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Dear Ms Crawford

Re: Review of the EPA Victoria's *What is Waste* draft guidance

Thank you for the reaching out to the Waste Management and Resource Recovery Association (WMRR) to provide our views on the 'What is waste?' guidance material ("*draft guidance*") WMRR understands that the definition of waste underpins the duties under the *Environment Protection Act 2017* ("*the Act*"), however, there is currently no EPA guidance on how to apply the definition of waste, leading to inconsistent applications of the definition. The draft guidance aims to help duty holders apply the definition of waste to their situation by:

- outlining guiding factors to take into consideration when determining whether a material is a waste;
- providing guidance on when resource recovery is complete and a material is no longer waste; and
- using examples explaining how to apply the guiding factors based on real world scenarios.

WMRR understands that the draft guidance has been derived from examples based on industry experiences and has been circulated to targeted stakeholders for feedback including the Waste and Recycling Sector Group.

Being at the forefront of the ongoing evolution towards whole-of-system action and the development of a circular economy, WMRR strongly advocates for a systems-based approach to managing materials in Australia, in order to prolong life, use less for longer and mitigate carbon impacts. This includes fierce advocacy for the waste and resource management hierarchy, which promotes avoidance of waste, and the diversion of materials from landfill through design for reuse, recovery, recycling and composting of resources. Transitioning to a safe circular economy will require government, industry and consumers to work together to drive significant changes in mindsets and systems.

The Draft Guidance

WMRR commends the draft guidance for recognising upfront that a material may shift between being waste and not waste at different points in its lifecycle and welcomes the commonsense approach that defining waste depends on facts, circumstances, and context.

WMRR appreciates that the EPA considers the following guiding factors in determining if material is 'waste':

- Burden – if material is costly to dispose of or has no market, it is more likely waste.
- Certainty of Use – if no clear contracts or buyers exist, the material is likely waste.
- Fit for Purpose – if contaminated, damaged, or fails standards, it may be waste.
- Value – if the material has a low or negative economic value indicates waste.

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- By-products – genuine by-products that are intentionally produced, managed, and sold under contract may not be waste.

The guidance notes that ‘waste’ ceases to be ‘waste’ when resource recovery is undertaken, market demand exists, standards are required or if it is prepared for a re-use.

WMRR makes the following recommendations, however, to enhance the clarity of the guidance.

i. Ensure consistent references between the draft guidance and the Act

WMRR notes that in *Definition of waste and resource recovery* section, the dot points given for the definition of waste are in number format (i.e 1-5), whereas in the Act they are in letter format (a – e). The draft guidance however also refers to the Act references such as (a) within the same section. For absolute clarity, it would be helpful to realign the references to the Act, so that points 1-5 in the draft guidance are referred to as (a) – (e).

ii. Include a Decision Tree Flowchart in the guidance

The introduction of the document includes the following phrase from the Act:

“Material may be waste in one (1) set of circumstances but not in another. Material that was waste may cease to be waste. Equally, a new product made from waste may become waste again.”

The fluidity of ‘waste’ warrants a visual diagram to show the key points when a material will begin and/or cease being a waste. This type of diagram would also help demonstrate how the definition of waste under the Act impacts and interacts with the guidance. For example, the reuse of compost, biosolids for land application, aggregate (for roads and fill), fill material or any other material that may be reused in or on land appears to "alter the environment" and would thus still be waste under (a) of the current definition of waste in the Act. A flow chart could assist the user’s understanding of how the guidance should be applied.

Furthermore, in WMRR’s view, including the flowchart would reduce the potential perception that decisions about whether a material is considered waste are solely at the discretion of the EPA. For absolute clarity, it would be useful if the guidance linked to other relevant considerations (such a Waste Designations) which may apply for some materials.

iii. Provide examples of both complying and non-complying scenarios for each guiding factor

Overall, the document appears fairly clear, however for each topic it would be beneficial to have an example that meets the given criteria and an example that does not. This will make it much easier to understand each principle and better apply. For example, provide an example of when a material is a burden and thus likely to be considered a waste AND an example of when it is not a burden and unlikely to be considered a waste. This yes/no type model should mirror the decision tree flowchart recommended above and could also appease concerns that the EPA is being subjective in how it applies the guiding factors.

iv. Acknowledge market volatility in the example for Certainty of Use

For Certainty of Use, the current example is provided:

“A company crushes bricks and concrete to sell for use in building and construction. If the company has existing buyers and contracts there is likely to be certainty of use. If the company does not have any existing buyers or contracts, or clear evidence that such a market exists, there is unlikely to be certainty of use. Therefore, the material is more likely to be waste.”

