



Australian Government

Department of Sustainability, Environment,
Water, Population and Communities

National Waste Policy: Less Waste, More Resources

PRODUCT STEWARDSHIP LEGISLATION
CONSULTATION PAPER
November 2010



Consultation paper for product stewardship legislation

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Definitions of key terms

Accreditation

The decision made by the Regulator that a proposed voluntary product stewardship arrangement conforms to the Government's standards and, if applicable, can be marketed with appropriate Government labelling.

Approval

The decision made by the Regulator that the proposed co-regulatory or mandatory (where appropriate) product stewardship arrangement may go ahead.

Arrangement

For the co-regulatory and mandatory frameworks (where appropriate), an arrangement is what a liable party develops for approval by the Regulator and implements in order to meet its product stewardship obligations and requirements under the legislation.

In the case of the voluntary framework, an arrangement is what a party develops and implements in order to meet its requirements and obligations for accreditation under the legislation. In this way, the term 'arrangement' can be applied consistently across all three frameworks under the legislation.

Arrangement administrator

An arrangement administrator is the entity responsible for administering an arrangement. This may be a product stewardship organisation established for that purpose.

Co-regulatory

Co-regulatory approaches to product stewardship will involve a combination of Australian Government regulation and industry action. Under a co-regulatory approach, government sets the minimum outcomes and operational requirements, while industry has some discretion about how those requirements and outcomes are achieved.

End-of-life

A product is at end-of-life when its owner no longer wants it, and the task of repair (if required) or of finding a new owner (such as by selling it or donating it) is not considered to be worth the time, effort or expense required. This may be due to damage or failure to perform the product's original functions, or it may have been superseded by more advanced products.

Environment Protection and Heritage Council (EPHC)

The Environment Protection and Heritage Council addresses broad national policy issues relating to environmental protection, particularly in regard to air, water and waste matters. The EPHC also addresses natural, Indigenous and historic heritage issues. The members of the EPHC are Ministers, not necessarily environment Ministers, from participating jurisdictions (i.e., Commonwealth, State and Territory Governments, the New Zealand Government, and the Papua New Guinea Government).

Extended Producer Responsibility (EPR)

Extended Producer Responsibility is a subset of Product Stewardship which places primary responsibility on the producer for the re-use, recycling or disposal of their products when they are no longer required by the consumer.

Green wash

Misleading information disseminated by an organisation to present an environmentally responsible public image. For example, products collected under the guise of recycling that end up in landfill, or are not recycled in an environmentally friendly or ethical way.

Legacy waste

Items for which the seller is still present in Australia, but the item was sold at a time when there was no Extended Producer Responsibility rule relating to that item in Australia.

Liable party and 'party'

A liable party is the entity responsible for meeting the obligations and requirements established under the product stewardship legislation for co-regulatory and mandatory schemes.

The term 'party' is used when referring to entities within the voluntary framework, recognising that there is no liability or obligation under the legislation compelling entities to obtain accreditation.

'Proponent', 'Participant', 'Entity' is also used.

Mandatory

Mandatory product stewardship is where the Australian Government regulates requirements for product stewardship, including the way that liable parties must meet those requirements, leaving little or no discretion on how requirements are met.

Market

A place or institution that facilitates trade between people. Usually, a market allows sellers to exchange goods, services or rights, for money and allows buyers to exchange money for goods, services or rights.

Market intervention

A law or government policy that alters the relationships between buyers and sellers in a market. For example, it might set minimum product standards or prohibit dealings in certain goods, services or rights.

National Waste Policy

On 5 November 2009, Australia's environment ministers agreed to a new national policy on waste and resource management. The *National Waste Policy: Less waste, more resources* sets the agenda for waste and resource recovery in Australia to 2020.

Orphan waste

Orphan waste consists of products or materials from a producer that cannot be identified or that belong to a company which no longer participates in the industry or no longer exists.

Polluter-pays

The 'polluter-pays' principle holds that the party responsible for undertaking an activity that causes environmental damage should pay for that damage. This reflects the view that the environment is a community asset and that any party damaging that asset should pay compensation to the community for that damage.

Product Stewardship

A policy approach recognising that manufacturers, importers, retailers, governments and consumers have a shared responsibility for the environmental impacts of a product throughout its full life cycle. Product stewardship schemes establish a means for relevant parties in the product chain to share responsibility for the products they produce, handle, purchase, use and discard.

Product stewardship legislation

This refers to the Product Stewardship Bill and subordinate legislation.

However, specific reference is made to the Product Stewardship Bill (referred to hereafter as 'the Bill') or subordinate legislation (usually referred to as 'Regulations') where it is important to make the distinction.

Product Stewardship Organisation (PSO)

An organisation established by industry participants, some of whom may be competitors, to deliver a product stewardship function for products or materials on their collective behalf.

Service level agreement

A service level agreement is a part of a service contract where the level of service is formally defined.

Threshold

A threshold is the minimum point of activity (e.g., in terms of annual turnover or number of units imported) below which parties are not liable for the obligations and requirements established under the legislation.

Voluntary

Voluntary product stewardship occurs when companies, groups of companies or organisations representing them choose to undertake product stewardship as part of their business model or as a means of demonstrating their values.

Overview of the consultation paper

The purpose of this paper is to provide information on the design of the National Product Stewardship Legislation as the basis for consultation with stakeholders, including the community, businesses, industry and governments.

Under strategy 1 of the Council of Australian Governments (COAG) endorsed *National Waste Policy: Less waste, more resources* (the National Waste Policy) it has been agreed by Australian, state and territory governments that:

The Australian Government, with the support of state and territory governments, will establish a national framework underpinned by legislation to support voluntary, co-regulatory and regulatory product stewardship and extended producer responsibility schemes to provide for the impacts of a product being responsibly managed during and at end of life.

Legislation, also known as a 'Bill' until it has Royal assent, is in the process of being drafted for introduction into the Australian Parliament.

This paper covers the legislation only. Consultation on regulations and arrangements for specific products or material, such as televisions and computers which will be covered under the legislation, is being dealt with through separate consultation processes (more information on this can be found on the department's website at: www.environment.gov.au/ewaste/index.html).

The paper sets out:

- the context to the legislation and overview of its content (Chapter 1)
- information on how the roles and responsibilities under the legislation will be implemented through governments, industry, consumers and the community (Chapter 2)
- how voluntary, co-regulatory and mandatory product stewardship will be provided for in the legislation (Chapter 3)
- accreditation or approval of product stewardship arrangements (Chapter 4)
- other design and implementation considerations (Chapter 5)

Submissions on this paper close 10 December 2010. Details on how to make submission on this paper is provided in Chapter 6.

Chapter One

Context

This Chapter outlines the context for the product stewardship legislation. It provides an overview of what constitutes product stewardship, the motivation behind product stewardship both nationally and internationally, and the role of national product stewardship legislation. It also gives an overview of the legislation and key concepts necessary to understand the rest of this paper.

1.1 Policy Context

On 5 November 2009, all Australian governments, through the Environment Protection and Heritage Council, agreed to a new national policy on waste and resource recovery. The *National Waste Policy: Less waste, more resources* sets the strategic agenda for reducing waste and managing waste as a resource to deliver economic, environmental and social benefits to 2020. The policy was endorsed by the Council of Australian Governments (COAG) in August 2010.

The aims of the National Waste Policy are to:

- avoid the generation of waste, reduce the amount of waste (including hazardous waste) for disposal
- manage waste as a resource
- ensure that waste treatment, disposal, recovery and re-use is undertaken in a safe, scientific and environmentally sound manner, and
- contribute to the reduction in greenhouse gas emissions, energy conservation and production, water efficiency and the productivity of the land.

Building on COAG's 1992 National Strategy for Ecologically Sustainable Development and a range of existing policy at all levels of government, the National Waste Policy was the culmination of a comprehensive nine month process that included significant stakeholder consultation, evidence gathering and analysis. A Regulation Impact Statement on the National Waste Policy made the case for national action. The result of the process was the identification of six key directions and sixteen strategies for all governments to pursue over the next ten years in order to realise the aims of the National Waste Policy. The first key direction of the National Waste Policy is:

Shared responsibility for reducing the environmental, health and safety footprint of manufactured goods and materials across the manufacture-supply-consumption chain and at end of life.

Under Strategy 1 of the National Waste Policy the Australian Government has given a commitment to introduce national legislation to support voluntary, co-regulatory and regulatory product stewardship and extended producer responsibility schemes to provide for the impacts of a product being responsibly managed during and at end-of-life.

Following consideration of a Regulation Impact Statement (RIS)¹, Australia's environment ministers also decided on 5 November 2009 that televisions and computers would be the first products covered by the new legislation. The detailed design of the proposed national recycling scheme for computers and televisions—addressing matters such as collection and recycling targets—is the subject of a separate process of consultation.

Product stewardship is one of 16 interrelated strategies under the National Waste Policy designed to address the challenge of achieving a vision of less waste and more resources. While product stewardship has a lot to offer as a tool for managing the environmental, health and safety footprint of manufactured products and materials, including at the end of a products life, it is one of many approaches to dealing with waste and resource recovery – it is important to choose the right tool for each problem.

1.2 What is Product Stewardship?

There are many definitions of product stewardship and extended producer responsibility, including those from the OECD, Productivity Commission and Environment Protection and Heritage Council. In drafting the Product Stewardship Bill a simple description of product stewardship (noting 'product' should be read to include 'materials' in this paper) is being used:

All parties in the production-supply-consumption chain ensuring that products are responsibly managed during and at the end of life and.... where Extended Producer Responsibility is the term applied where the producer or importer is responsible for the product during and at end-of-life.

Product stewardship is an approach which acknowledges that all those involved in producing, selling, using and disposing of products have a shared responsibility to ensure the sound management of those products. In this context, 'sound management' means management to reduce the environmental, health and safety footprint of products and materials.

Extended producer responsibility schemes are a type of product stewardship that places primary responsibility on the producer, importer and sometimes other sellers of a product. Under this approach, producers or importers are required to fund activities to reduce the environmental, health and safety impacts of a product. It is a strategy designed to promote the integration of environmental costs associated with goods throughout their life cycles into the market price of the products. These schemes give effect to the 'polluter-pays' principle.

¹ Before the Australian Government introduces legislation, there is a process of gathering evidence to determine whether there will be a benefit to the community from that proposed legislation. This analysis of the likely effect of the legislation is expressed in a Regulation Impact Statement.

According to the OECD (2009), an extended producer responsibility scheme is characterised by

the shifting of responsibility (physically and /or economically; fully or partially) upstream toward the producer and away from municipalities; and the provision of incentives to producers to take into account environmental considerations in designing their products.

Product stewardship schemes can be categorised as:

- *voluntary schemes*, under which organisations voluntarily take actions to responsibly manage products;
- *co-regulatory schemes*, involving a combination of industry action and supporting government regulation;
- *mandatory schemes*, which are more prescriptive, and give limited or no discretion as to how product stewardship goals are to be achieved.

Product stewardship schemes take many forms, depending on the problem they are seeking to address. Schemes may have a more 'holistic' or whole of life focus—from raw materials, design and manufacture to managing waste at end of life—or may just focus on one stage of life. Their objectives may be very broad, encompassing environmental, social and economic outcomes, or quite narrow, such as a recycling scheme focusing on reducing waste.

An example of a holistic and also a 'voluntary' scheme is the international Responsible Jewellery Council's materials stewardship scheme. Under this scheme members of that council

are committed to promoting responsible ethical, human rights, social and environmental practices in a transparent and accountable manner throughout the industry from mine to retail. Their commitment aims to reinforce consumer and stakeholder confidence in jewellery products.

The Australian Packaging Covenant, a co-regulatory scheme, has signatories from the packaging industry, government and community organisations. It is focused on reducing waste and increasing resource recovery, but action by signatories is taken at different stages in the supply chain, including improved design of packaging to reduce the amount of material used in packaging (called light-weighting) or to increase re-use of packaging.

The 'mandatory' South Australian container deposit scheme has a primary focus on the end of a product's life through collecting and recycling domestic food and beverage containers.

1.3 The drivers of product stewardship

Product stewardship has been widely adopted in Australia and internationally as an approach to managing the health, safety, environmental and sometimes other impacts of different products and materials.

The European Union introduced extended producer responsibility directives for products from as early as 1975. The most important of these are the Waste Electrical and Electronic Equipment Directive and the Restriction of Hazardous Substances Directive or RoHS. Early Australian examples include the 1975 South Australian Container Deposit legislation. In 2001, the OECD released a guidance manual for governments developing such schemes.

Internationally the key motivations behind product stewardship schemes include limited space for landfill, hazards in products, the costs imposed on local municipalities, lack of capacity to safely manage specific forms of waste, international regulations and agreements, increasing prices of oil and raw materials, availability of new recycling technologies, the scarcity of resources and community values. Table 1 provides examples of product stewardship schemes in Europe, North America and Asia.

While many schemes are waste and resource recovery focused, the drivers of product stewardship schemes are not always waste related or targeted at end-of-life. For example, international agreements like the Stockholm Convention on Persistent Organic Pollutants aim to reduce health as well as environmental impacts of substances. Approaches such as the European RoHS directive give effect to such international agreements by requiring producers to reduce the use of specified hazardous substances in their products—thereby reducing hazard at every stage in a product’s lifecycle.

There may also be a need for action at a different stage of a product or material’s life. Even where hazardous materials are not present or the driver is a desire to reduce waste, recycling may not be the only approach. For example, ‘light-weighting’ has been used throughout the world to reduce packaging waste, with flow on environmental (e.g., less energy use and greenhouse gas emissions) and economic benefits (these sorts of practices are often described as ‘green design’).

Table 1: Examples of product stewardship schemes in Europe, North America and Asia

Product	Country and legislation
Waste electrical and electronic Equipment	<p>EU: Directive 2002/96/EC on waste electrical and electronic equipment and Directive 2002/95/EC no restriction of use of hazardous substances in electrical and electronic equipment</p> <p>UK: <i>Waste Electrical and Electronic Regulations</i></p> <p>Holland: <i>WEEE Decree of July 2004</i></p> <p>USA (23 states): e.g., <i>Minnesota Electronics Recycling Act 2007</i></p> <p>Canada: <i>Waste Diversion Act 2002 (Ontario), Recycling Regulation (British Columbia)</i></p> <p>China: Management Regulation on the Recycling and Treatment of Disposal Appliances and Electronic Products</p> <p>Taiwan: <i>Waste Disposal Act 1988</i></p> <p>Japan: <i>Law for the promotion for the effective utilisation of resources 2003</i></p>
Batteries	<p>EU: Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators</p> <p>Belgium: Belgian Battery Take-back Scheme (BEBAT)</p> <p>Canada: Waste Diversion Ontario Battery Scheme</p> <p>South Korea: <i>Product Recycling System 2003</i></p> <p>Taiwan: <i>Waste Disposal Act 1988</i></p>

Mercury containing Products	EU: Directive 2002/95/EC Reduction of Hazardous Substances USA: Lamp and other Mercury-containing Products Programs South Korea: <i>Product Recycling System 2003</i>
Packaging	EU: Directive 94/62/EC on packaging and packaging waste France: <i>Household packaging decree</i> Germany: <i>Closed-Loop Substance and Waste Management Act 1994</i> (includes the German Packaging Ordinance) Switzerland: <i>Beverage Container Ordinances of 1990 and 2000</i> UK: <i>Producer Responsibility Obligations (Packaging Waste) Regulations</i> Japan: Containers and packaging recycling law Taiwan: <i>Waste Disposal Act 1988</i>
General consumer products (e.g., whitegoods, lubricants, tyres)	EU: Directive 2005/64/EC on approval of motor vehicles with regard to their re-sale, recycling and recovery EU: Council Directive 75/439/EEC on disposal of waste oils Holland: <i>Management of White and Brown Goods Decree 1998</i> Canada: <i>Ontario's Waste Diversion Act 2002, British Columbia's Waste Recycling Regulation 2004</i> South Korea: <i>Product Recycling System 2003</i> Japan: <i>Home Appliance Recycling Law 2001, Law for Promotion of Effective Utilisation of Resources</i>

Significance of drivers for Australia

The significance of these drivers for Australia varies. As part of developing the National Waste Policy, the National Waste Report was prepared. Published in 2010, it provided the first comprehensive report on resource recovery and waste management for Australia. The report and the consultation process for the National Waste Policy identified trends and problems that product stewardship, in concert with other strategies, can address.

