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## **Feedback to the Department of Environment, Land, Water and Planning's proposed integration of environment protection reform into land use planning**

### **Property Council of Australia (Victorian Division)**

The Property Council of Australia's Victorian Division welcomes the opportunity to respond to the proposed updates to Victoria's land-use planning system, through the commencement of the *Environment Protection Amendment Act 2018*.

In principle, the Property Council supports the reforms, which are intended to provide clarity, certainty and support to businesses, industry and community to comply with environmental protection requirements.

We are generally supportive of the proposed changes and the supporting practice notes. However, we seek some minor clarifications and propose a number of amendments, in particular with respect to Practice Note 30. We submit that the proposed modifications will increase role clarity and provide a simplified and streamlined process for all parties.

#### **The Property Council of Australia**

The Property Council is the leading advocate for Australia's property industry — the economy's largest sector and employer.

In Victoria, the property industry contributes \$45.1 billion to Gross State Product (12.4 per cent), employs more than 331,000 people and supports more than 400,000 workers in related fields. It pays more than \$21 billion in total wages and salaries per year, employs one in four of the state's workers either directly or indirectly, and accounts for 57.5 per cent of Victorian tax revenue.

The Victorian membership has more than 500 members. They are architects, urban designers, specialist consultants, town planners, builders, investors and developers. These members conceive of, invest in, design, build and manage the places that matter most — our homes, retirement living communities, shopping centres, office buildings, education, research and health precincts, tourism and hospitality venues.

This submission is informed by many of the Property Council's key member representatives and expert committee members.

#### **Feedback on proposed changes to VPP clauses 65.01 and 65.02**

The proposed change to VPP clauses 65.01 and 65.02 includes the need for consideration to be given to "any significant effects the environment, including the contamination of land may have on the use or development". In the absence of clear criteria by which "significant" can be assessed, decision-makers may vary in their interpretation, approach and application, leading to potential inconsistency.

A key area is guiding criteria for requesting an Environmental Audit. The Property Council proposes that clear criteria be provided by which “significant” can be assessed.

### Feedback on proposed changes to VPP clause 73.01 General – definition of ‘potentially contaminated land’

While the inclusion of a ‘potentially contaminated land’ definition is intended to limit ambiguity, there is a risk that the expanded definition could unintentionally capture more sites than previously observed.

We propose that greater guidance should be provided as to what constitutes “potentially contaminated land”. This guidance could be addressed through a practice direction. Examples as to what “past or present activities or events” have the potential to cause contamination would mitigate the risk of unwarranted activities or events being caught by this change. This clarification would also mitigate possible red tape delay and the applicants incurring unnecessary cost.

### Feedback on changes to Ministerial Direction No. 1 – Potentially Contaminated Land

Purpose	
Part 1	<p>The Property Council is concerned that the term “significantly adversely affected” is ambiguous and could be inconsistently applied.</p> <p><b>We propose this term is defined in the Definitions (Part 3). Alternatively, examples could be provided as to what would constitute “significantly adversely affected”.</b></p>
Definition	
Part 3, Point 2	<p>In the existing definitions, “sensitive use” includes “a residential use, childcare centre, kindergarten, pre-school centre, primary school, secondary school, or children’s playground, even if ancillary to another use”. Clarification is required as to whether a residential use includes a hotel setting, or the circumstances in which it may include a hotel (e.g. longer-term and/or short-term accommodation).</p> <p>Historically, there has been inconsistency between the definition that may have been present within regulatory documentation when compared to a council-specific planning scheme.</p> <p><b>We propose that consistent definitions be applied between the Direction and respective planning schemes – alternative we propose it be clearly stated that, in the case of any differences, the definitions in the Direction definitions prevail.</b></p>
Requirements to be met	

