S U B M I S S I O N

TO THE

ENVIRONMENT PROTECTION AND HERITAGE COUNCIL

ON THE REVIEW OF THE

NATIONAL ENVIRONMENT PROTECTION COUNCIL ACT 1994

[Copied to the Productivity Commission Inquiry into Waste Management and Resource Efficiency]

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Prepared by:
NATIONAL ASSOCIATION OF RETAIL GROCERS OF AUSTRALIA
Level 5, 34 MacMahon Street
HURSTVILLE NSW 2220
Tel: 02 9580 5599
Fax: 02 9586 4777
Contact: Gerard van Rijswijk BSc MEL – Senior Policy Advisor
Email: gerardvan@narga.com.au

CONTENTS

EXECUTIVE SUMMARY

The National Association of Retail Grocers of Australia (NARGA) is the peak national body representing the independent retail grocery sector in Australia.

Retailers provide the interface between manufacturers and producers and the general public and employ a substantial proportion of Australian workers, particularly young people who often get their first experience of work in this sector.

Retailers are significantly impacted when government acts to restrict product availability or to tax products for environmental or other reasons. Such measures increase costs to the retailer and to the community, impacting on employment in our sector and in the product sectors affected.

Retailers, as the product / consumer interface, are increasingly seen as a potential return route for products targeted for recovery and recycling. Those suggesting such an approach often fail to understand the value of retail space and of the relationship between the retailer and customer.

Proponents of return or re-use programs need to look at the costs of providing these services - including the value of retail space, as well as the potential for adverse impacts – contamination brought into food stores via re-usable shopping bags would be one example, occupational health concerns are another. Shoppers coming back into the store with a re-usable bag that has been used for non-shopping purposes, like carrying a pet, plants or other contaminating material, potentially impact on food or worker safety.

NARGA fully supports the intent of the NEPC Act, and the efforts by EPHC to ensure that significant environmental issues are addressed at the national level – rather than in a piecemeal fashion on a state by state basis.

However we find that, whilst in the past EPHC and the NEPC mechanisms have been a brake on state EPA excesses, more recently the mechanism has been used to elevate these excesses to a national agenda, under the guise of national consistency. In so doing, the degree of review and analysis of new regulatory proposals required under the NEPC Act are often being bypassed.

We are concerned that the coordinating capacity of EPHC is being abused in order to bring about agreements at the national level that either address trivia or implement 'solutions' to 'problems' that have not been properly assessed.

This results in proposals for action that have not been through the rigorous analysis of costs and benefits envisaged in the NEPC Act, diverting attention and resources away from genuine environmental issues. Examples are recent plans and agreements to reduce or eliminate plastic bags and the range of agreements being negotiated to manage the recovery of products such as televisions, computers and other electronics via taxes imposed at point of sale, under Extended Producer Responsibility or Product Stewardship schemes.

Not only do such schemes impact the retail sector, they appear to impose community costs on the community that exceed the value any associated environmental benefit.

It would appear that there is little amiss with the processes required under the Act for the development of a measure, it is just that, in the case of measures that address waste and recycling issues, they are not followed with the required degree of intellectual rigour, or that policies and strategies are put in place under the auspices of EPHC, without first undertaking the required cost-benefit assessment.

Examples and case studies in our submission show how various programs and industry agreements have been advanced, and are being negotiated, where little account appears to have been taken of the associated costs and benefits.

Although the obvious example is the plastic bag agreement, the new National Packaging Covenant has also resulted in increased cost to business without a corresponding increase in community benefit. This is in spite of statements by state and federal governments committing them to the reduction of unnecessary red tape.

There is ample evidence in the recent approaches taken to waste and recycling that the NEPC process is not working as it was intended. This is not due to the wording of the Act, but the way the processes described by it are used (or abused).

Shortcomings in the analysis of policy or regulatory proposals include:

- Failure to properly identify the environmental problem or to define the problem in environmental impact terms

- Failure to identify and quantify genuine environmental impacts and / or benefits

- Failure to fully quantify community costs, and to put these into perspective

- Failure to identify and evaluate all valid policy and regulatory alternatives – including the 'do nothing' option

- A tendency to adopt, uncritically, the regulatory approaches and policies of overseas jurisdictions, for example, Europe.

Whilst the powers and processes of the EPHC and the NEPC Act have not, in the area of waste management and recycling, been properly applied, it is clear that national cooperation in the setting of policy and the development of legislation is indispensable.

NARGA therefore supports the powers and processes inherent in the NEPC Act but emphasises the need to do more than pay lip service to the requirements for rigorous analysis of proposals, and to base the process on sound science.

Not to do so will lead unnecessarily to increased business and community costs and result in an economy that is not optimally competitive internationally.

WHO WE ARE

The National Association of Retail Grocers of Australia (NARGA) is the peak national body representing the independent retail grocery sector in Australia. It is composed of and related to the following organisations:

- Retail Traders and Shopkeepers Association of NSW
- The Master Grocers Association of Victoria
- Queensland Retail Traders and Shopkeepers Association
- WA Independent Grocers Association
- Tasmanian Independent Retailers
- IGA Retail Network
- State Retailers Association of SA

Together these represent more than 5000 small to medium sized businesses employing over 150,000 people, many of them young people who often get their first taste of the working environment in the retail sector.

Retailers provide the interface between manufacturers and producers and the general public and are therefore significantly impacted by policies and regulatory practices that impact on product price and / or attempt to incorporate additional taxes or levies into product prices.

Consumers see the resulting price increase as attributable to the retailer. That perception, and the cost increase itself, have an impact on the retailer's business.

Introduction

Retail grocers provide the interface between food and other product manufacturers and the consumer. They are therefore directly impacted by legislation and other rule making that affects products within that supply chain.

Examples include the use of the NEPC Act to provide a NEPM to support the National Packaging Covenant, and EPHC action aimed at reducing the availability of plastic shopping bags. Other measures are foreshadowed to control the recovery of televisions, electronics and electrical goods.

Increasingly, retailers are seen as potentially providing a return (or re-use) mechanism for a range of goods as has already occurred in the case of plastic bags. Return to retail is also a feature of two voluntary return programs, Mobile Muster – for the recovery of mobile phones, and Cartridges 4 Planet Ark – a return scheme for printer cartridges.

Proponents of return or re-use programs need to look at the costs of providing these services - including the value of retail space, and the potential for adverse impacts. Contamination brought into food stores via re-usable shopping bags would be one example, occupational health concerns are another.

NARGA fully supports the intent of the NEPC Act, and the efforts by EPHC to ensure that significant environmental issues are addressed at the national level – rather than in a piecemeal fashion on a state by state basis.

However NARGA is not convinced that:

- the checks and balances inherent in the legislation and its underlying agreements are effective in ensuring that only significant matters are addressed through the EPHC process,

- EPHC is given sound advice as to the nature of the problems being addressed nor the costs and benefits of any proposed measure or other rule making proposal,

- the processes involved in the development of NEPMs are sufficiently rigorously applied to ensure that environmental issues are properly identified and that the resulting NEPM represents the best policy response.

Rather than addressing issues of national significance, the states seem to have been able to elevate trivial matters onto the EPHC agenda and then have been able to use processes that do not come under the regime within the NEPC Act, to initiate agreements and programs to address those matters. This has obviated the need to go through the usual cost-benefit assessment processes before any policy approach or any agreement is proposed. The plastic bag issue is an example.

It is our view that, in the area of waste management and recycling, the processes outlined under the NEPC Act are not being following with sufficient rigour or are being bypassed by EPHC, with the result that projects, programs and measures are initiated that either do not result in net identifiable environmental gains or do so at disproportionate community cost or through use of inappropriate methods.

Terms of reference and definitions

The terms of reference given to this review are broad. Rather than respond to each of the terms of reference, this submission comments on:

- the functions of the Environment Protection and Heritage Council (EPHC),
- the National Environment Protection Council Committee (NEPCC),
- other committees / working group set up by the EPHC under Section 33 of the Act
- the National Environment Protection Measure (NEPM) development process
- specific NEPMs and draft NEPMs – as case studies
- the EPHC Strategic Plan
- the range of matters to be addressed via NEPMs

This approach has been taken in order to address issues relating to the operation of EPHC and the development of NEPMs more directly and comprehensively.

The focus of this submission is on those measures that impact on waste management and recycling, or implement related policy, for the following reasons:

- we seek to demonstrate that the processes associated with the development of NEPMs and other regulatory instruments in the area of waste management and recycling clearly demonstrate failure of the NEPM processes to meet the outcomes and objectives required under the Act
- our concern that, in this area, additional costs are imposed on business and the wider community that are either unrelated to or disproportionate to any improvement in environmental outcomes – recent action in regard to plastic shopping bags is an example
- evidence that policy in the area of waste management and recycling is more sentiment driven than fact based, resulting in policies and programs that may be populist, but do little to improve

environmental outcomes – this reality is combined with a concern that the processes set up under the Act do little to separate real environmental threats from perceived ones.

- our contention that, whilst the power to make NEPMs in matters that relate to pollution are important and should be retained – the power to make NEPMs in relation to re-use and recycling is not directly linked to pollution outcomes and does not fit into the same regulatory framework.

- our concern that the NEPM process is being used to drive a 'recycling at any cost' agenda, based on a flawed concept of 'resource recovery' or 'resource conservation', irrespective of whether actions proposed result in genuine environmental benefit.

- our concern that this rule-making power is being abused to advance populist 'environmental' agendas, facilitated by a lack of rigorous assessment based on sound science.

NARGA supports the objectives of the NEPC Act and its insistence that measures (NEPMs) that are developed through it are rigorously reviewed as to their costs and benefits.

NARGA also supports the coordinating function of the Act and of the EPHC and NEPCC, but believes that ALL policies, programs, projects and agreements developed or negotiated in the name of the EPHC need to be subjected to the same rigorous analysis as required for measures under the Act.

The functions of the Environment Protection and Heritage Council

Under the Act the functions of the EPHC (at least the NEPC functions of the EPHC) are restricted to the making of Environmental Protection Measures (NEPMs) and assessing and reporting on their implementation and effectiveness.

EPHC, in performing that function, may, under Section 13 consult widely, obtain advice from the NEPCC or any other committee it has established (under Section 33), commission research, publish reports (relating to NEPMs) and provide information to the public.

The development of NEPMs is restricted to matters allowed under the Act and by processes described in the Act and the IGAE (Schedule 3 of the Act). NEPMs also have to meet the requirements of Section 15 of the Act which, among other things, require consideration of 'the environmental, economic and social impact of the measure' and 'the simplicity, efficiency and effectiveness of the administration of the measure'.

The development of NEPMs must also meet the requirements of National Competition Policy legislation and COAG guidelines on the development of standards and legislation.

