



On 1 July 2021 the Environment Protection Act 2017 (Vic) (Act) was amended reforming environment protection legislation in Victoria to a duty-based, prevention-focused regime, and with it strengthened investigation and inquiry powers for authorised officers, including use of surveillance tools.¹

These powers will enable authorised officers to prevent and respond to current and future environmental and public health issues in Victoria.²

Authorised Officers appointed by EPA Victoria

Officers of multiple agencies may be authorised under the Act. The Environment Protection Authority Victoria (EPA) may appoint as authorised officers for the purpose of the Act, officers or employees of:³

- the EPA;
- a public sector body;
- a council;
- officers from the Environment Protection Authority of New South Wales; and
- officers of the Environment Protection Authority of South Australia.

More broadly, the EPA may also appoint a specified person or each member of a specified class of persons, as an authorised officer for the purpose of the Act.⁴ This allows contractors and consultants to be authorised for particular purposes. Officers from agencies other than the EPA are typically appointed for discrete functions and/or defined geographic areas, such as a local government municipality.

Authorised Officers appointed by delegated public sector body or council

Where the EPA has delegated a function to a public sector body or council, that body or council may appoint an officer,

employee or specified class of persons as an authorised officer.⁵

EPA delegation to public sector bodies and councils significantly increases the resources and capacity of the Victorian Government, including through Local Government, to investigate and enforce the Act. This is particularly relevant in remote and regional locations or a restricted access area like a port.

Person assisting an authorised officer

An authorised officer may request the assistance of any other person for the purpose of entry and inspection of a place or premises. An occupier of person in management or control of a place or premises must allow the person assisting the authorised officer to access the place or premises.⁶ Examples include where specialist skills and equipment are required, such as drilling bores for soil sampling at depth or accessing air discharge stacks for air sampling.

Obligations on an authorised officer exercising power of entry

An authorised officer must immediately upon entering a place or premises, take all reasonable steps to notify the occupier or apparent occupier of the place or premises and produce identification.⁷

An authorised officer is not required to produce identification if prior notice of the entry was given or if to do so would unreasonably interfere with performance of the function or power (e.g. covert surveillance).⁸

An authorised officer must take reasonable steps to:⁹

- (a) minimise disruption caused by entry and inspection of a place or premises and of taking any action; and
- (b) ensure the authorised officer does not remain at a place or premises any longer than is reasonably necessary.

¹Explanatory Memorandum – Environment Protection Amendment Bill 2018, 1-4.

²Second Reading, Environment Protection Amendment Bill 2018, 20 June 2018, 2083-2087.

³Act, s 242(1)(a).

⁴Act, s 242(1)(b).

⁵Act, s 242(2) and (2A).

⁶Act, s 250.

⁷Act, s 249(1).

⁸Act, s 249(2).

⁹Act, s 251(4).

Authorised officers' powers of entry and inspection

POWERS OF ENTRY [ss 246, 247 and 248]

For purpose of performing a function or duty or exercising a power under the Act, an authorised officer may enter and inspect a place or premises.

May enter and inspect -

- at any reasonable time; or
- at any other time, if the authorised officer reasonably believes there is an immediate risk of material harm to human health or the environment.

"Reasonable time" not defined. Relevant considerations:

- ordinary and normal business hours;
- not a public holiday or weekend;
- personnel present on site;
- place not closed, locked or otherwise empty;
- public able to enter; and
- director of body corporate able to be contacted.

An authorised officer may enter and inspect a place or premises that is, at the time of entry, open to the public.

Relevant considerations:

- can members of the public enter the place (e.g. weigh bridge at entrance to place); and
- is the place fenced with gates closed and locked (e.g. subdivision estate).

An authorised officer must not enter and inspect a residential premises used only for residential purposes except:

- with consent of the occupier;
- under authority of search warrant; and
- if the authorised officer reasonably believes:
 - * person has, or is about to, contravene the Act; and
 - * immediate risk of material harm to human health or the environment.

"premises" inclusive definition [s 3(1)]

includes a structure, building or vehicle

"vehicle" inclusive definition [s 3(1)]

- a vessel (same as Marine Safety Act 2010 (Vic));
- an aircraft; or
- a trailer attached to a vehicle.

"place" inclusive definition [s 3(1)]

includes land, waters, a location, an area or a region.

"land" inclusive definition [s 3(1)]

- means any land, public or private;
- any buildings or structures permanently affixed to the land; and
- groundwater.

"groundwater" exhaustive definition [s 3(1)]

means the act of parting with possession of waste or litter and includes burning waste or litter.

