

Question from Hansard:

1. Ms Donnelly: We've provided informal advice in terms of our thinking around what works and doesn't work well in the current structure and what some of the potential changes could be and how those impacts could benefit the objective of the covenant's work.

Senator WHISH-WILSON: Are you able to table or give the committee a copy of that informal advice?

Ms Donnelly: Yes, we are—absolutely.

Senator WHISH-WILSON: Fantastic. If you could take that on notice and provide that, that would be very useful.

Response:

Three documents are attached that were provided by APCO to the Department in August 2019:

- Document 1: Possible approaches to address short term issues with the National Environment Protection (Used Packaging Materials) Measure 2011
- Document 2: Proposal to review the National Environment Protection (Used Packaging Materials) Measure 2011
- Document 3: Potential scopes of a minor NEPM variation, and a review of the NEPM.

Questions received after the hearing:

1. Question to APCO (Senator Green)

During the 18 September Committee Hearing, the Australian Food & Grocery Council said that they wouldn't support mandatory 2025 recycling targets on the basis that food safety standards don't allow for all relevant food products to be packaged using recycled content. How does this impact the APCO target of '50% of average recycled content included in packaging'?

Response:

We undertook an extensive consultation process in setting the 2025 National Packaging Targets for recycled content, and that has enabled us to factor the sorts of issues that the Australian Food and Grocery Council was referring to into the design of the targets. The targets are set at the national and industry-wide level. The overarching target of 50% average recycled content is for an average level of recycled content across all packaging, including consumer-facing and business-to-business packaging, and all material types. We have also set differentiated targets for different materials, ranging from an average of 20% across all plastic packaging up to 60% for paper packaging. There are sectors, contexts and even specific packaging applications where there are regulatory, safety and technical barriers that prevent or limit inclusion of recycled content, and we therefore expect that sectors and companies will differ in the degree to which they are able to incorporate recycled content and the timeframes over which they will be able to do so. The material-specific targets and overall 50% recycled content target takes these factors into account.

2. Question to APCO (Senator Whish-Wilson)

The 2025 National Packaging Targets include a target for plastic packaging of 20 percent. What was the basis for a 20 percent target rather than a 30 percent target which is more in line with other countries such as the UK?

Response:

The 2025 national Packaging Target of 20% recycled content across all plastic packaging is based on extensive consultation and analysis of current status and opportunities and barriers. It is an ambitious, 10-fold increase on the current level of 2% recycled content in plastic packaging in Australia. We also consider that the 20% target is feasible and APCO's intention is that it will be achieved. We are not able to compare directly with the UK target, as we have not undertaken an analysis of the differences in the detailed design and contexts of the UK and Australian targets.

Possible approaches to address short term issues with the *National Environment Protection (Used Packaging Materials) Measure 2011*

This paper proposes short-term options to address issues in the administration of the legislative framework for packaging waste, for possible implementation while awaiting completion of a review of the *National Environment Protection (Used Packaging Materials) Measure 2011* (the NEPM).

The most pressing issues for APCO in administering the Covenant are:

- Lack of agreement amongst stakeholders about the meanings of key terms
- Weakness of free-rider protections for Covenant signatories.

These issues could be addressed through a minor variation to the NEPM, or by providing a clarifying statement from the Government Officials Group and APCO to stakeholders.

Possible minor variation to the NEPM

Provisions of the NEPM that could be considered through a minor variation process are listed in the table below.

