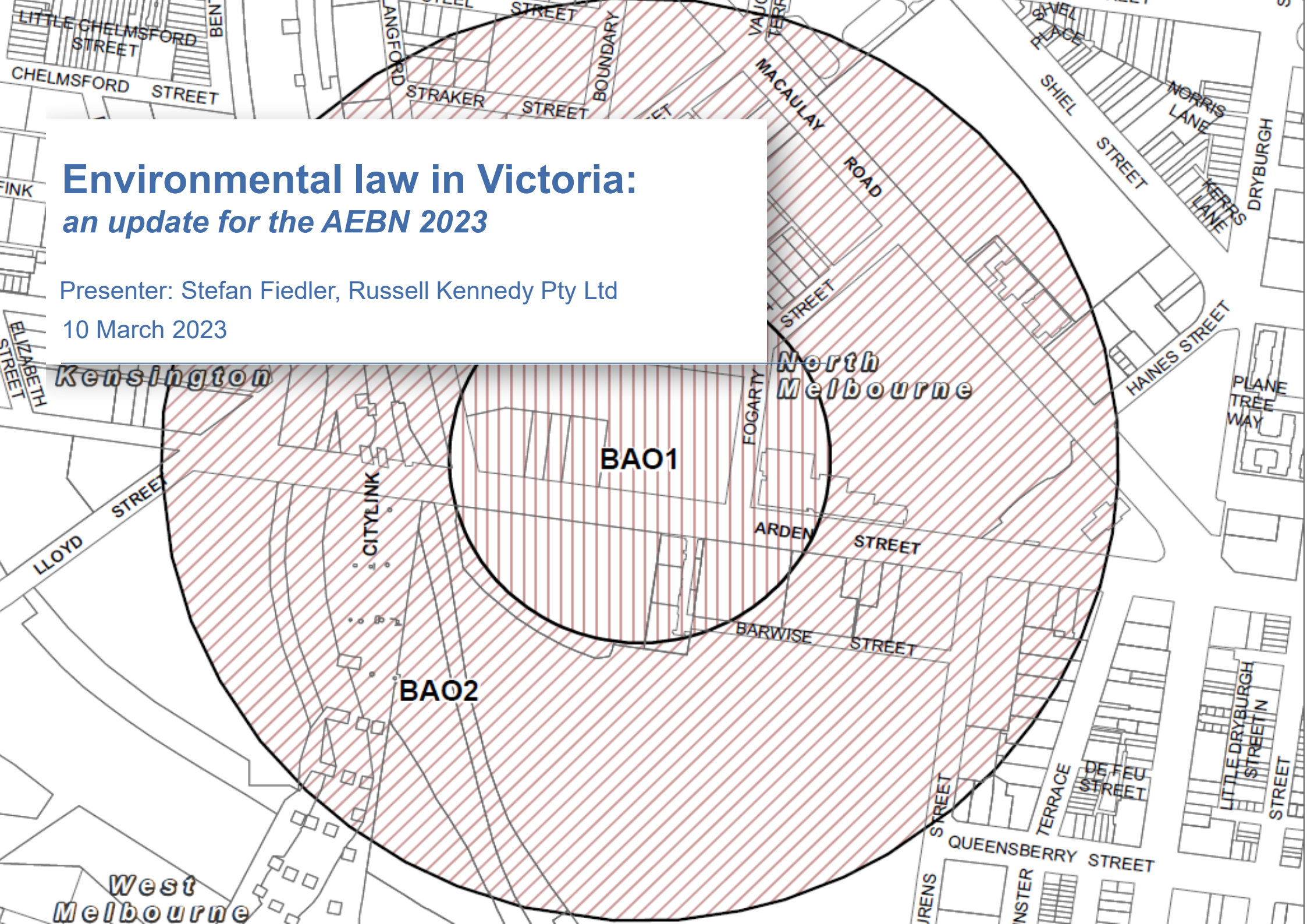


Environmental law in Victoria: *an update for the AEBN 2023*

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Source of the law and its interpretation

Legislation created by Victorian Parliament

- interpretation of legislation
- interpretation of instruments issued by Victorian Government under legislation
- common law torts (trespass, nuisance, negligence) continue
- superior court interpretation of legislation
 - *Uren v Bald Hills Wind Farm Pty Ltd* [2022] VSC 145
 - *Kingston CC v Mobius Materials Recovery Pty Ltd* [2022] VSC 588
 - *Environment Victoria v AGL Loy Yang* [2022] VSC 814
- VCAT proceedings – remedial notices and planning decisions
- superior court interpretation of repealed legislation and ordinary meaning of terms

Victorian Acts

Environment Protection Act 2017 (Vic)

- amendments since 1 July 2021:
 - *Circular Economy (Waste Reduction and Recycling) Act 2021 (Vic)*
 - *Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022 (Vic)*

Circular Economy (Waste Reduction and Recycling) Act 2021 (Vic)

- proclamation on 14 December 2021 with staggered commencement
- amendments since proclamation:
 - *Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022 (Vic)*

Victorian Rules

Environment Protection Regulations 2021 (Vic)

- amendments since AEBN Seminar in October 2022 (made on 1 February 2023):
 - *commencement of provisions of Environment Protection Amendment (Banning Single-Use Plastic Items) Regulations 2022 (Vic)*

Circular Economy (Waste Reduction and Recycling) (Container Deposit Scheme) Regulations 2022 (Vic)

- made on 27 September 2022

Circular Economy

Circular Economy (Waste Reduction and Recycling) Act 2021 (Vic)

- commenced, in part, on **1 July 2022** (by proclamation, 7 June 2022)
 - all bar:
 - Part 3 Divisions 1 and 2
 - Part 6 and ss 61, 74, 199 and 208
- commenced, in part, on **27 September 2022** (by proclamation, 27 September 2022)
 - Part 6, Divisions 1, 2, 3 (ex' s 87), 4 (ex' s 88), 6, 8 and 11, and s 111
- to commence, in part, on **1 March 2023** (by proclamation, 27 September 2022)
 - Part 6, Division 5
- to commence, remainder by **1 December 2023**, unless earlier by proclamation

Circular Economy

Circular Economy (Waste Reduction and Recycling) Act 2021 (Vic)

- to commence **1 March 2023**:
 - [Pt 6, Div 5] determination of first supplier for container deposit scheme
- to commence **1 December 2023**, unless proclaimed earlier:
 - [Pt 3, Div 1 & 2] reporting of data collection and exemption
 - [Pt 5, Div 2, s 61] mandatory sorting and separating of waste and recycling material
 - [Pt 5, Div 3, s 74] duty to minimise risk of failure, disruption or hindrance of service
 - [Pt 6, Div 7] offence container marking
 - [Pt 6, Div 9] offences and enforcement container deposit scheme

Circular Economy

Circular Economy (Waste Reduction and Recycling) Act 2021 (Vic)

- commenced, in part, on **1 July 2022** (by proclamation, 7 June 2022)
 - established Head, Recycling Victoria, business unit of Department
 - abolished Regional Waste and Resource Recovery Groups
 - procurement (RV Agreement / standards / terms / funding)
 - collaborative procurement
 - waste and recycling services (mandatory – staged commencement)
 - municipal residual waste service
 - municipal recycling service (other than glass)
 - municipal recycling service for glass
 - municipal food organics and garden organics service (FOGO)
 - prescribed services standards and offence
 - mandatory waste services (segregation at kerbside – 4th bin)
 - container deposit scheme (CDS)
 - compliance and enforcement, remedial notices, VCAT review, civil penalties

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- commenced retrospectively, in part, **1 July 2021** (proclamation 6 September 2022)
 - [s 27] extraterritorial application to Murray River, permission issued 'or granted'
 - [s 53] prohibition notice criteria to issue, permission issued 'or granted'
 - [s 58] statement of Authority evidence of permission issued 'or granted'
 - [s 73] equivalent new permission issued 'or granted'
 - [s 74] equivalent new permission, septic tank permits issued or granted by Councils
- commenced **6 September 2022**:
 - [ss 22 and 23] repeal ss 199 and 208 - Regional WRR Implementation Plans
 - [s 26(1)] definitions, motor vehicle testing, 'deposit' to include burial, 'unreasonable noise' exclude matters prescribed
 - [s 49] residential noise enforcement officer now includes specified person or class of
 - [s 52] authorised officer now includes specified person or class of and council or public sector body delegated may appoint
 - [ss 56 & 57] cost recovery provisions → Corporations Law displacement provisions

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- commenced **6 September 2022 (continued)**:
 - [s 59] Council may appoint person to bring proceedings for certain offences
 - (ss 25 & 26) general environmental duty, multiple GED offences
 - (ss 286 & 287) non-compliance with improvement notice or prohibition notice
 - [s 62(3)] exclusion from payment to Consolidated Fund:
 - civil penalty to Council
 - fee to approved motor vehicle tester
 - [s 64(3) & (4)] exemption may incorporate any documents, code etc
 - [s 66(1) and (2)] make regulations for motor vehicle testing fees
 - [s 67] incorporate documents into determination or designation for waste; determination for background waste; determination no permission required
 - [s 71(3)] make regulations to prescribe ‘not unreasonable noise’ – *Uren & Part 5.3, Div 5*
 - [s 72] Head, Recycling Victoria may be paid from Municipal and Industrial Waste Levy TA
 - administrative drafting corrections

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 3] purpose of Head, Recycling Victoria, insert:
 - provide for Victorian Recycling Infrastructure Plan
 - provide for waste to energy scheme
 - [s 4] amended definitions, such as reusing waste materials deleted from ‘recycling’ and definition of ‘reuse’ inserted preparation and use of the waste for a purpose that is the same or similar to the purpose for which it was used before it became waste
 - [s 5] functions of Head, Recycling Victoria
 - prepare VRIP
 - administer waste to energy scheme
 - prepare, monitor and review Responsible Entity Risk, Consequence and Contingency Plan
 - oversee risk, consequence and contingency planning for the circular economy
 - [s 6] annual report of Head, Recycling Victoria to address above

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 7] insert Div 3A – Market strategies and reporting
 - prepare market strategy for Minister approval
 - annual reporting on strategy (financial year) to be published 31 December
 - [s 8] insert Part 2A – Victorian Recycling Infrastructure Plan (VRIP)
 - objectives:
 - long-term strategic planning to guide and inform decision-making in relation to waste, recycling and resource recovery infrastructure at state, regional and local
 - enable WRRR infrastructure planning to be informed appropriately by:
 - land use and development planning;
 - environmental regulatory approvals and policy - *Mobius*
 - transport planning and policy
 - support risk, consequence and contingency planning for WRRRI network
 - Strategic planning for WRRRI **needs** for 30 years

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 8] VRIP to include:
 - suitable development areas to WRRRI
 - directions and actions for 3 yr interval over 30yr horizon
 - list of WRRRI needs (other land landfill) for state to:
 - orderly development of infrastructure; and
 - minimise risk of harm to human health and the environment
 - schedule of existing landfills and future landfills over 30yrs
 - preparation and consultation of VRIP, two iterations
 - EPA of view future landfill site will not comply with EP Act then site must be removed from schedule
 - [s 9] disclosure of information to Sustainability Victoria
 - [s 10] disclosure of information to Victorian Inspectorate, Ombudsman, Auditor-General

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 13] CE Risk Consequence and Contingency Plans (CERCC Plan):
 - Head, Recycling Victoria to prepare for Minister approval
 - CERCC Plan must:
 - identify risks of serious failure, disruption or hindrance to the provision of WRRR services
 - identify risks of a financial nature to Victoria's transition to a circular economy
 - outline consequences of the risks identified, including severity of harm
 - specify any suitable measures required to take to prevent or minimise risk
 - specify any action proposed to be taken to prevent or minimise risk
 - identify issues of performance or supply
 - specify measures to address issues identified in consultation
 - offence for responsible entity not to comply with CERCC Plan (120 / 600 pu)
 - 'responsible entity' to be prescribed by regulations
 - statement of assurance annually from responsible entity (120 / 600 pu)
 - Prepare Responsible Entity Risk Consequences Contingency Plans

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 14] insert Part 5A – Waste to energy scheme:
 - licencing & capping annual tonnage for thermal waste to energy processes of permitted waste
 - offence to operate without licence (1000 / 5000 pu)
 - offence fail to comply with licence (500 / 2500 pu)
 - offence to process banned waste (1000 / 5000 pu)
 - Head, Recycling Victoria may invite expressions of interest
 - if Head, RV satisfied, applicant may proceed - comprehensive licensing provisions:
 - application, conditions (matters prescribed)
 - issue, amend, transfer, suspend (immediate), revoke (immediate)
 - Disqualify, fit and proper test
 - VCAT review
 - transitional provisions for existing operators
 - omitted – RFI, referral, notification, community/third party participation

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 14] insert Part 5A – Waste to energy scheme (cont’):
 - ‘thermal energy processes’:
 - thermal process to recover energy from waste in form of heat → steam/electricity
 - thermal process to produce fuel from waste
 - excludes:
 - advanced recycling process
 - biological waste to energy process
 - landfill gas collection and combustion
 - incineration of waste without energy recovery
 - process that recovers energy from material other than waste
 - ‘permitted waste’:
 - waste that cannot reasonably be further recycled
 - municipal residual waste → permitted waste (after services for recycling)
 - industrial waste → permitted waste (sorted & separated and not technically, environmentally or economically practicable to reuse, recycle or extract further resources or material)

Amendment Act 2022

Environment Legislation Amendment (Circular Economy and Other Matters) Act 2022

- to commenced **1 June 2023**:
 - [s 80] VCAT review of waste to energy scheme, power to vary carved out, may be set aside and/or remitted to Head, Recycling Victoria to determine
 - [s 70] saving provisions for SWRRIP, Regional WRR Implementation Plans and WRR Infrastructure Planning Framework until Victorian Recycling Infrastructure Plan takes effect
 - [s 32] insert ss 51A and 51B power to RFI and suspend period for permissions
 - [s 43] insert s 90(5) & (6) power to RFI and suspend period on prohibited person app'
 - [s 65] insert ss 459A and 459B power to RFI and suspend time on exemption app'

Environment Protection Regulations 2021 (Vic)

Environment Protection Amendment (Waste Tyres – Silage Production) Regulations 2022

- B04 (Waste tyres – silage production) using 5m³ or more of waste tyres as weights during silage production, including storing tyres for that purpose [Sch 1, item 36A]
- registration required from **1 July 2023**
- prescribed exemption to that date [r 225]
- ‘silage’ means forage that has been preserved for use as animal feed
- ‘forage’ includes residual crops and crops grown for use in silage production

Note:

- offence provisions of Act apply
- actionable by regulatory intervention (e.g. remedial notices)
- civil remedies available where non-compliant

Environment Protection Regulations 2021 (Vic)

Environment Protection Amendment (Banning Single-Use Plastic Items) Regulations 2022

- from 1 February 2023
- offence to supply, supply, distribute or provide, a single-use plastic item (60 / 300 pu)
- ‘single use plastic item’ is wholly or partly made of plastic, whether or not that plastic is biodegradable, degradable or compostable and is not reusable
- ‘item’ means:
 - drinking straws
 - cutlery, including knives, forks, spoons, chopsticks, splades, food picks and sporks
 - plates
 - drink stirrers or sticks
 - expanded polystyrene food service items, including plates, cups, bowls, clam shells and any cover or lid
 - cotton bud sticks
- ‘reusable’ means item manufactured to be used for the same purpose on multiple occasions and with a warranty, or other representation from the manufacturer
- ‘integrated item’ means a plastic item, as a result of a machine automated process is part of packaging material, or attached thereto, used to seal food or beverages

Environment Protection Regulations 2021 (Vic)

Environment Protection Amendment (Banning Single-Use Plastic Items) Regulations 2022

