

## Introduction

As a result of coronavirus disease 2019 (COVID-19) and its associated impacts and disruption to businesses, companies and individuals may be unable to comply with Australian environmental protection laws and environmental approval conditions.

Some regulators have provided guidance on their approach to the enforcement of environmental laws and compliance, with conditions attached to environmental licences and approvals. Some regulators have made it clear that compliance with licence conditions is expected notwithstanding the COVID-19 pandemic. Other regulators have adopted a less strict approach, indicating that a more flexible approach will be taken in respect to both enforcement and compliance action during this time. Other regulators are yet to take a firm position.

The general position across all Australian jurisdictions is that environmental compliance with environmental protection laws and environmental approval conditions is expected except where a specific exemption applies, or where the regulator has exempted a particular company or person from their current environmental obligations.

## Overview

Environmental regulators across Australia have adopted a range of responses in light of the unfolding COVID-19 pandemic. Generally speaking, COVID-19 cannot be relied on to justify non-compliance with conditions of planning and environmental approvals. This is because planning and environmental laws and planning conditions are compliance requirements, which are linked to quantitative limits, targets and timeframes. Unless the relevant regulatory frameworks contains an exemption, or one is granted by the regulator, COVID-19 and any associated disruption to business is not a defence to an environmental offence under environmental protection legislation. Such offences include environmental harm or unauthorised discharge or a justification for non-compliance with the conditions of an environmental approval. We advise that the holders of environmental approvals adopt an approach that is focused towards harm minimisation and takes all reasonably practicable steps to meet their environmental compliance requirements, so long as this is not at the expense of workplace health and safety requirements.

Some regulators have provided guidance on their approach to the enforcement of environmental laws and compliance with environmental approval conditions.

For example, the NSW, Victorian and Tasmanian Environmental Protection Authorities (EPA) have all made statements that emphasise that their default position is that ongoing compliance with environmental obligations is expected. On the other hand, some other regulators have indicated that they will take a more flexible and pragmatic approach to enforcement and compliance action. These include the NSW Department of Planning, Industry and Environment and the NSW Resources Regulator.

Other regulators, including the Western Australia, South Australian, Queensland and Northern Territory EPAs and the Federal Department of Agriculture Water and Environment, have not yet taken a firm position. This may indicate that they are still reviewing the impact; however, in respect to these regulators, it is safe to assume that compliance will be expected as usual, unless the regulators issue guidance indicating otherwise.

The annexed Table A provides a comparative overview of each jurisdiction's response to environmental compliance in light of COVID-19.

## Conclusion and Key Takeaways

This varied national response to environmental compliance in light of COVID-19 has the capacity to cause uncertainty and confusion among environmental licence holders within Australia.

Generally speaking, environmental compliance is expected, unless there are particular exemptions within the environmental protection legislation, the approval conditions or an exemption is granted by the regulator.

Australian companies should ensure that they are able to meet their environmental compliance obligations as the COVID-19 pandemic unfolds. Some steps that could be taken now include:

- (a) Evaluating your approvals and identifying conditions that raise potential for non-compliance
- (b) Environmental compliance risk assessment and contingency planning
- (c) Early engagement with regulators to consider regulatory contingencies and if any provisions within the applicable environmental regulatory scheme may provide for an applicable emergency exemption or authorisation in respect of your environmental compliance circumstances in an emergency situation

If your company is concerned that the COVID-19 pandemic has impacted, or has the potential to impact, your ability to meet your environmental obligations in respect to your operations, we are well positioned to provide detailed and specific advice relevant to the jurisdictions you operate in and the nature of your environmental obligations. We are also able to engage with regulators to assist in obtaining exemptions where environmental compliance is rendered impractical or impossible by the COVID-19 pandemic and its associated impacts. Please do not hesitate to get in touch with our team if we can assist in anyway.