	Existing	Possible scope of minor variation
Definitions (Clause 3)	<p>Definitions are provided in Clause 3 of the NEPM and Schedule 1 of the Covenant. Interpretation of some definitions depends on interpretation of use in the NEPM and Covenant.</p> <p>For example, ‘consumer’ is defined in the Covenant as the ‘Final purchaser of packaging or a packaged product’. The context for this definition includes paragraph (b) of the definition of ‘consumer packaging’ in Clause 3 of the NEPM, which excludes the word ‘retail’ and includes both secondary and tertiary packaging, and subclause 7(a), which indicates that businesses are considered to be consumers.</p>	<ul style="list-style-type: none"> - Review definitions for clarity (e.g. ‘consumer’), and consistency in usage throughout the Covenant and NEPM - Consider updating definitions to improve clarity - Replace redundant definitions with current terms e.g. ‘APCO’ and ‘Sustainable Packaging Guidelines’ - Consider the need for new definitions e.g. ‘recover’, ‘composting’, ‘compostable packaging’, and ‘equivalent outcomes’.
Statutory obligations and rights (Clause 9)	<p>Obligations of liable parties are to:</p> <ul style="list-style-type: none"> - Undertake or assure the recovery of used packaging materials. - Undertake or assure the re-use, recycling or energy recovery of packaging materials - Demonstrate that the recovered materials have been re-used or exported - Demonstrate that reasonable steps have been taken to advise consumers as to how the packaging is to be recovered. 	No change to the obligations. Consider whether there is a need to clarify the meaning of ‘assure’.
	<p>Packaging materials to which obligations apply are ‘consumer packaging in which the brand owner’s products are sold’ (fungible</p>	To avoid any confusion arising from the phrase ‘in which the brand owner’s products are sold’, consider clarifying that obligations

	with materials of the same size and type), having regard to the practices of Covenant signatories.	apply to all consumer packaging materials relevant to Covenant signatories, as defined in Clause 3.
	Targets for recovery, re-use and recycling should be established ‘by reference to current national performance and targets specified in the Covenant’.	The reference in Subclause 9(5) to “current national performance” is confusing in the context of targets, which refer to intended future performance. Consider amending to refer to ‘current national performance and targets’, which would include targets established under the NWP, for example.
Exemptions, deemed compliance (Clause 11)	<p>Liabe parties can acquit their obligations in three ways:</p> <ul style="list-style-type: none"> - As signatories to the Covenant (currently 100 per cent of compliant liabe parties acquit their obligations in this way) - Participating in an industry or sector arrangement that produces outcomes equivalent to those achieved through the Covenant 	<p>Clarify what is meant by ‘equivalent outcomes to those achieved through the Covenant’.</p> <p>Amend note to Clause 11 to refer to Schedule 5 of the Covenant.</p>
Methods of collecting information and reporting (Clause 15)	Participating jurisdictions should collect the information set out in Part 4, from brand owners that are not signatories to the Covenant, and local governments.	Consider establishing that participating jurisdictions may use a 3 rd party service to collect the required information.
Data and reporting (Clauses 16-21)	Establishes the data that participating jurisdictions should collect from brand owners and local governments, and that this should be reported to the NEPC.	Consider including data on composting.

Clarifying statement by GOG and APCO

As an alternative to a minor variation, the GOG and APCO could publish a clarifying statement for stakeholders. The primary focus of the statement would be on the interaction between the Covenant and the NEPM, particularly the provisions establishing free rider protections. The statement could address:

- The scope and extent of obligations of liabe parties that are not signatories to the Covenant (see Clause 9 in the table above)
- The meaning of ‘equivalent outcomes’ (see Clause 11 in the table above).

Proposal to review the *National Environment Protection (Used Packaging Materials) Measure 2011*

This paper proposes priority matters for consideration in a review of the legislative framework for packaging waste, including the *National Environment Protection (Used Packaging Materials) Measure 2011* (the NEPM) and the Australian Packaging Covenant. The priority matters are free rider protection, allocation of liability, and scope of materials covered. This is not an exhaustive list of matters that could be usefully considered in a review of the NEPM.

Free rider protection

A key function of the NEPM is to protect the competitiveness of Covenant signatories from free riders, which are defined in the NEPM as liable parties that are neither signatories to the Covenant, nor producing equivalent outcomes to those achieved through the Covenant. The results of the brand audit carried out by APCO in 2018–19, which has seen an increase of more than 70 per cent in the number of Covenant signatories, indicates that a significant proportion of liable parties have been free-riding. In addition to competitiveness concerns for Covenant signatories, free-riding reduces the number of companies working to deliver on the outcomes of the Covenant, and the resources available to enable APCO to lead and support this work.

