

# Environment Protection Amendment Bill 2019

## Introduction Print

### EXPLANATORY MEMORANDUM

#### Clause Notes

##### Part 1—Preliminary

- Clause 1 sets out the main purposes of the Bill, which are to amend the **Environment Protection Act 1970** to prohibit the provision of certain plastic bags by retailers and false and misleading information relating to plastic bags, and to make technical and consequential amendments to the **Environment Protection Amendment Act 2018**.
- Clause 2 sets out commencement arrangements for the Bill.
- Clause 2(1) provides for the provisions of the Bill to come into operation by proclamation subject to this section.
- Clause 2(2) provides for Part 1 and Part 3 of the Bill to come into operation on the day after the day on which the Bill receives Royal Assent.
- Clause 2(3) provides for Part 2 of the Bill to come into operation on a day or days to be proclaimed, or on 1 November 2019 if not proclaimed before that date, to provide for a transitional period for the retail sector.
- Clause 2(4) provides for Part 4 of the Bill to come into operation on a day or days to be proclaimed, or on 1 December 2020 if not proclaimed before that date.

## Part 2—Amendments to the Environment Protection Act 1970

- Clause 3 provides that, in Part 2 of the Bill, the **Environment Protection Act 1970** is called the Principal Act.
- Clause 4 sets out the definitions of *banned plastic bag*, *barrier bag* and *exempt plastic bag* for inclusion in section 4(1) of the Principal Act and repeals the definition of *plastic bag* in section 4(1) of the Principal Act.

***Banned plastic bag*** is defined to mean a bag, other than an exempt plastic bag, with handles and that comprises, either wholly or partly, plastic, whether or not that plastic is biodegradable, degradable or compostable and has a thickness of 35 micrometres or less at any part of the bag, or a prescribed banned plastic bag. The definition includes reference to biodegradable, degradable and compostable bags but the inclusion of these types of bags is not to limit the scope but rather avoid confusion about whether they are exempt. The definition allows for specific types of bags to be prescribed as a banned plastic bag where the need for certainty or clarity arises.

***Barrier bag*** is defined to mean a bag that comprises, either wholly or partly, plastic and does not have handles and is used to carry unpackaged perishable food.

***Exempt plastic bag*** is defined to mean a bag that comprises, either wholly or partly, plastic that is a barrier bag or is an integral part of the packaging in which goods are sealed or provided for sale or a prescribed exempt plastic bag. The exemption for plastic bags which are an integral part of the packaging for certain goods is to exempt from the ban those plastic bags which are used to carry perishable goods that are pre-packaged in-store. A barrier bag is exempt from the ban due to the practicable issues of food safety and hygiene associated with perishable goods. The following types of bags are not intended to be a ***banned plastic bag***: heavyweight reusable plastic bags (also known as department store or boutique bags), paper bags, cloth bags, jute bags, hessian bags, kitchen tidy bags, bin liners, nappy bags or dog waste bags.

Clause 5 amends section 31A(1)(b)(ia) of the Principal Act to enable a pollution abatement notice to be issued for a contravention of section 45ZM where a retailer sells or provides a banned plastic bag to a person to carry or transport goods sold or provided by the retailer from the retail premise and repeals section 31A(2)(e)(ia) of the Principal Act as it is rendered redundant by the new provisions relating to banned plastic bags.

Clause 6 inserts new Division 8 into Part VIIA of the Principal Act to insert 2 offence provisions, new sections 45ZM and 45ZN.

New section 45ZM creates an offence, that is intended to be a strict liability offence, for the provision of banned plastic bags by a retailer and, also provides the relevant penalties if a natural person (60 penalty units) or a body corporate (300 penalty units) is found to have contravened section 45ZM.

For a strict liability offence to be made out, the prosecution would only have to prove the conduct of the retailer, namely the prohibited provision of the plastic bag, occurred. A strict liability offence removes the requirement for the prosecution to prove the element of fault. It would then be open to the retailer to show that they acted under an honest and reasonable mistake as to the existence of facts which, if true, would have made that conduct innocent. A strict liability offence serves an important public purpose as it is fundamental to the effective deterrence of the supply of banned plastic bags. As such, it is justified in preventing the serious environmental harm that results from the widespread dissemination of plastic bags from multiple points of supply.

The ban's enforcement regime would be undermined if it were required to prove mental intent, knowledge or recklessness for each prosecution. A less restrictive measure of enforcement would not be appropriate considering the strong public interest in preventing indelible harm to the environment through the dissemination of banned plastic bags. The supply offence being one of strict liability would only place an evidential burden on an accused. The imposition of strict liability for the supply offence is necessary and appropriate in the circumstance.

