

EXPLANATORY STATEMENT

Issued by Authority of Minister for the Environment, the Hon. Sussan Ley MP

Recycling and Waste Reduction Act 2020

Recycling and Waste Reduction (Mandatory Product Stewardship – Mercury-added Products) Rules 2021

Authority

The *Recycling and Waste Reduction Act 2020* (RAWR Act) establishes a legislative framework to enable Australia to more effectively manage the environmental and human health and safety impacts of products and waste material. This includes, in particular, impacts associated with the disposal of waste materials and products.

Chapter 3 of the RAWR Act deals with product stewardship. It establishes a framework providing the basis for those who design, import, manufacture and distribute products to take greater responsibility for their impacts on the environment. Product stewardship involves the shared responsibility for reducing the environmental, health and safety footprint of manufactured goods and materials across the life cycle of a product stream (including material streams).

Subsection 188(1) of the Act provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Act to be prescribed by the rules.

Part 5 of Chapter 3 of the RAWR Act deals with mandatory product stewardship requirements. Specifically, subsection 92(1) of the RAWR Act enables the rules to require one or more specified persons to take, or not to take, specified action in relation to a specified product.

The *Recycling and Waste Reduction (Mandatory Product Stewardship – Mercury-added Products) Rules 2021* (the Rules) are made for the purposes of subsection 92(1) of the RAWR Act.

Purpose

The purpose of the Rules is to implement Australia's obligations under Articles 4(1) and 4(5) of the *Minamata Convention on Mercury* (Minamata Convention), once that Convention comes into force for Australia.

Background

The Minamata Convention provides a range of obligations on Parties, including measures to control the supply and trade of mercury, prohibiting specific sources of mercury such as primary mining, and setting limitations and controls on specific mercury-added products and manufacturing processes in which mercury or mercury compounds are used.

In accordance with the usual division of responsibilities, it has been agreed with jurisdictions that the Commonwealth will be responsible for making the necessary legislative changes to implement the following articles of the Convention, should Australia decide to ratify:

- Article 3(6) (prohibit export of mercury);
- Article 3(8) (prohibit import of mercury);
- Article 4(1) (prohibit export, import and manufacture of certain mercury-added products);
- Article 4(5) (prohibit the incorporation into assembled products of certain mercury-added products).

The Commonwealth's position is that, where possible, existing subject matter specific legislation should be used to implement Australia's obligations under the above Articles.

The regulatory regime that would be relevant for a particular import, export or manufacture will depend on the intended purpose of the mercury or mercury-added products to be imported, exported or manufactured. Specifically, it is intended that:

- the import, export or manufacture of mercury-added products for industrial purposes, and the incorporation of mercury-added products into other products for purposes other than therapeutic purposes, will be regulated by rules made under the *Recycling and Waste Reduction Act 2020* (mandatory product stewardship provisions);
- the import or export of mercury for industrial purposes will be regulated by rules made under the *Industrial Chemicals Act 2019*;
- the import or export of mercury, the import, export and manufacture of mercury-added products, and the incorporation of mercury-added products into other products, for therapeutic purposes, would be regulated by the *Therapeutic Goods Regulations 1990*;
- the import or export of mercury, and the import, export and manufacture of mercury-added products, for agricultural or veterinary purposes will be regulated by the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995*;
- the import and export of mercury will also be regulated by the *Customs (Prohibited Export) Regulations 1958* (Prohibited Export Regulations) and the *Customs (Prohibited Import) Regulations 1956* (Prohibited Import Regulations) in order to ensure appropriate border controls are in place. However, no permissions would need to be granted under the Customs legislation; rather the Prohibited Export Regulations and the Prohibited Import Regulations would simply recognise the permissions granted under the relevant subject specific legislation.

Impact and Effect

The Rules prohibit the import into, export from, and manufacture in, Australia of the mercury-added products listed in Part 1 of Annex A of the Minamata Convention. This is intended to give effect to implement Australia's obligations under Article 4(1) of the Minamata Convention.

The prohibition is limited to the import, export and manufacture of the relevant mercury-added products for industrial purposes.