One means of free rider protection is cost recovery for kerbside recycling services. The NEPM provides for participating jurisdictions to enable cost recovery by local government from brand owners that are not signatories to the Covenant, for the cost of kerbside recovery systems. To date, this provision has not been implemented in any jurisdiction.

The other form of free rider protection is the enabling of alternative pathways for liable parties to acquit their obligations. The NEPM establishes two alternative pathways for liable parties that are not signatories to the Covenant:

- Individual liable parties can submit to direct regulation by state and territory governments, including in relation to:
 - o the recovery of used packaging materials.
 - o the re-use, recycling or energy recovery of packaging materials
 - o Demonstrating that the recovered materials have been re-used or exported
 - o Demonstrating that reasonable steps have been taken to advise consumers as to how the packaging is to be recovered.
- Liable parties can be part of an industry or sectoral arrangement that produces equivalent outcomes to those achieved under the Covenant.

Neither of these alternatives have been taken up by liable parties. However, a number of parties have delayed signing the Covenant, in some cases indefinitely, ostensibly on the grounds that they are considering the alternatives.

A review could consider:

- whether the three options for achieving the outcomes, i.e. the Covenant and the two alternatives, remain appropriate
- if the current framework of the Covenant and alternatives is retained:

- establishing more clearly how a liable party or industry arrangement would demonstrate that they were producing ‘outcomes equivalent to those achieved through the Covenant’
- how provisions for cost recovery by local governments, and regulation of non-signatories by participating jurisdictions, could be made more effective
- other means for free rider protection.

Allocation of liability

Liable parties under the NEPM are ‘brand owners’, as defined in Clause 3 of the NEPM. Clause 12 of the NEPM provides for a threshold to be established in consultation with APCO. The current \$5 million annual turnover threshold is established in the Covenant. Some liable parties have had difficulty establishing whether they are brand owners as defined in the NEPM, and how the concept of ‘annual turnover’ applies to their business.

The review could consider whether:

- the definition of ‘brand owner’ could be clarified, and whether it remains the most appropriate means of determining liability
- the \$5 million annual turnover threshold remains appropriate.

Scope of materials covered

Clause 7 of the NEPM establishes that the scope of the measure is limited to the recovery, re-use and recycling of used consumer packaging materials. Although key terms such as consumer packaging, recovery, recycling and re-use are defined, there is still a degree of uncertainty amongst stakeholders about what is in and out of scope of the measure, and what the implications of that might be. In addition, there are practical implications of considering certain materials and actions in or out of scope.

For example, there are a range of views amongst stakeholders about whether single use plastic cutlery is ‘consumer packaging’ when provided to consumers who have purchased take away food. Some regard the cutlery as packaging in that it is provided as part of the marketing and handling of a retail product (which is part of the NEPM definition of ‘consumer packaging’). Others regard the cutlery as something other than packaging.

In some circumstances, whether cutlery is considered packaging or not, is inconsequential. For example, if APCO is working with its Members on a project to trial compostable food service packaging, it may be impractical and counterproductive to exclude trialling of compostable cutlery from the project. In addition, there are some materials that are packaging in some circumstances, and not in others. For example, plastic containers and plastic film may be sold to food service businesses as packaging, and to householders as products.

Similarly, there are differing views on whether the recovery and recycling of packaging are within the scope of the Covenant, although they are explicitly within the scope of the NEPM. Currently, the Covenant does not provide for direct intervention in recovery and re-use.

Other product stewardship models are primarily focused on recovery and recycling. For example, Mobile Muster and the National Television and Computer Recycling Scheme fund collection and recycling. Tyre Stewardship Australia accredits and audits collectors and recyclers, and funds research and development of end-uses for tyre-derived materials.

From a practical perspective, decisions made by APCO's Members about design of packaging for recyclability need to take into account current and future recovery and recycling technologies and capabilities. Some of APCO's Members are already establishing or supporting collection and recycling of their own packaging.

A review could consider:

- whether the scope remains appropriate. For example, consideration could be given to:
 - o focusing on materials (e.g. plastics, glass, paper and cardboard) rather than on their use (i.e. as packaging)
 - o what interventions could be implemented under the Measure at different stages of the supply chain to drive the transition to a circular economy
- providing greater clarity about what is in and out of scope.

