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Dr Cathy Wilkinson
c/- NSW Environment Protection Authority
By e mail as a PDF file to resource.recovery@epa.nsw.gov.au

The independent review of the NSW Resource Recovery Framework by Dr Cathy Wilkinson Submission from the Waste Contractors & Recyclers Association of NSW ('WCRA')

Dear Dr Wilkinson,

The Waste Contractors & Recyclers Association of NSW (WCRA) is pleased to be provided with the opportunity to participate in this independent review of the resource recovery framework in NSW.

WCRA commends the NSW EPA on commissioning an independent review of the resource recovery framework in NSW. In support of better outcomes, we confirm that we have conducted consultation with our Members seeking specific comments on the review. We have incorporated those comments below.

We have framed our submission below around the questions posed for consultation.

About WCRA

WCRA is an industrially registered Association representing operators and service providers in the waste and recycling industry in NSW & the ACT. WCRA currently has 212 Members who own, operate or control an estimated 90% of the vehicles and infrastructure used in waste and recycling activities across NSW and the ACT. This membership includes most commercial recyclers and recycling facility operators in NSW, along with the transporters who contain and collect waste and recyclable materials.

Background

WCRA thanks the NSW EPA for its considerable efforts to-date, and we look forward to working with EPA staff and the NSW Government to ensure we achieve the best possible resource recovery framework for our sector. It is hoped that the outcomes of this review will create better and more sustainable opportunities for legitimate recycling and resource recovery across NSW.

Our concerns about the EPA's powers to amend and revoke Resource Recovery Orders and Exemptions without the appropriate regulatory impact, scientific, and economic studies are well

documented. In making any decisions on the resource recovery framework WCRA urge the EPA to consider the following:

- To achieve the diversion targets in the NSW waste strategy, we will require infrastructure and investment from the commercial sector.
- The commercial industry requires certainty as well as adequate time and a rate of return, which form a key part of the investment decision process. These considerations are significant as investment decisions require the approval of financiers, banks, the Board, etc.

At present, infrastructure is significantly lacking in NSW, an issue that was both exacerbated and brought to the fore during the recent unprecedented rain events in February/March 2022. It was evident to all stakeholders, including the government and regulators, that NSW has limited disposal options for Sydney's waste, and we are lacking an infrastructure network to safely address our essential waste management disposal needs. In light of these ongoing challenges, it is critical that EPA and the NSW government support the NSW waste management and resource recovery sector by ensuring that the regulatory framework does not hinder legitimate and sustainable resource recovery operations.

It is worth noting that organisations such as WCRA invest heavily (time, expertise, money, resources) in making submissions to NSW EPA. The EPA rarely provides detailed formal feedback to our submissions. In our view, it would be very much appreciated if we were to receive this formal feedback. And if it is a lack of resources that prevents the EPA from addressing this issue, then the EPA needs to be allocated additional resources.

Submission on review of the resource recovery framework

1. What other risk-based approaches, sustainability principles or criteria could be used to assess and manage the environmental and human health risks of resource recovery?

Need to rebalance risk – in WCRA's view, the balance in the EPA's consideration of sustainable development has been too heavily weighted towards individual site specific environmental and human health risk over broader resource recovery targets for NSW and the needs of the emerging circular economy. It is not necessarily the considerations that must change, but the weight to be given to each matter. This could be addressed by amendments to the objects of the Protection of the Environment Operations Act, the objectives of Resource Recovery Orders under the Protection of the Environment (Waste) Regulation or the objectives of the NSW EPA.

Alternative approaches – with respect to alternative approaches, WCRA considers that the risk-based approach of SafeWork NSW relating to asbestos and the NEPM Guidelines with respect to contamination strikes the right balance. These instruments, and standards of this type, should form the controls against which Resource Recovery Orders (RROs) and Exemptions (RREs) are assessed.

Alternatives to financial assurances - with respect to the risk from significant and catastrophic incidents of the type protected by Financial Assurances, we consider that better alternatives are available. The use of financial assurances should be limited and as an alternative, licence fees should include a payment to insure the Environmental Trust against the cost of clean-up in the very few cases where the financial assurance would otherwise be called upon. This could operate similar to personal injury protection provided to drivers under the automotive green slip scheme. Financial assurances limit capital for investment and are economically inefficient. Requiring each facility to set aside capital for worst case, low risk incidents and with a low probability of occurring, locks up more capital across the industry than is required to address pollution incidents each year by many orders of magnitude.

2. How can the framework be structured to deal with new and emerging waste streams and mitigate the risk of cumulative impacts from legacy and emerging contaminants?

Options to streamline assessment - the overarching goal should be to streamline the process for assessment of new and emerging waste streams to reduce regulatory burden. Secondly, it should be to improve transparency. WCRA recommends that the regulation of new and emerging waste streams be integrated in the development assessment process so that no separate application for a resource recovery order or exemption is required. This process would then be capable of independent review by the Land and Environment Court. This right of review would encourage more transparent decision making by the EPA.