In other words, the 'rule making' powers of the EPHC are, and should, be tightly regulated and controlled, by the Act itself and by other Acts and agreements.

However, the ability of these controls to prevent the development of measures that do not meet the required standards and / or do not address significant environmental issues are dependent on the rigour with which these control mechanisms are applied, and the quality of information used as input to the evaluation process.

It also appears that EPHC has been able to circumvent the NEPM impact assessment processes through the use of EPHC Working Groups which, prior to providing advice to EPHC ministers on nominated issues, are used to put pressure on industry sectors to develop a 'voluntary' agreement to address the issue, without the need for a rigorous assessment of the 'problem' or for a cost-benefit analysis of the proposed 'solution'. The regulatory impact assessment is then only carried out when the NEPM is developed to parallel the agreement reached.

The EPHC has, apart from its function under the Act to make NEPMs, important coordination and policy development functions. However,

these functions need to be exercised with the same degree of rigorous, science based analysis as is required for the development of measures under the Act, and not used to initiate policies, programs, actions or agreements that bypass the requirements for analysis that would apply had they been brought forward using the NEPM making mechanisms of the Act.

Such analysis needs to be undertaken during the policy formation process, prior to the announcement of programs, projects or agreements, and not after the fact.

The National Environment Protection Council Committee

NEPCC provides a useful mechanism for input into EPHC and the NEPM process. The NEPCC, being made up of senior representatives of federal and state environment departments and local government, should collectively have access to a wide range of expertise on environmental issues. In spite of that, judging by recent outcomes, it is not clear that EPHC ministers always get good advice on the matters that come before them or, if such advice is made available, that they act on it in an appropriate manner.

Only NEPCC know what advice is being given to EPHC both collectively by NEPCC itself and to individual ministers by their own department heads, who are the members of NEPCC. Therefore only NEPCC can tell whether the advice given is the issue, or whether the problem is the way it is being received and acted upon.

All we can see from the process, from the outside looking in, is that issues that get an EPHC response in some cases do not warrant their attention, and in other cases result in an inappropriate response – one that is disproportionate to the matter being addressed.

It is possible that EPHC is being used to advance issues that are on the individual state regulatory agenda – either initiated within that state's political framework or within its bureaucracy. EPHC and its committees are then used to bring other states on board and to advance that particular agenda and / or to shape the EPHC regulatory agenda or strategy.

Of particular concern is the tendency towards advice based on copying regulatory approaches taken by other jurisdictions, e.g. Europe, without first checking the local validity of that approach from environmental, social and economic perspective. Proponents appear to assume that the other jurisdiction has 'done its homework' in relation to costs and benefits, and that the measure to be adopted will translate into Australian law without adverse consequences. The current push for 'product stewardship' or 'extended producer responsibility' is an example.

The reality is that the EU does not conduct a cost-benefit assessment of any new directive – that is part of the ten year review process (i.e. after the fact). Also, the OECD process used to develop their EPR guidance manual[1] was less than rigorous, did not involve a cost-benefit assessment

[1] Extended Producer Responsibility, A guidance manual for governments, OECD, 2001

of the EPR mechanism, or an assessment of EPR programs which had been in place in Europe at that time, in some cases for over ten years.

As a result of this approach, a number of 'product stewardship' programs targeting the recovery for recycling of a range of products, are in development here, before any cost benefit analysis for the recycling of these products has been undertaken, before the impact of product levies or taxes that underpin these schemes have been assessed, and before the EPR mechanism itself has been assessed in terms of its benefits relative to other regulatory approaches.

What also appears to be missing from the process is an opportunity for external review. Personnel involved in giving advice to ministers, either directly or through NEPCC, all come from the environment departments in the various jurisdictions. Whilst such advice is essential, it lacks the balance derived from a 'whole of government' approach – input that would inject a wider perspective or world view appears to be lacking, particularly in the area of waste management and recycling.

There would appear to be a role for an interdepartmental review process, where regulatory proposals brought to NEPCC / EPHC are first assessed by representatives from within other government departments.

It could be argued that some of these proposals have been through a public consultation process, and therefore such review is unnecessary. The usual consultation process is, however, one initiated by the same agency, based on the same data and preconceptions, and is assessed internally.

For whatever reason, the current processes seem to be failing to recommend regulatory approaches other than those that are currently in vogue, and appropriate weight is not given to the option of not regulating.

The NEPCC needs to ensure that advice given to EPHC, either of its own accord or in response to requests from the EPHC, is based on sound science and on a wider assessment of the possible impact on Australia of any proposals for action, than would be available from their own sources or departments.

Other committees set up by the EPHC

Under Section 33 of the Act, EPHC has the power to set up other committees to give it advice relating to the development of NEPMs. In recent years, EPHC Working Groups have been set up to look at waste and in particular:

- tyres
- electrical waste (TVs and computers)
- plastic bags[2]
- Product Stewardship

These groups appear to act under the authority of EPHC, whether or not their actions are designed to result in the development of a particular NEPM. In so doing, they 'negotiate' with industry sectors to develop 'voluntary' approaches to the recovery for recycling of a range of goods, typically those listed under legislation in some states as 'wastes of concern' or 'priority wastes'. There appears to be no legislative basis or legislative power for these committees to undertake such negotiations, i.e. the role assigned to these groups goes beyond the powers conferred by the Act.

'Voluntary' programs have already been set up for the recovery and recycling of mobile phones and printer cartridges, and an industry group has been established to promote a scheme for battery recycling. In the case of the mobile phone scheme, the sector has faced ongoing pressure from EPHC ministers and other environmental agencies to improve the mobile phone recovery rate (a mandated scheme being the ultimate threat), yet no cost-benefit analysis has been undertaken to assess the viability or sustainability of mobile phone recycling.

None of the existing or proposed product recycling programs is viable without additional financial support from the sector concerned, a cost that is inevitably passed on to the consumer.

Whilst the Act allows committees or working groups to be formed to advise EPHC ministers in relation to the development of NEPMs, it does not appear to confer authority on such groups to enter into negotiation with industry sectors in the development of agreements to run 'voluntary' product recovery and recycling programs.

[2] This group reports to the National Packaging Covenant Council that was set up under the National Packaging Covenant, an agreement between representatives of the three levels and companies in the packaged goods sector.

Industry faces a number of problems with the approach being taken, including the following:

- the negotiations for product recovery and recycling schemes take place before the costs and benefits of the recovery of that product have been assessed

- mechanisms recommended for funding such schemes tend to be based on the European EPR approach, before the viability of this taxing mechanism has itself been assessed or debated by the community

- industry is at a disadvantage in the negotiation process because they are told that certain states have already legislated to provide them with the power to make such schemes mandatory, and then told that it would be in their interest to have a national scheme rather than individual programs in each state

- Industry is constantly reminded of the 'free rider' problem, with the suggestion that only an agreement backed up by supporting legislation (or a mandatory scheme) will ensure that they are not at a commercial disadvantage. They are not told that the 'free rider' problem is a direct artefact of the EPR mechanism and that other funding mechanisms are available to address the cost of recovery and recycling of their products.

- industry is at a disadvantage because it does not have the environmental knowledge available to government negotiators, and are not getting unbiased advice (i.e. advice other than suggesting that such a scheme is warranted)

- Community groups / NGOs are brought into the discussions to provide additional pressure.

These processes are not subjected to the scrutiny of a regulatory impact statement (RIS), or assessed under COAG guidelines, until such time as a draft NEPM is prepared, one which would then mirror the scheme negotiated with the industry sector. It is possible that at this late stage the RIS will only consider the options of a stand alone scheme or one supported by the NEPM, and does not address the underlying environmental issue or the validity and applicability of the approach taken. In any case, having negotiated a scheme with an industry sector, it is more than likely to proceed to implementation, in spite of the finding of a RIS.

There are a number of concerns that should be raised regarding the use of the approach being taken in the development of industry agreements (under the purported authority of EPHC). They include:

- The ability of scheme proponents to bypass the mechanisms that have been established at the national level to ensure that any new legislation is in the broader public interest

- The lack of analysis / rigour involved in the establishment, at state level, of lists of 'wastes of concern' or 'priority wastes' targeted for recovery schemes

- The ability of states to use these negotiations to initiate industry funded programs (funded through industry imposed levies or taxes) to avoid constitutional constraints on the imposition of product levies or taxes

- The lack of any firm or defined discipline relating to the development of lists of products to be targeted, which could result in an expanding range of product taxes to be imposed on the community

- The absence of any assessment of the EPR mechanism itself and its capacity, or otherwise, to bring about cost-efficient outcomes

There is no doubt that the approach being taken has its attractions to state bureaucracies. They do not have to go through the process of justifying the proposed scheme, nor do they have to go to their minister to ask for access to public funds to support proposed programs.

However, although funds do not come directly from the public (tax) purse, the general public as consumers do end up paying for these schemes.

Under authority of the EPHC, negotiations are underway for the development of a number of schemes, including schemes to recover televisions and computers. The rationale behind the recovery of these electronic goods is two-fold – the concept of 'resource recovery' and the perception of environmental harm from the constituent materials, if these goods are disposed in landfill.

However, no cost-benefit has been undertaken that demonstrates that the removal of these products from the waste stream destined for landfill results in a net community benefit. The concept of a value resulting from

the recovering these products for recycling has been imported from overseas but has not been confirmed using local data or conditions.

A report[3] on computer recycling prepared for the computer industry by Planet Ark Consulting points to a lack of knowledge as to the scale of the recycling task (and hence its cost) and questions the validity, in environmental and net benefit terms, of diverting CRT screens[4] and computers from landfill. The true environmental impact associated with disposal to landfill has not been assessed.

An industry group is also looking at setting up a battery recycling program in response to batteries being included in state based lists of wastes of concern. The EU has had a battery recycling directive in place since 1994, but its ten year review of that directive showed that cadmium from NiCd batteries made up less than 1% of the anthropogenic sources of cadmium, with the major contribution of cadmium to the environment coming from fertiliser. Since the reduction of human exposure to cadmium is the rationale for recycling NiCd batteries, their elimination from the waste stream would not appear to make much difference to the level of human exposure.

A program has also been developed for recycling mobile phones (which use NiCd batteries). Again, it would appear that mobile phone recycling results in little net community benefit.

The authority of the EPHC is being used by EPHC committees and / or state based working groups to negotiate agreements with industry to achieve outcomes, objectives and targets that have not been set by rigorous assessments of costs and benefits or by following the processes outlined under the NEPC Act. The result is that a range of programs and schemes have been developed or are in development which have not had the benefit of such assessment and could result in outcomes where the cost of their achievement exceeds any environmental benefit. The program which aims to reduce or eliminate light weight plastic shopping bags is but one example.