This example could be interpreted as deliberately capturing any recyclable material that is being stockpiled until specific end-markets are secured. Qualifying words should be provided here for absolute clarity, noting market dynamics, transport disruptions or seasonal variations could impact storage requirements on site, and allowing storage on site of

marketable materials for a reasonable timeframe. Otherwise, the risk is that this example could be used to undermine remanufacturing and recovered materials.

Furthermore, the example could potentially extend the remit of the EPA to capture organisations that do not consider themselves 'waste facilities' and which were never intended to be captured. From a policy perspective, it is important to ensure that materials with genuine albeit fluctuating markets avoid unnecessary classification as waste which may serve as a barrier to achieving circular outcomes.

v. Ensure examples are consistent with existing determinations

The aforementioned example used for Certainty of Use (crushed brick and concrete) already falls under the EPA determination for recycled aggregates (Gazette No. S 302). Hence, including it seems to overrule that determination. Is the intent here that the EPA determinations for similar situations (such as aggregates, fill material, pasteurized compost) will no longer be required? If not, a different example that does not create confusion about the already existing determinations may be more appropriate.

vi. Include a paragraph explaining the role of End of Waste Designations

As noted previously, it would be prudent for the guidance to note that End of Waste Designations may apply for some materials. For example, Clean Fill (uncontaminated soil or soil with contaminants below the Clean Fill threshold) is an Industrial Waste albeit covered by a Designation allowing its re-use. Reference to Designations could be incorporated into as an example under the "fit for purpose" guiding factor.

vii. Review the Fit for Purpose example

The following example is given to demonstrate Fit for Purpose:

"A company undertakes thermal treatment of contaminated soil with the intent to use it as fill material. The treatment reduces the contaminants below the required fill material threshold. However, it also substantially alters the structure of the material such that it is no longer considered soil as it cannot support life. The material is not fit for purpose for use as fill material as it is not soil. The material may however be fit for purpose for other uses such as building or construction purposes."

Whilst it is appreciated that this example intends to show a contaminated 'soil' being fit for purpose as a 'fill' once treated, this particular example may cause confusion and does not best demonstrate the fit for purpose principle. Given EPA's previous industry communications on thermally treated material (TTM) and its current very restrictive stance on the reuse of the material, this may not be the best example to include. The current stance on this does not allow for the easy 'fit for purpose' reuse of TMM. A less contentious example of material being fit for purpose may be better placed, such as the use of oversized recycled organics for mulch.

Final remarks

The EPA has an important role to play in the transition from a linear waste economy towards a circular economy by taking an approach that supports the elimination of waste in order that materials and resources are safely reinvested and circulated within the economy. It is crucial that regulators don't place additional barriers to circularity on material types and supply chains that have existing and emerging markets, and moreover, that the resource recovery industry – including remanufacturers, recyclers and reproducers – are not penalised for market dynamics and supply challenges which can be overcome by allowing reasonable timeframes for onsite storage. It is also important that guidance material provides certainty and clarity in so far as possible to ensure compliance.

WMRR notes that NSW is also currently working through guidance materials to provide more clarity to participants in the circular economy on the status of their material through the supply chain as part of its response to the review of its Resource Recovery Framework, and would encourage alignment between jurisdictions, noting that Australia is one (1) common market for supply chains and markets.

WMRR sincerely hope our comments will be constructive and helpful in shaping the draft guidance into a clear and useful document for both industry and regulators.

Please contact the undersigned if you wish to further discuss this submission.

Yours sincerely



Gayle Sloan
Chief Executive Officer

Waste Management and Resource Recovery Association of Australia