Reform of Victoria's Environment Legislation

Introduction

The reform of the environment legislation in Victoria has its origins in community, worker and emergency services personnel exposure to health risks from the contamination of the environment.

The purpose of the reform is to create a pre-emptive legislative framework allowing the elimination or reduction of risk to human health before the consequences of the hazard and exposure are realised.

A series of catastrophic events initiated the environmental legislative reform.

The exposure of the Morwell community, including workers and emergency services personnel, to the health impacts from the Hazelwood Mine fire in February-March 2014 revealed the fragmented institutional structures of State Government underpinned by the environment protection legislation in dealing with human health concerns caused by the condition of the environment, when a whole of government response was required.

Concurrently, the first term Andrews Labor Government initiated the Parliamentary 'Inquiry into CFA training facility at Fiskville' exposing the tragic human health burden on emergency services personnel and the local community.

The Andrews Labor Government and the United Firefighter Union have shaped and compelled the extensive Parliamentary inquiries into both matters, which set the foundation for the Independent Inquiry into the Environment Protection Authority (**Independent Inquiry**).

The Independent Inquiry commenced on 1 June 2015 and concluded on 31 March 2016 resulting in 48 recommendations. On 17 January 2017 the Andrews Labor Government confirmed its support in full for 40 of the recommendations, support in principle for 7 recommendations and supported in part for 1 recommendation.[1] No recommendations were rejected. The legislative reform implements the Independent Inquiry's recommendations and the Andrews Labor Government's response.

The Independent Inquiry identified waste and contaminated environments as core threats to the human health of Victoria's community. Together with pollution incidents and the expansion into mining and extractive industries these form the primary targets of the preventative and risk based legislative reform.

The existing legislation is responsive to specific outcomes, which continues to expose the Victorian community to health hazards and financial liability of clean up and ongoing management.

The increasing prevalence of waste stockpiling, storage and fires reinforces the focus of the legislative reform.

The most challenging matters for Government (Federal, State and local) and some corporations will continue to be legacy contamination and poor historical practices, which will be confronting and costly to examine and address.

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[1] Andrews Labor Government Response to the Independent Inquiry into the Environment Protection Authority (17 January 2017) (**State Government Response**)

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Legislative Reform

The legislative reform commences from **1 December 2020**.[2]

From 1 December 2020 the *Environment Protection Act 2017 (Vic)* (**New Act**) will be the principal act and the *Environment Protection Act 1970 (Vic)* (**Current Act**) and the *Environment Protection Amendment Act 2018 (Vic)* (**Amendment Act**)[3] will be repealed.

Regulations, State Environment Protection Policies, Waste Management Policies, Orders and Guidelines (published in the Victorian Government Gazette) will cease to have force other than by transitional regulations which may extend for a further 2 years.[4]

The State Government primarily through the Department of Environment, Land, Water and Planning (**Department**) are undertaking the consultation and engagement now to prepare the suite of subordinate legislation and instruments that will provide the critical detail of how the New Act will apply and how and on what basis the EPA and other stakeholders will engage.

The opportunity exists to engage with the Department directly and through peak bodies.

Everyone, whether regulated directly by the EPA or not, needs to understand the New Act and consider how it applies to their interests.

Update:

On 10 September 2019 the *Environment Protection Amendment Act 2019 (Vic)* (**Further Amendment Act**) received assent. The Further Amendment Act introduces offences relating to plastic bags into the Current Act and Amendment Act to take effect in the New Act.

The Further Amendment Act also corrects errors in the Amendment Act, shifts payment of the waste levy from 'deposited onto land' to 'received' and allows a provider of financial assurance to seek review of the **form** and amount of the financial assurance.

Contaminated Land (notification and management)

Introduction of the duty to manage and notify the EPA of contaminated land will compel investigation, assessment and where necessary remediation and ongoing management of contaminated land.

This will have significant consequential impacts on land values, transactions, development and use of land, planning and delivery of infrastructure.

