

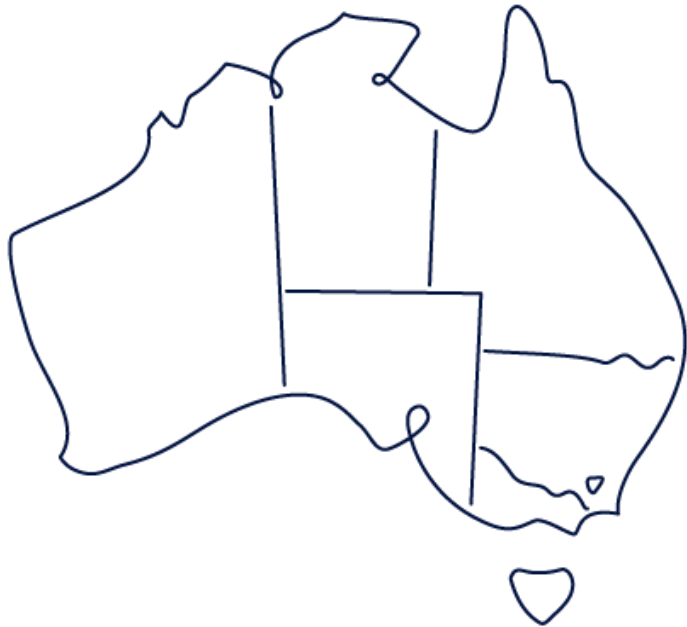
PREPARING VIC DAIRY MANUFACTURERS FOR THE NEW ENVIRONMENTAL PROTECTION ACT

Industry Partnership Program Training Workshop– 18th June 2021

Ian Olmstead – Dairy Australia

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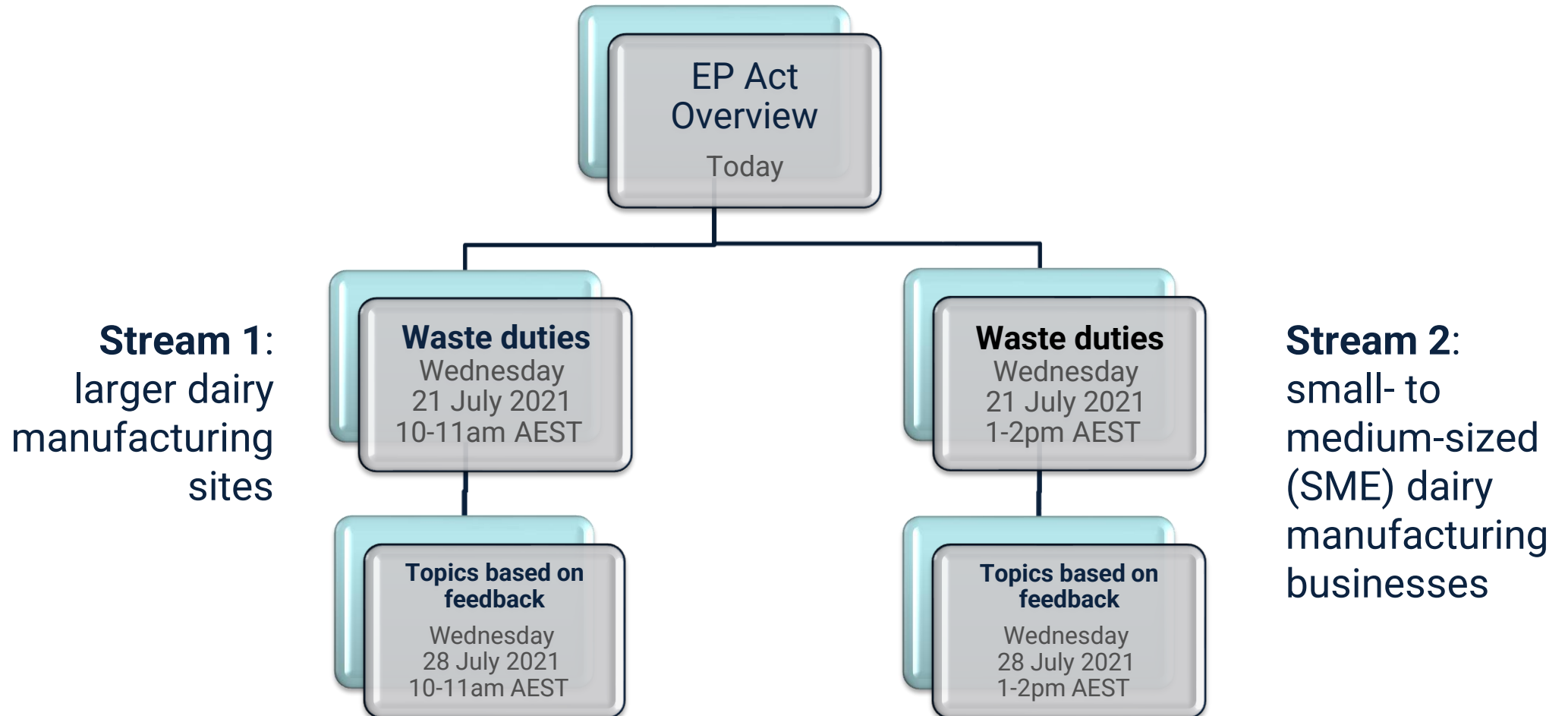
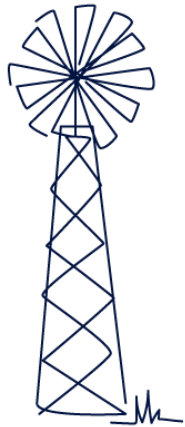
PREPARING VIC DAIRY MANUFACTURERS FOR THE NEW ENVIRONMENTAL PROTECTION ACT



