



australian network of environmental defender's offices

Submission on the Product Stewardship Legislation Consultation Paper

December 2010

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8982 1182)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

Submitted to: wastepolicy@environment.gov.au

For further information, please contact rachel.walmsley@edo.org.au.

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the *Product Stewardship Legislation Consultation Paper*, November 2010.

We welcome the proposal to draft national product stewardship legislation. Consistent with our expertise, we comment on the following issues:

1. A federal role in product stewardship.
2. Key elements of the framework legislation
3. The three-track approach
4. Detail in subordinate instruments

1. A federal role in product stewardship.

There are a number of benefits for a nationally consistent approach. A national framework provides an opportunity to address problems with inconsistent NEPM implementation in different jurisdictions (although we note more work needs to be done on this) and assist national operators, with flow-on benefits for customers. Legislation is the best way to deal with the problem of free-riders. The Commonwealth can rely on a range of Constitutional powers to make legislation relating to product stewardship, for example, in fulfilling obligations to implement relevant international agreements;¹ and powers regarding corporations, trade and commerce and if need be, taxation. However, to ensure that the legislation is not subject to any constitutional challenges, it would be appropriate for the Commonwealth to confirm and finalise any additional relevant referral of power from the States and Territories if required.

2. Key elements of the framework legislation

The Consultation Paper (Table 3) identifies 13 key elements of the legislation: definitions, objects, governance, geographical coverage, products covered, product stewardship arrangements, administrators of product stewardship arrangements, voluntary provisions, co-regulatory provisions, mandatory provisions, monitoring reporting and compliance, government fees and review of decisions.

We understand that much of the detail regarding implementation of the scheme will be in regulations and standards (discussed below), and that the legislation will necessarily be framework to allow flexibility in future coverage and regulatory options. This is a practical approach, however we submit that certain core provisions must be included in the head Act and not delegated to regulations or other subordinate instruments that are not subject to the same level of parliamentary scrutiny as an Act. These core provisions include the following:

Governance –Three governance options are identified in Chapter 2 with a preference for Departmental administration (option 1). If this option or option 2 are preferred to Option 3 (Independent statutory agency with an Advisory Board), we submit that the legislation should also establish an independent Product Stewardship Advisory

¹ For example, Australia has obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; the Stockholm Convention on Persistent Organic Pollutants; and the Montreal Protocol on Substances that Deplete the Ozone Layer; and can make federal domestic legislation to implement these obligations under to s51(xxix) of the Constitution.

Committee, with industry, consumer, community, environment and scientific expert representation. The Committee's role should be to advise on new products coming under the scheme and which products are appropriate candidates for voluntary accreditation, co-regulatory or mandatory regulation.

Coverage of products – ANEDO supports and additional criterion that explicitly recognises the role product stewardship plays in meeting Australia's international obligations. The independent Advisory Committee proposed above should have a legislative role in determining application of the criteria. Reasons should be made publicly available regarding any decisions to exclude products to ensure transparency.

Product stewardship arrangements – To ensure transparency and accountability, the legislation should require that finalised agreements are made publicly available, and be clear as to what limited information can be commercial in confidence – for example, financial information.

Voluntary, co-regulatory and mandatory elements are discussed below.

Monitoring, reporting and compliance – ANEDO strongly supports annual reporting requirements and independent auditing. This should be clearly set out in the legislation with requirements that reports be made public. The Consultation Paper lacks detail about compliance action. The Act should be clear on different compliance regimes for the three tracks, with a clear role for the regulator to intervene in the event of non-compliance with requirements under co-regulatory schemes or failure to meet accreditation standards under the voluntary track. The Act could also include innovative orders, such as requiring publication of accreditation revocation.²

Review of decisions – The legislation should provide open standing for any person to bring an action to enforce a breach of the Act.³

3. The three-track approach

The Consultation Paper proposes that the legislation will provide a three-track approach: accreditation of voluntary schemes, co-regulation and mandatory regulation. The pros and cons of these are discussed below.

Voluntary schemes – Existing voluntary schemes and potential future schemes should be encouraged. The benefits of voluntary accreditation include raising of standards across an industry and increased consumer confidence. However it is essential that for voluntary accreditation schemes to work and maintain their integrity, regular auditing of accreditation is required, with clear circumstances prescribed for when accreditation will be withdrawn. The Consultation Paper indicates these details will be in 'Guidelines' however, we submit that provisions regarding audits and non-compliance must be in the legislation. The ACCC must retain its role in reviewing potentially false or misleading accreditation claims but cannot be expected to pursue every misleading claim. The use of voluntary schemes and 'self-regulation' has not been sufficient alone to achieve product

² There are precedents for innovative orders regarding publication of offences, for example, the *Protection of the Environment Operations Act 1997* NSW section 250.

³ For example, *Protection of the Environment Operations Act 1997* NSW section 252 (1) Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act or the regulations.

stewardship goals to date,⁴ and so there should be a clear process for identifying when particular products are not suitable for voluntary schemes, but require a stronger regulatory approach. The independent Advisory Committee should have a review role to advise on this.

Co-regulation – A major benefit of co-regulation is to prevent free-riders gaining competitive advantage over producers or importers who do willingly adopt standards. (This is a key problem with the voluntary track). However, further detail is required in the legislation on exactly how free-riders will be regulated and penalised. One potential problem with the proposed co-regulatory model is the RIS process requiring a ‘community benefit’ from intervention. The legislation should clearly define what is meant by ‘community benefit.’⁵ ANEDO supports escalating sanctions on liable parties for breaches of product stewardship arrangements. Standard sanctions, such as the use of infringement notices, civil penalties and injunctions, should be set out in the legislation. ANEDO does not support unlimited ‘carry over’ of outcomes where annual targets (as set out in regulations) for a particular product are not met. If deficit carry over is permitted in consecutive years then it is unlikely that targets will be met. As there is no standard structure or model and arrangements will be approved on a case by case basis, decisions to approve or not approve proposed arrangements should be made public to ensure transparency. Furthermore the independent Advisory Committee should have a legislated role to review proposed arrangements. Public annual reporting and independent auditing should be standard requirements.

Mandatory regulation – Mandatory requirements may be appropriate where there are hazardous materials involved with potential for significant environmental or health impacts, or where voluntary and co-regulatory options have failed to achieve desired outcomes, or in a range of other circumstances where a product may be considered appropriate for mandatory regulation. ANEDO supports strong regulatory provisions in the Act. These must be underpinned by clear enforcement and compliance provisions, including innovative orders, that create a sufficient deterrent to non-compliance. We note that currently no products have been proposed for mandatory regulation, and submit that the independent Advisory Committee (as discussed above) have a statutory role in reviewing and advising on potential candidate products for mandatory regulation.

4. Detail in subordinate instruments

It is clear that the framework legislation leaves much of the regulatory detail to subordinate instruments such as regulations, standards and guidelines. It is practical to establish a framework whereby more products and arrangements may be added by regulation as and when the need arises. For example, future international agreements may create new obligations in the area of production stewardship and waste management, requiring consideration of new arrangements. In addition to the key elements that should be contained in the primary legislation as discussed above, ANEDO submits that the legislation must set out clear minimum public consultation requirements that apply to subordinate instruments when they are to be made under the Act, and how they are to be reviewed.

⁴ For example, attempts to establish a product stewardship scheme for used tyres and mobile phone recycling scheme, Mobile Muster.

⁵ The requirement to show a ‘net benefit’ can be a barrier to regulation. For example, tyres failed to meet the OBPR ‘net benefit’ test and are consequently working towards a voluntary scheme, notwithstanding the potential benefits of a co-regulatory approach for tyres.