



WESTERN AUSTRALIAN
LOCAL GOVERNMENT ASSOCIATION

Submission on the Department of Environment Extended Producer Responsibility Discussion Paper

PREPARED BY THE



MUNICIPAL WASTE ADVISORY COUNCIL
"Getting the Environment Right"

February 2005

Acknowledgements and Background

The Municipal Waste Advisory Council is a standing committee of the Western Australian Local Government Association with delegated authority to represent the Association in all matters relating to waste management.

The Municipal Waste Advisory Council has been formed through collaboration with Regional Waste Management Councils who are not ordinary members of the Association. The resulting body effectively represents the views of all Local Government bodies responsible for waste management in Western Australia.

Decisions and positions adopted by the Municipal Waste Advisory Council are considered by a board of elected member representatives from each member organisation who are supported by an Officers' Advisory Group (OAG) which has officer representatives from each member organisation.

The Municipal Waste Advisory Council's member organisations are:



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Executive Summary

<i>MWAC supports EPR</i>	The Municipal Waste Advisory Council supports the incorporation of EPR head-powers and a framework into the Waste Avoidance and Resource Recovery Act for developing and implementing EPR schemes. The Municipal Waste Advisory Council considers that the detail of this framework will be crucial in determining its effectiveness and has provided in this Submission a range of comments on the subject.
<i>Identify position on the zero-waste goal</i>	The Municipal Waste Advisory Council warns State Government of the need to distinguish between submissions which support the zero-waste goal and those which oppose it. This knowledge will provide an important lens through which to view the opinions expressed in anti-EPR submissions.
<i>Clear objectives and outcomes – State Govt responsibility</i>	The Municipal Waste Advisory Council believes that State Government must assume a primary role in setting the objectives and key outcomes to be pursued by both EPR schemes and Voluntary Agreements on Priority Wastes. State Government should also take a role in scrutinising the objectives and outcomes identified in voluntary agreements.
<i>Scheme selection to be increasingly focussed on outcome-certainty</i>	The Municipal Waste Advisory Council argues that the timely delivery of required outcomes requires State Government to increasingly focus on selecting schemes which provide certainty of outcomes. Certainty as to compliance costs must take progressively less priority where schemes are shown to be unlikely to deliver what is required.
<i>Tighten terminology to assist discussion</i>	The Municipal Waste Advisory Council notes that State Government needs to tighten its definitions of terms such as EPR and Product Stewardship in order to facilitate informed discussion. The Municipal Waste Advisory Council is concerned by a Ministerial statement indicating a more restrictive interpretation of EPR which may exclude important policy options.
<i>Focus on the framework, not on specific schemes</i>	The Municipal Waste Advisory Council believes that the priority for State Government should be to rapidly identify and develop a legislative framework through which to select, develop and implement specific EPR schemes. Implicit in this is the need to avoid undue attention to the detail of specific EPR schemes, since this scrutiny can be exercised once Parliament endorses the overarching framework by adopting Waste Management Legislation.
<i>Provide greater detail in the framework</i>	The Municipal Waste Advisory Council suggests that State Government consider two potential roles for a priority waste list. The Municipal Waste Advisory Council also suggests that the Legislation provide guidance on other aspects of decision making, in addition to the criteria for a priority waste listing.
<i>Reduce reliance on federal action and improve state activity within federal schemes</i>	<p>The Municipal Waste Advisory Council emphasises that State Government should only defer to the Commonwealth on the development of EPR where it can show to the community that this</p> <ul style="list-style-type: none">• Is legally necessary; OR• Is the most appropriate approach; AND can be delivered in a reasonable period of time. <p>The Municipal Waste Advisory Council also emphasises that State Government should be remain active in such instances in order to ensure that federally coordinated schemes are delivered in a timely way.</p>

Recommendations

Key Recommendations

Key Recommendation (i)

State Government should immediately endorse the principle of EPR as a useful tool for managing waste and resource consumption issues

Key Recommendation (ii)

State Government should deliver as soon as possible, a broad and flexible legislative framework which enables a wide range of types of schemes to be deployed in the future.

Key Recommendation (iii)

State Government should not allow the development of their general policy on EPR to be slowed down by an untimely discussion about specific mechanisms at this stage.

Key Recommendation (iv)

State Government should draft EPR head powers in order to meet the anticipated need to comply with federal schemes, including, but not limited to Co-Regulatory Schemes.

General Recommendations

General Recommendation (i)

State Government should establish the position of each submitting party on the goal of a waste-free society, to lend context to their comments on the EPR approach.

General Recommendation (ii)

Waste Management Legislation should specify objectives and key outcomes which are to be achieved in relation to priority waste types.

General Recommendation (iii)

These objectives and key outcomes should be advocated and defended by State Government as a party to the development of voluntary industry agreements to address the issues relating to priority waste types.

General Recommendation (iv)

In selecting policy approaches State Government should increasingly focus on outcome-certainty as deadlines for meeting targets draw nearer.

General Recommendation (v)

State Government must clarify the meaning of the terms EPR and Product Stewardship and should state whether Market Based Instruments fall within either category.

General Recommendation (vi)

State Government should ensure that the Legislation is broad enough to allow the use of instruments that might, by some definitions, fall outside EPR (eg levies and other market based instruments).

General Recommendation (vii)

State Government must legislate to allow EPR in the broadest possible range of circumstances

– arguments that EPR is not appropriate in specific instances should be had, if and when those industries make the priority list.

General Recommendation (viii)

State Government should assertively use the threat of regulation to stimulate industry action.

General Recommendation (ix)

State Government should ensure that mandatory alternatives are ready to be deployed to ensure that industries view the threat as imminent.

General Recommendation (x)

State Government should investigate the option of extending the role of the Priority Waste List beyond the identification of potential targets for EPR.

General Recommendation (xi)

State Government should incorporate a second stage into the generic framework for managing wastes of concern which establishes what is to be achieved in managing the waste, what the responsibilities of State Government as coordinator of the policy response will be and what things it should consider in its decision making. This second stage should include:

- Early consultation on outcomes and timeframes for a given waste material and public communication of these things once determined.
- State Government responsibility for achieving outcomes – delegable but not divestible.
- Early contingency planning in order that the timely achievement of the outcomes would not depend on the success of a specific scheme.
- Regular reporting on progress.
- When a scheme fails the selection of a replacement focuses on outcome certainty.
- Considerations for determining which type of scheme is most appropriate for dealing with a given waste issue. These should include those set out in s6(c) of the WALGA Policy Statement on Waste Management Legislation.¹

General Recommendation (xii)

State Government should provide the detail of its legal advice on the extent to which unilateral state action is permitted within existing Federal and Constitutional constraints.

