

Environment Protection Authority

Guideline on making exemptions under the Plastic Reduction and Circular Economy Act 2021



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The *Plastic Reduction and Circular Economy Act 2021* (PRCE Act) provides the EPA with a broad power to grant exemptions from any provisions of the Act or its regulations.

This document sets out the guiding principles the EPA may consider when using its exemptions power.

In general, the circumstances in which the EPA will consider it necessary or appropriate to grant an exemption will be limited. This is because the PRCE Act creates a framework of requirements to achieve positive environmental and human health outcomes, in support of a circular economy.

Key points summary

- The EPA can issue exemptions from the PRCE Act.
- Exemptions may be granted on the EPA's own initiative or in response to an application.
- A person may apply to the EPA for an exemption under section 61 of the PRCE Act
- An application must be in the form approved by the EPA, and the EPA may charge a fee.

Any enquiries about exemptions after reading this guideline can be addressed to:
plastics@epa.nsw.gov.au

1. Introduction

1.1. Legislative context

The *Plastic Reduction and Circular Economy Act 2021* (PRCE Act) passed parliament on 16 November 2021. It is a key outcome of the NSW Plastics Action Plan 2021, which sets out a series of actions to reduce plastic waste generation, make the most of plastic resources, reduce plastic leakage and improve our understanding of the future of plastics.

The PRCE Act creates the legislative frameworks to:

- prohibit the supply of problematic or unnecessary plastic items by all persons carrying on a business in NSW;
- set design standards for items for environmental, human health or economic reasons; and
- set product stewardship requirements for brand owners of regulated products, requiring brand owners to meet regulated targets and reporting requirements.

As the sole regulatory authority under the PRCE Act, the EPA has responsibilities, powers and remedies to manage compliance and enforcement of the above requirements.

The EPA also has the power to grant exemptions. Section 61 of the PRCE Act provides the EPA with a broad power to grant exemptions from any provisions of the Act or its regulations. Exemptions may be granted for a person (e.g. an individual or corporation) by reference to a particular product, item, premises or another matter or thing. The EPA may vary or revoke, or impose conditions on, an exemption granted under the PRCE Act.

The EPA may also proactively issue an exemption or seek and review exemption applications from stakeholders.

1.2. Purpose of this guideline

The PRCE Act does not set out the criteria, time frames or procedures that the EPA considers or follows in exercising its exemptions-related functions in section 61 (i.e. in considering whether to exercise a discretion to grant, refuse, vary, revoke or impose conditions upon an exemption). The PRCE Act further empowers the EPA to approve a form, charge a fee and determine what evidence is required for an exemption application.

The purpose of this guideline is therefore to set out guiding principles the EPA may consider when using its exemptions power under section 61 of the PRCE Act. These are not intended to be mandatory considerations.

Given that each exemption consideration has its own set of facts and circumstances, this guideline should not be viewed as a formula to be applied rigidly. Rather, the guiding principles can be used to assist the EPA in deciding, on a case-by-case basis, whether it will exercise its discretion to grant, refuse, vary, revoke or impose conditions upon, an exemption. While the EPA will endeavour to carry out the consultation mentioned in this Guideline, that may not always be relevant or practicable.

This is a living document. It will be updated as the EPA gains and learns from practical implementation experience. It will also be updated as regulations are made to impose new requirements that individuals or businesses may seek to be exempted from (e.g. product stewardship requirements or additional design standards).

1.3. Scope

This document outlines:

- guiding principles that the EPA may consider when using its exemptions power

- key factors that the EPA may consider when deciding whether to exercise its discretion to grant, refuse, vary, revoke or impose conditions upon an exemption
- the types of exemptions that the EPA may consider
- phases of the exemptions process
- key principles that the EPA may consider at each phase of the exemptions process
- steps for the granting of exemptions
- further information or advice regarding the EPA's exemptions power.

This guideline does not provide detailed instructions on how to implement its guiding principles, or balance key factors. This information will be available for EPA staff in the form of procedures, protocols and business rules, and linked to throughout this guideline.

This guideline is intended to be used by regulatory officers at the EPA who work on exemption-related matters, and to assist stakeholders that are thinking of seeking an exemption.

