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Environmental law reform in Victoria – upcoming changes and how to prepare Environment Protection Act 2017

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Background to the reforms

- **2009 – 2011** a number of reviews of EPA's regulatory approach
- **2015 – 2016** Inquiry into the EPA
- **Environment Protection Act 2017**
 - Governance reforms now in effect
 - New regulatory regime to come into effect mid 2020 – **flexible** and **risk based**
 - Gives effect to the focus on **prevention of harm** to **human health** and **environment**
 - Focus on **justice** – information sharing, notification, **third party rights**

Focus on risk, positive duties, interactive regulator

New investigation & inquiry powers

- Similar to WorkSafe inspection method.

New notice regime

- New breadth in the types and purpose of Notices to enhance enforcement capabilities.

Greater enforcement powers

- EPA is provided greater enforcement powers and is expected to be provided with greater resourcing.

Higher penalties

- Person must take action to remedy a contravention or activity likely to contravene.

What do you need to know?

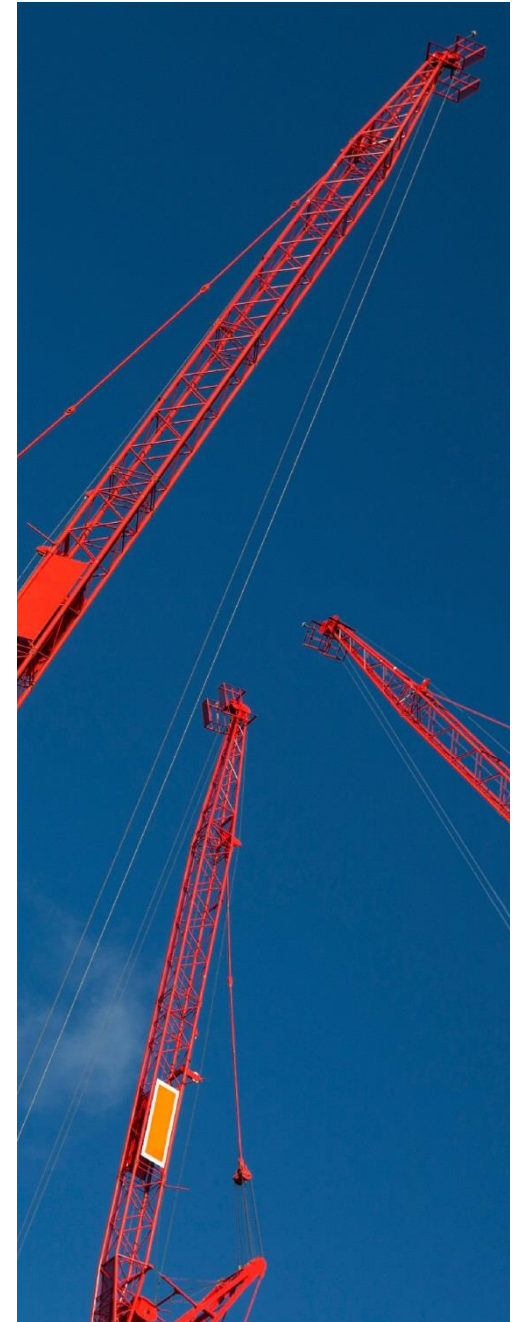