[3] AIIA – E-waste Program Development Phase, Planet Ark Consulting, June 2005
[4] The US EPA has recently re-classified CRT screens as non-hazardous waste as the risk of lead leaching out of them is minimal

The National Environmental Protection Measure development process

The development of NEPMs is outlined in the Act. The following requirements of the Act are noted:

In assessing an NEPM

- "...the environmental, economic and social impact of the measure"

- "...the simplicity, efficiency and effectiveness of the administration of the measure"

- "...whether the most effective means of achieving the desired environmental outcomes of the measure is by means of a national environmental protection standard, goal or guideline..."

must be considered.

The Intergovernmental Agreement on the Environment (IGEA) reinforces these concepts:

- "Any proposed measure must be examined to identify economic and social impacts and to ensure simplicity, efficiency and effectiveness in administration" (Schedule 4, Para 1)

- "In determining whether to adopt standards, guidelines or goals, the Authority (EPHC) will consider which is the most effective means to achieve the required national environmental outcomes." (Schedule 4, Para 6)

- "Publication of such drafts will be accompanied by an impact statement which includes:
    - (i) the environmental objectives and the reasons for the measures and the environmental impact of not adopting those measures
    - (ii) alternatives considered to achieve the desired environmental objectives and the reasons for their non-adoption
    - (iii) an assessment of the economic and social impact on the community and industry as a result of establishing the measures

(iv) the manner in which the regional environmental differences in Australia have been addressed in the development of the measures (Schedule 4, Para 10)

It is clear that the Act requires a rigorous process to assess the issues being addressed by any proposed measure (in clear environmental impact terms) and the assessment of the costs and other impacts on the community and industry.

Whilst it is clear that in the formulation and development of waste related NEPMs the *processes* outlined by the Act are being followed, the *outcomes* sought by the legislation are not being achieved. These outcomes are detailed in the Act and include:

- "…. The adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development…" (Section 3.2)

- "….the effective integration of economic and environmental considerations in decision-making *in order to improve community wellbeing* and to benefit future generations (our emphasis). (Section 3.2)

- "….ensuring that measures adopted should be cost-effective and *not be disproportionate to the significance of the environmental problems being addressed"* (our emphasis) (Section 3.4 (iii))

In the area of waste management and recycling there are a number of reasons as to why these objectives of the Act are not being met through the NEPM development process. These include:

- The failure to properly define the environmental issue being addressed in environmental impact terms, which would in turn allow a proper assessment of the extent and relevance of those impacts, the need for action and the degree to which regulatory measures are appropriate

- The failure to properly assess the default or 'do nothing' option

- The quality of studies undertaken to assess or quantify impacts or costs and benefits

- Problems with the interpretation of such studies

- Problems with perceptions of environmental impact that lead to action being proposed where none is warranted. These include:

    - A perception that there is an inherent net benefit in avoiding the generation of solid waste
    - A perception that there is an inherent net benefit that results from the reduction of waste going to landfill
    - A perception that there is an inherent net benefit associated with re-use or recycling
    - Uncritical application of the 'waste hierarchy'
    - Confusion between the potential for impact, the risk of impact and actual impact – the suggestion that NiCd batteries need to be recycled is an example
    - A perception that 'we are running out of resources' and that any form of diversion from landfill (through re-use, recycling or energy recovery) represents 'resource conservation' or 'resource recovery'
    - A perception that we 'are running out of landfill space'
    - A perception that the landfilling of waste material is inherently sub-optimal

The situation is complicated by the fact that locally and internationally a new vocabulary has developed around issues of waste management and recycling where the language used to describe certain activities imply benefit – where the action is of an 'approved' type, and diss-benefit where the action is 'not approved'. The 'approved' or 'not approved' status of a particular action has more to do with ideology or sentiment than rigorous analysis of the costs and benefits of the proposed action in the context in which it is proposed.

Unfortunately the language referred to has found its way into state legislation governing waste management and, as such, the terms used have been normalised, and are used throughout the regulatory assessment process.

Whilst the NEPC Act outlines specific procedures to be followed in the making of a measure (NEPM) and for its assessment, these procedures are either being bypassed or not implemented with required degree of rigour. Where the procedures and processes are followed we see sound science being replaced by sentiment, ideology or preconceived concepts of environmental correctness.

Specific NEPMs and draft NEPMs as case studies

- **Used Packaging Materials and the National Packaging Covenant – Plastic Bags agreement[5]**

The NEPM for Used Packaging Materials[6] was developed in mid 1999 as a 'safety net' for companies signing up to the original National Packaging Covenant (NPC). It allowed jurisdictions to target non-signatory companies and to require these to provide data on packaging and to either recover packaging to a level equivalent to that being achieved under the NPC, or to show that they were achieving equivalent outcomes under some other program or arrangement.

The NEPM sought to address the 'free rider' concerns of NPC signatory companies, the idea being that companies that chose not to sign up to the NPC would be obliged to achieve similar outcomes. (The NEPM was also used to impose reporting and other requirements on jurisdictions and local councils)

However, the requirements of the NEPM were more stringent (and more costly) for non-signatory companies, than the NPC requirements were for signatory companies. This is because companies that chose to comply with the NEPM requirements, rather than become NPC signatories, had to provide an extensive data set (at a cost) and achieve recovery / recycling objectives outside of the local government run kerbside recycling system. The 'logic' was that this would encourage companies to become a signatory to the 'voluntary' agreement – the NPC.

The development of the original National Packaging Covenant and NEPM as a framework for regulating packaging needs to be seen in a broader context. It came at a time when:

- Arrangements under the original set of ANZECC agreements, which had set targets for recovery and recycling of packaging materials for various sectors of the industry, were breaking down. This was because some sectors refused to sign new agreements or to agree to new, arbitrarily set, targets.

[5] The Plastic Bags agreement is included here as it is managed through the National Packaging Covenant Council and its processes

[6] National Environment Protection Measure for Used Packaging Materials, ANZECC, 2 July 1999

- Local government was looking for ways to share the cost of providing recycling collection services, and was promoting European style levies.

- State governments were considering regulatory intervention.

It therefore made sense for industry to bring the matter to a national forum and so negotiations were commenced, first with local government and later at state and federal levels, to develop a nationally consistent regulatory regime for packaging.

Negotiations with representatives of local government bodies resulted in a better understanding of the issues facing local government, the nature of costs and cost uncertainties and the means available to reduce those costs and uncertainties. It also resulted in a position being put, and generally accepted, that for an estimated net cost of around $25.00 per annum per household for the provision of recycling collection services, it did not make sense to develop a new system of taxes for packaging to recover that cost, especially when local government could charge householders directly through council rating systems.

The industry offer was not based on subsidising recycling collection services, but on the provision of funds for studies that would lead to better, more cost-efficient collection programs.[7] Under the funding arrangements in the first NPC, state jurisdictions agreed to match industry funding for such programs.

The objectives of the first NPC were as follows:

- "Establish a framework based on the principle of shared responsibility for the effective lifecycle management of packaging and paper products including their recovery and utilisation.

- Establish a collaborative approach to ensure that the management of packaging and paper throughout its lifecycle and the implementation of collection systems including kerbside recycling schemes produce real and sustainable environmental benefits in a cost effective manner.

[7] The first of these studies was a cost-benefit analysis of kerbside collection and recycling, the objective of the brief being in part to determine which recycling activities were NOT worthwhile, so that they could be eliminated and thereby reduce the cost to councils.

- Establish a forum for regular consultation and discussion of issues and problems affecting the recovery, utilisation and disposal of used packaging and paper, including costs."[8]

However, the success or otherwise of the NPC was not judged against these criteria during the NPC review process. Neither did the review process properly assess whether any improvement in recycling outcomes had been achieved at the local government level or whether changes to packaging had taken place within the packaged goods supply chain during the currency of the NPC.

Instead, the review amounted to an assessment of how many company and other NPC Action Plans had listed and reported actions against each of the voluntary stewardship criteria. Using this simplistic approach, and other related measures, the original NPC was deemed to be deficient in its capacity to regulate the environmental aspects of packaging and judged as needing 'strengthening'.

As a result, the new NPC, or NPC Mark II,[9] which came into effect in July 2005, imposed a new set of requirements on company signatories, including:

- The development of an extensive company data set outlining weight of packaging used, by package type, amount of product packaged, recyclability of each category, proportion capable of being recycled etc.

- The development of three year Action Plans

- Reporting against the data set and on Action Plan progress on an annual basis

- Conformance with a new more prescriptive Environmental Code of Practice for Packaging[10] (developed by copying information from the European CEN code developed in response to the EU Packaging and Packaging Waste Directive)

- Compliance with a new set of 'key performance indicators' for the NPC itself.

[8] National Packaging Covenant, ANZECC, July 1999
[9] National Packaging Covenant, EPHC, 15 July 2005
[10] Ibid

In addition 'overarching targets' were set for the NPC and NEPM. These included an overall packaging recycling target of 65% (up from 48%), specific material targets, a proposal to set targets for materials currently not being recycled (i.e. a significant extension of the range of materials to be targeted for recovery), and a target of 'no increase' in the overall quantity of packaging going to landfill in comparison with 2003 levels.

Increased recycling rates are to be achieved by, among other means, extension of recycling services to 'out of home' recycling (at additional community cost).

The NPC is also to be used to target litter.

The NEPM for Used Packaging Materials[11] was revised to reflect these changes.

A regulatory impact statement (RIS) was prepared for both the new NPC and NEPM. However, they were deficient in many respects, including:

- Failure to clearly define the environmental problem being addressed

- Failure to canvass all possible regulatory and non-regulatory responses, and in particular to properly assess the 'do nothing' option (see below)

- Failure to identify fully the costs imposed on business and the community and to detail environmental benefits associated with *regulation,* as opposed to the recycling activity itself.

An example is the RIS prepared for the new NPC[12] which estimates that "businesses undertaking increased packaging recycling are likely to average increased financial costs of between $50 and $100 per business year" – a gross underestimation of costs to business.

Costs to the community, through local government and product prices, associated with the establishment of recycling services for the extended range of materials to be collected, do not appear to have been properly assessed.

[11] National Environment Protection Measure for Used Packaging Materials, EPHC, July 2005
[12] Consultation Regulatory Impact Statement on the Revised National Packaging Covenant, Nolan ITU, March 2005

The costs associated with the provision of detailed data appear to have been underestimated. Data provision comes at significant costs, particularly if data is required to be provided in a form or format not usual to the business, as is the case with the new NPC.

The cost of generating and supplying packaging related data at a company specific level is one of the on-costs associated with a European style levy system – a cost that yields no additional environmental benefit.

The rationale behind the need to supply this data has not been clearly outlined. If it is for tracking purposes, i.e. to determine whether volumes of packaging or package types are increasing or decreasing over time, a simple sampling approach would be all that is required.

