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Mr Stephen Palethorpe  
Secretary  
Senate Environment and Communications Legislation Committee  
PO Box 6100  
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Canberra ACT 2600

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Dear Mr Palethorpe,

**Submission – Inquiry into the Product Stewardship Bill 2011**

Thank you for your letter of 28 March asking for comment on the above Bill.

The National Association of Retail Grocers of Australia (NARGA) represents the independent sector of the retail grocery industry which comprises some 6000 stores employing over 190,000 people<sup>1</sup>.

The grocery industry is in daily contact with Australians and is acutely aware of the rising cost of living faced by many – some of which is unavoidable, but a significant proportion due to government legislation of which this Bill is a prime example.

Governments are right to impose extra costs on the community when a benefit equal to or greater than those costs can be demonstrated. This submission shows that the regulatory framework outlined in this Bill will allow the imposition of costs that far exceed any benefit to the community. The proposed regulation of electronic waste is a case in point .

The Intergovernmental Agreement on the Environment (IGAE) signed by all Australian governments acknowledges that the effective and efficient implementation of environmental policy is a direct function of: ‘the extent to which the total benefits and costs of decisions to the community are explicit and transparent’ (Preamble)

A similar requirement is imposed by guidelines under COAG.

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<sup>1</sup> *The challenge to feed a growing nation*, Accenture Australia for NARGA, November 2010

Further the IGAE under 3.4 requires governments to ensure 'that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed' (The principle of Proportionality)

We would suggest that the Bill provides the opportunity to bypass this requirement through its reliance on a flawed National Waste Policy, on the concept of 'Extended Producer Responsibility' and on the misinterpretation of treaty obligations.

### ***Product Stewardship and Extended Producer Responsibility***

The concept of product stewardship requires a business which produces a product to be a 'good citizen' regarding the environmental impact of a product. A company which sees itself as such would design a product and its packaging with the environment in mind and consider ways of reducing impact – even beyond the time that the consumer has finished with it or its packaging – but not take on the physical or financial responsibility of managing the associated post consumer waste. The company may, however, provide the consumer with information on the most appropriate way of disposing of that waste as part of its 'stewardship' of the product.

Extended Producer Responsibility on the other hand extends the responsibility of the manufacturer beyond the point of purchase and consumption to the point of disposal and asks the producer to take on the physical and / or financial responsibility for managing the waste generated when the product or its packaging needs to be disposed of, even though the product and its packaging are the legal property of the purchaser and have been, in many cases for some considerable time. This undermines concepts within laws relating to the ownership of personal property as well as laws relating to the sale of products which confer property rights and responsibilities on the purchaser.

However, in spite of becoming 'responsible' for the downstream disposal of such goods, the producer does not get to choose the most cost-efficient means of disposal. The disposal method is dictated by regulation and increasingly is recycling based, whether or not this method of disposal makes environmental or economic sense.

The producer in most cases will pass on the additional cost to the consumer through the product price (market conditions permitting) and, as a result, becomes the **tax collector** for the funds needed to cover the cost of recycling.

### ***In this way the Bill becomes a tax Bill.***

This form of taxation is a convenient means of hiding the cost of recycling from the community and avoiding the need for other entities – state or local governments – to take on the responsibility of increasing rates or taxes to meet a recycling promise.

The concept of Extended Producer Responsibility (EPR) arose in Europe in the late 1980s and was first adopted in Germany, where in 1991, through the Packaging Ordinance the German government required the packaged goods sector to become responsible for the funding of packaging recycling.

The background to the Ordinance was increasing public dissatisfaction with high local government rates and the Ordinance was seen as a means of reducing local

government costs and passing those costs back to the consumer through the price of the goods they purchased. (There is little indication that local government rates actually came down after its introduction.)

The EPR concept was further promoted through the OECD who produced a 'guidance manual for governments' on the topic in 2001<sup>2</sup>. The manual provides little by way of environmental justification for this new tax other than the hope that it will result in the production of less waste and hence improve 'resource efficiency' seemingly oblivious to the fact that producers use as little raw material as practicable because these materials come at a cost which affects the competitive position of the product. i.e. it is the competitive pressures within a market economy that pressure companies to be economical with materials.