**You will need to allocate
time and resources**



**You will need to
build relationships**

| The upcoming changes



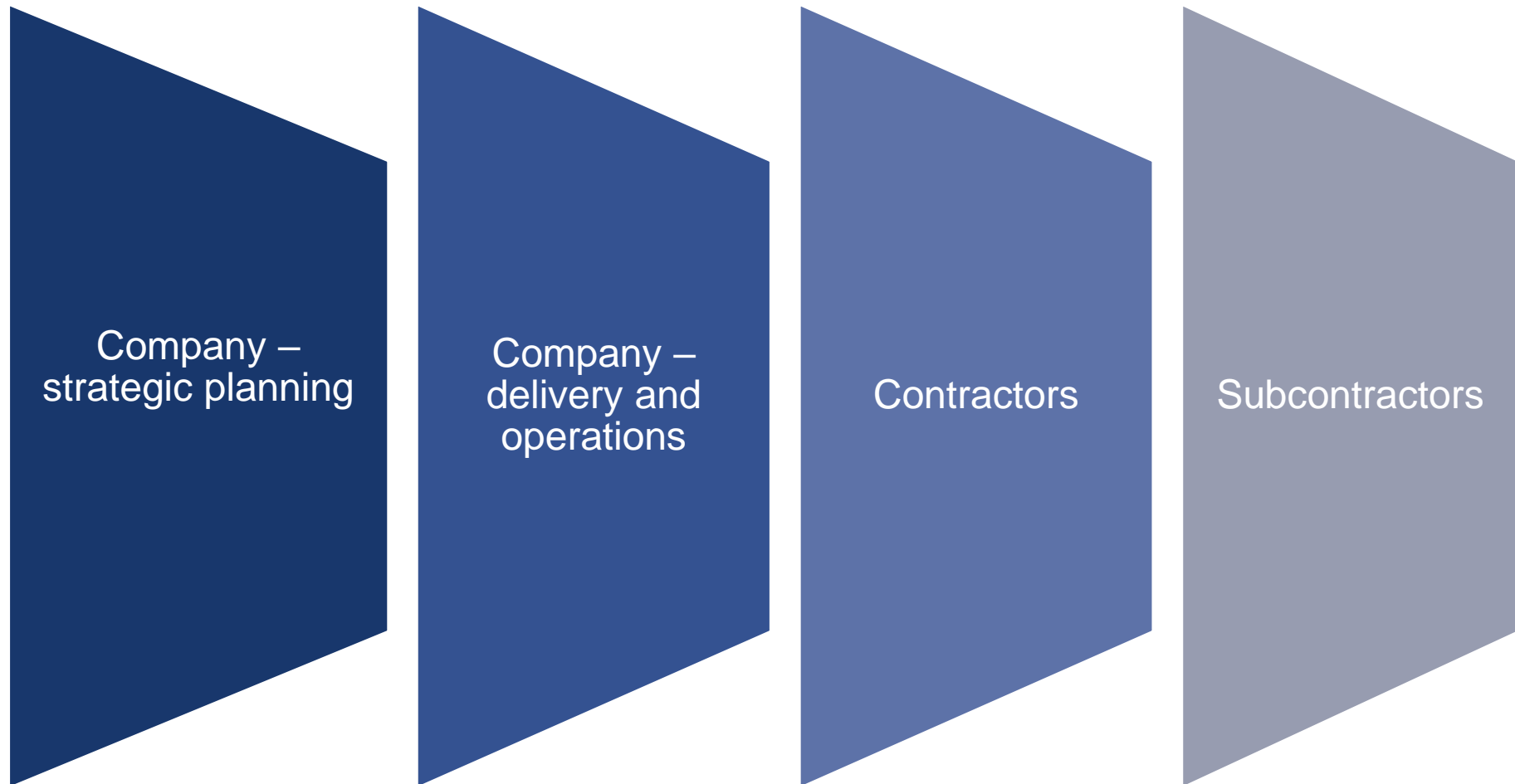
Duties

General Environmental Duty (GED)

*“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**”*

- Deemed contravention if certain actions not taken re systems, management measures, minimising risk of harm through design
- The VIC enforcement approach goes further than Tas, NT, Qld, SA, and ACT
- Civil as well as criminal penalties

Scope of duty: Degrees of ownership and control



General Environmental Duty – 5 key considerations

5 key considerations for ‘reasonable practicability’

When considering whether the risks of harm were sufficiently minimised ‘so far as is reasonably practicable’, a decision-making authority will consider 5 key factors:

1. the **likelihood** of those risks eventuating;
2. the **degree of harm** that would result if those risks eventuated;
3. what the person concerned **knows**, or **ought reasonably to know**, about:
 - the **harm or risks of harm**; and
 - any ways of **eliminating** or **reducing** those risks.
4. the **availability and suitability** of ways to eliminate or reduce those risks; and
5. the **cost** of eliminating or reducing those risks.