Acknowledgement of Country

PREPARING VIC DAIRY MANUFACTURERS FOR THE NEW ENVIRONMENTAL PROTECTION ACT

Structure of Workshop Series



Victoria's new Environment Protection laws: an overview

Dr Meredith Gibbs
Principal, Gibbs Advisory



New EP laws workshop series



Legal | Mediation | Advisory

Stream 1:
larger dairy
manufacturing
sites



Stream 2:
small- to medium-
sized (SME) dairy
manufacturing
businesses

Today's agenda

- Background and themes of the new EP Act
- The general environmental duty (GED)
- “Reasonably practicable”
- Contaminated land duties
- Waste management framework
 - Detailed discussion in next workshop
- Compliance and penalties
- Implementation



Legal | Mediation | Advisory

Background



Themes



- Prevention
- Flexible and risk-based
- Transparency: information and access to justice
- Modernising the EPA

A duties-based framework



- **General environmental duty (GED) – based on OHS duties**
- Duties to:
 - manage contamination
 - notify of certain levels of contamination
 - respond to harm and remediate after an incident
 - notify of certain pollution incidents
 - manage waste (industrial waste/priority waste/reportable priority waste)

A change of approach



Has pollution occurred?



Are systems and processes in place to eliminate/minimise risks to human health and environment?

New duties: General Environmental Duty (GED)



25 General environmental duty

(1) 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.

- Activities that MAY give rise to risks of HARM
- Criminal offence and civil penalty provision
- Max penalty – individual \$363,480; company \$1,817,400 (double for aggravated offence plus 5 years imprisonment)

What is “harm”?

means **an adverse effect** on human health or the environment (of whatever degree or duration) and includes—

(a) an adverse effect on the amenity of a place or premises that unreasonably interferes with or is likely to unreasonably interfere with enjoyment of the place or premises; or

(b) a change to the condition of the environment so as to make it offensive to the senses of human beings; or

(c) anything prescribed to be harm for the purposes of this Act or the regulations.

What do I need to do?

The GED requires **all individuals and entities** to:

- take **reasonably practicable** steps to **eliminate**; or
- if elimination is not reasonably practicable, to take **reasonably practicable** steps to **minimise**,

risks of harm to human health or the environment from pollution or waste.

