The Hon. Mr Ron Hoenig, MP
Minister for Local Government
GPO Box 5341
SYDNEY NSW 2001

Email: office@hoenig.minister.nsw.gov.au

14 March 2024

Dear Mr Hoenig

**Re: Amendments have been made to the Local Government (General) Regulation 2021 (the Regulation)**

WMRR is the national peak body for all stakeholders in the essential $17 billion waste and resource recovery (WARR) industry. We have more than 2,200 members across the nation – with more than 700 in NSW - involved in the breadth and depth of Waste and Resource Recovery (WARR) activities, representing a broad range of business organisations, the three (3) tiers of government, universities, and NGOs. WCRA has been representing the NSW waste management sector since May 1948 and is a registered industrial organisation under both the *NSW Industrial Relations Act* 1996 and the *Fair Work (Registered Organisations) Act* 2009. WCRA currently has 216 members who own, operate and/or control assets used in waste management collection, processing, and disposal across NSW and the ACT. Together, WMRR and WCRA represent the entire breadth and the depth of the NSW waste and resource recovery (WARR) industry.

As the representatives of this industry, we write to you with increasing alarm about the impact that the above Regulation is having on councils, WARR operators and the NSW government's own ability to meet its stated targets in relation to resource recovery and carbon mitigation. It is deeply disappointing that a Regulation such as this, which has such broad impacts, was not subject to any consultation with industry or local government before notification of its enactment by way of a media release on Sunday 17 December 2023 and a Circular dated 15 December 2023.

Industry strongly believes that this Regulation due to its ambiguous, unworkable and uncertain nature is already proving to have significant impacts on council tenders for both waste management and reprocessing services, it is not in any way making it "clearer and stronger"[i]. In fact industry is already aware, a number of councils have suspended tenders, as well as at least one (1) company refusing to tender in this uncertain environment. Industry queries how given this impact, Councils can meet their guiding principle pursuant to s8A(1)(b) of the *Local Government Act* 1993 that "*Council carry out functions in a way that provides the best possible value for residents and ratepayers".*

By way of background, industry made contact with the Minister's office on this matter (by phone and follow up email) on 22 December 2023. Discussions were held also with the Department in mid-January 2024, with meetings held with representatives of both Associations and the Department in the week of 30 January 2024, where an extensive list of issue arising were covered (See Annexure A). To date we have had no response to these issues raised, and at this time the only advice provided is further information is being gathered.

As you may be aware, the NSW Government in June 2021 adopted the *Waste and Sustainable Materials Strategy* 2041 (WASM) with targets including 80% resource recovery and 50% reduction of organics to landfill. Key to the success of this strategy is the capacity for councils to move away from disposal to recovering organic materials. This means a change in facility types, as well as possible changes in collection. Regrettably the Regulation is so broad, that it also includes WARR facilities of all types – facilities that are of a completely different nature, but

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also facilities that service a number of councils. The Regulation also requires protecting workers in collection, when in fact there may be reduced collections or different collections, when another of the WASM targets is reduce waste creation. It is nonsensical that in a time when NSW is working to mitigate carbon emissions and improve its management of materials that such a problematic Regulation is enacted without any understanding of the policy or investment landscape that currently exists in NSW.

As advised to both the Department and the Minister's office, there are significant large municipal contracts that are due to be tendered in 2024 for both collection and processing, including, but not limited to Campbelltown, Canada Bay, SSROC, Shellharbour, Blue Mountains. These councils are now trying to determine how they can best comply with this Regulation given existing contracts do not contain these requirements and the vague and onerous conditions that have now been set. In fact industry understands that a number of these councils are considering entering into an extension with existing providers, which may impact their ability to meet state WASM targets. Further we note that there is a real risk that Councils will be financially much worse of as a result of this Regulation, with one (1) council even proposing to underwrite worker entitlements- albeit they have already paid for these through the life of the existing contract. As mentioned above, we have also seen at least one (1) major facility operator refuse to tender given this uncertainty, making it impossible for Council's to receive competitive responses through the tender process.

The ambiguity created and the real possibility of not being able to meet the regulation, is leading to discussions in to how best *work around* this requirement in an attempt to meet the Act and the WASM targets. For example, although it is open to council under the Tendering Regulations to reject tenders and then negotiate, possibly avoiding the regulate requirements– this approach would also undermines what the NSW Government is seeking to achieve. More importantly, relying on this as a solution to the unworkable pathway created by the amendments does not help with ensuring a fair tender evaluation process. The proposed process of transitioning working to new employment needs to be transparent and managed so that tenders are being compared on a fair basis. To be able even to reject and negotiate tenders, the evaluation needs to be exhaustive and as such the 'industrial' matters need to be clear and fair, in order for the council to compare tenders. If the approach is not transparent, tenderers can make varying assumptions which creates an unfair process. All of this leads to potential risk of industrial action if it's viewed, for example, by some as an attempt to circumvent the Regulations.