Potential scopes of a minor NEPM variation, and a review of the NEPM

The table below sets out a comparison of potential scopes of:

- a comprehensive review of the National Environment Protection (Used Packaging Materials) Measure 2011 (the NEPM) and the Australian Packaging Covenant, leading to possible reform of the framework for used packaging materials from 2021
- a minor variation to the NEPM by 1 July 2019, to ensure the Covenant remains effective while the review is underway.

	Existing	Possible scope of minor variation under Section 22A of the NEPC Act	Possible scope of review under Clause 22 of the NEPM, leading to possible variation or revocation of the NEPM under Section 20 of the NEPC Act
Legislative framework	The National Environment Protection (Used Packaging Materials) Measure 2011 (the NEPM is established under subsection 14(1) of the <i>National Environment Protection Council Act 1994</i> , and relates to paragraph 14(1)(f) 'the re-use and recycling of materials'.	No change	Consider advantages and disadvantages of the NEPC framework, including in light of the outcomes of the review of the NEPC Act, compared to alternatives (e.g. Product Stewardship Act).
NEPM PART 1; Preliminary			
Definitions (Clause 3)	<p>Definitions are provided in Clause 3 of the NEPM and Schedule 1 of the Covenant. Interpretation of some definitions depends on interpretation of use in the NEPM and Covenant.</p> <p>For example, 'consumer' is defined in the Covenant as the 'Final purchaser of packaging or a packaged product'. The context for this definition includes paragraph (b) of the definition of 'consumer packaging' in Clause 3 of the NEPM, which excludes the word 'retail' and includes both secondary and tertiary packaging, and subclause 7(a), which indicates that businesses are considered to be consumers.</p>	<ul style="list-style-type: none"> - Review definitions for clarity (e.g. 'consumer'), and consistency in usage throughout the Covenant and NEPM - Consider updating definitions to improve clarity - Replace redundant definitions with current terms e.g. 'APCO' and 'Sustainable Packaging Guidelines' - Consider the need for new definitions e.g. 'recover', 'composting', 'compostable packaging', and 'equivalent outcomes'. 	Consider all definitions in light of other outcomes of the review.
NEPM PART 2: National Environment Protection Goal			

Purpose (Clause 4)	Purpose of Part 2 is to set out a goal that: <ul style="list-style-type: none"> - relates to the desired environmental outcomes - guides the formulation of strategies for the management of human activities that may affect the environment. 	No change	Consider in light of review of NEPC Act and other outcomes of the NEPM review.
Background (Clause 5)	Explains that the Covenant is a voluntary agreement entered into by governments and industry, outlines the commitments of Covenant signatories, and establishes the intent to ensure Covenant signatories do not suffer competitive disadvantage as a result of fulfilling their commitments under the Covenant.	Update as appropriate.	Update (if still needed following the review).
National Environment Protection Goal (Clause 6)	The goal is defined in Clause 6 of the NEPM. The Covenant specifies two goals: <ul style="list-style-type: none"> - Optimising resource recovery of consumer packaging through the supply chain - Preventing the impacts of fugitive packaging on the environment. 	No change	Consider whether the national environment protection goal, and the two goals of the Covenant, remain appropriate, including in light of consideration of the scope of the NEPM and the outcomes of the review of the NEPC Act.
Scope (Clause 7)	Limited to the recovery, re-use and recycling of used consumer packaging materials.	No change	Could be reconsidered as part of a review. For example, consideration could be given to a materials-based measure, for example addressing other plastic waste, or a more targeted measure focused on higher priority materials and formats.
NEPM Part 3: National Environment Protection Guidelines			
Purpose (Clause 8)	To set guidelines that give guidance on possible means for achieving desired environmental outcomes.	No change.	Consider in light of review of NEPC Act and other outcomes of the NEPM review.
Statutory obligations and rights (Clause 9)	Identification of liable parties: <ul style="list-style-type: none"> - Establishes that liability rests with Brand Owners, as defined in the NEPM. 	No change.	Consider whether 'Brand Owner' remains the most appropriate determinant for liability.
	Obligations of liable parties are to: <ul style="list-style-type: none"> - Undertake or assure the recovery of used packaging materials. - Undertake or assure the re-use, recycling or energy recovery of packaging materials 	No change to the obligations. Consider whether there is a need to clarify the meaning of 'assure'.	Consider whether the current obligations remain appropriate.

