

# Transformational reform of Victoria's environment protection regime tabled in Parliament

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June 2018

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On 20 June, a Bill was tabled in the Legislative Assembly which, if enacted, will replace the *Environment Protection Act 1970 (Vic)* (Act) in 2020.

The Bill proposes to establish a new prevention-focused and risk-based regulatory regime, which includes new environmental duties, a new development and operational approval regime, new offences and notices, enhanced enforcement powers, new obligations on public sector and infrastructure managers, and a new waste-framework. The Bill also proposes radical reform to the Victorian contaminated land regime.

White & Case will shortly be advising of seminars and workshops tailored for General Counsel and in-house lawyers, environmental and compliance managers, and Company directors and managers to address the significance of these reforms.

## ***Harm and material harm***

The Bill is underpinned by two key concepts:

*Harm* means an adverse effect to human health or the environment, of whatever degree or duration. *Harm* may arise due to the cumulative effect of *harm* from more than one activity.

*Material harm* means *harm* that is caused by pollution or waste that either:

- has an actual adverse effect on human health (including psychological health) or the environment that is not negligible;
- has an adverse effect on an area of high conservation value or special significance, or
- will or is likely to result in the expenditure of \$10,000, or such other amount as prescribed, to take appropriate action to prevent or minimise the harm or rehabilitate its effects.

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## New environmental and contaminated land duties

The Bill proposes a number of environmental duties, all of which are new:

- **General environmental duty** to minimise the risk of *harm* to human health or the environment, as far as practicable. This general environmental duty is at the heart of the new scheme, and is modelled on the general duties in the *Occupational Health and Safety Act 2004 (Vic)*. The Bill effectively deems certain types of conduct to be a breach of this duty, including conduct relating to the use and maintenance of plant and equipment, the handling of substances and – most interestingly – the use and maintenance of systems to identify, assess and control risks of harm;
- **Transitional environmental duty** to not engage in conduct that results in *material harm* to human health or the environment. This duty is repealed by no later than four years from the commencement of the new legislation, and is intended to assist industry to build its knowledge on risk prevention;
- **Duty to restore** the effect of a pollution incident that has *harmed* human health or the environment as far as practicable;
- **Duty to report a notifiable incident** to the EPA as soon as practicable. In general terms, these are events that cause or threaten to cause *material harm* to human health or the environment, though it is envisaged that the Regulations may exempt some incidents from this duty;
- **Duty to manage contaminated land**, confirming the obligation of the person in control and management of a contaminated site to ensure that it is safe for its current or planned future use and to prevent harm to neighbours; and
- **Duty to notify the EPA of contaminated land**, which requires a person who discovers significant land contamination to notify EPA. The duty applies where the contamination is present above background levels, creates a risk of harm to human health or the environment, and is either prescribed by Regulation or is otherwise likely to result in remediation costs that exceed \$50,000 (ie, the contamination is *notifiable contamination*).

There are three important things to note about these duties:

1. the privilege against self-incrimination does not apply to the duties to report a *notifiable incident* or *notifiable contamination*, although information notified to EPA will be inadmissible in criminal or civil proceedings (other than in relation to providing false and misleading information);
2. the general environmental duty and the duty to manage contaminated land require action to be taken to minimise the risk of harm “as far as practicable.” The Bill proposes to codify this concept by requiring the risk of harm to be *eliminated* as far as reasonably practicable or, if this isn’t possible, for the risk to be *reduced* as far as reasonably practicable. This risk-based approach to evaluating compliance with these duties will require organisations to systematically identify the environmental and human health risks arising from its operations, and evaluate what can reasonably be done to eliminate or reduce those risks; and
3. unlike some other Australian jurisdictions, non-compliance with the duties carry very heavy criminal penalties, including fines over \$3m for the offence of aggravated (ie, intentional or reckless) non-compliance with the general environmental duty by corporations, or five years imprisonment for individuals. Other proposed changes to the general sanctions framework include a new civil penalty scheme (as an alternative to criminal prosecution) that will allow EPA to take more timely and proportionate enforcement action for moderately serious breaches of the duties, and empowering courts to impose monetary benefits orders that reflect any financial advantage gained as part of breaking the law.

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## Permission regime

### Overview

The Bill also proposes a modernised and streamlined framework for the EPA to grant permission to engage in certain activities. In general terms, the current works approval, licence and research, development and demonstration approvals will be replaced by development, operating, and pilot licences respectively.

The Bill also proposes to introduce a requirement for permits and registrations for certain other activities that can be issued by either EPA or a local council.