The Rules also prohibit the incorporation of the mercury-added products listed in Part 1 of Annex A into other products. This is intended to give effect to Australia's obligations under Article 4(5) of the Minamata Convention.

The prohibition is limited to the incorporation of the relevant mercury-added products into other products for industrial purposes and agricultural or veterinary purposes.

Both prohibitions are absolute; a person cannot apply for approval to import, export or manufacture in Australia the mercury-added products listed in Part 1 of Annex A of the Minamata Convention, or to incorporate the mercury-added products listed in Part 1 of Annex A into other products.

Pre-conditions to making the Rules

The Minister for the Environment is satisfied that the requirements in subsection 93(1) of the RAWR Act are met, and that the specified action relates to the objects of the RAWR Act (as required by subsection 92(2)).

As required by subsection 93(2), the special circumstances that justify the making of the Rules despite the relevant mercury-added products not having been included in a Minister's priority list at least 12 months beforehand are that the Rules are necessary in order to implement Australia's international obligations under the Minamata Convention.

Consultation

There is broad support for ratification across government, business and industry, and civil society. Industry has flagged the importance of ratification in ensuring certainty about mercury controls in Australia and for alignment with trading partners. Impacts to industry are expected to be low due to global movements away from mercury-containing products.

Since 2010, six consultation rounds have been facilitated by the Department in relation to the ratification of the Minamata Convention:

1. Regulatory Impact Statement (RIS) for Australia's signing of the Convention (2013): Targeted consultation with government agencies (federal, state and territory), industry stakeholders and non-government organisations.
2. Public consultation paper (2014): Seeking views from stakeholders and the wider public on potential domestic impacts of Australia's ratification of the Convention.
3. Cost-benefit analysis consultation (2015): Targeted consultation process seeking quantified estimates of the potential impacts of ratification on business and industry, the community and government.
4. Exposure draft RIS (2016-17): Exposure draft of the RIS and CBA released for public comment. Twenty-nine submissions were received.
5. Cost-benefit analysis consultation (2017): Further targeted consultation with key stakeholders following submissions to the exposure draft RIS.
6. Final RIS and cost-benefit analysis (2020): Given previous extensive and thorough consultation, the Office of Best Practice Regulation advised that the update to the RIS and CBA would require only targeted consultation.

Details and Operation

Details of the Rules are set out in Attachment A.

The Rules commence on the later of the day after the Rules are registered and the day the Minamata Convention on Mercury, done at Minamata on 10 October 2013 (Minamata Convention), comes into force for Australia. However, the Rules do not commence at all if the Minamata Convention does not come into force for Australia.

Other

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

Details of the Recycling and Waste Reduction (Mandatory Product Stewardship – Mercury-added Products) Rules 2021

PART 1 - Preliminary

Section 1 – Name

1. Section 1 provides that the name of the instrument is the *Recycling and Waste Reduction (Mandatory Product Stewardship – Mercury-added Products) Rules 2021* (the Rules).

Section 2 – Commencement

2. Section 2 provides that the Rules commence on the later of the day after the Rules are registered and the day the Minamata Convention on Mercury, done at Minamata on 10 October 2013 (Minamata Convention), comes into force for Australia. However, the Rules do not commence at all if the Minamata Convention does not come into force for Australia.
3. The table in subsection 2(1) also requires the Minister to announce, by notifiable instrument, the day the Convention comes into force for Australia.
4. The note below the table provides that the table relates only to the provisions of the Rules as originally made. It will not be amended to deal with any later amendments of the Rules. The purpose of this note is to clarify that the commencement of any subsequent amendments is not reflected in this table.
5. Subsection 2(2) clarifies that any information in column 3 of the table is not part of the Rules. Information may be inserted in this column, or edited in this column, in any published version of the Rules. It is intended that the commencement date will be inserted into column 3 once the Minamata Convention comes into force for Australia and the Rules commence.