The duty applies to all activities that pose of risk of harm to human health or the environment from pollution and waste



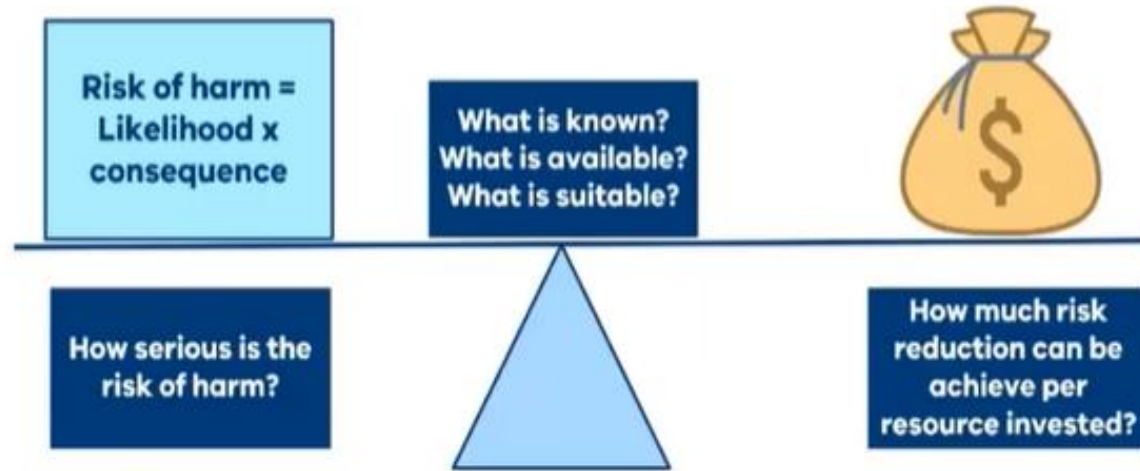
Reasonable practicability

Factors to consider

- The **likelihood** of the risks eventuating
- The **degree of harm** that would result if those risks eventuated
- What the person **knows**, or **ought reasonably know**, about the harms or risks of harm and the ways of eliminating or reducing those risks
- The **availability, suitability and cost** of eliminating or reducing those risks.

“State of knowledge”

So far as reasonably practicable



Source: EPA webinar 3 February 2020

State of knowledge

Factors to consider

- 'State of knowledge' is all the information you should reasonably know about managing your business's risks.
- It includes:
 - risks your business may pose to human health and the environment
 - steps you should take to eliminate or reduce those risks
 - knowledge as it changes over time – not a 'set and forget' mentality

Knowledge sources from business and industry

- Documents showing how to perform activities safely
- Manuals
- Safety data, instructions and labels
- Training on equipment use
- Contracts between parties
- Guidance from industry bodies

Knowledge sources from independent organisations

- Independent organisations like **Standards Australia**
- Universities
- Environmental engineers

Knowledge sources from regulators and government

- EPA guidance. **Find guidance for your industry**
- Government authorities like **Sustainability Victoria** and **WorkSafe**
- Guidance material
- Technical notes
- Outcomes from decisions EPA has made to enforce the law
- Specific advice for your business



Broad duty – all you need is a risk of harm



- No requirement for actual harm
- No requirement for causation
- OHS examples



Breach of GED by businesses



Failure to, so far as is reasonably practicable:

- **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
- **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
- **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**
- **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
- **provide information, instruction, supervision and training** to any person engaging in the activity to enable those persons to comply with the GED

A change of approach



Has pollution occurred?



Are systems and processes in place to eliminate/minimise risks to human health and environment?

