



Australian Government

**Department of Agriculture,
Water and the Environment**

Submission to the Inquiry into the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021

7 April 2021

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Inquiry into the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021

On 18 March 2021 the Senate referred the Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021 (the Bill) to the Senate Standing Committee on the Environment and Communications for inquiry and report by 5 May 2021.

This submission contains further information about the Bill to assist the Committee with its inquiry.

Overview of the Basel Convention and *Hazardous Waste (Regulation of Exports and Imports) Act 1989*

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the Basel Convention) is an international agreement that was adopted in 1989. The Basel Convention places obligations on member countries to help ensure that hazardous wastes are only sent to those countries that can deal with the waste in an environmentally sound manner.

The principal aim of the Basel Convention is to minimise the impacts of hazardous waste on human health and the environment by placing controls on the export, import and transit of hazardous wastes. Under the Basel Convention, the export, import and transit of hazardous wastes requires the prior informed consent (PIC) of all countries involved in the movement before it can proceed. Consent is only provided if it is demonstrated that the waste will be transported and processed in an environmentally sound way.

The *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) implements Australia's obligations under the Basel Convention. Under the Act, anyone seeking to export, import or transit waste through Australia must apply for, and be granted a hazardous waste permit by the Minister for the Environment. A permit will only be granted if it is demonstrated that the waste will be transported and processed in an environmentally sound way.

Proposed amendments to the Act

New classifications for waste plastics under the Basel Convention

In May 2019, the Conference of the Parties to the Basel Convention adopted amendments that strengthen international controls of unsorted plastic wastes and more clearly define hazardous plastic wastes. These amendments, which entered into force for Parties to the Basel Convention on 1 January 2021, include changes to the scope of the plastic wastes covered by the Basel Convention. The aim of the amendments is to reduce marine pollution from plastics. The amendments will also reduce impacts on human health and the environment caused by exporting waste plastics that are unsuitable for recycling, particularly in developing countries.

The Basel Convention amendments create two new categories of waste plastics subject to PIC controls: mixed non-hazardous plastics and hazardous plastics. Amendments to the Hazardous Waste (Regulation of Exports and Imports) Regulations 1996 will be required to fully implement the new controls.

Australia can play an active role in addressing the challenge of waste plastics by incorporating these amendments into the Act. This will show our support and leadership by ensuring there is

a robust international standard for waste plastics that will help to ensure that these materials can be recycled effectively, thus reducing the impacts of the global trade in waste plastics.

This was recognised when Australia, following our comprehensive treaty making process, agreed in 2019 to adopt the amendments. These amendments are a key part of Australia's international obligations under the Basel Convention. Australia is therefore obliged, under international law, to amend the Act to implement these changes.

The regulation of waste plastics covered by the Recycling and Waste Reduction Act will operate in tandem with the regulation of hazardous waste plastics under the Act.

Alignment with the Regulatory Powers Act

The proposed amendments under the Bill would align regulatory powers in the Act with standard provisions in the Regulatory Powers Act, thus making the compliance and enforcement regime of the Act consistent with current Commonwealth legislation. This will be achieved through adopting the standard suite of provisions under the Regulatory Powers Act and including new audit powers. The new regulatory regime will consist of monitoring and investigation powers, enforcement provisions using civil penalties, infringement notices, enforceable undertakings, injunctions and new audit powers.

The Bill includes additional monitoring and investigation powers beyond the standard provisions of the Regulatory Powers Act, which generally reflect existing powers in the Act. These include the power to test and analyse a sample of waste, the power to secure (or secure things on or in) premises, vessels, vehicles or aircraft and the power to use reasonable force against things. These powers are appropriate because it may be necessary to secure objects or premises, or to take and test samples in order to facilitate compliance with the Act.

The Bill also includes additional monitoring and investigation powers that deal with the specific issues that arise where regulatory powers need to be exercised on, or in relation to, a searchable place which is movable, such as a vessel, vehicle or aircraft. These powers include the power to stop and search, and control the movement of, a vessel, vehicle or aircraft where there are reasonable grounds for suspecting that it may be carrying hazardous waste.

Adoption of the amendments would allow an inspector to: search premises, measure or test anything on the premises; take photographs or make copies of documents; take necessary equipment onto the premises; ask persons on the premises questions and request the production of documents; operate electronic equipment; and secure electronic evidence for twenty-four hours to obtain expert assistance. The Bill also provides the power to require the production of permits, notifications or orders given under the Act.

New audit powers proposed under the Bill would allow inspectors to conduct audits in relation to export, import and transit proposals, ministerial orders, and other set activities. Auditing will be an important compliance tool to assess a person's compliance with permit and record-keeping requirements, among other things under the Act.

The investigative and monitoring and audit powers introduced through the Regulatory Powers Act reflect current best practice, which would allow non-compliance to be more easily detected and ultimately reduced, leading to greater compliance with the Act. Coupled with the new enforcement powers, this will support better environmental outcomes and assist in ensuring compliance with Australia's obligations under the Basel Convention.

New requirements for record keeping, information gathering and information sharing

The Bill proposes new requirements for persons regulated under the Act to keep records and provide information and documents on request and sets the conditions to be met for sharing information with certain government entities.

