

Response ID ANON-VAVM-U5ZZ-R

Submitted to **Review of the Waste Avoidance and Resource Recovery Act 2007**

Submitted on **2020-11-25 09:55:55**

Introduction

1 What is your name?

Name:

Tim Cusack

2 What is your email address?

Email:

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3 Do you want to remain anonymous?

No

4 Do your view officially represent those of an organisation?

Yes, I am authorised to submit feedback on behalf of an organisation

5 Which of the following best describes the group or person you represent?

Company

Waste policy development

6 Please provide feedback on the roles and functions of the Waste Authority and the CEO and department under the WARR Act? What are the potential areas for improvement? What benefits or impacts may result from clarifying the department's role and responsibilities?

waste policy development question:

Administering the WARR Account

7 Are there any potential issues arising from the proposed reforms to improve the administration of the WARR Account?

Administering the WARR Account:

Provision of services to the Waste Authority

8 Please provide feedback on the proposal to allow the Waste Authority to directly employ its own staff, or to enable the Minister for Environment or some other person to employ or appoint persons to work directly for the Waste Authority. Will this support the work of the Waste Authority and the department?

Provision of services to the Waste Authority:

Waste services

9 What are your views about the proposal to enhance the capacity of the WARR Act to improve waste services? Do you see any potential issues?

Waste services:

Waste legislative issues

10 Are there any potential issues that may result from these proposals to improve operational and administration aspects of the CDS?

Waste legislative issues 1:

Western Australian Return Recycle Renew Submission to the Review of the Waste Avoidance and Resource Recovery Act 2007.

Introduction

Western Australia Return Recycle Renew Ltd (WARRRL) welcomes the Government of Western Australia's review of the Waste Avoidance and Resource Recovery Act 2007 ("the Act").

This Act, inter alia, enables the container deposit scheme (CDS) in WA and establishes the office of the Scheme Coordinator.

WARRRL, as the appointed Scheme Coordinator is honoured to have the opportunity to make a difference in WA through its strong network of refund point operators supported by processors and logistics providers. Our vision is for a Western Australia that recycles, is free from beverage containers litter and empowers community participation in the circular economy.

Since commencement of the Scheme on 1 October 2020, the focus of our first year of operation is to work through challenges and generate critical insights to ensure we are meeting the objectives of our vision. We hope that this review will facilitate achievement of our goals.

WARRRL has a strong interest in that part of the review which proposes changes to the way material recovery facilities (MRFs) are required to dispose of collected containers (S 47M) and the constraints imposed upon the Board of WARRRL to have nine Directors "at all times". WARRRL's submission to the review addresses only these two areas of proposed reform.

MRFs obligation to dispose of containers (Section 47M)

WARRRL acknowledges that the WA CDS legal framework differs from those of other Australian jurisdictions which only prohibit MRF operator disposal in a prohibited manner (or equivalent) if the MRF operator has claimed or received a recovery amount in respect of the container.

The State Government has made the best endeavours to align the broad objectives of the Western Australian legislation with those of other states, WARRRL considers the proposal contained in the discussion paper to be reasonable and consistent with established practice in other jurisdictions. On that basis, the proposal could be supported.

Board Composition (Section 47V)

The discussion paper provides the following information:

"Section 47V currently provides that the company appointed to the role of coordinator must have a constitution which requires a specific composition of board members at all times. The rationale for inclusion of the provision is to ensure a balanced board, where the board's Chair is independent of industry associations; the interests of the beverage industry, waste industry and the community are fairly represented; and a minimum of two board members have legal or financial expertise".

However, the discussion paper suggests that section 47V does not contemplate a circumstance where there has been an unexpected resignation of a board member. As currently drafted, if a board member unexpectedly resigns or is unable to continue in the role, the paper suggests that the coordinator will immediately cease to be an eligible company under the WARR Act. The company will be required to report on this in its published annual report and could be exposed to revocation of its appointment as coordinator, the appointment of an administrator, or amendment of conditions of appointment pursuant to section 47ZQ(2) of the Act.

It is therefore proposed in the discussion paper that section 47V be amended to provide a short timeframe of 40 business days to allow the coordinator to deal with unexpected resignations of board members.