The National Waste Report found waste generation in Australia is increasing. Between 2002–03 and 2006–07 it increased by around 31 per cent. Over the same period, population growth was only 5.6 per cent. This trend is expected to continue.

The nature of waste is also changing, and existing approaches are often no longer adequate to manage this change. Waste is now more complex. It is increasingly made up of products and materials containing potentially dangerous chemicals, metals and other components that require safe management to protect the environment and human health. Some of these components are new compounds that have resulted from technological change, requiring a fresh approach to their management.

These products often pass through a global supply chain involving transport and packaging at each stage, resulting in health, safety and environmental impacts at each stage. Products also have an increasingly short life, which encourages consumers to throw them away and replace them.

Australia's international obligations are also changing. Under some international agreements, increasingly stringent controls are being placed on materials and products containing them. The Australian Government has responsibilities arising from a number of international agreements including agreements related to hazardous substances, wastes, persistent organic pollutants, ozone depleting substances and greenhouse gases. Relevant instruments to which Australia is a party include: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Montreal Protocol on Substances that Deplete the Ozone Layer and the Stockholm Convention on Persistent Organic Pollutants.

Commonwealth legislation has been passed to address some of these international obligations. However, there is a need to ensure that product and waste management in Australia remains in line with our international obligations which continue to evolve over time. It is only to be expected that gaps will continue to emerge in our regulatory frameworks in this area. Through the management of products and materials throughout their lifecycle, product stewardship has the potential to make an important contribution to the implementation of these international obligations.

Managing products that contain hazardous substances present particular challenges throughout their lifecycle. Producers, importers and retailers are not usually responsible for the product once it is sold. There is often no incentive for producers or importers to reduce the hazardous content of a product. Products are generally not labelled to ensure safe handling throughout their lifecycle. Consumers who purchase the product may not be aware that it has potentially dangerous components, may fail to consider the necessary means and costs of disposal when they purchase it, and may rely on other bodies to dispose of the product when they are finished with it. The responsibility for reducing the impact of products is not clearly delineated, and as a result, safe handling and disposal relies on acceptance of responsibility on a voluntary basis.

As illustrated in Table 1, product stewardship has been used internationally to address issues of hazardous materials in products and hazardous waste (generally as they relate to the Basel and Stockholm Conventions). However, the suitability of product stewardship as a response, in the Australian context, to issues of hazard in products would need to be carefully explored on a case by case basis before taking regulatory action.

When government intervenes in the form of legislation it is often in response to a regulatory and/or market failure.

Regulatory failure can include where a law has an unplanned or perverse outcome or where it is inefficient such as where there is a proliferation of legislation covering the same issue (discussed further in 1.4).

There are a number of potential market failures in relation to products. For example, it is common for the price incentives that would lead to producers or consumers reducing hazardous materials in products or reducing waste from products to be inadequate. In the absence of government intervention the environmental and social (such as health and safety) costs (known as 'externalities') associated with certain products and materials are often not fully represented in the costs incurred by producers or consumers. There is therefore limited incentive for producers or consumers to influence the quantity and design of products or to reduce waste (including hazardous waste).

Another form of market failure is where people do not have access to appropriate information (known as 'information asymmetry') to make a reasoned decision (such as in the 'green wash' example below). This can apply to both consumers and producers. For example, there is often inadequate information available for producers and consumers to make informed decisions about purchasing or disposal of products and materials (such as when a product's label does not identify its content).

Australians have indicated that they value reduction in waste, resource recovery through recycling and the reduction of hazard in end-of-life products. A recent study on community willingness to pay in relation to recycling computers and television sets shows that consumers are willing to pay between \$18 and \$50 to recycle each item. Respondents were also willing to pay an additional premium of \$3.55 for having the items collected from the kerbside rather than having to take them to a recycling facility.

The method of payment for recycling is also relevant in motivating people's behaviour in this area. While products may have residual value at end-of-life, this alone may not be sufficient to motivate people to recycle (or for the economy to provide them with this service). The television and computer study indicated respondents wanted this to be up-front in the purchase of a television or computer, not when they dispose of the product—something that can be achieved through product stewardship.

There is also evidence that Australians are concerned about 'green wash'—for example, where what they do recycle may not always be recycled in an environmentally or ethical way; or what is collected under the guise of recycling ends up in landfill. Green wash undermines people's confidence in product stewardship activities; particularly given that most people do not have the resources to establish the facts about a product stewardship scheme.

1.4 The role of national product stewardship legislation

A common issue identified in developing the National Waste Policy was the lack of a cohesive national approach to many aspects of waste and resource recovery, including product stewardship. Different approaches to the same problem by different jurisdictions in relation to national companies and products in national markets often increase costs to companies, consumers and society more broadly. The National Waste Policy identified a clear role for a range of national and cooperative action to achieve the aims of the policy.

The drivers of product stewardship have led to a variety of regulatory, co-regulatory and voluntary product stewardship and extended producer responsibility approaches being implemented, trialled or proposed by individual states and territories and at the local government level for individual products, materials or types of packaging. Schemes have been developed on a product by product basis and a jurisdiction by jurisdiction basis. Examples of these are summarised in Table 2.

Yet the products covered are sold in a national market by companies that operate nationally. In the absence of a comprehensive national approach, this patchwork of initiatives and proposals creates uncertainty in the market place, causes additional regulatory and operational burdens on business, distorts the market and provides competitors outside the bounds of the jurisdictional schemes a competitive advantage (free-rider behaviour).

Experience has shown a number of shortcomings with the current co-regulatory approach of National Environment Protection Measures (NEPM) under the National Environment Protection Council Act 1994. To give effect to a NEPM, regulations are made under separate legislation in each state (for example, the Used Packaging NEPM). Shortcomings include inconsistencies in approach, difficulty in undertaking compliance action and time taken to gain national coverage (four years in the case of the Used Packaging NEPM).

Wide support for national product stewardship was expressed throughout the National Waste Policy consultation process. The Australian Local Government Association (ALGA) stated 'One of the key outcomes of the National Waste Policy should be the development of an effective (EPR) and Product Stewardship framework at the national level. This is particularly important in diverse national markets where individual state-base approaches would add costs, restrict competition and contribute to distortions in the allocation of resources in the economy'.

Two of the schemes in Table 2 are supported by Commonwealth legislation (refrigerants, used oil), one is supported by stand-alone state legislation (beverage containers) and one is supported by a mix of state and Commonwealth legislation (packaging).

Table 2: Examples of product stewardship and EPR in Australia

Voluntary	Newspapers	Publishers National Environment Bureau—voluntary industry scheme—commenced 1990
	Mobile phones	MobileMuster—voluntary industry scheme—commenced 1999.
	Cartridges	Individual company and collective schemes, the best known being 'Cartridges for Planet Ark'—voluntary industry schemes—commenced 2003.
	Mattresses	Dreamsafe (Vic) and WSN (NSW)—two companies charge fees to remove and recycle used mattresses.
	Computers	Byteback—free take-back trial in Victoria, jointly funded by Victorian Government, leading computer manufacturers and peak industry association.
Co-regulatory	Packaging materials	The National Packaging Covenant—a joint industry and government scheme to reduce the environmental impacts of packaging materials across the packaging supply chain. The voluntary covenant is underpinned by the Used Packaging National Environment Protection Measure (NEPM) made under the <i>National Environment Protection Council Act 1994</i> and given effect by legislation in each state and territory. Brand owners that choose not to participate in the covenant are subject to the NEPM.
Mandatory	Oil	<i>Product Stewardship (Oil) Act 2000</i> —imposes a levy to fund recycling of waste oil.
	Beverage containers	Container deposit legislation (South Australia)—legislation for deposit and refund on beverage containers.
	Ozone	The <i>Ozone Protection and Synthetic Greenhouse Gas Management Act 1989</i> —requires companies or persons who deal in and dispose of refrigerant gases to hold a Refrigerant Trading Authorisation.

There are also a number of voluntary schemes with no legislative basis (agricultural chemicals, mobile phones, printer cartridges, mattresses and computers). New South Wales, Victoria and Western Australia have the legislative capability for implementing product stewardship or EPR schemes. However, the potential for consistency and complete coverage across Australia has not been fully addressed to date.

Industry and other stakeholders have been seeking government regulatory support in a number of cases, including televisions and computers, since the start of this decade.

The need for a national approach to product stewardship and the inefficiencies of state-based approaches were identified by submissions on the Consultation Paper on the National Waste Policy, including those from ALGA, the Waste Management Association of Australia and Product Stewardship Australia. The Productivity Commission in its 2006 report on waste management also referred to the potential of regulatory inconsistency if state-based schemes went ahead.

The Regulation Impact Statement for the National Waste Policy indicated that if states were to pursue their own product stewardship schemes then the cost to the economy would be between \$212 million and \$414 million above business-as-usual while a national approach for products operating in a national market would be a net saving of \$147 million. These costings are over 20 years and discounted at 7 per cent per annum.

There is no existing Commonwealth legislative framework of general application that would fulfil the requirements of the National Waste Policy under strategy 1 of the policy. The Product Stewardship Bill will establish a comprehensive national framework that will enable Australia to more effectively manage the health, safety and environmental impacts of products. It will address the fragmented approach that has characterised product stewardship activity to date and allow for government activities on product stewardship to be strategically targeted and to apply nationally.

1.5 Lessons from existing product stewardship

It is important in designing a Commonwealth legislative framework to apply the lessons from the experience of existing product stewardship legislation.

Product stewardship schemes in Asia, Canada, the European Union, and parts of the United States (see Table 1) cover packaging, electrical and electronic equipment, batteries, mercury-containing products, oils and general consumer products such as whitegoods and tyres. New Zealand has also passed legislation providing for regulatory and voluntary product stewardship schemes. Two reports commissioned by the department document overseas experiences of product stewardship schemes.² They are summarised at **Appendix A**. While providing lessons that are transferable to Australia, these reports note that no single approach could simply be copied or introduced in Australia for a given product.

1.6 Overview of the ‘framework’ legislation

This section provides an overview of the approach being taken to the design of the Bill—the key concepts and elements introduced in this section are then described in more detail in the following chapters of this paper.

Consistent with the motivations of product stewardship and the role of the national legislation identified above, the legislation may need to cater for several different products and materials to be covered over time and in a changing international, social, environmental and economic context.

² *Product Stewardship in North America and Europe and Product Stewardship Schemes in Asia: China, South Korea, Japan and Taiwan*, both at www.environment.gov.au/wastepolicy/resources.html.

Flexibility is a key design principle for the Bill. As each product and industry is unique, so are the requirements relating to specific products and industries, therefore the legislation will need to be flexible. To avoid the proliferation of isolated legislation relating to single products at Commonwealth, state or local government levels the legislation will need to provide the ability to add products over time following a rigorous assessment process and to tailor the arrangements to suit different circumstances. To achieve this flexibility, the detail relating to a specific product or industry cannot be in the Bill itself—as it is a sometimes costly and usually time consuming to amend legislation.

However, flexibility needs to be balanced with transparency of decision making (also a design principle). This is particularly relevant to where regulating a new product and industry may provide benefits as well as costs. The design of the Bill and how it is implemented will ensure there is appropriate consultation with relevant stakeholders such as the community and business/industry when adding new products. There are also a number of existing government policies and processes that help ensure transparency of decision making, such as regulatory impact assessment.

Appropriateness of regulating a product, particularly at a national level, is also a key design consideration. There needs to be good reason for government to intervene. Several elements of the Bill will establish a threshold to ensure that it only applies to products that are sufficiently significant to justify regulation. These elements include the objectives of the legislation (discussed in 1.8), product criteria (discussed in 1.9) and the fact that no product stewardship obligations would be imposed without regulations being made. These regulations would be subject to regulatory impact assessment, which will help identify the best approach to a problem with a product. The Constitution also helps identify what and who it is appropriate for the Commonwealth to regulate.

For major decisions, such as regulating a new product, the legislation will provide for oversight of the Parliament by using disallowable instruments like regulations and determinations by the Minister. A disallowable legislative instrument provides either house of parliament with a period of time for scrutiny and provides for them to veto that instrument if they have concerns.³

In designing the legislation consideration is being given to its potential interaction with other regulatory frameworks that affect products at the Commonwealth level and in the states and territories. This is a significant and complex task but one that is necessary to ensure that conflict and duplication between the new legislation and state, territory and Commonwealth legislation are avoided. Care is also being taken in drafting the legislation to ensure that Commonwealth regulatory activity does not create an impediment to continued state, territory and local government support for local product stewardship activities.

³ Chapter 15 Delegated Legislation and Disallowance. Odgers' Australian Senate Practice — Twelfth Edition — www.aph.gov.au/Senate/pubs/odgers/chap1501.htm

The approach being taken to implement these design principles is termed 'framework legislation'. The legislation will provide an enabling framework covering key matters such as the criteria that make a product suitable for coverage by the legislation and how obligations are created and applied to different entities, like companies or product stewardship organisations running a scheme. It will cover who the regulator is and what powers they have. The legislation will include provisions for offences and penalties, monitoring, auditing and reporting. Table 3 lists the key elements of the Bill.

