

# Webinar: General Environmental Duty: Implications for Waste and Resource Recovery Projects

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Presenters: Principals Stefan Fiedler and Kyle Gillan  
Facilitator: Associate Michael Bragg



# Webinar housekeeping

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- All attendees will be on mute and their cameras turned off for the entire webinar
- We have BD tech support live to assist with any technical issues
- Use the chat function for any comments/technical issues
- Use the Q&A function for specific questions related to the webinar content – Questions will be addressed at the end of the webinar
- There will be a post webinar survey link sent at the end of the webinar. We value attendee feedback
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## Disclaimer

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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.





# General Environmental Duty



# What is the General Environmental Duty?

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It is a statutory duty in Victoria from 1 July 2021

- Parliament's intention → create a preventative regulatory scheme

**Preventative action here**



**Clean Up & Penalties here**



- Origin → Worker / Community Safety (CFA Fiskville / Hazelwood Mine Fire / Waste Hazards)
- Adopts OH&S model with criminal and civil penalty and civil remedies
- General Environmental Duty at core of 13 statutory duties (industrial waste / pollution incident / contaminated land)

# How will the General Environmental Duty apply?

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## Regulatory application and intervention

- criminal indictable offence → conducted in business or undertaking

*IN*

*OUT*

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Government & Public Authority

Private or domestic not for profit / financial gain

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Whether profit or gain

Employee or volunteer

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- Court may impose criminal sanction or civil penalty
- EPA will issue remedial notices on ground of contravention of General Environmental Duty
  - Right to apply for internal EPA review and VCAT merits review

## Civil intervention

- Eligible person where EPA does not intervene
- must have leave of Court → Court's discretion to hear claim
- Remedies → restrain conduct / require specific act / **COMPENSATION** / financial assurance

# Full extent of the General Environmental Duty

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“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.**”

- 35 words → with definitions & sub-definitions within Principal Act 913 words
- Defined terms (colour and capitals) → inclusive (ordinary meaning & inclusions) or exhaustive
- Defined terms contain further sub-defined terms in colour and lower case
  
- 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
  
- Compliance Codes will prescribe further detail (none yet released)
  - likely by industry sector and for particular activity / waste / substance





# General Environmental Duty and Contracting



# General Principles

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## Relevance of contracts

### **ACTIVITIES** caught by GED

- Many **ACTIVITIES** caught by GED are performed under a commercial contract
  - Kerbside collection contracts / bulk transport contracts
  - Waste processing contracts (recycling, organics and water)
  - Waste disposal contracts (landfill, trade waste agreement and recycled water)
  - Facilities operation and maintenance agreements (waste and resource recovery infrastructure, and water infrastructure)
  - Construction contracts (waste and resource recovery, water or any other infrastructure)
- Some **ACTIVITIES** caught by GED **are not** performed under a commercial contract
  - Owner / operators (government or private sector owned and operated)
  - Business support functions

# General Principles

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## No contracting out of GED

GED statutory basis independent of contract

- Examples: *Country Fire Authority Act 1958*, *Occupational Health and Safety Act 2004*
- *Baiada v The Queen* [2012] HCA 14

**BUT ...**

## Contract as primary risk management tool

- Discharging the GED through contract by **MINIMISING** risks, so far as **REASONABLE PRACTICABLE**

Independent contractor relationship

- Balance between reliance on expert contractor and monitoring and compliance
- Avoid interference with contractor obligations and risk transfer
- Clear distinction between roles and responsibilities

# How to *MINIMISE* risks in contract

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## Obligation to comply with laws

- *Environment Protection Act 2017*
- Environment Protection Regulations
- Subordinate instruments, guidelines
- Compliance with EPA notices

## Maintain systems

- Quality control, certified systems, independent audits

## Keep principal informed

- EPA notices
- Notifiable incidents
- Reporting on compliance

## Environmental Management Plan

- Identify waste streams
- Collection, transport, processing and disposal methodologies





# How to *MINIMIZE* risks in contract (cont.)

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## Permissions

Which party obtains **and** maintains permissions (licences, permits, registrations)?

## Indemnities

*A promise from party A to hold party B harmless from loss or damage*

- Breach of contract
- Personal injury and property damage
- Third party claims
- Environmental damage and contamination
- Breach of environmental laws
  - *Environment Protection Act 2017 / Environment Protection Regulations*
  - Environmental reference standards, compliance codes, position statements

# How to *MINIMIZE* risks in contract (cont.)

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## Insurance

- Professional indemnity insurance (professional services)
- Public liability
- Consider contractor's pollution liability insurance (legal liability for pollution conditions and clean up costs as a result of the services)

## Records management by principals and owners

- Contract management records
- Audits

# Specific duties - tailored approach to specific contracts

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## Kerbside collection contracts / bulk transport contracts

- Waste tracker, duties of persons transporting waste

## Waste processing contracts (recycling, organics and water)

- Duties of persons receiving waste, operating licences

## Waste disposal contracts (landfill, trade waste agreements and recycled water)

- Duties of persons disposing of waste, operating licences

## Facilities operation and maintenance agreements (waste and resource recovery infrastructure, and water infrastructure)

- Management or control of land or water, infrastructure manager obligations, operating licences

## Infrastructure construction contracts

- Development licences for waste infrastructure, disposal of spoil, noise and dust

## Professional consultants

- Accurate scoping, standard of care



# Key Take Aways

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## No contracting out of GED

- BUT: - contract as primary risk mitigation tool

### **MINIMISE** risks through:

- Contractual obligations
- Permissions, licences
- Indemnities
- Insurance

## Tailored approach

- Specific duties for contracts in the supply chain require specific measures

## Existing contracts

- Review existing contracts
- Change in law risk (1 July 2021)

## Future contracts and tenders

Update contracts to ensure risks **MINIMISED** as far as **REASONABLE PRACTICABLE**

# Q&A – Your Russell Kennedy Contacts

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**Stefan Fiedler**  
Principal

(03) 9609 1672  
[sfiedler@rk.com.au](mailto:sfiedler@rk.com.au)



**Kyle Gillan**  
Principal

(03) 8602 7221  
[kgillan@rk.com.au](mailto:kgillan@rk.com.au)



**Michael Bragg**  
Associate & Facilitator

(03) 9609 1662  
[mbragg@rk.com.au](mailto:mbragg@rk.com.au)



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Russell Kennedy Pty Ltd  
info@rk.com.au  
russellkennedy.com.au

**Melbourne**

Level 12, 469 La Trobe Street  
Melbourne VIC 3000  
PO Box 5146  
Melbourne VIC 3001 DX 494 Melbourne  
**T** +61 3 9609 1555 **F** +61 3 9609 1600

**Sydney**

Level 6, 75 Elizabeth Street  
Sydney NSW 2000  
Postal GPO Box 1520  
Sydney NSW 2001  
**T** +61 2 8987 0000 **F** +61 2 8987 0077

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