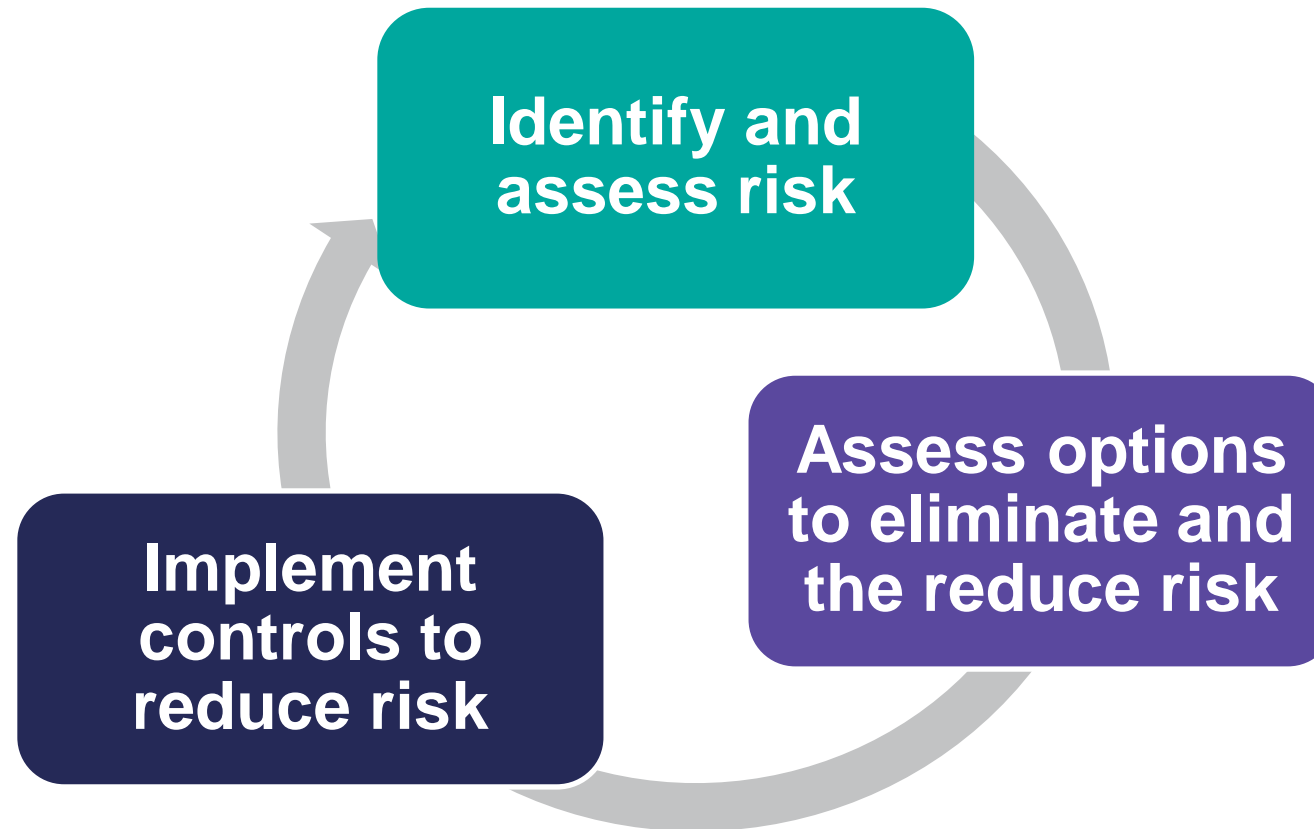


Breach of GED by designers, manufacturers, installers and suppliers of a substance, plant, equipment or structure

Failure to, so far as is reasonably practicable:

- minimise risks 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
- **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 GED

General Environmental Duty



A change of approach



Have I met the
minimum
standards?



Have I done all
reasonably
practicable to
eliminate/minimise
risks to human health
and environment?

GED: What's the big deal?



- Broad scope
 - No requirement for actual harm
 - No requirement for causation
- Open to interpretation
- Applies to all activities that pose risks
- Applies to all individuals and entities
- High penalties
- **D&O personal liability**