General Recommendation (xiii)

State Government should explain, with justifications, whether it considers that federally instituted EPR schemes will be seriously considered prior to 2010.

General Recommendation (xiv)

State Government should outline the procedures it proposes for identifying schemes most appropriately left to Federal coordination.

General Recommendation (xv)

State Government should outline the procedures it proposes for ensuring timely Federal action followed by timely State compliance.

¹ The WA Local Government Association Policy Statement on Waste Management Legislation, online, available http://wastenet.net.au/Resource_Library/Files/Policy_Statement-Waste_Management_Legislation.pdf.

The Municipal Waste Advisory Council Priority – Moving Forward

The Municipal Waste Advisory Council and the WA Local Government Association have made clear that they support both Extended Producer Responsibility (EPR) and the creation of a new Act focussing on waste management issues. Policy Statements articulating this support were finalised and published in 2004, although the support itself has been manifest for nearly a decade.² The Municipal Waste Advisory Council is convinced that the need for dedicated Waste Management Legislation empowering State Government to implement EPR-style schemes is well demonstrated. The principle is applied in many other jurisdictions and drafting instructions for WA's own waste management legislation made provision for EPR two years ago. In light of the work which has already been done, it is reasonable to expect that the current process will quickly result in the endorsement of the EPR principle.

Now is the time to focus on the big picture in order to deliver a flexible framework for using EPR when and where it is appropriate. Some stakeholders may seek to hijack the discussion with arguments about the detail of specific schemes or whether approaches should be federally or state based. State Government has an obligation to avoid these passionate debates. With respect to the 'specific schemes' diversion we will collectively visit the question of which schemes to adopt when specific waste streams are considered. With respect to the 'state or federal' diversion, we will need a general framework which can accommodate state or federally based schemes and we needn't know in advance which jurisdictional level will be favoured in which cases.

The priority for State Government must be to end the delays and expedite the completion of the Legislation, complete with a flexible framework for EPR. The task at hand is simply to recognise that in some instances EPR will be a useful tool, establish some basic criteria which will guide the consideration and development of EPR schemes in the future and set out the necessary legislative provisions to underpin the framework.

Key Recommendation (i) State Government should immediately endorse the principle of EPR as a useful tool for managing waste and resource consumption issues

Key Recommendation (ii) State Government should deliver as soon as possible, a broad and flexible legislative framework which enables a wide range of types of schemes to be deployed in the future.

² The WA Local Government Association Policy Statements are available at www.wastenet.net.au/Waste_Policy

Responding to the Discussion Paper

The purpose of the discussion paper and the limits of the debate which State Government wishes to generate were not clearly set out – a problem which is detailed in Appendix 1. Because of this, the Municipal Waste Advisory Council remains uncertain about the focus and level of detail desired by State Government in responses to the discussion paper. However, given our conviction that the merit of incorporating EPR provisions into the Waste Management Legislation is already demonstrated, it was decided to focus on other matters. Accordingly, the Municipal Waste Advisory Council has used this Submission as an opportunity to:

- Make comment on the specifics of State Government's interpretation of EPR
- Make comment on State Government's interpretation of jurisdictional matters
- Make suggestions on the interpretation of other submissions
- Make suggestions on the framework for establishing EPR schemes

1. EPR as a precondition for a waste free society

The State Government's goal of "living in a waste free society", as articulated in the Statement of Strategic Direction for Waste Management in WA, is a goal so ambitious that it necessarily demands radical solutions. The WA Local Government Association has stated that it endorses EPR as an important part of achieving the vision of a zero waste society.³ Going further, we argue that the zero waste vision makes it imperative that State Government add EPR approaches to the range of policy tools they can deploy.

It is relatively simple to demonstrate that, within a market based economy, reducing waste towards zero will involve producers taking greater responsibility for their products.⁴ Consequently, to oppose State Government acquiring the capacity to institute EPR schemes is to indirectly dispute the legitimacy of the goal of eliminating waste. Such opposition should be made to plainly reveal itself. Therefore, in reviewing submissions on the discussion paper, State Government should clarify which submitters endorse or disagree with this goal.

General Recommendation (i) State Government should establish the position of each submitting party on the goal of a waste-free society, to lend context to their comments on the EPR approach.

2. Setting Objectives

The Waste Management Legislation which provides the framework for establishing EPR schemes must also provide the means of establishing what the objectives of any scheme will be. It is axiomatic that the objectives or key outcomes to be achieved by scheme should be clearly defined from the outset. Such objectives or outcomes must flow logically from the objects of the Waste

³ Policy Statement on EPR s2 – Support for Extended Producer Responsibility.

⁴ We would be happy to illustrate this point at length if called upon.

Avoidance and Resource Recovery Act and should be developed prior to the development of any specific scheme. On page 5, the discussion paper refers to the potential benefits of EPR schemes and the problems with the status quo which might be avoided if EPR were adopted. These could provide the starting point for a series of objectives which might be placed at the top of an EPR framework. We refer State Government to the WA Local Government Association Policy Statements on EPR and Waste Management Legislation which set out a range of objectives and outcomes which could also be incorporated.⁵

State Government should reserve for itself a role in scrutinising the objectives and outcomes specified in any voluntary schemes as well. Local Government would be deeply disappointed to see the mistakes of the National Packaging Covenant repeated on other waste issues (see *Objectives of the National Packaging Covenant*). State Government must recognise the stake that it has in voluntary schemes achieving particular outcomes. Accordingly, State Government should ensure that these schemes have the best possible chance, by checking at the outset that the objectives of the voluntary schemes are well aligned with those of the State Government. The Act will help to streamline this process if it specifies both the nature of State Government's role in setting the objectives of voluntary schemes and the objectives that State Government must pursue.

Objectives of the National Packaging Covenant

In 2003, the performance of the Covenant was assessed. Since Local, State and Federal Governments had provided little input on the framing of the objectives of the Covenant, the assessment of its practical performance was crippled. The reviewers, Nolan-ITU were forced to assess the Covenant against the following objectives:

1. To establish a framework...for the management of packaging...
No mention of the effectiveness of the framework
2. To establish a collective approach...
No mention of the outcomes this collective approach would be expected to deliver
3. To establish a forum for...consultation and discussion of issues...
It is difficult to imagine this objective not being met

The lesson for us from this experience was that the various tiers of government have a responsibility to retain influence over the defining of objectives.