Part 4	<p>Part four requires that ‘a Planning Authority must satisfy itself whether or not the land is potentially contaminated’.</p> <p><b>We propose that criteria be developed to determine how a planning authority would be able to satisfy itself. This clarification would facilitate a clear benchmark to be met. Such a benchmark currently does not exist and its absence could lead to ambiguity.</b></p>
Part 6 (1)	<p>The current document suggests that aside from ‘a Planning Authority satisfying itself...’ a Preliminary Risk Screen Assessment (PRSA) must be undertaken. We believe this expression may have the unintended consequence of capturing lower risk historical land-use profiles, triggering an assessment (by a suitably qualified practitioner) to demonstrate that an Audit/PRSA is not required. This clause, as it reads, appears to mandate a heavier reliance on Auditors, through PRSA or Environmental Audits. The unintended consequence of this clause is that sites requiring assessment due to historical use or because of buffer issues are now more likely to be captured by the changes, where previously they would not likely have been captured.</p> <p><b>Consideration should be made to the wording to ensure that scope remains for the omission of a PRSA or Audit pathway in demonstrably lower-risk scenarios. For example, a farm property is acquired by a broadacre developer intending to use the land for residential development. Ancillary to the main use, farming chemicals were stored on the property and a site assessment (including soil sampling) shows there is low risk of the potential for contamination. In assessing the application for development, Council can rely on the site assessment provided without requiring a PRSA or Audit.</b></p> <p><b>This clause should remain consistent with guidance presented in the General Practice Note (referring specifically to the varying types of assessments to suit different scenarios – assessment, PRSA, Audit etc).</b></p>
Part 6 (2)	<p>This clause appears to rely on Council’s expertise in the determination of potentially contaminated land. As it currently reads, and with reference to notes (subclause (1)) there appears to be opportunity for subjective interpretation and therefore inconsistent (and potentially inappropriate – either in applying or omitting) application of the Environment Audit Overlay (EAO).</p>

	<p>The wording should be reconsidered such that scope remains for the omission of a PRSA or Audit pathway in demonstrably lower-risk scenarios. This clause should remain consistent with guidance presented in the General Practice Note (referring specifically to the varying types of assessments to suit different scenarios – assessment, PRSA, Audit etc).</p>
<p><b>How a Planning Authority can satisfy itself about potentially contaminated land</b></p>	
<p>Part 7</p>	<p>Under Part 7, “To satisfy itself whether the land is potentially contaminated the planning authority may consider the existing and previous land uses and activities on the land and any relevant report which may make a determination on whether the land is potentially contaminated land”.</p> <p>The Property Council is concerned this direction is open for interpretation. For example ‘any relevant report’, suggests that any report that makes an assessment/determination relating to the presence of potentially contaminated land can be utilised.</p> <p>In the absence of guidance around ‘any relevant report and how a Council may ‘satisfy itself’, the lack of clarity in this section could lead to a landholder being required to prepare multiple reports, until Council is satisfied, resulting in delay and adding costs to the project.</p> <p><b>Clarification is required regarding the type of report that may be acceptable and what thresholds need to be met to allow Council to be satisfied.</b></p>

**Feedback on changes to Planning Practice Note 30 – Potentially Contaminated Land**

<p><b>Statutory and other assessment tools</b></p>	
<p>‘Desktop Study’</p>	<p>In paragraph two, the definition does not specify what may constitute a ‘suitably qualified professional’.</p> <p><b>We propose consideration be given to the provision of guidance as to what constitutes a ‘suitably qualified professional’. This guidance would mitigate the risk of developers engaging consultants to complete risk assessments that are later not deemed suitable by Council.</b></p>

<p>Page 4 and 5</p>	<p>Various assessment tools are presented. However, the triggers for using each of these are not prescribed. As it reads, it currently presents ambiguity and invites inconsistency of application.</p> <p><b>It should be made clear that triggers/scenarios for each are further described in the following tables/figures etc.</b></p> <p>The PRSA is stated to assist with determining whether an Audit is required. Historically, and presumably under the new provisions, the role of a Preliminary Site Investigation (PSI) will also be to provide clear advice as to whether an Audit is needed. The benefit of a PRSA is such that it helps to define the scope of that Audit if required. However, reverting to a PRSA creates a more onerous step for developers (time, cost and involvement of an Auditor) and should only be used under specific circumstances, not as a default requirement (e.g. not applicable in lower-risk scenarios).</p> <p><b>We propose clearer guidance be provided as to when each assessment mechanism (Desktop Study, PSI and PRSA) can or otherwise must be used as an assessment tool, including in which case(s) each tool can or must be used to determine whether an Audit is required.</b></p>
<p><b>Table 1 - Outline of various assessment tools</b></p>	
<p>Page 6, Table 1</p>	<p>A definition has not been provided for what constitutes a 'suitably qualified professional'.</p> <p><b>As noted above, we propose guidance be provided as to what would constitute a 'suitably qualified professional'. This guidance would be beneficial particularly in instances where a landowner or developer is proactive in undertaking a risk assessment. A definition would allow for the preparation of an expert report that would be accepted without further reports being required. The benefit of this clear approach is that the landowner can be proactive in preparing materials that would be acceptable and mitigate any red tape or additional costs accounting for the potential for delay through Council processes or by councils not being satisfied by prepared reports.</b></p> <p><b>This amendment would not limit the rights of developers to lodge an application and rely on Council's decision-making processes to determine whether or not the land is Potentially Contaminated Land.</b></p>