The duty to manage[5] and notify[6] the EPA of contaminated land applies to contamination created before the New Act as well as after, which will capture legacy contamination with potentially unforeseen consequences.

Failure to notify is an offence under the New Act and subject to criminal and civil penalties.[7]

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[2] Amendments to the *Mineral Resources (Sustainable Development) Act 1990 (Vic)* inserting the EPA as a referral authority for specific decisions commences on 1 July 2019

[3] Repealed from 1 July 2021

[4] Amending Act, s 502. *Environment Protection (Vehicle Emissions) Regulations 2013 (Vic)* will end on 20 December 2023

[5] New Act, s 39

[6] New Act, s 40

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Interestingly, failure to manage is not, although this would be caught by the general environmental duty.

'Land' for the purpose of the New Act includes:

- buildings or other structures permanently affixed to the land; and
- groundwater.[8]

Land is contaminated if a chemical substance is present in a concentration above the background level and creates a risk of harm to human health or the environment.[9]

It is not clear how the background level of a chemical in a building or structure is to be considered, particularly when the chemical was deliberately applied (i.e. lead based paint or asbestos).

Consideration is also required where chemicals have impregnated the surface of a building or structure (i.e. explosive residues and fuels).

Under the Current Act the groundwater and land segments of the environment are dealt with separately.

Information has not yet been disclosed providing the detail of subordinate legislation and instruments.

The New Act provides that notifiable contaminated land (buildings, structures and groundwater) includes contamination with a remedial cost exceeding $50,000.

The New Act does not detail how the notifications will be dealt with and used, including public disclosure.

The public register provisions do not list notifiable contaminated land as a subject for a public register.[10] The New Act provides that a public register may contain any further information that the EPA considers appropriate, although this would be confined to the listed matters.[11]

The EPA may collect, use, disclose or publish any information to perform its functions and exercise its powers.[12] This is not unlimited and will require a case by case consideration before the EPA publicly discloses a notification of contaminated land.

This appears to fall short of the Independent Inquiry's recommendations 14.1:

> "The Department of Environment, Land, Water and Planning develop a comprehensive statewide database of sites that pose a high risk to the community because of their past use, which should link to other relevant government data sources including information held by the EPA."[13]

It is not clear how the notification of contaminated land forms part of the State Government Response:

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[7] New Act, s 314, item 4
[8] Amendment Act, s 6
[9] New Act, 35(1)
[10] New Act, Part 14.5, Division 2
[11] New Act, s 456(3)
[12] New Act, s 452(1)
[13] Independent Inquiry, pg xxv, chapter 14

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> "Government is committed to improving access to information to strengthen management of risks associated with legacy contamination. A public database providing consistent and easily accessible state-wide site history and information will be developed to assist with the identification of the potentially contaminated sites.
>
> Existing data across government as well as external information will be drawn upon. The database will include past uses of potentially contaminated sites, whether a statutory environmental audit has occurred for a site and whether any actions have been taken following that audit. Government will also provide guidance materials on how to interpret the information.
>
> The database will inform the community of potential contamination risks and support informed decision making by individuals, government and councils, including better targeted application of the Environmental Audit Overlay. DELWP has already commenced work to digitise historical land use information held by the State Library Victoria. As a first step, this information will be accessible in a searchable format through the State Library Victoria's website from late 2017."[14]

Disclosure of contaminated land and public access to the information was identified by the Victorian Auditor General's Office in its reports titled 'Managing Contaminated Sites' (December 2011) and 'Managing Landfills' (September 2014). As the single largest land owner in Victoria the State Government has a significant obligation in notifying of contaminated land.

EPA intervention will not be required under the New Act for a person in management or control of land to recover the reasonable costs incurred in complying with the duty to manage contaminated land or duty to notify of contaminated land.

When, where, how and against who the EPA intervenes, if at all, in response to a notification of contaminated land, is now more likely to focus on the merits of the EPA's intervention rather than inviting that intervention to give rise to a cause of action.