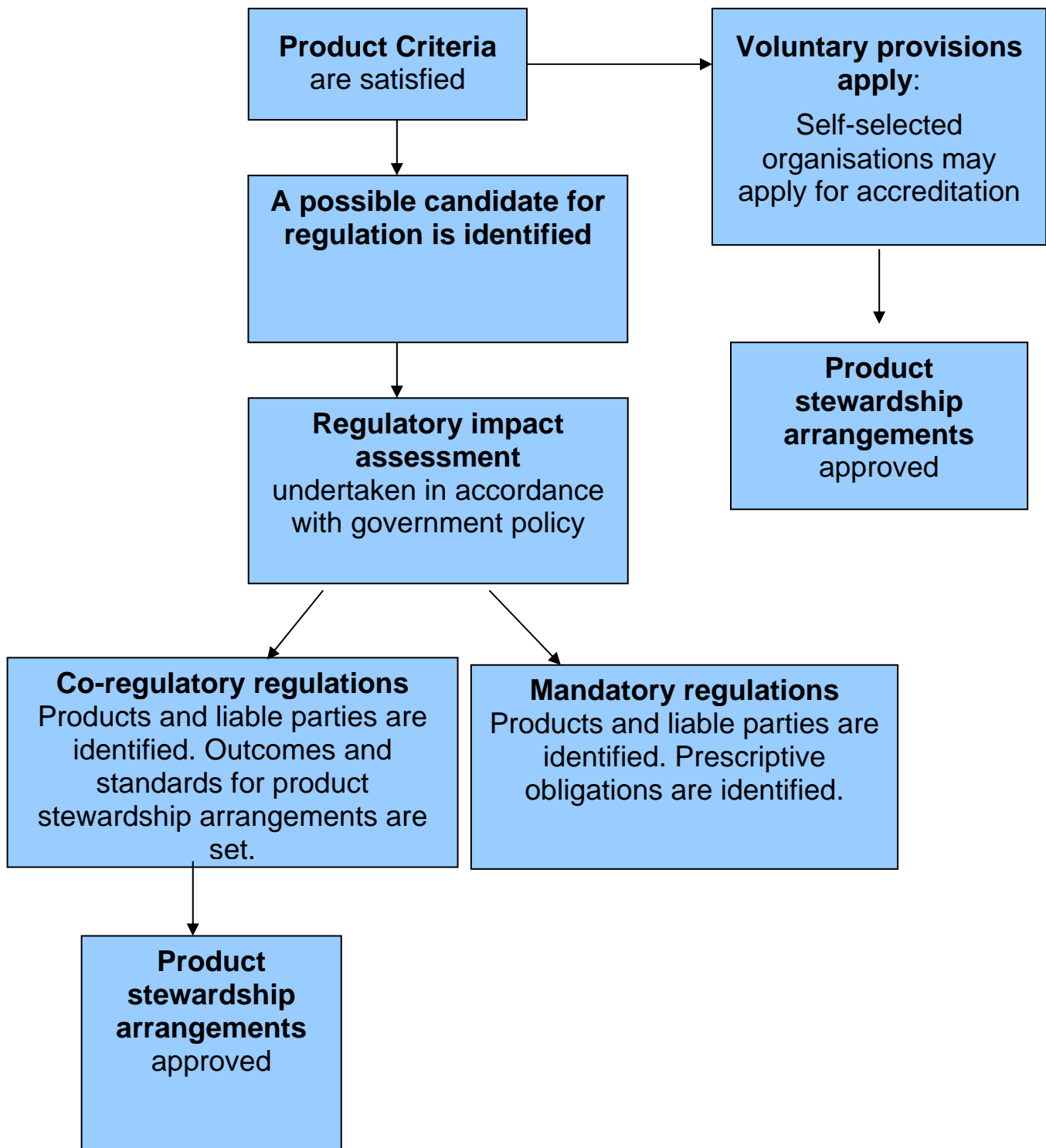
In order to maintain flexibility, regulations will contain the detailed rules to be applied to implement the legislation—including such things as what products and what entities are to be regulated (that is, the liable parties), and the obligations to be met by a liable party. Guidelines and other documents may be used to support activities, such as accreditation of a voluntary scheme.

The legislation will provide for accrediting voluntary product stewardship and regulating specified products and industries through either a co-regulatory or mandatory approach. In the context of the Bill:

- **Voluntary** approaches are where an industry, business or community organisation comes forward voluntarily to seek accreditation by the Australian Government of a product stewardship arrangement on a fee-for-service basis. This element is designed to encourage product stewardship more broadly and to address issues such as market failure including where the community cannot confirm for itself the environmental claims of organisations ('green wash'). Participation by all businesses within an industry in voluntary product stewardship arrangements would not be required under the legislation.
- **Co-regulatory** approaches involve a combination of industry action and supporting government regulation, with the latter being used to ensure, among other things, that no firm can obtain a competitive advantage from refusing to participate in industry action. Under this approach, government sets the outcomes to be met, but industry has discretion as to how those outcomes are achieved. Industry will be required by regulation to organise and fund product stewardship arrangements to meet these obligations or join an industry-run product stewardship organisation, which will meet these obligations on behalf of members.
- **Mandatory** approaches involve legislated requirements that are more prescriptive as to how product stewardship goals are to be achieved. Under mandatory schemes the regulator will specify both the outcome and the way in which the outcome will be met.

Figure 1 provides a flow diagram of the structure of the legislation.

Figure 1: Structure of the Product Stewardship Legislation



Four key concepts in the framework legislation are:

- product stewardship scheme, which refers to the regulatory scheme that covers all of a class of product and an entire industry;
- arrangement, which is a written agreement that sets out the actions put in place collectively or individually by organisations to meet obligations or requirements under voluntary or co-regulatory product stewardship schemes;
- arrangement administrator, which is the entity responsible for administering an arrangement. This may be a product stewardship organisation established for that purpose;
- product stewardship organisation, which may also be known as a producer responsibility organisation, is an organisation established by industry participants to implement an arrangement on their collective behalf.

As well as dealing with matters relating to products and individual product stewards, the legislation will also make provision for a regulator to approve product stewardship arrangements that would meet the obligations of individual firms and others (that is, liable parties) or to accredit voluntary arrangements. Consistent with Australian and international experience, given the economies of scale and cost effectiveness of cooperative action, it is likely that individual organisations would form product stewardship organisations to collectively deliver on individual obligations under the Act or to voluntarily realise product stewardship goals. The legislation and associated instruments will provide the structure to require appropriate standards of good governance (including transparency) of product stewardship organisations and product stewardship arrangements.

In order to be flexible in its design, the legislation will also include reference to relevant tools that could be used to manage the risks of products warranting mandatory product stewardship. These tools or 'controls' are based on those already used in relevant legislation in Australia and overseas (see Table 1 and Table 2). For example, the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* restricts and/or bans the use of certain ozone depleting substances in products, but also requires that products be de-commissioned in a way that prevents pollution. The European RoHS directive limits the use of listed hazardous substances in electronic products and requires labelling.

These tools may include the ability that those recycling or disposing of toxic waste products do so in a certain way, the ability to collect fees for recycling or safe disposal (a tax or levy is different from a fee and would require a separate Bill), and the ability to restrict hazardous substances in a product.

Listing the approaches to product stewardship that may be required is particularly relevant to the mandatory element of the Bill. There are currently no candidate products for this element of the Bill—but there may be some in the future as a result of changing international and Australian conditions. Specifying the list of possible implementation requirements also provides more transparency to what the mandatory element of the Bill might be used to do, as well as narrowing overlap with other Commonwealth legislation.

1.7 How will products come to be subject to the legislation?

In the first instance all products must meet two or more of the product criteria which will be contained in the legislation (see 1.9 for details of the criteria). Regulatory intervention would need to be consistent with the objectives of the Act (see 1.8) and there would be a need to establish that there is a community benefit from the intervention. There is no intention to create a list of products in the Bill, like those that appear in some state legislation. The way in which a product becomes a candidate for coverage by the legislation will be different depending on whether the approach being taken is voluntary or regulatory (co-regulatory/mandatory).

The majority of schemes covered by the legislative framework are likely to be voluntary, as industry and non-government organisations seek accreditation to improve the credentials and public recognition of their product stewardship activities. The Regulation Impact Statement for the National Waste Policy estimated that up to five products or materials might be proposed for national co-regulatory and mandatory product stewardship arrangements over the full time-frame of the policy (ie to 2020).⁴

Conceptually, the approach being taken to voluntary product stewardship is very different from co-regulatory or mandatory approaches. As suggested above—the aim of the voluntary component of the framework legislation is to encourage product stewardship and overcome ‘green wash’, without applying a regulatory requirement. While each product would need to meet the product criteria, organisations running product stewardship schemes would voluntarily apply, on a fee for service basis, for accreditation and would need to meet the requirements for accreditation of that scheme. This would entitle them to make use of government branding that signals to the community they are doing what they say they do, in an ethical and environmentally sound way.

As well as meeting the relevant criteria, consistent with the design principles, products to be regulated would go through a rigorous assessment process, including regulatory impact analysis.⁵ This would examine why there is a need to intervene, the community benefit to be gained from such an intervention and the best approach to an intervention (which may not always be product stewardship). It would look at practical matters, such as how the costs of implementing and regulating a product might be covered.

⁴ Allen Consulting, *National Waste Policy Regulation Impact Statement*, October 2009 p. 42

⁵ COAG and Commonwealth guidelines on best practice regulation can be found at: <http://www.finance.gov.au/obpr/about/>

Given the differences between products and industries it is not intended that the legislation identify the criteria for determining the best approach to a product. The analysis undertaken to assess the impact of regulation will be an important part of determining whether a co-regulatory or mandatory approach to a product would be taken; as well as looking at alternate options beyond the legislation for dealing with the issues raised by a product.

Consistent with the collaborative approach in the National Waste Policy, Commonwealth, state and territory environment ministers would play a key early role in assessing, consulting and providing views on whether a product needs to be regulated at a national level and the form this might take. This is consistent with the approach taken to televisions and computers.

There may also be occasions where the Australian Government initiates action on a product, such as a result of changing international obligations. The same requirements for consultation and assessment of impact would apply. Responsibility for any decision and decision-making process on products covered by the legislation will ultimately lie with the Australian Government.

1.8 Objectives of the legislation

Objectives (or Objects) in an Act help define the scope and guide the interpretation and application of an Act. The objectives of the legislation are being developed with reference to the aims of the National Waste Policy and the Taking Responsibility direction. It is the intention that the legislation would provide the capacity to address the environmental, health and safety impacts of a product or material across its full life cycle, from manufacture to disposal.

The objectives would seek to:

- a. reduce the environmental, health and safety impacts of products across the manufacture-supply-consumption chain and at end-of-life, including through:
 - i. avoiding the generation of waste;
 - ii. reducing or eliminating the amount of waste for disposal;
 - iii. designing products in a way that reduces or eliminates hazardous substances in products;
 - iv. managing waste as a resource; and
 - v. ensuring that waste treatment, disposal, recovery and re-use is undertaken in a safe, scientific and environmentally sound manner;
- b. assist in the co-operative implementation of Australia's international responsibilities concerning the environmental, health and safety impacts of products across the manufacture-supply-consumption chain and at end-of-life.
- c. contribute to reductions in greenhouse gas emissions, energy use and water consumption by encouraging responsible management of products across the manufacture-supply-consumption chain and at end-of-life.

1.9 Product criteria

As discussed in 1.6, the appropriateness of regulating a product is a key design consideration. The key test for whether a product is covered by the legislation is provided by product criteria to be established in the Bill. These criteria will be used in identifying products on which it is appropriate for the Australian Government to intervene.

The legislation will include the requirement that at least two of the following criteria are to be satisfied before the legislation would apply:

- are products or materials in a national market;
- whether the product contains hazardous or toxic substances;
- whether there is the potential, in relation to the product, for increased resource recovery, material conservation, re-use, recycling, or contribution to greenhouse gas reduction, energy or water conservation;
- whether the product places significant economic burdens on jurisdictions (including local government) for end-of-life management;
- whether the consumer is willing to pay for management of the product;
- whether management of the product offers business opportunities that would make a contribution to the economy.

Consideration is being given to making the first criterion, that a candidate product is a product or material in a national market, mandatory and to require that a product meet at least one other criterion. A primary purpose of Commonwealth intervention is to deal with the impacts of products that are marketed and sold in a national market so as to avoid inefficiency and inconsistencies that arise from having separate legislation dealing with the same product in multiple jurisdictions (with the resulting complexity and duplication for business and others who have obligations under that legislation). This suggests that it is appropriate that all products or materials must meet the requirement that they be part of a national market.

Consideration is also being given to inclusion of an additional criterion to reflect the role that product stewardship can play in helping Australia meet its international obligations.

As noted in 1.7, any product which meets relevant criteria in the legislation would also be subject to other requirements, including consultation and assessment of regulatory impact, before they become subject to regulation under the legislation.

Table 3: Key elements of the proposed Product Stewardship Framework Act

Element of Act	Scope of proposed provisions
Definitions	Key terms will be defined. 'Product' will be defined broadly to include materials (e.g., packaging materials).
Objects	The Act will contain a list of objects which will define the scope of the Act and frame its provisions. They will guide the way the Act is interpreted, and amended if necessary, over time. (1.8 above).
Governance	The Act will identify who is responsible for administering and enforcing the Act (the 'regulator'). It is proposed that this will be the relevant Minister/Department of Sustainability, Environment, Water, Population and Communities (Chapter 2).
Geographical coverage	The Act will apply throughout Australia, this is expected to include Australia's external territories.
Products covered	The Act is expected to only apply to products that meet two or more of the product criteria (see 1.9 above). Obligations cannot be imposed under the co-regulatory or mandatory provisions unless regulations have been made.
Product stewardship arrangements	The legislation is expected to make provision for assessment and approval of 'product stewardship arrangements' which provide for the responsible management of a product to reduce environmental, health or safety impacts associated with that product (Chapter 1).
Administrators of product stewardship arrangements	Proposals for product stewardship arrangements will potentially need to nominate an administrator of those arrangements. This administrator may be, amongst other things, an individual company or a Product Stewardship Organisation (PSO) representing a number of companies (Chapter 1).
Voluntary provisions	Under the voluntary provisions self-selecting organisations may apply, where a product meets the product criteria, for accreditation of a product stewardship arrangement. Accreditation would provide consumers with confidence about the accuracy of product stewardship claims (Chapter 3).
Co-regulatory provisions	Under the co-regulatory provisions, liable parties identified in regulations are likely to be required to have, or be a member of, an approved product stewardship arrangement. Penalties would apply if this obligation is not met. Co-regulatory product stewardship arrangements would need to meet requirements set out in regulations (e.g., collection and recycling targets for the product in question). If these requirements are not met a range of enforcement options, including cancellation of the arrangement's approval, could be imposed (Chapter 3).
Mandatory provisions	The mandatory provisions will take a more prescriptive approach than the co-regulatory provisions. They are expected to provide the basis, through regulations, to require people or organisations involved in the life of a product to take specified action to reduce the environmental, health or safety impacts of a product (Chapter 3).
Monitoring, reporting and compliance	The Act will contain monitoring, reporting, auditing and compliance provisions. Reporting and auditing may include annual reports by arrangement administrators and third party audits of those reports (Chapter 5).
Government fees	The Act is likely to allow fees to be set in regulations, including fees to accompany an application for approval of a product stewardship arrangement.
Review of decisions	The Act will provide for both internal review of decisions, and review by the Administrative Appeals Tribunal (Chapter 5).

Chapter Two

Roles and responsibilities under the legislation

This chapter canvasses potential roles and responsibilities under the product stewardship legislation of the Australian Government, state, territory and local governments, industry and other non-government organisations, consumers and the community. It includes consideration of who within the Australian Government should play the role of decision-maker or regulator in administering the legislation.

2.1 The role of the Australian Government

The National Waste Policy clearly articulates the Australian Government's roles and responsibilities for waste management.⁶ These flow from Australia's international obligations to minimise waste (and particularly hazardous waste), to manage the risks associated with hazardous materials and to protect human health and the environment. The policy also refers to roles for government to promote more consistent and coherent regulation and to address market impediments to improved environmental outcomes.

The legislation will establish new functions for the Australian Government in regulating products and materials in a national market. Examples of these functions include:

- *Determining which products and/or materials will be covered*
 - designating, through regulations, which products and materials will be covered by co-regulatory or mandatory provisions under the legislation
- *Approving and overseeing national product stewardship arrangements,⁷ by:*
 - approving co-regulatory and accrediting voluntary national product stewardship arrangements;
 - varying, revoking or suspending approval or accreditation of product stewardship arrangements;
 - providing advice and guidance materials on such matters as the approval process and governance requirements for product stewardship arrangements, and principles to govern financial mechanisms.