New section 45ZN creates an offence for the provision of false or misleading information by a retailer or wholesaler, or a manufacturer of plastic bags, about the composition of a banned plastic bag and whether or not a bag is a banned plastic bag or an

exempt plastic bag. Section 45ZN also provides the relevant penalties if a natural person (60 penalty units) or a body corporate (300 penalty units) is found to have contravened section 45ZN.

Clause 7 amends section 55(1) of the Principal Act, which currently provides for the premises into which an authorised officer may enter for compliance purposes. The powers of entry in section 55(1), in their current form, do not enable an authorised officer to enter retail premises to determine whether a retailer complies with the plastic bag ban. The purpose of the amendment is to extend existing powers of entry to any retail premises at "any reasonable time" to enable an authorised officer to ensure compliance with, or contravention of, the new plastic bag offences. Extending these powers is necessary for enforcement of the ban as enforcement will largely rely on regulation at the point of supply. The proposed expanded powers of entry onto retail premises are proportional to the existing powers of entry afforded to authorised officers under the Principal Act onto other regulated premises. Without extending the powers of entry to retail premises, the ability to enforce the plastic bag ban would be frustrated and the effectiveness of the policy limited. A reduction in the number of plastic bags in circulation relies on regulation at the point of supply. Failing to extend these powers of entry would limit the Environment Protection Authority's ability to prevent environmental harm through enforcing the ban, which largely relies on regulation at the point of supply to effect a reduction in the number of plastic bags in circulation.

Clause 8 amends the regulation-making heads of power in the Principal Act.

Clause 8(1) substitutes section 71(1)(ka) to create a regulation-making head of power for prescribing banned plastic bags pursuant to the definition of *banned plastic bag*.

Clause 8(2) substitutes section 71(1)(kb) of the Principal Act to create a regulation-making head of power for prescribing exempt plastic bags pursuant to the definition of *exempt plastic bag*.

Clause 8(3) repeals the regulation-making heads of power in section 71(1)(kc), (kd), (ke), (kf) and (kg) of the Principal Act because they are redundant due to the new prohibition of banned plastic bags.

Clause 9 amends Schedule A to the Principal Act to provide for the issuing of infringement notices in relation to the prohibition on the provision of a *banned plastic bag* under new section 45ZM. Infringement notices enable less serious breaches of this offence to be dealt with expediently.

### **Part 3—Amendments to the Environment Protection Amendment Act 2018**

Clause 10 provides that, in Part 3 of the Bill, the **Environment Protection Amendment Act 2018** is called the Principal Act.

Clause 11 amends section 6(9) of the Principal Act to correct the proposed definition of *resource recovery* by removing the unnecessary word "any".

Clause 12 amends section 7 of the Principal Act to substitute proposed section 57(5) of the **Environment Protection Act 2017** (the 2017 Act), which currently provides for the time frame in which the Authority, or a council in the case of a permit issued by a council, must make a decision following an application to amend a licence or permit within 42 days following receipt of the application by the Authority or a prescribed period in respect of an application made to a council. This substitution corrects the time frame in which the decision must be made, in the case of amending a licence to 42 days, in the case of an application to the Authority to amend a permit to any prescribed period not exceeding 42 days following receipt of the application or 15 business days if there is no prescribed period, and to the prescribed period in the case of an application to a council to amend a permit. This provides consistency with the time frame for an initial decision to grant a permit.

Clause 13 amends proposed section 61 of the 2017 Act in section 7 of the Principal Act, which provides for the revocation of permissions (a development licence, operating licence, pilot project licence, permit or registration under the **Environment Protection Act 2017**), on the Authority's or council's initiative where certain grounds or criteria apply.

Clause 13(1) repeals proposed section 61(1)(e) of the 2017 Act in section 7 of the Principal Act.

Clause 13(2) replaces the reference to paragraph (f) with paragraph (e) in proposed section 61(1).

Clause 13(3) substitutes proposed section 61(2), which currently provides that the Authority or a council may revoke a permission issued or granted by it where it considers that the holder is no longer required to hold the permission. If a permission is revoked on the grounds or criteria specified in section 61(1), the permission holder is a prohibited person by virtue of proposed section 88(1)(b) of the 2017 Act, meaning they are prohibited from engaging in particular activities. This substitution has the effect of not deeming a person to be a prohibited person, where a permission is revoked because the person no longer engages in the activity prescribed in the permission. No longer engaging in an activity is not indicative of a likelihood to cause harm to human health or the environment and should not deem a person to be a prohibited person.