1.4. Types of exemptions

The exemptions the EPA is likely to consider fall into the following broad categories:

- exemption to allow the supply of a prohibited plastic item or item that does not comply with a design standard
 - exemption regarding premises
 - exemption regarding product/item
 - exemption regarding purpose
 - exemption regarding another matter or thing
- exemption from a design standard requirement
- exemption from a product stewardship requirement
 - exemption from requirement to meet product stewardship target
 - exemption from requirement to prepare an action plan
 - exemption from record keeping or reporting requirement.

Note: There are currently no product stewardship requirements. Future product stewardship requirements will be set out in regulations. No regulation has yet been made.

1.5. Current exemptions

The EPA's website shows [current exemptions in force](#) that have been granted by the EPA under the PRCE Act.¹

¹ <https://www.epa.nsw.gov.au/licensing-and-regulation/public-registers/current-plastics-exemptions>

2. Guiding principles for exemptions

The EPA may consider the following guiding principles when deciding whether to exercise its discretion to use its exemptions power.

1. The PRCE Act creates a framework of requirements to achieve positive environmental and human health outcomes. As such, the circumstances in which it will be necessary or appropriate to grant an exemption **will be limited**.
2. The EPA will **generally prefer to grant time-limited exemptions**, to encourage innovation and the transition to a sustainable alternative.
3. Where there is a broader policy need, the EPA will **generally prefer to grant general exemptions** rather than (multiple) person-specific exemptions covering the same/primarily the same items and/or settings/premises.
4. The EPA will generally **prefer to grant exemptions for classes of products/items/premises** rather than specific products/items/premises.
5. The EPA will balance the different factors (see section 2.1) against each other to make an overall assessment of whether granting, refusing, varying, revoking or imposing conditions upon an exemption is warranted in light of the objective in section 6 of the **POEA Act** for the EPA to:
 - reduce risks to human health and prevent harm to the environment, and
 - protect, restore and enhance the quality of the environment, having regard to ecologically sustainable development. Ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes.
6. The EPA will consider whether the **exemption fits within the objects of the PRCE Act** (section 3 of the Act) and, more broadly, **the key outcomes of the NSW Plastics Action Plan 2021** and that the exemption will support the regulated community to meet the outcomes of the **WaSM**.
7. The EPA will **apply its regulatory discretion consistently**, based on the circumstances of the issue at hand. Flowing from this, the EPA will **treat stakeholders facing similar issues in an equitable fashion**.
8. The EPA will **consider the precautionary principle** as set out in section 5 of the PRCE Act; that is, if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation e.g. declining to grant an exemption.
9. The EPA will listen and actively engage with applicants before, throughout and after the application process.

Table 1 Terms, acronyms and definitions

Term	Meaning
POEA Act	<i>Protection of the Environment Administration Act 1991</i>
POEO Act	<i>Protection of the Environment Operations Act 1997</i>
PRCE Act	<i>Plastic Reduction and Circular Economy Act 2021</i>
WaSM	Waste and Sustainable Materials Strategy 2041

2.1. Factors to consider when deciding whether to exercise discretion to grant, refuse, vary or revoke, or impose conditions upon an exemption

Factors that the EPA may consider when deciding whether to exercise its discretion to grant, refuse, vary or revoke an exemption may include, but **are not limited** to, the factors in Table 2.

Table 2 Factors the EPA may consider

Factor	Examples of considerations
Negative impacts to human health	<ul style="list-style-type: none"> Physical, chemical or biological impacts
Harmful impacts to the environment	<ul style="list-style-type: none"> Whether an exemption would lead to increased waste or litter New or emerging scientific evidence or information revealing harmful impacts of the product in continued supply or circulation Whether alternatives would have a harmful impact on the environment, and how this impact compares to the existing item
Negative social impacts	<ul style="list-style-type: none"> Whether an exemption is required to support people living with a disability or medical need Whether harm and/or significant disruption would be occasioned to consumers, particularly vulnerable communities and other disadvantaged stakeholders Whether an exemption is required to provide or improve health, safety and security for a particular cohort
Negative economic impacts	<ul style="list-style-type: none"> Inefficient use/consumption of resources Supply chain issues
Negative impact on innovation	<ul style="list-style-type: none"> Whether an exemption disincentivises the transition to better plastic products and/or sustainable innovation more broadly Whether an exemption is consistent with what is considered best practice by industry
Availability and viability of suitable alternatives	<ul style="list-style-type: none"> Whether there is a practical or viable alternative Whether availability of an alternative is limited/problematic, such that access will become an issue
Does not support principles of a circular economy	<ul style="list-style-type: none"> Whether an exemption would disincentivise the use or re-use of other materials that will minimise the environmental or resource impact of a product's creation
Significant inconsistency with plastics requirements/exemptions in other Australian jurisdictions, without compelling policy reason	<ul style="list-style-type: none"> No other jurisdiction has proposed or is proposing such an exemption Another jurisdiction considered but rejected such an exemption (review of rationale required) The item is being actively phased out by other governments and/or voluntarily by industry
Inconsistency with other legal requirements	<ul style="list-style-type: none"> Where a design standard under the PRCE Act conflicts with another standard that applies to the same product/item