It is unlikely that the ABS has been asked to comment on this additional data gathering exercise, as is required.

It is doubtful that the data, even in aggregate, will provide a true picture of the changing packaging scene, as not all companies in the packaged goods sector are NPC signatories.

The basic question that needs to be addressed is how the data relates to the objectives of the NPC, or the supposed underlying environmental outcomes, as there does not appear to be a packaging reduction / packaging change target (nor should there be) in the NPC, and the gathering of company specific packaging data does not impact on or improve recycling outcomes which are still (and should remain) a local government responsibility.

Put simply – what do the numbers gathered reveal about the environmental outcomes attributable to the NPC / NEPM or, for that matter, the local government recycling effort?

In our view it appears that the new NPC has significantly increased community costs, through increases in compliance costs, without bringing about a corresponding increase in environmental benefit. This would suggest that the underlying EPHC processes are not working as they should.

Had the processes been followed properly, the most likely outcome of a thorough assessment of the packaging 'problem', would have been that there was no need for any regulation of packaging or its recycling

Another example of the failure of the process to properly match community cost to environmental outcome is the management, through the National Packaging Covenant Council, of the EPHC request (or directive) to reduce by 75% the proportion of plastic shopping bags in litter.

The matter of light weight plastic shopping bags was addressed by EPHC in response to media campaigns mounted by environmental NGOs. The EPHC response was to set targets for the reduction of light weight plastic shopping bags *being used* as a means towards achieving a target of a 75% reduction in plastic bag litter. (At a time when the proportion of plastic bags in litter was unknown.)

Again, this 'voluntary' approach was seen as an alternative to legislation which would have either banned the bags or applied a levy on them to encourage a reduction in their use. The Irish experience with levies was used as an example, even though at that stage, there was no hard data available on the 'problem' in Ireland, or on the success or otherwise of the 'solution'. It has since been revealed that Ireland has had to increase its levy in order to preserve the 'benefits' of the original measure.

NARGA has a number of problems with the approach taken by EPHC. They include the following:

- At the time to policy was announced, there was no data available on the impact of plastic bags, as part of litter, on the environment.

- Although EPHC had set a target of a 75% reduction of plastic bags in litter, there was no litter survey data available on the proportion of plastic bags in the litter stream

- No explanation was forthcoming on why plastic bag litter (acknowledged as a small proportion of the litter stream – even without hard data) should not be tackled as a part of the overall litter problem, as opposed to being addressed separately through other mechanisms

- No explanation was forthcoming as to why the prime mechanism for reducing the incidence of plastic bags in litter was the reduction of plastic bags use. Plastic bags themselves weren't the problem – plastic bags in litter were. (If a similar regulatory approach were to be taken to reduce motor vehicle accidents, we would see taking cars off the road as a 'solution' to this problem.)

- Why was action proposed before the facts were known?

The Department of Environment and Heritage commissioned a report on plastic bags and regulatory (levy) options available.[13]

It defined 'the problem' as one related to resource consumption and litter.

Although the report admitted "....there is no data available on the total size of the litter stream in Australia...." it estimated "....that a total of between 50 and 80 million bags enter the environment as litter annually."[14] The report provides no information on how this estimate was arrived at.

The report was also ready to miss-quote an Environment Canada website reference which, through the way the quote was reworded, suggested that 100,000 marine animals were being killed by plastic bags annually. The study referred to was referenced on the Environment Canada website and reports on a four year survey of birds (25,000 per annum) killed in fishing nets as by-catch of the fishing industry off the coast of Newfoundland. It makes NO REFERENCE to plastic bags as the cause of these deaths.

A retrospective review of the information available to DEH at the time (on its own website) suggests that there was sufficient data there for them to conclude that plastic bags were not a major marine litter problem. (see **APPENDIX A – LACK OF BASIS FOR CURRENT PLASTIC BAG POLICY)**

The study also did not properly assess the cost to the industry and the wider community associated with the reduction / removal of light weight plastic shopping bags, and their proposed replacement with heavier re-usable bags.

EPHC ministers may suggest that the retail sector signed on to a 'voluntary' code for the reduction of plastic shopping bags, and that the sector was involved – through a NPC Working Group, in the development of the sector response; i.e. that it was a 'negotiated' outcome.

In reality the retail sector was given little option. The options were co-operation with the proposed strategy (in spite of its lack of logic) or face regulatory action.

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[13] Plastic Shopping Bags – Analysis of Levies and Environmental Impacts, Department of Environment and Heritage / Nolan ITU, December 2002
[14] Ibid P8

As a result, substantial costs were imposed on the retail sector and on the wider community – costs that did not contribute to a corresponding improvement in environmental outcomes.

Of particular concern to the retail sector was the readiness by ministers and regulators to co-opt retailer resources including:

- Valuable retail space for alternative bags and recycling bins
- Management time and resources
- Additional check-out staff time
- Promotional and communication costs

- as well as costs to individual consumers associated with the need to purchase an appropriate number of re-usable bags.

This is not the way EPHC is supposed to act under the rules set out in the NEPC Act (or the IGAE). It was clearly a case of the 'solution' being dictated by EPHC ministers, and the NEPC processes being used after the fact to try to make the decision look sensible – to shoehorn the data to fit their conclusions.

It appears that, whilst it is useful to have waste and recycling matters debated nationally and for nationally consistent approaches to taken, the EPHC / NEPC framework appears unable to prevent the implementation of less than optimal 'solutions' to environmental 'problems'.

It would appear that a lack of rigour in the application of the NEPC Act processes is at the root of this problem. I.e. the 'problems' are not being properly defined in environmental impact terms, and the need for regulation or other intervention is not being properly assessed.

What we are now seeing is the EPHC / NEPC process being used to advance populist or 'environmentalist' agendas – agendas elevated by states to the national level – without the NEPC Act processes capable of restraining this trend through the application of rigorous analysis, as envisaged by the Act.

(Draft) NEPM for Product Stewardship

The NEPM for Product Stewardship is in development. A discussion paper has been released to industry and responses have been analysed. It is clear from the material available, that the 'product stewardship' NEPM is supposed to be able to provide a 'safety net' for companies entering into 'product stewardship' arrangements that may put them at a competitive disadvantage. The safety net legislation will then attempt to cover companies that are not part of those product stewardship arrangements, called 'free riders'.

It is clear that the proposed NEPM is to be 'framework' legislation providing for schedules that will address the detail of individual programs.

So how is 'Product Stewardship' different from "Extended Producer Responsibility" – the latter being the foundation of levy based product recovery schemes in Europe and elsewhere?

In a response by DEH[15] to the Productivity Commission's draft report of its inquiry into waste management[16], the two were differentiated as follows:

- In the case of "Product Stewardship" all groups in the product chain are responsible – (including governments and consumers) and each group is responsible for reducing the environmental impacts that they can most efficiently control

- In the case of "Extended Producer Responsibility" DEH sees the brand owner or importer as the responsible party, and responsibility for end-of-life recovery shifting from local government to producers (brand owners or importers).

If these definitions are correct, a 'Product Stewardship' NEPM would not need to worry about levies and 'free riders' as the producer would not be responsible for product recovery – as the producer is not the party that is best placed to run product recovery programs – in most cases local government is. The DEH definition of "Product Stewardship" appears to be describing a "Shared Product Responsibility" model.

It is now becomes clear that, in their discussion of a Product Stewardship NEPM, the need for a co-regulatory safety net comes from the imposition

[15] Second Submission to the Productivity Commission Inquiry into Waste and Resource Efficiency, DEH, July 2006
[16] Waste Management, Draft Report, Productivity Commission, Canberra, 2006

of EPR type mechanisms, where product recovery and recycling costs are borne wholly or partly by the producer, brand owner or importer.

In blurring these definitions, DEH and state environmental agencies are following the Canadian example where, in several provinces, EPR schemes and the associated taxes have been introduced using the softer 'Product Stewardship' language.

The point that seems to be missed is that the so-called 'free rider' problem associated with these schemes is a direct consequence or artefact of an EPR approach. If companies were not being asked, via EPR, to financially or physically support product recovery, they would not be under a commercial disadvantage, and there would be no need by 'free rider' companies to try to avoid the cost of participation.

The NEPC Act requires, in the development of an NEPM, consideration of cost-efficiency and administrative efficiency. To date no such analysis has been undertaken of the EPR mechanism itself, to see whether it meets cost and administrative efficiency criteria. The EPR mechanism is unlikely to survive such analysis.

Setting up an EPR scheme involves the following:

- Establishing (and funding) a Producer Responsibility Organisation to collect product levies (taxes) and distribute funds for collection and recycling of used products.
- Setting up those taxing and payment systems
- Organising product collection and recycling (usually via arrangements with other parties)
- Promoting the program to the general public
- Collecting and reporting relevant data
- Following up non-participants (free riders)

It is equivalent to setting up a mini-GST system for each product group that has its own "Product Stewardship" scheme, and setting up a collection and recycling program to match.

Further, the approach currently being taken by state and federal environmental agencies is to negotiate for separate schemes for each

targeted industry sector (TVs, computers, batteries etc.) compounding both the complexity and cost associated with product recovery. This approach is dictated by the need to target each sector to recover collection costs, rather than through consideration of operational and administrative efficiency.

The driver behind this push appears to be the notion of 'resource conservation' – in spite of the fact that no underpinning study exists on the nature and type of 'resources' that are scarce or likely to become scarce, nor one that indicates where, in a complex economy, is the best place in the economy to which conservation or recovery action should be directed or concentrated.

For example, let us look at steel recycling. Steel cans at the household level come under local government recycling collection programs and, as packaging, are subject to the National Packaging Covenant.

The steel industry in Australia recycles some 2.9 million tonnes of steel.[17] Of that some 60,000 tonnes (or 2%) comes from household recycling collection schemes, for which a recycling truck has to visit each of 8 million households weekly or fortnightly.

The simple question is then; if our 'environmental' objective is 'resource recovery' is recycling of cans at the household level the most efficient way to increase the level of steel recycling by 2%? Yet NSW has steel cans (as part of packaging) listed among its list of products targeted for EPR action.

The point being made here is that none of the programs proposed under the NEPM for Product Stewardship have received the degree of analysis required under the NEPC Act, and by the time such analysis is conducted, the scope and shape of those programs will have already been determined by negotiation with the various sectors, under threat of state legislation.

Some comments on the consultation process associated with the development of this NEPM are appropriate:

- The discussion paper released to industry[18] fails to define the *environmental* problem being addressed. Under "Why is action

[17] BlueScope Steel website
[18] Industry Discussion Paper on Co-regulatory Frameworks for Product Stewardship, EPHC, December 2004

needed" it is suggested that "too much energy and water is used in manufacture; natural resources (are) used in a wasteful or inefficient way; (there is) generation of unwanted by-products; excessive energy use and pollution associated with the use of the product and waste generated when it is eventually disposed of." (p2) – No data is presented to support these statements, nor is it stated how the proposed NEPM will address these matters.