Relevance of Industry Compliance Codes, licence conditions, OMLIs

Duties

Overarching duties



General Environmental Duty

Transitional duty to not cause material harm



Ongoing management

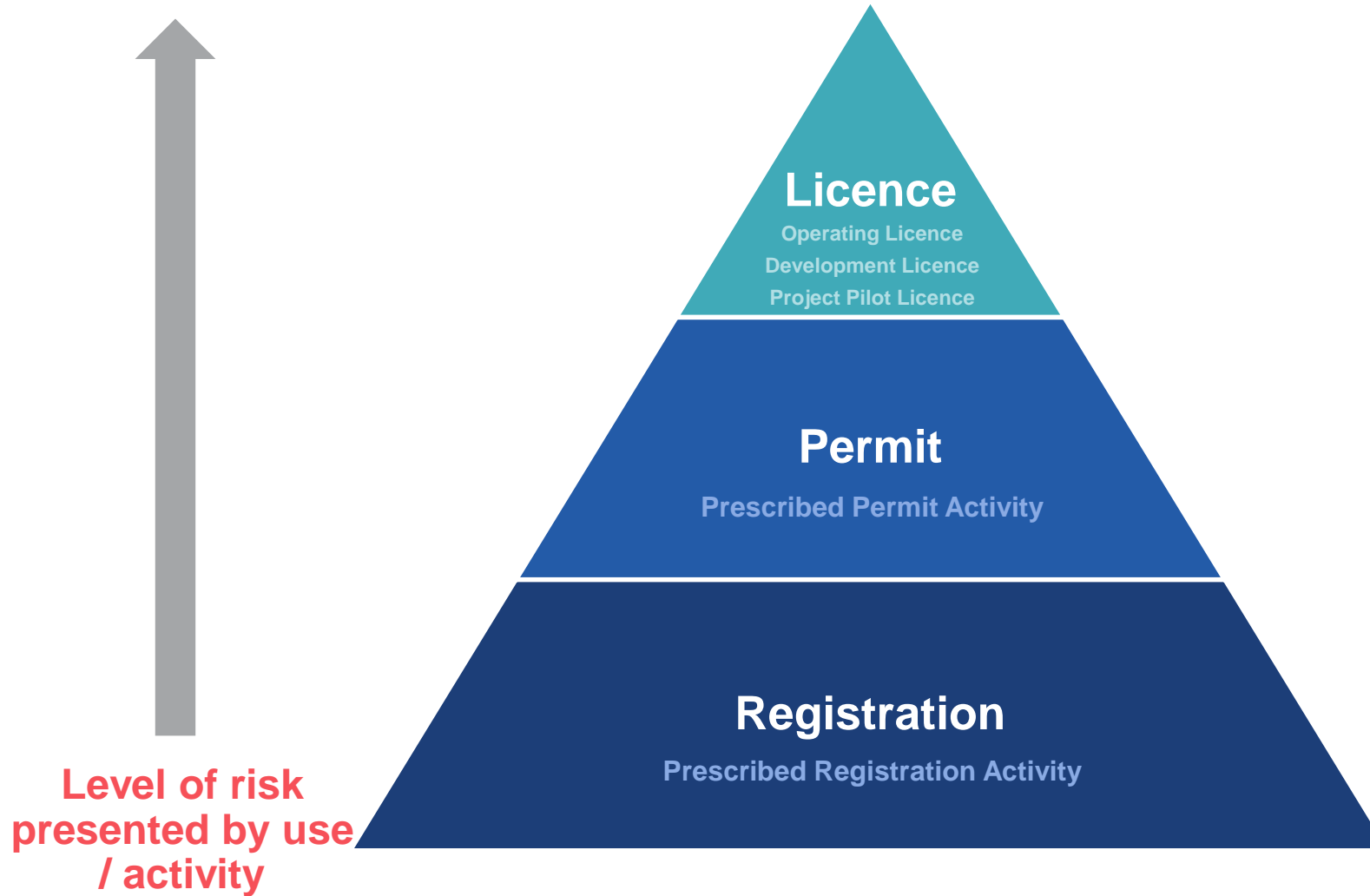
- **Duty to Manage Contaminated Land**
- **Duty to Notify of certain Contaminated Land**
- **Waste Minimisation Duty**

Incident response

- **Duty to Notify of Pollution Incident**
- **Duty to Respond to Pollution Incident**