General Recommendation (ii) Waste Management Legislation should specify objectives and key outcomes which are to be achieved in relation to priority waste types.

General Recommendation (iii) These objectives and key outcomes should be advocated and defended by State Government as a party to the development of voluntary industry agreements to address the issues relating to priority waste types.

3. Ensuring outcomes are delivered in time

To achieve significant advances in environmental performance where heated debate about the 'right' type of mechanism can dominate negotiations, State Government must keep a sharp focus on the timely achievement of a set of outcomes. Retaining this focus will help State Government to side step the debate about whether one approach will work better than another. If State Government emphasises that a specific and measurable outcome must be delivered by a particular date, this leaves scheme proponents with a simple challenge – to ensure that their scheme can

⁵ Policy Statement on Waste Management Legislation s3(b) – Supporting Objectives; Policy Statement on EPR s2 – Key Outcomes.

deliver what is required. State Government may endorse a voluntary scheme because it will create less resistance from industry, but such a scheme should only be continued if it can demonstrate that it is achieving the necessary outcomes within the stipulated timeframe.

Some voluntary schemes will fail to deliver and State Government will have an obligation to ensure they are replaced with more effective systems. It is likely that a well organised industry would lobby to replace a failed voluntary scheme with the least onerous alternative approaches. At this point, State Government's sharp focus on both outcomes and timeliness should guide its decision making. The failure of the first scheme places additional time pressure on any subsequent scheme to achieve the outcomes. The next scheme to be trialled should be able to provide State Government with greater confidence that it can achieve the required outcomes in a short period of time. The vision of a waste free society by 2020 demands that we not waste time successively trialling schemes with limited confidence that the outcomes can be achieved.

The Allen Group's recent review of the Product Stewardship (Oil) Act discussed the distinction between approaches which offer certainty as to compliance costs and those which provide certainty as to outcomes⁶. In the Review, a comparison was made between the actual performance of the oil industry's voluntary levy scheme and the potential performance of a tradeable certificate scheme. The first of these options saw oil producers paying an agreed fee which raised funds to subsidise oil recycling operations. Each producer's costs were known well in advance, but the scheme could make no undertakings about the improvement in the recycling rate it would achieve. The tradeable certificates option would require producers to purchase certificates from oil recyclers to demonstrate that a certain minimum quantity of oil had been recycled (a set percentage of oil sold by the producer in that year). This scheme would have guaranteed a minimum recovery rate, but the cost to each producer would be impossible to predict with confidence. This is because the price of the oil recycling certificates would be determined by market forces – reflecting the relative scarcity of used oil and the cost of reprocessing it.

Familiarity with the preceding example prepares us to consider how State Government should manage the tensions between timeframes, outcomes and industry preferences for particular approaches. Suppose that a consultation process leads State Government to adopt a target of 70% recovery of used oil within 10 years. It seems reasonable in the early years of this timeframe to agree to industry requests to minimise their financial disruption by trialling their preferred approach – a voluntary levy scheme. At some point along the ten year timeframe, State Government would have to make a determination about whether the scheme was likely to fail. If the answer was yes, it is reasonable to expect that State Government would seek to replace the scheme with one which offered more certainty that it would hit the target in time. Without the luxury of a long lead time, State Government would be obliged to dismiss proposals which could not provide this certainty. The time for generosity and good-will towards the industry would have passed.

General Recommendation (iv) In selecting policy approaches State Government should increasingly focus on outcome-certainty as deadlines for meeting targets draw nearer.

⁶ Allen Consulting Group, 2004, Independent Review of the Product Stewardship (Oil) Act 2000, pp 53-54, online available <http://www.oilrecycling.gov.au/pubs/psa-review.pdf> accessed 04/02/2005..

4. Distinguishing Extended Producer Responsibility from Product Stewardship

EPR and Product Stewardship are routinely used interchangeably by many writers on the subject and the discussion paper does this as well. The merits of accepting these two terms as synonymous are arguable, but the discussion paper asserts that they are different concepts (p5)⁷. The discussion paper also distinguishes between EPR and other policy instruments such as levies, rebates and advance disposal fees (p6). The discussion paper goes on list 10 Australian schemes to illustrate the application of EPR principles in Australia, all of which are product stewardship schemes and some of which incorporate levies, rebates and advance disposal fees (p7). On the following page, the discussion paper cites 15 “instruments which can be used to facilitate EPR schemes”, which include a broad range of financial instruments including all those previously mentioned as tools distinct from EPR⁸.

We are concerned that the confusing representation of different types of schemes under different collective terms will undermine progress in developing a comprehensive waste policy toolkit for State Government. From the perspective of Local Government, which terms are chosen is of little consequence. Local Government is concerned that the Department should have access to the largest practicable policy toolkit – including all of those approaches listed on p8 of the discussion paper. If not all of the instruments listed in the paper fall within the State Government’s concept of EPR and if the Government does not presently have a policy on the use of these other instruments, then would this prevent the implementation of such schemes? In view of the period required to secure a new waste management act, it is highly desirable to ensure that the process should not need to be repeated in years to come on account of the State Government having reverted to a narrow definition of EPR.

General Recommendation (v) State Government must clarify the meaning of the terms EPR and Product Stewardship and should state whether Market Based Instruments fall within either category.

General Recommendation (vi) State Government should ensure that the Legislation is broad enough to allow the use of instruments that might, by some definitions, fall outside EPR (eg levies and other market based instruments).

5. Generic versus Specific Focus

We take the view that the Government’s immediate assignment is to consider a generic framework for dealing with waste and resource conservation issues rather than to actually tackle any one specific waste type. If this view is correct, we submit that the discussion paper dedicates disproportionate discussion to specific waste types and specific EPR style schemes. Conversely, the discussion paper has not explained in sufficient detail, how the generic framework might be implemented.

⁷ We agree with this assertion.

⁸ From p 6: “...EPR is but one of a suite of tools, ...Other tools include the application of economic and regulatory instruments, such as levies and rebates, advance disposal fees and controls through licensing.”

