

➤ Environment Protection Amendment Act 2018

In brief: The *Environment Protection Amendment Act 2018* implements the first major overhaul of Victoria's environmental law in almost 50 years. The Act will repeal the *Environment Protection Act 1970* and replace it with a modern, risk-based regime focused on harm prevention, accompanied by a suite of positive environmental protection and reporting duties that will affect both business and the community.



GENERAL ENVIRONMENTAL DUTY

- > Cornerstone reform - an overarching **positive duty** for any person engaging in activities that pose a risk of harm to human health or the environment from pollution or waste to **eliminate or reduce those risks so far as reasonably practicable (the GED)**.
- > Applies to everyone, not just licensed businesses.
- > Covers a broad range of activities, including storage and possession of waste and supply.
- > At a minimum, the GED requires businesses to implement, so far as reasonably practicable: tailored systems to minimise environmental and human health risks from their operations, to handle and store substances and waste appropriately, to manage pollution and waste incidents to minimise harm, and to provide appropriate supervision and training to employees to reduce risks from their activities.
- > Protections will be provided for businesses who comply with licence conditions that specify measures to meet the GED.
- > **Breach of the GED attracts civil and (uniquely in Victoria) criminal penalties** of up to \$1.6 million for corporations. Maximum penalties for intentional or reckless breaches escalate to five years' imprisonment and \$3.2 million in fines.
- > A four-year transitional duty relating to prevention of **material harm**, and an accompanying offence provision, is intended to assist industry to adapt to the new duty-focused approach.

- > High level and generic policies will not satisfy the GED. Environment and safety manuals, compliance procedures and training should be reviewed before the Act commences and tailored to the particular risks from your business's operations.
- > The GED is based on Victorian OH&S laws – use your safety management system as a base for the new risk-based approach.



POLLUTION AND CONTAMINATION DUTIES

- > New **positive duties** relating to pollution incidents and contaminated land.
- Pollution duties**
 - > **Incident management:** Where a pollution incident causes or is likely to cause harm to human health or the environment, the person engaging in the polluting activity must restore the affected area to the state it was in before the incident occurred.
 - > **Notification:** Where a person engages in an activity that results in a **notifiable incident**, they must notify the EPA as soon as practicable after they become aware, or should have been aware, of the incident.
 - > **'Notifiable incident'** is a pollution incident that causes or threatens to cause material harm to human health or the environment. The draft Regulations can, but have not, also **prescribe** certain incidents to be notifiable.
- Contamination duties**
 - > **Management:** A person in 'management or control' of contaminated land must minimise risks of harm to human health and the environment so far as reasonably practicable.
 - > **Notification:** Person in management or control of land must notify the EPA of notifiable contamination. This is prescribed by the regulations or, where not prescribed, contamination which will cost \$50,000 or more to remediate – very low.
 - > EPA may issue a clean-up notice (renamed 'environmental action notice') to **current or former** occupier, the **current owner**, or the owner of the land at the time the contamination arose.

- > Baseline site contamination assessments and tailored management protocols will be key to discharging the new duties.
- > Reporting procedures should be updated and communicated to land managers once notification thresholds have been confirmed in regulations, so that EPA notifications are managed consistently across your business.



ENVIRONMENTAL PERMISSIONS & NOTICES

- Environmental permissions**
 - > The Act introduces a new tiered permissions regime focused on licensing 'activities' rather than premises.
 - > Licences will now have fixed terms and will be subject to regular review by the EPA.
 - > **Existing permissions will be transitioned to new regime for 12 months, but the EPA can add or amend conditions in that time.**
- The framework comprises
 - > Development licences (works approvals).
 - > Operating licences (EPA licences).
 - > Permits (a new approval for medium-high risk activities with standardised assessment processes).
 - > Registrations (new approval for low risk activities).
 - > Pilot project licences (replace existing RD&D licences).
- Remedial notices**
 - The new Act rebrands existing remedial notices and introduces new ones:
 - > Environmental action notices (replace clean-up notices)
 - > Notices to investigate (new)
 - > Improvement notices (replace PANs)
 - > Prohibition notices (replace PANs)
 - > Non-disturbance notices (new)
 - > Site management orders (new)
 - > The new SMOs will regulate long term management and monitoring of contaminated sites, will be registered on title and run with the land.

