



environmental defender's office new south wales

Review of the *Waste Avoidance and Resource Recovery Act 2001*

22nd June 2007

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of fostering close links with the community*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services across NSW.*

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Submission on the Review of Waste Avoidance and Resource Recovery Act 2001

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the five-year review of the *Waste Avoidance and Resource Recovery Act 2001* (hereafter '*WARR Act*').

The EDO is a community legal centre specialising in public interest environmental law. The EDO has 20 years of experience participating in environmental law reform processes.

Section 32(1) requires the Minister for Environment, Climate Change and Water to review the *WARR Act* in order to determine whether:

- the policy objectives of the Act remain valid, and
- the terms of the Act remain appropriate for securing the objectives.

The EDO believes that the policy objectives of the *WARR Act* remain valid. The Act's objectives, which include a commitment to principles of ecologically sustainable development (ESD), the implementation of the waste hierarchy and increased resource recovery, are vital to ensuring that waste impacts on the environment are minimised. The *WARR Act* provides a framework for promoting reductions in waste disposal and increases in resource recovery, but needs to be strengthened to more comprehensively operationalise the objectives. The key focus of the review therefore, should be the extent to which the Act has achieved its objectives and the progress that has been made towards meeting the 2014 state targets.

Consistent with section 32(1), the EDO makes comments on the following:

- 1) Validity and achievement of objectives
- 2) Terms of the Act
 - a. Waste Strategies
 - b. Extended Producer Responsibility

Part 1: Validity and achievement of objectives

The *WARR Act* sets out eight objectives in section 3(a)– (h). These are discussed in turn.

a) To encourage the most efficient use of resources and to reduce environmental harm in accordance with the principles of ecologically sustainable development.

It is appropriate that a primary objective of the Act is to underpin waste management with the principles of ESD. The efficient use of resources is a prime focus of ESD. The World Commission on Environment and Development have long recognised this:

In general, industries and industrial operations should be encouraged that are more efficient in terms of resource use, that generate less pollution and waste, that are based on the use of renewable rather than non-renewable resources, and that minimize irreversible adverse impacts on human health and the environment.¹

Two specific aspects of ESD are directly relevant to waste. These are:

- 1) the polluter pays principle which stipulates that those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
- 2) life-cycle analysis which states that the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste.

In this context, EcoRecycle Victoria has found that key strategies to achieve ESD in waste management include radical improvements in efficiency, the closing of material and waste cycles (eliminating waste) and a shift from products to services i.e. dematerialisation.² The *WARR Act* provides a framework to facilitate some of these mechanisms.

In order to more comprehensively achieve this objective, the Act must require compliance with these elements of ESD, as well as lead to a reduction in environmental harm due to waste impacts. While the environmental harm that has been reduced or avoided as a result of increased resource efficiency under the *WARR Act* is difficult to quantify, it is clear that using resources efficiently should lead to a reduction in the amount of waste generated and that this would logically lead to a lower impact on the environment. Therefore, the objective remains valid.

(b) To ensure that resource management options are considered against a hierarchy of the following order: (i) avoidance of unnecessary resource consumption, (ii) resource recovery (including reuse, reprocessing, recycling and energy recovery), (iii) disposal.

The EDO supports this hierarchy of actions, as consistent with ESD and international best practice. However, there are several difficulties with putting it into practice.

¹ World Commission on Environment and Development *Our Common Future* 1987, page 213.

² J. Gertsakis and H. Lewis, (2003) *Sustainability and the Waste Management Hierarchy- A discussion paper on the waste management hierarchy and its relationship to sustainability*. A discussion paper prepared for EcoRecycle Victoria at p6.