Section 3 – Authority

6. Section 3 provides that the Rules are made under the *Recycling and Waste Reduction Act 2020* (the RAWR Act).

Section 4 – Definitions

7. Section 4 defines a number of key terms for the purposes of the Rules. These terms include *mercury-added products* and *Minamata Convention*.
8. The term *mercury-added products* is relevant to implementing Australia's obligations under Articles 4(1) and 4(5) of the Minamata Convention. Mercury-added products is defined to only include those products listed in Part 1 of Annex A to the Minamata Convention and that contain mercury. It does not include all products containing mercury or all products to which mercury is added. It also does not include the following products:

- products essential for civil protection and military uses;
 - products for research, calibration of instrumentation, or for use as reference standards;
 - if no feasible mercury-free alternative for replacement is available – switches and relays, cold cathode fluorescent lamps and external electrode fluorescent lamps for electronic displays, and measuring devices;
 - products used in traditional or religious practices;
 - vaccines containing thiomersal as preservatives.
9. This is because these products are excluded from the scope of the Minamata Convention. Similarly, Australia’s obligations under Articles 4(1) and 4(5) of the Minamata Convention do not extend to all products containing mercury, or all products to which mercury is added. The concept of mercury-added products only covers those products for which Australia has international obligations under the Minamata Convention.
10. The term *Minamata Convention* is defined as the Minamata Convention on Mercury done at Minamata on 10 October 2013, as in force for Australia from time to time.
11. The note included under the definition of Minamata Convention explains that the Convention is in the Australian Treaty Series and provides a link to the Australian Treaties Library.

PART 2 – Prohibition on manufacture, import and export of mercury-added products and incorporation of mercury-added products

Section 5 – Constitutional connection

12. Part 5 of Chapter 3 of the RAWR Act deals with mandatory product stewardship requirements. Specifically, subsection 92(1) of the RAWR Act enables the rules to require one or more specified persons to take, or not to take, specified action in relation to a specified product. Subsection 92(3) clarifies that the power in subsection 92(1) relevantly allows rules that prohibit (either absolutely or subject to conditions), limit, restrict or otherwise affect the manufacture, import, export, distribution or use of the product (paragraph 92(3)(a)), or prohibit (either absolutely or subject to conditions), limit or restrict substances from being contained in the product. The specified action must relate to the objects of the RAWR Act (subsection 92(2)).
13. Section 94 of the RAWR Act is intended to ensure that rules made for the purpose of Part 5 are sufficiently supported by a constitutional head of legislative power. Subsection 94(1) requires that rules made for the purposes of Part 5 must either be expressed to apply in relation to acts and omissions of constitutional corporations (paragraph 94(1)(a)), in the course of constitutional trade and commerce (paragraph 94(1)(b)), or be appropriate and adapted to give effect to Australia’s obligations under an agreement with one or more other countries (paragraph 94(1)(c)). Subsection 94(2) requires the rules to specify whether they are made in accordance with paragraph 94(1)(a), (b) or (c) and, if they are made in accordance with paragraph 94(1)(c), identify the relevant international agreement.

14. Section 5 of the Rules provides that the Rules are made for the purposes of Part 5 of Chapter 3 of the RAWR Act and are made in accordance with paragraph 94(1)(c) of that Act. Section 5 of the Rules also identifies the Minamata Convention as the international agreement referred to in paragraph 94(1)(c) of the Act.
15. This section confirms that the Rules are made in reliance of the treaty-implementation aspect of the external affairs power in section 51(xxix) of the Constitution. This reflects the purpose of the Rules, which is to implement Australia's obligations under Articles 4(1) and 4(5) of the Minamata Convention, once that Convention comes into force for Australia.

Section 6 – Absolute prohibition on manufacture, import and export of mercury-added products