While Regulations will set out what activities will require the various types of licences, permits and registrations proposed under the Bill, the 2nd Reading Speech explains that the tiered approach to permissions is meant to avoid a “one-size-fits-all” approach to EPA licensing. Registrations are contemplated for low-medium risk activities (perhaps analogous to the existing permit regime for septic systems), permits are contemplated for medium-high risk activities and will be evaluated under a standardised assessment process, while licences would only be required for high risk activities. However, a permission will not be able to be granted for a landfill to accept priority Category A waste.

### Public notice and consultation

While only applications for development licences will be subject to public notification, the Bill also requires the EPA to develop a Charter of Consultation that, on the face of the Bill, could apply to any application for a permission. The Independent Inquiry into the EPA suggests the potential inclusion of Charter rights is essential for a healthy environment and access to justice, though its intended application to permissions remains unclear.

### Timelines and appeal rights

The Bill proposes that applications for permissions must be determined within the relevant timeframe. This timeframe is proposed to be 4 months in respect of development licences (which is the same as the current timeline for works approval applications), between 15 and 42 days for operating licences, and 22 days for pilot licences. An applicant will be able to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) if the application is not decided within the relevant statutory timeframe.

The applicant for a permission will also be entitled to apply to VCAT for a review of the EPA’s decision, which must be brought within 15 business days. Third parties will also have limited rights of review in respect of applications for development licences and the removal or suspension of an operating licence, but in each case only if the applicant’s “interests are affected” by the decision. The Bill proposes guidance which VCAT can have regard to in deciding whether a person’s interests are affected, and to limit the grounds of review on which a third party applicant can rely.

Overall, the proposals are broadly similar to the existing third party appeal review rights in respect of works approval applications. Similarly, as with now, there are no rights of review in VCAT if notice of the application for a permission has been exhibited with an environment effects statement.

### Suspension, revocations & amendment of permissions

The EPA or a relevant Council will also have the power to suspend, revoke or unilaterally amend a permission it has issued in certain situations – for example, if the holder of the permission does not satisfy the statutory “fit and proper” person tests, has provided materially incorrect or misleading information to the EPA or Council, or has unpaid fees in respect of the permission. A decision to suspend, revoke or amend a permission will be reviewable in VCAT.

Despite the requirement for permission, it is proposed the EPA will have the power to authorise the discharge, emission, deposit or handling of waste without permission. However, it will only be able to provide such authorisation if the discharge etc will not have significant adverse effects and is required to address a temporary emergency, provide temporary relief of a public nuisance or community hardship, or enable the commissioning, repair, decommissioning or dismantling of an item of plant or equipment.

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## Prohibited persons

The Bill proposes that a *prohibited person* will not be able to engage in activities prescribed by regulation without EPA approval. While there is as-yet no clarity as to what activities this is intended to apply to, there was a particular emphasis in the 2016 Inquiry into the EPA on activities which may have a significant impact on human health.

The types of *prohibited persons* include anyone who has been convicted or found guilty of fraud or indictable offences under the Act and other listed Victorian environmental legislation, who has had a Victorian or equivalent interstate permission revoked, is insolvent or (in the case of a company) is externally administered, or is a company where one or more officers matches these descriptions.

## Reference standards, codes and position statements

Environment reference standards will set out the environmental values (for example, safe drinking water) and the environmental quality objectives necessary to protect those environmental values. The environment reference standards will replace the state environment protection policies and waste management policies.

The Bill also provides for the making of compliance codes and position statements. Compliance codes will provide practical guidance to any person who has a duty or obligation under the Act. Position statements will set out information that a duty holder ought to reasonably know and will also provide direction on how the EPA will administer the Act.

## Public sector, Councils and *infrastructure managers*

An innovative feature of the Bill is the proposal to give the Governor in Council the power to make Orders, published in the Government Gazette, to require Councils, a public sector body or *infrastructure manager* to take actions, take into account matters, or comply with a document code, Standard or rule as specified in an Order. These Orders can apply generally or to an individual or class of Council, public sector body or infrastructure manager.

The types of infrastructure that could be subject to these Orders include roads and public transport facilities and installations, telecommunications facilities, ports, electricity and gas transmission and distribution networks, sewerage and waste water treatment systems, and public parks and public spaces. The *infrastructure manager* that would be required to comply with the Order are either the private or public entity that manages or operates the infrastructure or manages and controls the design, construction or maintenance of infrastructure.