Clause 14 amends section 7 of the Principal Act to replace the reference to the deposit of waste with reference to receiving waste in proposed section 67 of the 2017 Act to clarify that the Authority must not issue or grant a permission in relation to a landfill site for receiving priority waste prescribed as Category A priority waste and that this covers activities where it might otherwise be argued that there was no act of parting with the possession of waste.

Clause 15 amends section 7 of the Principal Act to replace the words "public works" with "works" in proposed section 70(a) of the 2017 Act to clarify that the notice required for the application for a development licence can be combined with any notice given for those works under the **Environment Effects Act 1978**, where it relates to any works as opposed to being limited only to works that are public works. This also provides consistency with the current provisions of the **Environment Protection Act 1970** for joint publication, which are not limited to only public works.

Clause 16 amends proposed section 86 of the 2017 Act in section 7 of the Principal Act, which provides for renewal of registrations which are a type of permission required for prescribed registration activities.

Clause 16(1) substitutes proposed section 86(4) with proposed section 86(4) and (5) to ensure that a compliant registration renewal is granted automatically upon application, and the

applicant notified, as is the case for granting the registration, rather than providing the Authority discretion to determine whether to renew after taking into account any prescribed matters.

Clause 16(2) replaces the references to subsections (5) and (6) in proposed section 86 to subsections (6) and (7) respectively.

Clause 17 amends section 7 of the Principal Act to remove the unnecessary word "section" in proposed section 89(2) of the 2017 Act which incorrectly refers to "section Part 11.8".

Clause 18 amends proposed section 93 of the 2017 Act in section 7 of the Principal Act, which provides for environment reference standards which set out the uses, attributes and functions of the environment that the community values and that are sought to be achieved or maintained, for example on air quality, water quality or noise.

Clause 18(1) amends proposed section 93(2) of the 2017 Act, which provides for what an environment reference standard must identify, to omit "that specify the environmental condition and uses of the environment" as environmental values do not specify the environmental condition and uses of the environment, rather, they are values to be achieved or maintained.

Clause 18(2) repeals proposed section 93(3)(e), which provides that an environment reference standard must specify the indicators and objectives to be used to measure whether environmental values specified in the environment reference standard are being achieved or maintained, and amends section 93(3)(d) to reflect that it is the final paragraph in the subsection.

Clause 18(3) inserts section 93(4) which provides that an environment reference standard may specify indicators and objectives. This removes the requirement for indicators and objectives to be specified in relation to each environmental value, and instead makes this discretionary. This was the original intent for indicators and objectives and is consistent with current practice in some State environment protection policies in relation to beneficial uses.

Clause 18(4) replaces the references to subsections (4) and (3)(e) in proposed section 93(4) to subsections (5) and (4) respectively as a consequence of subclause (2)(a) repealing proposed section 93(3)(e) and subclause (3) inserting a new proposed section 93(4) and existing proposed section 93(4) being renumbered 93(5).

- Clause 19 amends section 7 of the Principal Act to substitute "reasonably believes that another person" in proposed section 118(2)(b)(ii) of the 2017 Act for "saw another person who". This removes the requirement to see another person, instead requiring a reasonable belief that another person was in or near the vehicle at the time, for example because the vehicle had been used by another person at the time of the offence. Without this correction, the proposed section incorrectly narrows the defence to littering from a vehicle because where a person did not see who deposited the waste, it requires the person to have seen another person in or near the vehicle at the time the waste was deposited.
- Clause 20 amends section 7 of the Principal Act to replace the reference to "a person" with "a natural person" in proposed section 125(3), (4) and (6) of the 2017 Act and to set out in the offence, rather than the penalty provision at the foot of the offence, that this offence applies only to natural persons for consistency.
- Clause 21 amends section 7 of the Principal Act to replace the references to "deposited on to land" for "received" in proposed section 145(1) and (2) of the 2017 Act and "deposited" for "received" in proposed section 145(4)(b) of that Act. Proposed section 145 provides for the requirement to pay the waste levy and this clarifies that where waste is received at premises subject to the waste levy, the levy remains payable in situations where it may otherwise be argued that there was no act of parting with possession of litter or waste (as per the definition of "deposit"). For example, in the situation where a landfill operator also collects waste as a transporter. It also clarifies that the waste levy is payable at the point at which landfill operators record the weight and type of incoming waste at the landfill gate rather than at the point at which the waste is unloaded.
- Clause 22 amends section 7 of the Principal Act to replace "appointment" with "application" in the provision and in the heading of proposed section 196 of the 2017 Act to provide for consistent references across proposed sections 191, 196 and 198 of that Act.