Resources

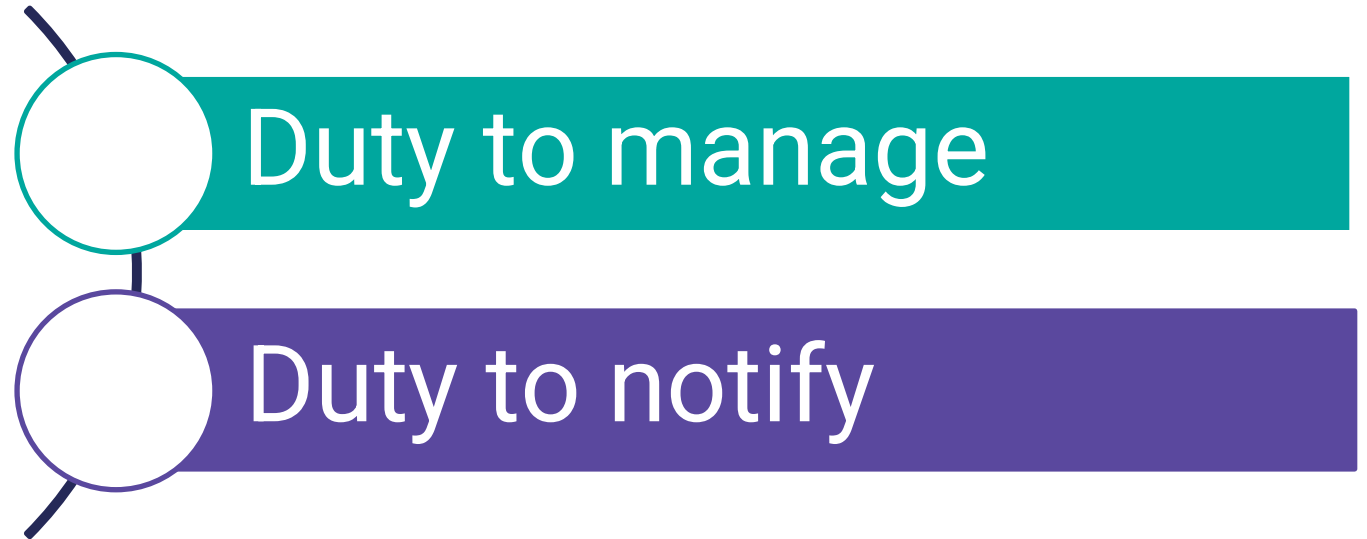


- <https://www.epa.vic.gov.au/for-business/new-laws-and-your-business/general-environmental-duty>
- [Industry guidance: supporting you to comply with the general environmental duty](#) (publication 1741.1)
- [Reasonably practicable](#) (publication 1856)

New duties: Contaminated Land



- New duties bring Victoria into line with other states
- Act specifically applies to land that is contaminated before, on or after the commencement of the Act.
 - Historical or legacy contamination
 - New contamination



Duty to manage contaminated land



- Positive duty to manage risks of harm to human health and the environment, so far as is **reasonably practicable**
- Person in management or control of contaminated land (includes groundwater)
 - hold a legal interest in the land, such as owner, leaseholder or committee of management
 - have access to the land or use of the land – practical control.
- Identify, assess and manage contaminated land
 - Based on what you know or **ought reasonably know**
 - Could include clean up where reasonably practicable
 - Return land to state that does not pose a risk to human health and the environment
- Provision of adequate information to any person that may be affected by the contamination

Contaminated Land

What happens to clean up notices?

- Environmental Action Notices
- Site Management Orders
 - New instrument for long-term management of a contaminated site
 - Registered on title, binds subsequent owners



Polluter pays principle



- Reasonable costs incurred by a person in management/control of contaminated land in complying with:
 - contaminated land duties
 - environmental action notices
 - site management orders
 - notification
- Recoverable from polluter
 - causing or contributing to the contamination
- Could be timing issues – need to think this through
- **No need for EPA notice**



Duty to notify contaminated land



Applies to a subset of contaminated land - significant contamination

- **Person in management/control** must notify the EPA, as soon as practical after becomes aware or **ought to have become aware** of contamination
 - person's skills, knowledge and experience
 - whether the person could reasonably seek advice
 - any other circumstances of the contamination
- **Triggers:**
 - all contaminants listed in Section 6 of Schedule B1 of the NEPM Assessment of Site Contamination
 - onsite soil retention (other than fill material) sourced on site and no permission required
 - friable asbestos under certain circumstances
 - vapour intrusion
 - all circumstances of NAPL (non-aqueous phase liquid)
 - there are exemptions
- **Penalties:** individual \$21,808.80; company – approx. \$109, 000

Audits



Preliminary Risk Screen

- Rapid, low cost (\$5k)
- Current trials with Council



Scaled Assessment Audit

- Scaled assessment of key risks

Statements must be given to future managers/controllers of land

Resources



- [Assessing and controlling contaminated land risks: a proposed guide to meeting the duty to manage for those in management or control of land](#) (publication 1977)
- [Contaminated land policy](#) (publication 1915)
- [Contaminated land: Understanding section 35 of the Environment Protection Act 2017](#) (publication 1940)
- Guideline on notification of contaminated land expected soon