- > Prescribed activities and any relevant thresholds will be specified by regulation.
- > Be prepared for previously unregulated operations (including lower risk and 'once off' activities) to trigger approval requirements.
- > Look out for 'model permissions' and opportunities to retain business critical conditions in your existing approvals.



THIRD PARTY REVIEW AND ENFORCEMENT

- > The Act introduces statutory third party enforcement rights, bringing Victoria in line with other jurisdictions and enhancing community participation.
 - > 'Eligible persons' can bring enforcement action for contraventions of the Act and breach of permission conditions.
- An eligible person is a person:
- > whose interests are affected by the contravention. Demonstrated impacts on proprietary, economic or financial interests are unlikely to be required, but the person will need to demonstrate more than a personal, moral or intellectual interest in the issue, and that they will benefit in some way from the relief sought;
 - > who obtains leave from the court to bring action in the public interest, if the EPA has not taken action within a reasonable time;
 - > a broad range of civil remedies are available, including injunctions, and orders to pay compensation, stop an activity, rectify damage or provide a financial assurance.

- > Early engagement for new projects and clear processes to manage community concerns and complaints for ongoing operations will be key to avoiding construction delays for developments and enforcement action more broadly.

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ENVIRONMENTAL AUDIT

- > The Act abolishes the 'section 53V' and 'section 53X' audit system, replacing it with a two-stage 'Preliminary Risk Assessment' and where required, 'Scaled Audit'.
- > The Act aims to replace the unwieldy 'one size fits all' approach with a flexible system which streamlines audits for less complex sites.
- Preliminary Risk Screen Assessment**
 - > Based on a desktop study and site inspection to determine if a detailed audit is necessary, similar to the non-statutory screening commonly required in planning processes.
 - > The PRSA screens for contamination and determines the need for, and likely scope of, a full audit.
 - > Results are provided to the landowner, the EPA, planning authorities and future owners and occupiers of land in property transactions.
- Scaled Audit**
 - > Scaled Audits will assess and manage risks of harm to human health and the environment, and inform land use planning decisions. Audits can result in remedial action being taken to manage risks posed by site contamination or industrial activity.
 - > Scaled Audits are intended to be flexible and responsive to a site's particular risks.
 - > There is no requirement to go through a PRSA prior to a Scaled Audit.

- > Volunteering for PRSA screening could be a quick, cost-effective method to potentially avoid or scale down the scope, time and cost of statutory audits.
- > Consider potential impacts on current PANs and clean up notices.



WASTE MANAGEMENT

- > The Act replaces the current waste management framework with a more specific tiered framework.
- Industrial waste**
 - > Clearer supply chain focus: anyone with management or control of industrial waste who propose to give that waste to another person for transportation must take all reasonable steps to ensure the industrial waste will be received at an authorised place..
 - > Broader range of lawful places to receive industrial waste: expanding from licensed landfills to include a broader range of places (eg recyclers, re-processors).
- Priority waste**
 - > New concept of 'priority waste': hazardous industrial waste that carries particular risks of harm to human health or the environment, or municipal or industrial waste which has resource recovery, recycling or re-use potential.
 - > Priority waste is subject to an additional layer of duties: duties for prescribed classes of priority waste to be classified, contained and isolated to promote recovery; duty to investigate waste disposal alternatives (ie resource recovery); tracking and vehicle permit offences (to be detailed by regulations).
 - > The duties are supported by new offences (with increased civil and sometimes criminal penalties), including a focus on unlawful depositing and disposal of industrial waste.

- > Once classes of priority waste are prescribed, businesses should ensure that they have appropriate management and record keeping procedures in place to comply with the new duties.
- > Review your waste management strategies for compliance.