- The statement is made that the stewardship framework will, however help by: "improving the efficiency of resource use in products; increasing resource recovery; minimising the generation of waste; improving the management of post-consumer waste; reducing the risks to human health from poor management of products; and incorporating product management costs into consumer price signals" (p3) – Here the post-consumer waste / EPR slant is evident, but again, no evidence is provided as to how the mechanism proposed is going to achieve those outcomes, nor why this particular approach is the best way of achieving them.

- As with EPR itself, the claimed 'benefits' are not attributable to the co-regulatory mechanism, but the result of activity within the proposed program, however these programs are funded – assuming that there is a net community benefit.

- Although the paper[19] goes on to mention a range of regulatory approaches – including non-intervention – only the co-regulatory model is outlined, and it is proposed that under this model "industry will be able to take the primary responsibility for its own products" (p4). This definition of product stewardship is at odds with that proposed for 'Product Stewardship' by DEH in its submission to the Productivity Commission. (see above)

- Flow diagrams and case studies presented clearly indicate that 'product stewardship' is 'extended producer responsibility' in disguise.

Responses to the discussion paper were mainly from industry and government. The report on the consultation exercise[20] says 82% of respondents supported co-regulation, even though it was clear that some had problems with the approach, had reservations or needed more detailed information.

[19] Ibid
[20] Co-regulatory Frameworks for Product Stewardship, Analysis of Submissions, EPHC, undated

The companies that were in sectors working with the EPHC working group (tyres, televisions and computers) were well represented and supportive. That is not surprising. These companies have been told that they are being targeted, that they must act to set up product recovery programs and that, failing a national approach, individual states are prepared to initiate mandatory schemes. They would also be in most need of the enforcement mechanism offered under this NEPM to avoid any competitive disadvantage.

A number of points need to be made about the analysis that was undertaken:

- Of the 39 'industry' respondents, 16 were from recycling companies or their associations. A further five were from organisations that could be classified as Producer Responsibility Organisations (PROs). Retailers were not represented in the responses. (i.e. consultation was not broadly based)

- It would not be surprising that recyclers and related organisations would support what would in effect be a scheme that subsidised their business or existence.

- It appears that support for a co-regulatory model for product stewardship is based on the following assumptions:

    - The programs that will come under this mechanism are in themselves worthwhile
    - There will be some sort of cost shifting mechanism in place to ensure that 'producers' pick up all or part of the cost of product recovery and recycling
    - That this will put scheme participants at a competitive disadvantage
    - That a mechanism is then required to force non-participants to contribute to the scheme or match program outcomes

At no stage was the inherent value or environmental merit of any of these programs addressed or other approaches for funding canvassed.

Again we see that, whilst the processes required under the NEPC Act have been complied with, the analysis of underlying need (definition of the problem) and of available solutions is absent.

This is symptomatic of the public consultation process generally where we see:

- reports tend to emphasise support for the proposal being canvassed, whether or not respondents were fully informed, or whether or not other options were genuinely seen as available alternatives

- an inability to distinguish between industry sectors – industry is grouped as a single cohort even when it is obvious that there may be winners and losers as a result of the implementation of a particular proposal

- no account is taken of the power difference between industry and government and how this can taint industry response. If industry representatives believe that implementation of a scheme is inevitable, their response is then dictated by how a scheme can be made fairer to all or lower in cost to themselves – not on the merit of the approach taken

- no account is taken of the difference in knowledge or understanding of regulatory matters that can exist between industry and government – industry can give support to a scheme on the basis that they believe that government has ensured that the scheme is necessary and that it is the best approach – after all, that is what they are supposed to do under the NEPC Act

- support can be forthcoming from industry simply on the basis that they believe that the regulatory environment is a government responsibility and they will go along with it as long as all competitors are equally affected – i.e. they are quite happy to be a conduit for passing a tax onto consumers, as long as it does not impose a competitive disadvantage. Individual companies do not see themselves as being responsible for overall economic efficiency – they see that as a government responsibility.

- Uncritical acceptance by reviewers of supporting points of view, whether or not these come from credible sources. Opinions are often given equal weight to factual data.

- Use of 'public opinion' or 'public support' as a justification for action. E.g. the EPHC website[21] hosting the discussion paper on product

[21] http://www.ephc.gov.au/nepms/product_stewardship/product_stewarship.htm

stewardship leads with the statement: "The Australian community has a clear desire for industry to support a healthier environment by exercising producer responsibility to reduce the environmental impact of its products." No supporting research is referenced.

What we have tried to do here is to point out that, although the NEPC Act imposes clear requirements that must be met in the development of NEPMs, the system appears to be going through the processes required but without sufficient attention to key elements (i.e. identification of the problem) and without sufficient intellectual rigour.

As stated before, the language used is a problem. **Terms are not clearly defined or used loosely, (e.g. product stewardship versus extended producer responsibility) and the language itself is used in support of the cause – terms such as 'resource conservation', 'resource recovery', 'efficient resource use' contain implied assumptions that suggest that the approaches proposed are worthwhile.**

A whole new language is being used to describe waste management and recycling activities – unfortunately those that have learnt the new language don't know the meaning of the words.

The use of language within the waste and recycling policy sector is one cause of poor policy analysis. Woolly thinking and loose definitions seem par for the course. Thinking at the OECD level is no exception, as is shown by the BIAC commentary (appended as Appendix C) on the draft OECD guidelines for EPR.

It shows that the OECD secretariat was confused as to the nature and the objectives of an EPR policy approach and could not show where EPR of itself (as opposed to the underlying project) yielded a benefit.

It is interesting to note that an EPR based program is never described as an "Increased Community Cost" program! – Or, for that matter, as yet another tax. It is simply assumed that there is a benefit associated with extending a producer's responsibility. In spite of what the various 'Sale of Goods' Acts say about product responsibility, and in spite of the statutory responsibilities of local governments for waste management.

A discussion of Extended Producer Responsibility (EPR) is appended as Appendix B.

The EPHC Strategic Plan

EPHC has a brief that is much wider than waste management. It is, however, encouraging to see the EPHC 2006 – 2008 strategic plan[22] list the following under 'Strategic Directions'

- "strengthen linkages for integrating the results of scientific and economic research with policy development on environmental issues" and

- "Maximise regulatory efficiency and avoid unnecessary impacts"

Waste and recycling policy needs a sound scientific basis and more cost efficient approaches to regulation.

However, under the 'waste management' heading in the strategy's Priority Issues section, EPHC sees the promotion of, among other things, product stewardship / extended producer responsibility as leading to better resource efficiency. Unfortunately no policy analysis document is available to support this assumption.

The rider 'based on better data, economic analysis and sound science' is added. It is to be hoped that the NEPM development processes and EPHC policy mechanisms are going to be reinforced to endure that sound science rules.

NARGA supports the basing of waste policy on sound science and better data. However, it is evident that to date the NEPC processes have not been able to deliver sound policy outcomes.

It is to be hoped that a renewed emphasis on sound science can address the problems we have identified.

[22] Strategic plan 2006-2008, EPHC

Matters to be addressed by NEPMs

NARGA has no comment to make regarding the range of matters to be addressed by NEPMs, other than to point out that the power to make NEPMs for the re-use and recycling of materials appears to be at odds with those being addressed under other headings, which tend to focus more directly on pollution or environmental impacts.

Re-use and recycling, however, has an indirect link to pollution. In some instances certain types of pollution can be avoided through the use of re-use and recycling mechanisms (whilst increasing other impacts through the resources employed to do so), whereas in other instances the impact of re-use and recycling mechanisms can be demonstrated to result in a net environmental loss.

Given the propensity to use of 'resource efficiency' arguments to support measures relating to re-use and recycling, the question needs to be asked as to why these matters are not transferred to departments that manage resource issues, leaving EPHC to address more directly any pollution concerns that may result from re-use, recovery, recycling or disposal operations.

Such an approach to policy would be more likely to result in the direct targeting of pollution or in the proper internalisation of pollution externalities.

However, it is recognised that:

EPHC has a national coordinating function, and that the NEPC Act, properly utilised, provides a mechanism for the development of policies and mechanisms based on sound science and sound cost-benefit assessment. That function of EPHC and NEPC Act can be used to counteract the policy development problems evident in state legislation, provided that the requirements of the Act are rigorously adhered to and the processes are correctly applied.

If that is the case, there would be an argument for retaining the 'reuse and recycling' NEPM category, but to include a requirement in the assessment of the merits of any proposed program or NEPM, for input from other departments, including those involved with resource issues and with industry and commerce.

Conclusions

- **It is our view that, in the area of waste management and recycling, the processes outlined under the NEPC Act are not being following with sufficient rigour or are being bypassed by EPHC, with the result that projects, programs and measures are initiated that either do not result in net identifiable environmental gains or do so at disproportionate community cost or through use of inappropriate methods.**

- **NARGA supports the objectives of the NEPC Act and its insistence that measures (NEPMs) that are developed through it are rigorously reviewed as to their costs and benefits.**

- **NARGA also supports the coordinating function of the Act and of the EPHC and NEPCC, but believes that ALL policies, programs, projects and agreements developed or negotiated in the name of the EPHC need to be subjected to the same rigorous analysis as required for measures under the Act.**

- **The EPHC has, apart from its function under the Act to make NEPMs, important coordination and policy development functions. However, these functions need to be exercised with the same degree of rigorous, science based analysis as is required for the development of measures under the Act, and not used to initiate policies, programs, actions or agreements that bypass the requirements for analysis that would apply had they been brought forward using the NEPM making mechanisms of the Act.**

- **Such analysis needs to be undertaken during the policy formation process, prior to the announcement of programs, projects or agreements, and not after the fact.**

- **The NEPCC needs to ensure that advice given to EPHC, either of its own accord or in response to requests from the EPHC, is based on sound science and on a wider assessment of the possible impact on Australia of any proposals for action, than would be available from their own sources or departments.**

- **The authority of the EPHC is being used by EPHC committees and / or state based working groups to negotiate agreements with industry to achieve outcomes, objectives and targets that have not been set by rigorous assessments of costs and benefits or by following the processes outlined under the NEPC Act. The result is**

that a range of programs and schemes have been developed or are in development which have not had the benefit of such assessment and could result in outcomes where the cost of their achievement exceeds any environmental benefit. The program that aims to reduce or eliminate light weight plastic shopping bags is but one example.