New duties: Pollution incidents

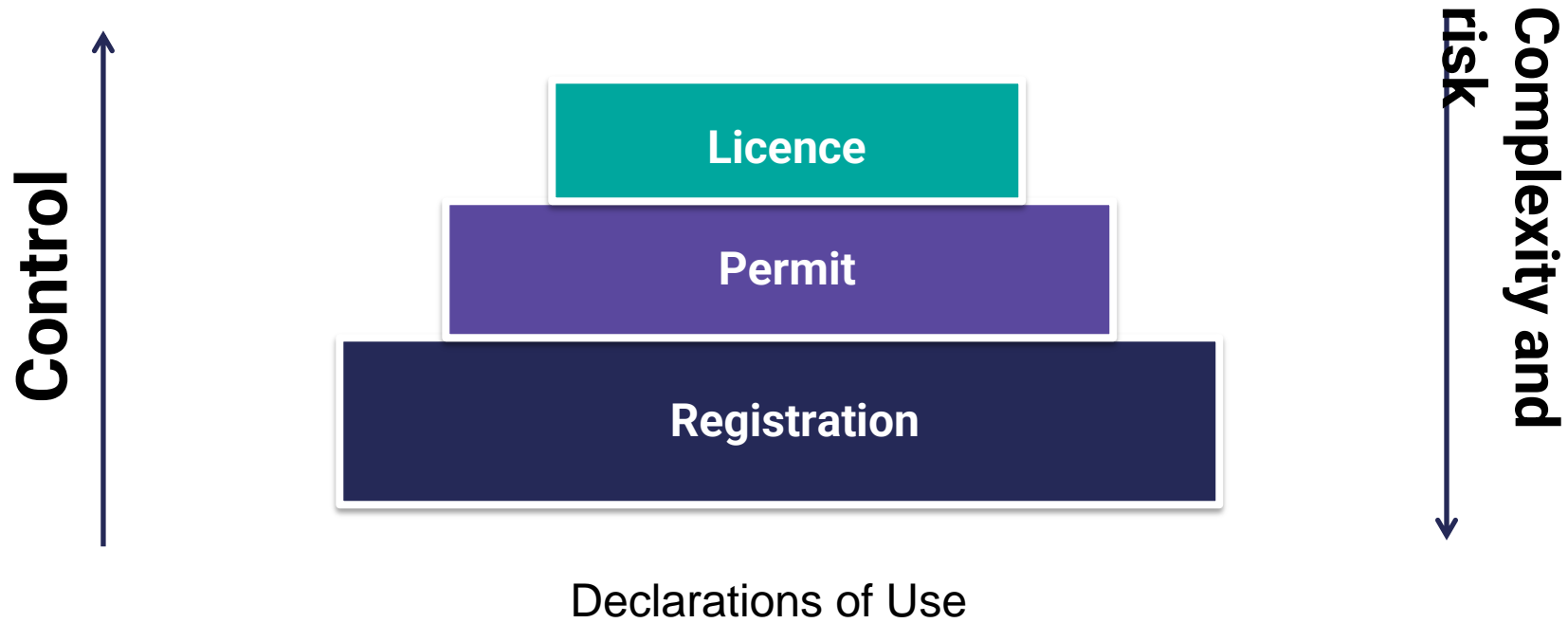


The new pollution incident duties will include obligations to both:

take action in response to harm caused by pollution; and

notify relevant authorities of pollution incidents (material harm)

Permissions



Schedule 1—Prescribed permission activities and fees

<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>
<i>Item</i>	<i>Activity type and summary description</i>	<i>Description of prescribed permission activity</i>	<i>Type of prescribed permission activity</i>	<i>Operating licence base fee in fee units (if applicable)</i>
31	A23 (Temporary storage—designated waste)	Temporary storage of 1000 litres or less of designated waste not generated at the site if the storage is for a period of no more than 60 days	<ul style="list-style-type: none"> • Prescribed registration activity 	

B: Primary industry and allied operations

32	B01a (Animal industries—waste solely to land)	Operating a piggery, cattle feedlot, sheep feedlot, goat feedlot, goat dairy or dairy freestall that— (a) has more than 5000 animals (of any combination of pigs, cattle, sheep or goats) concentrated for the purposes of agricultural production; and (b) discharges or deposits waste solely to land	<ul style="list-style-type: none"> • Prescribed development activity • Prescribed permit activity 	
33	B01b (Animal industries—waste not solely to land)	Operating a piggery, cattle feedlot, sheep feedlot, goat feedlot, goat dairy or dairy freestall that— (a) has more than 5000 animals (of any combination of pigs, cattle, sheep or goats) concentrated for the purposes of agricultural production; and (b) does not discharge or deposit waste solely to land	<ul style="list-style-type: none"> • Prescribed development activity • Prescribed operating activity 	140 fee units

Permissions



44	D07 (Milk processing)	Processing milk or manufacturing dairy products with a designed throughput of at least 200 tonnes per year of product(s)	<ul style="list-style-type: none"> • Prescribed development activity • Prescribed operating activity 	70 fee units
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Waste Management Framework