"waters" inclusive definition [ss 3(1), 3(3) and 8(3)]

- reservoir, tank or billabong;
- anabranch, canal, spring, swamp;
- natural/artificial channel, lake, lagoon, waterway or dam;
- tidal water, coastal water or groundwater;
- bed/subsoil beneath waters;
- airspace superjacent to waters;
- open, piped or underground drain excluding that which conveys waste as part of treatment of waste; or
- the River Murray and waste/pollution from Victorian bank.

"harm" exhaustive definition [s 4]

means adverse effect on human health or the environment, of whatever degree or duration, and includes:

- adverse effect on amenity of a place or premises that unreasonably interferes with, or is likely to unreasonably interfere with, enjoyment of the place or premises;
- a change to the condition of the environment so as to make it offensive to the senses of human beings; and
- anything prescribed (nothing prescribed).

Harm may arise as a result of cumulative effect.

"material harm" exhaustive definition [s 5]

Harm that:

- involves actual adverse effect on human health or the environment that is not negligible;
- involves an actual adverse effect on an area of high conservation value or special significance; and
- results in, or is likely to result in, costs in excess of threshold amount (\$,10,000) for restoration or rehabilitation of environment prior to harm.

POWERS OF INSPECTION [ss 251, 252 and 253]

- do or cause to be done any thing or action the authorised officer reasonably believes is necessary for the purpose of performing a function or duty or exercising a power;
- inspect, examine and make enquiries about a thing at the place or premises;
- take and remove samples of a substance or thing;
- carry out testing and examination;
- take photographic, audio, video or any other recording;
- examine, copy or take extracts from a document;
- inspect, examine or test any plant, equipment, vehicle or thing;
- bring equipment or materials to the place or premises;
- seize and remove a thing connected with a suspected contravention;
- request the assistance of a person at a place or premises;
- take any other action;
- require a person to produce a document or part of a document, located at the place or premises, that is in the person's possession or control; or
- require a person at the place or premises, that the authorised officer reasonably believes has knowledge of a matter or thing relevant to another person's compliance with the Act, to give any information, or answer any question for the purpose of performing a function or duty or exercising a power.

Testing and examination includes testing that results in the destruction of the thing.

Search warrant and seizure [ss 261 and 264]

An authorised officer may apply to a Magistrate for the issue of a search warrant in relation to a place or premises, if the authorised officer reasonably believes that there is, or may be, within the next 72hrs, a particular thing, including a document, at the place or premises, AND, the particular thing may afford evidence of the commission of an offence against the legislation.

In executing the search warrant the authorised officer may enter the place or premises, search for the thing and seize the thing.

"human health" inclusive definition [s 3(1)]

- psychological health.

"environment" exhaustive definition [s 3(1)]

- physical factors of surroundings of human beings;
- land, waters, atmosphere, climate, sound, odour and taste;
- biological factor of animals and plants; or
- social factor of aesthetics.

Obligations on an authorised officer exercising power of entry (cont)

An authorised officer who enters and inspects a place or premises must give a report concerning the entry to the occupier or apparent occupier, as soon as practicable.¹⁰ The report must be in writing and detail:¹¹

- the time of entry and departure;
- the purpose of the entry and inspection;
- a description of any actions taken at the place or premises;
- a summary of observations of the authorised officer of the place or premises; and
- the procedure for contacting the EPA and the authorised officer for further details of the entry and inspection.

If an occupier disputes an observation or identifies an error in a report, the occupier should record the matter then inform the EPA in writing. This ensures contemporary notes are available to the authorised officer and the EPA for the purpose of the entry and inspection.

An employer must so far as reasonably practicable, ensure an authorised officer and person assisting an authorised officer, are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.¹²

Once entry is gained, an authorised officer will make an informed decision for themselves as to whether it is safe to conduct any inspection. The EPA has confirmed this position on open record in the Magistrates Court of Victoria.

To facilitate an authorised officer making an informed decision the employer must inform the authorised officer of all relevant information relating to risk to their health and safety arising from the conduct of the undertaking.

Obligations on an authorised officer executing search warrant

Before executing a search warrant, an authorised officer must:

- announce that the authorised officer is authorised by the warrant to enter the place or premises to be searched; and
- give any person at the place or premises the opportunity to allow entry;

unless the authorised officer reasonably believes that to do so would frustrate the effective execution of the search warrant.¹³

As soon as possible after the authorised officer seizes or obtains a thing, including a document, the EPA must return the thing to the owner unless:

- the EPA considers it necessary to retain the thing because it may afford evidence in a proceeding;
- the thing is forfeited to the EPA; or
- the EPA is authorised to retain, destroy or dispose of the thing.¹⁴

The EPA may return a seized thing subject to conditions appropriate to minimise risks of harm to human health or the environment from pollution or waste.¹⁵

Anything seized by an authorised officer is forfeited to the EPA if the EPA cannot find the owner despite making reasonable enquiries, cannot return it to the owner despite making reasonable enquiries or considers it necessary to retain the thing to prevent the commission of a further offence. If forfeited to the EPA, the EPA must give the owner notice of how the owner may apply to the Victorian Civil and Administrative Tribunal for return of the thing.

