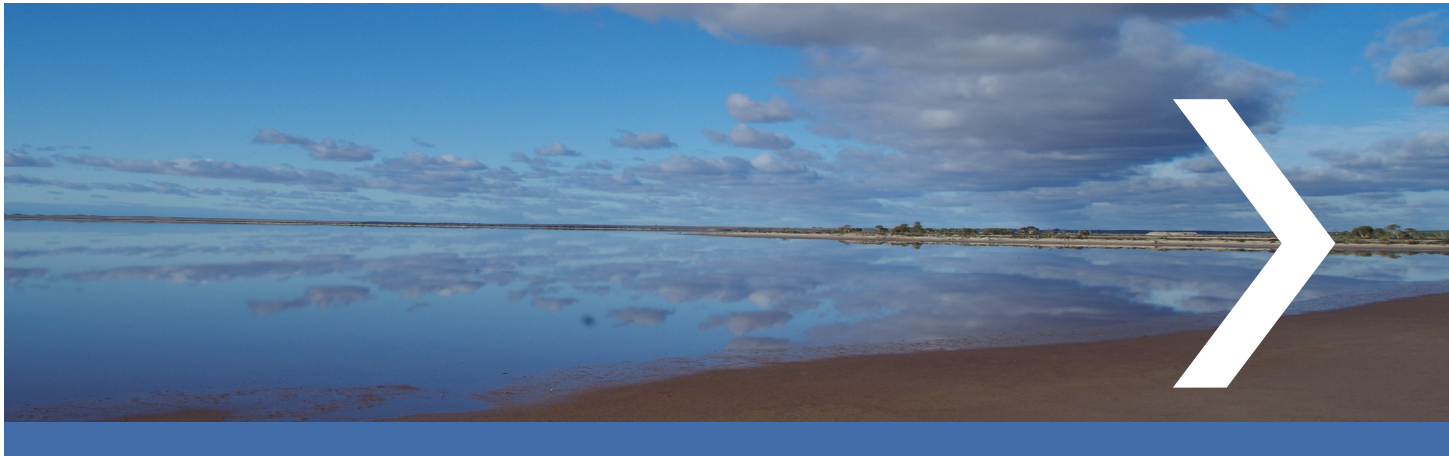


General Environmental Duty



On 1 July 2021 the Environment Protection Act 2017 (Vic) was amended to provide a prevention- focused regulatory scheme and at its heart is the general environmental duty.¹

The general environmental duty is actionable by eligible persons for civil remedies and by the Environment Protection Authority as a civil penalty and indictable criminal offence.

It is not clear if the general environmental duty is an absolute liability offence observing the availability of civil remedies and civil penalties and Parliament's intention to limit an accused presumption of innocence by raising its due diligence in defence.²

Civil Remedies

Civil remedies including restraining conduct, requiring a specific act, provision of financial assurance, payment of compensation and other ancillary matters. These are available to an eligible person whose interests are affected and has leave of the Court.³

Criminal Offence (criminal penalty or civil penalty)

Contravention of the general environmental duty in the course of conducting a business or an undertaking is an indictable⁴ criminal offence.

A person '**conducts**' a business or undertaking:⁵

- (a) whether or not the business or undertaking is conducted for profit or gain; and
- (b) whether or not the business or undertaking is conducted by a government or public authority.

A person does **not conduct** a business or undertaking merely because the person is engaged in an activity that:⁶

- (a) is primarily domestic or private and not conducted for profit or financial gain; or
- (b) solely in the person's capacity as an employee or officer of another person or on a voluntary basis.

The maximum criminal penalty⁷ and the maximum civil penalty⁸ for contravention of the general environment duty are 10,000 and 2,000 penalty units for a body corporate and natural person, respectively.

The maximum penalty⁹ doubles (and for a natural person includes 5 years imprisonment for aggravated offending, which in an indictable offence)¹⁰ where:

- (a) a person intentionally or recklessly contravenes the general environmental duty; and
- (b) the contravention results in material harm to human health or the environment from pollution or waste; and
- (c) the person knew or reasonably should have known that the contravention would result in material harm or would be likely to result in material harm to human health or the environment from pollution or waste.

'**Material harm**'¹¹ in relation to human health or the environment means harm that is caused by pollution or waste that:

- (a) involves an actual adverse effect on human health or the environment that is not negligible; or
- (b) involves an actual adverse effect on an area of high conservation value or of special significance; or
- (c) results in, or is likely to result in, costs in excess of the threshold amount (at present, \$10,000)¹² being incurred in order to take appropriate action to prevent or minimise the harm or to rehabilitate or restore the environment to the state it was in before the harm.