- Clause 23 amends proposed section 225(2)(f) of the 2017 Act in section 7 of the Principal Act to ensure that the Authority may review the form of a financial assurance in addition to the amount of a financial assurance.
- Clause 24 amends section 7 of the Principal Act to clarify that proposed section 234(2)(a) of the 2017 Act applies to all permissions whether they are licences or permits which are issued or registrations which are granted.
- Clause 25 amends section 7 of the Principal Act to correct a typographical error by replacing "of" with "or" in proposed section 242(1) of the 2017 Act and removes the unnecessary words "in writing" in proposed section 242(2) of the 2017 Act because an instrument is always a document in writing.
- Clause 26 amends section 7 of the Principal Act to replace the reference to "a person" with "a natural person" in proposed section 259(3) of the 2017 Act and to set out in the offence, rather than the penalty provision at the foot of the offence, that this offence applies only to natural persons for consistency.
- Clause 27 amends section 7 of the Principal Act to clarify that proposed section 271(1)(b) of the 2017 Act, which provides that the Authority or an authorised officer may issue a person with an improvement notice if the Authority or authorised officer reasonably believes that the person is not complying or has not complied with a permission granted under the 2017 Act, applies to all permissions.
- Clause 28 amends proposed section 274(4) of the 2017 Act in section 7 of the Principal Act to allow the Authority or an authorised officer to specify any condition, requirement, restriction, performance standard or level in an environmental action notice, rather than just the Authority.
- Clause 29 amends section 7 of the Principal Act to remove the unnecessary word "section" in the Note at the foot of proposed section 293(1) of the 2017 Act.
- Clause 30 amends section 7 of the Principal Act to clarify that proposed section 309(1)(a) of the 2017 Act applies to all permissions whether they are licences or permits which are issued or registrations which are granted.

Clause 31 amends section 12 of the Principal Act to substitute the incorrect reference to "the human" with "human" in proposed section 358(e) of the 2017 Act.

Clause 32 amends the Table to proposed section 430(4) of the 2017 Act in section 18 of the Principal Act.

Clause 32(1) substitutes an incorrect reference to "(6)" with "(7)" in item 5 so that review by the Victorian Civil and Administrative Tribunal is available for a decision by the Authority or council to extend a period of suspension of a permission, and is not available for a decision to remove a period of suspension of a permission.

Clause 32(2) inserts new item 18A into the Table to enable review by the Victorian Civil and Administrative Tribunal of a decision by the Authority, any other litter authority or a litter enforcement officer to direct the occupier of the place or premises to remove or dispose of waste within the time specified in the notice, if a person who deposited waste at a place or on premises in contravention of Part 6.3 of the 2017 Act cannot be located.

Clause 32(3) amends item 23 to include reference to subsection (2) of proposed section 200 of the 2017 Act to enable the Victorian Civil and Administrative Tribunal to review a decision by the Authority to revoke the appointment of an environmental auditor who is suspended.

Clause 33 amends section 18 of the Principal Act by replacing references to "public works" with "works" in proposed section 431(3)(a) of the 2017 Act to limit the availability to an eligible person of a review by the Victorian Civil and Administrative Tribunal for a decision to issue a development licence where the licence relates to any works to which the **Environment Effects Act 1978** applies, the notice is combined with any notice under the **Environment Effects Act 1978** and the licence is substantially in accordance with the Environment Effects Statement for those works.

Clause 34 amends section 18 of the Principal Act by replacing references to "public works" with "works" in proposed section 434(5)(a) of the 2017 Act to limit the availability to a third party of a review by the Victorian Civil and Administrative Tribunal of a decision to issue a development licence where the licence relates to any works to which the **Environment Effects Act 1978** applies, the

notice is combined with any notice under the **Environment Effects Act 1978** and the licence is substantially in accordance with the Environment Effects Statement for those works.