⁶ See page 2 *National Waste Policy: Less waste, more resources* November 2009
<http://www.ephc.gov.au/taxonomy/term/86>

⁷ For the co-regulatory and mandatory an 'arrangement' is what a liable party develops for approval by the Regulator and implements in order to meet its product stewardship obligations and requirements under the legislation. In the case of voluntary, an arrangement is what a party develops and implements in order to meet its requirements and obligations for accreditation under the legislation.

- *Compliance and enforcement of product stewardship obligations, by*
 - receiving annual reports on performance from product stewardship organisations, individual companies or other liable parties
 - undertaking monitoring, auditing and compliance action (either directly or through agents appointed to do this, such as inspectors), and
 - imposing penalties for non-compliance with the provisions of the legislation.

- *Providing public information and raising awareness, by*
 - providing annual reports on the performance of product stewardship arrangements to the public
 - maintaining a register of product stewardship arrangements, and
 - providing information and maintaining a website for national product stewardship, including demonstration of good practice.

What the Regulator will do

The Act will identify the person or body responsible for making decisions on matters such as applications or proposals for product stewardship arrangements, assessments, approval, accreditations, monitoring and auditing of participants' activities, levels of compliance, appropriate enforcement activity and the provision of information on arrangements to consumers and the community. This person or body is commonly referred to as the regulator.

A decision on whether a product or material should be covered under the co-regulatory and mandatory provisions of the Act is not a matter for the regulator as it will involve the making of regulations. The Governor-General has responsibility for making regulations.

Governance structure for the regulator

The question of who within the Australian Government should perform the role of regulator (or decision-maker), and what administrative support ought to be provided to them, are key issues in the design of the legislation.

In 2005, the Australian Government issued a policy on *Governance arrangements for Australian Government bodies* to assist in determining the most appropriate structure and governance arrangements for activities that its agencies undertake.⁸

The governance policy states that a function, activity or power should, if possible, be conferred on an existing department, or another existing Australian Government body, rather than on a new body. There must be persuasive reasons to justify forming a new body. It should also be shown that benefits would flow from its establishment and that there is a clear need for separation and independence from departmental functions.

⁸ Department of Finance and Administration *Governance Arrangements for Australian Government Bodies* August 2005, at <http://www.finance.gov.au/financial-framework/governance/docs/Governance-Arrangements-for-Australian-Government-Bodies.pdf>

Given the scope of the legislation and proposed regulatory roles, and drawing on the guidance provided by the governance policy, there are three ways the Australian Government might undertake the regulatory functions.

1. *Minister/departmental delegate administers legislation*

- Environment Minister/delegate makes decisions within the scope provided by the legislation and regulations;
- Department staff supports the minister/delegate;
- Trained inspectors undertake compliance and enforcement activity.

An existing example is the *Environment Protection and Biodiversity Conservation Act 1999*.

2. *New statutory office-holder*

- The appointed statutory office-holder makes decisions within the scope given by the legislation and regulations;
- Office-holder reports directly to the minister or to appropriate agency head;
- Office-holder has a specialised and clearly defined range of functions.;
- Staff are made available by an agency (e.g., The Department) to support the office-holder;
- Trained inspectors may undertake compliance and enforcement activity on behalf of office-holder.

An existing example is the Office of the Renewable Energy Regulator.⁹

3. *Independent statutory agency*

- A new Commonwealth statutory agency makes decisions within the scope given by the legislation and regulations;
- Agency is independent of the Minister, though some level of Ministerial direction may be provided in legislation;
- Agency has specialised and clearly defined statutory role and function, and an Advisory Board may be used;
- Agency is responsible for compliance and enforcement, and own governance.

An existing example is Wheat Exports Australia¹⁰ established in 2008 to regulate the export of bulk wheat from Australia through the Wheat Export Accreditation Scheme.

Of these approaches, the first is likely to be most consistent with existing Government policy¹¹ and is a common approach successfully used to deliver regulatory functions across the Commonwealth.

⁹ www.orer.gov.au

¹⁰ www.wea.gov.au

¹¹ The policy is explained in 'Governance arrangements for Australian Government bodies' which can be accessed at <http://www.finance.gov.au/financial-framework/governance/governance-arrangements-for-australian-government-bodies.html>

As noted in 1.7, the Regulation Impact Statement for the National Waste Policy estimated that the level of regulatory activity resulting from the new legislation is expected to be modest. This activity level could be dealt with adequately by the first and second approaches, which avoid the costs of establishing a new agency.

The second approach of a statutory office holder is consistent with government policy and has sometimes been adopted for activities involving a level of market intervention and requiring a degree of independence.

The cost of establishing a new agency—the third approach—is likely to be considerably higher. There would need to be a compelling reason to establish an independent organisation, such as to deal with high volumes of regulatory activity. As noted in Chapter 1, the level of regulatory activity is expected to be modest and there does not appear to be a case for establishing a new agency.

On balance, administration by the Minister or delegate appears to be the most cost-effective approach.

2.2 Roles and responsibilities for state, territory and local governments

Under the National Waste Policy, the Australian Government is responsible for establishing a national legislative framework for product stewardship with the support of state and territory governments.

The Environment Protection and Heritage Council (EPHC), consisting of the Australian, state and territory environment ministers, will continue to address key national waste issues, and will monitor progress of the product stewardship framework and outcomes.

It is expected that EPHC would continue to initiate research into options for managing products and materials and put forward proposals for action under the national legislation. It may also facilitate the development of national guidelines and standards to support product stewardship.

Implementation of the national legislation will require a close working relationship between the Australian and state and territory governments, as the latter are the primary regulators of waste management and recycling activities.

The roles and responsibilities for state and territory governments will continue to flow from their existing environmental policy and regulatory functions, as well as their responsibility for other laws that apply to approved product stewardship arrangements, such as occupational health and safety laws and consumer protection laws.

Infrastructure and Product Stewardship

Those national product stewardship initiatives that focus on management of end-of-life products will have impacts on the capacity of existing collection and recycling infrastructure, as well as on planning for future infrastructure.

State and territory governments have important roles and responsibilities for strategic planning for major waste collection, re-use and recycling infrastructure, and managing the regulatory approval and licensing systems for this infrastructure.

Local governments and regional waste management groups¹² in some states also have roles as planners and providers of waste and recycling services and the appropriate infrastructure for them in their regions or areas. There is potential for local councils and regional waste management groups to broker and partner with those who are liable under the legislation, Product Stewardship Organisations or their service providers in the delivery of collection and recycling services.

State and territory agencies, local government and regional waste organisations are already strongly involved in promoting waste minimisation and raising public awareness about any product stewardship schemes within their area of responsibility. This includes activity to promote behavioural change. As product stewardship initiatives expand, there will be opportunities to provide information about their availability and provide guidance on accessing drop-off and collection services in their jurisdiction/area.

Compliance

It is expected that the Regulator will require proponents to demonstrate that they have governance structures with the capacity to comply with all relevant state and territory laws. Parties that have approved arrangements may be required to submit a compliance statement as part of annual performance reporting.

State and territory governments may be able to assist the Regulator with verification of compliance information provided by proponents, inspections and information gathering as part of their existing licensing programs and regulatory activities. The actual performance of any compliance activities on the Australian Government's behalf, should it be required, would be managed through agreements with the particular jurisdiction.

¹² Some local governments have established regional waste management groups, usually in high population areas, to manage waste efficiently by sharing the costs of capital investment, sharing information and achieving economies. See *National Waste Report 2010*, p 266.

2.3 Roles for industry and other non-government organisations

Under the legislation, liable companies involved in the life of products or materials covered by the legislation will be required to either enter into a product stewardship arrangement (under the co-regulatory element) or take specified action to reduce the environmental, health or safety impacts of the product (under the mandatory element). Companies or other non-government organisations such as charities would also need to meet requirements outlined in legislation or regulation/ministerial directions if they choose to seek accreditation of a voluntary product stewardship arrangement.

Organisations subject to the requirements of voluntary and co-regulatory product stewardship will generally have the primary responsibility for developing and implementing product stewardship arrangements.

Such roles and responsibilities may include:

- establishing governance and administrative arrangements;
- managing ongoing operations, including financing and compliance;
- reporting on progress against required performance outcomes;
- promoting product stewardship services;
- conforming with all relevant policies and legislation.

The roles and responsibilities of organisations subject to requirements and obligations under the legislation are discussed in further detail in subsequent chapters of this consultation paper.

An increased role for service providers

The establishment of a product stewardship scheme under the legislation is likely to lead to increased activity for businesses that support product stewardship of the covered product or material.

Where product stewardship schemes relate to managing a product at end-of-life, then the waste management and recycling industry (for example, recyclers, collectors and transporters) is likely to experience growth in its business. Similarly, where product stewardship schemes relate to better design or industrial processes, then there may be an increased role for industries providing such design or research services. This involvement may arise through being contracted by a liable party to deliver an element of a national product stewardship arrangement or through involvement in handling a covered product or material.

The waste management and recycling industry is also likely to be affected by any national standards and specifications that are developed for collection, transport and recycling of products and materials. Such standards would not be developed under the legislation. However, administrators of product stewardship arrangements may be required to use such standards in contracting services to encourage best-practice procedures that minimise environmental and health risks.

2.4 The role consumers and the community will play in product stewardship arrangements

Household and business consumers have an important role in product stewardship activities even though they may not have legal obligations under the legislation.

With the right information, such as labeling and access to appropriate infrastructure, consumers can make more thoughtful choices about the products they purchase, and actively participate in the collection, re-use and recycling at end-of-life.

The use of branding and consumer awareness schemes complemented by well-located collection networks has assisted the take-up of product stewardship schemes here and overseas. Awareness and education activities about how to dispose of products or materials at end-of-life can also play an important role by helping initiate a behavioural change by consumers within the community in support of product stewardship.

It can be expected that under the legislation proponents of particular product stewardship arrangements will be required to build in communication and awareness/education activities. The Regulator is also expected to provide public information to consumers, possibly via a register that provides details on accredited/approved arrangements.

However, there will also be an opportunity for community interest groups and consumer groups to play a role in promoting product stewardship in the community. For example, in the case of schemes dealing with end-of-life, in making information on recycling services and convenient collection points readily available.

One of the reasons for providing for the accreditation of voluntary product stewardship under the proposed legislation is to provide the community with assurances that the claims made about product stewardship activities are truthful and that they are being undertaken in a safe and ethical way. This is important because most people don't have the resources to observe the activities of product stewardship organisations and assess their effectiveness.

It is expected that the community's willingness to engage in product stewardship will be enhanced by the legislation's role in regulating product stewardship arrangements. The legislation will ensure that consumers and the community can be confident that where claims of product stewardship are made, there is evidence supporting the outcomes.

Chapter Three

Product stewardship schemes

It is proposed that the legislation will support a comprehensive approach to product stewardship by making provision for voluntary, co-regulatory and mandatory product stewardship schemes.

This chapter considers these three types of product stewardship in turn, discussing proposed objectives, coverage, administration and related issues.

3.1 Voluntary approach

Voluntary product stewardship occurs when companies or organisations initiate product stewardship activities as part of their environmental strategy or to deliver a community service. There are already a number of voluntary product stewardship arrangements operating in Australia, including those for mobile phones, computers, printer cartridges, mercury-containing lamps in the commercial and public sectors and chemical and pesticide containers.

The intention of the product stewardship legislation is not to impose obligations on companies or organisations which undertake voluntary product stewardship. Rather, the legislation provides the option to self-selected parties of submitting their voluntary arrangements to the Regulator for accreditation against accreditation requirements.

These requirements will provide for consistent responsibilities and standards of performance against which participating parties can be judged. Under reporting requirements in the legislation, information on how parties have performed against the criteria would be made public. This allows consumers and the community to be confident that the claims made about accredited product stewardship arrangements are accurate.

Objectives and coverage

The objectives of voluntary product stewardship are to

- provide an avenue for encouraging and recognising product stewardship without the need to regulate, and
- provide assurance to the community that a voluntary product stewardship arrangement is operating as it claims or as it is intended to be.

Accreditation of voluntary arrangements will remain optional for all new and existing voluntary product stewardship activities.

Voluntary product stewardship arrangements will be restricted to products or materials which meet two or more of the product criteria to be specified in the legislation. These criteria are listed in **Chapter One**.

Administration

In general terms, the administration of voluntary product stewardship will involve the following steps:

- Self-selected companies or organisations apply, according to the process published by the Regulator, for accreditation of their proposed product stewardship arrangements;
- The Regulator decides whether or not to accredit the voluntary arrangement. Applications will be assessed against eligibility and application requirements;
- Suitable branding may be developed and made available to accredited voluntary arrangements. This branding would enable accreditation to be communicated to consumers and other interested parties;
- Administrators of accredited arrangements will be required to certify or demonstrate that the arrangement continues to meet the requirements of their accreditation on an annual basis;
- The Regulator will undertake random and/or risk-based audits of arrangements to ensure compliance with accreditation requirements. Non-compliance may result in revocation of accreditation and withdrawal of any branding rights.

Full details of the administration of voluntary arrangements are expected to be set out in guidelines or directions issued by the Regulator. The guidelines will serve as the central reference point for any organisation considering, or subject to, accreditation and associated requirements. The guidelines will provide information to assist an organisation to assess the costs associated with achieving and maintaining accreditation, including the costs associated with adhering to standards, systems and processes that may apply.

In addition to the guidelines, the Regulator will publish a list of accredited voluntary arrangements and their key performance requirements.

Accreditation

The Australian Government uses accreditation in several different areas to measure and monitor an organisation's capability and performance against a pre-determined set of national standards and criteria. For example, accreditation is used for:

- *Providers of residential aged care services*,¹³
- *Child care service providers*,¹⁴
- *Building and construction contractors*,¹⁵
- *Overseas aid funding recipients*.¹⁶

¹³ <http://www.accreditation.org.au/>

¹⁴ http://www.ncac.gov.au/about_ncac/qa_childrens_services.asp

¹⁵ <http://www.safetysolutions.net.au/articles/37343-The-Australian-Government-Building-and-Construction-OHS-Accreditation-Scheme>

¹⁶ http://www.ausaid.gov.au/ngos/pdfs/accreditation_policy.pdf

‘Accreditation’ means that an organisation’s product stewardship arrangement has met a set of quality standards or criteria. Accreditation certifies the quality of the process or activity against the standards, and is designed to give the community confidence about the delivery of that process or activity. Reporting and auditing of performance form an essential part of accreditation processes. No funding will be provided by the Australian Government as part of the accreditation, and application fees will be charged.

Branding

Branding may be made available to accredited product stewardship arrangements to denote that accreditation requirements have been met. Administrators and members of a voluntary arrangement would be able to use the branding to communicate to the community that their product stewardship arrangement meets specified standards and criteria.

The Australian Government has frequently used branding as part of the delivery of products and services, but less often in the environmental domain. The National Carbon Offset Standard is an example of voluntary promotion of environmental products and services that has a strong branding component.

Box 1: National Carbon Offset Standard

The National Carbon Offset Standard provides guidance on what constitutes a genuine, additional voluntary offset. It sets minimum requirements for the verification and retirement of voluntary carbon credits and provides guidance for calculating the carbon footprint of an organisation or product for the purpose of achieving ‘carbon neutrality’.

The Standard provides Australian businesses, particularly farmers, with the opportunity to develop offset credits for voluntary carbon markets. These opportunities include offsets from a range of land-based activities such as improved forest management, revegetation and soil carbon.