New Permissions Regime

Regulation through prescribed activities



New Enforcement Notices

Non-Disturbance Notices

- Occupier must stop activity for up to 7 days

Environmental Action Notices

- Person must clean up, reduce stockpiles, remediate contamination, lawfully dispose of waste – potential cost recovery from polluter

Improvement Notices

- Person must take action to remedy a contravention or activity likely to contravene

Prohibition Notices

- Person prohibited from undertaking activity and must take action to minimise risk of harm

Notices to Investigate

- Person must investigate and report to EPA

Site Management Order (SMO)

- Long term management of environmental risk – remediation, monitoring, reporting (recorded on certificate of title and runs with the land) – potential cost recovery from polluter

Liabilities

Civil penalties (NEW)

- Timely and proportionate response for less serious offences
- Courts can seek greater than maximum penalty for ill-gotten gains
- May be in addition, or as an alternative, to criminal penalty
- Introduction of new maximum penalty to:
 - \$1,611,900 (body corporate)
 - \$322,280 (natural person)



Criminal penalties

- Breach of general environmental duty and other provisions
- Penalties have doubled from 1970 Act
- No criminal proceedings while enforceable undertaking in force
- Increase of maximum penalty (aggravated breach of GED):
 - \$3,223,800 (body corporate)
 - \$644,760 and/or 5 years imprisonment (natural person)



Liabilities

Related entities

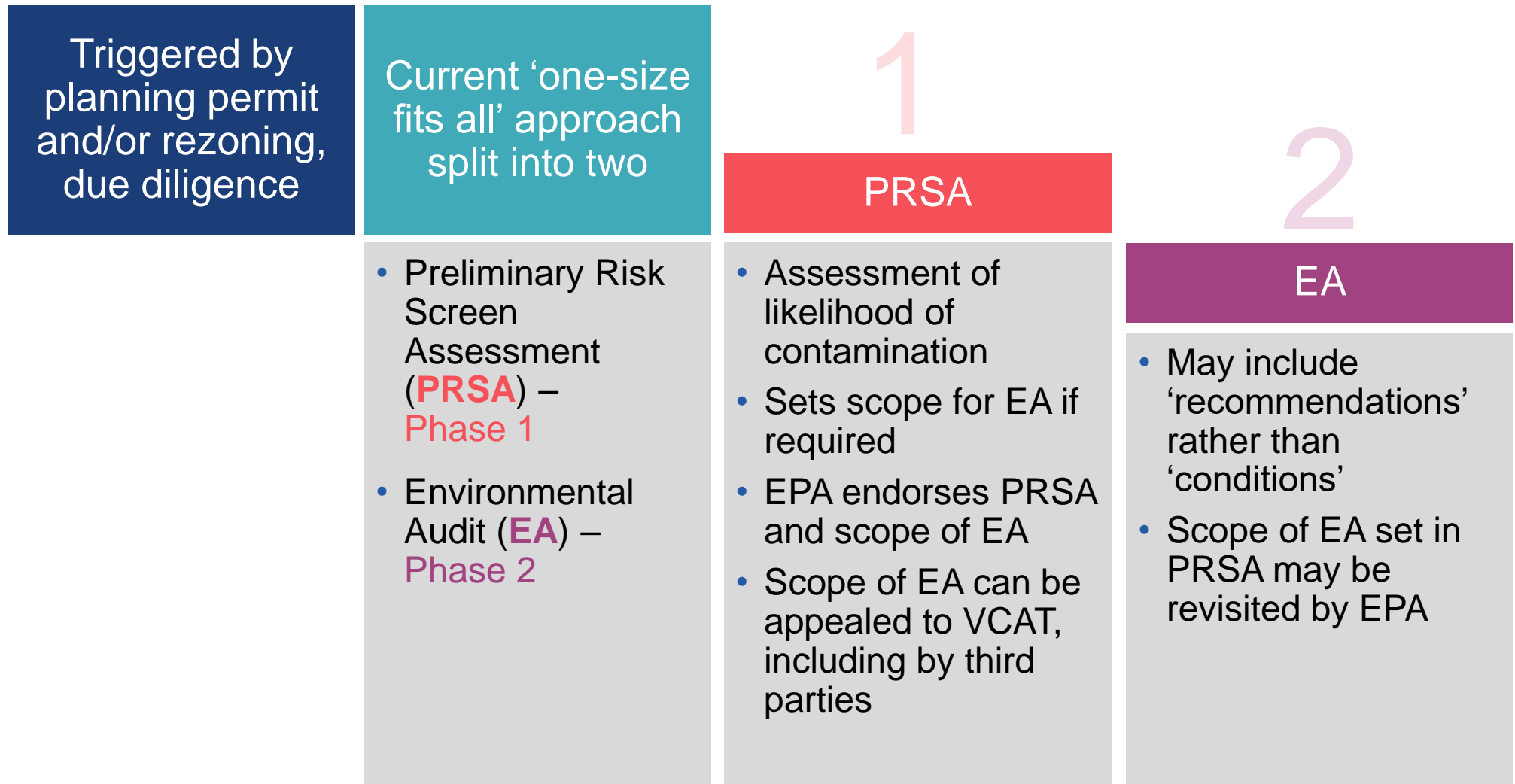
- Liability for compliance with environmental action notice or site management order may be redirected to related/associated body corporate
 - knowledge, control, influence and due diligence
 - Broader than the current subsidiary/related entity redirection powers
- Applies where company wound up or fails to comply