The impacts of the failure to facilitate new and emerging waste is found in the example of Licella Holdings, a plastic recycler. Licella Holdings are global leaders in the chemical transformation of wastes such as end-of-life plastic and biomass residues into synthetic oils. The owners shifted their development from NSW to an interstate location due to regulatory burden. This was caused by substantial delays in the NSW regulatory framework, combined with an inability by the NSW EPA to make a prompt decision on this application. As a result, Licella formed the view that it would be far easier to obtain the required approvals in Victoria.

Revision of definition of waste – the definition of waste was also an issue in Licella’s decision to move interstate. Currently, if a company has feedstock of unwanted plastic that is converted into synthetic crude oil, the EPA sees it as waste, thus requiring an order and exemption. The requirements of RROs and RREs including in relation to record keeping generally stifles and often will kill innovation. An end of waste policy for processed materials (e.g., converted back to oil as there are no waste derivatives) would enable a manufacturer to take material currently defined as waste and create a new product.

3. What options exist to facilitate better circular economy outcomes and improve certainty for innovation, business, investment, and participants within the resource recovery framework?

Separation of responsibility for compliance and strategic direction/assessment - the EPA to date has proven that its desire to regulate and prosecute is far greater than its interest to achieve high resource recovery rates. The current C&D recovered fines issue is an example of this. Recycling operators need a department whose sole role is to ensure high rates of resource recovery and who can have direct access to the Minister for Environment and be able to communicate and argue for better resource recovery issues. WCRA considers that this separation of the responsibilities of strategic planning for resource recovery, planning assessment and regulation would facilitate better circular economy outcomes. Currently, the EPA both sets the strategic direction and rules under the resource recovery regime and enforces it. WCRA considers that the mindset required for regulation and enforcement leads to a resource recovery regime with an undue focus on worst case outcomes at the cost of the compliant majority. Better separation would allow better alignment with strategic planning outcomes and development assessment that facilitates outcomes rather than focusses unduly on compliance risk. For example, an independent body could be created to make decisions on resource recovery orders or their replacement equivalent. The EPA could retain its focus on compliance.

Reduction of red tape – in order for recovered material to compete, it is necessary to reduce red tape to make recovered materials competitive with virgin products. The government, including the EPA, should have as an objective of any decision in respect of resource recovery orders or their replacement to support the use of recovered material. Adding cost to recycling makes recovered products uncompetitive with virgin products. In some cases, it makes it cheaper to landfill or transport to an interstate facility.

Integration of RRO and RRE applications with development assessment – WCRA considers that resource recovery orders (or their replacement) should be assessed as part of a development assessment under the integrated assessment approach in the Environmental Planning and Assessment Act 1979. The government may wish to adopt a similar process to the current process with respect to environment protection licences required to carry out development. This would improve transparency on resource recovery orders (or their replacement) by creating rights of review to the Land and Environment Court.

Certainty against revocation - consideration should be given to resource recovery orders (or their replacement) 'locking in' standards to prevent later revocation unless there are genuine exceptional circumstances. As stated in our opening comments, certainty is important to obtain finance for development activities associated with resource recovery.

Making specific resource recovery orders transparent – specific resource recovery orders or their equivalent should be made publicly available. As a matter of principle, orders should be as general as possible. Under the current regime, the EPA may issue a specific resource recovery order to an organisation and the EPA is not required to publish the order and exemption. This means that others are not able to compare and compete with the standard deemed acceptable by the EPA (and those competitors are at risk of having harsher standards imposed without their knowledge).

Need for protection for accidental contamination – it is well understood that users of recovered products have limited control over contamination. Consumers get no protection if recovered material is compliant on paper with the requirements of any order or exemption. To encourage re-use, the regime must offer some protection to consumers. A minor breach of a resource recovery order or equivalent must not mean the complete loss of any protection for the generator or consumer (see the *Grafil* case for an example of this). This is because the consequences of an order or exemption not applying is often the catastrophic application of the waste levy. The absence of any protection for NSW consumers discourages the use of recovered and recycled products.

Need for allowable asbestos limit in RROs and RREs – the zero-tolerance requirement for asbestos is unworkable. The majority of material recovered from waste in NSW is in the construction, building and demolition sector. It is impossible for processors of waste to always meet an absolute zero level of asbestos contamination. This is because of the widely documented prevalence of asbestos in our built environment.

We attach a copy of our submission in relation to the Joint Submission by WCRA and WMRR on the Recovered Fines Orders and Exemption for further detail on this issue. With respect to a sensible approach to asbestos, we refer to the approach adopted by SafeWork NSW Guidance *Managing Asbestos in or on Soil*. The legislative scheme should provide for an allowable limit and more practical isolation and asbestos removal requirements.