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**Table A – Summary of the Response of Australian Jurisdictions in Response to Environmental Compliance in Light of COVID-19**

Jurisdiction	Regulator	Response
Commonwealth	<b>Department of Agriculture, Water and Environment</b>	<p>The Commonwealth Department of Agriculture Water, and Environment (DAWE) has not released any specific guidance on its approach to the enforcement of environmental law and Commonwealth environmental approvals (including compliance with conditions attached to them) during the COVID-19 pandemic.</p> <p>We note that in the absence of any specific guidance, the Compliance Policy continues to apply, this outlines the department’s current approach and policy towards compliance. We understand that the Compliance Policy is under review following machinery of government changes, which took effect on 1 February 2020 (the Departments of Agriculture and Environment have been merged to create the Department of Agriculture, Water and the Environment).</p>
Australian Capital Territory	<b>ACT EPA</b>	The ACT EPA has not released any specific guidance on its approach to environmental compliance during the COVID-19 pandemic.
New South Wales	<b>NSW EPA</b>	<p><b>NSW Environment Protection Authority (EPA)</b></p> <p>The NSW EPA has a business continuity plan in place, which is being regularly reviewed in light of the up-to-date advice to enable them to meet their regulatory responsibilities. The NSW EPA will continue to require compliance with licence conditions and issue clean-up notices and prevention notices where necessary. It may, however, consider requests for exemptions on a case-by-case basis in accordance with the provisions of the Protection of the Environment Operations Act 1997 (NSW).</p> <p><b>Advice for Regulated Bodies</b></p> <p>The NSW EPA recommends the implementation of a business continuity plan, which takes into account the updated advice being provided by NSW and Commonwealth health officials, including any sector-specific advice. Licence conditions and other regulatory responsibilities remain in place, as well as associated obligations. A business continuity plan will help meet these responsibilities for any environmental impacts from activities. These include the priority responsibilities of maintaining and operating pollution control equipment and storing, transporting and disposing of waste appropriately.</p> <p>Further, regulated bodies should have environmental risk management procedures in place. Responsibilities in this instance include:</p> <ul style="list-style-type: none"> <li>• Keeping staff up-to-date about arrangements, the business plan and their roles in that plan</li> <li>• Informing EPA officers, when contacted, about the actions taken in preparation if impacted by COVID-19 prevention measures</li> </ul>

These strategies should be assessed and revised to account for changing circumstances such as reduced staff numbers or loss of key personnel, with a particular focus on high-risk activities.

All environment protection licence holders should also assess their Pollution Incident Response Management Plans to see if they need to be updated to reflect the impact of COVID-19 prevention measures. For example, additional mitigation measures may be needed if there is a greater likelihood of certain pollution events occurring due to the absence of key personnel.

Regulated bodies should engage in open communication with the NSW EPA, particularly in the event of significant risk to the ability to comply with a licence. Licence holders should also:

- Continue to make any notifications about incidents causing or threatening material harm to the environment in accordance with any reporting licence conditions
- Report all non-compliances with licence conditions to the EPA via the Environment Line

### **Changes to the Construction Industry**

As per a new order made by the Minister for Planning, building and demolition work can now be carried out on weekends and public holidays, even where this is prohibited by an environment protection licence or a development consent. Spreading building work across more days of the week allows workers to practice social distancing, as well as ensure that construction work can continue safely. This will continue until the pandemic is over or the advice of NSW Health changes.

Some noisy activities are restricted on these days (such as rock breaking, pile driving and other similar activities) and all reasonable measures must be taken to minimise noise. Construction sites must still comply with other environment protection licence conditions, development consent conditions and other legal requirements. The EPA and local councils can still use notice powers under the Protection of the Environment Operations Act, such as prevention notices and noise control notices, if they need to deal with significant noise issues at construction sites.

### **Pollution Incident Response Management Plan Training and Testing Requirements**

The NSW EPA has indicated that there are no changes to the usual Pollution Incident Response Management Plan (PIRMP) training and testing requirements due to the COVID-19 situation, and that these will still be required at least every one to two months and within one month of any pollution incident occurring in the course of an activity to which a licence relates. The NSW EPA has recommended that licences contact the NSW EPA if there is a significant risk with their ability to comply with the conditions required by their licence and that licences must continue to comply with the duty to notify the EPA under s 148 of the POEO Act.

Advice issued by the NTEPA on COVID-19:

- Acknowledges that the NTEPA's business will be conducted differently for the duration of the situation
- Indicates that the NTEPA will aim to meet statutory timeframes in the assessment of development proposals'
- Indicates that the Environment Protection Act 2019 (NT) will commence mid next year, and the NTEPA will continue to prepare for commencement by developing and consulting on a range of guidance material to support implementation of the new environmental impact assessment and approval legislation

The NTEPA's advice indicates that the expectation is that firms will act responsibly and act reasonably in meeting their environmental obligations.

The NTEPA intends to work constructively with its regulated community and has indicated that, where warranted, it will adopt a practical approach to licensing and approval decisions and compliance activities that recognises the temporary challenges and constraints that the regulated community may be experiencing due to genuine COVID-19-related impacts on their business operations.