- Flexible, proportionate
- GED applies
- Duties to manage: Industrial Waste, Priority Waste and Reportable Priority Waste
- Clarifies obligations – duty applies across the supply chain
 - generators of waste
 - transporters of waste
 - receivers of waste
- **Waste duties are cumulative**



Waste Management Framework



Source: EPA publication 1753

Waste Management Framework



Source: EPA publication 1756

Waste definition



waste includes any of the following—

- (a) matter, including solid, liquid, gaseous or radioactive matter, that is deposited, discharged, emitted or disposed of into the environment in a manner that alters the environment;
- (b) a greenhouse gas substance emitted or discharged into the environment;
- (c) matter that is discarded, rejected, abandoned, unwanted or surplus, irrespective of any potential use or value;
- (d) matter prescribed to be waste;
- (e) matter or a greenhouse gas substance referred to in paragraph (a), (b), (c) or (d) that is intended for, or is undergoing, resource recovery;

deposit, in relation to litter and waste, means the act of parting with the possession of litter or waste and includes the disposal of litter or waste by burning;

Waste Management Framework



Source: EPA publication 1756

What is industrial waste?



- Waste from:
 - commercial, industrial or trade activities
 - laboratories
 - waste prescribed to be industrial waste
- Wide definition captures waste not previously treated as industrial waste
- EPA now working with industry to address this – ‘Determinations’



Industrial waste



- Waste duties apply (in addition to the GED) to:
 - person generating the waste – take reasonable steps to:
 - identify and classify waste
 - ensure waste is going to a ‘lawful place’ and with the consent of owner/manager of the lawful place
 - provide info to enable next person to transport and take to a ‘lawful place’
 - person receiving the waste – you must be a ‘lawful place’
 - person transporting the waste – contain your waste safely during transport
- All offence provisions

Lawful place



1. in low-risk circumstances specified in the Environment Protection Regulations 2021 – Regulation 63

Discharge or deposit to land of less than 20 m ³ per month of manure	Trade waste under a Trade Waste Agreement
Receipt of 5m ³ or less of industrial waste that is not priority waste	Receipt of 5m ³ or less of tyres and don't need a permission
Wastewater if on a A14 permit (Reclaimed wastewater supply or use permit)	Biosolids if on a A15 permit (Biosolids supply or use permit)

2. if received in accordance with specifications set out in a **determination**
3. under a **declaration of use**
4. by a **permission** authorising receipt of the waste (licensed premises)
5. under a **section 48 determination** (determination that person does not require a permission)
6. by being **exempt** from the need to hold a permission for receipt of the waste
7. by an **emergency authorization**

Priority waste



- Replaces prescribed industrial waste (PIW) – subset of industrial waste e.g. processed food waste, e-waste and liquid organic wastes
- Can include both industrial and non-industrial waste
 - hazardous; or
 - other controls e.g. to maximise recycling/reuse
- Greater granularity, proportionality in controls
- Industrial waste duties apply plus:
 - **isolate your waste to enable resource recovery to occur**
 - **duty to investigate alternatives**
- Check regulations – Schedule 5
 - new level of detail

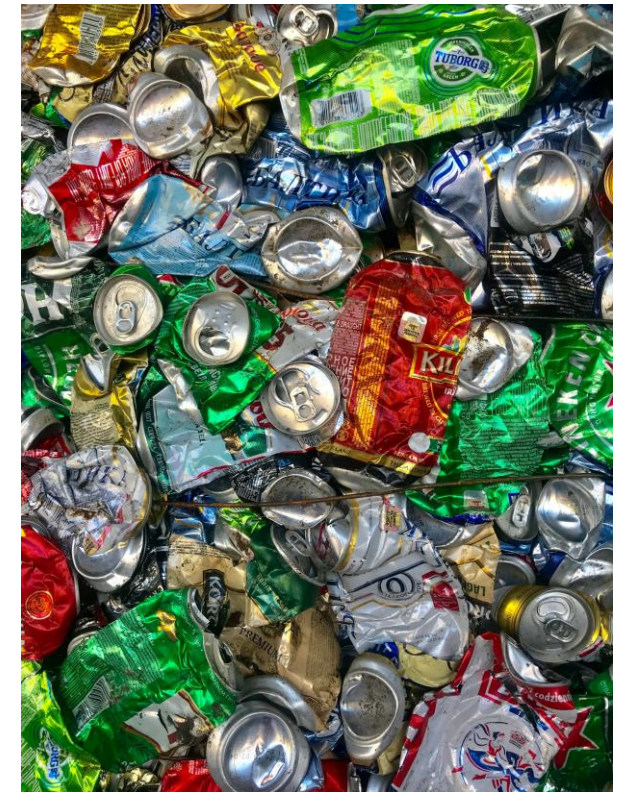


Photo by [Evgeny Karchevsky](#) on [Unsplash](#)