This is clearly a significant issue for WARRRL, the timely and efficient management of Board membership and the Company's governance framework. The Chair and CEO made representations to the Minister in 2019 about the constraints the Board was under because of the wording of the legislation. So, it is pleasing that there is an opportunity to improve the wording of the Act. The Board of WARRRL is acutely aware of its constitutional and legislative obligations and has at all times adhered to these obligations.

In preparing this submission, WARRRL sought legal advice on the complexities of this issue. This advice suggests that no similar legislation has been identified which imposes the constraint of "at all times" as is the case for WARRRL. Furthermore, there is no legislation that imposes a period of 40 business days to fill a Board vacancy. There are however numerous acts which provide a grace time of 60 business days to fill a board vacancy.

WARRRL would also suggest respectfully that it is open to debate and perhaps even to say that it is not correct to opine that "WARRRL would immediately cease to be an eligible company in the event of an unexpected vacancy..." (Review of the Waste Avoidance and Resource Recovery Act 2007 Discussion Paper, p22). WARRRL's legal advice opines that as WARRRL's constitution would still be compliant with the requirements of section 47V of the Act in relation to Board composition, the Company would still be an "eligible company". What might be the case is that WARRRL may be non-compliant with its constitution until the vacancy was filled.

To address the very real and practical problem that this wording imposes on the Board, WARRRL recommends that a saving provision as is found in other relevant legislation be included in the WARR Act. This would address the 'eligible company' status of the coordinator if it became non-compliant with its own constitution due to a casual board vacancy. A form of words such as the following could be considered:

"No act, proceeding or determination of the coordinator shall be invalid on the ground only that the coordinator was not, at the time of the act, proceeding or determination, an eligible company by reason of a vacancy in the office of any director or of any defect in the appointment of any director contrary to the requirements of the constitution of the coordinator".

This could be strengthened by a consequential amendment to Regulation 27 of the Act to expressly provide that grounds for termination of the coordinator's appointment or appointment of an administrator includes noncompliance by the coordinator with its own constitution.

If the Government sees fit to impose a time frame, WARRRL strongly recommends that the time frame ought to be longer than 40 days, and consistent with numerous acts which provide 60 days grace time. To demonstrate the time it can take to find suitable candidates for the various positions on the Board, it recently took the Board of WARRRL 55 days to fill a casual director vacancy. Identifying a suitable candidate who met the requirements of the Act, discussing the role, establishing a two-stage interview process and ratification by the Board all took time to ensure due diligence. It also required the resignation of one Director and the appointment of another director to happen concurrently. We may not always be so fortunate to ensure that the succession/transition could be executed so seamlessly.

It should be stated that finding suitable candidates for positions, particularly where no sitting fee is paid, cannot be rushed. It is vital to the effective working of a good board that the best candidate is identified. Imposing an arbitrary time frame could well compromise this goal and may impose a further constraint on the effectiveness of the Board.

A further consideration in relation to setting time frames is the introduction in mid-2021, of the requirement that all board directors in Australia will need a Director Identification Number (DIN). This legal requirement will undoubtedly add time to the appointment process and in WARRRL's view strengthens the argument that 40 days is inadequate.

WARRRL, in conclusion, wishes to state that the Board and executive wholeheartedly support the intent of the legislation that the Scheme coordinator's board should be diverse and that the independent directors be in the majority. This principle is fully embraced by the Board. In amending the Act to rectify the practical problem created by the words "at all times", the principle should not be compromised.

WARRRL recommends that the Act be amended to remove the words "at all times" which create the possibility of constitutional invalidity if a director unexpectedly resigns and that a saving provision be inserted, as per or along the lines of the wording above.

In the event that a defined time period is preferred, this period be a minimum of 60 days. In addition, WARRRL recommends that a savings provision also be included to protect the validity of decisions of the Board during a period where there the Board may be constituted with less than nine Directors.

11 Please provide comments on product stewardship plans or extended producer responsibility schemes, and if the WARR Act requires amendments to support their introduction.

Waste legislative issues 2:

12 Please provide feedback on these proposed changes to support regulations that implement the waste management framework. Will increasing penalties under the regulations be effective in deterring illegal waste activities?

Waste legislative issues 3:

Other

13 Are there any other matters which should be considered as part of this review of the WARR Act?

Other:

14 How do you think the WARR Act could better support an innovative and thriving waste sector, and ensure that waste and recycling services are effective?

Other 2: