



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
 - None since last AEBN Conference in March 2023
- 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- superior court interpretation of repealed legislation and ordinary meaning of terms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)*
- Container deposit scheme
- Waste to energy scheme
- Victorian Recycling Infrastructure Plan
- Circular Economy Risk Consequence and Contingency Plans
- Responsible Entity Risk, Consequence and Contingency Plans

Victorian Rules

Environment Protection Regulations 2021 (Vic)

- amendments since AEBN Seminar in March 2023:
 - *none*

Circular Economy (Waste Reduction and Recycling) (Waste to Energy Scheme) Regulations 2023 (Vic)

- made on 1 June 2023
- Part 5A of the Act commenced 1 June 2023
- ‘waste to energy licence’
- ‘permitted waste’ cannot reasonably be further recycled or ‘exempt waste’
- ‘exempt waste’ prescribed by Regulations

‘regard should be given to’

Environment Protection Act 2017 (Vic), s 11

“It is the intention of Parliament that in the administration of this Act and the regulations **regard should be given to** the principles specified in this Chapter.”

“Note: in making certain decisions under this Act the Authority or the Minister must take into account the principles of environment protection.”

- ‘should’ is not mandatory as provided by ‘shall’ or ‘must’
- the standards specified in the principle are the goal to be aimed at and the authority is to be guided by those standards in considering an application for permission
- unless a compelling reason provided otherwise, where the exercise of power is instructed by the word “should”, then the decision maker “ought to” exercise the power as instructed
- discretion permitted is far more limited than “may”
- ‘should’ is a direction / instruction of Parliament that must be displaced
- Remains open to determine for which decisions consideration is mandatory

Statutory Duties

- General environmental duty (s 25)
- Duty – prevent material harm (s 28)
- Duty – respond to pollution incident (s 32)
- Duty – notify of pollution incident (s 32)
- Duty – manage contaminated land (s 39)
- Duty – notify of contaminated land (s 40)
- Duty – deposit industrial waste at place authorised to receive (s 133)
- Duty – only receive industrial waste authorised to do so (s 134)
- Duty – prior to relinquishing control to place authorised (s 135)
- Duty – management of priority waste (classify, contain, isolate, consign) (s 139)
- Duty – investigate alternative to disposal (s 140)
- Duty – notify of transaction in reportable priority waste (s 142)
- Duty – transporting reportable priority waste (s 143)

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**.”

- **Mandatory standards (will be applied by courts)**
 - for any business or undertaking
 - for design, manufacture, installation or supply of a substance, plant, equipment or structure
- **conducts a business or undertaking**
 - Whether or not for profit or financial gain
 - Whether or not a company (private or public) or government body
- **Person does not ‘conduct’ business or undertaking**
 - where primarily for domestic or private purpose and not for profit or financial gain
 - solely in capacity as employee, officer or volunteer
- **Compliance Codes will prescribe further detail (none yet released)**
 - likely by industry sector and for particular activity / waste / substance

'Mandatory Standard' – what was reasonably practicable

Minimise, so far as reasonably practicable, risks of harm to human health and the environment → eliminate, where cannot minimise

Determine what was reasonably practicable, must have regard to:

- likelihood of risk eventuating
- degree of harm if risk eventuated
- what the person knows, or ought reasonably know, about the harm or risk of harm and any ways of eliminating or reducing those risks → **'STATE OF KNOWLEDGE'**
- availability and suitability of ways to reduce risks
- cost of eliminating or reducing risks

Pleadings and charges with particulars

- OH&S case law provides forms element of offence → authority must plead
- EPA approach – OH&S distinguishable; unable to plead until discovery complete; allow more timely and proportionate enforcement action for moderately serious breaches

How will the statutory duties apply?

Regulatory application and intervention

- enforcement of criminal offence
- where a criminal offence a Court may impose criminal sanction or civil penalty
- compliance action by EPA issue remedial notice or site management order
 - Improvement Notice / Prohibition Notice / Environmental Action Notice / Notice to Investigate
 - Right to apply for internal EPA review and VCAT merits review
 - Information Gathering Notice (no VCAT review) – may compel interview
 - Site Management Order
 - EPA reasonably believes that long-term management of the site is necessary because land on the site is contaminated, or there is a harm or risk of harm to human health or the environment from pollution or waste
 - binds future owner/occupier or person in ‘management or control’ → VCAT review

Civil intervention

- Eligible person where EPA does not intervene within reasonable time of request to do so
- must have leave of Court → Court’s discretion to hear claim
- Remedies → restrain conduct / require specific act / **COMPENSATION** / financial assurance

Power of entry

Power of entry

- for purpose of performing a function or duty or exercising a power [s 246]
- at any reasonable time [s 246(3)(a)]
- at any other time, reasonable belief of immediate risk of material harm to human health or the environment [s 246(3)(b)]
- may enter and inspect a place or premises open to the public [s 247]

Obstruction

- hinder, delay or obstruct / conceal / use abusive, threatening or insulting language
- summary offence

Powers on entry

- Limit of authorised officer powers on entry
 - take reasonable steps to notify occupier of entry and produce identification
 - minimise disruption caused by entry
 - not remain any longer than reasonably necessary

Case Study - Power of entry



Case study - Power of entry

EPA prosecution Norstar Recycling Pty Ltd

- Charge-sheet and summons – company
- Guilty plea
- Court ordered:
 - without conviction
 - fined \$2000
 - pay EPA costs in amount of \$2000
 - adverse publicity order

EPA prosecution Director

- Charge-sheet and summons – director
- Guilty plea
- Diversion plan on conditions
 - lawyers to prepare training for all directors to be delivered within 6 months

Case Study - Power of entry



Case study - Power of entry

EPA proceedings in Supreme Court of Victoria

- Civil penalties and orders sought in SCV (case pending)
- Interim order in force
- Trespass and vandalism of equipment reported

- Entry of fenced private property, gate left open by contractor
- No notification to land owner with head office locally
- Contractor on site, land surveyor questioned for extended period
- Entry report observations unfavourable – disputed, land owner not present cannot verify
- Observations and assessment of two authorised officers divergent

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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