An interested person's right to access a notification of contaminated land is a live matter to be actioned by freedom of information or discovery.

Recovery of reasonable costs incurred will include the cost of taking the action in court and will no longer be confined to the requirements of a clean up notice.[15] The definition of 'clean up' has expanded to include investigation and assessment, which were costs previously excluded.[16]

Cost recovery is provided for:

- compliance with duty to manage contaminated land;[17]
- compliance with duty to notify of contaminated land;[18]
- compliance with an environmental action notice;[19]
- compliance with a site management order.[20]

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[14] State Government Response, pg 21
[15] Current Act, s 62A(2)
[16] Current Act, s 4
[17] New Act, s 39(3)
[18] ibid
[19] New Act, ss 274(6)
[20] New Act, 275(11)

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The Barkly Street, Brunswick[21] and Burnley Street, Richmond[22] cases detail how the Supreme Court of Victoria has decided these claims, although some caution is required noting the amendments to the provisions.

While the duty to manage and to notify of contaminated land extend to legacy contamination, cost recovery will be limited to costs incurred after commencement of the New Act and will necessitate placing the polluter on notice of the claim.

Incomplete information on the potential or actual contamination of land (buildings, structures and groundwater) presents a significant risk to duty holders – person in management or control.

The duty to notify of contaminated land requires consideration of the duty holder's knowledge and whether the duty holder could practicably have sought advice regarding the contamination.[23]

For corporate and government entities the 'knowledge' is not defined by the individual office holder's knowledge, but rather the corporation's or government entity's knowledge, which for municipal councils and water corporations will extend back before amalgamations. This was a point of appeal in the *Yarra CC v MFESB* case.

Regardless, the duty to manage contaminated land includes to investigate and assess the contamination.[24] In reality this will translate to duty holders reasonably informing themselves of any contamination of land.

In our opinion, the timing of the investigation works should be deferred until the commencement of the New Act to allow recovery from the person responsible, if identifiable.

The scale of work required by municipal councils, water corporations and any other land holder is significant.

The New Act appears to allow an exemption to be granted from 'prescribed exempt notifiable contamination'.[25]

Duty holders will need to consider the consequences of discharging the duty to manage and notify of contaminated land in relation to:

- insurance obligations;
- contractual obligations (sale, lease, etc);
- valuation;
- borrowing and finance; and
- systems and procedures.

In our opinion, this is the most significant amendment introduced by the New Act and warrants careful consideration by persons in management or control of land in Victoria.

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[21] *Premier Building & Consulting Pty Ltd v Spotless Group Ltd (No. 12)* [2007] VSC 377
[22] *MFESB v Yarra City Council & Ors* [2015] VSC 773 and *Yarra CC v MFESB* [2017] VSCA 194
[23] New Act, s 40(3)
[24] New Act, s 39(2)(b)
[25] New Act, 40(4)

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We anticipate a proliferation of claims for cost recovery escalating over time as entities carry out works to discharge the duties.

Municipal councils will likely be a target for cost recovery in relation to landfills and works depots. Water corporations will likely be targets for wastewater treatment plants and abandoned infrastructure.

Industry will likely be targeted where contaminated land has been divested and the contract did not include an indemnity or release broad enough to bar this future cost recovery.

Permissions and exemptions

The New Act introduces a tiered hierarchy of permissions replacing existing approvals, licences, permits and exemptions.

Subordinate legislation is being prepared to provide the detail of what activities are regulated and how. It is likely that additional activities will be regulated including stockpiling of combustible materials.

Existing approvals, licences and permits (**old permissions**) will translate to a commensurate permission under the New Act.

When translating the old permission the EPA may amend the old permission within 12 months from the commencement of the New Act.