16. Subsection 6(1) is made for the purpose of subsection 92(1) of the RAWR Act and prohibits a person from manufacturing a mercury-added product in Australia, importing a mercury-added product into Australia, or exporting a mercury-added product from Australia. The term *mercury-added product* is defined in section 4 of the Rules.
17. The purpose of the prohibition in subsection 6(1) is to implement Australia's obligations under Article 4(1) of the Minamata Convention, which require Parties to not allow, by taking appropriate measures, the manufacture, import or export of the mercury-added products listed in Part I of Annex A.
18. The prohibition in subsection 6(1) is an absolute prohibition; a person is not able to apply for approval to import, export or manufacture in Australia a mercury-added product. This is consistent with Australia's obligations under Article 4(1).
19. Subsection 6(2) has the effect that mercury-added products that are therapeutic goods (within the meaning of the *Therapeutic Goods Act 1989* (TG Act)) or that are chemical products (within the meaning of the *Agricultural and Veterinary Chemicals (Administration) Act 1994* (AVCA Act)) are not subject to the prohibition in subsection 6(1).
20. Instead, it is intended that an equivalent prohibition on the import, export and manufacture in Australia of mercury-added products will be imposed in the *Therapeutic Goods Regulations 1990* (for mercury-added products that are therapeutic goods within the meaning of the TG Act), and in the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995* (for mercury-added products that are chemical product within the meaning of the AVCA Act). This is consistent with the Commonwealth's policy that, where possible, existing subject matter specific legislation should be used to implement Australia's obligations under the Minamata Convention.
21. Subsection 6(3) excludes from the prohibition in subsection 6(1) mercury-added products that are covered by an exemption that Australia has under Article 6 of the Convention. In order for the exclusion to apply, the exemption must be both registered for Australia and be in effect. The exclusion will only apply to the extent of the exemption.

Section 7 – Absolute prohibition on incorporation of mercury-added products into assembled products

22. Subsection 7(1) is made for the purpose of subsection 92(1) of the RAWR Act and prohibits a person from incorporating a mercury-added product into an assembled product. The term *assembled product* is defined in section 4 to have the same meaning as in the Convention. The term *mercury-added products* is also defined in section 4.
23. The purpose of subsection 7(1) is to implement Australia's obligations under Article 4(5) of the Minamata Convention, which requires Parties to take measures to prevent the incorporation into assembled products of the mercury-added products covered by Article 4(1) of the Convention.
24. The prohibition in subsection 7(1) is an absolute prohibition; a person is not able to apply for approval to incorporate a mercury-added product into an assembled product. This is consistent with Australia's obligations under Article 4(5).
25. For assembled products that are therapeutic goods (within the meaning of the TG Act), the prohibition in subsection 7(1) would not apply (see subsection 7(2)). Instead it is anticipated that an equivalent prohibition on the manufacture in Australia of therapeutic goods that contain mercury-added products will be imposed in the *Therapeutic Goods Regulations 1990*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)

Recycling and Waste Reduction (Product Stewardship—Mercury-Added Products) Rules 2021

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)*.

Overview of the instrument

The *Recycling and Waste Reduction (Product Stewardship—Mercury-Added Products) Rules 2021* (the Rules) are made under the *Recycling and Waste Reduction Act 2020* (the RAWR Act). The Rules give effect to Australia's obligations under Articles 4(1) and 4(5) of the Minamata Convention on Mercury (Minamata Convention) by establishing prohibitions on:

- the import into Australia, export from Australia and manufacture in Australia of mercury-added products covered by Part 1 of Annex A of the Minamata Convention; and
- the incorporation of the same mercury-added products into other assembled products.

Both prohibitions are absolute; a person cannot apply for approval to import, export or manufacture in Australia the mercury-added products listed in Part 1 of Annex A of the Minamata Convention, or to incorporate the mercury-added products listed in Part 1 of Annex A into other products.

Chapter 3 of the RAWR Act deals with product stewardship. It establishes a framework providing the basis for those who design, import, manufacture and distribute products to take greater responsibility for their impacts on the environment. Product stewardship involves the shared responsibility for reducing the environmental, health and safety footprint of manufactured goods and materials across the life cycle of a product stream (including material streams).

Subsection 188(1) of the Act provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the Act to be prescribed by the rules.

Part 5 of Chapter 3 of the RAWR Act deals with mandatory product stewardship requirements. Specifically, subsection 92(1) of the RAWR Act enables the rules to require one or more specified persons to take, or not to take, specified action in relation to a specified product.

The Rules are made under subsection 92(1) of the RAWR Act.

Background

The Minamata Convention on Mercury aims to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. Australia signed the Minamata Convention on 10 October 2013. The Convention entered into force globally on 16 August 2017.