State Government must decide (with the assistance of responses received to the discussion paper) whether WA should adopt EPR as one of the tools it can use to deal with waste and resource conservation issues. Much later, State Government will need to decide between specific scheme options for dealing with particular waste types. Yet this question can be set aside for the time being. As the discussion paper identifies, “any EPR scheme would need to include extensive consultation and transparent decision making” (p 10). This passage makes clear that consideration of the specifics of any EPR scheme can take place later.

Key Recommendation (iii) State Government should not allow the development of their general policy on EPR to be slowed down by an untimely discussion about specific mechanisms at this stage.

For the purposes of legislative development, State Government should focus on developing a streamlined framework for making decisions on waste and scheme types. The legislation (or supporting regulations) will need to clearly set out decision making processes and criteria. One important type of legislative detail will be the considerations for determining priority materials and the discussion paper provides a list of these (twice)⁹. Setting aside the consideration added at the bottom of page 10 relating to ‘capacity’, Local Government is supportive of the items in this list.

With respect to the point about industry capacity, we would argue that this will be a relevant criterion if the list identifies only wastes for which EPR schemes may be appropriate. The criterion would not be appropriate if the list is to serve the broader function of identifying all wastes of concern to State Government and therefore warranting a policy response of some kind. To suggest that a waste is not a material of concern on the grounds that its industry has no capacity to respond to its impacts would not be acceptable to the community. To suggest that a material is not a priority for an EPR scheme because the industry lacks capacity is a different and more satisfactory proposition.

6. Proscribing Limits for EPR Approaches

The discussion paper states that:

“EPR can only apply to wastes where there is a clearly identifiable producer with a reasonable capacity to take action, or though a well organised industry sector with a capacity to influence the whole supply chain.”
(final paragraph on p4)

With respect to the requirement for *a clearly identifiable producer*, we agree that identifying the producer is a precondition for producer responsibility and certain categories of industry would be inappropriate targets for an EPR scheme. For example it would be difficult to make the fishing, livestock and the fruit and vegetable industries responsible for consumers’ kitchen scraps.

With respect to question of *a reasonable capacity to take action*, we note that the WA Local Government Association Policy Statement on Waste Management Legislation includes, among other considerations for developing the priority waste list, the question of whether “the producer is

⁹ Recommend culling one of the lists, see pp 10 & 11-12

well placed to reduce the impacts of their products".¹⁰ This statement may be read as being consistent with the *reasonable capacity* test mentioned in the discussion paper. This is partly true, but depends on the purpose to which the Priority List is put.

The WA Local Government Association criterion was adopted with the expectation that the priority list would be developed as a first step in creating possible EPR schemes, as per the NSW model – see section entitled "Function of the Priority List". As suggested in that section, this model need not be automatically adopted by State Government. Perhaps the decision will be made to use the priority list more broadly, as a list of materials to address by means of some Government action, potentially including but not limited to EPR. If this happens then wastes should be selected for the list by virtue of the characteristics of the waste type, irrespective of the capacity or situation of the producer.

With respect to the questions of whether an industry is *well organised* or able to *influence the whole supply chain*, we take a different view. It seems to Local Government that where State Government is satisfied that a particular sector does not possess the capacity to influence the supply chain, this only serves to justify adding other participants in the supply chain to the scheme. It shouldn't supply a rationale for not using EPR. Similarly, where an industry sector is not well organised, this may justify the State Government imposing an external (regulatory) response rather than waiting for an internal (voluntary) scheme. The presence or absence of a high degree of organisation in that industry sector doesn't speak to the suitability of increasing industry responsibility, merely to the likelihood that the industry will be capable of organising its own scheme to manage that responsibility.

We note that debating the question of who has capacity to influence the whole supply chain has been a recurrent industry strategy to obstruct EPR schemes around the world. A salient example is provided by the New Zealand experience with their Packaging Accord. One of the architects of this agreement recently noted that all the industry participants, from retailers to brand owners, were initially reluctant to admit that they possessed any capacity to affect the supply chain.¹¹ Once these industry participants were assembled in one room, they were compelled to admit that they did possess this capacity, since collectively they effectively were the supply chain. We hope that State Government will reject such arguments when it considers whether an EPR response is appropriate.

To conclude our remarks about the narrowing of the potential application of EPR we wish to comment on the Minister's media statement to the effect that EPR in WA would be about supporting voluntary industry measures.¹² Local Government accepts that there will be many instances in which regulation may not be the preferred option, but pre-emptively ruling out regulation in a range of circumstances is an irresponsible negotiating strategy. The threat of regulation must be seen as a key bargaining chip which State Government must start using to motivate industries to get organised and start winning supply chain influence. This threat will be all

¹⁰ s4(b)(point 6)

¹¹ Ket Bradshaw, Ministry for the Environment, 2004, pers comm.

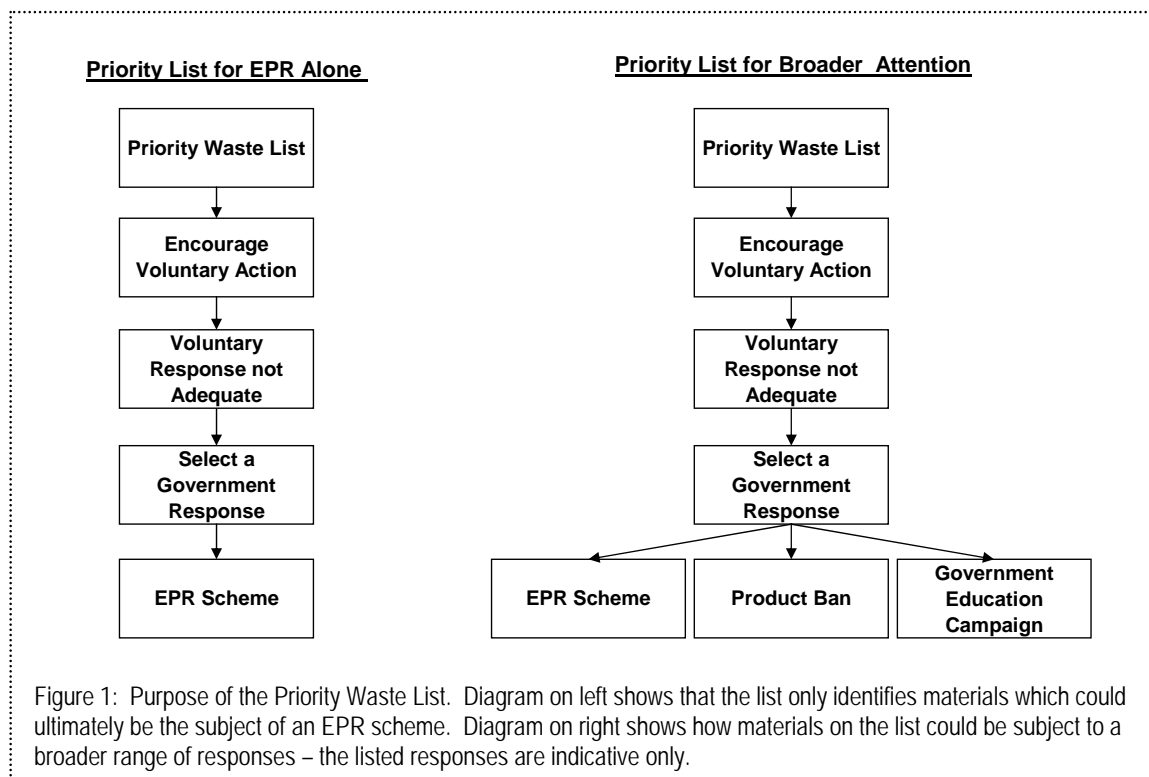
¹² "Feedback on the EPR discussion paper will help... develop the necessary mechanisms to support voluntary schemes in WA." Judy Edwards, 31/12/2004, Media Release: "A New Direction for Waste Management", p2.