The purpose of any amendment is to ensure the new permission is consistent with the kinds of conditions that may be imposed under the New Act.[26]

Clearly this is to allow for a translation of the existing permissions and not an amendment to substantive matters. No right exists to seek merits review in the Victorian Civil and Administrative Tribunal (**VCAT**).[27]

An important condition allowed to be inserted for licences (operating) by the New Act is an expiry providing a limited term of up to 20 years and for a waste management activity 99 years.[28]

The Current Act provides that licences run indefinitely until revoked, suspended or surrendered.[29]

The New Act facilitates greater certainty for applicants and permission holders with what appears to be all substantive decisions reviewable before the VCAT.[30] The Current Act makes no provision for review by the VCAT of decisions concerning exemptions or research, demonstration and development approvals.

Exemptions granted under the Current Act will continue to translate under the New Act and continue to apply for a period of 5 years. This will be an important change for entities relying on exemptions, which have been poorly recorded and disclosed under the Current Act.

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[26] New Act, 472(1)
[27] New Act, s 430
[28] New Act, s 75
[29] Current Act, s 26
[30] New Act, s 430

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While not all procedural decisions of the EPA under the New Act are reviewable on the merits it appears that all procedural decisions will be able to be considered in declaratory relief before the VCAT.[31] This is significantly broader than the Current Act, bringing the new framework into line with the *Planning and Environment Act 1987 (Vic)*.

EPA will develop a 'charter of consultation' detailing how it will deal with the decision making process for permissions.

The New Act creates a bar to a person convicted or found guilty of an indictable offence under the New Act or Current Act and various other matters (**prohibited person**).[32]

This is much broader than the 'fit and proper person' provision of the Current Act.[33]

A prohibited person is barred from engaging in a prescribed activity.[34] Subordinate legislation will prescribe the activity.

A prohibited person may apply to the EPA to engage in a prescribed activity.[35] The decision is reviewable before the VCAT.[36]

Duties

A centre piece of the legislative reform is the translation of the core indictable offences from outcome responsive (i.e. pollution and environmental hazard) to pre-emptive risk based (i.e. breach of duty) with civil penalties and civil remedies available.

The duties include:

- general environmental duty (10,000 penalty units; aggravated 20,000 penalty units);[37]
- duty not to engage in conduct resulting in material harm (10,000 penalty units);[38]
- duty to deal with pollution incident;[39]
- duty to notify the EPA of a pollution incident (1200 penalty units);[40]
- duty to manage contaminated land;[41]
- duty to notify EPA of contaminated land (600 penalty units);[42]
- duty to ensure industrial waste in possession received at a place authorised to receive it (10,000 penalty units);[43]

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[31] New Act, s 436
[32] New Act, s 88(1)
[33] Current Act, s 20C
[34] New Act, s 88(2)
[35] New Act, s 90
[36] New Act, s 430
[37] New Act, s 25
[38] New Act, s 28
[39] New Act, s 31
[40] New Act, s 32
[41] New Act, s 39
[42] New Act, s 40
[43] New Act, s 135

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- duty to investigate alternatives to waste disposal;[44]
- duty to notify transaction of priority waste (1200 penalty units);[45]
- duty transporting priority waste (1200 penalty units).[46]

The maximum criminal and civil financial penalties marked above apply to a body corporate with lesser maximum penalties applying to individuals. Terms of imprisonment also apply for the most serious indictable offences.

Notably an offence is not created for breach of the duty to manage contaminated land or the duty to deal with a pollution incident.

In additions to the breach of duty offences other significant offences are provided particularly in relation to breach of a licence and industrial waste management.

Enforcement by the EPA in the courts may remain focused on incidents where an outcome has eventuated (discretion of the EPA to prosecute), however the matters required to be proven are fundamentally different.

The New Act adopts the model of the occupational health and safety legislation in Victoria.