Permit holders, holders of OECD transit waivers and persons to which ministerial orders have been issued will be required to keep records. The Bill provides for the making of Regulations to specify the types of records that are required to be kept. This will enable permit holders to clearly identify the types of documents they need to retain and the length of time for which these records must be retained.

New information gathering powers will give the department the ability to investigate contraventions of the Act, whether the alleged offenders are permit holders or not, noting that the Act currently only allows the department to request information from permit holders.

The proposed amendments on information sharing allow for the sharing of information collected under the Act between the Minister and Commonwealth entities, State or Territory government bodies or law enforcement agencies in certain circumstances, for example, in the case of a suspected illegal export operation that was potentially being stored or processed at unlicensed premises. Use and disclosure of information obtained under the Act would also be permitted for a number of secondary purposes (i.e. purposes not related to hazardous waste).

The new powers proposed above are necessary to deal with risk of irreversible harm to human health and the environment due to illegal trade, or non-compliant management of hazardous wastes. They will enhance detection of and deter non-compliance, which will materially address illegal trade in hazardous wastes, and facilitate the efficient and effective delivery of regulatory functions and powers. The amendments would also ensure that information obtained by Commonwealth officials that could reasonably be expected to cause harm if disclosed without authorisation can only be used or disclosed for appropriate authorised purposes.

Coupled with proposed new audit powers and adoption the Regulatory Powers Act provisions, these amendments complete a robust suite of powers to regulate hazardous wastes and monitor compliance with the Act.

Updated offence and civil penalty provisions

It is proposed that the Act is updated to streamline its operation, reduce complexity and introduce penalty provisions that are proportionate to the offences committed. Prohibitions under the Act that would be covered could include:

- export, import or transit of hazardous waste without a permit or, where relevant, a notification that a transit permit is not required
- export, import or transit of hazardous waste that is not in accordance with the permit or the permit conditions
- sale of hazardous waste in certain circumstances
- failure to deal with hazardous waste in accordance with a ministerial order

- failure to provide information in accordance with a ministerial order.

Each prohibition would have a fault-based offence, a strict liability offence, and a civil penalty attached. This approach is intended to provide an adequate deterrent to persons engaging in such conduct, which has the potential to cause significant harm and to result in Australia's international obligations being breached.

The amendments would also provide an escalating range of sanctions, which would provide the Commonwealth with the flexibility to enforce the prohibitions appropriately without always needing to pursue criminal penalties (noting that conviction from a criminal offence carries a range of consequences beyond the immediate penalty).

It is expected that criminal proceedings would be brought for conduct that contravenes the above prohibitions and is at the more serious end of the spectrum or that involves a higher degree of malfeasance.

In addition, there are increases to the penalties for offences relating to the export, import and transit of hazardous waste and the introduction of new serious offences where there is, or could be, injury or damage to human health or the environment. The size of the maximum penalties are appropriate as a deterrent and reflect the seriousness of the conduct involved.

These changes will ensure that the Commonwealth can respond to non-compliance in a targeted and proportionate manner that will give industry and community confidence in the effectiveness of the regulatory regime.

Hazardous Waste Technical Group

The current consultation mechanism to declare hazardous wastes is cumbersome and relies on seeking advice from a fixed pool of expertise that no longer represents the breadth and depth of expertise required to provide robust technical advice. This is because the Hazardous Waste Technical Group does not always have the expertise that is necessary to provide advice on a particular waste or treatment method.

The Bill proposes a new process that still requires the Minister to consult with a range of stakeholders with appropriate expertise when making these decisions. This more flexible approach will facilitate the timely consideration of new information on the properties of hazardous wastes and their treatment technologies, without lessening the consultation requirements.

This new mechanism would ensure that the Minister can tailor the mandatory consultation to persons who have the appropriate expertise for the particular decision at hand, and can also seek a wider range of views on the potential implications of the decisions from persons who may be, or who represent those who may be, affected by that decision. This would ensure the Minister has all relevant information before them when deciding whether to list new hazardous wastes or determine new environmentally sound treatment technologies.

Regulatory impact of amendments

The proposed amendments are not expected to place additional regulatory burdens on businesses.

While the power to conduct audits is new, it is expected to have a minimal regulatory impact as audits could be used to reduce the number of documents that are currently provided to the department as a condition of the permit. These would likely offset any regulatory burden the new audit regime may impose.

The Office of Best Practice Regulation has advised the department that amendments are minor and non-regulatory in nature and that a regulation impact statement is not required (OBPR ID 25748).

Consultation

The plastics amendments were considered and agreed to by Joint Standing Committee on Treaties (JSCOT) in December 2019.

The department has recently consulted on the Recycling and Waste Reduction Act, including the plastic rules to be made under the Act. Consultation included a discussion paper and a series of industry roundtables in every state and territory capital. Key industries consulted through a webinar included plastics manufacturers and recyclers. The department is seeking to align the management of waste plastics under the Recycling and Waste Reduction Act with the requirements of the Hazardous Waste Act to minimise disruption to industry.

The department is currently undertaking a review into the specifications for waste plastics. Should a new specification for allowable contamination be identified, the department will carry out consultation prior to the Regulations being amended.