The National Carbon Offset Standard also provides a voluntary standard for businesses to use in becoming carbon neutral or developing carbon neutral products. A trade mark has been developed to provide consumers with confidence that organisations and products bearing the trade mark are committed to carbon neutrality in a way that achieves genuine emissions reductions.

How many organisations will seek accreditation is likely to depend on the value that is placed on accreditation, and any associated branding, by the organisation itself, consumers and clients. Branding should be both valuable to the participants in voluntary arrangements and useful to the community.

Using government branding, parties to a voluntary product stewardship arrangement could market themselves as environmentally responsible, citing their participation in accredited schemes in promotional activities. Appropriate branding would assist consumers to assess whether the promotional claims and marketing are accurate.

To be effective, accreditation and any associated branding must:

- be as informative as possible;
- signify which organisations participate in an accredited product stewardship arrangement;
- clearly communicate what activities are covered by the accreditation (e.g., product design or collection and recycling).

Consideration is being given to the form that branding could take in the event it is to be made available, for example, the branding could be a standardised logo that can be used consistently across all voluntary arrangements. Another option could be to allow accredited arrangements to use branding and/or a logo of their choice, together with text that indicates their arrangement has been accredited by the Regulator. The latter approach is similar to the model adopted in New Zealand, whereby accredited voluntary arrangements have their own logo incorporating the statement 'Accredited by the Minister for Environment'.

Branding that is used where an arrangement has not been accredited, or false claims about the activities for which accreditation has been awarded, could constitute misleading and deceptive conduct under consumer protection laws.

Scope of voluntary arrangements

It is expected that accreditation for voluntary product stewardship arrangements could be sought by individual organisations, groups of two or more organisations or an entire industry sector for the same product or material. This could mean that for the same product or material there is more than one accredited product stewardship arrangement.

Multiple arrangements could promote competition and provide greater community choice. However, there is overseas experience that suggests having a large number of different arrangements dealing with the same product can have detrimental effects, for example, 27 multiple container deposit schemes resulting in public confusion and a reduction in recycling.¹⁷

The nature of the product and the approach being taken to product stewardship is a consideration in whether a collective approach or a competitive approach is more effective. For example, collecting a product for recycling that is typically leased or sold into large businesses (for example, photocopiers) may be more effective through individual company take back schemes; whereas there may be economies of scale to be gained from a smaller number of entities collecting from a large number of consumers.

¹⁷ Product Stewardship in North America and Europe *Final Report, MS2 and Perchards, 2009*

One option might be to limit accreditation to arrangements that cover a minimum level of market share for a particular product or material. However, this could have other consequences, such as requiring a number of different organisations to work together to meet the minimum level, which may delay action.

Application of voluntary product stewardship

Ideally, voluntary product stewardship under the legislation should apply to a wide variety of companies or organisations across different product markets. The range of entities to which voluntary product stewardship might apply is influenced by the powers available to the Commonwealth under the constitution that could be used to underpin the legislation.

It is likely that the legislation will rely significantly on the corporations' power of the constitution. This power allows parliament to make laws in relation to trading, financial or foreign corporations. These corporations are generally referred to as 'constitutional corporations'. A key limitation of relying on the corporations' power is that other entities, such as some charities, non-government organisations and industry associations may not fall within the scope of a 'constitutional corporation' and could potentially be excluded from the legislation.

Consideration may need to be given to using other constitutional powers or other design options, including whether voluntary accreditation could be implemented in part or entirely outside of the legislation. This could help ensure that a wider variety of organisations can participate in voluntary product stewardship arrangements.

Demand for accreditation of voluntary schemes

Since the accreditation of voluntary product stewardship arrangements is a new area of activity for the Australian Government, there are no precedents in terms of demand to indicate how many organisations may apply, what range of products or materials may be proposed, and what activities will be covered in the product stewardship arrangement (such as product or process redesign, or end-of-life management including collection, transport, re-use, recycling and responsible disposal of products).

The volume of potential applications will influence the design of the process for accreditation. It will also be important to have a process that avoids unnecessary costs to proponents, particularly where their product or material may not meet the criteria in the legislation or the required standards.

If demand for accreditation is likely to be high, a two-step process for applying for accreditation may be considered. Such an approach would help to avoid applicants investing time and money in a process that may not be successful for them. This would involve an expression of interest round in the first instance. Those shortlisted would then be invited to submit a full application.

Additional eligibility criteria

Maintaining the reputation or value of accreditation will be essential to meeting the objectives of voluntary product stewardship. To be considered for voluntary product stewardship arrangements, a product or material must meet the product criteria specified in the legislation. The question arises whether additional eligibility criteria ought to be considered for the proposed arrangements to protect the integrity of the accreditation provided and to reduce the risk of unintended or perverse outcomes.

Additional eligibility criteria would need to be consistent with the objectives of the legislation and could include whether a product stewardship arrangement:

- addresses or mitigates an environmental or health and safety problem, that is, it generates benefit to the community rather than just producing a financial benefit for the proponent;
- presents an appropriate strategy for effectively managing some or all of the environmental, health and safety impacts of a product or material;
- is already operational.

Conditional accreditation

Accreditation of arrangements under development, should the arrangement not deliver to expectations, could result in the community losing trust in accreditation. Consideration could be given to the granting of 'conditional accreditation' as a means of encouraging new arrangements to develop. Conditional accreditation would apply until an arrangement can demonstrate its effectiveness.

3.2 Co-regulatory approach

Co-regulatory approaches to product stewardship will involve a combination of Australian Government regulation and industry action. Under a co-regulatory approach, government sets the minimum product stewardship outcomes and operational requirements to be met, while industry has some discretion about how those outcomes and requirements are achieved.

Objectives and Coverage

The objectives of co-regulatory product stewardship are to reduce the environmental, health or safety impacts of a product, including to

- ensure a consistent standard of responsibility is achieved across an industry for product stewardship of specified products or materials, and
- protect against 'free-riders' by preventing producers or importers which choose not to take responsibility for stewardship of their products from gaining a competitive advantage over those that do.

Products or materials that are covered by co-regulatory product stewardship would need to meet the product criteria specified in the legislation (refer to **Chapter One** for further detail on the criteria).

Consistent with existing requirements for changes to Commonwealth legislation, a regulation impact analysis to establish community benefit from such an intervention would be an important input to making a decision to regulate new products or materials.

It is anticipated that, initially, co-regulatory schemes will only cover a small number of products or materials. As discussed earlier, governments have agreed that televisions and computers will be the first products to be covered by a co-regulatory product stewardship scheme under the legislation.

Administration of co-regulatory product stewardship

Co-regulatory product stewardship will be administered through a combination of statutory requirements specified in the Act and subordinate legislation, complemented by policy guidelines and operational procedures. The legislation is being drafted to provide powers:

- to make subordinate legislation (e.g., regulations) for a co-regulatory scheme;
- to require liable parties to develop, or be a member of, an approved product stewardship arrangement;
- for the Regulator to assess and approve appropriate product stewardship arrangements;
- to require an arrangement to meet certain minimum requirements, such as, obligations to advise the Regulator about the entry of new members or departure of existing members, the preservation of confidential information of members, obligations for membership rules to be fair to new and existing members, obligations for the fair apportionment of costs associated with the product stewardship arrangement;
- to monitor and ensure compliance with obligations of liable parties.

Subordinate legislation will set out in more detail the obligations and requirements that will apply under a specific co-regulatory scheme. The regulations will broadly cover:

- what product or material is to be subject to a co-regulatory product stewardship scheme;
- who will be responsible for product stewardship;
- what type of actions will be required;
- what types of data need to be collected and reported on;
- the period for which the requirements will be in place;
- the detailed rules for determining specific obligations (e.g., targets and thresholds).

It is likely that there will be two key obligations under the co-regulatory provisions of the Act. The first obligation would apply to liable parties. Liable parties will have to administer their own approved product stewardship arrangement or have membership of one. A failure to meet this obligation could result in a series of escalating sanctions, which may include an infringement notice, a civil penalty or an injunction.

The second obligation would apply to the arrangement administrator. It must take steps to ensure that the arrangement is implemented and that outcomes specified in the arrangement are met. Failure to meet these obligations could lead to sanctions, which may include an improvement notice or a revocation of the arrangement's approval.

Co-regulatory arrangements will need to be approved by the Regulator under the product stewardship legislation. The Regulator will assess each proposed arrangement to ensure that it is capable of meeting the obligations and requirements established by the Act and subordinate legislation.

The Act will provide parties with the right to appeal to the Administrative Appeals Tribunal on specified decisions (e.g., decisions by the Regulator to refuse to approve, or to revoke, an arrangement).

Figure 2 provides an overview of the administrative arrangements for co-regulatory product stewardship. The discussion below sets out the key elements and processes underpinning efficient and effective assessment, approval and operation of co-regulatory product stewardship arrangements.

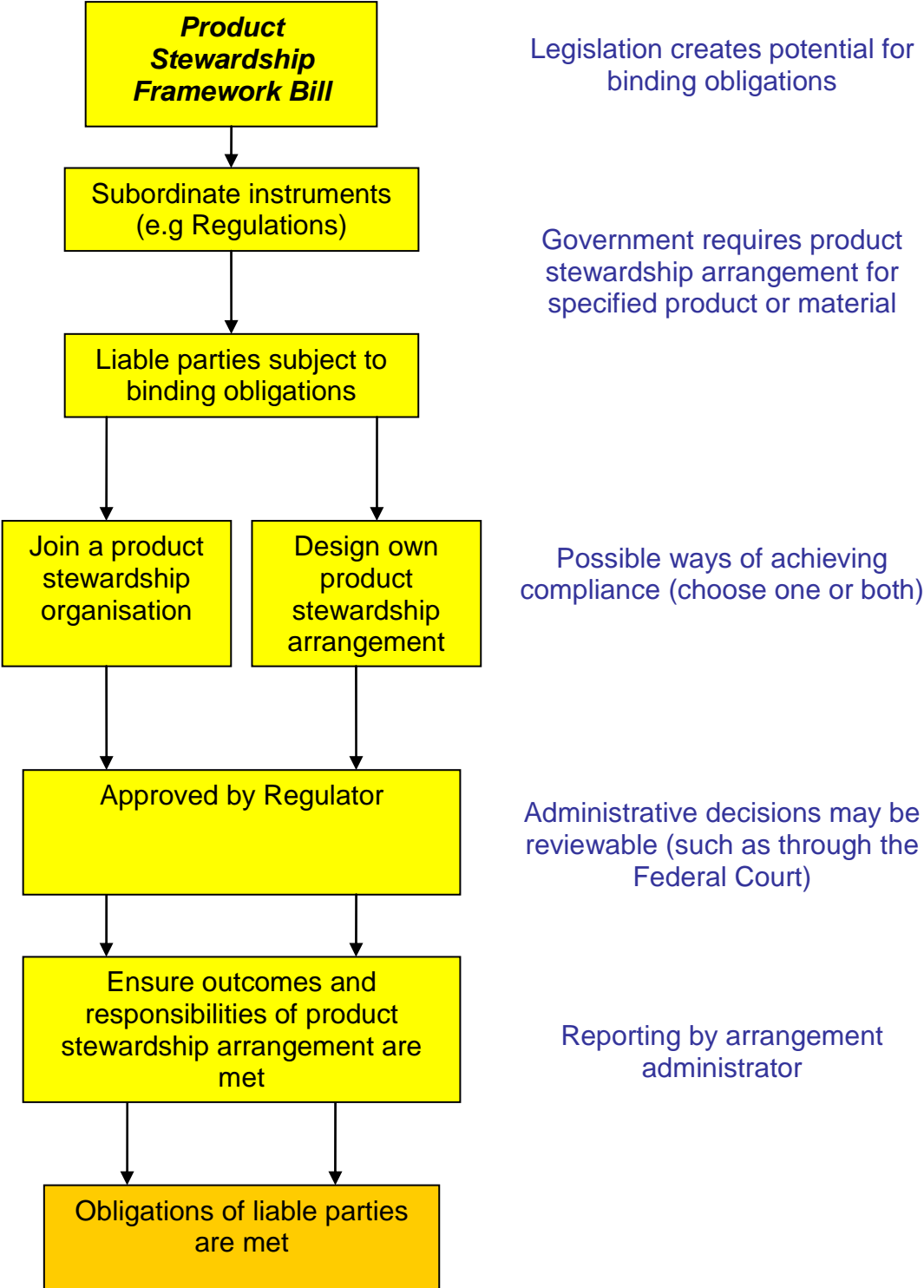
Point of liability

The subordinate legislation will identify the point within the supply chain at which the obligations established under co-regulation will apply.

The point of liability (or who are designated as the liable parties) for a specific product stewardship scheme will depend on the nature of product stewardship sought for the product or material in question. In general, it is expected that the point of liability will rest with the importer or Australian manufacturer of the specified product or material. However, it may be appropriate for particular products or materials that the point of liability is set at a different point in the supply chain. For example, the Used Packaging NEPM focuses on brand owners of packaging—who may be importers, manufacturers, wholesalers or retailers.

Liable parties under a product stewardship scheme will be able to satisfy their obligations by developing their own or joining another approved product stewardship 'arrangement'. Where a liable party opts to join, and comply with the membership requirements of an arrangement, it is planned that the liability to implement obligations under an approved arrangement will then rest with the arrangement administrator (such as a product stewardship organisation) for the duration of their membership.

Figure 2: Administration of Co-regulatory Product Stewardship



Responsibilities or obligations could include product redesign requirements, collection, re-use, recycling or other appropriate end-of-life treatment. Liable parties may also be responsible for orphan or legacy waste.

While liable parties may seek to pass on the costs of establishing and operating a product stewardship arrangement to the consumer of their products, any such action would be a commercial decision and would not be provided for in the legislation for co-regulatory product stewardship arrangements.

In addition to the requirements specified under the product stewardship legislation, liable parties would also be expected to conform to all applicable industry standards as well as to existing Commonwealth, state and territory and municipal local laws. Such laws may relate to, among other things, the establishment of waste and collection facilities, occupational health and safety requirements, and handling of hazardous materials.

Thresholds

The subordinate legislation may, where appropriate, specify a threshold for liability under co-regulation. The establishment of a threshold provides a mechanism for limiting the compliance burden on small business and the administration burden on government, while still capturing broad coverage of the market for a specific product or material.

There are a number of issues influencing the setting of a threshold. These include policy considerations relating to compliance, competition and equity, as well as practical limitations such as the availability of credible data.

In relation to the proposed television and computer product stewardship co-regulatory scheme, for example, the Regulation Impact Statement recommended setting the threshold at a level of 5000 units of all television and computer products imported annually by companies. This is expected to exclude 95.5 per cent of importers but maintains coverage of 95.3 per cent of total units sold in Australia in 2008.

Thresholds have also been applied under other Australian Government legislation, such as that provided under the *National Greenhouse and Energy Reporting Act 2007*, which excludes facilities and corporations from statutory reporting requirements where their carbon emissions or energy consumption do not exceed set levels.

Targets

Targets are widely applicable to models where government stipulates the outcomes to be achieved but provides flexibility in how they can be achieved. The subordinate legislation may specify a target or targets to be achieved by arrangements, as well as the process and rules for target setting. The subordinate legislation may also set out the means of determining the respective contribution to achievement of the target by each product stewardship arrangement, where two or more product stewardship arrangements cover the same market for a specified product or material.

A target in this context could generally be defined as a minimum performance outcome desired under a co-regulatory scheme, which enables the effectiveness of product stewardship arrangements to be measured, reported on, and compared. The type of targets established will depend on the nature of the product stewardship required for a specified product or material. Targets could relate to end-of-life management of products or other outcomes, such as improvements in product design and packaging.