The Supreme Court of Appeal relevantly remarked in relation to the occupational health and safety legislation that:

> "Axiomatically, proof of a breach of the OHSA does not require proof that the breach caused actual harm to any person. The offences created by the Act (and by its 1985 predecessor) are risk-based, not outcome-based, offences. The breach consists in the employer's failure to eliminate or reduce a risk to employee safety. The occurrence of death or injury is of evidentiary significance only. It is not an element of the offence.
>
> This is one of the most important — but, it seems, least well-understood — features of criminal liability under the OHSA. As will appear, this characteristic of OHSA offences has very significant implications for the conduct of a trial of alleged breaches of the Act.
>
> As we have said, proof that the alleged breach caused the death (or injury) is not an element of the offence charged. On the contrary, as explained in the reasons which follow, the prosecution need only establish that:
>
> (a) there was a risk to employee health and safety
>
> (b) the measures identified as necessary would have eliminated or reduced the risk (as the case may be); and
>
> (c) it was 'reasonably practicable' in the circumstances for the employer to have taken those measures."[47]

What is required to discharge the general environmental duty will be determined in the facts of each case. The New Act identifies matters that must be undertaken to satisfy the general environmental duty (not exhaustive), including:

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[44] New Act, s 140
[45] New Act, s 142
[46] New Act, s 143
[47] *Director of Public Prosecutions (Vic) v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676 at 682

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- proper maintenance and use of plant and equipment;
- use and maintenance of systems for the identification, assessment and control of risks;
- evaluation of the effectiveness of controls;
- use and maintenance of systems for the mitigation of risks;
- proper handling, storage and transport of substances; and
- provision of information, instruction, supervision and training of personnel.[48]

Environmental management systems, documented operating procedures, training, supervision, periodic review and auditing, are likely to form part of corporate and government normal business practices.

These systems, procedures and operational documents will need to be reviewed and amended to deal with the New Act.

The general environmental duty also applies to the design, manufacture, installation or supply of a substance, plant, equipment or structure.[49]

This necessitates that the substance, plant, equipment or structure is used for the purpose for which it is designed, manufactured, installed or supplied and the provision of information regarding that purpose.[50]

Together with the narrow definition of 'reuse'[51] confined to the same or similar purpose, it is likely that the EPA will increase scrutiny over facilities producing new products from waste. Product specifications and quality assurance will be critical.

Compliance Codes[52] and Position Statements,[53] which are not yet provided, will detail to some extent how a duty holder may comply with the duty.

Environmental Audit System

The environmental audit system continues under the New Act, with the previous distinction between the types of environmental audit removed and a focus placed on defining the scope of the environmental audit.

This is consistent with the EPA's practice, which evolved over time to utilise environmental auditors in an increasing range of functions not contemplated when the environmental audit system was created in the 1990s (i.e. landfill cell construction, licence compliance, natural resources).

An important change is the introduction of a preliminary risk screen assessment to:

- assess the likelihood of contaminated land;
- determine if an environmental audit is required; and

[48] New Act, s 25(4)
[49] New Act, s 25(4)
[50] New Act, s 25(5)
[51] New Act, s 6
[52] New Act, Part 5.3
[53] New Act, Part 5.4

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- define the scope of any environmental audit.[54]

A preliminary risk screen assessment and the outcome being a report and statement must be performed by an appointed environmental auditor.[55] The New Act does not bar an appointed auditor from completing a preliminary screen risk assessment and subsequent environmental audit. This may be a matter discouraged or prohibited under guidelines (not yet available). Cost and logistical considerations become relevant for proponents required to engage multiple environmental auditors for a single project.

The preliminary risk screen assessment responds directly to longstanding criticism of the Current Act and its integration with the *Planning and Environment Act 1987* (Vic), where an environmental audit was considered a blunt and conservative requirement, where a lesser standard of assessment may suffice, particularly where the risk is low.[56]

Again, subordinate legislation and instruments will provide significant detail.

The preliminary risk screen assessment is complementary to the preliminary site investigation provided under the *National Environment Protection Measure (Assessment of Site Contamination) (Cth)* (2009, as amended in 2013) with the addition of a determination of whether an environmental audit is required and its scope, the use of appointed auditors and inclusion of a preliminary risk screen assessment statement.

These provisions of the New Act will translate to amendments to the Victorian Planning Provisions.