Officers

- remain liable for offences of corporation, subject to due diligence defence – s 349 and s 350
- may be liable for **non-compliance** with environmental action notice or site management order
- may be liable for civil penalties as an alternative to criminal prosecution

Environmental audits

Two-tier environmental audit framework



Third party rights

Public involvement and third party rights



Third party review and enforcement

- Review of certain decisions
- Person whose interests are affected



Conference of interested persons

- Conference is to assist in the just resolution of the matter or decision under consideration
- May include person, body or public entity that EPA considers has an interest in the matter or decision, person with technical experience or public entity that has asked to be consulted



Enforcement / stop orders

- Eligible person may make an application to Court for an order to restrain someone from engaging in specified conduct or for them to take an action



Compensation orders

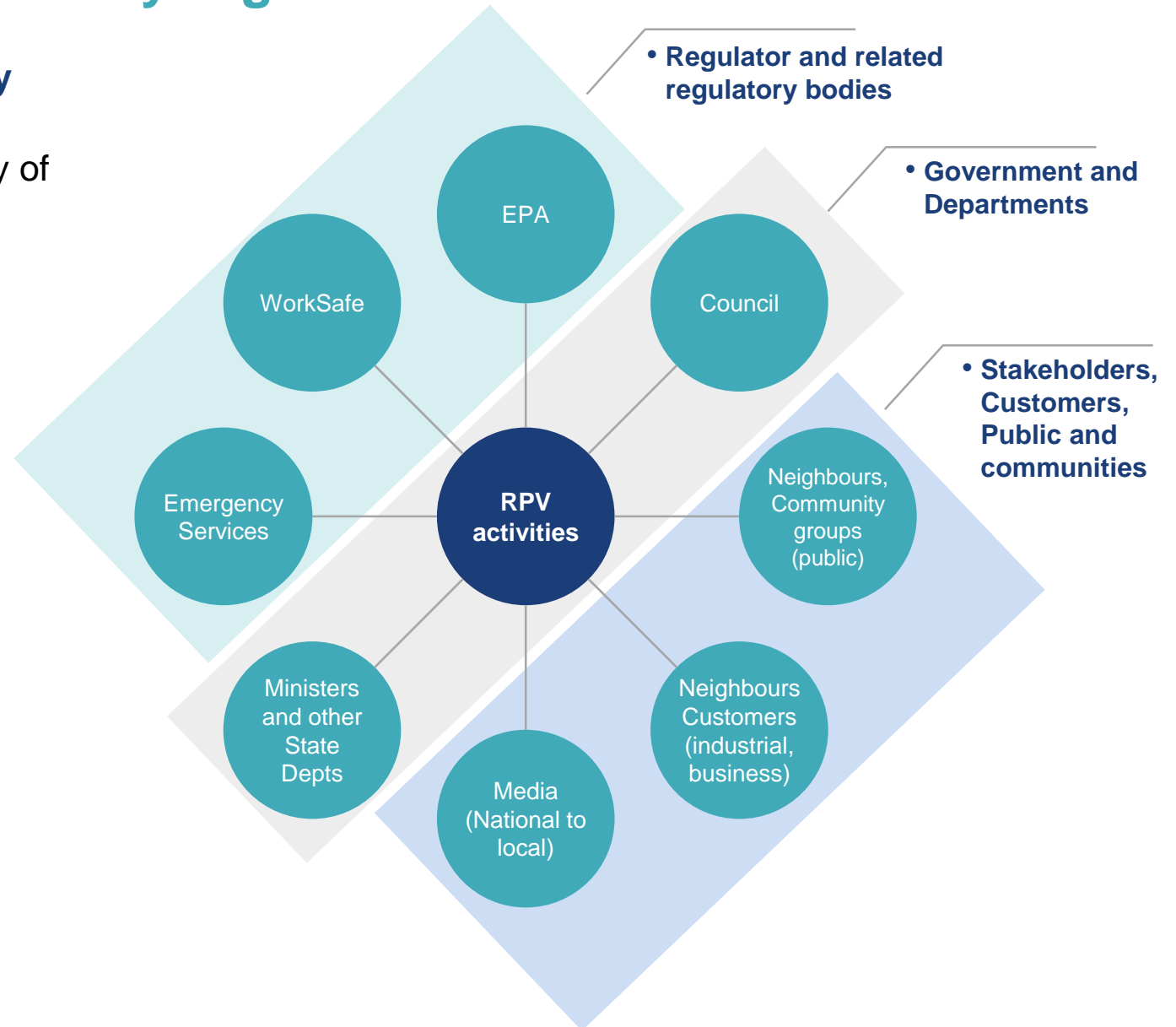
- Court may make compensation orders in favour of persons injured from a contravention of the Act
- Not necessarily for the person who brought the action