Reportable priority waste



- Further subset of priority waste
- Applies to prescribed transactions
- Must be tracked and transport must be licensed, depending on category – refer Schedule 5 of Regulations



Waste offences (in addition to GED offence)



- It is an offence to:
 - make false representations that a person is authorised to receive industrial waste
 - provide false or misleading information to EPA or any person in relation to industrial waste
 - conceal information about the type, properties and classification of the waste or the risks of harm to human health or the environment.
- Non-compliance can result in a penalty of more than \$80,000 for an individual or \$410,000 for a company.
- In addition, if an individual is convicted of an industrial waste duty offence for a second time within five years, a court may impose an imprisonment term of up to two years.



Resources

- [Waste duties](#)
- [Declaration of Use](#)
- [Industrial waste](#)
- [Guide to classifying waste](#) (publication 1968)
- [How to establish lawful place](#) (publication 1946)
- [Waste classification assessment protocol](#) (publication 1827)
- [Waste disposal categories - characteristics and thresholds](#) (publication 1828)

Compliance



- Compliance codes
- EPA position statements
- Better Environment Plans
- Regulations
- Emergency approvals
- Notices
 - Improvement Notices
 - Notice to investigate
 - Environmental Action Notices
 - Site Management Orders
- Environmentally hazardous substance orders



Penalties – increased, some doubled!



Max penalties for aggravated offences:

- companies: approx. \$3.6M
- individuals: approx. \$727,000 and up to five years imprisonment for aggravated offences

Continued criminal sanctions and D&O liability

- Derivative liability remains largely unchanged: Directors and those concerned in the management guilty of same offence as corporation unless can establish a defence (due diligence)
- Parent company liability
- “Chain of responsibility provisions” – Redirection of corporate obligation notices

Introduction of civil penalties

Third party rights



- Members of the community will be able to apply directly to Court (without any EPA involvement required) for orders to either:
 - restrain persons from engaging in breaching conduct; or
 - require persons to take specific mitigation or remedial action
- Where a person has an **interest in the matter** or where **the proceeding is in the public interest and the EPA has not acted**

Implementation



- New Act and Regulations will commence on 1 July 2021
 - *Environment Protection Act 2017*
 - Environment Protection Regulations 2021
 - Environmental Reference Standards
 - Other EPA guidance documentation
 - 1970 Act will be repealed
- EPA will work with industry – but business has had time to prepare
- EPA has published a range of guidance documents
- All current EPA licences need to be transitioned over, new standard conditions

Implementation



Delivery horizons

Delivery of the strategic focus areas will occur across three main horizons.

In **Horizon 1 (2020-2022)**, EPA will work to support the transition to the new legislative scheme and maintain focus on existing priority harms and those that deliberately non-comply or create a risk of harm.

As we start to realise the benefits of stronger capabilities and increased duty holder awareness of legal obligations, **Horizon 2 (2022-2024)** will focus on raising broader compliance across industry sectors and activities.

Horizon 3 (2024-2025) will focus on applying additional features of our legislation and permissions scheme, to improve efficiency of our administrative services, and incentivise businesses to increase their environmental performance.

Implementation



Are systems and processes in place to eliminate risks to human health and environment?

- Understand and assess the risks of your activities and how you can:
 - **Eliminate** where reasonably practicable
 - **Minimise** as far as reasonably practicable
- Review/update environmental management systems/plans to ensure compliance with the new Act
- Understand transition of any site licences
- Get ready for any contaminated land notifications that need to be made
- Understand new waste management duties and how they will impact on your business
- Take your team on the journey

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It does not constitute legal or other professional advice and should not be relied on as a statement of the law.
It is intended only as a general guide and may contain generalisations.
You should obtain professional advice for your specific circumstances.