OECD also did not explore the tax's potential for market distortion. This means that where these taxes were imposed they often resulted in changes to products and packaging that had negative environmental outcomes. The current Bill suffers from the same deficiencies.

The production of the manual was preceded by a series of stakeholder workshops. The writer was the Australian industry (ACCI) representative to the workshops held in Washington DC in December 1998 and Paris in May 1999.

It was quite clear from the Washington workshop that the US EPA did not subscribe to the EPR concept and saw it as illogical and market distorting.

However, the concept was adopted here by the NSW environment department and became a feature of the NSW Waste Avoidance and Resource Recovery Act 2001 which provided the department with the power to list 'wastes of concern' which were to be targeted for EPR treatment. Section 15(1) of that Act describes EPR:

### **15 Extended producer responsibility schemes**

(1) For the purposes of this Part, an *extended producer responsibility scheme* is a scheme for giving effect to an environmental policy in which the producer's responsibility for a product (including physical or financial responsibility) is extended to the post-consumer stage of the product's life-cycle.

The department's approach to developing the list of products to be targeted for EPR treatment was less than rigorous and, as the team with the prime responsibility under the Environmental Protection and Heritage Council system for carrying forward the EPR concept into national legislation was from that same NSW department, the Bill suffers from that same lack of rigour.

### ***The basis of the Product Stewardship Bill***

Apart from the concept of Extended Producer Responsibility, the Bill is based on an agreed *National Waste Policy; Less Waste, More Resources* and Australia's treaty obligations under the *Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.

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<sup>2</sup> Extended Producer Responsibility – a guidance manual for governments, OECD, Paris 2001

Dealing with the latter first, it is quite clear that the convention does not require that the wastes targeted under the Bill – e.g. electronic waste, be recycled when it can be safely disposed of in landfill, nor does it require that a taxing mechanism be set up as is proposed in the Bill.

The National Waste Policy on the other hand is based on a series of simplistic and untested assumptions including:

- That the environment benefits whenever the quantity of waste disposed of to landfill is reduced;
- That, based on the concept of a 'waste hierarchy', it is preferable to recycle waste rather than 'send it to landfill' even if the waste is inert and the cost of landfill is far less. The current approach to the recycling of packaging is based on this concept.

The result is an unsubstantiated notion that 'resource recovery' leads to greater 'resource efficiency' and that, as a result there is some overall benefit.

Such a conclusion is in direct contrast with the conclusions reached by the Productivity Commission's extensive inquiry into waste management which stated:

- 'Resource efficiency has some major limitations as a policy tool. The most substantial of these is that it only focuses on part of the picture...without any regard to the amount of other inputs such as labour or capital'
- 'All costs and benefits of different policy options for addressing market failures (should) be considered, and that government intervention be considered only if it produces net benefits to the community.'
- 'Government intervention should aim to assist markets to maximise the returns from using all resources – land, raw materials, energy, labour and capital....This approach recognises that scarce resources have alternative valuable uses, and may yield greater returns to the community in other areas, such as education, health or other environmental programs' (Productivity Commission – Waste Management – October 2006 P.XXVI )

'Resource recovery' is but the latest of a series of false premises used in support of increased levels of recycling which in the past were justified on the basis of a lack of landfill space, a reduced level of pollution, sustainability or the perception of a net environmental benefit. Note that the latter is not mentioned as a justification for the Bill.

The Commission went on to recommend a 'net public benefit' approach to waste management – a concept missing from the Bill under review.

The question that needs to be asked is whether the policy settings on which the Bill is based are sustainable.

Whilst 'resource recovery' or recycling are useful tools in improving the sustainability of our society, they need to be used judiciously to ensure a balance between costs and benefits.

The public has, however, over the last twenty years or so been bombarded with messages suggesting that recycling is 'good' and landfill is 'bad' – oblivious of the cost differential and of how little impact their recycling activity has on extending the life span of any resource.

Household steel can recycling in Australia provides an illustration:

- 45,000 tonnes of steel cans recycled each year represent around 1.5% of the 3 million tonnes of steel recycled in Australia by industry each year
- But this 45,000 tonnes represents just 15 minutes of annual world steel usage
- This suggests that 100 years of steel can recycling will save just 1 day of world steel use – at vast community cost.
- Current Australian iron ore reserves are 24 billion tonnes (Geoscience Australia)
- Is the resource saving contribution significant enough to warrant intervention?