The NTEPA has also indicated that its priorities are to efficiently assess licence and approval applications, especially where activities support essential services, and focus compliance and enforcement efforts on higher environmental risk activities, particularly where the public interest warrants action to prevent immediate environmental harm, egregious illegal conduct or other time critical matters.

The NTEPA has provided clear guidance on its expectations during this time. It has indicated that licence and approval holders must continue to comply with environmental legislation and the conditions of their authorisation. However, it has also recognised that this is an unprecedented situation that may create temporary challenges for licence and approval holders to meet their obligations. Where this occurs, the NTEPA is encouraging licence and approval holders to contact them to discuss their concerns and what alternative, practical measures might be put in place to meet the environmental outcome.

The NTEPA has undertaken to aim to be constructive and pragmatic in its response to the challenges currently faced by industry, while expecting appropriate environmental outcomes to be maintained. Any temporary relief may include extensions to timeframes, time-bound amendments to licence and approval conditions, and granting exemptions where available.

Finally, the NTEPA is strongly encouraging the regulated community to maintain good communications with customers, clients, local communities and the NTEPA, particularly around any predicted or unexpected service disruptions. The NTEPA has expressed that it expects that the regulated community will continue to notify the NTEPA of pollution incidents and other regulatory or compliance issues or events that may arise during this time.

<p><b>Queensland</b></p>	<p><b>Department of Environment and Science</b></p> <p><b>Queensland EPA</b></p>	<p>The Department of Environment and Science is actively managing its response in line with the latest advice from health experts and has activated its Business Continuity Plan to ensure it is able to continue to deliver core services. As the situation evolves and to ensure continuity of critical services, the department may enact further business continuity plans.</p> <p>The Queensland EPA has not released specific guidance on its approach to environmental compliance during the COVID-19 crisis, including how it will respond to non-compliance and environmental harm issues that may arise.</p> <p>There are certain tools that can be utilised in Queensland to facilitate necessary changes to environmental authority conditions or respond to incidents where environmental harm is caused or threatened as a result of COVID-19 and its associated impacts on companies' and individuals' abilities to comply with environmental protection laws and approvals.</p> <p>For example, one such tool is a Temporary Emissions Licence (TEL), which is a licence issued under the Environmental Protection Act 1994 (Qld), which permits the temporary relaxation or modification of specificity conditions of an environmental approval to allow the release of contaminant into the environment in response to an applicable event, which is an event that was either not foreseen or was foreseen but, because of a low probability of occurring, it was not considered reasonable to impose a condition to deal with the event or series of event. When approved, this will apply instead of the conditions specified on the environmental approval for a temporary period of time.</p> <p>The Department of Environment and Science also has the power to make an emergency direction if:</p> <ul style="list-style-type: none"> <li>• Either human health or safety is threatened or serious or material environmental harm has been caused or is likely to be caused</li> <li>• Urgent action is necessary to: <ul style="list-style-type: none"> <li>– Protect the health or safety of persons</li> <li>– Prevent or minimise the harm</li> <li>– Rehabilitate or restore the environment because of this harm</li> </ul> </li> </ul> <p>An emergency direction would only be made where the department was satisfied that all reasonable and practicable measures were taken to minimise the risk.</p>
<p><b>South Australia</b></p>	<p><b>EPA South Australia</b></p>	<p>The EPA South Australia has put in place new working arrangements to ensure that they continue to maintain their capability to carry out their regulatory role and respond to emergencies and the community. It has made a statement expressing that it understands that some businesses may require assistance, advice and EPA decisions due to changed circumstances, and has indicated that it will work through the details with each business and keep the community informed where it is appropriate to do so.</p> <p>The EPA South Australia has not released specific guidance on its approach to environmental compliance during the COVID-19 crisis, however, has advised that it will keep its website updated with any new information.</p>

EPA Tasmania has a business continuity plan with processes in place to continue to deliver their regulatory functions. They are prioritising the delivery of their approval, compliance and pollution response activities to support delivery of essential services, such as waste management, to facilitate the continuity of businesses and to prevent harm from pollution and waste.

#### **Advice for Regulated Bodies**

EPA Tasmania recommends the adoption of a business continuity plan, which ensures key processes can be continued if staff numbers begin to diminish. They also recommend following Tasmanian and Commonwealth governments and any specific health advice for a relevant sector.

EPA Tasmania advises that duty holders remain responsible for environmental impacts from their activities and should plan business continuity with that in mind.