- **Whilst the NEPC Act outlines specific procedures to be followed in the making of a measure (NEPM) and for its assessment, these procedures are either being bypassed or not implemented with required degree of rigour. Where the procedures and processes are followed we see sound science being replaced by sentiment, ideology or preconceived concepts of environmental correctness.**

- **In our view it appears that the new NPC has significantly increased community costs, through increases in compliance costs, without bringing about a corresponding increase in environmental benefit. This would suggest that the underlying EPHC processes are not working as they should.**

- **Had the processes been followed properly, the most likely outcome of a thorough assessment of the packaging 'problem', would have been that there was no need for any regulation of packaging or its recycling**

- **It appears that, whilst it is useful to have waste and recycling matters debated nationally and for nationally consistent approaches to taken, the EPHC / NEPC framework appears unable to prevent the implementation of less than optimal 'solutions' to environmental 'problems'.**

- **It would appear that a lack of rigour in the application of the NEPC Act processes is at the root of this problem. I.e. the 'problems' are not being properly defined in environmental impact terms, and the need for regulation or other intervention is not being properly assessed.**

- **What we are now seeing is the EPHC / NEPC process being used to advance populist or 'environmentalist' agendas – agendas elevated by states to the national level – without the NEPC Act processes capable of restraining this trend through the application of rigorous analysis, as envisaged by the Act.**

- **What we have tried to do here is to point out that, although the NEPC Act imposes clear requirements that must be met in the development of NEPMs, the system appears to be going through the processes required but without sufficient attention to key elements (i.e. identification of the problem) and without sufficient intellectual rigour.**

- **Terms are not clearly defined or used loosely, (e.g. product stewardship versus extended producer responsibility) and the language itself is used in support of the cause – terms such as 'resource conservation', 'resource recovery', 'efficient resource use' contain implied assumptions that suggest that the approaches proposed are worthwhile.**

- **NARGA supports the basing of waste policy on sound science and better data. However, it is evident that to date the NEPC processes have not been able to deliver sound policy outcomes.**

- **It is to be hoped that a renewed emphasis on sound science can address the problems we have identified.**

- **EPHC has a national coordinating function, and that the NEPC Act, properly utilised, provides a mechanism for the development of policies and mechanisms based on sound science and sound cost-benefit assessment. That function of EPHC and NEPC Act can be used to counteract the policy development problems evident in state legislation, provided that the requirements of the Act are rigorously adhered to and that the processes are correctly applied.**

- **If that is the case, there would be an argument for retaining the 'reuse and recycling' NEPM category, but to include a requirement in the assessment of the merits of any proposed program or NEPM, for input from other departments, including those involved with resource issues and with industry and commerce.**

APPENDIX A

LACK OF BASIS FOR CURRENT PLASTIC BAG POLICY

The list below sets out statements from public documents which purport to provide a basis for the reduction or elimination of plastic shopping bags, together with any facts on which that statement may have relied. Where possible, the origin of the statement is given, as well as factual data relating to the matter addressed by the statement

STATEMENT	BASIS FOR STATEMENT	FACTUAL DATA / COMMENT
"A figure of 100,000 marine animals killed **annually** has been widely quoted by environmental groups; this figure was from a study in Newfoundland which estimated the number of animals entrapped by plastic bags in that area over a four year period from 1981 -1984"[23] (DEH – 2002)	The report refers to information on an Environment Canada website, but misquotes it. The actual quote is: "**A four year** study off the coast of Newfoundland estimated that over 100,000 animals were killed by **entanglement** from**1981 to 1984.** (our emphasis) NB. Plastic bags are NOT mentioned	The original study refers to animals caught in fishing nets as part of fishing operations: "Summer surveys of the incidental catch of marine birds and mammals in **fishing nets** around the east coast of Newfoundland indicated that over 100,000 animals were killed **in nets** during a four year period (1981-1984)"[24] NB No mention of plastic bags
"Plastic shopping bags appear to be 2% of the Australian litter stream"[25]	Clean Up Australia 2002 Rubbish Report – This was not a proper litter survey because Clean-Up targets rubbish sites. These are more indicative of illegal	There was **no data** available on the proportion of litter represented by plastic bags at the time the plastic bag policy was determined, yet EPHC ministers decided on a

[23] Plastic Shopping Bags – Analysis of Levies and Environmental Impacts – Final Report, December 2002, Department of Environment and Heritage (DEH 2002)
[24] Incidental catch of marine birds and mammals in fishing nets off Newfoundland, Canada. Piatt, JF; Nettleship, DN, Marine Pollution Bulletin 1987
[25] DEH 2002

	dumping than litter	75% reduction target of plastic bags in litter (75% of what?) Since then KESAB in SA has conducted litter surveys[26] that have looked at plastic bags as a separate litter item. These were conducted in 2004 and 2005. They show "Light weight carry bags" make up between 0.7 and 1.1% of litter in SA. However SA litter statistics are atypical as there is only a low level of litter law enforcement (in comparison with states such as NSW or VIC.)
"The 0.8% level of littering plastic bags is very low…"[27] (There are two references in the report to 0.8% of plastic bags ending up as litter – but no supporting data)	"….however the actual number of bags currently in the environment or littered annually is not known"[28] "As there are no data available on the total size of the litter stream in Australia, this data cannot be used to determine the total number of bags entering the litter stream"[29]	There are no data on the proportion of plastic bags that end up as litter. Even if it is assumed (as in the DEH report) that 0.8% of bags do so, it must follow that 99.2% of bags **do not** end up as litter. On the basis of that simple analysis, a litter reduction strategy based on eliminating plastic bags cannot be justified.
"In this report it has been estimated that a total of between 50 and 80 million bags enter the	No supporting evidence is given (Same comment applies to Victorian	There is no data to support this number. But a simple reality check would show it to

[26] Litter Survey, McGregor Tan Research for KESAB, Wave 28, February 2005
[27] DEH 2002
[28] Ibid
[29] Ibid

environment as litter annually"[30]	government claim that "About 10 million of these shopping bags become litter[31])	be a gross overestimation. (Also applies to the Vic government claim)
"Australia has a strong history over the last three decades of public education to prevent littering. By international comparison, the 0.8% level of littering plastic bags is very low compared to, in Bangladesh for example where 85% of plastic shopping bags were entering the litter stream"[32]	Neither figures are supported by references or data	If this statement has any validity it would point to the success of past litter education campaigns and not the need for a ban or levy
Referring to Ireland, the report states: "The levy has resulted in a dramatic decrease of 90 – 95% in 'single use' plastic bag consumption"[33]	No verifiable references given	The statement could reflect the fact that, after the introduction of the bag tax in Ireland, stocks in supermarkets and stores were at levels which met demand and, for a period, precluded the need to re-order bags.
"In recent consultation with major Irish retailers, the sustained reduction of plastic shopping bags has been confirmed"[34]	No references given.	Bag tax receipts show that, during 2005 the use of plastic bags in Ireland rose to 115 million, in spite of the tax. The Government has responded by

[30] Ibid
[31] Our Environment Our Future, Department of Sustainability and Environment, Melbourne, July 2006
[32] Plastic Shopping Bags – Analysis of Levies and Environmental Impacts – Final Report, December 2002, Department of Environment and Heritage (DEH 2002)
[33] Ibid
[34] Ibid

		increasing the tax from 15c to 19c (AU$0.30).[35] There also appears to be an enforcement problem, with many smaller stores not charging the tax – so the true level of bag use is unknown.
"A total of 136 Australian fur seals and 1 New Zealand fur seal with neck collars were observed over the four year study period. Polythene trawl nets accounted for 42% of neck collars, polypropylene straps 29%, monofilament gill nets 15% and nylon rope 11%. Other incidental items included steel rings (n=2) and a rubber loop"[36]	From chapter entitled "Entanglement of Australian fur seals in human debris"	Information from DEH website. No mention of plastic bags.
"…in 1975 the US National Academy of Science estimated that 6.4 million tonnes of litter were jettisoned from ships at sea each year…"[37]	Chapter entitled "Ocean litter stranded on Australian coasts". - Provides details of sources and types of litter. Sources include ships, material drifting in from other countries on ocean currents as well as beachgoers.	Available on the DEH web site. This is a detailed analysis of the marine litter issue but was not used by DEH in its report on plastic shopping bags. No direct reference to plastic shopping bags as a specific issue in this report.
"The amount of soft plastic collected during	In 2004, the 'soft plastics' category	This survey has been conducted annually

[35] Press release: The Green Party June 21, 2006.
[36] State of the Marine Environment Report for Australia: Pollution – Technical Annex 2. Zann LP Ed. DEST, 1995
[37] Ibid

the annual Robe Litter Survey has varied substantially….The largest proportion (87%) of the 'soft plastics' collected consisted of rope, however, netting, packaging tape and a smaller proportion of plastic bags were also collected….. It is important to note that the amount of soft plastics is likely to be an exaggerated amount given that some of the plastics, particularly plastic bags, contained sand."[38]	made up 9.7% of marine litter in this study. Plastic bags, although present, made up a very small proportion of this litter (see adjacent column). Even then the amount of plastic was considered as overestimated and, as bags was likely to be filled with sand, and largely immobile.	since 1997 and would have been available to DEH when the 2002 report was in preparation.

[38] Marine Debris Monitoring in South Australia – A Report on the 2004 Annual Robe Litter Survey. Eglinton YM et al, SA Research and Development Institute Feb 2005

Appendix B

Extended Producer Responsibility

Extended Producer Responsibility is defined by the OECD as "an environmental policy approach in which a producer's responsibility for a product is extended to the post-consumer stage of a product's life cycle. There are two related features of EPR policy:

(1) the shifting of responsibility (physically and/or economically; fully or partially) upstream toward the producer and away from municipalities, and
(2) to provide incentives to producers to incorporate environmental considerations in the design of their products[39]

OECD goes on to explain that EPR 'seeks to integrate signals related to the environmental characteristics of products and production processes throughout the product chain'[40]

So far EPR based programs that have been instituted around the world have used the EPR cost transfer mechanism to transfer product or packaging recycling costs from local government to the manufacturer or marketer, who then passes this cost on to the consumer through the product price (together with the costs of administration of associated schemes).

The EPR concept and the OECD Guidance Manual were widely debated over a four year period (1997 – 2001) through a series of OECD organised workshops and, although the concept was strongly supported by some European countries (who make up the majority of OECD membership), it was not supported by economies such as the USA who saw a stronger role for a market based approach.

Throughout this process comments from industry groups and others were fed back to the OECD secretariat drafting the document, but all the concerns raised have not been addressed. In particular, the advice given on EPR lacks the basic requirement to spell out the environmental problem being addressed by a proposed EPR program, and OECD has failed to demonstrate, either through theoretical argument or by reference to existing programs, that the EPR approach was superior to other policy options.

