



Environmental Defenders Office

6 February 2020

Via email: Vaughan.Levitzke@sa.gov.au

Re: Single – use and Other Plastic Products (Waste Avoidance) Bill 2019

The Environmental Defenders Office (EDO) is an independent community legal centre specialising in public interest environmental and planning law. The EDO provides advice, representation and education on environmental matters and engages in law reform activities.

The EDO welcomes the opportunity to comment on the Single – use and Other Plastic Products (Waste Avoidance) Bill 2019 (the Bill) . The EDO is very supportive of the proposal in general. We understand it is the first legislation of it's type in Australia although the ACT and QLD are proposing similar pieces of legislation. The EDO is supportive of much of the Bill particularly as it seeks to ban a wide range of single use plastics and doesn't discriminate based on what the plastic is made of either (single-use bioplastics are still banned) and there is a big focus on oxo-degradable plastics.

We make the following recommendations:

SCOPE OF ISSUES

The Bill tends to focus on waste disposed at an individual level as opposed to industry/commercial contributions to waste.

- *Turning the Tide's* identifies major sources of litter as:
 - Snack bags & confectionery wrappers
 - Take away drinks cups and cup lids
 - Food containers including fast food packaging
 - Drink stirrers
 - Drink bottles, caps and lids
 - Cotton bud sticks
 - Cigarette butts
 - Plastic bags
 - Straws¹

In practice, the Bill's coverage of these items (in its present version, excluding any proposed future regulations) is limited to polystyrene food items, drinking straws, plastic cutlery and beverage stirrers.

Despite an intention to exclude single-use products exported beyond SA in the Bill (s 6(2)), such a decision will perpetuate cheap, poorly designed plastics production without any effective regulation

¹ *Turning the Tide* p 3.

to reduce waste elsewhere. Internationally, plastics packaging is considered the largest industrial sector that produces single-use materials for immediate disposal.² While this Bill demonstrates a commitment to reducing the impact of single-use plastics at the end of their life cycle, it disregards a comprehensive response in line with SA's demonstrated commitment to implementing a circular economy.³

The Bill should include a prohibition on production in SA if it is for export to other countries/jurisdictions.

In addition whilst "The government has announced previously that takeaway coffee cups, thicker plastic bags and other takeaway food service items would be considered for inclusion in the legislation at a later date" (SA Green Industries Website) we strongly recommend that given the known impacts on the environment these items should be included within the scope of the Bill.

ENFORCEMENT

The Bill's relationship with the EPA is such that it is inherently administered and enforced under the latter Act and therefore the SA civil penalties regime applies. This regime

empowers the SA EPA either to negotiate a civil penalty in respect of certain contraventions of the EP Act, or to apply to the Environment, Resources and Development Court (ERD Court) for an order that a person pay to the EPA an amount as a civil penalty. Before the ERD Court can make an order for the payment of a civil penalty, it is required only to find the contravention proved on the balance of probabilities, not to the criminal standard of proof.⁴

However the EDO would question the effectiveness of this regime and would recommend that it only be used in very limited circumstances. It is important that the legislation sends a strong message that this is a serious environmental issue to be dealt with and the enforcement regime should reflect this.

THIRD PARTY RIGHTS

The EDO strongly recommends that the Bill allows third parties to apply to the Courts without undue legal impediments. Our experience over several decades is that the courts do not have to deal with large numbers of these applications and applicants are very cautious in proceeding with any action due to concerns regarding the cost of doing so and the possibility of paying the other party's costs if unsuccessful.

The Bill provides:

Part 11—Civil Remedies and penalties

104—Civil remedies

² UN Report, https://wedocs.unep.org/bitstream/handle/20.500.11822/25496/singleUsePlastic_sustainability.pdf?sequence=1&isAllowed=y, 4.

³ <https://www.greenindustries.sa.gov.au/circular-economy-in-action>

⁴ Brendan Grigg, 'Environmental civil penalties in Australia: Towards deterrence?' (2011) 28 EPLJ 36, 46.

(1) Applications may be made to the Environment, Resources and Development Court for one or more of the following orders:

(a) if a person has engaged, is engaging or is proposing to engage in conduct in contravention of this Act—an order restraining the person from engaging in the conduct and, if the Court considers it appropriate to do so, requiring the person to take any specified action;

(b) if a person has refused or failed, is refusing or failing or is proposing to refuse or fail to take any action required by this Act—an order requiring the person to take that action;

...

(7) An application under this section may be made—

(a) by the Authority or another administering agency; or

(b) by any person whose interests are affected by the subject matter of the application; or

(c) by any other person with the permission of the Court.

(8) Before the Court may grant permission for the purposes of subsection (7)(c), the Court must be satisfied that—

(a) the proceedings on the application would not be an abuse of the process of the Court; and

(b) there is a real or significant likelihood that the requirements for the making of an order under subsection (1) on the application would be satisfied; and

(c) it is in the public interest that the proceedings should be brought.

The EDO supports this proposal provided that the Court process to decide whether to grant permission is dealt with quickly and efficiently at the initial stage of the application so that there is little cost impact on all parties concerned.

Should you have any questions on the above, please do not hesitate to contact Melissa Ballantyne on (08) 8359 2222 (Tuesdays and Thursdays) or melissa.ballantyne@edo.org.au

Yours faithfully



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