	<p>Row 1 Column 3: Appears to suggest that a PSI can also be utilised to determine if an Audit is required.</p> <p><b>We seek guidance as to whether this is the intended reading?</b></p> <p>Row 4 column 3: indicates that a PSI outcome is ‘whether an environmental Audit is required’. This outcome appears to be inconsistent with the defined ‘purpose’ in Row 1 and earlier description on page 5. We agree that the role of a PSI should remain as to confirm whether an Audit is needed. However, current document appears to be ambiguous in its description of triggers/purpose of various tools and hence, invites inconsistent and potentially inappropriate application of tools by council planners.</p> <p><b>We propose that greater clarity be provided about what is the intended purpose and triggers for each assessment tool, including where Planning authority discretion is intended to be applied.</b></p>
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**Table 4 – Recommended assessment levels**

	<p>Row 3, Column 3</p> <p><b>We propose that a PRSA would also be applicable at the discretion of Council to demonstrate whether contamination risk is evident and whether an Audit is warranted, including the scope of that Audit.</b></p> <p>Row 3, Column 4</p> <p><b>Consideration could be given as to whether a PSI (with an appropriate sampling program) may be sufficient to determine whether a contamination risk exists and whether an Audit is warranted – managing risk, while avoiding unnecessarily onerous planning controls. Alternatively, we suggest that specific triggers for PRS should be defined.</b></p> <p>Row 4, Column 3</p> <p><b>We suggest that a PSI (with an appropriate sampling program) may be sufficient to determine whether a contamination risk exists and whether an Audit is warranted – managing risk, while avoiding unnecessarily onerous planning controls. Alternatively, we suggest that specific triggers for PRSA should be defined.</b></p>
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	<p>Row 5, Column 4</p> <p><b>We seek clarification regarding in which cases a PRSA would be appropriate.</b></p>
<b>Figure One</b>	
Page 12, Figure 1	<p>Table 3, Table 4 and associated text does not indicate that the decision-making framework (Figure 1) must be followed.</p> <p><b>We propose introductory text be added to the table to provide context to the process the figure outlines.</b></p>
<b>Planning Approvals and Contaminated Land</b>	
Page 13 - Planning Approvals and Contaminated Land	<p>The text provided here is critical to the understanding of the section. However, the intent does not appear to be integrated into previous tables/Figures creating ambiguity. For example, where an applicant or a Planner (Council) is required to make an interpretation of requirement, the current format, including linking/continuity between text and tables/figures is difficult to digest and therefore, interpretation may become subjective, implement onerous Planning controls or otherwise, leave contamination risk unmanaged.</p> <p><b>We submit that greater clarity in definitions, process and more continuity (linking of concepts) throughout the document will assist with a more consistent application, aligned to its intended purpose (controlling contamination risk in a planning context).</b></p>
Page 13 - When can a Preliminary Risk Screening Assessment	<p>Line 1 – ‘medium to lower risk of potential contamination’. This concept does not appear to have been defined. The existing Practice Planning Note 30 does define high, medium and low risk of contamination.</p> <p><b>Is it the intention that the definitions of high, medium and low risk as defined in Practice Planning Note 30 be applied here? If so, we suggest that is made clear.</b></p>
<b>When is an environmental audit necessary for a planning permit application?</b>	
Page 13 - When is an environmental audit necessary	<p>In the last paragraph, the phrase ‘careful consideration’ implies that subjective interpretation is required.</p> <p><b>We propose that instead of ‘careful consideration’ the paragraph should be amended to read, ‘Based on the outcomes of a PSI’ consideration should be given to the likelihood of contamination and the subsequent need for an Audit.</b></p>

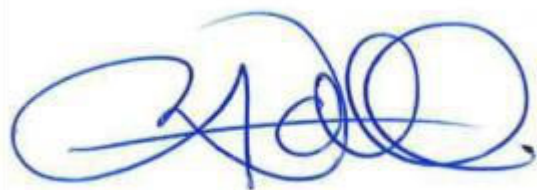


### Next Steps

We look forward to continuing to support the Department in this review. We remain available to provide expert industry knowledge where it is required to support a better understanding of the nuances of the industry and industry operation.

If you require further information or clarification, please contact Emily Young, Senior Policy and Communications Advisor, on 0475 161 328 and [eyoung@propertycouncil.com.au](mailto:eyoung@propertycouncil.com.au).

Yours sincerely,



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