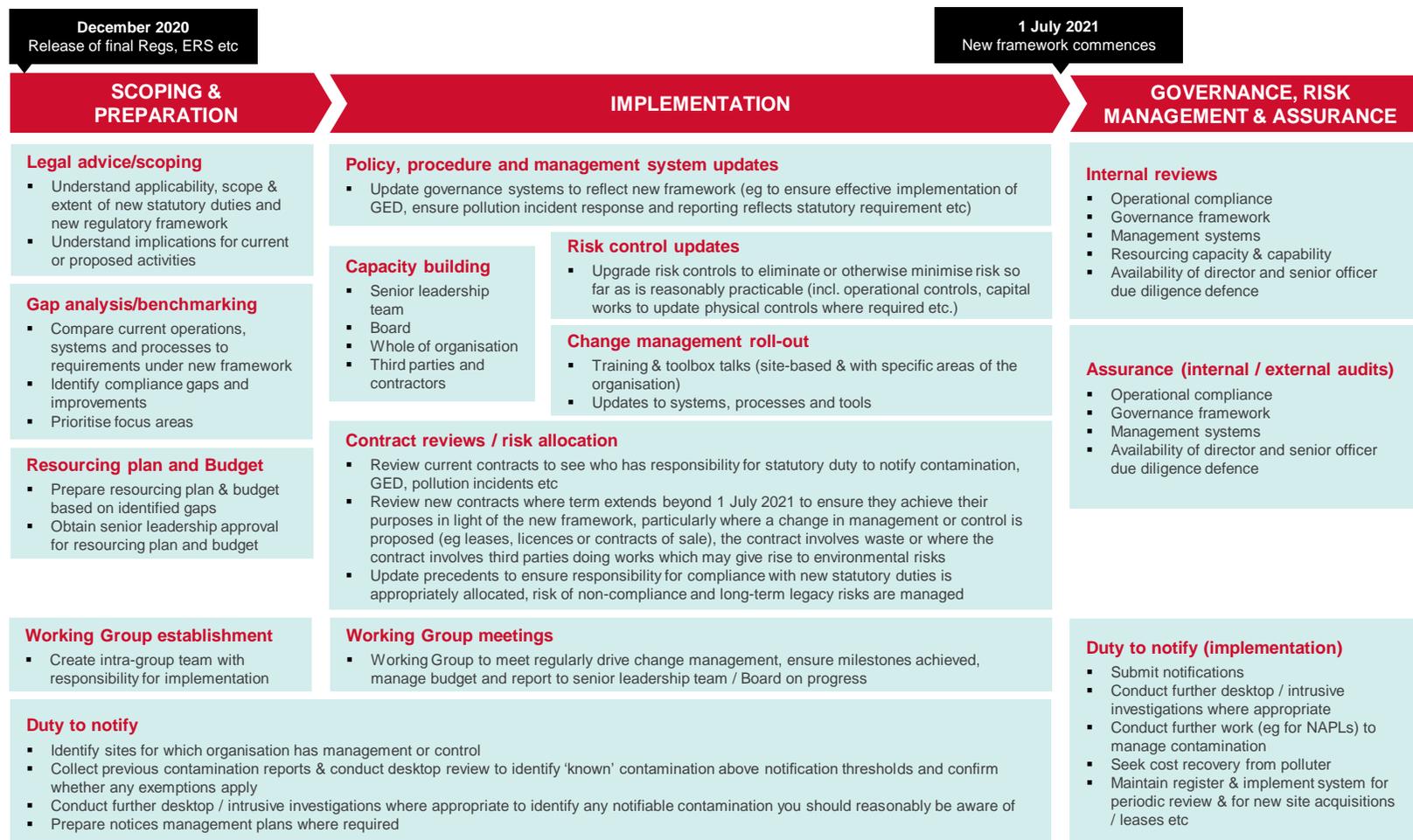
- 1 Management or control** Identify the sites for which you will have management or control on and after 1 July 2021. This may need to include reviewing leases, licences or other contractual documents to determine whether you are in management or control of land for the purposes of the Act.
- 2 Subjective awareness**
 - (a) Identify any historical reports which indicate the site is or may be contaminated. The timing for completing this step (and the following steps) should depend on whether you may seek to recover costs from the person who is responsible for causing or contributing to the contamination. If so, then these steps should be delayed until 1 July 2021 and records kept of costs incurred in complying with the duty to notify.
 - (b) Compare the contamination levels identified in those reports to the notification thresholds in the Regulations.
 - (c) If the notification thresholds are exceeded:
 - (i) consider whether the contamination report is likely to represent the current contamination levels of the land. If not – for example, because the report is old or remediation or development activities have occurred since the date of the report – then a contamination assessment may be required;
 - (ii) consider whether any exemptions to notification apply; and
 - (iii) if no further work is required and no exemptions apply, prepare the relevant notice (including the intended management response). This should be done as soon as reasonably practicable after you become aware of the contamination. If you are currently aware of the contamination, this means as soon as reasonably practicable after 1 July 2021.
- 3 Objective awareness**
 - (a) Depending on the circumstances, consider current and historical uses of the land (and proximate land), previous reports and relevant databases to identify whether the land is potentially contaminated.
 - (b) If the land is potentially contaminated, conduct targeted investigations and assess whether any of the notification thresholds have been met.
 - (c) If the notification thresholds are exceeded:
 - (i) consider whether any exemptions to notification apply; and
 - (ii) if no exemptions apply, prepare the relevant notice, including the intended management response. This should be done as soon as reasonably practicable after you become aware of the contamination.
- 4 Record keeping** Keep a record of relevant searches, assessments and decision-making processes.
- 5 Cost recovery** If appropriate, seek to recover reasonable costs of complying with the duty from the person responsible for causing or contributing to the contamination.
- 6 Contractual review** Ensure future contracts, such as leases, licences, works contracts and sale documents, appropriately allocate the risks and liabilities associated with the duty to notify.
- 7 Management system update** Ensure organisational policies and management systems are updated so that notifications can be made as soon as practicable after a contamination event, such as a chemical spill.
- 8 Periodic review** Periodically review land under your management or control to confirm whether the duty to notify arises – for example, because of a change in circumstances.

14. What else do I need to do to prepare for the new framework?

The duty to notify is one of many changes to Victoria's environmental protection regulatory framework.

The final version of the Regulations have now been released, which means that now is the time to prepare your organisation for the commencement of the new framework on 1 July 2021.

Our **roadmap** on how to prepare provides a guide which you can tailor to your organisation or use as a sense-check against your current plan:



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