Specifically, regulated bodies should ensure that:

- They are able to maintain and operate pollution control equipment
- Solid and liquid waste is consigned and disposed of appropriately and to approved facilities

Section 34 of the Environmental Management and Pollution Control Act 1994 enables EPA Tasmania to grant emergency authorisations for the protection of life, environment or property, e.g. discharge or storage of waste in certain circumstances. Where a regulated body believes this will be required, they should contact EPA Tasmania as soon as possible. Granting of an emergency approval will be on a case-by-case basis and may be subject to conditions.

#### **Extended Hours of Operation**

The Director of EPA Tasmania is able to approve operations outside the specified hours until the State of Emergency is revoked or notice is given by the Director of EPA Tasmania (whichever occurs earlier) provided:

- The person responsible for the environmentally relevant activity subject to the Permit, Environmental Licence or Environment Protection Notice takes all reasonable and practicable measures to avoid an environmental nuisance as defined under the Environmental Management and Pollution Control Act 1994
- Operating hours are specified in any Permit, Environmental Licence or Environment Protection Notice
- Extended operating hours are necessary to allow business continuity during the pandemic

The relevant operating hours condition in the Permit, Environmental Licence or Environment Protection Notice stipulates that the Director of EPA Tasmania may approve a change to the operating hours. The Director of EPA Tasmania will not progress compliance action until the State of Emergency is revoked or notice is otherwise given by Director of EPA Tasmania where:

- The person responsible for environmentally relevant activity subject to the Permit, Environmental Licence or Environment Protection Notice takes all reasonable and practicable measures to avoid an environmental nuisance as defined under the Environmental Management and Pollution Control Act 1994
- Approval of extended hours of operation is not provided for under conditions of the permit as described above, and authorisation is not sought under section 34
- Extended operating hours are necessary to allow business continuity during the COVID-19 pandemic

<p><b>Victoria</b></p>	<p><b>EPA Victoria</b></p>	<p><b>EPA Victoria</b></p> <p>EPA Victoria has published an update on COVID-19 and business responsibilities on its website. EPA Victoria has a business continuity plan in place, as well as a specific pandemic plan. EPA Victoria has implemented particular processes to ensure that standard regulatory functions are delivered.</p> <p>EPA Victoria considers that it is critical for regulated bodies to create and adopt a business continuity plan. They also strongly advise deciding what is to happen in the short to medium term, while considering the longer-term impact. Further, EPA Victoria recommends following the advice of state and federal governments and any specific health advice for a body's sector.</p> <p>EPA Victoria advises that duty holders remain responsible for environmental impacts from their activities and should plan business continuity with that in mind.</p> <p>Specifically, regulated bodies should ensure:</p> <ul style="list-style-type: none"> <li>• That they are able to maintain and operate pollution control equipment</li> <li>• That solid and liquid waste is consigned and disposed of appropriately and to approved facilities</li> </ul> <p>EPA Victoria have issued clear advice that if your activities are conducted under an EPA licence or other approval that all conditions remain in force and must be complied with.</p> <p>Section 30A of the Environment Protection Act enables EPA Victoria to grant emergency approvals for discharge or storage of waste in certain circumstances. Where a regulated body believes this will be required, they should contact EPA Victoria as soon as possible. Granting of an emergency approval will be on a case-by-case basis.</p> <p>The Victorian Environmental Protection Amendment Act 2018 (Vic) was due to commence on 1 July 2020; however, the commencement date has been delayed until 1 July 2021 as a result of COVID-19. The Victorian government is intending on introducing the COVID-19 Omnibus (Emergency Measures) Bill 2020 on 23 April 2020, and this bill includes measures to delay the commencement of the environmental protection from until 1 July 2021 to allow businesses and industry to focus on the immediate impacts of coronavirus.</p>
<p><b>Western Australia</b></p>	<p><b>Western Australian EPA</b> <b>Department of Environment Water and Regulation</b></p>	<p>The WA EPA has not released any specific guidance on its approach to environmental compliance during the COVID-19 pandemic</p> <p>However, on 6 April 2020, the Director General of Department of Water and Environmental Regulation issued a statement regarding statutory obligations under the EP Act in relation to COVID-19:</p> <p>“Statutory obligations including Ministerial Statements, water and environmental licence conditions and other regulatory responsibilities, remain in place, subject to any directions issued under the Emergency Management Act 2005 or the Public Health Act 2016.”</p>