Obligations of an authorised officer executing warrants under Surveillance Devices Act 1999 (Vic)

An authorised officer appointed under the Act may apply for a surveillance device warrant where the officer, on reasonable grounds, believes that:

- an offence has been, is being, is about to be or is likely to be committed; and
- the use of a surveillance device is or will be necessary for the investigation and obtaining evidence of the commission of the offence or the identity of the offender.

An application may be made to the Supreme Court of Victoria, or to a Magistrate where the surveillance device is for tracking only.¹⁶

An authorised officer may also apply for a retrieval warrant to allow entry and retrieval of a lawfully installed surveillance device.¹⁷

Criminal Offences (criminal penalty and civil remedies)

It is a summary criminal offence for a person, without reasonable excuse, to refuse or fail to comply with a request from an authorised officer for relevant information,¹⁸ or to refuse to provide a document located at the place or premises or otherwise in the person's possession or control.¹⁹

In each instance, the Court may impose a maximum penalty of 60 penalty units for a natural person and 300 penalty units for a body corporate.²⁰

In relation to the performance of a function or the exercise of a power by an authorised officer or a person assisting, it is a summary criminal offence²¹ to:

- hinder, delay or obstruct;
- conceal the location or existence of any person or thing; or
- use abusive, threatening or insulting language.

Where an authorised officer has requested assistance from a person at the place or premises and that request is refused, this will in most instances constitute hindrance, obstruction or delay of the authorised officer or person assisting.

A Court may impose a maximum penalty of 60 penalty units for a natural person and 300 penalty units for a body corporate.

In relation to the performance of a function or the exercise of a power by an authorised officer or a person assisting, it is an indictable criminal offence²² to:

- assault;
- intimidate or threaten, directly or indirectly; or

¹⁰Act, s 251(1).

¹¹Act, s 254(2).

¹²Occupational Health and Safety Act 2004 (Vic), s 23.

¹³Act, s 262.

¹⁴Act, s 264(1).

¹⁵Act, s 264(2).

¹⁶Surveillance Devices Act 1999 (Vic), s 15.

¹⁷Ibid, s 20C.

¹⁸Act, s 253(3).

¹⁹Act, s 252(2).

²⁰Act, ss 252(2), 253(3).

²¹Act, s 266.

²²Act, s 267.

- attempt to assault, intimidate or threaten the authorised officer or person assisting.

A Court may impose 2 year's imprisonment or a maximum penalty of 240 penalty units, or both, for a natural person and a penalty of 1200 penalty units for a body corporate.

If the EPA returns a seized thing, and returns it subject to conditions, it is an offence if the owner fails to comply with the conditions.²³

A Court may impose a maximum penalty of 60 penalty units for a natural person and 300 penalty units for a body corporate.

Civil remedies including restraining conduct, requiring a specific act, payment of compensation and other ancillary matters are available to the EPA, or delegated public sector body or council.²⁴

On a finding of guilt or conviction, a Court may also, in addition to any penalty or civil remedy, make orders providing for:

- payment of an amount equivalent to the monetary benefit derived from the offence;
- adverse publication of the offence;
- prevent, minimise or remedy any harm caused;
- eliminate or reduce any risk of harm;
- prevent any continuation or reoccurrence;
- restoration of a public place or for a public benefit; or
- engage an environmental auditor to conduct a preliminary risk screen assessment or environmental audit.

An infringement notice may not be issued for these offences confining enforcement to proceedings before a Court.²⁵

²³Act, s 264(3).

²⁴Act, Part 11.4.

²⁵Act, s 307 and *Environment Protection Regulations 2021 (Vic)*, r 169 and Schedule 10.

Who may bring proceedings?

The EPA may appoint an employee or officer to take proceedings against the Act.²⁶

A public sector body, or a council delegated functions or powers by the EPA, may appoint a person to bring proceedings²⁷ for offences where so delegated, including:

- the general environmental duty;
- aggravated breach of the general environmental duty;
- contravention of an improvement notice;
- contravention of a prohibition notice; and
- failure to report under an improvement notice or compliance notice.

Notices, directions and production of information

Authorised officers have extensive powers to issue notices, directions and to compel production of information. These powers may be exercised regardless of whether the authorised officer has exercised the power of entry and inspection.

The exercise of power to issue notices, give directions and compel production of information is addressed separately in further material.

²⁶Act, s 347(1).

²⁷Act s 347(7).

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