Similar analyses of other collected materials show that much of household recycling does little to extend the long term availability of resources. In fact a study conducted for EPHC by BDA Group/Wright Corporate Strategies on beverage packaging suggests that aluminium cans use less than 0.1% of annual bauxite production (and Australia is a major exporter of bauxite and aluminium), steel cans use less than 0.1% of the annual iron ore extracted and other packaging materials have similarly small resource footprints.

Yet the Product Stewardship Bill implies that there is a need to recover more of these materials as 'resources' without first inquiring whether the resources in question are in fact scarce and whether the proposed recovery efforts are an appropriate and cost effective method of addressing any identified scarcity.

In fact, if the issue were resource recovery and / or resource efficiency that was being addressed it is surprising that the Bill did not originate within the Department of Resources Energy and Tourism which would be in the best position to determine whether these resource recovery mechanisms were warranted.

### ***Comments on the Bill***

- Paragraph 4(1) and (2) state that the object of the Bill is to reduce the impact of product throughout their lives and that this can be achieved by encouraging or requiring manufacturers etc. to take responsibility for their products by, among other things, managing waste from products as a resource and ensuring that these are 'reused, recycled, recovered, treated or disposed of in a safe, scientific and environmentally sound way'. It is not explained how transferring the cost from consumer back to manufacturer better achieves such outcomes or why, given the responsibility for waste, the manufacturer is not free to choose the least cost, safe means of disposal – given that resource scarcity is not an issue.
- Subclause 4(3) suggests that the Bill is a response to Australia meeting its treaty obligations, in particular in relation to the Basle Convention. We submit that there

is no treaty obligation requiring the government to proceed in the way envisaged by this legislation.

- Subclause 4(3) also suggests that the Bill will contribute to the reduction of greenhouse gases emitted, energy used etc. Unfortunately for that proposition most of the materials targeted under this Bill are inert and do not produce greenhouse gases in landfill. Rather their collection, transport and processing is likely to increase energy use and GHG emissions.
- Product stewardship criteria set out in Clause 5 are quite broad and lack the rigour that would be expected from a detailed assessment of net community benefit. To meet the criteria a product grouping needs to comply with only two of the proposed set. Let us take two as an example: (a) the products are in a national market and (f) taking action to reduce those impacts will offer business opportunities that would make a contribution to the economy. Now let's translate this: **Any product** in a national market can be targeted for recycling because a business recycling it will contribute to the economy and the manufacturers of the product can be forced to subsidise the process.
- The other criteria similarly lack rigour. For example a product containing 'hazardous substances' such as a computer could be targeted for recovery even though computers can be safely disposed of in landfill. This is because, although they contain materials such as the heavy metals lead and cadmium, these materials are unlikely to present a leachate risk. This is recognised by regulatory regimes such as those of the US EPA. Other jurisdictions have, however, chosen to ignore the realities of the chemistry of these materials and have chosen to regulate on the basis of a fear hazard rather than actual hazard. This legislation makes the same mistake.
- Under (c) (i) any product could be targeted because it has 'the potential to increase the conservation of materials...' ('hazardous' is not defined in the context of the Bill, so is open to interpretation.)
- Under 5(d) any product currently being recycled or targeted for recycling could 'involve a significant cost to the Commonwealth, State, Territory or local governments'. The question is whether there is any real merit in the activity.
- Under 5(e) the consumer 'willingness to pay' is used as justification. This is pertinent in the e-waste case which will be addressed later. However, willingness to pay for recycling needs to be balanced by an understanding that the community has for over twenty years been subjected to messages suggesting that recycling per se is 'good'.
- Section 37(3) is of concern. It allows for regulations that restrict or limit the manufacture, import, export or distribution of a product of the class regulated or prohibit, limit or restrict substances from being contained in a product. This clause allows for regulations similar to the European 'Restrictions of Hazardous Substances' directives and can be used to specify the materials allowed in a product. The experience with the EU approach suggests that such regulation is not always well founded.

