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Department of Agriculture, Water and the Environment

RE: ASBG's Submission on the Recycling and Waste Reduction Legislative Package.

Dear Kristin

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the draft ***Recycling and Waste Reduction Legislative Package***.

The [Australian Sustainable Business Group](http://www.asbg.net.au) (ASBG) is a leading environment and energy business representative body that specializes in providing the latest information, including changes to environmental legislation, regulations and policy that may impact on industry, business and other organisations. We operate Federally, in NSW and Queensland and have over 100 members comprising of Australia's largest manufacturing companies and other related businesses.

ASBG represents a broad range of industries and businesses which also includes manufacturers, importers and the waste section. Our membership base, while including the waste sector, it largely represents generators of waste and product suppliers. Business wishes to reduce waste to landfill, recycle and reuse wastes made and supports government policy in this direction. Our members are strong supporters of waste avoidance, reuse and recycling founded on a science, cost-benefit and a risk-based approach. ASBG supports the continuing export of recyclate commodities which meet international and local acceptable standards for recycling. In this context export is an essential way for Australia to better participate in an internationally based circular economy.

ASBG supports the general thrust of the *Recycling and Waste Reduction Legislative Package* including the *Recycling and Waste Reduction Bill 2020* (RWR Bill). On this basis the general criteria for the waste export bans, as it appears on the www.environment.gov.au website, is at this stage considered conceptual and indicative, with its legal meanings to be spelled out. In doing this ASBG looks forward to the Government being flexible on the rules details covering what can be exported under licence for paper, plastics, tyres and future waste types. As a consequence, the website, fact sheets and other information sources will need to reflect the legal criteria once established, as the current drafts are somewhat different to the package and website.

In review there are a number of recommended improvements to the RWR Bill including on the:

- Definitions used for Relevant Courts and Waste
- Ministerial Exemptions
- Product Stewardship Liabilities
- Ministerial Priority List

1 Definitions

Definitions carry considerable weight in any legislative instrument. Consequently, it is important to get these correct or the course of the legislation will not perform as intended. ASBG has found two definitions which require attention: Waste and Relevant courts.

1.1 Definition of Waste

Getting the definition of waste correct legally is a major issue for State environmental agencies managing their wastes and essential for the proper working of such legislation. There are many court cases which have been determined, even appealed, based the definition of waste, such as the three [EPA v Grafil](#)¹ cases run in NSW. Waste has also been at the centre of a High Court challenge, with [ResourceCo Material Solutions Pty Ltd & Anor v. State of Victoria & Anor](#). While it was withdrawn this was due to a negotiated solution, but it was considered likely to be heard by the High Court if this had not occurred. As a consequence, the Commonwealth's definition of waste will carry significant legal weight and requires to be carefully considered.

Under section 14 RWR Bill the definition of waste is considered far too broad especially subsection (1)(a):

*(1) **Waste material** means any substance or thing that is:*

(a) generated, produced or recovered from an industrial, commercial, domestic or other activity; or

Any substance or thing would capture all products, goods, services etc. ASBG can see very little escaping being defined as waste under this section. Too broad a definition of waste can lead to absurd outcomes. It also sets a precedent for the definition of waste under other Commonwealth law, which can dominate State and Territory law at a constitutional level. Also included in the Bill is the definition of waste is under section 9 definition:

waste, in relation to a product, means waste associated with the product over the life cycle of the product.

Working with section 14 this definition of waste becomes circular. If this definition of waste is to be used in a broader means it would become unworkable.

As the RWR Bill will be centre to the Commonwealth's National Waste Policy it will be used to take a lead role in the management of waste, it should be consistent with the jurisdictions' definitions of waste.

R1 ASBG recommends the RWR Bill use a definition of waste, carefully considered and reasonably consistent with those used under state jurisdictions.

Victoria² and Queensland³ have broad, but clear and limited definitions of waste that should be reflected at the national level.

NSW's definition of waste⁴ under the POEO Act 1997 Dictionary is also a good basis, which also includes part (d) which is linked to the states Resource Recovery Framework process. Note s6 POEO (Waste) Regulation extends the definition of waste further.