Most of the current effort in NSW has been focussed on recycling programs, which are of course important. However, it has been shown internationally that the primary focus of waste policy should be on avoidance strategies rather than on waste recovery, and that this is the most effective means of complying with ESD.³ To illustrate this point, although recycling and reuse has increased significantly since the *WARR Act* came into force, this has not been enough to counter a corresponding increase in waste generation. Indeed, waste to landfill has increased by 70,000 tonnes per annum.⁴

The increase in waste generation in NSW indicates that insufficient attention is being paid to avoidance strategies. Hirschhorn *et al*, note that a hierarchy with prevention at the top “necessarily requires upheaval and organisational change that is not always desirable or appealing to companies that have invested heavily in conventional environmental management systems and other end-of-pipe strategies.”⁵ This indicates that there is little impetus amongst business to change their practices in the absence of clear regulation. Indeed, it has been noted that the degree to which Australian producers of goods and services have engaged with the upper level of the hierarchy is negligible.⁶

Another identified barrier to implementation of the hierarchy is that waste managers in both government and industry have little control over production decisions that influence waste generation, especially in the absence of regulation.⁷ Again as a result, the focus has been on resource recovery, or ‘end-of-pipe’ measures, to the detriment of avoidance strategies. The hierarchy indicates that there must be a shift from an ‘end-of-pipe’ model to more preventative models, consistent with the precautionary principle. This involves pollution prevention, source reduction and waste reduction through cleaner technology.⁸

While the hierarchy remains a fundamentally important objective and strategic guide, an inordinate focus on resource recovery is stifling progress in implementing the hierarchy. Strategies are needed that will lead to a significant decrease in the raw amount of waste generated. A key element of this is the creation of regulatory waste targets (this is discussed further below). This will also involve working more closely with industry to effect waste avoidance. The Act should be strengthened to enable Resource NSW to enforce mandatory avoidance strategies.

The EDO also supports TEC’s recommendation to refine this objective by including a sub-hierarchy in 3(b)(ii), in recognition of the differing environmental value of different processes. The sub-hierarchy suggested is:⁹

³ *Ibid.*

⁴ Total Environment Centre (2006) *Submission to the NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 Consultation Draft* at p3.

⁵ J. Gertsakis and H. Lewis, (2003) *Sustainability and the Waste Management Hierarchy- A discussion paper on the waste management hierarchy and its relationship to sustainability*. A discussion paper prepared for EcoRecycle Victoria at p8.

⁶ *Ibid.*

⁷ J. Gertsakis and H. Lewis, (2003) *Sustainability and the Waste Management Hierarchy- A discussion paper on the waste management hierarchy and its relationship to sustainability*. A discussion paper prepared for EcoRecycle Victoria at p9.

⁸ Hirschhorn, Jackson and Baas (1993), ‘Towards Prevention- the emerging environmental management paradigm’ In *Clean Production Strategies- Developing Preventative Environmental Management in the Industrial Economy* at p125.

⁹ TEC submission on the *WARR Act* Review, June 2007.

- a. Reuse
- b. Remanufacturing
- c. Reprocessing
- d. Recycling
- e. Energy recovery

(c) To provide for the continual reduction in waste generation.

The 2003 Waste Strategy established state targets for waste. In relation to waste generation, total waste generated was to remain steady over a five year period from the release of the Strategy.¹⁰ This is in spite of expected economic growth and population increases. However, the 2006 Strategy has shown an increase of nearly two million tonnes in 2004/05 over 2000 levels.¹¹ Specifically, Sydney generated 8.81 million tonnes in 2004-05 compared with 8.64 million tonnes in 2002-03.¹² The Total Environment Centre (TEC) notes that the justification given for this increase is economic and population growth, despite the fact that the targets were formulated taking these into account.¹³ At current rates, waste generation is likely to increase to 11.29 million tonnes per annum in 2015.

Thus, the Act has to this point been largely unsuccessful in achieving real reductions in total waste generated. As discussed above, this may be due to a disproportionate focus on resource recovery to the detriment of preventative strategies, and the lack of regulatory targets.

To better implement this objective, the EDO recommends that a regulation be drafted to include specific incremental targets.

(d) To minimise the consumption of natural resources and the final disposal of waste by encouraging the avoidance of waste and the reuse and recycling of waste.

This objective remains valid and complements objectives (b) and (c). Resource recovery targets have been set for 2014, however, these targets are based on maintaining 2000 baseline levels of total waste. As shown above, total waste generated in NSW is well above 2000 levels. Therefore, although resource recovery has increased dramatically, this is not enough to counteract the concurrent increase in total waste generated. Indications are that another three million tonnes in recovery would be required to meet the 2014 targets in light of this increase.¹⁴ The 2014 resource recovery targets therefore need to be increased. This will involve setting interim targets to assist in monitoring progress.