[39] OECD op cit P9
[40] Ibid

An example of the input into the guidance manual development process provided by BIAC is appended as Appendix C

Since the introduction of the early EPR based schemes such as the German DSD system for the funding of packaging recycling, and the publication of the referenced OECD guidance manual, more countries have introduced EPR based packaging and product collection and recycling schemes.

Literature here and elsewhere has also started to refer to these programs as "Product Stewardship" programs. This term is seen as a 'softer' reference to the taxing of business (and indirectly the consumer) to achieve product or packaging recovery targets.

British Columbia in Canada is one jurisdiction that has adopted this nomenclature for its EPR based schemes.

In Europe directives are now in place covering the collection for recycling of a wide range of materials, including consumer packaging, batteries, consumer electronics / appliances and motor vehicles.

Whether called EPR or Product Stewardship, this taxing or levying mechanism has a number of advantages for the regulator:

- It allows the targeting for recovery of those materials that are not profitable to recover – i.e. where the recovery costs exceed the value of materials recovered

- As the funding for these programs comes from industry, funds do not have to be sought from local or state governments,

- As the cost of the program is contained within the price of the product purchased by the consumer, it is not seen as a government tax (or an increase in local council rates)

The benefits of the EPR approach have been widely promoted. More often than not, the claimed benefit results, not from the EPR taxing mechanism, but from the underlying activity, which could have been funded by other means. The next table outlines the supposed benefits often attributed to EPR and any relevant comments.

EPR 'Benefit'	Comment
EPR internalises a product's environmental cost	The cost internalised is the cost of collection and recycling. This has no direct relationship to the product's environmental performance – it is not an environmental cost
EPR provides an incentive for the producer to improve the environmental performance of a product	The levy charged is passed on to the consumer – even if there is a significant differential in levy costs between one manufacturer's product and that of a competitor, competing design factors reduce the likelihood of product change. If there is change, there is no guarantee that this change is of overall benefit to the environment
EPR sends a signal to the producer to improve the recyclability of the product or package	Most EPR scheme levies are based on the recovery of recycling costs related to the materials or products. The European packaging experience has shown that design shifts do occur in an attempt to decrease these costs. However there is no guarantee that a net environment benefit results from any change, as environmental merit does not rely on recyclability alone.
EPR helps optimise the use of natural resources	Only if, in the program being funded by EPR, fewer resources are used in the recovery and recycling of materials than are recovered through the program. Those benefits do not rely on EPR; they are the result of the program, regardless of how it is funded.
EPR improves the efficiency of resources used in products	Companies do not need EPR to be conscious of resources used, because all resource used comes at a cost. Reduction of this cost is the driver of product change.
EPR improves resource recovery	Only if fewer resources are used in the recovery process through the EPR funded program. Not unique to EPR as a funding method.
EPR minimises the generation of waste	The generation of waste within the manufacturing sector is related to resource use efficiency and unlikely to be influenced by EPR. Post consumer waste may be reduced, but at a cost – financial and environmental – and can be achieved by other funding mechanisms

EPR incorporates product management costs into consumer price signals	That is not unique to an EPR based scheme. Consumers could be charged a direct disposal fee and see a direct price signal as opposed to one hidden within the product price.
EPR sends a signal to the consumer about the relative recyclability of a product	Only if the underlying scheme makes that distinction in its fee structure. Most non-packaging programs charge a common fee related to product type. The relative recyclability of the product then has no impact on product price. Nor is recyclability an indication of environmental merit.
EPR reduces risk to human health from poor management of products	Not unique to EPR. Only true in relation to product disposal if and when a risk to human health can be identified. This is not the case for most products and packaging targeted for EPR schemes – they do not impose such a risk.
EPR increases the level of re-use and recycling of products	Not unique to EPR. Assumes that re-use or recycling is always desirable and / or beneficial. This is not so.
EPR leads to more environmentally compatible designs	It may, if the cost of a levy is high enough, change product design to improve recyclability, but only if charges on the product directly reflect these costs and there are no more strongly competing design criteria. However there is no guarantee that a more recyclable product has a better overall environmental performance – as many other factors impact on this.
EPR helps close material loops to promote sustainable development	Not unique to EPR. Not true if the impacts of closing the loop exceed the benefits of doing so, or if financial costs are excessive. Costly schemes are not sustainable

Supporters of an EPR approach to the management of products and packaging also need to look more closely at the suitability of EPR to the type of product being considered. Whilst EPR can be used to fund a recovery and recycling program (as can a variety of taxing regimes), an EPR based or levy based approach is not suited to many product recovery situations.

The 'not suitable' category includes the following:

- Those products where markets / market forces will lead to recovery programs based on the value of recovered materials (e.g. newsprint) – intervention is not needed to bring about product recovery

- Those products that have low value relative to collection costs (collection is not self sustaining) but low impact (e.g. most packaging) – the imposition of a levy and the administrative cost of running the levy collection and funding program, is disproportionate to any benefit (if such benefit exists)

- Genuinely voluntary programs driven by CSR or other commercial considerations (e.g. the recovery of obsolete pharmaceuticals, farm chemicals and chemical containers)

- Products that have low residual value relative to collection costs (collection not self sustaining) but medium environmental impact if disposed of in landfill – a decision needs to be made as to whether intervention is warranted – and then re the type of intervention. Schemes other than those based on EPR may be more appropriate. (e.g. household chemical collections)

- Products that have low value relative to collection costs (collection not self sustaining) high environmental impact if disposed of in landfill, but a complex market in terms of brand owners, importers and companies that have gone out of business (leaving orphan products) and / or stored legacy / historic products. In this case an EPR scheme that imposes levies on new products may be difficult / costly to administer and / or inequitable. Other funding approaches should be considered.

This suggests that an EPR based approach may only be suited to relatively few situations, ones that meet the following criteria:

- The program addresses a genuine environmental hazard (i.e. disposal of the product in landfill as part of general waste will result in environmental impacts)

- Product recovery for recycling is the best way of addressing these hazards

- The program would not be self funding

- The proposed program will result in benefits to the environment that exceed the costs of the program, including administration costs

- The program cannot be effectively managed through existing waste management and / or recycling arrangements

- The product(s) to be covered have a relatively short life span – there is not a long time between the purchase of the product (and the payment of the EPR levy) and the need to recover the product for recycling.[41]

- The program covers industry sectors that are well defined and do not have large numbers of brand owners / suppliers of product

- Industry sectors cannot develop or maintain a voluntary program.

- There is no better or more cost-effective way of recovering these materials (e.g. a government run / supported product return centre that caters for a range of products)

- There is not a more efficient means of funding a return system, e.g. through council rates / charges, central government revenue / GST revenue, or funds collected via an existing taxing scheme (e.g. GST)[42]

These criteria confirm that the EPR mechanism is no more than a new form of product tax charged through the product price by the manufacturer, marketer or re-seller, specifically to cover the cost of recovery of the product for recycling.

There would appear to be little identifiable benefit associated with insisting that this tax be collected by an industry run PRO, through the EPR mechanism, rather than through taxing mechanisms already in place.

The current approach to the setting up of such PROs to fund industry run collection and recycling programs may be counterproductive, resulting in a multiplicity of schemes, each with their own administration, promotional program and separate return mechanism. Such an approach leads to

[41] The longer the time difference the more difficult it is to predict future recovery costs and maintain a viable industry fund to recover obsolete products

[42] On of the main disadvantages of EPR as it is currently practiced in Europe is the fact that each product sector is separately targeted to set up its own scheme – with its own levy system, administration and its own return mechanism. This is both inefficient and confusing.

increased costs to the consumer and to a public that is confused about what is to be returned where.

We now come full circle to the OECD definition of EPR and its features, where it is suggested that one of the reasons for EPR is to move costs away from local government to the producer.

No valid reason for such a move has been forthcoming. In fact there are many valid reasons for resisting such an approach – economic and environmental efficiency being just two.

Appendix C

Business and Industry Advisory Committee to the OECD - Comité Consultatif Economique et Industriel Auprès de l' OCDE

BIAC In Response

Comments on the OECD Report "Extended Producer Responsibility: A Guidance Manual for Governments"

The Business and Industry Advisory Committee (BIAC) to the OECD welcomes the opportunity to comment on the revised draft OECD Guidance Manual for Governments on Extended Producer Responsibility (April 2000 version). It is our view that the manual, as currently designed, has too narrow a focus to offer practical guidance to governments regarding effective and efficient product policy. The fundamental purpose of the Guidance Manual should be broadened to focus on the environmental objective, in this case product policy, and offer a range of policy options that governments could tailor to meet that objective. We also recommend to add a detailed economic assessment of the impact of existing EPR schemes at the practical level and a comparison between EPR and "shared product responsibility" models in terms of economic and environmental effectiveness.

General Comments:

As expressed in our comments on the previous draft, which we submitted in December 1999, the manual attempts to present a users manual for a tool – producer take back – without specifying how exactly and in what situations that tool will be used. The guide focuses on the many potential uses of EPR, but contains limited practical advice as to whether EPR is or is not the most efficient or appropriate tool in any given situation. EPR is a means to an end rather than an end in itself. As such, the manual should focus on the policy objective - improved environmental performance of products through their life-cycle - and offer a range of alternative tools that could be used to meet that objective. The guidance should also recognize that, whatever the policy approach, improvements in environmental performance cannot be made at the expense of product safety, quality or customer satisfaction.

The draft is almost completely devoid of performance data or other factual results regarding existing product take-back systems, and offers no evidence that EPR does, in fact, produce the benefits which are mentioned. As noted in the draft, a range of EPR programs are in operation.

We recommend that such programs be evaluated against the criteria suggested in the text: environmental effectiveness, economic efficiency, innovative advancement, political acceptability, and administrability. The guidance manual should support its recommendations with factual evidence of the results of these programs.

The manual is inconsistent when discussing EPR itself. At various points in the draft, EPR is listed as a principle, a strategy, and a waste management tool. Definitions of EPR in the draft include elements of supply chain management, design for environment, liability for post-consumer waste, cost-shifting from local authorities to producers, and product policy more generally. The definitions and explanation of EPR are at odds with the fifteen principles listed in Chapter 2.

The manual should provide the user with an accurate representation of the range of product stewardship approaches currently in place in the OECD. The Phase III workshops provided clear evidence that existing national programs present a continuum of approaches, ranging from fully mandatory to fully voluntary, and from full producer responsibility to shared responsibility across the product chain. The guidance manual should fully explain this continuum and assess the benefits and challenges associated with these various approaches. Unfortunately, the draft presents a clear bias for what is termed as "the most rigorous form of EPR" - fully mandatory programs for full producer responsibility.

