australian earth laws alliance

Submission to the Product Stewardship Act Review, 2018

The Australian Earth Laws Alliance (AELA) is pleased to have the opportunity to comment on the review of the Product Stewardship Act 2011 ('the Act'). AELA is a not-for-profit organisation with a mission to increase the understanding and practical implementation of Earth centred law, governance and ethics in Australia. AELA's focus is to build systemic change, so that human societies can live, work and flourish within the productive capacity of the living world. We work within a multi-disciplinary context and our project leaders include indigenous community leaders, scientists, lawyers, economists, deep ecologists, artists and community development practitioners.

The Act is an extremely important foundation for managing the short and long term impacts of production and consumption in Australia. Our Submission sets out three tiers of recommendations: the first tier directly addresses the questions posed in the review and relates to strengthening elements of the existing legislation. The second tier comprises recommendations concerning administrative and enforcement issues relating to the legislation. The third tier sets out recommendations that would enable the Government to strengthen the governance system within which the Act operates and create a truly sustainable regulatory regime for consumption and production in Australia. AELA lawyers and project officers are available at any time, to address questions about this submission.

Regards,

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SUMMARY OF RECOMMENDATIONS

Escalating rates of production and consumption in industrialised societies are key drivers of resource depletion, waste production, biodiversity loss and runaway climate change[1].

The Product Stewardship Act 2011 (the Act) is an important foundation for managing the short and long term impacts of production and consumption in Australia. The Act was created pursuant to the National Waste Policy which was adopted by all Australian governments in 2009[2]. The Act serves as a mechanism to allocate responsibility to various parties involved in the manufacture and sale of products in Australia and to reduce the impact that products (and its contents) have on the environment and humans. The Act aims to achieve its goals by accrediting voluntary, or prescribing co-regulatory or mandatory schemes, that require certain actions to be taken by parties to reduce the impacts of products on human and natural communities. Under the Act, the Minister is required to publish a list of "priority products" that have been identified as being the subject of possible regulation pursuant to the Act.

AELA is of the opinion that the Act offers a strong framework for requiring parties involved in producing and selling goods to fulfill their responsibilities to minimize harm to the environment and to human health. However the Act is not, at present, achieving its full potential.

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[1] Alfredsson, E., Bengtsson, M., Szejnwald Brown, H., Isenhour, C., Lorek, S., Stevis, D. and Vergragt, P., (2018), 'Why achieving the Paris Agreement requires reduced overall consumption and production', Sustainability: Science, Practice and Policy 14:1 and UNEP (2016). Global Material Flows and Resource Productivity. An Assessment Study of the UNEP International Resource Panel. Schandl, H., Fischer-Kowalski, M., West, J., Giljum, S., Dittrich, M., Eisenmenger, N., Geschke, A., Lieber, M., Wieland, H.P., Schaffartzik, A., Krausmann, F., Gierlinger, S., Hosking, K., Lenzen, M., Tanikawa, H., Miatto, A., and T. Fishman. Paris, United Nations Environment Programme , p18.

[2] Australian Government Department of the Environment and Energy website (2018). 'About the National Waste Policy', http://www.environment.gov.au/protection/national-waste-policy/about. Accessed 10 May 2018.

Accordingly, AELA recommends 3 tiers of reform for the Act:

1. Tier 1 Recommendations offer a direct response to some of the key questions being asked in the current Review with a focus on eliminating the planned obsolescence of products.
2. Tier 2 Recommendations suggest administrative and policy measures to increase the effectiveness of the recommendations in Tier 1 and the operation of the Act.
3. Tier 3 Recommendations suggest ways that the Act, and the governance system within which the Act operates, can be further reformed and improved so that production and consumption levels are maintained within planetary boundaries.

Tier 1 Recommendations – Direct Responses to Questions of the Current Review

As stated in the National Waste Policy[3] for Australia, to achieve ecologically sustainable development, urgent action must be taken to maximise the potential of the Act to, among other things, reduce the impact of waste on our natural environment.

The National Waste Policy sets out various goals, including the aspiration that by 2020, there should be an adoption of product stewardship and extended producer responsibility in business operations, leading to improvements in the design, longevity and disassembly of products, a reduction in hazardous content, less waste and more thoughtful consumer choices. Improvements in the design and longevity of products is extremely important, as it will reduce material consumption and its related environmental and health impacts.

To date, the Act has not achieved the increased longevity of products. The Act has primarily generated recycling schemes. Recycling is an important part of waste management, however it has limitations. Recycling focuses on addressing the problem of waste once that waste has been produced, rather than aiming to reduce the amount of waste produced in the first place. In addition, recycling itself causes a range of problems, including the pollution caused by the recycling process, the eventual depletion of finite resources and the lack of incentive for product redesign and vulnerability to market fluctuations. Consequently, while recycling will always need to be part of the responses under the Act, actions higher on the waste management hierarchy must be deployed urgently.

[3] ibid, p6.

Where the knowledge and technology exists or can be quickly developed, products must be created that are optimally durable, repairable, upgradeable and ultimately recyclable. This also provides the co-benefit of supporting the objects of the Australian Consumer Law[4] by strengthening the consumer guarantee to make products of acceptable quality.

In Tier 1, we address the first Terms of Reference for the Review of the Act (TOR1). The recommendations concerning TOR 1 incidentally overlap with TOR 2, 3 and 4 and we will identify where this occurs. We do not address TOR 5.

Terms of Reference 1: The extent to which the objects of the Act are being met and whether they remain appropriate.

Extent to which the objects of the Act are being met

The primary object of the Act is to reduce the impacts that products have on the environment and substances contained in those products have on the environment and humans, throughout the lives of those products.

Schemes created under the Act to date have focused on recycling, however, this is not the most effective way to meet the objects of the Act. More effective action can be taken by reducing the amount of material that goes to recycling streams by addressing the practice of planned obsolescence. This gap in the Act can be filled with mandatory requirements that sit within the Act in addition to requirements under regulated schemes made pursuant to the Act. One of the most immediate and effective ways to do so is to require minimum product standards, minimum sustainability standards and parties to adhere to a duty of care to the environment.

Accordingly, AELA makes the recommendations below:

Standards for product design

Recommendation 1: Where there are existing "ecodesign standards[5]" for classes of products, those designs must apply to the relevant classes of products that are manufactured, imported, and sold in Australia. This should be applicable regardless of whether the Minister has listed the product class as a priority product. **Addendum 1** contains recommended changes to the Act to give effect to this recommendation.

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[4] Schedule 2, *Competition and Consumer Act 2010* (Cth).
[5] See page 23 for definition.

Recommendation 2: For priority products that affect the environment or humans and where there is an absence of ecodesign standards concerning those products, the Act should identify that ecodesign standards must be developed to apply to Australian manufacturers, importers, distributors and retailers in the same way that existing ecodesign standards would apply pursuant to Recommendation 1 above.

2.1 For Australian manufacturers of priority products, this should be done via a co-regulatory scheme that at a minimum, identifies the core objective of making products that are optimally durable, upgradeable, easily repairable and recyclable where technically possible.

2.2 For priority products that are manufactured internationally, resources must be made available to commission the development of relevant ecodesign standards that would be applicable to products imported, distributed and sold within Australia under a mandatory scheme.

We refer to Addendum 1 for suggested amendments to the Act.

Recommendation 3: Previous priority products that are now covered by the National Television and Computer Recycling Scheme and Mobile Muster scheme should have mandatory ecodesign standards applied as per Recommendations 1 or 2.

Currently, the Act only allows product redesign to be the subject of a co-regulatory or mandatory scheme under the Act for the purpose of avoiding generating waste (including addressing other waste related outcomes) and addressing hazardous substances. This excludes capturing products where waste is not created by the product (for example, in a circular economy where products have high rates of recycling and/or where industrial waste is reduced during processing and manufacture) but nonetheless have other substantial negative environmental or human health impacts arising during its life cycle.

Recommendation 4: The Act should identify that redesigning products for optimal longevity, reparability, upgradeability and recyclability can be a subject of any of the schemes regardless of the waste issues associated with the relevant products. See Addendum 1.

To ensure that applicable standards utilize the best knowledge available, there must be a process to review and update ecodesign standards. Collaboration with experts in

product design and international governments and organisations working to implement a circular economy will be beneficial to identifying the most effective process. This process should involve the expertise of the advisory group proposed in Recommendation 10 below.

Recommendation 5: Further consultation should be carried out to identify a process, to be outlined within the Act, for the advisory group to routinely review ecodesign standards to accommodate efficiency and technological advances.

General standards for sustainability

To eradicate the planned obsolescence of all products and improve environmental responsibilities of parties, the Act should identify a minimal set of sustainability standards applicable for Australian manufacturers, importers, distributors and retailers.

