

Australian Capital Territory

Plastic Reduction Regulation 2022

Subordinate law SL2022–7

made under the

Plastic Reduction Act 2022

EXPLANATORY STATEMENT

Introduction

This explanatory statement relates to the *Plastic Reduction Regulation 2022* (the Regulation) as presented to the Legislative Assembly. It has been prepared to assist the reader of the Regulation and to help inform debate on it. It does not form part of the Regulation and has not been endorsed by the ACT Legislative Assembly.

This explanatory statement must be read in conjunction with the Regulation. It is not, and is not intended to be, a comprehensive description of the Regulation. What is written about a provision is not to be taken as an authoritative statement of the meaning of a provision, this being a responsibility of the Courts.

Overview

Section 7 of the *Plastic Reduction Act 2021* (the Act) provides that certain plastic products are prohibited plastic products. The effect of this is that they cannot be supplied, as section 10 makes it an offence to supply prohibited plastic products.

Under section 7 of the Act, prohibited plastic products include certain listed products, and any other single-use plastic product or a non-compostable degradable plastic product prescribed by regulation. Section 42 enables regulations to be made for the Act.

The Regulation prescribes two single-use plastic products and one non-compostable plastic product. The effect of this is that these products are prohibited and cannot be supplied in the ACT, except in accordance with any exemptions that apply.

The prescribed products are a single-use plastic drinking straw, a cotton bud with a single-use plastic stick or stem, and a product made of oxo-degradable plastic.

Exemptions

The Regulation has been made in conjunction with the *Plastic Reduction (Single-use Plastic Products – Special Circumstances) Exemption 2022 (No 1)*, which is a disallowable instrument that provides exemptions to allow the supply of certain products in certain circumstances.

It provides an exemption to allow single-use plastic straws to be supplied to those who need them. This is because there is no alternative straw that can replicate all the properties of single-use plastic straws so some people with disability or a medical need will still require access to these. The exemption allows the supply of single-use plastic straws by a healthcare entity. It also provides that an individual straw can be supplied by anyone if requested.

The instrument also provides an exemption to allow the supply of cotton buds with a single-use plastic stick or stem where scientific, forensic or medical integrity would be compromised.

Regulatory Impact Statement (RIS)

Section 34 of the *Legislation Act 2001* requires the preparation of a Regulatory Impact Statement (RIS) if a subordinate law or disallowable instrument is likely to impose appreciable costs on the community, or part of the community. A RIS has been prepared to support the development of the regulation. The RIS was informed by a cost benefit analysis.

The RIS identified a regulatory ban as the recommended option. It found that the banning of additional items will further reduce single-use plastic consumption in the ACT, resulting in positive environmental outcomes, and that explicit government regulatory action provides certainty to industry and the community, while providing the most effective way to lessen the environmental and social costs of problematic single-use plastics.

However, it noted that a reform with amendments may also be appropriate in certain circumstances to enable more flexible implementation of the proposed reform in response to ongoing stakeholder feedback. While alternatives to certain single-use plastic items, such as oxo-degradable dog waste bags, represented a cost saving, alternatives to other items, such as straws, are expected to cost more. There will also be an up-front administration cost for the ACT Government associated with implementing the Regulation and raising community awareness.

Scrutiny committee principles

As noted in the RIS, this regulation is consistent with the Scrutiny Committee principles. This regulation does not make rights, liberties or obligations dependent upon administrative powers or non-reviewable decisions because it simply prescribes certain products for the purposes of the existing framework in the Act; it does not create any additional administrative or decision-making powers. Similarly, it does not delegate legislative powers. This explanatory statement has been prepared to reflect the technical or stylistic standards expected by the Assembly.

Human Rights

Offence Provisions

The Regulation does not create any new offences, but it does bring additional conduct within existing offences. Supplying the products prescribed by the Regulation will now fall within the existing offence of supply of prohibited plastic products in s 10 of the Act, which is a strict liability offence.

These offences engage human rights, as explained in the explanatory statement to the Plastic Reduction Bill 2020 (the Bill). Namely, rights in criminal proceedings and the right to be presumed innocent until proven guilty. The offences also engage the right to privacy because of the enforcement provisions in the Act such as directions to give name and address. As with the provisions in the primary legislation, the rights limited by the Regulation are for the legitimate purpose of reducing the impact of plastic on the environment and the waste management system. Straws and cotton buds are small items that cause harm to the environment when littered and cannot be recycled so end up in landfill or littered. Oxo-degradable plastics fragment into microplastics, which are harmful to the environment, but do not fully break down. There is a rational connection between the limitation on rights and the purpose of the law because strict liability offences support enforcement of offences for this additional class of plastics in a regulatory context, and compelling people to give their name and address and answer questions would enable a full and proper investigation.

The limitations are reasonable and proportionate as rights are limited to circumstances where offences apply to a specified class of additional plastic products, which are being implemented in a staged manner to enable individuals and businesses to find alternatives or eliminate prohibited products in their activities. The enforcement mechanisms are considered to be the most effective and least intrusive way of making sure the statutory requirements are complied with.

The regulatory ban will be supported by public education and engagement, to ensure that stakeholders and the community are aware of their legal obligations surrounding the products. This will include the development of communications materials about the ban, and store visits to directly engage with relevant businesses.