the more compelling if State Government ensures that mandatory EPR schemes are poised for deployment should voluntary approaches fail to materialise or perform.

- General Recommendation (vii)** State Government must legislate to allow EPR in the broadest possible range of circumstances – arguments that EPR is not appropriate in specific instances should be had, if and when those industries make the priority list.
- General Recommendation (viii)** State Government should assertively use the threat of regulation to stimulate industry action.
- General Recommendation (ix)** State Government should ensure that mandatory alternatives are ready to be deployed to ensure that industries view the threat as imminent.

7. Function of the Priority List

State Government should clarify whether it intends to develop a priority list specifically to guide the development of EPR policy responses or whether it should be used in initiating a broader range of government actions. The Waste Avoidance and Resource Recovery Act will not simply be an EPR framework and therefore it is not apparent why materials on the priority list should be limited only to EPR-style responses. It may be sensible for the priority list mechanism to be integrated with the broader range of responses contemplated in the last drafting instructions. This list included EPR schemes, product bans, subsidies, levy schemes, education campaigns, residue bans and others. The two different approaches can be represented pictorially as below.



The NSW approach has been focused on EPR in particular, but WA could adopt a broader framework. We note that the current version of the WA Local Government Association Policy Statement on Waste Management Legislation contemplated an approach similar to the NSW model. However, we do not express a preference for one or other approach.

General Recommendation (x) State Government investigate the option of extending the role of the Priority Waste List beyond the identification of potential targets for EPR.

8. A Second Stage for the Framework

The discussion paper draws on the NSW model to set out how priority wastes might be identified. The NSW model also provides some basic guidance to the Minister in determining whether a given EPR scheme is appropriate.¹³ We interpret these provisions as relating to a second stage in the process of determining government policy. The first stage relates to identifying the wastes, the second to establishing what should be done about them. The discussion paper does not explain how State Government intends to address the second stage in the process.

The Legislation should guide the Department and the Minister in their decision making at this second stage. Naturally, the nature of this guidance will depend on the latitude which Parliament wishes to extend to the Department and the Minister. For example, Parliament will decide whether to limit the suite of possible policy responses to EPR or to include other types of responses like market based instruments.¹⁴ In addition to setting out the range of policy instruments, the legislation will need to guide the Department and the Minister in how to make their decisions. This guidance should include

- the type of evidence to consider;
- the level of consultation to be undertaken;
- the types of impediments which are to be considered relevant (and irrelevant);
- what constitutes a timely response;
- reporting requirements; and
- how inter-jurisdictional issues should be resolved.

More than a set of considerations, a general process should be defined for how new schemes are to be developed, implemented, tested and if necessary abandoned. We have provided a sketch of what the process might look like (see inset: *Possible Stage 2 of Framework*).

¹³ See Waste Avoidance and Resource Recovery Act 2001, s17(1).

¹⁴ We note that these are included under the point entitled "*How would an EPR scheme operate?*" (Discussion Paper p8).

Possible Stage 2 of Framework – Addressing Priority Material Types

If we assume, for arguments sake, that the first stage of the framework results in a material being identified as appropriate to be dealt with via EPR approaches, then the second stage of the framework might look something like the following:

- I) State Government undertakes consultation (perhaps covering a series of materials in one block) to:
 - o develop a set of key outcomes relating to the waste material type which will need to be achieved;
 - o outline the timeframes for each of the outcomes to be achieved;
 - o define the event and timing trigger for a non-voluntary approach to be considered necessary (assuming there would be significant pressure to try a voluntary approach first);
- II) State Government encourages industry voluntary action and liaises closely with the industry to ensure that the voluntary mechanism can achieve the necessary outcomes within the required timeframes;
 - o ensure outcomes are incorporated within the voluntary mechanism;
 - o ensure mechanism creates the necessary drivers to create behavioural change;
 - o ensure that necessary regulatory support is provided;
- III) State Government provides public reports:
 - o Regularly, on the progress being made towards achieving the outcomes;
 - o Six months before the trigger on the prospects for achieving the outcomes;
 - o At the trigger point, to declare whether the voluntary scheme succeeded or failed;
- IV) State Government begins research and development in order to have identified the best non-voluntary approach in time to publish this in its report six months prior to the trigger deadline.
- V) If the trigger is activated, State Government immediately provides a deadline to the Commonwealth to undertake to develop a mandatory scheme, with a unilateral state scheme as the default route;
- VI) State Government moves immediately to create the necessary regulations to operate a state based mandatory scheme;
 - o Consultation is limited to technical details and to the stakeholders who will be operationally affected;
 - o Industry alternatives would need to show how they will provide certainty of outcomes;
- VII) Implementation of the mandatory scheme and reporting requirements similar to those set out in (III).