3. Phases of the exemptions process

There are two workstreams for the EPA:

1. work related to where the EPA is considering exercising its discretion to proactively grant an exemption; and
2. work related to where the EPA is considering exercising its discretion to grant an exemption in response to an application.

The EPA has broken down each workstream into phases, as set out in the following table. As can be seen, the EPA considers that there will be a significant amount of overlap in the mid-to-latter phases.

Table 3 Phases of the exemption process

Phases where EPA exercises discretion to proactively grant an exemption	Phases where a person applies to EPA for an exemption
Considering whether to grant an exemption on the EPA's own initiative (including research, assessment and, where relevant and practicable, consultation)	Pre-application
	Application (including assessment, consultation (where relevant and practicable), communication)
Drafting, conditions or refusal	
Approvals, gazettal, communications and publication	
Monitoring, compliance, audit	
Variation, revocation	

The following sections outline the key principles that the EPA may consider at each phase. Further guidance on how to implement these principles, including procedures, protocols and business rules, will be available for EPA staff and linked to throughout the following sections.

3.1. Considering whether to grant an exemption on the EPA's own initiative

In addition to the guiding principles outlined in section 2 of this guide, the EPA may:

- listen, identify and respond to risks and opportunities when considering whether to exercise its discretion to grant exemptions, with a focus on targeted consultation strategies² where relevant and practicable
- partner with local communities, industries and businesses, as well as other regulators and government organisations, to enhance understanding and gather relevant evidence
- have regard to any trends or insights that may emerge from complaints, enquiries and applications received, and relevant data from other teams in the EPA
- focus on the impact of the proposed exemption on industry, community, environment, the EPA and the NSW Government more broadly.

² For consultations, these resources may be useful: NSW Department of Planning and Environment's *Community Participation Plan* and the *IAP2 Public Participation Spectrum*.

3.2. Pre-application

The PRCE Act allows any business or individual to apply to the EPA for an exemption from any provision of the Act or its regulations. The EPA foresees there will be cases where an application is not needed or not appropriate, and this could be identified early in the process.

To streamline the application process for both the EPA and potential applicants, the EPA will:

- prioritise checks that the applicant is eligible to apply for an exemption – for example, by considering whether
 - the product/item is a prohibited item
 - the applicant is a legal entity
 - the applicant is ‘carrying on a business’ (e.g. no exemption needed for domestic use)
 - supply of the prohibited item is to or within NSW, or there is an extraterritorial impact
 - a general exemption that covers the situation exists, or is being developed
 - the applicant has considered the impacts to human health and environment, social, economic and legal matters etc. and is not just applying because ‘why not’ or to avoid inconvenience or increased business costs
 - the applicant has turned their mind to plastic-free alternatives
- be collaborative and responsive
- be candid and practical in our advice as to whether the submission of an application is worthwhile to the applicant (i.e. where we may be considering a general exemption for the same class of products).

3.3. Application

In line with the guiding principles set out in section 2 of this guide, the EPA envisages that the circumstances in which it will be necessary or appropriate to grant an exemption **will be limited**. Further, the EPA will balance the different factors under section 2.1 of this guide against each other to make an overall assessment of whether granting an exemption is warranted. The EPA may refuse or reject an application for an exemption.