In summary, as a result of this new Regulation, Council tenders are being delayed, with a real risk of increased cost and industrial action to Councils. This will mean the possibility of increased costs to households as well as possibly disruption to their essential service. Regrettably, despite over two (2) months of liaising and discussing this matter at length with government, there has been no progress towards resolving. We note that all of this could have been avoided if there had been consultation prior to the Regulation being developed. As such we request that this Regulation be urgently repealed before the cost impacts hit NSW councils and that government work with industry as a matter of priority to identify the issue is that they believe require resolving on order that we can work collaboratively to solve. Please contact the undersigned to arrange a meeting as a matter of urgency.

Yours sincerely

Gayle Sloan
Chief Executive Officer
WMRR

Brett Lemin
Executive Officer
WCRA

CC: NSW Premier
NSW Environment Minister
President of NSW LGA

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**Annexure A**

i. The application of the requirements of the Reg apply to '*storage, treatment, processing, collection, removal, disposal, destruction, sorting or recycling'* staff. Whilst the collection services drivers are typically transferred, the broad capture of all workers seems unnecessary. For example, for disposal/recycling services, the staff are usually attached to a facility that services numerous local councils and so, the tendering council ought not be requiring that these staff be offered employment with a new contractor/new facility. The new facility is likely to have its staff already engaged.

ii. If the requirements are limited to waste collection services, there are still questions that arise, for example, are call centre staff, education staff, managers etc. all expected to fall with '*individual employees'*? Again these staff members are likely to be servicing more than one local council. We are faced here with the issue that the same individual may be subject to two separate local council tenders where they are being required to be offered employment by 2 different contractors. Whilst the worker has some control – this situation causes problems in the tendering of the services. Council's need to understand exactly what will occur for each individual in order to fairly compare tenders, as well as for the contract itself.

iii. Where numerous types of workers are captured (such as drivers, support staff, management staff) we would have the possible situation where the local council needs to gain the satisfaction of multiple unions in order to be able to accept a tender. There are no indications of what constitutes 'satisfaction'. This could be different for different unions. What if one union is satisfied and another is not. There is no requirement for the unions to act reasonably. The uncertainty around what will 'satisfy' the union cannot be built into tender processes. What happens if for "each registered organisation" the measure of 'satisfaction' is different – this needs to be managed in the RFT process.

iv. The 'satisfaction' of the unions as a concept is very broad. There is no limitation to what the union may seek to demand for the workers. This seems to be in contrast to the jurisdiction of the Fair Work Commission. This is a unilateral power for the unions and effectively a veto power for local council tenders. The local council has no power to determine what is suitable for its own services. Local councils understand their own communities best and usually make decisions to suit their constituents. Providing unions with the power to effectively determine work conditions and the costs of their own services will impact how services are delivered to local communities, which should be the local councils' decision.

v. How do local councils gain the 'satisfaction' of the unions. It is possible to demonstrate to the unions what the local council intends to do in its new contract and consider any input from the unions on behalf of existing workers. This would need to happen prior to going to tender. However, given the confidential nature of the tender evaluation process, it is impossible to seek the 'satisfaction' of the union during this process, prior to accepting a tender. It would be open to the unions to disallow a preferred tenderer because the union was not satisfied. The amendments allow for the union to require certain things prior to a council resolution that have not been considered in the tender evaluation process. Local councils need to define exactly, the basis upon which tenders will be compared. New features of the service arrangements cannot be introduced between the tender evaluation and the council resolution stage. This would be an unworkable situation where a local council has run a fair tender process and the unions can veto the recommendation of a duly constituted evaluation panel. The result being that the local council has no ability to proceed with a new contract. This would result in no waste services for the local community.

vi. The union 'satisfaction' needs some kind of limitation. There are contractors that win tenders without unionised work forces. These amendments are particularly risky for these tenderers. Even with unionised workforces, there are barriers to overcome. Some existing enterprise agreements determine

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what happens at the expiry of the agreement. In addition, the amendments could set up a contractor having to manage various workforces from the same depot. This would be unworkable and could present risks of industrial unrest in existing contracts.

A more sensible approach would be for the local councils to not have to seek the union 'satisfaction'. A process of consultation could be considered by the local council (which effectively already occurs). The local council should retain the ability to determine the basis for their own contracts and costs. I have not come across one local council that wasn't open to the existing workers being taken up by the new contractor. This is what usually occurs anyway. Local councils would generally welcome this occurring as the drivers are familiar with the service area etc. But local councils ought not be stepping into the industrial management of a contractor's workforce.

It would be more helpful if the unions disclosed to the local councils what their expectations were for their members, when new contracts were being developed. This would allow for a local council to consider what the impact of any changes would be and whether such changes would be acceptable to their communities. The tendering process and next contract can then be designed to accommodate what the local council intends for the workers for the new services.

There needs to be a refined definition of which workers the amendments will apply to.

Where necessary, the local council ought to retain the power to determine the features of their own contracts. This may include, for example, where changes to services (for strategic endeavours) may result in changes to the workforce.