General Recommendation (xi) State Government should incorporate a second stage into the generic framework for managing wastes of concern which establishes what is to be achieved in managing the waste, what the responsibilities of State Government as coordinator of the policy response will be and what things it should consider in its decision making. This second stage should include:

- o Early consultation on outcomes and timeframes for a given waste material and public communication of these things once determined.
- o State Government responsibility for achieving outcomes – delegable but not divestible.
- o Starting contingency planning for other alternatives long in advance of the final determination that the scheme being trialled has succeeded or failed.
- o Regular reporting on progress.
- o When a scheme fails the selection of a replacement focuses on outcome certainty.
- o Considerations for determining which type of scheme is most appropriate for dealing with a given waste issue. These should include those set out in s6(c) of the WALGA Policy Statement on Waste Management Legislation.¹⁵

¹⁵ The WA Local Government Association Policy Statement on Waste Management Legislation, online, available http://wastenet.net.au/Resource_Library/Files/Policy_Statement-Waste_Management_Legislation.pdf.

9. National Policy Approaches

The discussion paper states that “it is likely that any mandatory EPR scheme would need to be established nationally.” We consider that certain specific schemes may be more appropriately dealt with by means of federally coordinated action. Yet the Federal Government has, through its actions, made it perfectly clear that it will not implement mandatory mechanisms. Thus it remains for State Government to address two aspects of its glib view that mandatory measures should be reserved for the Commonwealth.¹⁶

Firstly, State Government should share the detail of its legal advice that unilateral, state based EPR schemes would be likely to offend constitutional provisions, the National Competition Policy or other aspects of the Australian federal system. Legal advice provided to the not-for-profit organisation, Boomerang Alliance, and appended to this Submission supports a contrary view. This legal advice is the first legal analysis we have seen of the practical, political and legal impediments to state action in this area. It concludes that it is perfectly conceivable that a state government could, for instance, implement a CDL scheme identical to that which operates in SA. Without seeing State Government’s conflicting analysis, their decisions to defer to the Federal level will continue to arouse suspicions of ‘buck-passing’.

Secondly, State Government should re-address the appropriateness of deferral to the Federal Government, given that the Howard Government has made clear by its words and deeds that it will not implement mandatory EPR schemes. For at least the next three years, State Government calls for federal action in this area are likely to continue to go unheeded. We doubt that State Government would be ignorant of this reality. Thus, if it declares that it will eschew state-based schemes and will continue to opt for federal action, State Government can scarcely claim to be an advocate for mandatory EPR schemes. We view State Government’s unwillingness to even test the waters with unilateral action as evidence that it wishes to continue to pay mere lip service to mandatory EPR approaches. It would be preferable for State Government to declare that mandatory schemes are ‘off the agenda’ than to continue to pretend that it truly advocates this approach.

General Recommendation (xii) State Government should provide the detail of its legal advice on the extent to which unilateral state action is permitted within existing Federal and Constitutional constraints.

General Recommendation (xiii) State Government should explain, with justifications, whether it considers that federally instituted EPR schemes will be seriously considered prior to 2010.

10. Timeliness

Local Government and their communities are keen to see timely and appropriate responses to priority waste issues. The epidemic of tardiness in waste policy at the state and federal levels

¹⁶ In fairness to the WA State Government, we note that the other states have whistled the same tune.

strongly militates against increasing the motivation of industries to voluntarily assume responsibility. Given the expectation of regular deferral to the Federal level, State Government will need to set out how the impediments caused by Federalism might be overcome. If State Government satisfies itself that Federal coordination is required, this should not absolve the State of responsibility for working towards an outcome. Local Government will wish to know that the State Government intends to follow a clearly established process when it identifies a waste of concern. The process must include clear guidelines for determining whether federal sphere action is required, for referring matters into the federal sphere and for progressing state compliance with federal provisions.

It bears reminding State Government of its tardiness in implementing the NEPM on Used Packaging Materials.¹⁷ Perhaps the State Government anticipates that all EPR-style schemes would be federally coordinated. Were this the case, State Parliament, would still need to legislate for the expedient roll-out of those schemes within WA. An avoidable delay that we could conceive of would be one caused by narrowly drafted head powers which prevented the Department from producing the necessary regulations to give local effect to a national scheme. This suggests that the legislative head powers should be broadly drafted in anticipation of the need to support national schemes. Further to this point, we caution State Government to contemplate a broader range of federal schemes than simply the Co-Regulatory style schemes for which a generic framework has recently been proposed.¹⁸

General Recommendation (xiv) State Government should outline the procedures it proposes for identifying schemes most appropriately left to Federal coordination.
General Recommendation (xv) State Government should outline the procedures it proposes for ensuring timely Federal action followed by timely State compliance.
Key Recommendation (iv) State Government should draft EPR head powers in order to meet the anticipated need to comply with federal schemes, including, but not limited to Co-Regulatory Schemes.

¹⁷ Consider the Environmental Protection (NEPM - UPM) Regulations 2003 which brought WA into compliance with the National scheme nearly five years after it started.

¹⁸ See the EPHC Industry Discussion Paper *Co-regulatory Frameworks for Product Stewardship*

Appendix 1 – Comment on Purpose of Discussion Paper

Currently two remarks on the purpose of the discussion paper are buried in the Intro and the section entitled "Next Steps". These remarks are not perfectly consistent. It is our understanding that the discussion paper is designed to help the Govt gauge the extent and nature of community support for EPR as a policy tool in WA. This in turn will permit Cabinet to endorse or reject EPR in a formal policy position and if endorsed, to approve the incorporation of EPR head powers into the Resource Recovery and Waste Avoidance Bill.

In addition, we originally interpreted the authors' remarks regarding feedback to imply that the paper aimed to elicit input to be used in producing legislative drafting instructions. Informal conversations with Departmental staff indicated that this was not a primary function of the discussion paper. Adding to our confusion around this question, was the following statement, found in the Minister's launching Media Statement:

"Feedback on the EPR discussion paper will help... develop the necessary mechanisms to support voluntary schemes in WA."

(31/12/04 "New direction for waste management")

This statement suggests a desire to receive input on functional aspects of EPR mechanisms, rather than just the higher policy level question of whether to endorse EPR as a possible approach. Moreover, it indicates that the Government's vision for EPR is limited to voluntary schemes – a proscription upon which the discussion paper is silent. The poorly defined purpose of the discussion paper and the inconsistency of aims articulated by the Minister and the Department make it difficult to respond in a constructive manner and lend no confidence that the input will be put to any useful purpose.

The Municipal Waste Advisory Council hopes that by drawing attention to these inconsistencies, it will assist the Department to better target future Discussion Papers. In particular, the Municipal Waste Advisory Council suggests that Discussion Papers be introduced with a section clearly setting out what the Discussion Paper and the feedback it generates should achieve.

