



australian network of environmental defender's offices

Submission on the Product Stewardship Legislation Bill 2011

8th April 2011

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.

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ANEDO submission to the Senate Inquiry into the Product Stewardship Bill 2011 April 2011

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is pleased to provide the following brief comments on the *Product Stewardship Bill 2011* (the Bill). ANEDO consists of nine community legal centres located in each State and Territory of Australia, specialising in public interest environmental law and policy.

Our comments on the proposed Bill draw on recommendations made in our previous *Submission on the Product Stewardship Legislation Consultation Paper* in December 2010.¹ We reiterate important recommendations regarding the key elements that need to be included in the framework legislation. Our comments address the following issues:

1. A federal role in product stewardship.
2. Key elements of the framework legislation:
 - a. Governance;
 - b. Coverage of products;
 - c. Product stewardship arrangements;
 - d. Monitoring, reporting and compliance; and
 - e. Review of decisions.
3. Detail in subordinate Instruments.

1) A Federal Role in Product Stewardship

ANEDO welcomes a national legislative framework to address the issue of product stewardship. As noted in our previous submission, the introduction of such a framework provides the opportunity to address problems with some existing measures, such as the National Environment Protection Measures (NEPM). Whilst ANEDO does have concerns over the possibility of constitutional challenges² and we identify a number of inadequacies with the current Bill, the fact that such a document has been released is a positive step.

2) Key elements of the Framework Legislation

In our previous submission, ANEDO made comments regarding the following key elements of: governance, coverage of products, annual reporting, monitoring and compliance in the context of the three track approach, and review. We note a number of our recommendations regarding these elements are addressed in the Bill, and note where additional clauses are still required.

Governance

In terms of Governance options, ANEDO supports the development of a Departmental Administration option. We are pleased to note that such an option has been pursued, however the accompanying independent Product Stewardship Advisory Council that ANEDO and others recommended (consisting of industry, consumer, community,

¹ Available at: http://www.edo.org.au/policy/101217product_stewardship_legislation.pdf.

² No clarification has been made about the relevant referral of power from the States and Territories that may be required.

environment and scientific representation) is absent from the Bill. Such an independent body would be invaluable in providing expert advice on new products coming under the scheme and in determining which products are appropriate candidates for voluntary accreditation, co-regulatory or mandatory regulation. ANEDO therefore submits that provisions to establish an independent advisory body should be included in a revised Bill.

Coverage of Products

The Bill provides that the product stewardship criteria are satisfied in relation to a class of products if 2 or more of the criteria of clause 5 are satisfied. ANEDO supports this clause as it should ensure a broad coverage of products.

Annual Reporting and Independent Monitoring

In our previous submission, ANEDO highlighted the need for mandatory annual reporting requirements and independent monitoring. ANEDO submits that the current clauses in the Bill relating to these matters are inadequate.

Under the voluntary arrangements there are no mandatory requirements for annual or independent auditing. Regarding the co-regulatory arrangements, clause 24 of the Bill does provide that a person who is a liable party in relation to a class of products, may be required to make and keep records, give information and report to the Minister or Inspector. Furthermore it provides that the Minister may require an administrator to carry out an audit of a co-regulatory arrangement. However these again are not mandatory requirements. Regarding mandatory product stewardship there are no explicit requirements for annual reporting or independent auditing.

Whilst the Bill provides (at clause 108) that any audit reports that have been conducted must be published³, ANEDO believes that this is inadequate as it only allows information to be released on those participants who have been audited. ANEDO would therefore like to see the Bill amended to ensure that there are a series of mandatory reporting and annual auditing requirements across the three differing tracks. Furthermore, the Bill should stipulate that all these reports be made publically available.

Compliance Regime

In our previous submission we noted that the legislation must be clear on 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 Bill does provide an enforcement regime (Part 5) and a compliance regime (Part 6). Within these parts there are broad inspection powers and also standard sanctions such as the use of infringement notices, civil penalties and injunctions. We welcome the inclusion of these provisions (as recommended in our previous submission), however we note much of the detail is to be included in the regulations. ANEDO would like to see a greater representation of the detail in the primary legislation (the Bill). For example, one particular provision that should be explicitly included in the Bill relates to the “carry over” of unmet targets. ANEDO submits that any “carry over” be met with strong penalty provisions in the legislation to ensure that targets are met.

³ Unless it prejudices the commercial interests of a person and the information is not in the public interest.

Review of Decisions

ANEDO previously submitted that the Bill should provide open standing for any person to bring an action to enforce a breach of the legislation. Such a provision has not been included in the Bill, however clause 93 does provide the decisions made by the Minister under the Bill that are open to review and the persons able to seek review of a reviewable decision. ANEDO would like to see these limited opportunities for review, as well as the class of individuals able to undertake a review, broadened through the incorporation of an open standing provision.

3. Detail in Subordinate Instruments

As previously submitted, whilst it is practical to establish a framework whereby more products and arrangements may be added by regulation as and when the need arises, it is important that the key regulatory provisions be included in the primary legislation. As noted above there are many elements that have been delegated to subordinate instruments. ANEDO submits that more detail needs to be incorporated into the primary legislation (such as compulsory annual reporting and independent monitoring regimes as well as detail pertaining to the compliance and enforcement regime).

The Bill should be amended to include minimum public consultation requirements that apply to the subordinate instruments when they are made under this Bill. Currently, clause 111 deals with the power to make regulation, and there is no mention of public consultation at all. Where a significant level of detail is delegated to subordinate instruments, ideally the draft regulations should be exhibited for comment in conjunction with any exposure Bill. ANEDO would welcome the opportunity to comment on draft regulations once they have been prepared.

We appreciate the opportunity to provide input into the development of the Bill and looks forward to further consultation on the matter in the near future.