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

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Webinar housekeeping

- 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
- We will also have a QR code linking to our feedback survey towards the end of the presentation so you can provide instant feedback



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.





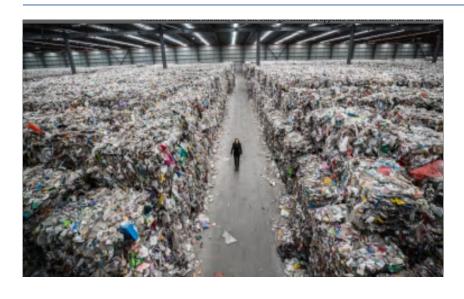


What is the General Environmental Duty?

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?

Regulatory application and intervention

- criminal indictable offence → conducted in business or undertaking

IN	OUT
Government & Public Authority	Private or domestic not for profit / financial gain
Whether profit or gain	Employee or volunteer

- 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

"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*."

- <u>35 words</u> → with definitions & sub-definitions within Principal Act <u>913 words</u>
- 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 Principles

Relevance of contracts

ACTIVITIES caught be 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 <u>are not</u> performed under a commercial contract
 - Owner / operators (government or private sector owned and operated)
 - Business support functions



General Principles

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

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

- FPA notices
- Notifiable incidents
- Reporting on compliance

Environmental Management Plan

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





How to *MINIMISE* risks in contract (cont.)

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 *MINIMISE* risks in contract (cont.)

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

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

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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