Recommendation 6: In all instances, businesses that make or sell products in Australia should be required to adhere to a minimum set of sustainability standards that, among other things, require companies to create or sell products that are durable, reparable, upgradeable and recyclable where technically possible. We refer to Addendum 1.

Duty of care to the environment

Recommendation 7: The Act should provide for a duty of care to not harm or damage the environment, which can be placed on all businesses that make or sell products. To develop this type of duty of care, research and consultation should be undertaken to prescribe a duty of care not to harm or damage the natural environment and ensure that it can be enforceable.

Whether the objects remain relevant and appropriate

The Act currently has the object to reduce emissions and energy and water use as a secondary objective that parties can aim to achieve under a voluntary scheme. Given the rapidly declining state of the environment, this object should be a primary goal of the Act, not a secondary objective.

Recommendation 8: The Act should be amended to include the object to reduce emissions and energy and water use as a core objective. Refer to Addendum 1.

Terms of Reference 2: The effectiveness of the accreditation of voluntary product stewardship schemes and the minister's annual product list in supporting product stewardship outcomes

To ensure planned obsolescence is addressed as a priority, AELA makes the following recommendation.

Recommendation 9: The Act specify that products listed on the Minister's annual list of priority products be subject to redesign standards per Recommendations 1 or 2 (in addition to any other measures that the Minister may see fit to implement). We refer to Addendum 1.

Terms of Reference 3: The operation and scope of the National Television and Computer Recycling Scheme

We refer to recommendation 3 above.

Terms of Reference 4: The interaction of the Act with other Commonwealth, state and territory and local government legislation, policy and programs

Currently, the planned obsolescence of products can be addressed in some circumstances by consumers exercising their rights under the Australian Consumer Law. However, there are many barriers in doing so and it is likely that the Australian Consumer Law protections will not capture low priced products made to break.

Mandatory ecodesign standards will inject certainty into the Australian Consumer Law by identifying when something has been built to be durable, thereby reducing some of the barriers consumers have when enforcing their consumer rights.

Accordingly, we refer to recommendations 1 and 2 above.

Tier 2: Recommendations concerning the administration of the Act and policy measures

A number of legal, institutional and administrative systems need to be strengthened, or put in place, to ensure the Act operatives effectively. AELA's Tier 2 recommendations relate to the need to create an advisory group, strengthen enforcement and support businesses transitioning to reduce planned obsolescence. AELA's Tier 2 recommendations are as follows:

Re-establish an Advisory Group

The Act currently provides for the establishment of an advisory group to provide advice to the Minister regarding identifying priority products and otherwise as requested by the Minister. AELA notes that an advisory group was establish in accordance with the Act but was abolished in 2014.

Identifying priority products and implementing the recommendations in Tier 1 require a considerable amount of technical knowledge drawing from various types of expertise. Further, it is important that people affected by the legislation are able to provide input and feedback as to how products affect them, and the environment. Accordingly, AELA makes the recommendation below.

Recommendation 10: A new advisory group should be established comprised of various stakeholder representatives, including civil society and non-government organisations, and relevant experts. The expertise required on the advisory group should include: engineering, product design, industrial ecology, ethics and Earth systems science. The role of the advisory group would be to advise the Minister with regard to the following matters:

- providing input to the priority list developed by the Minister under s108A of the Act;
- assessing the efficacy of proposed voluntary schemes, co-regulatory and mandatory schemes under the Act;
- assessing existing, and developing new, ecodesign standards pursuant to recommendations 1-3 above;
- routinely reviewing the suitability of applicable ecodesign standards in light of developments in technology and the state of the natural environment pursuant to recommendation 5 above;

- assessing whether liable businesses have adhered to the sustainability standards pursuant to recommendation 6 where those businesses have come to the attention of enforcement staff.

Enforcement

The Act should be amended to include a number of broad enforcement rights.

Procedural environmental rights

Procedural environmental rights (to information, public participation and justice) should be adopted within the Act, or its substitute legislation, to uphold the rule of law in a democratic system that enables civil society to hold the government to account. Among other things, this would enable the benefit or protection of substantive human rights and consistency with the Aarhus Convention.

AELA supports and advocates for the following recommendations made by the Australian Panel of Experts of Environmental Law (APEEL) [6]:

Recommendation 11: Incorporate 'open standing' or 'citizen suit' provisions that allow any person to challenge government decisions or undertake enforcement proceedings.

Recommendation 12: Allowing administrative (merits) review mechanisms to key decisions.

Recommendation 13: Protection from costs for a person bringing or maintaining legal action in the public interest.

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[6] Australian Panel of Experts on Environmental Law (2017), Democracy and the Environment (Technical Paper 8), Melbourne: Australian Panel of Experts on Environmental Law; https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e6018e6a496356f02631c0/1491468697413/APEEL_democracy_and_environment.pdf, accessed 10 May 2018, and Australian Panel of Experts on Environmental Law (2017), 57 Recommendations for the next generation of Australia's Environmental Laws, Melbourne: Australian Panel of Experts on Environmental Law; https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58f99d3c9de4bb35974ae5a5/1492753725897/APEEL_recommendations.pdf, accessed 10 May 2018, p.10.

Recommendation 14: All necessary resources should be allocated to support the enforcement and effective implementation of the Act.

Business transition

Eliminating the practice of planned obsolescence will require businesses to adopt new business models that account for lower sales of longer lasting products. To do this, the Government should introduce effective consultation with stakeholders so that the transition can be managed to support business practices over time.

Recommendation 15: Research and further consultation needs to be carried out to consider policy measures to assist businesses transitioning to new business models that eradicate planned obsolescence and allows greater business environmental performance.

Tier 3: How the Act, and the governance system within which the Act operates, can be further reformed and improved.

Every state of the environment report in Australia and overseas in the last two decades, points to an ever increasing environmental crisis, due to industrial society unsustainably extracting resources from, and emitting pollution back into, the biosphere. To address this unsustainable consumption of the planet's resources, all industrial societies must shift from a growth-focused economy to a steady state economy, and reduce the volume of material resources consumed in their communities. Only by *reducing* consumption of virgin materials, and embracing a truly circular economy, can we hope to build a future in which human societies live sustainably.

On this basis, our laws need to undergo a quantum shift and sit within a realistic governance framework; one that is embedded in the biophysical systems that we are part of. Our economy and legal system must acknowledge and prioritise ecological limits and humanity's dependence on our natural environment

Tiers 1 and 2 of this Submission address the urgent changes that need to be made to ensure the Act effectively meets its objectives and the spirit of the legislation. In this section, our Tier 3 Recommendations provide suggestions to strengthen the broader governance framework within which the Act – and all other Australian legislation - operates.

Building a governance framework that accepts that we live in a finite world: replacing Ecologically Sustainable Development (ESD) with Planetary Boundaries

The legal and economic system in Australia is built on the belief that we can have endless material growth on a finite planet. In the early 1990s, the concept of 'ecologically sustainable development' (ESD) gained traction in policy and legal frameworks[7], and had some initial success in addressing environmental destruction. However this policy framework has ultimately failed, because ESD was implemented within a 'business as usual' economic growth paradigm. ESD proposed that the 'three

[7] For example, see: Intergovernmental Agreement on the Environment 1992, National Strategy for Ecologically Sustainable Development.

pillars' of sustainability – ecology, society and economy – were equal, and needed equal attention. Within a pro-growth cultural, legal and economic system, the use of ESD wasn't enough to stop the relentless destruction of the natural world.

What we need to aim for instead of ESD, is a focus on 'living within our ecological limits', or living within the productive capacity of the living world. In the past ten years, 'ecological limits' have been defined by Earth Systems Science, and described in the concept of Planetary Boundaries.[8]

Planetary Boundaries set out, for the first time, the healthy parameters which humanity needs to operate within, to survive into the future. Significant work has been done to outline how Planetary Boundaries can in turn guide national and bioregional strategies to understand, and live within, healthy limits.

It is vital to understand the ecological boundaries of our planet to support the health of our environment and consequently, that of humanity. Climate science, Earth Systems Science and the scientific field of Planetary Boundaries is critical to this understanding[9]. Additionally, one of the principles of ecological integrity is that everything is interconnected[10] and thus incorporating ecological integrity would, among other things, include consideration of broader and indirect, however no less important, effects.

[8] Rockstrom, J., Steffen, W., Noone, K., Persson, A., F. Stuart Chapin lll, F. Lambin, E., M.Lenton, T., Scheffer, M., Folke, C., Joachim Schellnhuber, H., Nykvist, B., A. de Wit, C., Hughes, T., van der Leeuw, S., Rodhe, H., Sorlin, S., K. Snyder, P., Costanza, R., Svedin, U., Falkenmark, M., Karlberg, L., W. Corell, R., J. Fabry, V., Hansen, J., Walker, B., Liverman, D., Richardson, K., Crutzen, P. and A. Foley, J., "Safe Operating Space for Humanity", Nature 461, 472-475 (24 September 2009).