The creation of exemptions engages the right to be presumed innocent until proven guilty because it has the effect of reversing the onus of proof in the situation that conduct falls within an exemption. This conduct is not prohibited, but the onus of proving the exemption is on the defendant; the prosecution is not required to prove that the exemptions do not apply. However, this is justified and proportionate because the approach of making exemptions enables single-use plastic straws and cotton buds to continue to be supplied where needed, while otherwise prohibiting them. The exemptions are broadly worded and would therefore not be difficult to establish. The exemptions enable the purpose of the regulation to be achieved while also allowing access to prohibited plastic products where required.

Straws

The inclusion of single-use plastic straws as a prohibited plastic product was delayed until tranche two of the ban to allow additional time to consider human rights issues and consult with affected stakeholders. Consultation included a 12 week public

consultation period inviting written submissions, meetings with relevant stakeholders including disability advocacy stakeholders, and meetings of the ACT Plastic Reduction Taskforce. This consultation, and consideration of the human rights and discrimination issues, has informed the design of the exemption so that it best meets the needs of those who require single-use plastic straws.

The exemption has been designed to allow single-use plastic straws to be broadly available if required, and there are two exemptions to allow single-use plastic straws to be supplied in certain circumstances. The exemptions will allow businesses and organisations that provide care or supply products to people with disability or healthcare needs to display and supply packets of straws and individual straws for those who need them, while also allowing for hospitality venues to supply an individual plastic straw to those who ask for one, with no requirement to provide evidence or proof of a need for a plastic straw. This is so that, for example, a café could provide a straw with a beverage. There is a general exemption for the supply of single-use plastic straws by a healthcare entity. There is also an exemption so that an individual straw can be supplied by anyone if requested. Neither of these exemptions imposes a mandatory requirement on businesses to stock the exempt products.

The Regulation engages the right to recognition and equality before the law, in s 8 of the Human Rights Act, which provides that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind and that everyone has the right to equal and effective protection against discrimination on any ground. Under s 7 of the Human Rights Act this Act is not exhaustive of the rights that an individual may have, including, for example, under the *Discrimination Act 1991*. The Discrimination Act creates obligations not to discriminate on the basis of disability. Discrimination can include indirect discrimination, which is where a rule is the same for everyone but affects people differently.

Some people with disability or a medical need require single-use plastic straws because no alternative straw can exactly replicate all the properties of these straws. Unduly restricting access to these straws would therefore have a discriminatory effect. For this reason, the exemption has been designed so that, in addition to packets of straws being available at certain places, individual straws can also be supplied by any person, business or organisation, including at hospitality venues or other locations where they may be required. This may still result in straws being less readily available in some circumstances. However, it has been designed to make them as widely available as they can be in the context of a ban. Any less restrictive approach would effectively not ban straws and thus not achieve the Regulation's aim of reducing the environmental harm of single-use plastic products including straws.

In addition to the availability of single-use plastic straws, another potential human rights and discrimination issue is the possible stigma associated with asking for a straw. The negative reputation that plastic straws have, because of increasing awareness of their environmental harm, means there may possibly be stigmatisation associated with asking for a straw. To address this, the tranche two education and engagement will emphasise that some people have a need for single-use plastic straws. It will increase awareness of this and highlight that straws should be given out if requested without being questioned. The education and engagement for tranche two

is an opportunity to promote messages related to accessibility and the important role that single-use plastic straws have as an accessibility tool.

Section 12 of the Human Rights Act contains the right to privacy and reputation. This includes that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The exemption to allow straws was designed so that potential limitations on the right to privacy are minimised. No evidence or proof of disability or a medical need is required to access a single-use plastic straw. Further, it is not required that someone say that they need a straw because of disability or medical need. Though this is the reason that the exemption exists, it has been designed to allow a straw to be supplied on request, without any requirement relating to the need the person requesting the straw has for it. This will protect the right to privacy because people will be able to be supplied single-use plastic straws without having to disclose information about the reason that they need a single-use plastic straw. This will be emphasised during the engagement and education for tranche two so that relevant businesses and organisations understand this, and the implementation of the exemption achieves this. This design of the exemption will also protect those supplying straws, including businesses and staff, by providing certainty that they will not be committing an offence by supplying a straw to someone who requests it.

Other plastic products

Prescribing oxo-degradable plastics and single-use plastic cotton buds does not engage any additional human rights. No specific human rights issues have been raised in relation to restricting access to these items.

Section notes

PART 1 – PRELIMINARY

Section 1 – Name of regulation

This section names the regulation.

Section 2 – Commencement

This section provides that the regulation commences on 1 July 2022.

Section 3 – Notes

This section provides that notes are explanatory and not part of the regulation. This means that the notes provide information to assist the reader but do not affect the interpretation of the regulation.

PART 2 – PROHIBITED PLASTIC PRODUCTS

Section 4 – Prescribed single-use plastic product —Act, s 7 (1), def *prohibited plastic product*, par (a) (v)

This section prescribes a single-use plastic drinking straw and a cotton bud with a single-use plastic stick or stem. This means that these are prohibited plastic products and cannot be supplied in the ACT.

Section 5 – Prescribed non-compostable degradable plastic product —Act, s 7 (1), def *prohibited plastic product*, par (a) (vi)

This section prescribes a product made of oxo-degradable plastic. This means that this is a prohibited plastic product and cannot be supplied in the ACT. This section defines oxo-degradable plastic as including products made of plastic that include one or more additives to accelerate the fragmentation of the product into smaller pieces. This definition is intended to broadly capture any soft plastic products that fragment and therefore aims to reduce the environmental harm of microplastics.