This objective is therefore being implemented unevenly, with the waste avoidance element of the objective is not being met. Therefore, although resource recovery is a vital

¹⁰ NSW Department of Environment And Conservation, *NSW Waste Avoidance and Resource Recovery Strategy 2003* at p37.

¹¹ See Total Environment Centre (2006) *Submission to the NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 Consultation Draft* at p3 for detailed mapping of NSW's progress in meeting its targets.

¹² NSW Department of Environment And Conservation, *NSW Waste Avoidance and Resource Recovery Strategy 2006* at p5.

¹³ See Total Environment Centre (2006) *Submission to the NSW Waste Avoidance and Resource Recovery Strategy and Performance Report 2006 Consultation Draft* at p3

¹⁴ *Ibid.*

part of any waste strategy, it is only effective if it works in conjunction with waste avoidance initiatives.

(e) To ensure that industry shares with the community the responsibility for reducing and dealing with waste.

As noted above, a key element of ESD is the polluter pays principle, and industry has a key role.¹⁵ As industry is a significant contributor to the waste stream, their involvement in both reducing and managing waste is essential. This objective remains valid.

(f) To ensure the efficient funding of waste and resource management planning, programs and service delivery.

The EDO supports the continued use of funds generated through the waste levy to be used to fund programs to implement the objectives of the *WARR Act*.

(g) To achieve integrated waste and resource management planning, programs and service delivery on a State-wide basis.

This objective remains valid, however integration is not being achieved in some key areas, as discussed below.

In order to more comprehensively achieve this objective, the *NSW Waste Strategy* must tie in with other laws that regulate natural resource planning, especially the *Environmental Planning and Assessment Act 1979*. Currently, developments that will generate significant amounts of waste are determined under Part 4 of the planning legislation. However, there is no requirement for the consent authority to have regard to the *NSW Waste Strategy*, or the 2014 state targets, in determining whether to grant consent.

Furthermore, under *State Environmental Planning Policy (Major Projects) 2005*, waste intensive industries and developments are listed as major projects under Part 3A of the *EP&A Act*. For example, development for putrescible landfills that has the capacity to receive more than 75,000 tonnes of waste per year, or development for the purpose of resource recovery or recycling facilities that handle more than 75,000 tonnes per year, are classified as Part 3A projects. This means that the Minister for Planning is the consent authority. However, there is no requirement on the Minister to have regard to the *NSW Waste Strategy*, nor any indication how these developments will contribute to achievement of the state targets. This prevents integrated waste and resource management planning on a state-wide basis.

The *WARR Act* should be strengthened to require consent authorities to take the *NSW Waste Strategy* (and any future regulatory targets) into account when assessing developments, as well as determining whether developments will assist in the achievement of state targets. Strict conditions should be mandatory for developments that are likely to generate significant amounts of waste. If this does not occur, the *NSW Waste Strategy*, which is meant to be the overarching document representing government policy and targets relating to the management of waste, is meaningless, as it does not apply to the activities that are likely to have the most significant waste impacts. The *NSW Waste Strategy* will be discussed further in Part 2.

¹⁵ WCED 1987, *op cit*.

(b) To assist in the achievement of the objectives of the Protection of the Environment Operations Act 1997 (POEO Act).

The objectives of the *POEO Act* reflect and complement the *WARR Act* in many ways, including:

- (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,
- (b) to provide increased opportunities for public involvement and participation in environment protection,
- (c) to ensure that the community has access to relevant and meaningful information about pollution,
- (d) to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the following:
 - (i) pollution prevention and cleaner production,
 - (ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,
 - (iia) the elimination of harmful wastes,
 - (iii) the reduction in the use of materials and the re-use, recovery or recycling of materials,
 - (iv) the making of progressive environmental improvements, including the reduction of pollution at source,
 - (v) the monitoring and reporting of environmental quality on a regular basis,
- (e) to rationalise, simplify and strengthen the regulatory framework for environment protection,
- (f) to improve the efficiency of administration of the environment protection legislation,
- (g) to assist in the achievement of the objectives of the *Waste Avoidance and Resource Recovery Act 2001*.