[9] Maloney, M. (2014), 'The role of regulation in reducing consumption by individuals and households in industrialised nations', Ph.D, Brisbane: Griffith University, p.237-242.

[10] Earth Charter Commission (2000), Earth Charter, Earth Charter Initiative, http://earthcharter.org/discover/download-the-charter/, accessed 10 May 2018.

Recommendation 16: Remove the principle of ESD from Australia's governance system and replace with the societal goal to live within planetary boundaries.

Recommendation 17: Create governance systems that place ecological integrity and the health of the natural environment as the foundational principles for all other governance and economic structures.

Recommendation 18: Adopt bioregional ecological and economic governance models, in order to create practical ways for communities to understand ecological limits, and develop consumption and production models that fit within the ecological limits of their bioregion.

Recommendation 19: At a minimum, there should be a requirement that ecological integrity and earth systems science be a basis for decision making under the Act where an assessment of the impact of products (including the actions considered to reduce those effects) are required. Refer to Addendum 1 for suggested amendments to the Act.

Respecting the rights of nature to exist, thrive, evolve and regenerate

To implement the concepts of ecological integrity and living within our ecological limits, Australia's legal system and world view needs to shift to acknowledge the primary importance of the living world. One of the ways this can be achieved is by supporting rights of nature law reform. Rights of nature laws now exist in more than six nations and many more jurisdictions within the USA, and offer vital tools to designing governance systems so that humanity can live with our planetary boundaries. The right for natural communities and ecosystems to exist, thrive and evolve should be at the forefront of any decisions made under the legislation.

Recommendation 20: Research should be carried out to identify how the following matters will be imported into decision making under the Act:

a. all natural entities have the rights to exist, to habitat or have a place to be and participate in the evolution of the Earth community;
    i. This section could provide a list of rights and also refer to recognised natural legal entities;
b. the integrity of ecosystems must be preserved in accordance with the principles of Ecological Integrity in the Earth Charter; and
c. products should not be made if they threaten the rights of nature, or our ability to live within our planetary boundaries.

Recommendation 21: Until the research identified in recommendation 20 is completed, policy documents concerning the Act should state that the rights of nature, the ecological integrity principles of the Earth Charter and regulating for the purpose of producing and consuming within planetary boundaries will become integrated within the Act or legislation replacing the Act.

Evolving from a Benefits and Costs Analysis (BCA) in decision making

AELA recommends that BCAs no longer be used as part of the decision making framework for permitting the production or import of products. A new decision making framework must be used, to account for the reality that the health of humans and the economy is embedded within the ecological limits of our environment. Ecological economics may provide a viable alternative to traditional BCAs.

Recommendation 22: Research should be carried out to identify a suitable alternative to the use of traditional BCAs in decision making concerning environmental matters. AELA strongly recommends that the research occur in collaboration with ecological economists.

SUBMISSION DETAILS

Terms of Reference 1 - The extent to which the objects of the Act are being met and whether they remain appropriate.

Objects of the Act

The core object of the Act is to reduce the impact that:

- products have on the environment, throughout their lives; and
- substances contained in products have on the environment, and on the health and safety of human beings, throughout the lives of those products.

These objects are to be achieved by encouraging or requiring manufacturers, importers, distributers and other persons to take responsibility for those products, including by taking action that relates to the following:

- avoiding generating waste from products;
- reducing or eliminating the amount of waste from products to be disposed of;
- reducing or eliminating hazardous substances in products to be disposed and in waste of products;
- managing waste from products as a resource;
- ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way.

The following are secondary objects of the Act;

- to contribute to Australia meeting its international obligations concerning the impacts referred to in subsection (1);
- to contribute to reducing the amount of greenhouse gases emitted, energy used and water consumed in connection with products and waste from products.

The object to reduce greenhouse gases, energy used and water consumption is broad enough to cover the extraction and processing of raw materials connected with the products and waste however this object may be seen as a secondary object of the Act

where actions committed to by parties to achieve this object may only be done under a voluntary scheme[11].

To achieve the objects of the Act, the Act sets out a framework for voluntary, co-regulatory and mandatory product stewardship schemes.

Extent to which the objects of the Act are being met

AELA is of the opinion that the objects of the Act are not being met.

Schemes created under the Act to date have focused on recycling, however, this is not the most effective way to meet the objects of the Act. More effective action can be taken by reducing the amount of material that goes to recycling streams (where those streams exist) by addressing the practice of planned obsolescence. This gap in the Act can be addressed with mandatory requirements that sit within the Act in addition to requirement under regulated schemes made pursuant to the Act. One of the most immediate and effective ways to do so is to require minimum product standards, minimum sustainability standards and parties to adhere to a duty of care to the environment.

The problem with recycling as the main outcome

We agree that recycling is an integral waste minimisation strategy but the avoidance of the production of waste should be prioritised as it appears higher in the management of waste hierarchy.

Although recycling allows for the repeated use of raw materials, recycling negatively affects our environment via the pollution caused as a by-product of the energy consumed to collect, sort, clean and separate materials and also by materials reclamation processes. The manufacture and distribution of products made from recycled materials also have negative impacts on the environment[12]. Further, the laws of thermodynamics mean that finite resources eventually become depleted[13].

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[11] s4(3) *Product Stewardship Act 2011* (Cth) and *Revised Explanatory Memorandum, Product Stewardship Act 2011* (Cth), p.7.

[12] Cooper, T. (1994), Beyond recycling: The longer life option, London: The New Economics Foundation, p.1., https://www.researchgate.net/publication/245584324_Beyond_recycling_the_longer_life_option, accessed 6 June 2018. See also, Lepawsky, J., 'Beyond recycling: solving e-

Recycling does not operate as an incentive for businesses to create products that last for optimal lifetimes as it does not challenge the practice of planned obsolescence[14]. Further, literature concerning plastic packaging, concludes that recycling does not promote intensive product redesign as producers choose the least expensive options[15]. Recycling is also vulnerable to market fluctuations, as illustrated by the recent China Sword policy[16].

Below we consider two schemes to illustrate how recycling schemes alone have failed to address the objects of the Act.

National Television and Computer Recycling Scheme

We note that televisions, computers, printers and computer products are covered by the scheme.

Research concludes that some products covered by the scheme have high negative environmental impacts during the manufacturing stage that are only partially recoverable by up-to-date recycling[17]. For example, 70 percent of the energy needed to make and operate a typical laptop computer throughout its life span is used in manufacturing the computer. Carbon emissions attributed to the materials in the laptop computer only comprise 10% of the total. Accordingly, recycling can only recover a small amount of the energy invested in the product.

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waste problems must include designers and consumers', *The Conversation*, accessed 2 May 2018, https://theconversation.com/beyond-recycling-solving-e-waste-problems-must-include-designers-and-consumers-41719.

[13] Cooper, T., op.cit., p.2.

[14] Cooper, T., op.cit., p.6.

[15] Monroe, L., (2014), "Tailoring product stewardship and extended producer responsibility to prevent marine plastic pollution"', Tulane Environmental Law Journal, 27:219-236, pp. 231-232.

[16] Ritchie, M., China's National Sword is cutting deep in the recycling sector, InsideWaste, February/March 2018, accessed on 4 May 2018 from Parliament of Australia webpage at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/WasteandRecycling/Additional_Documents.

[17] Deng, L., Babbitt, C.W., Williams, E.D., (2011), "Economic-balance hybrid LCA extended with uncertainty analysis: case study of a laptop computer", Journal of Cleaner Production, 19:11, July 2011, pp., 1198-1206, p. 1203. See also Arizona State University (2011), 'Factory is where our computers eat up most energy', Phys.org, https://phys.org/news/2011-04-factory-energy.html#jCp, accessed 11 May 2018.

Consumer culture and the practice of planned obsolescence have resulted in millions of tonnes of e-waste entering the waste stream yet fewer than 1% of televisions and around 10% of computers and laptops are recycled as e-waste grows[18]. Numerous inadequacies have been identified under the scheme, including significant amounts of electronic waste that continues to be shipped overseas illegally, threatening Australia's compliance to the Basel Convention. Longer lasting products will contribute to reducing the scale of these issues by curbing the increasing amount of electrical waste and electronic equipment[19].

Several experts support the redesign of products so that they become more durable, repairable and recyclable to reduce the environmental and health impacts of products covered by the Scheme[20].