- exclusions:
 - up to 1 November 2024 – paper or cardboard plates lined with plastic
 - up 1 January 2026 – integrated items
 - cotton bud sticks used or intended for scientific, medical, forensic or law enforcement purposes
 - cutlery used or intended for mental health service provider / premises, correctional, police or youth justice facility for the purpose of preventing any physical harm or injury
 - sale, supply, distribution or provision to a ‘designated person’, or person on behalf of (person who required a single-use plastic drinking straw due to a disability or for medical purposes)
 - plastic items purchased prior to 1 February 2023
 - sale of plastic items by a registered second-hand dealer or endorsed pawnbroker
- infringement offence and penalties (2 / 10 pu)

CE (WRR)(Container Deposit Scheme) Regulations 2022

- definitions of various containers and beverages
- exempt beverages:
 - milk (not flavoured), cordial, concentrated juices, health tonics
- ‘eligible container’ defined and prescribed
- refund prescribed about for a suitable eligible container → **10 cents**
- conditions for appointment of Scheme Coordinator
- prescribed content of network operator agreements
- conditions of appointment of Network Operators
- specifications and standards for ‘eligible containers’
 - marking, labelling and barcodes
- method to determine first supplier payments - monthly

Superior Court decisions

Uren v Bald Hill

- Noise from wind turbines non-compliance with Environment Protection Regulations and NZ Standard so unreasonable noise, and consequently subject to nuisance cause of action, which was made out
- Amendment Act inserted regulations making power to prescribe matters ‘not unreasonable noise’

Kingston CC v Mobius Materials Recovery

- integration of planning and environment protection undone without express adoption of defined term, such as ‘waste’
- now defined differently in EP Act and CE(WRR) Act and ordinary meaning in P&E Act
- careful scrutiny of strategy land planning required, to guard against perceive protection

Environment Victoria v AGL Loy Yang

- ‘should’ have regard to environment protection principles as compared to ‘must’ have regard to. Not mandatory, but a direction/instruction to be displaced

Draft 'Separation Distance Guideline' (pub 1949)

- EPA - Pub AQ2/89 (1990) → Pub 1513 (2013) → Pub 1949 (2023?)
- EPA – SEPP → WMP – Pub 788 (2001 / 2010 / 2015) → 1950 (2023?)
- Buffer Area Overlay – clause 44.08 (introduced 1 March 2021 by V10)
- Planning Practice Note 92 'Managing buffers for land use compatibility' (March 2021)
- Minister's Direction No.19 (10 October 2018)
 - “Ministerial Direction on the preparation and content of amendments that may significantly impact the environment, amenity and human health and Ministerial requirement for information for authorization or preparation of amendments that may significantly impact the environment, amenity and human health”
- Environment Significance Overlay, clause 42.01 continues
- 'separation distance' – 'threshold distance' – 'buffer'
- 'industrial residual air emission' → 'odour' and 'dust'
- existing industrial facility – may apply Pub 1949, reverse of MD No.19
- Clause 53.10 (Uses and activities with potential adverse impacts), not met must refer to EPA, clause 66.02-7 (Use and development referrals) - EPA a 'determining referral authority'

Draft 'Separation Distance Guideline' (pub 1949) cont'

- ESO regulates development only, not use
 - Many examples of ESO's for industrial facilities across Victoria
 - Wastewater treatment plants, potable water plant & storage, dairy production, landfills, etc
- BAO regulates development and use
 - Arden Precinct only example (200m and 500m to Asphalt Plant)
- VPA was the proponent. Applied in urban area.
- No other applications of BAO since commencement, 2 yrs ago
- EPA approach under MD19 and odour assessment requirements
 - Pub 1881 'Field odour surveillance'
 - Pub 1883 'Guidance for assessing odour'
- Odour survey in non-urban area is expensive, time consuming and piecemeal
- Odour survey in urban area is redundant, as may rely on complaints of a questionnaire
- Method of assessing distance sterilises industrial land, inconsistent with planning unit
- Draft pubs 1949 and 1950 not policy documents or incorporated documents

Disclaimer

The information contained in this presentation is intended as general commentary and should not be regarded as legal advice. Should you require specific advice on the topics or areas discussed please contact the presenter directly.

Questions & Answers & Contact

Any questions are welcome.



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