# CONTAMINATED LAND IN WESTERN AUSTRALIA: A TIMELY REMINDER THAT LEASES MUST COMPREHENSIVELY ADDRESS LAND CONTAMINATION

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**Australia Real Estate Alert**

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## A PROTRACTED HISTORY

In April 2025, Justice Musikanth of the WA Supreme Court delivered his judgment in *Henderson v. Contaminated Sites Committee* [2025] WASC 123 (Henderson).

The decision was the latest development in a 15-plus year process that is yet to finally determine responsibility for the contamination of a parcel of land used as a service station.

The land in question was classified in 2007 as "possibly contaminated–investigation required".

In 2016 the WA Contaminated Sites Committee (CSC) determined responsibility to remediate the contamination of the land (First Determination of Responsibility).

The First Determination of Responsibility was appealed to the WA Supreme Court.

The Supreme Court considered the *First Determination of Responsibility (Viva Energy Australia Pty Ltd v Contaminated Sites Committee* [2018] WASC 89 (Viva Energy Decision)) and remitted the matter back to the CSC to reconsider the First Determination of Responsibility.

By 2023 the CSC had reconsidered the First Determination of Responsibility in light of the Viva Energy Decision and made a further determination of responsibility to remediate the contamination (Second Determination of Responsibility).

The Second Determination of Responsibility was appealed to the WA Supreme Court.

In Henderson, the Second Determination of Responsibility was considered and the responsibility for remediation was remitted back to the CSC to reconsider the Second Determination of Responsibility.

The above process highlights the complexities around determining responsibility for remediation as well as the adverse time and financial consequences associated with contaminated land.

An aspect of the judgment particularly relevant to the owners and occupiers of industrial real estate is the helpful observations by his Honour regarding the relevance of the lease in determining who caused or contributed to the contamination and who is responsible for its remediation.

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## WHY THE WORDING OF THE LEASE MATTERS

The decision in Henderson highlights the important role that the lease plays in determining responsibility for contamination and its remediation.

It is materially less likely that an owner will be found responsible for the remediation of contamination where the lease thoroughly addresses matters relating to contamination.

If an owner wants to seek to comprehensively ensure that a tenant is responsible for contamination occurring while the tenant is in occupation of the land, then the owner needs to ensure that the lease does this.

If the lease does not make the tenant responsible, then the owner may end up being responsible.

The following concepts are ones your lease may need to address:

- The obtaining of a property condition report that identifies present contamination (if any) at the time occupancy commenced.
- An obligation on the tenant not to damage, overload, pollute or contaminate the land or the owner's property.
- An obligation on the tenant not to disturb any existing contamination, pollution or monitoring pits.
- An obligation on the tenant to put in place systems, processes and plant and equipment to minimise the risk of contamination and to mitigate the effects of any contamination.
- An obligation on the tenant to promptly report to the owner any known or suspected contamination of the land (whether by the tenant or someone else).
- An obligation on the tenant to use the land and the owner's property in a manner that complies with all laws and the requirements of all authorities.
- An obligation on the tenant to repair and maintain the land, the owner's property and the tenant's property.
- An obligation on the tenant to keep the owner's property and the tenant's property in good working order.
- An obligation on the tenant to comply with "works conditions" that set out the rules that apply when the tenant is doing repairs and maintenance, e.g. to use suitably qualified and licensed tradespersons.
- An obligation on the tenant to test for contamination during the term at either pre-agreed intervals or whenever reasonably required by the owner.
- Some leases exclude from the tenant's obligations, works:
  - Required due to fair wear and tear;
  - Of a capital or structural nature; or
  - Required due to damage caused by an insured risk.

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But where this is the case, the inclusion of a positive obligation on the tenant to regularly inspect the land and promptly report to the owner if, and when, these works are required, may assist.

- In relation to areas licenced to the tenant (i.e. that are not part of the leased premises) there must be certainty as to which of the tenant's environmental obligations apply to the licensed area.
- To help manage the risk of loss due to contamination by a subtenant or a licensee of the tenant:
  - The right to sublease or licence without the consent of the owner should be resisted; and
  - A direct contractual relationship between the owner and the subtenant / licensee (to address contamination amongst other matters) should be required.
- Making the failure to comply with the tenant's contamination obligations a breach of an "essential term" of the lease.
- An obligation on the tenant to obtain an end of lease property condition report that identifies the contamination (if any) at that time.
- Ensuring that the end of lease contamination report is expressed to be for the benefit of the owner and can be relied upon by the owner.
- An obligation on the tenant at the end of the term to make good contamination occurring during the term and any prior period of occupation.
- Ensuring the tenant's indemnification for contamination-related losses extends to the owner's liability to future occupiers of the land if remediation needs to be done while someone else is in occupation of the land.

## OTHER IMPORTANT TAKEAWAYS

- In the event of contamination, the lease document will be highly relevant to the CSC's determination process.
- An owner can be liable for contamination where:
  - The owner has an obligation in the lease (e.g. to do structural works or replace parts of the premises at the end of their working life);
  - The works or replacements are not done (or are not done promptly or properly);
  - The failure to do the works or replacements means an aspect of the premises does not function correctly; and
  - The owner's failure to do something or failure to do it properly is a cause of, or a factor contributing to, the contamination.
- An owner's acts or omissions can make the owner liable to remediate contamination. For example:
  - Where an inherent defect in the building causes or contributes to the contamination; or

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- Where the owner fails to do something that is not the responsibility of the tenant, even whilst the thing is also not expressed in the lease to be an obligation of the owner.

- If no one else can be made responsible for the remediation of contamination, then the liability and cost to do so ultimately falls to the then current owner.

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We can assist with:

- Legal due diligence;
- Planning and development approvals;
- Buying and selling industrial land;
- Leasing of industrial land (both for landlords and major tenants);
- Land contamination advice;
- Managing risk when dealing with contaminated land; and
- End of lease make good advice and dispute resolution.

# KEY CONTACTS



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