Specific Comments:

Foreword:

The review of the Phase I Interim Report states that EPR was adopted as a "basic principle", a "key strategy", and a "waste minimization tool". EPR may be defined as one of these, but cannot be all three simultaneously. As framed by the OECD, EPR is a tool to shift the cost of post-consumer waste management from local authorities to producers, and is thus neither a principle nor a strategy.

Executive Summary:

As a general comment on the Executive Summary, it focuses more on history of the OECD project than a summary of Chapters 1-7. Significant elements from the text should be carried forward into the summary, including the discussion of shared responsibility in Chapter 1, the discussion of alternatives to EPR in Chapter 3, the potential trade and competitive disruptions in Chapter 5, and the concepts entailed in the application matrices in Chapter 6.

- Edit the second paragraph to read: "Faced with the growing interest in new policy areas, some governments have implemented EPR on some goods in commerce."

- The 15 "guiding principles" for an effective EPR program go far beyond the relatively narrow scope of EPR defined by the OECD. Many of the "principles" listed would direct the user away from EPR and to a number of viable alternatives.

- The fourth principle on *responsibilities* does not recognize that responsibility can be both well-defined and shared. This point should state that responsibility should be placed with the actors in the product chain that are best positioned to make key changes at the least cost to society, as included in Chapter 1 of the previous draft.

- The earlier draft of the manual correctly stated that the Polluter Pays Principle "is not particularly suitable or applicable" to product policy and "might not be the appropriate principle for the new generation of policies that address the product system." The Polluter Pays Principle does not apply to EPR as long as the "producer" is not equated to the "producer of pollution".

- The different types of measures discussed in the Executive Summary (unit-based pricing, eco-labeling, green procurement, etc.) do not fit the narrow model of EPR (cost-shifting) and thus do not "support and enhance" EPR.

- The Executive Summary lists a number of issues that were either not fully addressed in the Phase III workshops or for which insufficient data exists, including the applicability of EPR to various products, the role of EPR in a broader product policy, funding and cost internalization, existing products, and industry-based voluntary programs. Regardless of controversy or not, all of these issues are significant and potentially key determinants of the applicability and effectiveness of EPR. Full research on these issues and the performance of various EPR programs should be completed prior to the development of a guidance manual.

- The conclusion states that "the principle of EPR is expressed in a new generation of pollution prevention policies that focus on the product…" This statement would be accurate if the EPR in question referred to Extended Product Responsibility.

Chapter 1:

While the revised draft is somewhat less prescriptive than earlier versions, the central issue of the purpose of the guidance manual still need to be addressed. As mentioned in the general comments, the manual should identify environmental objectives related to product policy and recommend alternative approaches for meeting such objectives. The manual focuses instead on EPR as a tool and seeks to offer potential uses for the tool.

- The "benefits of EPR" listed in Box 1 lack supporting evidence or data regarding the actual performance of such programs. The material which is quoted should include a reference or source of the claims.

- In explaining "Why EPR," the draft states that "OECD countries are increasingly implementing EPR in their efforts to shift physical and/or financial responsibility…from government to the producer." The focus is on the means rather than any environmental objective.

- Box 2 on the German Packaging Ordinance is an example of selective quoting from materials provided in the Phase III workshops. A second paper presented by the DSD at the Washington workshop covered the significant problems faced by the German system, including the near "financial collapse of the dual system." A balanced presentation of the material would include both the benefits and problems associated with existing programs.

- The continuum of approaches used to implement EPR should be presented in a clear and balanced manner. The current draft discusses producer take-back in certain terms, yet

dismisses shared responsibility under the heading of "Debate." Shared responsibility is a fact in functioning government programs, including those in France and the UK.

- While the revised draft acknowledges that "sharing responsibilities across the product chain is an inherent part of EPR," it fails to include the definition of shared responsibility from the previous draft:

  "Shared product [responsibility] aims: (1) to bring about reduction in the life cycle environmental impacts of products (as opposed to simply shifting financial and/or physical responsibility for products at the end of life): and (2) that it contemplates all players in the product chain to have a role in the reduction of product environmental impacts, with leading roles for the those that are best positioned to make key changes at the least cost to society."

- The draft makes clear that EPR is difficult to integrate with broader product policies such as IPP in the EU, revealing that it has a limited use – take back of post-consumer waste for final disposal - and does not present an overarching framework for product policy.

Chapter 2:

In the discussion of the policy context, the draft correctly states that "no one EPR approach has been identified that is applicable to all markets, products, product groups or waste streams." The same point needs to be made about product policies in general, including EPR. The concepts raised in the application matrices from Chapter 6 should be discussed in this context as well, setting out scenarios where government intervention may or may not be required.

- The 15 "guiding principles" for an effective EPR program go far beyond the relatively narrow scope of EPR defined by the OECD. Indeed, many of the "principles" listed would direct the user away from EPR and to a number of viable alternatives.

- Goals and Objectives: The goals and objectives listed in the draft manual are most appropriate to product policy.

- In the discussion of legal and administrative approaches, the draft shows a bias for mandatory programs and against voluntary programs. Where the guidance provides straight-forward advice on how to put a mandatory program in place, it includes a list of criteria "recommended" for voluntary programs, including "credible regulatory threats." Also in this section, the definition of "polluter" and "pollutee" should be added.

Chapter 3:

The chapter on policy instruments and measures includes a significant amount of discussion of alternatives to EPR, yet classifies them as "EPR policy instruments," "instruments and measures…for implementing EPR," and "supportive measures." Aside from the take-back requirements discussed in section 3.3.1, the vast majority of policy instruments discussed in Chapter 3 do not include cost-shifting for post-consumer waste management, and are therefore alternatives to EPR rather than supporting policies.

- The section on policy options for EPR confuses the issue of what EPR is and is not by including product design (and development) and source reduction. EPR in the OECD context does not address these elements, but is instead focused on cost-shifting of post-consumer waste management. The guidance should make the policy options for EPR consistent with the OECD definition.

- The selection criteria discussed in section 3.8 provide a useful guide for users to analyze the value and advantages of take-back relative to the large number of alternative policies presented in Chapter 3. Further, the draft manual should include the results from such assessments in order to provide governments with the information required to make an informed decision.

- The selection criteria on "*economic efficiency*" should be edited to read: "the extent to which the instrument saves or expends resources,…"

Chapter 4:

As discussed in the general comments, the manual should provide the user with a balanced assessment of the range of product take-back approaches currently in place in the OECD. The Phase III workshops provided clear evidence that existing national EPR programs present a continuum of approaches, ranging from fully mandatory to fully voluntary, and from full producer responsibility to shared responsibility across the product chain. The framework of Chapter 4 presents a clear bias for what is termed as "the most rigorous form of EPR" - fully mandatory programs for full producer responsibility.

- Further to this point, the draft states that "the *ultimate responsibility* model essentially clarifies who is responsible under the context of EPR." However, responsibility can be both well-defined and shared.

- Given the discussion of shared responsibility, it would be useful for the draft to restate the definition that was included in the previous draft (see page 3).

- The discussion of the role of consumers in the draft manual misses the central point of their contribution to product development: continuous feedback to producers through purchasing behavior. This direct feedback drives the vast majority of product changes, signaling to producers which products and their various attributes are considered value added by the consumer and which are not. It is this consumer role that is the most significant driver for product improvements. In addition, it should be recognized that consumer behavior at the waste management stage - participation in recycling programs, individual waste reduction efforts, etc. - can be influenced through cost signals.

Chapter 5:

In contrast to the claim made in the Executive Summary that "an analysis of potential trade effects has indicated that…implementing EPR should not have such effects," section 5.5 lists 9 potential areas for significant trade impacts from EPR programs.

More importantly, the section on Regulatory Instruments and Materials Requirements fails to address the most trade disruptive aspect of existing and pending EPR programs in the OECD:

materials bans that are not justified under the WTO TBT Agreement due to the absence of a scientific basis. Such materials bans appear to be inconsistent with the WTO in that they apply only to certain products and are not country-wide bans. Indeed, if scientific evidence existed to justify the removal of a material from a certain product, one would think that use of the material would be restricted by a broader statute than an EPR mandate for a type of product.

Chapter 6:

In the discussion of implementing an EPR program, the draft assumes fully mandatory programs with full producer responsibility and fails to address issues such as product design incentives, materials conservation, and cleaner production raised in Chapter 2. The draft states that the central issue in implementing EPR "is how to fund the collection and treatment of post-consumer waste."

- Further to the bias of the document in favor of mandatory programs and against voluntary approaches, the draft includes significant caveats regarding voluntary approaches, yet includes none for mandatory programs.

- The application matrices for EPR included in Box 10 are the clearest guidance in the draft on when EPR may and may not be most appropriate. The central concepts behind the matrices (e.g. that government intervention and the form of that intervention can be tailored to particular situations based on the residual value of the product and the severity of any environmental impact) should be carried forward to the Executive Summary and Chapters 2 and 3.

- The draft questions the usefulness of the matrices to help identify products where EPR would be most applicable, and claims that "advice cannot be included in the Guidance Manual" for lack of data. On the other hand, the draft offers no evidence either that EPR does, in fact, produce the benefits claimed throughout the draft

- The most important omission is the absence of performance data in section 6.9. Given the growing number of government take-back programs in OECD countries, some of which have been in place for nearly a decade, the absence of factual evidence or performance data on the environmental effectiveness and economic efficiency of various EPR approaches significantly limits the utility of the manual.

Chapter 7:

While a range of EPR programs are in operation, the OECD has yet to evaluate such programs against the criteria suggested in the text. Developing a guidance manual without such data and relegating this aspect to "future steps" raises the question of how useful the guidance will be to policy-makers.

- While section 7.1.8 calls for future work on industry-based voluntary programs, significant material is available on such programs from the Phase III workshops, some of which has not been included in the draft manual, and other sources such as the US PCSD meeting report on SPR (PSCD and EPR: Proceedings of the Workshop on Extended Product Responsibility, October 21-22, 1996, The White House Conference Center (Feb 1997)).

- The manual does not clearly state how EPR relates to broader product policies such as Integrated Product Policy. This raises a significant concern that implementing EPR along the lines defined by the OECD will result in a stand-alone program unable to benefit from synergies with other policies.

- The conclusion in section 7.2 that "EPR can provide governments with a practical and cost-effective strategy" should first be supported by clear evidence.

Conclusion:

The fundamental purpose of the OECD Guidance Manual should be broadened to focus on the environmental objectives of product policy, and offer a range of policy options that governments could tailor to meet those objectives. Further, we urge the OECD to include performance data or other factual results regarding existing product take-back systems and to offer evidence whether or not EPR does produce the benefits mentioned in the draft. In view of the inconclusive evidence and other comments presented above, we strongly recommend that the EPR manual should not be approved for release by the OECD Working Party on Pollution Prevention and Control prior to substantial changes and a further round of comment.

* * *