Gaining the '*details of the current workers*' can be problematic. It is not open to the local councils to start asking workers whether they are members of a union/what their rates of pay are/what their accrued entitlements are etc. A better approach would be to not require this information to be provided in a tender. Through the preliminary consultation with the unions, the local council could ask the unions to identify particular workers that seek new employment and the local council could then determine who/what entitlements ought to be recognised. These details are then captured in the new contract with a high degree of certainty. The local councils ought not be requiring that a new contractor must offer employment. The risk to the local council in insisting on this, exposes the council. What if the worker is not fit-for-work? High standards of safety are required and the companies are being compelled to employ workers that may not be fit-for-work.

vii. What if a worker is identified to be transferred? What if the new contractor's work conditions are better for other workers performing the same services? The new contractor can be compelled to manage identified workers in a particular way, but there is a risk that, whilst those workers would be no worse off, they could be employed on conditions that are not the best available. Again the contractor could be faced with managing 2 workforces on the same contract.

viii. Although we can identify the pay rates and can aggregate the accrued entitlements for each tender process, the new contractor is going to need details for each individuals' entitlements, so they will need to be defined. The contracts will need to obligate the new contractor to do what the amendments are seeking for each individual – otherwise the arrangements sought by the amendments will be impossible to enforce. Incumbent contractors have no obligation to provide information. The local council cannot compel the incumbent contractor to provide detail of the individuals.

ix. What if existing enterprise agreements provide for all entitlements to be paid out at expiry? This obligation needs to be overcome in order to comply with the amendments.

x. If the details for each individual are gained from the union, what undertakings will the union give as to the accuracy and quantum of entitlements? The new contract will specify what is expected to occur regarding the workers. The contractors are not going to then allow for additional conditions/varied work requirements to be assumed that have not been defined in the contract. The new contract needs to be definitive in this regard. This needs to be defined when a local council goes to tender. It cannot be contemplated at a later stage.

It seems that the local councils need the unions to provide an undertaking as to the entitlements, and the limits to whatever else is intended to be '*satisfactory industrial arrangements*'.

xi. How will the incumbent contractor be obligated to then transfer accrued entitlements? If the expectation is that leave entitlements will be honoured by the new contractor, there is no ability for a local council to compel their existing contractor to transfer them to the new contractor. Although this sometimes happens between contractors, and I expect would be a process agreeable to most new contractors, there are no provisions empowering local councils to secure the accrued entitlements. This causes issues for designing the RFT, evaluating tenders, and final contracts. The incumbent contractor may refuse to pay the entitlements. The incumbent contractor may be otherwise obligated to pay the entitlements. The local council has effectively already paid the entitlements (to the contractor under the existing contract). If the local council cannot compel the incumbent contractor to transfer the entitlements, and the transfer does not occur, the local council is at risk of the new contractor claiming the quantum of the accrued entitlements from the council. That is, the council will be paying twice. Contract provisions can be drafted into new contracts to protect the local council from this, but I would not expect any new contractor to accept this risk position. And why should they? The councils ought not be forced into this position either. This won't be achievable via contract – so how is it expected to be managed?

xii. The amendment provision allowing for a worker to enforce the undertaking needs to be limited. A worker could be in a position where the incumbent contractor refuses to transfer entitlements but pays the worker out at the expiry of the existing contract. If the RFT is designed to insist on the transfer of accrued entitlements for that worker, the worker can then enforce the undertaking against the new contractor. This amendment can be easily improved with a limitation or exemption compelling the worker to prove that the entitlements have not been received.

xiii. What if the workers are nominated as wanting to be offered employment under the new contract and then don't accept the position? Where a contractor has made estimates in their tender for that worker and then a different worker needs to be engaged to perform the services because the old worker chooses not to be employed, who meets any cost differences. This may not be an issue for 1 or 2 workers, but what if there are 50 workers?

xiv. In order to fairly assess tenders, the councils will need to understand exactly what is going to occur for the individuals. If the incumbent contractor tenders (and properly understands all of the details of the individuals) this will be unfair if the other tenderers are expected to just guess. In addition, if the incumbent contractor has accrued entitlements (via the council paying for the services) and other tenderers are expected to allocate funds for these entitlements – this is an unfair tendering process. The evaluation needs to understand what that quantum is and exactly what is going to occur for each worker (noting, as above, the workers cannot be compelled to accept employment).

xv. What will satisfy a registered organisation that appropriate industrial arrangements will be in place? This needs to be planned for and captured in the RFT. Local councils need to understand what is required in its contract i.e. to compel the new contractor. And this will be the limit of what the new contractor must do. The unions need to be compelled to agree to this 'satisfaction', that is, once the

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union and the council agree to what is to be included in obligations in the contract and the RFT, there can't be any further changes, because this presents risks that no-one can manage in the procurement process or contracts.

xvi. The requirement for pay rate increases will now confuse the adjustment of the 'wages' component of all service rates. Should the wages component be adjusted in accordance with movements in the NSW Local Government (State) Award?

Whilst contract provisions can be designed to require the new contractor to do certain things, they cannot compel the incumbent contractor (engaged before this regulation commenced) to do anything.

In addition, the changes give rise to a risk of industrial unrest that local councils are expected to manage (and bear the cost of).

[ii] Brett Withington, Budget Estimates Portfolio Committee No. 8, Wednesday 6 March 2024

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