Improved information regarding waste produced should be made public, consistent with objectives (c), (b), (d)(v). (The inadequacies of information reported under the waste strategy is discussed in part 2 below).

As discussed above, better integration with other relevant legislative regimes is important, and as such, specific cross-reference to the *POEO Act* objectives remains valid.

Part 2: Do the terms of the Act remain appropriate to secure objectives?

In addition to the above comments on achieving the specific objectives, two key parts of the legislation are discussed below: Part 3 concerning waste strategies and Part 4 regarding extended producer responsibility schemes.

(a) Waste Strategies

The *WARR Act* requires that a waste strategy should be developed for the state. This a key provision of the Act as much of the crucial detail, such as waste targets, are delegated to the strategy rather than be set out in the Act. Part 3 requires the strategy to be based on continuous improvement, benchmarked against international best practice and is to include targets for waste reduction, resource recovery and the diversion of waste from

landfill disposal.¹⁶ There is also provision for the strategy to be replaced by a new strategy every two years.¹⁷ While these terms are essential for operationalising the objectives of the Act, a number of concerns have been raised.

The first strategy was released in 2003. It set state-wide waste targets to be achieved by 2014. A second strategy was produced in 2006. It revealed several deficiencies.

Firstly, the strategy did not measure progress towards 2014 targets. For example, the strategy did not reveal overall tonnage of waste generated, the total amount of resource recovery, nor how this has changed since 2014. Therefore, there is no means by which progress towards the 2014 targets can be measured.

Secondly, the Strategy revealed few initiatives on waste avoidance. Although the Strategy mentioned new partnerships with industry, new avoidance technologies and demand management programmes, specific actions to reduce waste generation were not apparent. The Strategy does provide detail on resource recovery projects but these alone will be insufficient in the long run as total waste generation continues to increase.

In order to ensure that the waste strategy leads to real reductions in waste generation, it must set out clear programmes that achieve a minimisation in total waste and an increase in resource recovery. Furthermore, progress towards 2014 targets should be clearly set out. Otherwise, programmes will continue to operate in a haphazard manner, not as part of an integrated state-wide approach to waste management.

Two key reforms are required to address the deficiencies of the current waste strategies:

1. Waste reduction targets, currently expressed in the Waste Strategies, should be explicitly set out in a regulation. The regulation should state targets including:

- by 2014 increase recovery and utilisation of materials from municipal sector from 25% to 66%;
- by 2014 increase recovery and utilisation of materials from the commercial and industrial sector from 28% to 63%; and
- by 2014 increase recovery and utilisation of materials from the construction and demolition sector from 65% to 76%.¹⁸

2. The Act should require annual reporting against legislated performance criteria on incremental achievement of targets. These reports must be made public. The EDO supports the TEC recommendation that the Annual Performance Report should require:¹⁹

- Use of consistent key performance indicators;
- Reporting on whole of NSW figures;
- Reporting on overall tonnes to landfill and tonnes recovered on a raw tonnage basis;
- Reporting on the contribution of product wastes identified in Priority Statements to overall waste volumes and their contribution to the toxicity of municipal waste;

¹⁶ Section 12 (2), *Waste Avoidance and Resource Recovery Act 2001*.

¹⁷ Section 12(5), *Waste Avoidance and Resource Recovery Act 2001*.

¹⁸ Resource NSW, *Waste Avoidance and Resource Recovery Strategy*, 2003, p. 3.

¹⁹ TEC submission on the *WARR Act* review, June 2007.

- Methodologies that allow comparison between existing Waste Strategy data; and
- Modelling that shows the existing and expected contribution of each program towards the 2014 goals.

Access to relevant and meaningful information is consistent with furthering objective (h) as discussed above.

(b) Extended Producer Responsibility (EPR)

The Act provides an opportunity for the Minister for Environment, Climate Change and Water to implement mandatory EPR schemes for certain products. The central premise of the concept is that producers become responsible for a product throughout its life-cycle, from production through to use and post-consumer stages. The Director-General must prepare an annual Priority Statement setting out the waste streams that are of most concern. The 2005-06 Priority Statement lists 17 waste streams.