Harm may become material harm regardless of the period of time in which the harm occurs and as a result of:

- (a) a single occurrence of harm arising from an activity; or
- (b) multiple occurrences of harm arising from the same activity; or
- (c) the cumulative effect of harm arising from an activity combined with harm arising from other activities or factors.

Contravention of the general environmental duty is not an infringement notice offence.¹³

¹Explanatory Memorandum – Environment Protection Amendment Bill 2018, pg 2.

²Second Reading, Environment Protection Amendment Bill 2018, 20 June 2018, pg 2080.

³Environment Protection Act 2017 (Vic) s 308.

⁴Environment Protection Act 2017 (Vic) s 25(3).

⁵Environment Protection Act 2017 (Vic) s 3(4).

⁶Environment Protection Act 2017 (Vic) s 3(4).

⁷Environment Protection Act 2017 (Vic) s 25(2).

⁸Environment Protection Act 2017 (Vic) s 314.

⁹Environment Protection Act 2017 (Vic) s 27(1).

¹⁰Environment Protection Act 2017 (Vic) s 27(2).

¹¹Environment Protection Act 2017 (Vic) s 5(1).

¹²Environment Protection Act 2017 (Vic) s 5(3).

¹³Environment Protection Act 2017 (Vic) s 307; Environment Protection Regulations 2021 (Vic) r 169 and Schedule 10.

General Environmental Duty

“A person who is engaging in an **activity** that may give rise to risks of **harm** to **human health** or the **environment** from **pollution** or **waste** must **minimise** those risks, so far as **reasonably practicable**.”

“ACTIVITY” inclusive definition [s 3(1)]

- storage or possession of waste
- prescribed activity for permission [r 16 and Sch 1]
- development activity [r 16(1) and Sch 1 – column 3 & 4]
- operating activity [r 16(2) and Sch 1 – column 3 & 4]
- permit activity [s 16(3) and Sch 1 – column 3 & 4]

“HARM” exhaustive definition [s 4]

means adverse effect on human health or the environment, of whatever degree or duration, and includes:

- adverse effect on amenity of a place or premises that unreasonably interferes with or is likely to unreasonably interfere with enjoyment of the place or premises [s 4(1)(a)]
- a change to the condition of the environment so as to make it offensive to the senses of human beings [s 4(1)(b)]
- anything prescribed (nothing prescribed).

Harm may arise as a result of cumulative effect. [s 4(2)]

“HUMAN HEALTH” inclusive definition [s 3(1)]

- Psychological health

“ENVIRONMENT” exhaustive definition [s 3(1)]

means:

- physical factors of surroundings of human beings
- land, waters, atmosphere, climate, sound, odour and taste;
- biological factor of animals and plants;
- social factor of aesthetics.

“land” inclusive definition [s 3(1)]

means any land, public or private:

- any buildings or structures permanently affixed to the land; and
- groundwater

“groundwater” exhaustive definition [s 3(1)]

means any water contained in or occurring in a geological structure / formation or artificial landfill below the land surface.

“waters” inclusive definition [s 3(1) and (3)]

means:

- reservoir, tank or billabong; [s 3(1)(a)]
- anabranch, canal, spring, swamp; [s 3(1)(b)]
- natural /artificial channel, lake, lagoon, waterway or dam; [s 3(1)(c)]
- tidal water, coastal water or groundwater; [s3(1)(d)]
- bed / subsoil beneath waters; [s 3(3)(a)]
- airspace superjacent to waters; [s 3(3)(b)]
- open, piped or underground drain excluding that which conveys waste as part of treatment of waste. [s 3(3)(c)]
- the River Murray and waste/pollution from Victorian bank. [s 8(3)]

“WASTE” inclusive definition [s 3(1)]

- matter (solid, liquid, gas, radioactive) deposited, discharged, emitted or disposed into the environment in manner that alters environment;
- greenhouse gas;
- matter discarded, rejected, abandoned, unwanted or surplus (may have potential use or value);
- matter for resource recovery;
- anything prescribed (nothing prescribed to date)

“deposit” exhaustive definition [s 3(1)]

means the act of parting with possession of waste or litter and includes burning waste or litter.

“greenhouse gas substance” exhaustive definition [s 3(1)]

means:

- carbon dioxide, methane, nitrous oxide or sulphur hexafluoride (gas or liquid);
- hydrofluorocarbon and a perfluorocarbon (gas or liquid) specified in regulations made by National Greenhouse and *Energy Reporting Act 2007* (Cth).

“resource recovery” exhaustive definition [s 3(1)]

means:

- preparation for reuse of waste;
- recycling waste;
- reprocessing waste;
- recovering energy or resources from waste;
- anything prescribed (nothing prescribed to date).