Target-setting methodologies may vary according to the nature of the product or material specified. For example, a target could be set for a product stewardship arrangement based simply on a nominal amount of product or material to be collected and recycled annually by each liable party (such as 50 000 units per annum). Alternatively, an industry-wide target could be set and apportioned for each product stewardship arrangement based on each liable party's share of the entire market for a product or material.

Subordinate legislation may also provide flexibility in the scope for target setting to address other matters such as:

- establishing targets that increase over an appropriate period;
- allowing for 'carry over', from one year to the next, of outcomes that exceed an annual target, or a deficit where the annual target was not met.

In seeking approval for a product stewardship arrangement, a product stewardship organisation or individual liable party may be required to provide information to assist the Regulator in applying the methodology for allocating targets for each product stewardship arrangement. Liable parties will also be required to provide information to the Regulator on how targets will be met. After commencement of the product stewardship arrangement, liable parties, through the arrangement administrator, will be required to report at intervals to the Regulator on progress towards targets.

Assessment and approval of co-regulatory arrangements

The Act and subordinate legislation will set out the requirements for assessment and approval of product stewardship arrangements. These will include the minimum requirements and outcomes that must be satisfied before the Regulator could grant approval. The subordinate legislation may specify fees payable by applicants relating to the assessment and approval process.

A liable party may apply individually or jointly with other parties to have a product stewardship arrangement approved by the Regulator. An application may nominate a product stewardship organisation to administer the product stewardship arrangement.

The role of government will be to establish, through legislation and other appropriate policy instruments such as guidelines, the minimum obligations, performance criteria and procedures for approval and ongoing oversight of co-regulatory arrangements. Industry will have primary responsibility for developing and managing product stewardship arrangements.

Therefore, while the legislation will not specify a particular model or structure for a product stewardship arrangement, it may specify a number of matters for which the Regulator would have to be satisfied will be met before approval can be granted to a product stewardship arrangement. (For more detail about this, see **Chapter Four**.)

The Regulator would need to assess each arrangement on a case-by-case basis to ensure the above matters are adequately provided for. As part of this process, guidelines may be prepared to support the Regulator's assessment of an application, including any stakeholder consultation processes to be undertaken by the proponent of an arrangement. The Regulator may also seek advice from specialist advisors.

Arrangements will be approved for a fixed period, after which either a renewal or a new approval will be required.

This model for assessment and approval of co-regulatory arrangements is similar to the approach adopted by New Zealand for product stewardship arrangements under the *Waste Minimisation Act 2008* (NZ).

Collaborative product stewardship arrangements, such as through a product stewardship organisation may also require separate authorisation by the Australian Competition and Consumer Commission (ACCC) under the *Trade Practices Act 1974* (See **Chapter Four**). Collaborative product stewardship arrangements involve industry competitors working together to obtain product stewardship services in the market place. The *Trade Practices Act* seeks to prevent competitors from engaging in restrictive trade practices and the ACCC is responsible for enforcing that law. In some circumstances, the ACCC is able to authorise the procedure of certain conduct if it is satisfied that the public benefit outweighs the public detriment, if any.

Reporting and auditing requirements

Administrators of approved arrangements will be required to comply with regular reporting and auditing obligations.

Reporting and auditing obligations may include annual performance reporting in line with targets and other specified requirements. For example, reporting of information may be required on key matters such as rate of collection, number of units recycled and/or re-used, proportions of product or material that are recycled and disposed to landfill, and cost of collection and handling.

Requirements may be established for auditing of annual reports by third parties or the Regulator and for the public disclosure of information.

3.3 Mandatory approach

Under mandatory product stewardship the Australian Government regulates requirements for product stewardship, including the way that liable parties must meet those requirements. There may be little or no discretion on how requirements are met. It is a more prescriptive approach than provided under co-regulatory product stewardship, which provides flexibility in how obligations may be met.

The inclusion of mandatory product stewardship in the legislation is to ensure that the product stewardship framework is comprehensive and has the capacity to cope with future needs. There is currently no particular product earmarked for mandatory product stewardship, and it is not intended that there will be a proliferation of such schemes under the proposed legislation. It is envisaged that mandatory arrangements will be used where other types of product stewardship have been explored and found unsuitable or where mandatory arrangements would deliver greater benefit to the community than other options.

Objectives and coverage

The objective of mandatory product stewardship is to provide the basis for imposing prescriptive obligations on people or organisations involved in the life of a product (or material) to take specific action to reduce the environmental, health or safety impacts of a product.

Products or materials to be covered by mandatory product stewardship as a minimum would need to meet the criteria specified in the legislation. A decision on mandatory product stewardship would generally follow a regulation impact assessment to establish community benefit from such an intervention if it was undertaken.

Administration

In general terms the administration of mandatory product stewardship schemes would involve the following steps:

- The Australian Government to introduce the specific regulation to give effect to the mandatory scheme and any additional legislation;
- The Regulator to notify liable parties of their obligations and provide guidance material, including a compliance strategy and administrative arrangements to be followed;
- Liable parties to develop their own systems to ensure they meet their regulatory requirements and undertake specified actions;
- Liable parties to report to the Regulator on compliance action;
- Regulator evaluates compliance, undertakes random or risk-based audits and publicly reports on scheme performance.

Types of mandatory product stewardship

Mandatory product stewardship can take a number of different forms and can take place at any point in the supply chain from production to end-of-life management. The form of prescriptive obligations imposed to meet product stewardship requirements will depend on the product, the nature of product stewardship sought and individual circumstances.

The Australian Government currently has two mandated product stewardship schemes, used oil and used refrigerants that are ozone depleting. Under the *Product Stewardship (Oil) Act 2000*, a levy is placed on oil producers and importers of petroleum based oils and their synthetic equivalents. This levy funds the collection and recycling system for waste oil, paying benefits to those who recycle it. The *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* contains comprehensive product stewardship requirements, including: import and manufacture restrictions; product restrictions; extended producer responsibility; offences for unauthorised emissions; restrictions on access to controlled substances; end use controls; and restrictions on the method of disposal.

Prescriptive obligations (or tools) that could be provided for in the legislation to manage the risks of products warranting mandatory product stewardship include:

- **Product design** requirements such as restrictions on the quantity of certain materials (such as hazardous substances) in the manufacture of a product, design for disassembly or ease of end-of-life management or design for product integrity to avoid the escape of hazardous substances into the environment.
- **Import and manufacture restrictions** which determine what can be sold in Australia. These restrictions may involve a limit on the type of products and materials that can be sold, a limit on the quantity sold, the requirement for labelling, and the need to record information about the product entering the marketplace or the need to undertake extended producer responsibility.
- **Distribution restrictions** which could include restricting the agents that can distribute the product or material or restricting the end users that can acquire the product.

- **Restrictions on use** which could include the circumstances in which a product or material may be used, the location for use, the quantity used and the disposal requirements.
- **Requirements for product owner** which may require the product owner to dispose of a product in a particular way.
- **Extended producer responsibility** which requires the manufacturer or importer to manage their product at end-of-life. Requirements may include acceptance of product return, funding of a collection program and funding of product disposal.
- **Imposition of charges on products or materials** such as Advance Disposal/Recycling Fees or Point-of-disposal fees to help fund product stewardship arrangements.

The inclusion of a wide range of appropriate tools in the legislation could increase its effectiveness by ensuring that the right tool is available for the right circumstances, thus avoiding the need for legislative amendments in the event that the preferred form of prescriptive obligation is not provided for.

While the legislation would specify the prescriptive obligations that could potentially be applied, the preferred form of a particular mandatory product stewardship scheme will be part of the consideration of the options under the regulatory impact assessment. This analysis will inform a decision by the Australian Government on whether regulation is necessary and what the most efficient and effective form it could take would be.

If it was to be determined by government at some point in the future that a levy was an appropriate approach to a problem with a product, such a levy would very likely comprise taxation, and for constitutional reasons, separate imposition Acts would be required.

The introduction of a new mandatory scheme would therefore involve the introduction of a regulation specifying the details of the mandatory scheme and, where necessary, a separate tax Act specifying the nature of any tax and the amount.

Additional eligibility requirements

Given that mandatory product stewardship represents a substantial imposition on a producer, importer or retailer of a particular product or material, it is envisaged that it would be only used in circumstances where there is a potential for significant impact on the environmental, health or safety or where a significant waste management burden or legacy issue will be passed on to future generations. Consideration could be given to having the legislation list additional criteria specifying the circumstances where it is appropriate to use mandatory schemes or it could rely on the objectives of the legislation to guide decision makers.

Chapter Four

Obtaining and maintaining accreditation or approval of product stewardship arrangements

This chapter discusses the key requirements that will apply to proponents in obtaining and maintaining accreditation or approval of product stewardship arrangements. Regulations for a specific product or material may also impose additional requirements.

4.1 Product stewardship arrangements

Under voluntary and co-regulatory forms of product stewardship, the main mechanism through which obligations and requirements will be met is the product stewardship 'arrangement'. As discussed in earlier chapters, voluntary arrangements will be accredited by the regulator. Co-regulatory arrangements will need to be approved according to requirements in the legislation and subordinate instruments.

Within the context of the proposed legislation, a product stewardship 'arrangement' is being used to describe what:

- a liable party, under the co-regulatory provisions of the legislation, develops for approval by the Regulator and implements in order to meet its product stewardship obligations and requirements;
- a voluntary party develops and implements in order to meet its requirements and obligations for accreditation under the legislation.

In the case of mandatory product stewardship, liable parties will adopt the activities prescribed by government. Accordingly, it is not generally expected that these liable parties would develop and seek approval of a product stewardship arrangement.

Arrangements may be developed at an individual company or organisation level, or joint arrangements such as through industry/non-government organisation partnerships or a Product Stewardship Organisation, which can manage stewardship arrangements on behalf of its members. Each arrangement would have an identified administrator which is the entity responsible for implementing an approved product stewardship arrangement.

4.2 Accreditation or approval of arrangements

In approving any product stewardship arrangement, the Regulator will consider a range of governance and related matters, including decision-making structures and record-keeping processes, and systems for performance monitoring and risk management. Before making a decision, the Regulator may seek advice from specialist advisors and also stakeholders that may be affected by the application. For example, the Regulator may seek 'due diligence' assessments for assurance purposes. These assessments may be done by independent advisors with specialist skills.

Governance requirements for accredited or approved product stewardship arrangements

The legislation will set requirements and obligations for product stewardship arrangements. However, the legislation will not specify a preferred structure for governance of voluntary and co-regulatory product stewardship arrangements.

Existing national standards such as the Australian Standard for Corporate Governance—Good governance principles (AS 8000-2003), and related standards, may be used as the governance performance standard where applicable.

The Regulator will require proponents to submit information demonstrating that the proposed governance structure is suitable for the design and objectives of the arrangement. Such information could include:

- the kind of legal structure in place (e.g., company or trust);
- who is responsible for making decisions and the rules and procedures for setting and maintaining objectives;
- who is responsible for the control and overall operation of the arrangement;
- who is participating in delivery of the arrangement, and their roles and responsibilities (including internal compliance and enforcement);
- who is responsible for keeping records and reporting;
- who is responsible for monitoring and reviewing the performance of the arrangement, including establishing third party auditing requirements;
- how the arrangement is financed;
- who is the nominated contact officer for further queries and correspondence.

It is expected that proponents will consult with their stakeholders in designing product stewardship arrangements, and will build alliances with other participants in their supply chain or industry sector to deliver elements of the arrangement as appropriate.

Where other organisations have agreed to participate with the proponents in the arrangement, evidence of their agreement to be involved should be provided. These others may include those involved in the design, manufacture, sale, use, servicing, collection, recovery, recycling, treatment and/or disposal of the product or material for the arrangement to operate.

Information about the product stewardship arrangement

The Regulator will also require proponents to submit other specific information on the proposed product stewardship arrangement. This information will enable the Regulator to make an assessment about whether the proposed arrangement is capable of meeting the wider obligations and requirements specified under the legislation.

While the nature of information requested will vary depending on the form of product stewardship involved, the type of information sought by the Regulator may include a description of:

- the product or material that will be subject to product stewardship arrangements;
- the objective of the proposed arrangement and the segment of the supply chain that will be the focus of action (for example, the reduction of hazardous substances contained in a particular product through improved design of new products and easier disassembly and reprocessing of end-of-life product);
- the business plan, including relevant milestones to be reached in achieving the objectives of the arrangement;
- the proportion of the national market for the product or material that will be captured by the proposed arrangements immediately and over the life of the arrangement;
- who will be involved in delivering the arrangement, and how. Where applicable, information may also be required regarding the intended geographical coverage of the proposed arrangement;
- how similar products or materials from market competitors and orphan and historical waste will be handled (where applicable);
- how the proposed arrangement will be financed (see below for further discussion);
- how business and householders will access any services provided;
- what stakeholders will be required to do, what it will cost them, and what the procedures will be for handling complaints and disputes;
- proposed communication and awareness/education activities and who they will target;
- proposed performance indicators, targets and/or benchmarks to track progress and provide assurance to the community that the arrangement is doing what it set out to do, and how these will be measured, monitored and verified;
- details of mechanisms proposed or in place to ensure internal compliance of members (where the proposed arrangement is a collaborative one), and any enforcement procedures that can be used in the event of non-compliance;

- potential risks that may affect the performance of the arrangement and the actions intended to manage those risks;
- information on transitional arrangements (if any) for start up of the arrangement and/or once the arrangement reaches its expiry date.

Proponents will need to be in a position to respond quickly to any requests from the Regulator so that consideration of their application is not unnecessarily delayed. Time limits may apply to the period in which proponents can supply the requested information and also to the period that the Regulator may take to assess an application for accreditation or approval. Rules may also be developed that 'stop the clock' for the Regulator's assessment to take account of the period(s) where further information from the proponent is sought.

Financial information

The proponent will be required to demonstrate to the Regulator that the capital and operating costs of the arrangement can be met for its duration. This will require proponents to present information on matters such as:

- the costs incurred in undertaking product stewardship activities for the product or material over the life of the arrangement;
- the income to the arrangement which will be used to meet these costs;
- any capital investment required over the life of the arrangement and the means by which that capital will be obtained;
- any other information useful in explaining the arrangement's financial viability.

The proponent may provide all or part of the funding information in confidence provided that this information is clearly marked 'commercial in confidence'.

The granting of an accreditation or approval will not indemnify the administrators of product stewardship arrangements and provides no guarantee that an arrangement will remain financially viable throughout its accreditation or approval period. Further discussion on managing the potential for insolvency is covered in **Chapter Five**.

Relationship with approvals under other law

Applying for accreditation or approval under the product stewardship legislation will not remove the need to seek approvals that may be required under any other Commonwealth or state and territory laws for operation of any product stewardship arrangement.

For example, where a joint arrangement or a product stewardship organisation is proposed for delivering product stewardship, there is the possibility that the parties involved could behave in a manner that is in breach of the *Trade Practices Act 1974*, through collusion, forming a cartel, or other such situations that influence the marketplace. To avoid such a situation, the proponents would seek a separate determination from the ACCC on their proposed product stewardship arrangements, prior to submitting an application for accreditation or approval under this legislation.

The Regulator would not decide on an application for accreditation or approval until the applicant had sought the advice of the ACCC on the possible application of the *Trade Practices Act* and on the necessity or otherwise for a section 88 authorisation under that Act. An authorisation from the ACCC may be required for both co-regulatory and voluntary arrangements.