	<ul style="list-style-type: none"> - Demonstrate that the recovered materials have been re-used or exported - Demonstrate that reasonable steps have been taken to advise consumers as to how the packaging is to be recovered. 		
	Packaging materials to which obligations apply are 'consumer packaging in which the brand owner's products are sold' (fungible with materials of the same size and type), having regard to the practices of Covenant signatories.	To avoid any confusion arising from the phrase 'in which the brand owner's products are sold', consider clarifying that obligations apply to all consumer packaging materials relevant to Covenant signatories, as defined in Clause 3.	Consider in light of review of the scope of the measure (Clause 7).
	Targets for recovery, re-use and recycling should be established 'by reference to current national performance and targets specified in the Covenant'.	The reference in Subclause 9(5) to "current national performance" is confusing in the context of targets, which refer to intended future performance. Consider amending to refer to 'current national performance and targets', which would include targets established under the NWP, for example.	Consider whether the system of setting jurisdiction-specific targets remains effective and appropriate, or whether national targets could be set.
	Cost recovery by local government from brand owners that are not signatories to the Covenant, for the cost of kerbside recovery systems: participating jurisdictions may wish to enable cost recovery by local governments, in order to protect Covenant signatories from free-riders.	No change.	Consider the effectiveness of cost recovery for recovery systems as a means of protecting Covenant signatories from free riders. Consider whether its effectiveness could be improved e.g. by providing more detailed provisions on how this could be achieved, or by providing alternative protections measures.
Enforcement (Clause 10)	Participating jurisdictions should establish offences carrying substantial financial penalties for non-compliance.	No change	Consider appropriate enforcement provisions depending on other outcomes of the review.
Exemptions, deemed compliance (Clause 11)	<p>Liable parties can acquit their obligations in three ways:</p> <ul style="list-style-type: none"> - As signatories to the Covenant (currently 100 per cent of compliant liable parties acquit their obligations in this way) - Participating in an industry or sector arrangement that produces outcomes equivalent to those achieved through the Covenant 	Clarify what is meant by 'equivalent outcomes to those achieved through the Covenant'. Amend note to Clause 11 to refer to Schedule 5 of the Covenant.	Consider whether the current co-regulatory arrangements remain appropriate (e.g. could consider removing the obligation of state and territory governments to provide alternative pathways for acquittal through direct regulation by jurisdictions)
NEPM	The NEPM provides for a threshold to be	No change	Consider whether the \$5 million turnover threshold

application thresholds (Clause 12)	established in consultation with APCO. The current \$5 million threshold is established in the Covenant.		remains appropriate, in terms of the level and the use of turnover as the measure.
Dependence on the Covenant (Clause 13)	Establishes that obligations imposed under the NEPM have no effect if the Covenant ceases to be in force.	No change	Consider whether the co-regulatory system of the NEPM and Covenant remains appropriate.
NEPM PART 4: National Environment Protection Protocol			
Purpose (Clause 14)	To set out protocols for the process to be followed to enable participating jurisdictions to assess the achievement of the desired environmental outcomes of the Covenant and the NEPM and to report annually to the Council on progress against the goal of the NEPM.	No change.	Consider in light of review of NEPC Act and other outcomes of the NEPM review.
Methods of collecting information and reporting (Clause 15)	Participating jurisdictions should collect the information set out in Part 4, from brand owners that are not signatories to the Covenant, and local governments.	Consider establishing that participating jurisdictions may use a 3 rd party service to collect the required information.	Consider in light of other outcomes of the review.
Data and reporting (Clauses 16-21)	Establishes the data that participating jurisdictions should collect from brand owners and local governments, and that this should be reported to the NEPC.	Consider including data on composting.	Consider data needs and reporting processes in light of other outcomes of the review.