Due diligence defence if small quantities of asbestos are detected – the current strict liability provisions are a major deterrent to investors and operators of NSW C&D recycling facilities. There should be a more readily available due diligence defence for Directors and Senior Managers who can demonstrate that they have complied with the NSW Construction and Demolition Waste Standards.

We need a better system to review & approve innovative, first time-in-NSW proposals – new ideas that have potential to create better circular economy outcomes, that pass a range of tests and are ready to be scaled commercially should be approved via a concierge service. These proposals should be fast tracked, skipping past the usual planning and regulatory hurdles to expediate the construction of the first commercial scale operation. Once the first facility is approved and operational, it will create a pathway for duplication of further facilities around NSW.

EPA is currently reviewing the RRO/Es for recovered fines – we have stated in our October 2021 submissions to EPA that a decision of such importance must be informed by proper and thorough assessment of impacts, costs, benefits, and potential alternatives. We note that the EPA has not done a cost benefit analysis or regulatory impact assessment of its proposed changes. For this reason, a decision to commence any new orders and exemptions should be deferred until either:

- The completion of this review by Dr Wilkinson of the Resource Recovery Framework; or,
- At least nine (9) months have passed, to allow the C&D waste resource recovery industry to both construct and implement the necessary changes to their business models and practices

4. What specific benefits would an ‘end of waste’ provision deliver that aren’t already provided by the current framework?

There is currently no certainty about when material ceases to be waste. Once in the system it can arguably never escape as always, a material recovered or recycled. An end of waste provision would:

- better allow recovered material to compete with virgin products (as both would be ‘products’).
- better reflect the risk of recovered material (i.e., the risk is lower after processing).
- improve market perception that a recovered product is worthy of use and is a genuine product as opposed to a waste.
- better facilitate a circular economy by allowing a user of recovered material to stockpile materials for large projects in accordance with the requirements for virgin products.

5. Are there resources being recovered or re-used outside the current exemption framework that would benefit from greater regulatory clarity?

WCRA cannot see benefit in bringing into the waste regulatory system resources being currently recovered outside the exemption framework. In WCRA’s view it is only likely to create further barriers to cost and use.

6. Does the current waste definition facilitate circular economy outcomes while ensuring the protection of the environment and human health? If not, what changes do you suggest?

As stated above, the definition of waste is too broad. Recovered or recycled materials should cease being waste once converted to a product. The definition of waste in the POEO Act and Regulation should specifically describe when becomes a product. One way forward would be to create a definition of a recycled product. Factors relevant may include whether the material is capable of being sold for value as well as other factors (refer to the attachment headed “Lawful recycling”)

7. How could the overall transparency and clarity of the resource recovery framework be improved?

Better policy guidance on requirements for RROs and RREs – the absence of clear policy guidance on what is required for RROs, and RREs makes any application a difficult and time-consuming process. The standard to be met is not clearly stated in the legislation. The level of contamination to be met is not uniform across orders and exemptions.

Public register of site specific RROs and RREs – the absence of a register for specific RROs and RREs undermines transparency and clarity. Industry participants cannot plan or invest based on the precedent set by the EPA for a specific RRO and RRE because the

content of those RROs and RREs is unknown. Site specific resource recovery orders should be placed on the public register.

Planning style instruments for assessment of RROs and RREs – There is no clear standard or objective to meet as occurs with development assessment by Councils under planning instruments. Assessment requirements imposed by the EPA for RROs, and RREs may vary and are often cost prohibitive. The need for clarity is especially important because of the need to obtain specialist consultants to deal with technical scientific matters related to environmental impact. It would be a significant improvement to create policies and standards (much like environmental planning instruments) that would provide guidance to assessment.

Protecting commercial in confidence information – there is no need for an RRO or RRE to contain commercial in confidence information. Such information is generally not required for development applications and even if provided is not required to appear in the public consent document. In WCRA's view the ultimate RRO and RRE and the environmental controls within those documents are not commercial confidence.

8. What tools, systems, data or methods could be used by the EPA to better understand the waste being utilised under the framework?

The simple fact of the matter is that the proponent or the licensee's staff often have a far greater subject matter knowledge than any of the EPA's staff. This is a weakness in the EPA's operations and given that it aspires to be a world class regulator, these issues need to be addressed.

New EPA staff should be given induction which includes meeting with industry associations. Obtaining a proper introduction to the industry would improve communication and responsiveness of EPA regulation to real world considerations. It will also ensure that new EPA staff better understand the needs of industry.

9. What processes could the EPA put in place when determining whether existing orders and exemptions should be amended or revoked due to environmental or human health risks?