Anticipating that the ACCC and the Regulator may require different amendments to a proposed product stewardship arrangement in order to satisfy their respective objectives, it would be necessary for both agencies to work closely together while assessing each proposal. Decisions under both processes would be independent of each other, and the agencies working together would not fetter the discretion of either the ACCC or the Regulator.

One option is for proponents to apply to the ACCC for authorisation first, and also ask for an 'interim authorisation' to proceed with planning activities. If granted, the interim authorisation could be limited in scope so that it does not authorise the arrangement to substantively commence, but only for planning activities to occur, including lodgement of an application under the Product Stewardship Bill. The basis on which the ACCC may grant interim authorisation is set out in the ACCC's Guide to Authorisation available from the ACCC's website.

Any costs associated with an ACCC determination (including any requirement by the ACCC for the proponent to regularly resubmit an application) are the responsibility of the proponent.

Approval or accreditation of a product stewardship arrangement does not mean the arrangement is compliant with other Acts or laws. Proponents must identify the applicable laws and ensure compliance with them.

How the accreditation or approval will be maintained

Accreditation or approval of an arrangement will be maintained by operating in accordance with the terms with which it was granted, and by complying with annual reporting and other requirements of the legislation. The terms of the accreditation or approval will include the time period for which it is valid.

It is expected that proponents will be required to submit an annual report containing at least the following minimum information:

- how the arrangement has performed relative to agreed indicators and outcomes;
- a statement on how a product or material has been managed to reduce environmental impacts;
- an independently audited statement of arrangement revenues and expenditures;
- a summary of significant milestones achieved and any departures from proposed arrangements.

Chapter Five provides further detail regarding data reporting requirements.

It is anticipated that the Act will allow the arrangement administrator to apply to vary the arrangement. The Act will also specify the circumstances in which an accreditation or approval might be suspended or revoked, such as where false information has been provided or there has been a repeated failure to achieve required outcomes.

What it will cost and who will pay

Proponents who submit an application for accreditation or approval of a product stewardship arrangement will be responsible for all costs incurred in preparing the application and the costs incurred by the Regulator in assessing the application. Proponents will also be responsible for the continuing costs of operating the product stewardship arrangement.

For arrangements that are to be operated by a group representing several entities, such as a PSO, costs will be apportioned in accordance with the constitution and membership arrangements of the PSO. For arrangements run in-house by individual companies, costs will accrue to the company.

The variable nature and scope of possible product stewardship arrangements make it very difficult to accurately estimate the cost of preparing an application for approval. A range of factors, including number of parties involved in delivering the arrangement, existence and availability of information, infrastructure, appropriate business models and collaborative partnerships will influence the cost.

For the Regulator, the aim is to establish information requirements that can be reasonably met by those seeking accreditation or approval and which provide the Regulator with an appropriate level of assurance that the proposed arrangements are robust and can achieve their stated objectives.

The costs to proponents associated with developing and implementing product stewardship arrangements may include, but are not limited to:

- selection of a business model and recruitment of business partners;
- supporting analysis and market research;
- set-up costs;

- contracting service providers;
- provision of training, education and communication to stakeholders;
- administration including data collection and reporting systems;
- infrastructure investment;
- ongoing operational and compliance costs;
- managing consequences of under delivery;
- transitional arrangements, if any.

As part of the regulatory impact assessment process for a product it would also be necessary to determine how other costs, such as for compliance and enforcement, would be covered in each case. There are a number of different examples of this across the Commonwealth—from full cost recovery of all costs associated with regulation to regulatory frameworks that are funded by government.

The Government has a cost recovery policy which will help guide how and when costs might be recovered by government under the legislation.¹⁸ The policy establishes a framework for consistent, transparent and accountable cost recovery arrangements.

¹⁸ www.finance.gov.au/financial-framework/financial-management-policy-guidance/cost-recovery.html

Chapter Five

Other design and implementation issues

This chapter considers an important set of issues that are relevant to the design of the proposed product stewardship legislation, and which have not been captured in previous chapters. It canvasses matters relating to the integrity of the product stewardship 'system', processes for the review of decisions made under the legislation, data collection and reporting requirements, and monitoring and responding to non-compliance with legislative obligations.

5.1 Ensuring the integrity of product stewardship arrangements

The purpose of this section is to outline some measures aimed at ensuring that product stewardship schemes and arrangements deliver desired outcomes, whilst avoiding unintended consequences from the operation of product stewardship arrangements.

Supporting occupational health and safety and protecting the environment

The management of products and materials throughout their life cycle involves many industrial processes and practices including manufacturing, materials handling, transport, waste processing, refurbishment, recycling and disposal. Product stewardship therefore has occupational health and safety and environmental protection implications. The legislation will rely on existing state and territory occupational health and safety (OH&S) and environment protection law and systems for compliance and enforcement in these areas.

As there are already laws covering these matters, the legislation will not directly regulate service providers. However, those operating product stewardship arrangements will need ways of ensuring that the service providers they contract are complying with occupational health and safety and environmental law, such as through contract requirements.

Government can also, in consultation with stakeholders, help to support the performance of the service providers in this area, including:

- Conduct an early assessment of a scheme's impact on the maturity and performance of the supply chains, sectors and markets;
- Facilitate, with state and territories, development of appropriate handling standards addressing safety and environmental protection issues for the products covered by a scheme;
- Apply these standards as part of obligations under relevant regulations;
- Develop and enforce strict and specific reporting standards by liable parties which could include certification of the level of compliance of their service providers with relevant state and territory regulations;

- Conduct close consultation with relevant businesses and government agencies to ensure all parties are aware of their obligations;
- Develop a targeted audit and compliance framework before the start of any product stewardship scheme under the legislation, including agreement with states and territories on the appropriate role they would play.

Supporting the financial stability of product stewardship arrangements

Joint arrangements, which consist of a group of companies or organisations working together or through a product stewardship organisation, are likely to be the preferred approach to delivery of product stewardship. The main reason is that they will provide greater economies of scale, making them more cost-effective to operate.

These benefits may mean that a joint arrangement for a product may end up being the dominant or sole operator of a product stewardship scheme. Should the joint arrangement face significant operational difficulties or failure due to insolvency, this may create short term operational problems such as:

- collection facilities being unexpectedly closed and planned collection events cancelled, causing distress and confusion for consumers;
- waste already collected being stockpiled or dumped in landfill because no funds are available for transporting/recycling it.

Private sector businesses, including not-for-profit enterprises, are unable to continue trading if insolvent.¹⁹ Like any business, a joint product stewardship arrangement could face insolvency if the costs rise above, or revenues fall below, what was predicted or budgeted. The financial challenges facing a product stewardship arrangement could come from many sources. For example, the cost of essential services, such as logistics or insurance, could rise while the value of recovered materials could rapidly fall; and of course, the collapse of a major business member of a product stewardship arrangement could challenge the viability of the arrangement.

It is not the intention of the Australian Government to underwrite product stewardship arrangements. Rather, its interest is in minimising the impact on the community should a problem occur. There are strategies that could be adopted to encourage financial stability in joint arrangements.

In the first instance, approval of such arrangements could be made conditional on the inclusion of a funding model which:

- demonstrates the availability of adequate resources to achieve the objectives of the scheme, including for meeting administrative and reporting obligations;
- identifies and treats foreseeable risks in an appropriate and cost-effective manner;
- acknowledges the potential for unforeseeable financial problems and provides clear processes for determining how to respond in the event one emerges;

¹⁹ Insolvency means a person or company is unable to pay their debts as they fall due.

- monitors budget trends on continuing basis, with processes to make decisions in response to shocks or emerging risks;
- facilitates the participation of a range of liable parties on a fair and equitable basis. If members are liable for obligations in the event of failure, then objective rules governing the apportioning of responsibility are provided;
- incorporates a regular reporting regime for stakeholders and Government.

The Regulator could also fast-track decision-making for any urgent changes to a joint product stewardship arrangement's funding model that need approval, thereby allowing a timely response from that arrangement to such events. Time limits or conditions could be put on the changes by the Regulator if necessary.

There would be consequences for liable parties arising from the failure of a joint product stewardship arrangement, given their obligations would no longer be met. This could mean that the any unmet portion of the joint arrangement's targets would be the responsibility of its members, in proportion to their market shares. An adjustment period could be allowed before liable parties must have an alternative arrangement in place. This provides a stronger incentive to ensure the effective management of their arrangement.

There may also be other strategies that could be used to improve financial stability of product stewardship arrangements, which may depend on the nature of the product and industry covered by the arrangement.

5.2 Review of decisions

The legislation will allow the Regulator to make decisions on various matters ranging from assessment of applications to enforcement. The Regulator's decisions will affect environmental and market outcomes. Therefore, it is important to consider measures to help ensure that the Regulator is accountable for its decisions and that decision making processes are transparent.

Regulators can be accountable for decisions through a variety of measures, such as internal and external merits review and judicial review. Merits review is the process by which a person or body other than the primary decision-maker reconsiders the facts, law and policy aspects of the original decision. Merits review can be done internally or externally (e.g. Administrative Appeals Tribunal (AAT)).

The principal objective of merits review is to ensure that a 'correct' and preferable' decision is reached.²⁰ 'Correct' means that the decision is made according to the law and, 'preferable' means that the decision settled upon is the best that could have been made on the basis of the relevant facts.²¹ Further, merits review also helps promote openness and accountability of decision-making processes.

The Act and subordinate legislation will make provision for internal and external merits review of certain provisions, such as

- the rejection of an application to approve a product stewardship arrangement
- approval of a proposed arrangement with amendments
- a notice to revoke an arrangement or revocation of an arrangement.

External review to the AAT will be available in the following circumstances

- once internal review mechanisms have been exhausted, or
- if a decision cannot be internally reviewed, for example, where there is not a more senior officer who can conduct an internal review.

The Regulator will be required to notify a person of their decision in writing and inform a person of their review rights as soon as practicable. It is likely that appeals rights for internal review will need to be made within a specified timeframe, such as 28 days. There is no intention for the legislation to change normal requirements for judicial review.

Judicial review is more likely to be used where legislation does not provide for external merits review or places restrictions on the availability of merits review. The purpose of judicial review is to ensure a decision-maker has acted lawfully and not exceeded their power. The main disadvantage of judicial review compared with merits review is that it is costly.

5.3 Data collection and reporting by arrangements

Data collection and reporting of information on the operation and performance of product stewardship arrangements will be a key requirement for arrangement administrators. The main purpose of this information will be its use in assessing progress and monitoring compliance with legislative requirements. The data or information collected will also inform any analysis of the effectiveness of the legislation and provide the evidence base for future decisions on the legislation such as amendments.

This section canvasses a number of issues that arise when designing the data collection and reporting requirements to be included in the proposed product stewardship legislation.

²⁰ Administrative Review Council, *What Decisions should be Subject to Merit Review*, [Administrative Review Council - What decisions should be subject to merit review? 1999](#)

²¹ *ibid*

What data will be required?

The type of data that arrangement administrators will need to collect and report will arise from the obligations specified in the legislation for product stewardship arrangements. The reporting requirements for specific products or materials covered by co-regulatory or mandatory product stewardship will be detailed further in the regulations that establish these schemes.

The Department commissioned a study to develop a set of common data requirements under the proposed National Product Stewardship Framework. This report can be accessed at www.environment.gov.au/wastepolicy. Based on this report, Table 4 provides an overview of the types of information that may be required and the reason for their collection.

Table 4: Information collection under Product Stewardship Arrangements

Information type	Reason for collection
Membership and administration of the approved arrangement	This information will assist the Regulator in assessing the effectiveness of the arrangement and its continuing capacity to comply with legislative requirements. It would incorporate information on the compliance performance of members. Information may also be sought on actions taken to ensure service provider compliance with industry standards and obligations under related legislation.
Products/materials handled	Information about the handling of products or materials will assist in identifying trends in the number of products produced or arising as waste.
Materials in products	Identification of the amounts and percentages of materials (by weight and volume) assists in better understanding the environmental footprint of the product and the risks associated with proposed product stewardship activities.
Performance against agreed targets	Performance indicators would be established for targets and other key parameters appropriate to specific schemes. Outcomes that could be addressed include: <ul style="list-style-type: none"> - reduced generation of waste - product redesign for the environment, health & safety - volume of product re-use and repair - recovery and recycling
Destination for recovered materials	May be used to prove performance against targets and assist in understanding future infrastructure needs and the risks associated with a particular product stewardship arrangement.
Flows to landfill	Information on flows to landfill may be used to identify trends on the proportion of products and materials diverted from landfill and to compare with information provided on matters such as amount of product recycled and recovered.
Contribution to other environmental objectives	Reporting on reductions in greenhouse gas emissions, energy use and water consumption.
Cost of arrangement	The Regulator may require information on revenues and expenditures for risk management purposes. This information is likely to be commercial-in-confidence.
Changes in service provider arrangements	Information may assist the Regulator in risk management, including remedial action (if necessary). This information is likely to be commercial-in-confidence.
Outlook	Information on future product stewardship activities and changes to service provision may assist the Regulator in risk management and may also allow the Regulator to take remedial action. This information is likely to be commercial-in-confidence. In providing outlook information to the public, the Regulator would aggregate that information so that the identity of the liable party is hidden

How will data be reported and when?

As discussed in earlier chapters, several types of report are envisaged:

- annual reports to the Regulator from arrangement administrators;
- independent third party auditing reports to the Regulator;
- exception reports to the Regulator from arrangement administrators;
- annual report from the Regulator to the Parliament on the performance of scheme(s) and the legislation.

Arrangement administrators may also require reports from their contracted providers about activities undertaken, performance standards met, costs incurred to meet obligations and other matters. Product stewardship organisations may require reports from members as part of their internal administrative and financial arrangements and in order to meet legislative compliance requirements but these reports will not need to be forwarded to the Regulator.

Annual reports by parties are an appropriate form of compliance because they match other common cycles, such as tax reporting and a shorter reporting period, would create additional costs to parties and the Australian Government. Annual reports will need to contain a statement of compliance by an independent auditor.

Independent third party auditing is common practice in financial reporting and is also a requirement of a number of emerging environmental or sustainability reporting initiatives such as the Global Reporting Initiative. Such a practice may also offer assurance to members of a product stewardship organisation that the information presented in the annual report is a fair representation of its operations, and that relevant policies and standards are being met.

There will also be a requirement for arrangement administrators to provide *exception reports* to the Regulator, in the event that there is a substantial change in their circumstances. The Regulator would provide guidance on what constitutes a substantial change as part of an overall compliance strategy. Examples may include, but may not be limited to a key member leaving a product stewardship organisation, the insolvency of a key service provider, or the withdrawal of export markets.

The legislation is likely to include *an annual report by the Regulator*. This is common practice in the Australian government for legislation that regulates the activities of business and individuals. The *Environment Protection and Biodiversity Conservation Act 1999* requires the publication of an annual report, as does the *Trade Practices Act 1974*. Annual reports are tabled in Parliament by 31 October of the year in which the report is given.

The annual report would examine the operation of the product stewardship legislation against its main objectives and would include information on the arrangements approved or voluntary schemes accredited, compliance activity including breaches and performance outcomes, such as the number of units re-used or recycled under a product stewardship scheme.

How much information is needed?

Different stakeholders have different motivations and concerns over data collection, management, analysis and disclosure.