Mobile phones - Mobile Muster Scheme

Mobile phones are another example of products where recycling should be coupled with highly effective actions such as designing for longer lifespans, reuse and remanufacture to significantly address the environmental impacts of a product.

For example, with climate change one of the biggest environmental crisis that requires urgent mitigation, we refer to the greenhouse gas emission impacts for mobile phones. Studies confirm that those impacts are greatest at the extraction and manufacturing life cycle stage of the product[21] and that longer lasting products with longer usage time can significantly lower the burden of products that have negative environmental impacts arising from the production stage of the product[22].

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[18] Metternicht, G., 'Does not compute: Australia is still miles behind in recycling electronic products', The Conversation, https://student.unsw.edu.au/citing-different-sources-0, accessed 2 May 2018,

[19] ibid.

[20] See for example Deng, op.cit., pp. 1203 and 1205, and Lepawsky, J., op.cit. and Lepawsky, J., (2018) 'Almost everything you know about e-waste is wrong', The Conversation, https://theconversation.com/almost-everything-you-know-about-e-waste-is-wrong-93904, accessed 10 June 2018.

[21] Manhart, A., Blepp, M., Fischer, C., Graulich, K., Prakash, S., Priess, R., Schleicher, T., Tur, M., (2016), Resource Efficiency in the ICT Sector, Freiburg, Germany, Oeko-Institut, https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/20161109_oeko_resource_efficency_final_full-report.pdf, accessed 10 May 2018, p21.

[22] ibid, p.34.

Lifecycle studies illustrate how even with a 20% improvement in phone efficiency every 4 years, using a mobile phone for 10 years is more sustainable[23]. The studies conclude with recommendations:

- to promote longer product use by changing product design and business models. The recommendation identifies the importance of replaceability and upgradability of components that can limit usage time, namely batteries, display, memory and storage and the standardisation of charging interfaces; and
- that telecommunications service providers change their business models to incentivise usage of existing product models beyond the life of service contracts.
- The recommendation also identifies the importance of designing to facilitate recycling, for example, allowing for quick battery removal without the use of tools[24].

Mandatory requirements to meet the objectives

One of the most immediate and effective ways to reduce the amount of material that goes to recycling streams is to require minimum product standards, minimum sustainability standards and parties to adhere to a duty of care to the environment.

Products should be redesigned with environmental considerations

The Federal Government's National Waste Report identifies that 70%-90% of a product's environmental and economic impacts are determined at the design stage[25]. Despite this, there are no accredited schemes or regulations under the Act that address the design stage of a product's lifecycle to minimise waste. To some extent, the Minister already has the power to regulate for the mandatory redesign of products to meet the purpose of reducing or eliminating the amount of waste from products to be disposed of however amending the legislation would expand the scope of this power.

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[23] Suckling, J. and Lee, J., (2015), "Redefining scope: the true environmental impact of smartphones?", International Journal of Life Cycle Assessment, 20:1181-1196, p.1191.
[24] Manhart et al, op.cit., p.72.
[25] RMIT University, Green Design Policy Review: Analysis Report, Report to the Department of the Environment, Water, Heritage and the Arts, February 2009, p.8., cited in Environment, Heritage Protection Council (EPBC) 2010, National Waste Report, Department of the Environment, Water, Heritage and the Arts, Australian Government, http://www.environment.gov.au/protection/national-waste-policy/national-waste-reports/national-waste-report-2010. Accessed 9 May 2018, p.254.

Sustainability is a pre-competitive issue and manufacturers and suppliers should take greater responsibility. To deal with rapidly escalating environmental problems, specific and mandatory objectives are best to even the playing field in a competitive marketplace and ensure that innovative product design is developed at a pace to address the problems[26]. The Act needs to specifically require the redesign of products to meet the objects of the Act.

In this submission, the word "**ecodesign standard**" means a certified design standard for a type or class of products designed to achieve an optimal lifetime. Additionally, where technically possible, ease of reparability, upgradeability and recyclability will also be a part of the standard in addition to any other relevant positive environmental requirements.

Optimal lifetimes

In the pursuit of creating standards for durable products, it is important to consider the optimal lifetime of the product.

In many cases, products that have high negative impacts during manufacturing should be made to last as long as they can, particularly where the negative impacts cannot be reduced by technological improvements. Alternatively, a shorter lifetime than what is technically feasible may be preferable if a new, more energy-efficient and less resource-consuming product is available. In this case, the manufacturer could lease products to consumers, providing upgraded products as necessary and taking back the old product to repurpose or recycle components[27].

Research and consideration is also required as to the time the consumer finds a product attractive.

The following recommendations do not apply to products that cause, or are likely to cause significant or irreparable harm to our environment or human health. In these cases, we consider that such products should be banned.

In light of the above, we make the following comments and recommendations.

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[26] See for example Monroe, L., op.cit., p.232.

[27] Pope, Kamila (2017), Understanding Planned Obsolescence: Unsustainability through production, consumption and waste generation, London and New York: Kogan Page Limited, p.164.

Recommendation 1: Where there are existing "ecodesign standards" for classes of products, those designs must apply to the relevant classes of products that are manufactured, imported, and sold in Australia. This should be applicable regardless of whether the Minister has listed the product category as a priority product. Addendum 1 contains recommended changes to the Act to give effect to this recommendation.

As the circular economy concept gains traction internationally, it is likely that more ecodesign standards will be developed. For example, the European Commission has committed to develop product requirements by analysing the issues of reparability, durability and upgradability (in addition to recyclability) on a product by product basis[28].

Recommendation 2: For priority products that affect the environment and there is an absence of ecodesign standards concerning those products, the legislation should identify that ecodesign standards must be developed to apply to Australian manufacturers, importers, distributors and retailers in the same way that existing ecodesign standards would apply pursuant to Recommendation 1 above.

2.1 For Australian manufacturers of priority products, this should be done via a co-regulatory scheme that at a minimum, identifies the core objective of making products that are optimally durable, upgradeable, easily repairable and recyclable where technically possible.

2.2 For priority products that are manufactured internationally, resources must be made available to commission the development of relevant ecodesign standards that would be applicable to products imported, distributed and sold within Australia under a mandatory scheme.

We refer to Addendum 1 for suggested amendments to the Act.

Consideration should be given to the most effective process to harness the opportunities of product redesign, particularly for products that are substantially damaging to our environment (including via the creation of pollution of greenhouse gas emissions and the usage of water and energy) and human health during the process of manufacture and distribution.

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[28] European Commission, (2015), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Closing the loop – An EU action plan for the Circular Economy, Brussels, https://www.eea.europa.eu/policy-documents/com-2015-0614-final, accessed 20 June 2018, p.4.

We note that it cannot be based just on the individual impacts of certain products, but the sales volume of those products. For example, smartphones and tablets, when compared to other everyday products, have a modest environmental burden. However, the high number of sales of those products cause the high environmental impact of producing those items[29].

We consider that Australian manufacturers of priority products should share the cost of the creation of relevant ecodesign standards pursuant to a co-regulatory scheme that identifies the core objective of making products that are optimally durable, upgradeable, easily repairable and recyclable. ISO TR 14062(2002) concerning product redesign with environmental considerations may be useful to inform the measurable outcomes to be achieved from the scheme. Certification of the ecodesign standard should operate as a trigger for the Minister to declare the standard pursuant to Recommendation 1 so it becomes applicable to parties who import or sell that product and to parties who manufacture the product at a later date.

To ensure the best technical outcomes are obtained, it is vital that the ecodesign standard be assessed and approved by an advisory group with the relevant expertise to make such decisions. Please see recommendation 10 below.

Alternatively, for priority products that are manufactured internationally, resources must be made available for the Government to commission the development of relevant ecodesign standards that would be applicable to products imported, distributed and sold within Australia. Once the ecodesign standard is developed and certified, it should be declared pursuant to Recommendation 1 above so that it applies to any parties manufacturing the relevant product in Australia in the future.

AELA considers that the Government would benefit from collaborating with international governments (particularly those implementing circular economy policies that also focus on product longevity) and international design entities such as the International Standards Organisation (ISO) to benefit from the work carried out in this area.

Recommendation 3: Previous priority products that are now covered by the National Television and Computer Recycling Scheme and Mobile Muster scheme should have mandatory ecodesign standards applied as per Recommendations 1 or 2.

[29] Manhart et al, op.cit., p32.

Currently, the Act only allows product redesign to be the subject of a co-regulatory or mandatory scheme under the Act for the purpose of avoiding generating waste (including addressing other waste related outcomes) and addressing hazardous substances. This excludes capturing products where waste is not created by the product (for example, in a circular economy where products have high rates of recycling and/or where industrial waste is reduced during processing and manufacture) but nonetheless have other substantial negative environmental or human health impacts arising during its life cycle.