- Clause 35 amends section 18 of the Principal Act to remove the unnecessary words "in writing" in proposed section 437(1) of the 2017 Act because an instrument is always a document in writing.
- Clause 36 amends section 18 of the Principal Act to correct terminology in proposed section 445(1)(a) of the 2017 Act in describing the process for how funds from the Environment Protection Fund are paid out, by replacing "used" with "applied".
- Clause 37 amends section 18 of the Principal Act to correct terminology in proposed section 447(3) of the 2017 Act in describing the process for how funds from the Restorative Project Account are paid out, by replacing two references to "used" with "applied".
- Clause 38 corrects terminology in describing the process for how funds from the Sustainability Fund Account are paid out.
- Clause 38(1) amends section 18 of the Principal Act to replace "used" with "applied" in proposed section 449(3) of the 2017 Act.
- Clause 38(2) amends section 18 of the Principal Act to replace "use" with "application" in proposed section 449(4) of the 2017 Act.
- Clause 39 amends section 18 of the Principal Act to replace the incorrect reference to "the doing" with "doing" in proposed section 465(2)(c)(i) of the 2017 Act.
- Clause 40 amends proposed section 469 of the 2017 Act in section 18 of the Principal Act to replace incorrect references to "Part" with "Chapter" to ensure that proposed section 469 references Chapter 16 rather than Part 16.2 of Chapter 16.
- Clause 41 inserts new item 6.11A in section 23 of the Principal Act after proposed Schedule 1 to the 2017 Act to provide for a regulation-making head of power for regulations which prohibit the provision of false or misleading information relating to plastic products, plastic packaging or plastic bags.

- Clause 42 substitutes references to depositing waste with references to receiving waste in Table 1, Table 2 and in the Notes at the foot of both tables in proposed Schedule 2 to the 2017 Act in section 23 of the Principal Act as a consequence of the amendment of proposed section 145 contained in clause 21 of the Bill.
- Clause 43 substitutes section 32(2) of the Principal Act, which amends the **Catchment and Land Protection Act 1994** so that section 48B(c) of that Act provides that in determining an application under the **Catchment and Land Protection Act 1994**, the Victorian Civil and Administrative Tribunal must take account of, but is not required to give effect to, any environment reference standard. Environment reference standards can be taken account of but not given effect to as they do not contain compliance obligations. Similar amendments are contained in clauses 44, 46 and 47 of the Bill.
- Clause 44 amends section 37 of the Principal Act, which amends the **Flora and Fauna Guarantee Act 1988**.
- Clause 44(a) substitutes the reference to "section 38(c)" with "section 41B(c)".
- Clause 44(b) omits the words "and give effect to" in proposed section 41B(c) to ensure that in determining an application under the **Flora and Fauna Guarantee Act 1988**, the Victorian Civil and Administrative Tribunal must take account of, but is not required to give effect to, any environment reference standard.
- Clause 45 inserts new section 42A into the Principal Act to make consequential amendments to the **Marine and Coastal Act 2018** to ensure the currency of references and definitions.
- New section 42A(1) inserts definitions of *environment reference standard* and *environmental value* into the **Marine and Coastal Act 2018**.
- New section 42A(2) substitutes a reference to the **Environment Protection Act 1970** with a reference to the 2017 Act.
- New section 42A(3) replaces "beneficial uses" with "environmental values" and "State environment protection policy" with "environment reference standard" in paragraphs (a) and (b) of section 50 of the **Marine and Coastal Act 2018** respectively. This provides that an environmental management plan must include, among other things, proposed actions to be

undertaken to protect environmental values and a description of how the plan promotes the objectives of any environment reference standard applying to that area to align the terminology with that of the 2017 Act.

Clause 46 amends section 54 of the Principal Act, which amends section 41B(c) of the **Subdivision Act 1988**.

Clause 46(a) provides that in determining an application under the **Subdivision Act 1988**, the Victorian Civil and Administrative Tribunal must take account of, but is not required to also give effect to, any environment reference standard.

Clause 46(b) substitutes the word "environment" for "environmental" to provide for the correct term.

Clause 47 substitutes section 61 of the Principal Act to amend the **Water Act 1989** to provide that—

- in issuing a water share, determining an application for bulk entitlement and allocating an environmental entitlement under the **Water Act 1989**, the original decision-maker must have regard to any environment reference standard and any Order made under section 156 of the **Environment Protection Act 2017**; and
- in determining an application for review under the **Water Act 1989**, other than determining an application for review from a person objecting to the calculation or application of a valuation equalisation factor or the fixing of different fees based on valuation, the Victorian Civil and Administrative Tribunal must take account of, but is not also required to give effect to, any environment reference standard and any Order made under section 156 of the **Environment Protection Act 2017**.

Orders made under section 156 of the **Environment Protection Act 2017** are mandatory obligations on the persons to whom they apply.

#### **Part 4—Repeal of amending Act**

Clause 48 provides for the automatic repeal of the Bill on 1 December 2021. The repeal of the Bill does not affect in any way the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).