Stakeholder & Community engagement

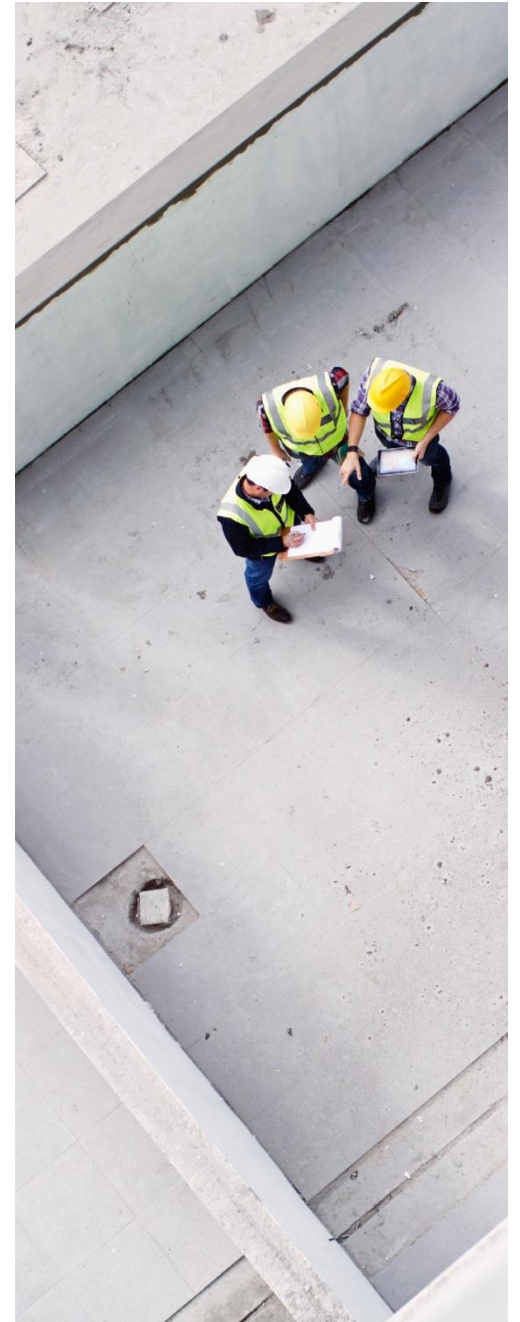
Thinking about Third Party Rights

Implications of new third party rights

- Interaction with duty to notify of contamination
- Relationship with industry
- Relationship with regulators



| Preparing for change



What does the future hold?