Appendix 2 – Legal Advice on State-Based Regulation: Boomerang Alliance

Excerpt from EDO Advice to Boomerang Alliance

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8 December 2004

Ms Jane Castle
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C/- Total Environment centre
Level 2, 262 Kent St
Sydney NSW 2000
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Dear Jane

Advice in relation to the National Packaging Covenant

Introduction

1. The Boomerang Alliance Inc has sought advice from the Environmental Defender's Office Limited (EDO) on a number of issues relating to a potential challenge to the validity of the National Packaging Covenant (NPC) and legal impediments to pursuing a zero waste/Extended Producer Responsibility (EPR) legislative framework within Australia.
2. This advice is divided into three parts as follows:
 - Constitutional issues
 - *Trade Practices Act* issues
 - *Mutual Recognition Act* issues

Summary of advice

3. For the reasons set out below, we are of the opinion that legislation can be drafted, with the specific aims and objectives of waste reduction, resource conservation and conserving energy, that imposes responsibility on the producers of packaging waste to recover that waste. Provided that such legislation does not impose discriminatory burdens upon market participants from other States or provide discriminatory incentives to local participants, then we do not believe that it would breach section 92 of the Constitution.



An independent public interest legal centre specialising in environmental law

4. In relation to trade practices, we are of the opinion the NPC and National Environment Protection (Used Packaging Materials) Measure do not contain provisions which are likely to be in breach of the *Trade Practices Act 1974*.
5. We are also of the opinion that the *Mutual Recognition Act* does not necessarily constrain EPR or Container Deposit Legislation schemes. We are also of the opinion that the *Mutual Recognition Act* could not be used to curtail the operation of a new NPC, assuming that it was based upon the existing model.

Part 1 - Constitutional Issues

6. This part of the advice addresses whether legislation that requires waste producers to pursue EPR, through schemes such as container deposit legislation (CDL), will infringe upon the “free trade” provisions of the Commonwealth Constitution.

Extended Producer Responsibility and Container Deposit Legislation

7. For the purpose of this advice, we have adopted the definition of extended producer responsibility (EPR) used by the OECD being “*an environmental policy approach in which a producer’s responsibility, physical and/or financial, for a product is extended to the post consumer stage of a products life cycle.*”
8. There are two key features of EPR. First, to shift responsibility for waste (physical and or economic, full or partial) upstream to the producer and away from municipalities. Second, to provide an incentive for producers to take environmental considerations into the design of the products to reduce waste.
9. EPR can be implemented through a range of voluntary, mandatory and regulatory approaches. These include product take back programs, consumer procurement programs, voluntary industry approaches (such as the National Packaging Covenant), economic incentives¹⁹, prohibitions on the use of materials, disposal bans and mandated recycling. The latter four approaches would, in our opinion, require a legislative framework to give effect to the measure proposed. Accordingly, it is these concepts which we have considered for the purposes of this advice.

Constitutional powers

10. You have asked us to advise whether the Constitution limits or constrains EPR, and if so, how?
11. The Commonwealth of Australia Constitution Act 1901 (***Constitution***) is the document enacted by the Commonwealth Parliament at the commencement of Federation to delineate and coordinate the relationship between the Federal government and the sovereign States. The *Constitution* operates as an agreement between the sovereign powers, whereby those bodies give up some of their powers to a new central body, the Commonwealth, but preserve their sovereignty over those powers that they retain. To the extent that powers or functions of the two levels of government are concurrent, section 109 of the *Constitution* provides that the Commonwealth laws will prevail over inconsistent State laws.

¹⁹ For example, special taxes, product charges, advance deposit fees, deposit refund schemes, subsidies and tax credits for environmentally sound products

12. The primary area in which the *Constitution* may be relevant to EPR schemes is in relation to the powers of the State to make laws in respect of domestic trade and commerce.
13. Section 92 is the primary lever by which the *Constitution* controls inter-state trade and commerce and ensures that markets remain competitive. The section is found within Chapter IV of the *Constitution* headed “Finance and Trade”. It provides:

“92 Trade within the Commonwealth to be free

On the imposition of uniform duties of custom, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free....”

14. Essentially, section 92 of the *Constitution* requires inter-state trade and commerce to be immune from discriminatory burdens that are imposed to protect the States’ domestic markets from competition.
15. Notwithstanding the explicit expression that trade and commerce be absolutely free²⁰, the High Court has, on a number of occasions considered circumstances where provisions of State legislation which limit or restrict free trade are permissible. A significant body of jurisprudence and constitutional law theory has developed over the last century that discusses these circumstances. However, for the purposes of this advice, it is only necessary to review the more recent decisions of the High Court that address the imposition of burdens upon trade to achieve objects relating to environmental protection.
16. The first case of relevance is the decision in *Cole v Whitfield* (1988) 165 CLR 360. In this case the High Court was required to consider whether provisions of the *Sea Fisheries Regulation Act 1962* (Tas) which imposed limits on the minimum size for crayfish sold in Tasmania imposed a discriminatory burden on South Australian fishermen who could not sell undersized crayfish in that market. The object of the *Sea Fisheries Regulation Act* was to assist in the protection and conservation of Tasmanian crayfish stocks. The High Court held that the minimum size restriction was not a form of protection that gave the Tasmanian industry a competitive or market advantage. However, even if it did confer a market advantage, the prohibition was a necessary means of enforcing the object of the legislation. Therefore, section 92 of the *Constitution* was not infringed.
17. The second case which is directly relevant to the present fact situation relates to the validity of provisions of the *Beverage Container Act 1975* (SA) and the *Beverage Container Amendment Act 1986* (SA) which established the CDL scheme in South Australia. In *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 (the Bond Case) the Bond Brewing Group argued that the South Australian CDL legislation discriminated against the importation of beer from other States which did not have the facilities to use refillable bottles.
18. The *Beverage Container Amendment Act 1986* had sought to amend sections 4, 5, 6, 7 and 10 the CDL legislation by doing the following:
 - Inserting new definitions of “container”²¹ and “refund amount”²² in section 4;

²⁰ “absolutely free” has been held to mean an absolute freedom from unreasonable burdens *Hughes and Vale Pty Ltd v New South Wales [No.2]* (1955) 93 CLR 127

²¹ meaning – “a container of any kind made for the purpose of containing a beverage, being a container which when filled with the beverage is sealed for the purpose of storage, transport and handling prior to delivery for the consumption of its contents.