Although the Act provides for mandatory EPR schemes, this has not yet occurred for any product. Section 17 of the Act requires the Minister to consider, among other things, whether there are effective voluntary schemes in place before establishing a mandatory scheme. The current stance of the NSW Government is that mandatory EPR schemes will not be introduced where voluntary reduction schemes are in place. Indeed, the 2005-06 Priority Statement stipulates:

Whilst the Waste Act enables mandatory action, the Government has made a strong commitment to support national voluntary sector initiatives where possible, as this provides flexibility for industry and fosters innovation. Each of the sectors identified as wastes of concern has progressed voluntary steps to a certain degree. Consistent with this policy of encouraging voluntary action by industry, the NSW Government supports a coregulatory approach to producer responsibility where this is appropriate for a sector. This involves national voluntary product stewardship underpinned by government regulation of companies that refuse to participate (free riders) in industry schemes. This maintains a level playing field and ensures that those who work within a voluntary scheme are not disadvantaged in the market place.²⁰

The EDO has previously made comments on voluntary and co-regulatory schemes generally.²¹ In short, voluntary schemes are no substitute for mandatory regulation where there is a real risk of significant environmental impacts involved. The OECD has identified various problems with voluntary approaches. For example, voluntary approaches often lack clearly-defined targets, credible regulatory threats, credible and reliable monitoring, third party participation and penalties for non-compliance.²² The EDO therefore submits that voluntary measures should not be considered as an alternative to binding regulation, but should form part of a range of mechanisms to achieve the state-wide waste objectives. The failure to take advantage of the provisions

²⁰ NSW Department of Environment and Conservation, *NSW Extended Producer Responsibility Priority Statement 2005-06* at p4.

²¹ For example see EDO submission, *Investigation into the burden of regulation in NSW and improving regulatory efficiency Draft Report* - 24 February 2006. Found at: <http://www.edo.org.au/edonsw/site/policy/ipart060224.php> (19 June 2007).

²² See OECD (2003) "Voluntary Approaches for Environmental Policy: Effectiveness, efficiency and usage in policy mixes" Working Party on National Environmental Policies, OECD Environmental Policy Committee.

enabling mandatory EPR schemes to be established for certain products is a significant failing of the Act, and may go some way to explaining the minimal progress towards achieving 2014 targets.

The provisions of the *WARR Act* should be tightened to remove the discretion enabling the Minister to rely on voluntary schemes. One suggestion is that the waste streams identified in the Priority Impact Statement should be regulated through mandatory EPR schemes, whilst ‘non-priority areas’ could operate through voluntary schemes, and if they prove unsuccessful, mandatory schemes should follow for these waste streams. A time limit should be set for commencing and implementing schemes.

Conclusion

The EDO submits that there needs to be an organisational and technical shift²³ in waste management in NSW that moves from a hierarchy dominated by resource recovery to a hierarchy prioritising prevention and avoidance. A true implementation of the waste hierarchy will lead to demonstrable improvements in waste management in NSW, and will assist in achieving 2014 targets, as well as the objects of the *WARR Act*.

The *WARR Act* as it currently stands, provides the opportunity for progress to be made in achieving reductions in total waste generation, and an increase in resource recovery. However, the key problem is that the Act is not being utilised to its full potential, such as the failure to implement mandatory EPR schemes. The problem with the Act is therefore its *implementation*, rather than its objectives and substantive provisions.

Summary of key recommendations:

- **Retain objectives**
- **More focus on avoidance initiatives in the hierarchy**
- **Refine (3)(b) sub-hierarchy**
- **Include waste targets in a regulation**
- **Include more explicit annual reporting requirements**
- **Utilise mandatory EPR provisions**

Should you have any questions regarding this submission please contact Robert Ghanem on (02) 9262 6989.

Yours sincerely,

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²³ J. Gertsakis and H. Lewis, (2003) *Sustainability and the Waste Management Hierarchy- A discussion paper on the waste management hierarchy and its relationship to sustainability*. A discussion paper prepared for EcoRecycle Victoria at p10.