

Australian Capital Territory

Circular Economy (Prohibited Products— Special Circumstances) Exemption Declaration 2023 (No 1)

Disallowable instrument DI2023-247

made under the

Circular Economy Act 2023, section 23 (Minister may disapply Act for person or prohibited product)

EXPLANATORY STATEMENT

Overview

This instrument provides exemptions to allow prohibited products to be supplied in certain circumstances where they are required. Specifically, it provides exemptions to allow the supply of single-use plastic drinking straws and cotton buds with single-use plastic sticks in situations where they are required because alternative products are not suitable. This instrument recreates the exemption (DI2022-68) that was originally made under the *Plastic Reduction Act 2021*, which has been repealed and replaced by the *Circular Economy Act 2023* (the Act).

The purpose of these exemptions is to ensure that the ban on additional plastic items does not prevent people who need single-use plastic drinking straws because of disability or a medical need from accessing them and does not prevent cotton buds with plastic sticks being used in forensic, scientific, or medical situations where alternative materials would compromise the results of analytical procedures.

This instrument has been made in conjunction with the Circular Economy Regulation 2023 (the Regulation), which prohibits the products that are being exempted.

Under s 23 of the Act, the Minister may exempt a person or a prohibited product from a provision of the Act. This instrument exempts a person who supplies certain products in certain circumstances from division 3.2 of the Act, which contains the offence of supplying a prohibited product.

The instrument provides two exemptions to allow single-use plastic straws to be supplied in certain circumstances. The exemptions are designed so there are places where packets of straws can be supplied but also so that a straw can be supplied anywhere (e.g., a hospitality venue) if it is requested. This is so that, for example, a café could choose to stock and provide a single-use plastic straw to a customer, upon

request, to enable them to consume a beverage. The exemption provides a general exemption for the supply of single-use plastic straws by a healthcare entity. It also provides that an individual straw can be supplied by anyone to anyone if requested. Neither of these exemptions creates a mandatory requirement for the exempted products to be stocked by any business.

Human Rights

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 products where required.

This instrument supports human rights by ensuring that people who require straws can access them. This is to prevent potential discrimination that could result from banning straws. The inclusion of single-use plastic straws as a prohibited plastic product under the Plastic Reduction Act 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. The consultation that informed the original ban, which included consideration of the human rights and discrimination issues, 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.

Banning straws engages the right to recognition and equality before the law under section 8 of the *Human Rights Act 2004*, 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 section 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 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 provided 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 has and will continue to be emphasised through engagement and education so that relevant businesses and organisations understand 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.

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 was prepared to support the development of the original regulation made under the Plastic Reduction Act, this includes consideration of exemptions. The Legislation Act states a RIS may not be required if the subordinate law is transitional in nature. As this instrument is a continuation of the existing exemption following the repeal of the Plastic Reduction Act by the Circular Economy Act and so is transitional in nature, an additional RIS is not required.

The previous 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.

For single-use plastic straws and cotton buds, the preferred option was the inclusion of these items as banned with relevant exemptions. The inclusion of exemptions reduces potential negative impacts associated with a complete ban on these items.

Section Notes

Section 1 – Name of instrument

This section names the instrument.

Section 2 – Commencement

This section provides that the instrument commences on the day the Circular Economy Act, section 3 commences.

Section 3 – Exemption —single-use plastic drinking straws supplied on request to individuals

Section 3 provides an exemption to allow single-use plastic drinking straws to be supplied on request to individuals. This applies to any person, business or organisation, and allows an individual straw to be supplied if requested. It does not allow straws to be displayed. The purpose of this exemption is to enable those who need a single-use plastic straw because of disability or a medical need to access one. However, the exemption does not require a person to demonstrate a need. The exemption has the effect that anyone may request a single-use plastic straw and be given one. This is so that people with a genuine need are not required to disclose their condition or requirement. Staff at hospitality venues will also not be required to make judgements about a person's need and are therefore unlikely to commit an offence if they supply an exempt item in good faith. This exemption also enables single-use plastic straws to be supplied through the supply chain so they can be purchased by individuals or entities who are supplying them in accordance with this exemption.

Section 4 – Exemption—single-use plastic drinking straws supplied by healthcare entity

Section 4 provides an exemption to allow single-use plastic drinking straws to be supplied to or by a healthcare entity. A healthcare entity means an entity (such as a business or organisation) that provides care or products to people with disability or healthcare needs, including a dental clinic, a hospital, a medical clinic, an aged or disability care facility, a medical needs supply store, and a pharmacy. The purpose of this exemption is to ensure that packets of straws can still be purchased at certain retail and medical venues by those who need them. This exemption applies only to certain types of businesses and organisations and allows straws to be supplied generally, including being displayed, and does not require that they be requested. This exemption will also ensure that there are no restrictions on the use of single-use plastic straws in healthcare settings where they may be needed. This exemption also enables single-use plastic straws to be supplied through the supply chain to healthcare entities who are supplying them in accordance with this exemption.

Section 5 – Exemption—cotton buds with plastic sticks supplied for scientific etc use

This section provides an exemption so that cotton buds with a single-use plastic stick or stem can be supplied to an entity that uses them for scientific, forensic, or medical

uses. This is intended to broadly apply to circumstances where samples are taken and may be compromised by contamination from the materials that make up cotton buds with non-plastic sticks. For example, forensic swabs can be contaminated by alternative products such as cotton buds with cardboard stems. It also applies in the circumstances that a scientific, forensic, or medical purpose would be compromised for any other reason by the use of a non-plastic cotton bud.

Section 6 – Exemption considerations

This section states that the requirements of s 23(3) of the Act have been met.

Under s 23(3), the Minister may only make an exemption if satisfied that it is not reasonably practicable or in the public interest for the person to comply with the provision, or it is not consistent with the person's human rights for the person to comply with the provision. The Minister must also be satisfied that disapplication of the provision will not have any significant adverse effect on public health, property, or the environment.

In the case of the exemptions for straws, the consultation that was undertaken in developing the ban, including with disability advocacy organisations, indicated that it is neither practicable nor in the public interest for the persons exempted to comply with the provisions because compliance would have the effect that some people would be unable to access products that they require to enable them to drink.

In the case of the exemption for cotton buds, it is neither practicable nor in the public interest for the persons exempted to comply with the provisions because compliance could lead to forensic, scientific, and medical testing being compromised. This could lead to outcomes such as evidence in legal proceedings being compromised, or inaccurate medical diagnosis.

Disapplication of the provision will not have a significant adverse effect on the environment because the number of additional straws and cotton buds that this will allow is deemed to be small compared to the overall amount of plastic used in the ACT. The cost benefit analysis that was undertaken to inform tranche 2 of the original ban made under the Plastic Reduction Act included an estimate of the per capita use of single-use plastic straws and cotton buds in the ACT. The estimated quantity of plastic waste from these items is much smaller than estimated quantity of per capita plastic waste disposed of in Australia. The cost benefit analysis assumed that 3% of single-use plastic straws and cotton buds are used for exempt uses. Based on this assumption, the estimated quantity of plastic straws and cotton buds used under the exemption will account for a relatively small proportion of the plastic waste generated in the ACT. Also, cotton buds used for forensic, scientific, or medical purposes are unlikely to be disposed of inappropriately and end up as litter. The exemptions will not have an effect on property and will not have an adverse effect on health.