Recommendation 4: The Act should identify that redesigning products for optimal longevity, reparability, upgradeability and recyclability can be a subject of any of the schemes regardless of the waste issues associated with the relevant products. We refer to Addendum 1.

To ensure that applicable standards utilize the best knowledge available, there must be a process to review and update ecodesign standards. Collaboration with experts in product design and international governments and organisations working to implement a circular economy will be beneficial to identifying the most effective process.

Recommendation 5: Further consultation should be carried out to identify a process, to be outlined within the Act, for the advisory group to routinely review ecodesign standards to accommodate efficiency and technological advances.

Sustainability Standards

To capture products that are neither listed by the Minister or subject to an existing ecodesign standard, all Australian businesses who manufacture and provide products should be required to adopt sustainability standards in their business practices.

Recent work carried out by the APEEL concerning improving corporate environmental performance identified various law reform options supported by various legal scholars, including:

- requiring all companies to establish an appropriate environmental management system such as one certified by the ISO;
- obliging corporations to establish an environmental sustainability plan that sets targets and means to achieve environmental improvements in the business, such as resource use, efficiency gains and waste emission reductions, with progress in achieving the measures reported in the companies' annual reports;

- obliging corporations to consult routinely with specified stakeholders such as local community and environmental organisation to improve companies' awareness of how their operations affect the environment and to report in their annual report how consultation occurred and how stakeholder's advice has been taken into account;
- obliging companies to improve their collection of environmental performance data and to disclose it in order to, among other things, assist regulators in supervising compliance and enable a more informed dialogue on environmental issues within companies and between companies and their stakeholders;
- differentiation of the above responsibilities between large and small companies[30].

Additionally, existing ISO standards such as ISO TR 1406 (2002) and ISO 26000 could inform the sustainability standards. Wimmer, Zust and Lee relevantly summarise the objectives of ISO TR 1406 (2002)[31].

"According to ISO TR 1406 (2002) the integration of environmental aspects into product design and development involves setting strategic product related objectives for reducing the product's environmental impact while maintaining or improving its functionality. Two such objectives are:

- "Conservation of resources, recycling and energy recovery via optimizing the use of resources required for the product (like materials and energy) without having any adverse effect on its performance, durability, etc. decreasing the quantity of hazardous materials and reduce the creation of waste during manufacturing and disposal, achieving suitability for reuse, recycling and for use as source of energy.
- "Preventing of pollution, waste and other impacts through dealing with problems at their sources."

[30] The Australian Panel of Experts on Environmental Law, The Private Sector, Business Law and Environmental Performance (Technical Paper 7, 2017), Melbourne: Australian Panel of Experts on Environmental Law; https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e601626a496356f02627df/1491468647286/APEEL_private_sector_business_law.pdf, accessed 10 May 2018, pp. 25-26.

[31] Wimmer, W., Zust, R., Lee, K.M., (2004), Ecodesign implementation: A systematic Guidance on Integrating Environmental Considerations into Product Development, Springer Science + Business Media Dordrecht, p72.

Concerning ISO 26000, academic Kamila Pope states it "provides guidance to sectors interested in adopting socio-environmental policies in their organisations" and also provides that parties that supply products to consumers have responsibilities to those consumers.

The above law reform options identified by the APEEL and the terms of ISO TR 14062 (2002) and ISO26000 should be inserted into the Act to the greatest extent that they are consistent with the objects of the Act. The construction of the sections importing these requirements will require further research and consideration of how the requirements below can best be implemented, allowing for the different size of businesses and other variables.

Recommendation 6: In all instances, businesses that provide products should be required to adhere to a minimum set of sustainability standards that, among other things, include:

1. requiring Australian manufacturers to:
    a. conserve resources, recycle and recover energy via optimising the use of resources required for the product without having any adverse effects on durability or performance;
    b. decrease or eliminate the quantity of hazardous materials;
    c. reduce waste during manufacturing and disposal;
    d. build products so they may be reused, repaired, recycled and/or used as a source of energy;
    e. prevent pollution, waste and other adverse impacts by dealing with problems at their sources; and

2. requiring all Australian companies that provide products to consumers to:
    a. only offer high quality products with longer life-cycles (existing ecodesigns will help meet this requirement) and competitive prices; and
    b. use fair and transparent marketing and contractual processes and promote sustainable consumption;
    c. provide clear, accurate and complete information about the product or service, its origins, impacts throughout the life-cycle, durability and efficiency, among others, including:
        i. educating consumers about how to recycle products[32] ;
        ii. identifying the projected life span and availability of spare parts.

3. Requiring all Australian businesses who manufacture, import or distribute products to

[32] The author acknowledges Erin Lewis-Fitzgerald's input made in her capacity as Founder and Managing Director of the repair café Bright Sparks, Melbourne confirming the importance of this information being provided to consumers

a. establish an environmental sustainability plan that sets targets and means to achieve environmental improvements in the business, with progress in achieving the measures reported in the companies' annual reports;
b. consult routinely with specified stakeholders such as local community and environmental organisations and to report in their annual report how consultation occurred and how stakeholder's advice has been taken into account; and
c. improve their collection of environmental performance data and to disclose it.

Duty of care not to harm or damage the natural environment

AELA considers that a duty of care not to harm or damage the environment would help to achieve the objects of the Act by requiring parties to take reasonable steps to create products that do not harm the environment or human health. As contemporary science, such as life cycle analysis and earth systems science, evolves, it may become feasible to identify reasonable steps for parties to take to meet the duty of care.

Recommendation 7: The Act should provide for a duty of care to not harm or damage the environment, which can be placed on all businesses that make or sell products. To develop this type of duty of care, research and consultation should be undertaken to prescribe a duty of care not to harm or damage the natural environment and ensure that it can be enforceable.

Whether the objects remain relevant and appropriate

The Act currently has the object to reduce emissions and energy and water use as secondary objective that parties can aim to achieve under a voluntary scheme. Given the rapidly declining state of the environment, this object should be the primary goal of the Act, not a secondary objective. Rather than waiting for companies to voluntarily address, this would allow regulations to be made to capture products that may not be considered to generate much waste however generate substantial emissions and/or is energy and/or water intensive the lifecycle of the product.

Recommendation 8: The Act should be amended to include the object to reduce emissions and energy and water use as a core objective. We refer to Addendum 1.

Terms of Reference 2 - The effectiveness of the accreditation of voluntary product stewardship schemes and the minister's annual product list in supporting product stewardship outcomes

To ensure planned obsolescence is addressed as a priority, AELA makes the following recommendation.

Recommendation 9: The Act specify that products listed on the Minister's annual list of priority products be subject to redesign standards per Recommendations 1 or 2 (in addition to any other measures that the Minister may see fit to implement). We refer to Addendum 1.

Terms of Reference 3 - The operation and scope of the National Television and Computer Recycling Scheme

We refer to our comments concerning the Mobile Muster and National Television and Computer Recycling Scheme and recommendation 3 above.

Terms of Reference 4 - The interaction of the Act with other Commonwealth, state and territory and local government legislation, policy and programs

Currently, the planned obsolescence of products can be addressed in some circumstances by consumers exercising their rights under the Australian Consumer Law. However, there are many barriers to doing so and it is likely that relatively cheaper products made to break will not be covered by the Australian Consumer Law protections.

Guarantee of acceptable quality - ACL

Relevantly, the law states that if a person supplies, in trade or commerce, goods to a consumer (other than by sale of auction), there is a guarantee that the goods are of acceptable quality. Goods are considered to be of acceptable quality if they are:

- fit for all the purposes for which goods of that kind are commonly supplied; and
- acceptable in appearance and finish; and
- free from defects; and
- safe; and
- durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regards to:

- the nature of the goods; and
- the price of goods (if relevant); and
- any statements made about the goods on any packaging or label on the goods; and
- any representation made about the goods by the supplier or manufacturer of the goods; and
- any other relevant circumstances relating to the supply of goods[33] .

Barriers

Uncertainty of durability requirement

There is a dearth of jurisprudence that illuminates how the above law may be interpreted in cases that involve the planned obsolescence of products, particularly in identifying what a reasonable consumer would consider to be durable. In the absence of statements made by the retailer or manufacturer, the expected lifespan of a product may be difficult to identify. To further complicate matters, considering the purchase price may not be helpful. Studies in overseas markets conclude that a high purchase price is not always a good indicator of product durability[34]. In the recent review of the ACL, CHOICE identified that this is likely a factor in preventing consumers from enforcing their rights in situations where a product has failed under the manufacturer's warranty expires[35] .