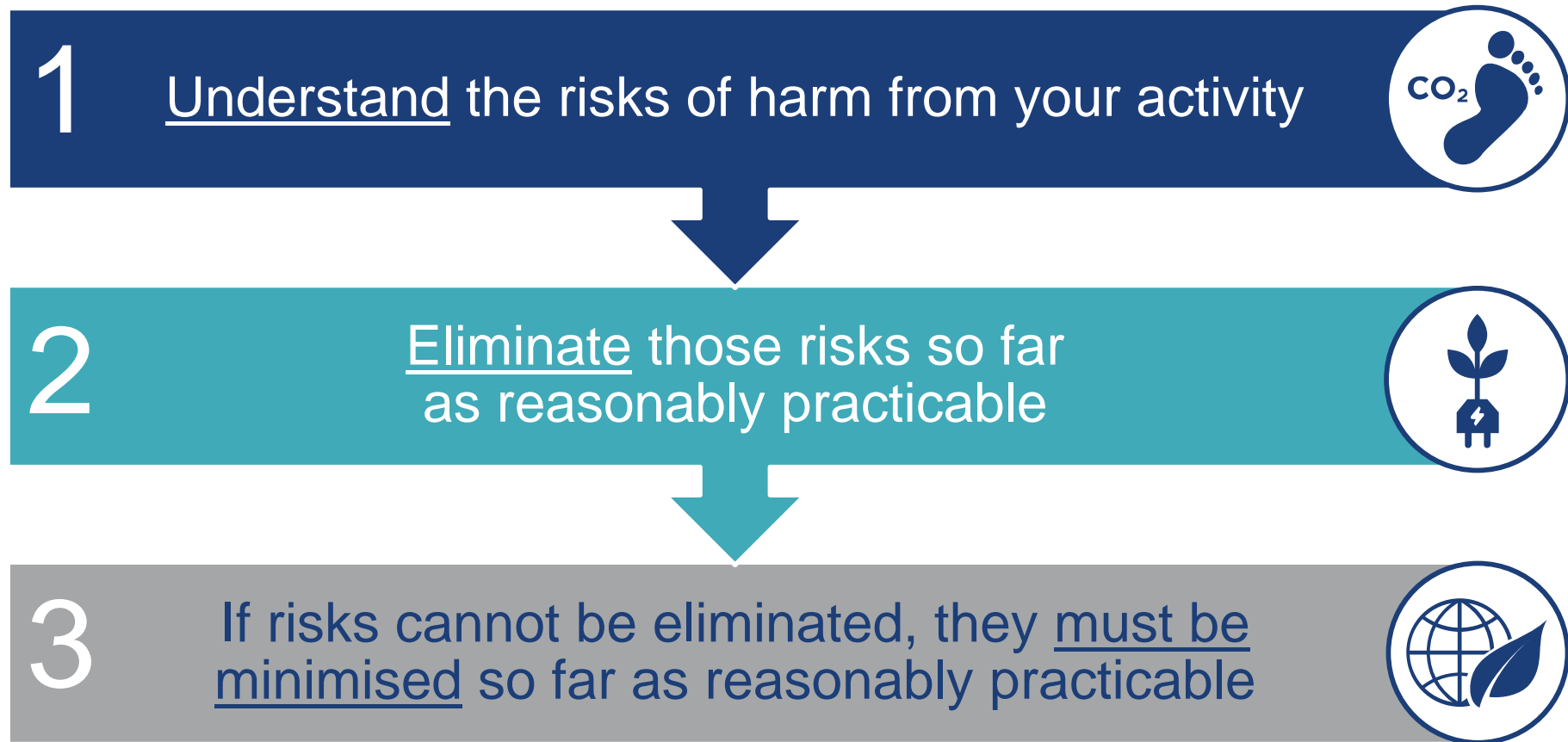
What you
should
you be
doing?

What
knowledge
or skills do
you need to
develop?

What is your
plan for
meeting the
new
compliance
requirements?