The EPA will support industry’s, individuals’ and its staff’s understanding of the ability to apply for exemptions under the PRCE Act by:

- ensuring the process for applying for an exemption is straightforward and accessible, with any application form itself supported by clear and helpful guidance
- ensuring any fees charged for the application are reasonable and proportionate, with opportunities for fee waiver and reduction where appropriate
- providing the regulated community with clear information and explanations about the EPA’s role regarding exemptions and the EPA’s expectations and decision-making principles
- ensuring staff have a clear understanding of the key factors/criteria that guide the EPA’s decision-making framework for exercising a discretion to grant and refuse applications for exemptions (e.g. that the EPA is consistent in its decision-making, and that the EPA seeks to balance and meet the objectives of the PRCE Act and EPA functions more generally).

3.4. Drafting and conditions

The EPA may impose conditions upon an exemption. If the EPA decides it is appropriate to exercise its discretion to grant or vary an exemption, it will **be important to ensure the policy intent is realised through clear conditions on the exemption**.

When preparing drafting instructions and drafting exemptions the EPA will generally:

- **ensure any exemptions are as targeted and time-limited as possible** to achieve the intended outcome, while encouraging innovation
- **consider the broader context**, to ensure any exemptions address all relevant aspects of the supply chain and life cycle of a product/item as needed to achieve the intended outcome
- **consider avoiding placing undue burden** upon the EPA or third parties, such as beneficiaries of the product/ item
- **ensure the obligations are proportionate and practical**, to ensure persons can comply with their obligations
- aim to **minimise prescription**; however, there may be instances in which it may be appropriate to adopt a more prescriptive approach e.g. to set out a particular operational process to be followed
- **ensure general consistency**, to the extent appropriate (noting differences with legislation and definitions etc.), with similar or equivalent exemptions in other Australian states and territories
- **remain as closely engaged** with the applicant/key affected stakeholders as possible/is suitable throughout the drafting process to ensure the end result is fit for purpose, proportionate and practical.

3.5. Approvals, gazettal, communications and publication

The EPA must take the following actions for an exemption to take effect under section 61 of the PRCE Act:

- for exemptions granted to specific persons only, provide written notice to the relevant persons or publish the exemption by notice in the Government Gazette
- for all other exemptions (e.g. general exemptions), publish the exemption by notice in the Government Gazette.

The EPA must also publish the details of the exemption granted in a public register. The EPA's preferences for publication of details in its public register are as follows:

- for exemptions granted to specific persons only, to ensure transparency the EPA will prefer to publish the exemption in full (after redacting any personal information), unless there are concerns with confidentiality
- for all other exemptions (e.g. general exemptions), the EPA will publish the exemption in full.

In discharging its legal obligations above, the EPA will:

- ensure exemptions and information about the exemptions is accessible to the public
- balance the need for transparency with the EPA's privacy and confidentiality obligations.

3.6. Monitoring, compliance and audit

Any exemptions will have a significant impact on rights and obligations under the PRCE Act and may have negative environmental impacts. It is important to ensure affected stakeholders understand their rights and obligations, and that exemptions do not continue to be in force where the EPA considers they are no longer needed.

Considering the above, the EPA aims to:

- support the regulated community to comply with its obligations
- where possible and practical, impose record keeping and reporting obligations on those subject to the exemption

- where possible and practical, require advice of material changes in circumstances of relevance to the exemption within a reasonable timeframe/as soon as practicable after the change (e.g. changes to the use of an exempt product)
- periodically review exemptions granted to consider whether revocation or variation is appropriate.

3.7. Variation and revocation

The EPA may vary or revoke an exemption that it has granted under the PRCE Act. The EPA considers that the process for revocation or variation may be initiated by an application or done on the EPA's own initiative (where relevant and practicable, this may be following consultation with affected parties).

The EPA has a broad power to vary or revoke an exemption. For example, under this power the EPA may:

- revoke person-specific exemptions where these have been subsumed by a general exemption
- revoke/vary an exemption where the exemption was granted for the supply of items for certain purposes, in certain settings and/or at certain premises, but the purpose/setting/ premises has changed
- revoke/vary an exemption where a sustainable alternative has become available or there are advances in scientific research or emerging evidence demonstrating viable alternatives
- revoke/vary an exemption if it becomes apparent that the continued supply of the prohibited plastic item via an exemption is causing environmental or human health harm
- consider whether revocation, variation or other action is needed where a person is incorrectly relying on an exemption to supply other prohibited items
- consider whether revocation or variation is necessary upon being notified of a material change in circumstances of relevance to the exemption
- consult and remain engaged with the applicant/key affected stakeholders throughout the variation or revocation process to the degree practicable and suitable (noting this might not occur in all instances)
- consider whether revocation, variation or other action is appropriate upon uncovering any false or misleading information provided in the process of granting an exemption.