## The e-waste case

A consultation paper on the proposed National Television and Computer Product Stewardship Scheme is currently available.

It bases the rationale for recycling these materials on the outcome of a 'Decision RIS' which highlighted a number of 'problems'

- 'Failure to conserve non-renewable resources' – The RIS did not assess whether or not these materials were in any way scarce or whether their recovery through this program would be the most appropriate and cost-effective way of addressing any such scarcity. The reality is that the recoverable 'resources' in question are available in great abundance. In fact, Australia is a major producer and exporter. Therefore this 'problem' does not qualify as a rationale for action.
- 'Failure to take advantage of community willingness to recycle' – Willingness to recycle is dependent on the perceived rather than the actual benefits associated with recycling. The community has access to a number of e-waste recycling programs run on a 'fee for service' basis as well as on a free basis by both industry and community based organisations. Anyone keen to recycle can take advantage of these. The question not addressed is whether any higher level of recycling results in a net community benefit. 'Willingness to pay' has not been demonstrated by community response to these programs – in fact one of the major barriers to progress in overseas schemes funded through EPR type taxes is an unwillingness on the part of consumers to make the effort to participate. The 'willingness to pay' argument would support a fee based scheme rather than a tax based scheme – but this is not what is proposed under the Bill. In any case 'willingness to pay' surveys are inherently flawed, as they ask respondents to express opinions based on issues for which they have little information or understanding.
- The 'free-rider problem' where some companies / entities support recycling and others escape the cost of participating. The 'free-rider problem' is a direct consequence of the push to recycle. There would be no free-rider issue if it were recognised that e-waste could be disposed of through the household waste collection service paid for by ratepayers. The free-rider problem does not provide justification for this scheme.
- 'Costs and risks associated with landfilling'. The cost of landfilling e-waste is substantially lower than managing e-waste by recycling it. So cost is no justification. Further e-waste in the quantities and dispersion derived from households is manageable in landfill. **It does not represent a leachate hazard** as confirmed by legislation under the US EPA. Again, this issue does not justify recovery for recycling.
- 'International obligations'. Disposal of e-waste to landfill is compliant with our international obligations under both the Basel Convention and the Stockholm Convention.

It is noted that the scheme seeks to increase the current 10% recycling rate of these materials to 80% by 2021. Should this be successful it would mean that over this period some 55% of e-waste would still end up in landfill.

If the disposal to landfill were truly a hazard, that residual level of e-waste going to landfill could not be justified (i.e. the proposed program would need to be more comprehensive – and therefore more costly) and government could not allow the millions of TVs and computers already in landfill to stay there.

Note that the Decision RIS<sup>3</sup> for television and computer recycling quoted a cost of up to \$995 million for reaching a recycling target of **70% over 20 years** as opposed to the current proposal of an **80% target over 10 years**. (cost unknown). Benefits, including the value of recovered materials and landfill savings could reach \$382 million – leaving the community with **a net cost of \$613 million** for no net community benefit. (Note that the report states that the cost for regional and rural areas will be **55% greater** than for metropolitan centres.)

Naturally there is a great level of uncertainty attached to these costs, particularly as the proposed program requires companies to also become responsible for legacy products. A report prepared for the computer industry by Planet Ark in 2005<sup>4</sup> put the cost of recycling of legacy products (computers only) at between around \$200 million and \$1 billion.

We should note here that several of the producer responsibility schemes commenced in Europe and elsewhere 'fell over' in their first incarnation and needed to be bailed out in order for the schemes to survive.

Also, although these schemes have been in place for several years, the EU has recently reduced e-waste recycling targets to 65% by 2020 from an initial 85%. This suggests that the 80% target proposed for the Australian scheme is too ambitious and would be far more expensive than estimated in the study conducted for the 'Decision RIS'.

As is, the scheme will impose an annual tax on the electronics industry of at least \$60 million to \$100 million a year, reflective of the cost of running the proposed take back program, and, given the EU experience, probably much higher.

The following should also be noted re the Decision RIS that was used as a basis for the decision to develop a product stewardship scheme for televisions and computers:

- Scheme costs greatly exceed identified benefits;
- No attempt was made to determine the viability of disposing e-waste to landfill as is allowed by legislation in the US;
- Therefore there is no quantification of the benefit, if any, of keeping e-waste out of landfill other than the value of avoided landfill use;

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<sup>3</sup> Decision Regulatory Impact Statement: Televisions and Computers, PwC for EPHC, October 2009.