Due diligence and environmental duties

Minimising risks of harm to human health and the environment



Setting a new course for compliance



Reactive

- Higher risk, falling short of compliance
- Greater likelihood of dissatisfaction with regulatory outcomes



Proactive

- Planning and working toward implementation
- Identifying how the current system works against the new requirements, travelling to make it in time for 2020
- Participate in formal consultation with regulator and industry



Go 'beyond' proactive planning

- Rethink, implement, test, strategic approach to your issues and compliance requirements – '360 approach'
- Consider risks and issues relevant to your industry, engage early in development of regulatory detail
- Potential benefit in being innovative with compliance, opportunity to be a trailblazer with EPA

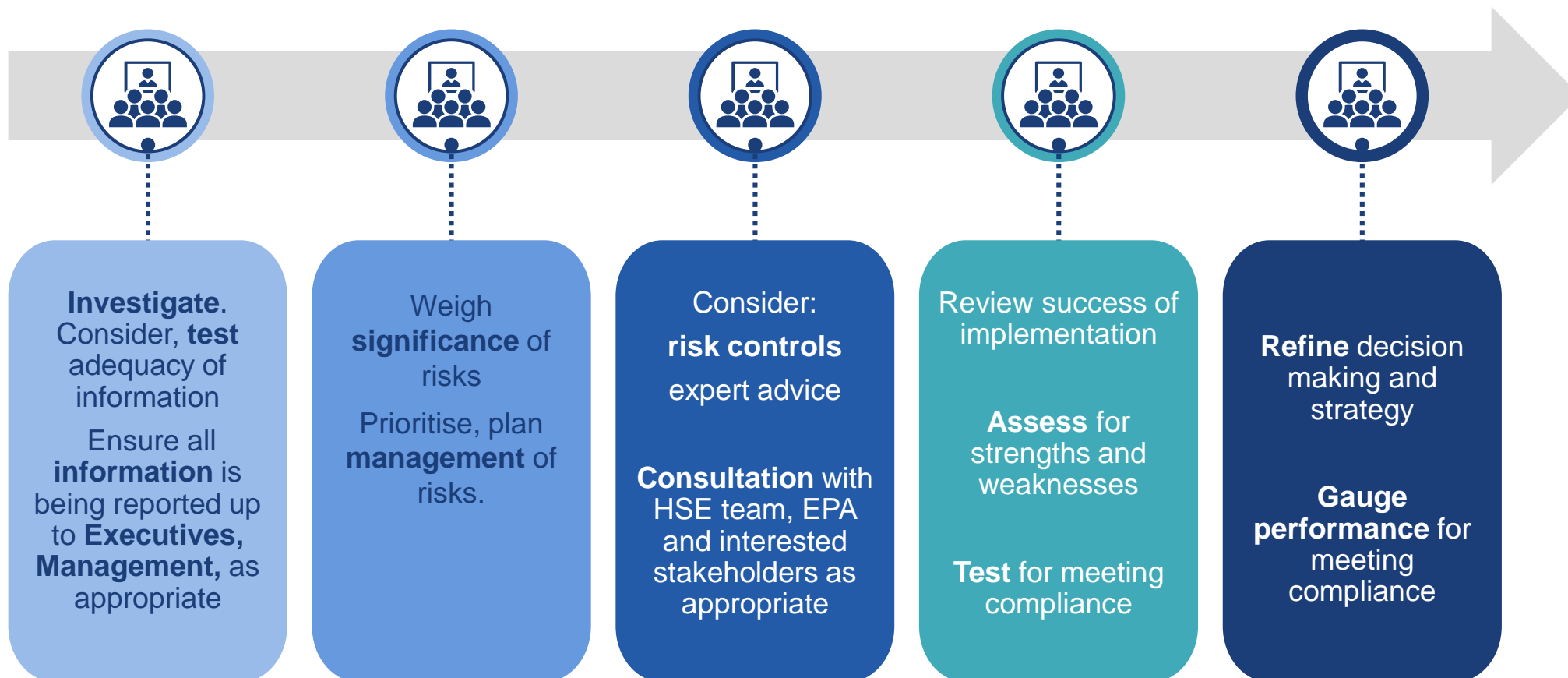
Timeframe

- 12 months to chart and implement your pathway to compliance.
- 24 months to meet compliance requirements.

Governance: Due diligence and environmental duties

Risk management

Duty to minimise, so far as reasonably practicable, risks of harm to human health and the environment



| Looking ahead



Big picture: a culture of compliance, transparency and reporting



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