## Contamination and pollution notices

### Overview

The current regime of pollution abatement and clean up notices is proposed to be replaced by a new regime of Notices. The key ones include:

- **Improvement Notices** can require the recipient to remedy a contravention of the Act, Regulations, subordinate instrument or permission, or remedy the activity that is likely to cause harm to human health or the environment from pollution or waste;
- **Prohibition Notices** can prohibit the recipient from engaging in conduct that contravenes the Act etc, and require the recipient to take any action that is reasonably considered necessary to prevent or minimise the harm or risk of harm;
- **Notice to Investigate** can require the notice recipient to investigate whether land is or may be contaminated, whether a pollution incident has occurred, industrial waste is unlawfully present or there is a risk of harm to human health or the environment from depositing, storing or handling waste;
- **Environmental action notice** can require the recipient to (among other things) take clean up measures, remediate contaminated land, and take waste to premises that can lawfully accept it; and

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- **Site management orders** can be issued on the current owner or occupier of a site that the EPA reasonably believes requires long-term management because the site is contaminated or there is *harm* or a risk of *harm* to human health or the environment. This new regulatory control will attach clear management conditions to the land title to ensure high levels of transparency. These orders not only bind the current owner, occupier or person in control of the land subject to the order, but each subsequent owner, occupier or manager, as if they had personally been served with the order. The order has the status of a charge under the *Transfer of Land Act 1958*.

The recipient of a notice issued by an authorised officer may apply to the EPA for a review of that decision within 10 business days. Otherwise, notices and orders can be reviewed at VCAT.

## Redirecting liability

The Bill proposes to empower the EPA to shift a notice recipient's obligation to comply with the notice to a related or associated body corporate in certain circumstances.

Pursuant to these provisions, where an entity has been issued with an environmental action notice or site management order and that entity is being or has been wound up in the previous two years or has failed to comply with the notice or order, the EPA may direct that compliance with the notice or order be undertaken by:

- a related or associated body corporate which had control over the entity at the time the notice or order was issued; or
- an individual officer of the entity, provided the person is an officer of the entity at the time the direction is issued.

This is a very substantial expansion of the existing situation, where the EPA has limited powers to direct related body corporates to comply with a clean-up notice. Given the often high cost of complying with a clean-up notice, especially in relation to contaminated land, the proposal to empower the EPA to shift this liability to individual body corporate officers is a significant and important change.

Having said that, it should be noted that in both cases, the EPA must also be satisfied of certain knowledge, control and culpability factors on the part of the body corporate or officer in respect of their relationship with the entity. The EPA will also consider the reasonableness of redirecting an obligation to an officer.

In similar circumstances, a body corporate may also be required to comply with a site management order issued to a related or associated entity if within the two previous years, the body corporate has transferred to the entity any land subject to the site management order.

As under existing legislation, the scope of body corporate "officers" that would potentially be liable under the Act encompasses not merely officers as defined in section 9 of the *Corporations Act 2001* (Cth), but also any persons concerned with or involved in the management of a body corporate. The Victorian Courts have held that this can encompass people such as site or line business managers.

## Other matters

Other notable features include:

- offences and enforcement provisions relating to noise emissions;
- a system for Better Environment Plans, the successor to the existing environment improvement plan regime, which will allow duty holders and the EPA to agree on a voluntary pathway to compliance;
- more specific regulation of waste management, which aims to supplement the general environmental duty by improving the ability of EPA to apply targeted regulatory controls to priority and industrial wastes;
- a system for the auditing and risk assessment by EPA-appointed auditors. A notable feature of these reforms is the ability to engage an auditor to undertake a preliminary screen assessment to assess the likelihood of land contamination, whether an audit is required and, if so, the scope of the audit. This is intended to provide a rapid, low-cost assessment of risks, to determine whether a more

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detailed audit is necessary. Given the length and complexity of environmental audits under the current regime for sometimes questionable benefit, this is a desirable reform;

- the power of the EPA to require financial assurances from the holder of prescribed permissions and from the recipient of a site management order, environmental action notice, or as required under an environmentally hazardous substances Order;
- clarifying EPA's role in providing positive advice regarding compliance with the law;
- making the EPA a referral authority for work plans and work plan variations for mining and extractive industry;
- strengthened investigation and inquiry powers for EPA authorised officers to enter premises and investigate suspected breaches of law, and empowering EPA's use of modern surveillance tools;
- clarifying and improving the process for the review of EPA decisions, providing for both internal reviews by EPA, and merits review by VCAT;
- powers for the EPA and other persons whose interests are affected by the activity or where the proceeding is in the public interest and the EPA has not taken action, to apply for Court orders to enforce the Act, although third parties will require leave of the Court; and
- an ability for courts to impose alternative sentences in addition to, or instead of, imposing specified penalties, including a modernised system for funding environmental restoration projects.

## Seminars and workshops

We will explore the implications of the Bill further in our seminars and workshops for General Counsel and in-house lawyers, environmental and compliance managers and Company directors and managers.

Please contact us if you would like to discuss the impact of this Bill on your business, or if you are interested in attending a seminar or workshop.

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