[33] Sections 54(4)-(7), Schedule 2, *Competition and Consumer Act 2010* (Cth).
[34] Goyens, M., and Maurer, S., (2015) Waste Prevention: consumer information and long-lasting products, Circular Economy in Europe: Towards a New Economic Model, The European Files, September 2015, https://www.europeanfiles.eu/magazine/circular-economy-europe-towards-new-economic-model, accessed 6 June 2018, p. 27.
[35] CHOICE, Submission to the Consumer Affairs Australia and New Zealand on the Australian Consumer Law Review: Issues Paper, 2016, https://www.choice.com.au/~/media/9abffb328e3c4cd9a9b43a8a0c6d1b6f.ashx?la=en, accessed 6 June 2018, p. 11.

Access to justice

Where a product fails prematurely, consumers seeking a remedy either in a tribunal or court would have to prove, among other things, that the product was not durable due to factors that existed before the product was sold to the consumer and which the consumer was not aware of. This may require engaging an expert to confirm the fault and determine the cause of the fault, particularly in complicated matters where, for example, a car allegedly has a major defect as a result of a collection of minor defects. As noted by various consumer groups, the costs of enforcing consumer rights in courts or tribunals exist as a barrier to enforcing consumer rights[36].

Other reasons consumers may not enforce their rights include:

- the value of the remedy may not justify the time and expense of litigating;
- lack of assertiveness;
- the power imbalance between traders and consumers; or
- the imperfect processing of information by the consumer[37].

The recommendations to the ACL review do not address these barriers. Action is being taken to consider making guidelines as to what may be considered to be "reasonably durable" but this also lacks certainty. For example, during the review of the ACL, the NSW Business Chamber stated that lifetime guides would increase uncertainty because of variables such as price[38].

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[36] Consumer Action Law Centre, Submission to the inquiry into consumer protections and remedies for buyers of new motor vehicles 2015, https://consumeraction.org.au/wp-content/uploads/2015/10/Submission-Consumer-Action-FINAL-08102015.pdf, accessed 6 June 2018, p.4, See also, CHOICE, op.cit., pp.43-45, and Legal Aid NSW, Australian Consumer Law Review: Legal Aid NSW Submission to Consumer Affairs Australia and New Zealand, 2016, https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25056/Review-of-Australian-Consumer-Law-May-2016-Final-Submission.pdf, accessed 6 June 2018, p.22.

[37] Corones, S., Christensen, S., Malbon, J., Asher, A. and Marie Paterson, J., 'Comparative Analysis of Overseas Consumer Policy Frameworks', Queensland University of Technology, April 2016, http://consumerlaw.gov.au/files/2016/05/ACL_Comparative-analysis-overseas-consumer-policy-frameworks-1.pdf, accessed 20 June 2018, pp.201-205.

[38] Consumer Affairs Australia and New Zealand, Australian Consumer Law Review: Interim Report, 2016, https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf, accessed 6 June 2018, p.49.

Mandatory ecodesign standards would increase the effectiveness of the ACL and eliminate any uncertainty from the proposed durability guidelines and the uncertainty that exists under the current durability requirement. It would also capture the planned obsolescence of cheap products that currently are unlikely to fall within the scope of the guarantee as to acceptable quality because price is a factor. Additionally, it may alleviate the costs of obtaining expert evidence in cases of planned obsolescence as it would arguably be easier to identify whether a design standard has been adhered to and provide additional confidence to consumers to enforce their rights.

See recommendations 1 and 2 which reduces barriers to enforcing the guarantee of acceptable quality pursuant to the Australian Consumer Law.

Tier 2 Recommendations concerning the administration of the Act and policy measures

A number of legal, institutional and administrative systems need to be strengthened, or put in place, to ensure the Act operatives effectively. AELA's Tier 2 recommendations relate to the need to create an advisory group, strengthen enforcement and support businesses transitioning to reduce planned obsolescence.

Re-establish an advisory group

The Act currently provides for the establishment of an advisory group to provide advice to the Minister regarding identifying priority products and otherwise as requested by the Minister. AELA notes that an advisory group was establish in accordance with the Act but was abolished in 2014.

Identifying priority products and implementing the recommendations in Tier 1 require a considerable amount of technical knowledge drawing from various types of expertise. Further, it is important that people affected by the legislation are able to provide input and feedback as to how products affect them, and the environment. Accordingly, AELA makes the recommendation below.

Recommendation 9: A new advisory group should be established comprised of various stakeholder representatives, including civil society and non-government organisations, and relevant experts. The expertise required on the advisory group would include: engineering, product design, industrial ecology, ethics and Earth systems science. The role of the Advisory group would be to advise the Minister with regard to the following matters:

- providing input to the priority list developed by the Minister under s108A of the Act;
- assessing the efficacy of proposed voluntary schemes, co-regulatory and mandatory schemes under the Act;
- assessing existing, and developing new, ecodesign standards pursuant to recommendations 1-3 above;
- routinely reviewing the suitability of applicable ecodesign standards in light of developments in technology and the state of the natural environment pursuant to recommendation 5 above;
- assessing whether liable businesses have adhered to the sustainability standards pursuant to recommendation 6 where those businesses have come to the attention of enforcement staff.

Enforcement

The Act should be amended to include a number of broad enforcement rights.

Procedural environmental rights

Procedural environmental rights (to information, public participation and justice) should be adopted within the Act, or its substitute legislation, to uphold the rule of law in a democratic system that enables civil society to hold the government to account. The APEEL technical paper concerning democracy and the environment provides valuable reasoning for this recommendation. Among other things, the technical paper illustrates how this would enable the benefit or protection of substantive human rights and identifies procedural rights relevant to environmental law that is consistent with the Aarhus Convention[39].

AELA supports and advocates for the following recommendations made by the APEEL[40]:

Recommendation 11: Incorporate 'open standing' or 'citizen suit' provisions that allow any person to challenge government decisions or undertake enforcement proceedings;

[39] Australian Panel of Experts on Environmental Law (2017), Democracy and the Environment op.cit., p.16.
[40] Australian Panel of Experts on Environmental Law (2017), Democracy and the Environment loc. cit., and Australian Panel of Experts on Environmental Law (2017), 57 Recommendations for the next generation of Australia's environmental laws, loc. cit.

Recommendation 12: Allowing administrative (merits) review mechanisms to key decisions;

Recommendation 13: Protection from costs for a person bringing or maintaining legal action in the public interest.

Recommendation 14: All necessary resources should be allocated to support the enforcement and effective implementation of the Act.

Business transition

Eliminating the practice of planned obsolescence will require businesses to adopt new business models that account for lower sales of longer lasting products (for example, leasing models)[41]. To do this, the Government should introduce effective consultation with stakeholders so that the transition can be managed to support business practices over time.

We consider that respective and responsive consultation with businesses to be affected by the recommendations in this submission would inform how government can best support businesses to transition to ecologically sustainable business models. The merits and success of such consultation is argued by Dr Michelle Maloney[42].

Recommendation 14: Research and further consultation needs to be carried out to consider policy measures to assist businesses transitioning to new business models that eradicate planned obsolescence and allows greater business environmental performance.

[41] For example, see Intlekofer, K., Bras, B., Ferguson, F., "Energy implications of Product Leasing", Environ. Sci. Technol., 2010, 44 (12), 4409-4415 and The Ellen Macarthur Foundation, In-depth – Washing Machines, Ellen Macarthur Foundation, 9 October 2012, https://www.ellenmacarthurfoundation.org/circular-economy/interactive-diagram/in-depth-washing-machines, accessed 6 June 2018.
[42] Maloney, op.cit., pp 216 -221.

Tier 3 Recommendations suggest ways that the Act, and the governance system within which the Act operates, can be further reformed and improved.

Every state of the environment report in Australia and overseas in the last two decades, points to an ever-increasing environmental crisis, due to industrial society unsustainably extracting resources from, and emitting pollution back into, the biosphere. To address this over-consumption of the planet's resources, all industrial societies must shift from a growth-focused economy to a steady state economy, and reduce the volume of material resources consumed in their communities. Only by *reducing* consumption and production, and embracing a truly circular economy, can we hope to build a future in which human societies live sustainably.

On this basis, our laws need to undergo a quantum shift and sit within a realistic governance framework; one that is embedded in the biophysical systems that we are part of. Our economy and legal system must acknowledge and prioritise ecological limits and humanity's dependence on our natural environment

Tiers 1 and 2 of this Submission address the urgent changes that need to be made to ensure the Act effectively meets its objectives and the spirit of the legislation. In this section, our Tier 3 Recommendations provide suggestions to strengthen the broader governance framework within which the Product Stewardship Act – and all other Australian legislation - operates.