Liability parties or administrators of voluntary arrangements will want the cost burdens associated with data collection and reporting minimised. They will only want to provide the information that is necessary for the Regulator to ensure compliance. The community may want reassurance that product stewardship is delivering the community's environmental and social goals and doing so in a cost-effective manner. They may also want reassurance that product stewardship is not having an adverse impact on market competition or consumer choice.

These competing needs for data and information influence the design of data and reporting requirements. A number of trade-offs come into play, including:

- transparency and public disclosure vs protection of commercial interests;
- maintaining longer-term policy effectiveness vs strict compliance focus;
- flexibility to make adjustments vs predictable requirements.

Public disclosure—in seeking to manage these policy trade-offs, one approach is for the Act to require confidentiality of information obtained under the legislation, unless one or more exceptions apply, namely:

- the disclosure is about a person with the person's consent;
- only aggregated information is publicly disclosed, thereby fully protecting the individual person, business or arrangement;
- the disclosure is necessary for law enforcement purposes or is required by a Court;
- the disclosure is to a Minister.

An alternative model is that certain commercial information is published unless the business applies for confidentiality.

Maintaining longer-term policy effectiveness—as a minimum, the Regulator will collect data or information from liability parties and arrangement administrators sufficient for the enforcement of legislative requirements. The question arises as to what information the Regulator needs beyond enforcement in order to effectively manage the risks associated with rollout and delivery of product stewardship. Product stewardship activities occur in an operational environment in which rapid changes may occur:

- export markets for recycled materials may expand or contract and the international price for such materials may experience large price fluctuations;
- demand for collection, recycling and disposal services may wax or wane;

- other government initiatives may affect the rate at which consumers dispose of products or materials e.g., the rollout of digital broadcasting means that consumers may dispose of analogue televisions at a faster rate than previously).

Advice on prospective changes in the way parties, arrangements or markets function would be valuable to the Regulator in ensuring that regulations remain contemporary.

Flexibility to make adjustments—liable parties or operators of voluntary arrangements will want data and information requirements for compliance purposes to be established in advance and be consistent over time, to allow them to design and operate their own systems for data collection and presentation. Changing information or data requirements may involve additional costs for them.

Nevertheless, original requirements for data and information may not be sufficient to make decisions about compliance, or may demand reporting of data which is found to be irrelevant. To address these circumstances, the legislation could give the Regulator the power to change reporting requirements at the conclusion of a reporting year, or at the time of re-approval or re-accreditation of arrangements.

5.4 Monitoring and responding to non-compliance

Provisions for monitoring, compliance and enforcement will be contained in the legislation (including in the regulations). The primary purpose of a monitoring, compliance and enforcement regime is to ensure that all liable parties and arrangement administrators are meeting their obligations under the legislation and to avoid fraudulent behaviour by liable parties.

The legislation will impose product stewardship obligations and requirements, and therefore costs, on companies involved in the life of products or materials covered by the legislation. Consequently, there could be a financial incentive for companies to avoid or limit the impact of these obligations. Strategies to help control such behaviour will include:

- an effective compliance and audit regime, combined with suitable sanctions for proven cases of fraudulent behaviour;
- a detailed analysis of the affected market to confirm liable parties and their share of the market for the covered product or material;
- a suitably stringent application process for approval of product stewardship arrangements;
- the development and enforcement of strict and specific reporting standards by liable parties.

It is envisaged that the regulator will develop a compliance and enforcement strategy to assist liable parties and the community in understanding the principles and approaches that will be used when undertaking compliance and enforcement activities under the product stewardship legislation.

Monitoring compliance

Monitoring plays an important part in ensuring that parties achieve the outcomes set out in product stewardship arrangements. It also helps verify that free-riding especially, in the context of co-regulatory arrangements, is minimised.²²

Monitoring involves the collection and assessment of compliance-related information to enable the Regulator to:

- detect non-compliance in a reliable and timely manner;
- assist liable parties to achieve and maintain compliance, and to help those who want to comply, while also deterring those who do not want to comply;
- provide evidence to support enforcement actions;
- provide data and information to identify risks and problems, and to establish patterns and trends to direct regulatory activities;
- provide statistics to evaluate the progress of compliance and enforcement activities.

Data and information will be collected from a variety of sources. The key initial source will be the data collected and reported by parties in accordance with requirements under the legislation. The regulator may also obtain data from other sources, for example, the regulator may obtain data independently on volumes of product sold or imported in particular markets in order to validate the extent of stewardship coverage. Random or risk based audits of liable parties and arrangement administrators may also be undertaken to monitor compliance with the requirements of the legislation.

Monitoring of the operation of product stewardship arrangements may also be undertaken by other Commonwealth agencies (for example, the ACCC pursuant to the *Trade Practices Act*) and state and territory agencies administering environmental protection, occupational health and consumer awareness laws.

Responding to non-compliance

The legislation will outline the powers of the Regulator, including compliance and enforcement activities. Where appropriate, the legislation may make provision for a range of general compliance and enforcement provisions. This may include, but is not limited to:

- *Civil penalty provisions*—The co-regulatory and mandatory provisions of the legislation may contain civil penalty offences e.g., for failing to join a product stewardship program. Other relevant offences may also attract a civil penalty.

²² Organisation for Economic Co-operation and Development, *Extended Producer Responsibility—A Guidance Manual for Governments*, OECD Publications: Paris, 2001, p.98.

- *Enforceable undertakings*—The legislation may require a person to give the Regulator an enforceable undertaking regarding compliance with the Act or associated regulations.
- *Infringement notices*—Infringement notices could provide an alternative to prosecution.
- *Injunctions*—The Regulator may be able to apply for an injunction from a relevant court if a person is engaging or proposing to engage in conduct that may constitute an offence under the legislation.

Criminal offences are reserved for seriously harmful conduct and the legislation may impose criminal penalties in extremely limited circumstances, such as the disclosure of official information.

Certain offences may also be subject to compliance and enforcement powers of bodies other than the Regulator, for example, false or misleading claims regarding product stewardship arrangements would be likely to fall within the purview of the ACCC. The ACCC is responsible for administering the Trade Practices Act which prohibits misleading and deceptive conduct in trade or commerce.

The *National Waste Policy* anticipates that state and territory governments will assist with implementation of the product stewardship legislation by ‘provid[ing] for assessments, inspections, intelligence gathering as part of existing policy, programs and regulatory operations’.

In order to facilitate this, the Regulator would be given the power to appoint State or Territory officers or employees, as well as Commonwealth officers or employees, as inspectors. Inspectors may have the power to require that specified information or documents be provided, or that a person appear before an inspector to answer questions or produce documents.

Related to compliance and enforcement are sanctions for non-compliance of product stewardship arrangements. One option may be to have escalating sanctions. For example, at first instance a formal caution could be issued informing an arrangement administrator that the arrangement is not meeting specific legislative or regulatory requirements. If no action is taken following the caution, the Regulator could issue an improvement notice specifying that certain remedial action needs to be undertaken within a specified period.

If the arrangement administrator fails to comply with these lower level sanctions then the sanction/s may be escalated to include a conditional notice of revocation or notice of revocation of the arrangement.

The escalated sanction approach is aimed at encouraging arrangement administrators to rectify problems early and to help ensure that arrangements are functioning accordingly. By taking early action higher level sanctions are more likely to be avoided.

Chapter Six

Making a submission

Public input is essential to the process of drafting legislation. The Department has prepared this consultation paper to encourage individuals, businesses and organisations across Australia to provide input to the development of product stewardship legislation.

This consultation paper is one part of the consultation process for the proposed product stewardship legislation. Input will be used to inform the legislative drafting process as well as the preparation of a Regulation Impact Statement for the draft legislation.

Submissions are invited on relevant issues. All submissions will be regarded as public documents unless clearly marked 'confidential' or 'commercial-in-confidence' and they may be made available to other interested parties, subject to provisions of the *Freedom of Information Act 1982*. No formal response will be provided on submissions. All comments will be considered in the development of the legislation.

The closing date for submissions is **10 December 2010**.

To protect your privacy please complete a submission cover sheet available at www.environment.gov.au/wastepolicy.

Provision of electronic submissions by email is preferred. The department encourages interested parties to make submissions either in Microsoft Word or PDF format. Hardcopy submissions should be unbound, so that they can easily be photocopied.

Submissions may be directed to:

wastepolicy@environment.gov.au

(include the word 'submission' in the title)

or:

Product Stewardship Legislation Team
Department of Sustainability, Environment, Water,
Population and Communities
GPO Box 787
Canberra ACT 2601

Overseas product stewardship schemes: overview and lessons learnt

Many examples of product stewardship exist throughout the world, and overseas experience is valuable in informing government and industry in Australia about the advantages and pitfalls of particular approaches. Product stewardship schemes exist in Asia, Canada, the European Union, and some parts of the United States, and cover packaging, electrical and electronic equipment, batteries, mercury-containing products, oils and general consumer products such as whitegoods and tyres.

Two reports commissioned by the department document overseas experiences of product stewardship schemes across different waste streams and products. ^{†††††} They are summarised in the following two tables:

Comparison of schemes in selected European and North American countries

	Germany	Netherlands	Belgium	Minnesota, USA	Ontario – Canada
Scheme	Packaging	Waste Electrical and Electronic Equipment (WEEE)	Batteries	WEEE	Batteries
Year of introduction and relevant regulation	1991 now under the <i>Closed Substance and Waste Management Act 1994</i> which [gives effect to the <i>EC Packaging Waste Directive</i>]	1999 <i>Management of White Goods and Brown Goods Decree 1998</i> <i>WEEE Management Decree 2004</i> which gives effect to the <i>EC Directive on WEEE</i>	1995 Regional Decrees e.g., <i>Flanders Waste Prevention and Management Decree VLAREA 1998</i> <i>Eco Tax Law 1993</i> — provides exemption from excise tax on batteries if producer in scheme and meeting targets.	2007 <i>Minnesota Electronics Recycling Act 2007</i>	2008 <i>Waste Diversion Act 2002</i> Note: Batteries defined by regulation as Municipal Hazardous or Special Waste (MHSW) subject to product stewardship/EPR.

^{†††††} *Product Stewardship in North America and Europe and Product Stewardship Schemes in Asia: China, South Korea, Japan and Taiwan*, both at

<http://www.environment.gov.au/wastepolicy/resources.html>.

Product and material coverage	All packaging, including 'point of sale' packaging	All WEEE except ICT equipment	Portable batteries and accumulators	Covered Electronic Device (CED) computer peripherals fax machines DVD players video recorders and Video Display Device (VDD)—TV or computer monitor with cathode ray tube or flat panel screen > 9'.	Single-use dry cell batteries Program being extended to cover all batteries except lead acid from vehicles.
Obligations and mechanisms	Producers are responsible for packaging waste. They set up convenient collection (close to home) kerb or 'bring' banks. Collection operates alongside municipal waste services via dual systems which fund the management of packaging waste. Producers delegate their obligations to these systems. Fees paid are based on the tonnage put on the market. Systems contractors report amount of packaging delivered for recycling. These amounts establish the recycling rates for the organisation. Company data are audited where high tonnage placed on the market.	Manufactures and importers finance and take back WEEE from municipal collection points and retailers. Disposal schemes are approved by Minister. Manufacturers and importers required to report on products collected and recycled. Municipalities and scrap dealers able to collect and treat WEEE but have no reporting obligations.	Battery producers and importers are responsible for collection and recycling an amount of batteries equal to 65% of batteries sold by weight (as of 2000, up from 40% in 1996). Battery producers and importers have established a collective system BEBAT as a not-for-profit organisation financed by a government set fee per battery placed on the market.	Manufacturers responsible for recycling of covered electronic devices Targets are based on weight of previous year's sales. Retailers, collectors and recyclers must register and report. Retailers report annual sales of VDD to manufacturers on 1 July each year. Collectors report weight collected, source and destination of materials. Recyclers report weight of material received.	Stewards/brand owner or first importer bears full costs from collection to disposal. Waste Diversion Ontario (WDO) sets program requirements including targets and costs to be met. Affected stewards establish industry funding organisation (IFO) to manage program for designated products. The IFO, program plan (including fees to be paid to IFO) approved by Minister. Stewards report quantities supplied for sale to IFO. IFO reports on program annually. WDO reports on all programs.

Source: Product Stewardship in North America and Europe, MS2 Perchards 2009

Comparison of schemes in selected Asian countries

	Japan	Taiwan	China	South Korea
Scheme	Product stewardship	EPR	EPR	EPR
Year of introduction	1998-2000: Original establishing legislation. Other legislation relates specifically to home appliances (HARL 2001)*, computers and an increasing variety of other consumer goods, including cars (LPEUR 2001)*.	1988: EPR incorporated into the <i>Waste Disposal Act 1988</i> . 1997: Seven IT scrap items designated for recycling program that commenced in 1988.	Scheduled for 2011.	2003: Product Recycling System (replaced earlier Producer Deposit Refund scheme which ran from 1992-2002).
Product and material coverage	Packaging, electrical and electronic appliances (other recycling programs cover food, construction and demolition waste, end-of-life vehicles).	Electrical and electronic equipment (other recycling programs cover food, construction and demolition waste, end-of-life vehicles including tyres, lubricants, and batteries).	Electrical and electronic equipment.	Electronic equipment, tyres, lubricant, batteries, fluorescent lamps, packaging.
Obligations and mechanisms	Consumer responsibility to purchase recycling ticket that enables them to dispose of home appliances (consumer pays a higher price for the disposal of products that are more expensive to recycle). Producers are obliged to take back and recycle goods of particular types.	Producer has financial responsibility. Registered recyclers take physical responsibility for goods in return for a small subsidy. No contribution by producers is made on equipment that is exported.	Details to be determined. Manufacturers will pay fees into central government fund.	Producer responsibility to meet recycling targets based on sales.

Lessons from overseas product stewardship schemes

The reports commissioned by the department note that no single product stewardship approach could simply be copied or introduced in Australia for a given product. However, there are lessons for Australia from overseas product stewardship schemes.

The lessons from the North American and European schemes are:

- program objectives must be clearly articulated;
- collaborative approaches may be helpful in progressing programs;
- any market intervention must be justified, fair, and support competition;
- short implementation times are viable only if there has been effective stakeholder engagement in the program design, and existing or planned waste and recycling systems are taken into account;
- a robust process for establishing fee structures is essential to ensuring perception of fees as fair, reasonable and based on actual program costs. The fee establishment process must also allow for revisitation once understanding of actual cost improves;
- most manufacturers are active in global markets and tend to strive for the consistent standards that have generally been established in Europe.

The lessons from the Asian schemes included:

- effective design of financial incentives is vital to the success of a scheme. Emphasis on sales-based targets does not encourage re-use or design for the environment;
- a coordinated mechanism which creates incentives and obligations for various players along the supply chain can promote resource efficiency;
- convenience strongly influences consumer behaviour;
- impacts on competition should be considered—there is a need to balance growth of the recycling industry against opportunity for the formation of monopolies;
- participation of manufacturers in the physical management of their end-of-life products is a significant factor in success of EPR schemes. Schemes that assign only a financial responsibility for end-of-life goods to the manufacturer are less effective in improving efficiency and reducing the cost of resource recovery;
- accounting for non-participants is important. This is well-managed in Japan, where consumers pay more for disposing of goods manufactured by non-participants, which gives an incentive to purchase products manufactured by participants;
- a focus on resource and innovation influences how people perceive end-of-life consumer goods, so they are not viewed as worthless ‘waste’ but as cost-effective sources of materials.

