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Environment Protection Amendment Act 2018

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Background

The *Environment Protection Amendment Act 2018* (Vic) (**EP Act**), which has just been passed by the Victorian Parliament, will be the most significant change to Victorian environmental law since the adoption of the *Environment Protection Act 1970* (Vic) nearly 50 years ago.

The EP Act increases regulatory compliance burdens for businesses, toughens the Environmental Protection Authority's (**EPA**) ability to pursue offenders, and allows third parties to restrain breaches of the environmental protection regime.

The EP Act contemplates what is effectively an entirely new regime for environmental compliance. Businesses in Victoria must ensure that they are ready to comply with the new obligations.

Duties and Obligations

General Environmental Duty

The EP Act introduces a new underlying '*general environmental duty*', known as the '*GED*', which is similar to regimes in other Australian states. Companies and individuals are required to minimise risks so far as reasonably practicable from activities that may risk harm to human health or the environment from waste or pollution.¹ The EP Act gives further guidance as to what minimum conduct is required:

- maintain plant, equipment, processes and systems in a way that minimises risk to humans and the environment;
- use and maintain systems for identification, assessment and control of risks to humans and the environment;

- use and maintain adequate systems so that if issues were to eventuate, the harmful effects would be minimised;
- ensure substances are handled, stored, and transported in a way that minimises risk; and
- provide information, instruction, supervision and training to persons engaging in the abovementioned activities.

Individuals face penalties of 2,000 penalty units (\$322,380), and companies face penalties of 10,000 penalty units (\$1,611,900) for contravening this section. If an individual intentionally or recklessly contravenes the general duty, and that contravention results in material harm or is likely to result in material harm to human health or the environment, the penalty increases to 4,000 penalty units (\$644,760) or five years imprisonment, or both. For companies, the penalties increase to 20,000 penalty units (\$3,223,800).

Pollution duties

The EP Act introduces two new duties on individuals and businesses for '*pollution incidents*':

- a duty to take action to respond to harm (or potential harm) to human health or the environment caused by a pollution incident; and
- a duty to notify the EPA of '*notifiable incidents*' as soon as practicable after the person becomes aware of the notifiable incident.

A '*pollution incident*' means an incident or circumstance that causes a leak, spill or escape of a substance, which results in pollution (this does not include the emission of noise).

A '*notifiable incident*' is a pollution incident where it causes or threatens to cause material harm to human health or the environment, or is otherwise prescribed by regulation.

Contaminated land duties

The EP Act introduces a new duty to manage contaminated land, which creates an obligation on individuals and companies in management or control of land to minimise risks of harm to human health and the environment from contamination. The new obligations include:

- a person must identify, investigate and assess any contamination that a person reasonably knows about, or should reasonably know about;
- manage the contamination by taking reasonably

practicable measures to minimise risks of harm to human health and the environment from the contamination, including undertaking reasonable clean up activities; and

- notifying any person who may be affected.

Waste management duties

Under the EP Act, waste management will be managed in a risk-based, tiered framework. The EP Act introduces '*priority waste*' which is prescribed priority waste for the purposes of eliminating or reducing risk to human health or the environment.

A person who has the management or control of priority waste must correctly classify the priority waste, and must take all reasonable steps to:

- contain the waste in a way that prevents its escape;
- isolate the waste in a way that ensures resource recovery remains practicable; and
- provide information regarding the nature, type and risks of the waste to a person who collects, consigns, transfers or transports priority waste.

There are also additional obligations requiring the assessment of reusing and recycling priority waste, and to avoid producing or generating such waste in the future. A new waste levy scheme has also been introduced.

Public rights

The EP Act will now give the general public rights to challenge environmental issues. '*Eligible persons*' under s 308 of the Act may apply directly to the court for orders restraining a person or business from breaching its environmental duties. An '*eligible person*' is a person whose interests are affected by the contravention or who has leave to make the application. The court must not give a person leave unless it can be satisfied:

- that the application would be in the public interest; and
- the person had previously requested the EPA to undertake action, but the EPA did not take the requisite action within a reasonable time.

The court is empowered to restrain offending conduct, require remedial action and may order compensation to be paid to a person that has suffered or may suffer injury, loss or damage as a result of the offending conduct.

Transparent information

The EP Act makes environmental information more transparent and accessible. The changes will mean:

- holders of a licence or other permissions would be required to make environmental information available;
- all environmental information that is not excluded by privacy, public safety, security and law enforcement, public health or other legal reasons, would be available for Victorians to access;
- the EPA would have greater access to information to make decisions; and
- the EPA would be able to further share information with other departments.

Permissions

The EP Act introduces a revised regime for issuing a 'permission' to undertake certain prescribed activities. The new framework introduces a three tiered approach to licencing, based on an assessment of the risk of the activity.

Businesses should ensure that they are compliant with the new regime, as the range of activities that will require a permission is likely to increase.

Penalties and liability

The EP Act includes increased civil and criminal penalties. In some circumstances, if a company commits an offence, an officer of the company will also commit an offence if the officer failed to exercise due diligence to prevent the commission of the offence.

In addition, the EPA may direct a body corporate to comply with an order or notice given to a related or associated entity.

What happens next?

The EP Act has now passed parliament and has received royal assent by the Governor. Certain transition provisions will apply to some provisions, and the EP Act will be fully implemented by 1 December 2020.

Victorian businesses should review their activities to ensure that they will be appropriately licenced and will be able to comply with the range of new obligations regarding pollution, contamination and waste. It is also advisable that relevant insurance policies are reviewed or considered in light of the increased obligations and associated penalties for non-compliance, including for directors and officers of companies that undertake relevant activities.

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¹ Environmental Protection Amendment Bill 2018 (Vic) cl 7; to be *Environmental Protection Act 2017* (Vic) s 25(1).

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