Building a governance framework that accepts that we live in a finite world: replacing Ecologically Sustainable Development (ESD) with Planetary Boundaries

The legal and economic system in Australia is built on the belief that we can have endless material growth on a finite planet. In the early 1990s, the concept of 'ecologically sustainable development' (ESD) gained traction in policy and legal frameworks[43] , and had some initial success in addressing environmental destruction. However this policy framework has ultimately failed, because ESD was implemented within a 'business as usual' economic growth paradigm. ESD proposed that the 'three pillars' of sustainability – ecology, society and economy – were equal, and needed equal

[43] For example, see: Intergovernmental Agreement on the Environment 1992,National Strategy for Ecologically Sustainable Development.

attention. Within a pro-growth cultural, legal and economic system, the use of ESD wasn't enough to stop the relentless destruction of the natural world. For further analysis, we refer to work undertaken by the APEEL[44].

What we need to aim for instead of ESD, is a focus on 'living within our ecological limits', or living within the productive capacity of the living world. In the past ten years, 'ecological limits' have been defined by Earth Systems Science, and described in the concept of Planetary Boundaries[45].

Planetary Boundaries set out, for the first time, the healthy parameters which humanity needs to operate within, to survive into the future. Significant work has been done to outline how Planetary Boundaries can in turn guide national and bioregional strategies to understand, and live within, healthy limits.

It is vital to understand the ecological boundaries of our planet to support the health of our environment and consequently, that of humanity. Climate science, Earth Systems Science and scientific field of Planetary Boundaries is critical to this understanding[46]. Additionally, one of the principles of ecological integrity is that everything is interconnected[47] and thus incorporating ecological integrity would, among other things, include consideration of broader and indirect, however no less important, effects.

AELA asserts that nationwide consultation should occur, involving every community, to decide how those communities can live within planetary boundaries and help create the governance systems to achieve that goal.

On advice from its advisory panel of experts[48] , AELA advocates that bioregions are the best unit of analysis to begin to build Earth-centred governance systems. Bioregions are areas of land or sea that have common patterns of natural characteristics and

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[44] Australian Panel of Experts on Environmental Law (2017), The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1), Melbourne: Australian Panel of Experts on Environmental Law; https://static1.squarespace.com/static/56401dfde4b090fd5510d622/t/58e5f852d1758eb801c117d8/1491466330447/APEEL_Foundations_for_environmental_law.pdf, accessed 10 May 2018.

[45] Rockstrom et al., loc.cit.
[46] Maloney, op. cit, p.237-242.
[47] See Earth Charter Commission (2000), loc.cit.

environmental processes and have already been identified in Australia[49]. By drawing on various global sustainability initiatives, AELA has identified the steps for communities may take to identify how they may live and thrive whilst preserving the ecological health of the bioregion in which those communities live[50].

Recommendation 16: Remove the principle of ESD from Australia's governance system and replace with the societal goal to live within planetary boundaries.

Recommendation 17: Create governance systems that place ecological integrity and the health of the natural environment as the foundational principles for all other governance and economic structures.

Recommendation 18: Adopt bioregional ecological and economic governance models, in order to create practical ways for communities to understand ecological limits, and develop consumption and production models that fit within the ecological limits of their bioregion.

The Act should identify what types of matters need be considered to identify whether the proposed regulations would potentially "substantially" impact the matters identified in s5(b) of the Act. Relevantly, life cycle research should, where possible, include assessing whether a product fits within a truly sustainable consumption pattern within planetary boundaries as research develops in this regard[51].

Recommendation 19: At a minimum, matters such as ecological integrity and earth systems science should be required within the relevant decision making under the Act where an assessment of the impact of products (including the actions considered to reduce those effects) are required. Refer to Addendum 1 for suggested amendments to the Act.

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[51] See Ryberg., M.W., Owsianiak, Mikolaj., Richardson, K., Hauschild, M.Z, "Challenges in implementing a Planetary Boundaries based life-Cycle Impact Assessment methodology", Journal of Cleaner Production 139 92016) 450-459 and Heijungs, R., de Koning, A., Guinee, J.B., (2014), "Maximising affluence within the planetary boundaries"' Int J Life Cycle Assess 19:1331-1335.

Respecting the rights of nature to exist, thrive, evolve and regenerate

To implement the concepts of ecological integrity and living within our ecological limits, Australia's legal system and world view needs to shift to acknowledge the primary importance of the living world. One of the ways this can be achieved is by supporting rights of nature law reform. Rights of nature laws now exist in more than six nations and many more jurisdictions within the USA, and offer vital tools to designing governance systems so that humanity can live with our planetary boundaries. The right for natural communities and ecosystems to exist, to habitat, to thrive and evolve should be at the forefront of any decisions made under the legislation. Law that protects specific ecological species should also be taken into consideration[52].

Recommendation 20: Research should be carried out to identify how the following matters will be imported into decision making under the Act:

a. all natural entities have the rights to exist, to habitat or have a place to be and participate in the evolution of the Earth community;

    i. This section could provide a list of rights and also refer to recognised natural legal entities;

b. the integrity of ecosystems must be preserved in accordance with the principles of Ecological Integrity in the Earth Charter; and

c. products should not be made if they threaten the rights of nature, or our ability to live within our planetary boundaries.

Recommendation 21: Until the research identified in recommendation 20 is completed, policy documents concerning the Act should state that the rights of nature, the ecological integrity principles of the Earth Charter and regulating for the purpose of producing and consuming within planetary boundaries will become integrated within the Act or legislation replacing the Act.

[52] For example, the *Yarra River Protection (Willip-gin Birrarung Murron) Act 2017* recognises the river and surrounding areas of public land as one living, integrated natural entity for protection and improvement.

Evolving from a Benefits and Costs Analysis (BCA) in decision making

A new decision making framework must be used, to account for the reality that the health of humans and the economy is embedded within the ecological limits of our environment. Ecological economics may provide a viable alternative to traditional BCAs. AELA recommends that BCAs no longer be used as the decision making framework for permitting the production or import of products, as a BCA is no longer appropriate for matters that relate to environmental crisis that threaten the way of life on Earth. For example, economist Martin Weitzman states that the risk of climate change catastrophe renders a benefits and costs analysis in considering action to address climate change unhelpful as the benefits of averting climate change outweigh the costs[53].

A new decision making framework must be used, to account for the reality that the health of humans and the economy is embedded within the ecological limits of our environment.

Ecological economics may provide a viable alternative to traditional BCAs by recognising the reality that the health of humans and that the economy is embedded within the ecological limits of our environment. A cost benefit analysis may still be able to be carried out, however, as distinguished from more traditional economic approaches, ecological economics provides a more comprehensive treatment of:

- the value of unpriced items that are not traded in any market (for example, waste and the natural capital of the Earth such as air, soil, water, ecosystems);
- values (both costs and benefits) that occur well into the future; and
- values that are of benefit to species other than humans (recognising that humans rely on healthy ecosystems, resources must be set aside for nature)[54].

[53] Weitzman, M.L., "Fat-tailed uncertainty in the economics of catastrophic climate change", Review of Environmental Economics and Policy, 5:2, summer 2011, pp.275-292.

[54] O'Connor, S., Ecological Economics Fact Sheet, The Australian Collaboration, updated March 2012, http://www.australiancollaboration.com.au/pdf/FactSheets/Ecological-economics-FactSheet.pdf, accessed 7 May 2018. See also, Gowdy, J., and Erickson, J.D.,"The Approach of Ecological Economics", Cambridge Journal of Economics, 2005, 29, pp. 207-222.

Recommendation 22: Research should be carried out to identify a suitable alternative to the use of traditional BCAs in decision making concerning environmental matters. AELA strongly recommends that the research occur in collaboration with ecological economists.

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Addendum 1

The suggested amendments to the Act are preliminary as AELA acknowledges the valuable input from other stakeholders. They are designed to illustrate how some of the recommendations are intended to operate. It is likely that other sections of the Act may need to be amended to accommodate AELA's recommendations.

Recommendation 1

(a) In the same way that the Minister may declare "gazetted oil" pursuant to the Product Stewardship (Oil) Act 2000, the Act should allow the Minister to declare existing ecodesign standards in the regulations.

In section 6, insert "***Gazetted product design standard*** *means a product design standard of a kind that is declared by the Minister, by notice published in the Gazette, to be a gazetted product design standard and identifies the date persons are required to apply the gazetted product design standard*.".

In section 6, "***Product design standard***" should be defined. The definition should at a minimum incorporate that the standard addresses optimal longevity, reparability, upgradeability and/or recyclability utilizing the best knowledge available at the time. The content of the definition will likely depend on the chosen entity to develop and approve product design standards under this Act.

(b) Australian manufacturers of the relevant product categories must adhere to the existing ecodesign standard listed in the regulations;

Insert new section "*Where a gazetted product design standard is applicable to a product class, a person must not manufacture a product in that class unless the product is manufactured in accordance with the gazetted product design standard*"

(3) Australian importers, distributors and retailers must not deal with relevant products that have not been manufactured to the regulated ecodesign standard.