Civil Remedies and Penalties

The introduction of civil remedies available to an 'eligible person' and civil penalties in addition to or alternate to a criminal penalty together with the prohibited person provisions will change the EPA's current enforcement practices.

The EPA has consistently targeted water corporations for prosecution in relation to failure of sewer infrastructure. Continuation of this enforcement practice may result in a water corporation becoming a prohibited person prevented from holding an operating licence necessary to provide essential services (sewerage) to its region. Civil penalties provide an alternative allowing a civil penalty without a conviction or finding of guilt for an indictable criminal offence. Criminal proceedings may be initiated after a civil penalty is imposed. If a conviction is recorded for an indictable offence then a civil penalty may not follow.

The prohibited person[57] provisions may influence the discretion of the EPA in pursuing criminal or civil sanctions against licensees providing essential services or other critical services (i.e. waste management) in Victoria.

Access to civil remedies are restricted to an eligible person. An eligible person must hold interests that are affected by the contravention or non-compliance and be granted leave of the Court. To be granted leave:

- the proceeding must be in the public interest;
- the person must have written to the EPA requesting enforcement or compliance proceedings; and

[54] New Act, s 204
[55] New Act, s 204(1)
[56] Potentially Contaminated Land (AC) [2012] 9 March 2012
[57] New Act, Part 4.7

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- the EPA must not have commenced proceedings within a reasonable time.[58]

The public interest test is a broad concept that requires consideration of the purpose of the legislation and the legislation as a whole.

Civil remedies available extend to orders prohibiting particular conduct,[59] compensation orders[60] and ancillary orders.[61] Compensation orders are separate to the recovery of costs for contamination of land discussed earlier. Interim relief is also available on the giving of an undertaking by the applicant.

Industrial Wastes, Priority Wastes and the Waste Levy

Part 6 of the New Act provides the duties and provisions relating to industrial waste and priority waste and the waste levy. Part 6 also covers litter.

As for all other parts of the New Act the detail is to be provided by subordinate legislation and instruments.

Priority waste may include municipal waste and industrial waste that is prescribed as a priority for reduction, resource recovery, resource efficiency or other controls alternate to disposal. This is likely to include waste where established viable alternatives to disposal exist (i.e. food and garden organics).

The concept of prescribed waste initiated in the 1980s is not carried forward with the New Act simply identifying industrial waste.

It is anticipated that permissions will apply to the transport and storage of industrial waste, however these details are not yet available.

The indictable offences relating to industrial waste place an increased focus on persons relinquishing control of the industrial waste ensuring that the industrial waste is received at a place allowed to accept it.

A term of up to 2 years imprisonment is available for any person committed an offence within 5 years of being found guilty of indictable offences relating to industrial waste.[62]

As noted earlier the definition of 'deposit' is expanded to include burning waste, which will be relevant for incidents like Coolaroo (July 2018) and West Footscray (August 2018).

Recommendations 14.3 and 21.1 – 21.3 of the State Government Response prioritise the reformation of the levies under the Current Act collected for waste management and disposal.

Part 6.6 of the New Act provides for a waste levy scheme. The details of the waste levy scheme are to be provided by subordinate legislation and instruments.

It is highly unlikely that the waste levy scheme will depart substantially, if at all, from the Municipal and Industrial Landfill levy, which funds the EPA, Sustainability Victoria and each of the regional waste and resource recovery groups.

Key Takeaways

[58] New Act, s 308
[59] New Act, s 309
[60] New Act, s 313
[61] New Act, s 312
[62] New Act, s 136

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The changes to the reform of the environment legislation in Victoria are significant, broad ranging and unlikely to be fully understood until all subordinate legislation and instruments are given effect.

Local government, water corporations, industry and the community have an opportunity now to engage with the Department with a view to shaping the legislative framework into the future.

This paper provides a preliminary overview of the major changes to the legislation. All persons with interests in Victoria need to understand the New Act and identify how it applies to their interests.

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