1.2 Relevant Court

The definition of the Relevant Court under the RWR Bill is limited to:

¹ 1: [EPA v Grafil](#), LEC, 99 2018 2: [EPA v Grafil CCA 174](#) 2019 3: [EPAv Grafil LEC 90 2020](#)

² See "waste" [Environment Protection Act 1970 s4 Definitions](#)

³ See [Environment Protection Act 1994 s13 Waste](#) sections 1-3

⁴ See Waste in [Dictionary Protection of the Environment Operations Act 1997](#)

- (a) the Federal Court of Australia; or
- (b) the Federal Circuit Court of Australia; or
- (c) a Supreme Court of a State or Territory.

While this captures the major types of offences there are many technical and minor offences, which should be handled at other courts or tribunals as run by the jurisdictions. Attending to them at the Supreme or Federal Court level is costly and time inefficient when there are many other courts available across Australia. Additionally, the limitation to a Supreme Court of a State or Territory ignores many specialty courts which deal with environmental and scientific legal issues, which is ideal for the complex legal issues in dealing with waste and other environmental matters.

R2 ASBG recommends the RWR Bill increase the types of relevant courts to include (d) courts and tribunals as prescribed in the regulations (or rules).

As the names and types of courts across Australia can change, the use of a regulation is a more efficient means in which to change the list other courts that can hear cases under the RWR Act and regulations.

2 Ministerial Exemptions

ASBG members are concerned the process of Ministerial Exemptions could be abused, such as providing commercial advantage to one or more waste exporters. In saying this ASBG fully supports an exemption process as there are always unforeseen circumstances where an exemption is fair and logical or is required due to overseas issues.

To address such concerns an application process with a set of published criteria should be prepared. Typically, such exemption applications need to first pass a gatekeeper process, before being assessed under the application criteria. A good argument for an exemption would be required, but will need to be left open due to the unforeseen circumstances which could arise, but this would need to be balanced with checks and balances to ensure a fair and reasonable exemption is granted where it has sufficient merit.

R3 ASBG recommends the development and use of a Ministerial Exemption Guideline and application rules to accompany the RWR Bill's part 3.

3 Product Stewardship Liabilities

There are many commercial law processes that manage bad debts, non-payments and ongoing liabilities including declaration of bankruptcy. However, such provisions, especially if there is a debit owing to the Commonwealth is poorly handled under the Product Stewardship Act 2011 and not under the RWR Bill either. As the majority of the products being considered under a Product Stewardship arrangement will be imported, care needs to be exercised where the importing organisation can be temporary and easily divest from Australia as a whole. ASBG considers section 75 deficient in the way it covers such liabilities and need to include commercial law arrangements dealing with such liabilities.

For example, if an importing party removes its self from the Australian market, but due to the lifecycle of its product refuses to pay and or goes into liquidation, who then pays for ongoing recycling costs? Under the current legislation there is no provision for handling such debt. Importing commercial law legal means to manage such liabilities into the RWR Bill is required. Consider the following hypothetical case study:

An importer of electrical goods sets up a low cost company in Australia. They use local distributors to sell their product and join a Co-regulatory arrangement for the recycling of their old products. These products have an expected life of 8 years. However, the importer decides to leave the Australian market with this brand and liquidate the importing company within 5 years. They then fail to pay the waste recyclers, Government and others for the Product Stewardship obligations. Note the importer could also phoenix, setting up a new company with a slightly rebranded product, repeating the process.

The RWR Bill needs to consider such issues, especially on how the liabilities to meet the co-regulatory arrangements will either met or discounted as per normal creditor arrangements on companies which may go insolvent or suffer significant commercial changing circumstances.

R4 ASBG recommends the RWR Bill include provisions for Product Stewardship arrangements that deal with liabilities in a similar manner as undertaken under commercial law.

To assist liable parties: manufactures, importers, distributors and users of the covered product, in dealing with the liabilities in joining a Product Stewardship arrangement, the Commonwealth could provide a document identifying the types of liabilities to be covered in contracts and legal obligations for the arrangement.


4 Ministers Priority List

Under s92 the Minister is to publish an annual Priority list. However, ASBG considers there is a need for a set of broad criteria on which wastes for this Priority List is to be selected or removed. ASBG strongly supports a scientific and evidence based risk approach to the setting of a priority list. For example, making a Product Stewardship arrangement on plastic straws has a strong popular appeal, but in reality the volumes are so low plastic straws would be more cost effectively managed by other regulatory means, rather than applying a Product Stewardship approach to it alone.

R5 ASBG recommends the RWR Bill include a scientific, cost and evidence based risk approach in the determination of which product groups are included or removed on the Minister's Priority List.

Should you require further information, clarification or details on the submission please contact me on 02 9453 3348.

Yours Sincerely



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