Insert new section "*Where a gazetted product design standard is applicable to a product class, a person must not import or distribute a product in that class unless the product is manufactured in accordance with the gazetted product design standard.*"

Recommendations 2 & 9

The Act should identify that ecodesign standards must be developed to apply to Australian manufacturers, importers, distributors and retailers in the same way that existing ecodesign standards would apply pursuant to Recommendation 1 above.

The following sections are for the purposes of regulating Australian manufacturers.

A new section 21(4) should be inserted into the Act which states:

"*Where a class of products has been identified pursuant to section 108A and the adverse effects of that class of products on the environment (including on levels of greenhouse gas emissions, water use and energy use) or humans can be reduced by improving the :*

a) optimal lifetime;
b) repairability;
c) upgradeability; or
d) recyclability;
of the product class, the liable parties must develop a product design standard that addresses the matters in (a)-(d) that were identified in the published material pursuant to s108A(1)(b).

Liable parties under this section 21(4) may only comprise of persons whom have at anytime manufactured a product in the product class in Australia."

A new section 21(5) should be inserted the Act which states:

"*To clarify, liable parties must also adhere to section 21(4) where there may be additional reasons identified pursuant to section 108A(1)(b) to the matters identified in section 21(4)*."

A new section s21(7) should be inserted into the Act which requires liable parties to submit the product standard design created pursuant to s21(4) for certification by an independent entity. The construction of this section will depend on whether an entity such as the Australian Standards Organisation will be the chosen entity or whether a new entity will be created to access these particular applications.

A new section s26(2) (f) should be inserted into the Act which states:

"for applications concerning the matters in sections 21(4)-(5), the relevant product design standard has not been approved by [insert the entity identified in s21(6)(i)]".

NB: certification of an ecodesign standard in an approved co-regulatory scheme should operate as a trigger for the Minister to gazette the standard as per Recommendation 1.

The following sections are for the purposes of regulating Australian importers and distributors.

A new section should be inserted in the proposed new section of the Act that deals with mandatory standards (see under Recommendation 1 above).

"*Where section 21(4) does cannot apply to liable parties for the sole reason that the class of products are not manufactured in Australia, the Minister will consult with the Advisory group and engage the [insert the standards body identified in proposed section 21(7) above] for the purpose of:*

a) developing a product design standard that addresses the matters in 21 (4)(a)-(d) that were identified in the published material pursuant to s108A(1)(b;) and

b) declaring the product design standard as a gazetted product standard."

Recommendations 4 & 8

The matters listed in s4(2), s21(3) and s37(2) of the Act should include redesigning products for optimal longevity, reparability, upgradeability and recyclability.

The Act should be amended to include the object to reduce emissions and energy and water use as a primary objective.

Proposed amendments to the Act are marked up below:

"*4 Objects of this Act*

Object—reducing impact of products

(1) The following are objects of this Act:

(a) to reduce the impact that:

(i) that products have on the environment, throughout their lives; and

(ii) that substances contained in products have on the environment, and on the health and safety of human beings, throughout the lives of those products; and

(b) ***to contribute to reducing the amount of greenhouse gases emitted, energy used and water consumed in connection with products and waste from products.***

(2) It is Parliament's intention that this object be achieved by encouraging or requiring manufacturers, importers, distributors and other persons to take responsibility for those products, including by taking action that relates to the following:

(a) avoiding generating waste from products;

(b) reducing or eliminating the amount of waste from products to be disposed of;

(c) reducing or eliminating hazardous substances in products and in waste from products;

(d) managing waste from products as a resource;

(e) ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way;

(f) ***redesigning products for optimal longevity, reparability, upgradeability and recyclability.***

Other objects

(3) The following are also objects of this Act:

(a) to contribute to Australia meeting its international obligations concerning the impacts referred to in subsection (1);

21 Outcomes for co regulatory arrangements

(1) Regulations made under subsection 19(1) specifying liable parties in relation to a class of products must also specify one or more outcomes to be achieved by a co regulatory arrangement that relates to that class of products.

(2) The regulations may also do one or more of the following:

(a) specify a method or formula by reference to which such an outcome may be determined, or for working out whether such an outcome has been achieved;

(b) require different outcomes to be achieved by the end of different periods;

(c) specify requirements for achieving those outcomes with which the administrator must comply.

(3) Outcomes specified under subsection (1) must relate to one or more of the following:

(a) avoiding generating waste from products;

(b) reducing or eliminating the amount of waste from products to be disposed of;

(c) reducing or eliminating hazardous substances in products and in waste from products;

(d) managing waste from products as a resource;

(e) ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way;

(f) ***redesigning products for optimal longevity, reparability, upgradeability and recyclability.***

37 Mandatory product stewardship requirements may be specified in regulations

Basic rule—requiring person to take, or not take, specified action

(1) The regulations may require one or more specified persons, or classes of person, to take, or not to take, specified action in relation to a product, or products, in a specified class.

(2) The action must relate to one or more of the following:

(a) avoiding generating waste from products;

(b) reducing or eliminating the amount of waste from products to be disposed of;

(c) reducing or eliminating hazardous substances in products and in waste from products;

(d) managing waste from products as a resource;

(e) ensuring that products and waste from products are reused, recycled, recovered, treated and disposed of in a safe, scientific and environmentally sound way;

*(f) **redesigning products for optimal longevity, reparability, upgradeability and recyclability**."*

Recommendation 7

We recommend that the Act should list the relevant sustainability requirements applicable to all companies. The construction of the sections importing these requirements will require further research and consideration of how the requirements below can best be implemented, allowing for the different size of businesses and other variables. The following sections should be inserted into a new section of the Act that

deals specifically with the minimum sustainability requirements of all parties who manufacture, import and distribute products in Australia.

The terms of ISO TR 14062 (2002) and ISO26000 should be inserted into the Act to the greatest extent that they are consistent with the objects of the Act, including but not limited to:

1) requiring Australian manufacturers to:

   a) conserve resources, recycle and recover energy via optimising the use of resources required for the product without having any adverse effects on durability or performance;

   b) decrease or eliminate the quantity of hazardous materials;

   c) reduce waste during manufacturing and disposal;

   d) build products so they may be reused, repaired, recycled and/or used as a source of energy;

   e) prevent pollution, waste and other adverse impacts by dealing with problems at their sources; and

2) requiring all Australian companies that provide products to consumers to:

   a) only offer high quality products with longer life-cycles (existing ecodesigns will help meet this requirement) and competitive prices; and

   b) use fair and transparent marketing and contractual processes and promote sustainable consumption;

   c) provide clear, accurate and complete information about the product or service, its origins, impacts throughout the life-cycle, durability and efficiency, among others, including:

   d) educating consumers about how to recycle products ;

   e) products identifying the projected life span and availability of spare parts.

3) Requiring all Australian businesses who manufacture, import or distribute products to

a) establish an appropriate environmental management system such as one certified by the ISO;

b) establish an environmental sustainability plan that sets targets and means to achieve environmental improvements in the business, such as resource use, efficiency gains and waste emission reductions, with progress in achieving the measures reported in the companies' annual reports;

c) consult routinely with specified stakeholders such as local community and environmental organisation to improve companies' awareness of how their operations affect the environment and to report in their annual report how consultation occurred and how stakeholder's advice has been taken into account; and

d) improve their collection of environmental performance data and to disclose it in order to, among other things, assist regulators in supervising compliance and enable a more informed dialogue on environmental issues within companies and between companies and their stakeholders.

Recommendation 17

The Act should identify what types of matters need be considered to identify whether the proposed regulations would potentially "substantially" impact the matters identified in s5(b) of the Act.

We recommend the insertion of a new section 5A.

5 Product stewardship criteria

The **product stewardship criteria** are satisfied in relation to a class of products if:

(a) the products in the class are in a national market; and

(b) at least one of the following applies in relation to the products in the class:

(i) the products contain hazardous substances;

(ii) there is the potential to significantly increase the conservation of materials used in the products, or the recovery of resources (including materials and energy) from waste from the products;

(iii) there is the potential to significantly reduce the impact that the products have on the environment, or that substances in the products have on the environment, or on the health or safety of human beings.

5A

In considering the matters in section 5(b)(iii), the Minister must apply:

(a) the best available knowledge of Climate science, Earth Systems Science and the scientific field of Planetary Boundaries; and

(b) the principles of ecological integrity in the Earth Charter.

Insert into section 6 "***Earth Charter means the charter launched on 29 June 2009 by the Earth Charter Commission, endorsed by over 6,000 organisations and governments***."