- Inserting a new section 5 which exempted certain types of containers from the operation of the Act (including refillable beer containers approved by the Minister);
 - Inserting a new section 6 which created an offence of selling beverages in containers not marked in a manner and form (in relation to the refund amount) approved by the Minister;
 - Amending section 7 to create an offence for retailers who refuse to accept delivery of empty glass containers and pay the person delivering the container the refund amount; and
 - Amending section 10 to create an offence (subject to section 7 above) for retailers to sell beverages off their premises unless the premises in which the sale takes place is within a delineated collection area of a depot that will accept the containers.
19. Clause 7 of the *Beverage Container Regulation 1976* was also amended so as to prescribe new refund amounts for certain containers. Of note, non-refillable containers for low alcohol based beverages and beer were allocated a refund amount of 15 cents in comparison to a refund amount of 4 cents for refillable containers approved by the Minister pursuant to section 5(b) of the Act.
 20. Prior to the Amendment Act being passed, Bond had been increasing its market share in the South Australian market, although it did not operate a brewery in that State. The practical effect of the amendments were that Bond was prevented from increasing its market share.
 21. The objects of the CDL legislation included “to promote litter control by forcing the return of glass bottles” and “to promote energy and resource conservation”. However, Bond argued that an unstated object of the legislation was to make the sale of beer in non-refillable bottles commercially disadvantageous.
 22. The High Court reviewed a number of authorities from the United States that considered that country’s commerce clause doctrine (which is the equivalent of s.92). The US Courts had adopted an approach of looking at whether the purpose of the legislation was in the public interest and whether its effects on inter-state trade and commerce were merely incidental or imposing an excessive punitive burden on such commerce²³. For example, in the case of *Minnesota v Clover Leaf Creamery Co* (1981) 449 US 4565 the Court held that legislation banning the use of non-refillable plastic containers was not discriminatory because the purpose of the prohibition was to promote resource conservation, ease the burden on solid waste disposal and conserving energy.
 23. The majority of the Judges in the Bond case distinguished the US test from that applied by Australian Courts since *Cole v Whitfield* on the basis that the critical issue for section 92 of the Constitution was whether the laws were protectionist. In other words, Australian States have the power to enact legislation for the wellbeing of the people in their States, provided that it is not discriminatory.
 24. The Court took the view that the questions about whether a particular legislative enactment is a necessary or desirable solution to a particular problem is a matter best left to the political process. However, if the means adopted to solve that problem are disproportionate to the objects to be

²² meaning – “in relation to a container of a particular description means an amount prescribed as the refund amount in relation to the container of that description”

²³ See for example – *Pike v Bruce Church Inc* (1970) 397 US 137 @142

achieved, then the law will not be considered to be appropriate for the achievement of the objects of the legislation²⁴.

25. In the Bond case, the majority of the Court was of the opinion that whilst the legislative intent was appropriate for the protection of the environment, the burden imposed by the disproportionate costs in Regulation 7(d) and the benefit imposed by the exemption in s.5(2) of the Amendment Act were excessive. In the Court's view, those provisions went beyond the aim of ensuring the same rate of return of refillable bottles and disadvantaged the sale of beer in non-refillable bottles.
26. Notwithstanding the Court's finding that s.5(2) and Regulation 7(d) infringed s.92 of the Constitution and were therefore invalid, the Court was of the opinion that the deposit and return system itself was not invalid and that the definitions in s.4 and the provisions of ss6 and 7 were capable of standing apart. In other words, provided the cost of return for non-refillable bottle was not going to significantly affect the ability of Bond to access the market, it would not be discriminatory. Following on from this case, the South Australian parliament reduced the cost of return to 5 cents for all glass containers.
27. In summary, the current High Court interpretation of section 92 of the Constitution is underpinned by two questions. First, does the State law or measure at issue impose a discriminatory burden on inter-state trade in a protectionist sense? Second, if so, is the law or measure saved by the fact that it was passed in pursuit of a non-protectionist objective as a reasonable and appropriate means of achieving that objective?

Implications for EPR/CDL

28. The cases referred to above establish the principle that provided burdens imposed on inter-state trade and commerce do not discriminate between market participants from different States, then the legislation that imposes that burden will most likely be consistent with s.92 of the Constitution. We have specifically referred to cases that have considered the imposition of burdens that seek to achieve objectives of environmental protection and waste reduction. Clearly these are matters that States have the power to legislate for and are matters that it is in the public interest that they do so.
29. The CDL scheme adopted by South Australia is an example of a regulatory approach to EPR which, in our opinion (subject to the qualification above) is valid from a constitutional perspective.
30. As noted above, the primary limitations that derive from the Constitution are whether or not the law can validly be made by a particular State or the Commonwealth, as the case may be, and, from a commercial point of view, whether a State law infringes upon the guarantee of free trade between the States.
31. In relation to the jurisdiction question, we have assumed that the focus of legislation providing a regulatory framework for EPR would be at a State level through stand alone waste or packaging management legislation. These issues are matters that the States clearly have power to enact laws in relation to.

²⁴ the court was following the approach adopted by it in the earlier cases of *the Commonwealth v Tasmania* (1983) 46 CLR 625 (Tasmanian Dams case) and *South Australia v Tanner*(19)



32. However, if the Boomerang Group were to seek legislative changes that related to corporate responsibility - for example through amendments to the *Corporations Law* - then this would require a review of the Commonwealth statute and the complementary State Acts which adopt that law. The Commonwealth has the power to make laws with respect to trading corporations: by virtue of the corporations power in section 51(xx) of the *Constitution*. However, it may be reluctant to make the changes proposed unless it had the support of all the State and Territory governments.
33. Assuming that valid legislation can be drafted, the critical question is how far that legislation can go in imposing burdens which may have implications upon the ability of companies to engage in free trade or restrict competition in the market. This issue will be dealt with in a separate advice on the *Trade Practices Act 1974*. The cases discussed above provide guidance as to how the High Court would consider a provision that imposed a discriminatory burden upon persons who were disadvantaged by an EPR scheme. In our opinion, when considering the burden being imposed, or any incentives being offered for participation in an EPR scheme, regard must be had to the class of persons who may be affected by the scheme (both within and outside the State) and whether the burden imposed by the scheme will significantly affect that class of persons ability to enter and participate in the waste or packaging market.