The Minamata Convention provides a range of obligations on Parties, including measures to control the supply and trade of mercury, prohibiting specific sources of mercury such as primary mining, and setting limitations and controls on specific mercury-added products and manufacturing processes in which mercury or mercury compounds are used.

In accordance with the usual division of responsibilities, the Commonwealth is responsible for implementing the following articles of the Convention:

- Article 3(6) (prohibit the export of mercury);
- Article 3(8) (prohibit the import of mercury);
- Article 4(1) (prohibit the export, import and manufacture of certain mercury-added products);
- Article 4(5) (prohibit the incorporation into assembled products of certain mercury-added products).

The Commonwealth's position is that where possible, existing subject matter specific legislation is being amended to implement Australia's obligations under the above Articles. The regulatory regime that would be relevant for a particular import, export or manufacture will depend on the intended purpose of the mercury or mercury-added products to be imported, exported or manufactured.

Relevantly, it is intended that the import, export or manufacture of mercury-added products for industrial purposes, and the incorporation of mercury-added products into other products for purposes other than therapeutic purposes, will be regulated by rules made under the RAWR Act (mandatory product stewardship provisions). The Rules give effect to this policy.

The Rules are intended to prohibit the manufacture, import or export of mercury-added products covered by the Convention, and the incorporation of the same mercury-added products into other assembled products, consistently with Australia's obligations under Articles 4(1) and 4(5) of the Convention.

It is also intended that separate amendments will be made to the *Industrial Chemicals (General) Rules 2019*, the *Agricultural and Veterinary Chemicals (Administration) Regulations 1995*, *Customs (Prohibited Export) Regulations 1958*, *Customs (Prohibited Import) Regulations 1956*, and the *Therapeutic Goods Regulations 1990* to fully implement Australia's obligations under Articles 4(1) and 4(5) the Convention.

Human rights implications

This legislative instrument engages the right to health under Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR). Article 12(1) of the ICESCR makes provision in relation to the right to health, specifically the right to the enjoyment of the highest attainable standard of physical and mental health. Article 12(2)(b)

includes the improvement of all aspects of environmental hygiene as a step to be taken to achieve the full realisation of the right to health. In its *General Comment No 14 (August 2000)*, the United Nations Committee on Economic Social and Cultural Rights states that this encompasses the prevention and reduction of the population's exposure to harmful substances such as harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health (at [15]).

Mercury is a toxic pollutant that is released into the environment mainly through human activities. It accumulates in the environment and in food chains, and circulates globally through the oceans and the atmosphere, causing significant harm to human health and the environment, sometimes at great distances from its point of origin. The World Health Organization lists mercury as one of the top 10 chemicals of major public health concern.

Exposure can harm the immune system, brain, heart, kidneys, and lungs of people of all ages. Victims may suffer memory loss or language impairment. Damage to the brain cannot be reversed. The effects can be seen even at very low levels. Foetuses, newborn babies and children are among the most vulnerable and sensitive to the adverse effects of mercury

The largest source of mercury pollution globally is artisanal and small-scale gold mining, followed by coal combustion, non-ferrous metal production and cement production. Mercury is also used in a range of commercial products such as batteries, fluorescent lamps, cosmetics, thermometers and dental amalgam.

Part 2 of the Rules operate to prohibit the manufacture, import and export of the mercury-added products covered by Part 1 of Annex A of the Minamata Convention, and the incorporation of the same mercury-added products into other assembled products, consistent with Australia's obligations under the Minamata Convention. This prohibition promotes the right to health by aiming to protect human health and the environment from harmful anthropogenic emissions and releases of mercury and mercury compounds. The prohibitions are considered necessary to ensure that Australia's obligations under the Minamata Convention are fully implemented.

For these reasons, the Rules are consistent with the right to health in Article 12(1) of the ICESCR.

The Rules do not engage any other human rights.

Conclusion

This legislative instrument is compatible with human rights because it promotes the right to health under Article 12(1) of the ICESCR.

The Hon Sussan Ley MP
Minister for the Environment