4. Process for granting exemptions

4.1. Process for the proactive granting of exemptions

- Identify potential policy need for an exemption.
 - This could, for example, come to the EPA's attention via research, enquiries, applications, monitoring news and/or monitoring what other jurisdictions are doing.
- Conduct research and, where relevant and practicable, targeted consultation within the EPA and relevant external stakeholders (including relevant government departments/agencies) to confirm whether there is a compelling policy need and work out appropriate scope, conditions, timing etc.
- Internal drafting of exemption and accompanying guidance to assist businesses and individuals to comply with the exemption, seeking of relevant approvals.
- Publish exemption in the Government Gazette and on the EPA's public register.
- Publish guidance on the EPA's website.

4.2. Process for exemptions granted in response to an application

Those interested in applying for an exemption should first complete the enquiry form available on the [EPA's website](#).

Following completion of this form, and any correspondence or discussions with the EPA, those who wish to apply for an exemption will be provided with an application form (which may be accompanied by a fee).

- The EPA will consider whether it is appropriate to exercise its discretion to grant an exemption in response to an application, including by:
 - conducting research and, where practicable and relevant, targeted consultation with EPA Legal and relevant external stakeholders, and
 - seeking further information and evidence from the applicant (noting that the PRCE Act requires an application to be accompanied by information, documents or evidence the EPA requires for the purpose of determining whether the exemption should be granted) to confirm whether there is a compelling policy need and work out appropriate scope, conditions, timing etc.
- If the application is proposed to be refused:
 - notify the applicant that we are considering refusing the application and invite representations from the applicant before making a decision
- Internal drafting of exemption, seeking of relevant approvals.
- Notify applicant of the exemption in writing and/or publish exemption by notice in the Government Gazette.
- Publish details of exemption granted on EPA's public register.

5. References

This guideline has been developed by reference to:

- objects under s 3 of the PRCE Act
- what the Minister must consider under s 7 of the PRCE Act when forming an opinion that a plastic item is unnecessary or problematic for environmental, human health or economic reasons
- the EPA's objectives under s 6 of the POEA Act
- decision-making processes set out in the EPA's *Regulatory Policy*
- the EPA's *Regulatory Strategy*
- PRCE Bill second-reading speech
- summary of guiding principles for problem plastics from the Better Regulation Statement for reducing the impacts of problematic plastics (p 48)
- *New South Wales Plastics Action Plan (2021)* and WaSM outcomes/targets
- plastics exemption policies and documents from other Australian jurisdictions.

6. Further information or advice

- [Plastics Implementation team](#) (email address) – for further information or advice³
- [Further information about the PRCE Act](#)⁴
- [Current exemptions in force](#) that have been granted by the EPA under the PRCE Act⁵
- [General information about plastics](#)⁶

If you are considering applying for an exemption to allow the continued supply of a banned plastic item, the EPA recommends that you consider the following questions before contacting us.

- Whether the item is a banned plastic item. [Read more about the banned plastic items](#).⁷
- Whether you are supplying the banned plastic item while carrying on a business (including not-for-profit businesses and activities carried out for commercial, charitable, sporting, educational or community purposes). If you are not supplying the banned plastic item while carrying on a business, the ban does not apply to you.
- Whether you are supplying the banned plastic item to or within NSW. If you are not, the ban does not apply to you; however, there may be equivalent bans in other states and territories.
- The availability of plastic-free alternatives, and why any such alternatives are not suitable.
- The impacts on the environment and human health that may occur if the banned plastic item continues to be supplied.

³ plastics@epa.nsw.gov.au

⁴ <https://www.epa.nsw.gov.au/licensing-and-regulation/legislation-and-compliance/acts-administered-by-the-epa/act-summaries#plasticreduction>

⁵ <https://www.epa.nsw.gov.au/licensing-and-regulation/public-registers/current-plastics-exemptions>

⁶ <https://www.epa.nsw.gov.au/your-environment/plastics>

⁷ <https://www.epa.nsw.gov.au/your-environment/plastics>