“reuse” exhaustive definition [s 3(1)]

means use of waste for a purpose the same or similar for which it was used before it became waste.

“industrial waste” exhaustive definition [s 3(1)]

means:

- waste arising from commercial, industrial or trade activities or laboratories;
- anything prescribed.

Prescribed: [r 60]

- waste from any source received at a place/premises which stores/handles waste generated at another site for resource recovery or off-site transfer or disposal;
- waste transported for fee or reward, other than the collection of kerbside waste by or on behalf of a council or waste and resource recovery group.

“POLLUTION” [s 3(1) inclusive definition]

any emission, discharge, deposit, disturbance or escape of:

- solid, liquid or gas, or combination of, including smoke, dust, fumes or odour;
- noise;
- heat;
- anything prescribed (nothing prescribed).

“MINIMISE” exhaustive definition [s 6(1)]

- eliminate [s 6(1)(a)]
- reduce (if cannot eliminate) [s 6(1)(b)]

risk of harm to human health or the environment so far as reasonably practicable.

“REASONABLY PRACTICAL” [s 6(2) considerations]

to determine must consider:

- likelihood of risks eventuating; [s 6(2)(a)]
- degree of harm that would eventuate; [s 6(2)(b)]
- knowledge of harm, risk and way to eliminate/reduce (“State of Knowledge”); [s 6(2)(c)]
- availability and suitability of ways to eliminate/reduce; [s 6(2)(d)]
- cost to eliminate/reduce. [s 6(2)(e)]

Required standard

Any business or undertaking

A person conducting a business or undertaking contravenes the general environmental duty if the person fails, so far as reasonably practicable, to:¹⁴

- (a) use and maintain plant, equipment, processes and systems in a manner that minimises risks of harm to human health and the environment from pollution and waste;
- (b) use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from pollution and waste that may arise in connection with the activity, and for the evaluation of the effectiveness of controls;
- (c) use and maintain adequate systems to ensure that if a risk of harm to human health or the environment from pollution or waste were to eventuate, its harmful effects would be minimised;
- (d) ensure that all substances are handled, stored, used or transported in a manner that minimises risks of harm to human health and the environment from pollution and waste;
- (e) provide information, instruction, supervision and training to any person engaging in the activity to enable those persons to comply with the general environmental duty.

Design, manufacture, installation or supply of a substance, plant, equipment or structure

A person conducting a business or undertaking and engaging in an activity that involves the design, manufacture, installation or supply of a substance, plant, equipment or structure, contravenes the general environmental duty if the person fails, so far as reasonably practicable, to:¹⁵

- (a) minimise risk of harm to human health and the environment from pollution and waste arising from the design, manufacture, installation or supply of the substance, plant, equipment or structure when the substance, plant, equipment or structure is used for a purpose for which it was designed, manufactured, installed or supplied;
- (b) provide information regarding the purpose of the substance, plant, equipment or structure and any conditions necessary to ensure it can be used in a manner that complies with the general environmental duty.

The Victorian Government confirmed that the Environment Protection Authority will provide education, support and guidance addressing compliance with the general environmental duty,¹⁶ and that Compliance Codes,¹⁷ prepared in partnership with industry, will identify the best ways to comply.

The Environment Reference Standard 2021¹⁸ is not a compliance standard or code. Its primary function is to provide an environmental assessment and reporting benchmark. Guidance has been published indicating the Environment Protection Authority's interpretation of the legislation and approach to compliance and enforcement.

¹⁴Environment Protection Act 2017 (Vic) s 25(4).

¹⁵Environment Protection Act 2017 (Vic) s 25(5).

¹⁶Fact Sheet – Environment Protection Amendment Act 2018 (Department of Environment, Land, Water and Planning) April 2019.

¹⁷Environment Protection Act 2017 (Vic), s 100.

¹⁸Environment Reference Standard 2021, preamble.

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Stefan is a leading environmental lawyer who acts for local government, the Victorian Government, water corporations, waste and resource recovery corporations across various sectors including waste management, resource recovery, infrastructure, manufacturing, organics, rendering, logistics and agriculture.

His practice involves landfills, solid waste management, contaminated land and groundwater, statutory permissioning, statutory and strategic planning, trade waste, reclaimed water, stormwater drainage and enforcement. Prior to practicing law, Stefan worked as an environmental engineer for the Environment Protection Authority.

Stefan has been recognised by Best Lawyers for expertise in Land Use and Zoning Law (since 2014), and is currently ranked as Leading by Doyle's Guide, in the area of Environment and Climate Change.

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