The RRO and RRE scheme has all the power of a regulation but without the formality and checks on power (it can be made and revoked by the EPA alone). A best practice approach would be to require any revocation to be treated as a revocation of a regulation and require a full Regulatory Impact Assessment to assess the impacts of the proposed change. Better and more informed decisions can then be made.

The key options for improving the process of revocation include:

- **Publishing guidelines for consultation** – the EPA could publish guidelines it would follow in the event of proposed amendments or revocation of the exemptions and orders. The guidelines would:
 - contain steps for consultation.
 - outline the extent of the consultation required at each step.
 - set out a test in respect of environmental risk that an Order and Exemption must meet to avoid amendment or revocation.
 - provide for a notice period and consideration of transition arrangements.
 - detail the rights for appeal for the applicant, in the event of disagreements with the EPA's decisions or findings on resource recovery matters.

- **Formalising guidelines in the Waste Regulation or the POEO Act** – The EPA could incorporate the steps contained in the guidelines in the Waste Regulation or the POEO Act. This could include conducting a Regulatory Impact Statement as would occur for an amendment of a Regulation. The advantages would be:
 - the Waste Regulation or Act could incorporate the same best practice guidelines referred to above.
 - industry would have more certainty when investing based on orders and exemptions because the EPA would be required to follow a formal process to amend or revoke them (and could not unilaterally change that process).
 - It is likely the proposed changes to the Regulation or Act would be more widely consulted before the change to the Waste Regulation was made or the amendment to the Act passed Parliament.
 - It would improve transparency and the ability to seek to review decisions in the courts.

10. How could the framework be strengthened to ensure responsibility along the whole supply chain – waste generator, transporter, processor, transporter, and customer?

Need to focus on point of generation of waste – The current scheme under the POEO Act is broad enough to ensure responsibility. However, a major concern is the focus of the EPA purely on the transport and treatment of waste after it has been generated and classified. For example, after it leaves a building site and enters the recycling stream. At this point, very difficult to manage contamination, which in the case of asbestos fibres, can be invisible to the naked eye in a stockpile. The site of waste generation should be made responsible for the lawful disposal of waste (this is the current law, yet the EPA doesn't enforce it). The framework should place greater emphasis and accountability on the lawful responsibilities and obligations of demolition & construction sites, as well as other waste generators.

Need for consistent licence thresholds – There is a need for consistent Environment Protection License (EPL) thresholds across all parts of the waste management and scrap metal recycling sectors. The current thresholds (for waste management, excluding scrap metal recycling) for determining whether or not a site needs to hold an EPL are currently set as follows:-

- 1,000 tonnes or 1,000m³ on site at any one time or processing more than 6,000 tonnes per annum (Regulated Area).
- 2,500 tonnes or 2,500m³ on site at any time or processing more than 12,000 tonnes per annum (outside Regulated Area)

To illustrate our argument, the cost of lawfully disposing of 6,000 tonnes of general waste is approx. \$2,100,000 with a potential levy liability to the NSW Government of \$882,600. These are significant sums of money, and the EPA should have regulatory oversight of such facilities.

Further, these EPL thresholds don't apply to scrap metal operators. According to the NSW EPA Public Register, there are ~10 sites in NSW licensed to conduct scrap metal processing as a primary function. It is estimated that there are ~500 scrap metal recycling sites across NSW. Therefore, the NSW EPA has regulatory oversight on ~2% of the industry across NSW. This is a major issue in the scrap metal recycling sector and does nothing but increase the commercial and operational imbalance in our industry and to decrease the competitiveness of EPL facilities. and it is well documented that unlicensed facilities are significantly over-represented in the occurrence of environmental incidents (such as fires) that have great impacts on the community in NSW. We have **attached** a one-page summary to this submission.

NSW EPA must re-visit threshold limits and at the same time bring metal recycling facilities in line with waste facility thresholds. WCRA would be happy to be a part of these discussions.

It has also long been the view of WCRA that waste transporters should be licensed, similar to the scheme in Victoria. The licensing should include a training and education program to promote awareness and encourage compliance with environmental laws. This will provide better control over the transport of waste and recyclables and will lead to better compliance and resource recovery outcomes.

11. What are the strengths, weaknesses, and challenges of using the waste classification guidelines and definitions in the context of operating within the resource recovery framework?

The current Waste Classification Guidelines are based on the Landfill Guidelines and so are not designed or framed in a way that encourages circularity. The Waste Classification Guidelines should better classify and identify material suitable for recovery and recycling.

For example, this could be achieved by including definitions of recyclable content. For example, the contents of the domestic collection yellow bin should be classified as “dry recyclables”.

WCRA and/or Members would be pleased to provide further examples and information to support the positions detailed in this submission.

We invite you to contact us to explore these issues further and look forward to continuing to work with the EPA and Dr Wilkinson on this very important review.

Yours faithfully

Tony Khoury
Executive Director

Attach