<sup>4</sup> AIIA – E-Waste Program Development Phase, AIIA & Planet Ark June 2005



- No assessment has been undertaken of the need to recover the materials contained in the affected products on the basis of any genuine scarcity, and whether their recovery is the optimum means of ameliorating any such scarcity;
- The 'willingness to pay' survey was conducted via an indirect method. At no time was any respondent asked whether they themselves would be prepared to pay a particular amount to have their e-waste products recycled and is therefore of no validity;
- Calculated costs are, in our view, conservative.

### **General conclusions**

- The Product Stewardship Bill via the schemes set up under it becomes a tax Bill – imposing taxes on sectors of industry to, among other things, fund recovery and recycling of industry products;
- The proponents of the Bill arrive at their estimate of 'savings' on the basis that it would be more expensive to set up similar schemes as suggested under this Bill on a state by state basis – assuming of course that such schemes are necessary;
- The rationale for the Bill is based on concepts of 'saving landfill' and 'resource recovery' regardless of whether or not such objectives make environmental or economic sense;
- The Bill provides government with extensive powers to subject any product category to its requirements, with the consequent effect of substantially increasing the tax burden on the community;
- The Bill provides the government with extensive powers to control the content and make-up of products with the potential for negative outcomes in the affected markets;
- The Bill is an example of an increasing tendency towards a 'command and control' approach to government;
- There would appear to be little justification for proceeding with the type of legislation proposed here – certainly the information supplied so far suggests little rigour has been applied in the underlying policy analysis. It has instead relied on a series of simplistic and untested assumptions;
- It is clear that this Bill will enable recycling schemes that would otherwise be uneconomic (i.e. costs exceed benefits) to be set up resulting in net cost to the community. Clearly such an outcome contradicts the proportionality principle set out in the IGAE;
- We would suggest that the government seek input from other agencies and departments – including resource and economy related agencies or a review by the Productivity Commission prior to proceeding with this Bill.
- Should the government proceed down this path, the community would see the expansion of the range of recycling programs available to it. However, unlike the

recycling of household packaging and paper where costs are, in most cases, shown as part of the waste charge on council rate notices – the related costs will be hidden from the public through the taxes imposed on the affected industry sectors. The general public could develop a perception that not only is recycling 'good' it is also 'free'.

Of particular concern to us is the fact that this legislation and the proposal to develop a product stewardship scheme for televisions and computers has survived the analysis required under COAG guidelines, where firstly a genuine problem needs to be defined and secondly the cost of all means of addressing that problem – if one indeed exists – is to be assessed and compared with the benefits of any proposed intervention.

It is clear that in this case that the COAG process has not been correctly followed and that as a result the proposed legislation is severely flawed. As a result the proposed Bill has the potential to add to a family's cost of living without providing a commensurate improvement in their living environment.

The Senate should be very clear about the cost of living impact that would result from the passage of this Bill. It will lead to the development of a series of EU style material recovery schemes supported by taxes on industry which will inevitably be passed on to consumers in the form of higher prices and increased cost of living. As outlined above, these schemes have no validly substantiated benefits and will join the range of failed green programs such as pink batts, solar subsidies, etc. but their cost impact will be permanent.

The first of these, as outlined in the Explanatory Memorandum, will be the scheme covering televisions and computers but will be followed by schemes for broad range of other products, plans for which are already in the pipeline – batteries, CFLs, etc.

Passage of this Bill will accelerate the bureaucratisation of our legal framework where, as is already the case in the EU, the bureaucracy will decide what laws are required – often on the basis of their own agenda – and ministers and parliament simply provide the rubber stamp.

Please note that absence of the legislative framework proposed in the Bill would not prevent the establishment of private initiatives aimed at achieving worthwhile waste related environmental outcomes. Such schemes could be run on the basis of commercial viability funded by the intrinsic value of the materials collected and/or on a fee for service basis.

We trust this assists your inquiry.

Please contact me should you have any questions.

Yours sincerely

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