

Submission on the proposed Protection of the Environment Operations (Waste) Regulation 2014

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Opening

Local Government NSW (LGNSW) is the peak body for councils in NSW. It represents all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW. LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

LGNSW welcomes the opportunity to comment on the proposed Protection of the Environment Operations (Waste) Regulation 2014.

Executive Summary

Local Government supports in-principle the introduction of measures to address rogue operators and provide a more level playing field for all those involved in the recovery, reprocessing and disposal of waste. However, a fundamental challenge with reviewing the draft Regulation is that the Waste Levy Guidelines, which contain “details on the specific forms and methodologies”, are not available. This information is essential for Local Government and other stakeholders to be able to adequately assess the draft Regulation and its impact on their operations.

An added complexity is that NSW Environment Protection Authority (EPA) is also currently consulting on options to extend the Waste Levy to the remainder of NSW (closing 20 June), which has the potential to significantly increase the number of council-operated facilities that would be required to pay the levy and/or measure and report waste flows. With so many unknowns and variables arising from the absence of documentation, and the potential for further changes to the waste framework, it is difficult to truly understand what the combined/net implications are for Local Government.

Based on the information that has been provided in the consultation documents, LGNSW has the following concerns with the draft Regulation:

- a) The Regulatory Impact Statement (RIS) estimates 100-110 additional facilities will be required to pay the levy (i.e. they are currently licenced but levy exempt), but this estimate does not seem to include the facilities that will become scheduled waste facilities as a result of lowering the licensing thresholds. For example, a number of council reuse/recycling and drop off centres will be captured by the lower threshold. We believe the RIS underestimates the number of additional facilities and therefore the costs of complying with administration and reporting requirements.
- b) Rural and regional councils will be affected by the new thresholds and reporting requirements, particularly if the waste levy is extended state-wide. Some councils may have multiple affected facilities, which are usually unstaffed with no gate fee and minimal recording of waste received/out. The draft Regulation creates a significant administrative burden for these councils for little benefit, as these remote facilities are rarely used by ‘rogue operators’ nor pose significant threat of stockpiling.
- c) As a result of the proposal for reuse and recycling facilities in the regulated area to be captured within the levy framework, there are significant potential increased administrative costs and contract variation claims for councils. For example, waste contract prices will

- likely increase to cover the increased administrative costs, which will either be passed on to councils, or councils (as the operator) will have to pass them on to others.
- d) Local Government has serious concerns in relation to the proposal to make the levy payable on waste that is stockpiled for more than 12 months or if stockpile limits are exceeded. Regional areas and some metropolitan operations often need to have reasonable-sized stockpiles before processing or relocating becomes efficient e.g. concrete crushing for road base. Alternatives that should be considered include increasing the stockpile time limit (e.g. to 24 months), or making the time limit site specific (noted on each licence), or removing the time limit altogether and having only a volumetric limit.
 - e) The funding offered by the NSW Government (up to \$75,000 or 50%) for weighbridge installation at sites is welcome, however some councils will not be able to raise the matching funds, provide the required staffing or cover ongoing administration and reporting costs.
 - f) The proposed 10 tonne threshold for asbestos to be considered land pollution seems high (e.g. equivalent to over 650 sheets of super 6 roof sheeting). A smaller quantity of loose and friable asbestos would not meet the threshold but may have more potential to cause harm than a larger quantity of non-friable asbestos (as friable asbestos is more likely to release asbestos fibres into the environment). LGNSW suggests an alternative is to remove the threshold, and the actual volume of 'pollution' can inform the enforcement path (e.g. penalty notice or prosecution).
 - g) The draft Regulation does not provide appeal rights for licensing decisions made by the EPA, despite the Act providing this head of power. Appeals rights should be included in the Regulation.
 - h) Definition of 'waste' – there were some views that material should no longer satisfy the definition of a waste when it has a new purpose (as per the approach in the European Union). Although it may not be possible to achieve such a change through this suite of amendments to the draft Regulation, we call on the EPA to investigate a revised definition.
 - i) Local Government has concerns that the RIS probably underestimates the EPA resourcing required to administer and regulate the increased number of Scheduled Waste Facilities.

Overall, there is a view within Local Government that the majority of waste facility and transport operators are legitimate and law-abiding, yet they will be the ones burdened with the increased costs of the regulatory controls proposed. There is also a view that increasing the number of EPA inspectors would do more to capture the illegitimate operators than tightening the regulatory controls will.

LGNSW understands that the intention of the proposed changes is to prevent unscrupulous intermediary facility operators from illegally dumping residual waste from their processing operations, and the proposed changes may go a long way towards realising this intention. However, when it comes to illegally dumped waste material, unscrupulous recycling facility operators are of least concern to councils. The vast bulk of illegally dumped waste that councils have to deal with is household material. The inclusion of intermediary facilities within the waste levy framework is therefore likely to have little if any impact on illegal dumping.

Response

Waste management is a key responsibility for councils, and Local Government is a critical provider in the delivery of waste management and resource recovery services to the community. It is the only sphere of Government which has an on-ground presence in relation to waste in NSW.

Local Government is a fundamental part of the waste management system conducting a range of activities including:

- managing landfills
- operating collection services for waste and recyclables for residents, business and public spaces
- operating drop off centres
- cleaning up illegally dumped materials
- undertaking education and increasing awareness of the waste hierarchy, and
- operating reprocessing facilities in some cases e.g. organics composting.

The Regulatory Impact Statement (RIS) estimates 100-110 additional facilities will be required to pay the levy (i.e. they are currently licensed but exempt), but this estimate does not seem to include the facilities that will become scheduled waste facilities as a result of lowering the licensing thresholds. For example, a number of council reuse/recycling and drop off centres will be captured by the lower threshold. We believe the RIS underestimates the number of additional facilities and therefore the costs to 'industry' (including councils) of complying with the administration and reporting requirements.

The EPA is also currently consulting on options to extend the Waste Levy to the remainder of NSW (closing 20 June), which has the potential to significantly increase the number of facilities operated by council that would be required to pay the levy and/or measure and report waste flows. With so many unknowns and variables arising from the absence of documentation, and potential for further changes to the waste framework, it is difficult to truly understand what the combined/net implications are for Local Government.

Lowering the licensing thresholds as proposed in the draft Regulation will shift the regulatory burden for those facilities from Local Government to the EPA, but this is likely to only marginally offset the additional administrative and reporting costs for Local Government arising from other elements of the draft Regulation.

The Waste Levy

The proposal to have all scheduled waste facilities in the regulated area incur levy liabilities will have an impact on Local Government, as it operates a number of such facilities. In principle, the liabilities/credits system makes sense, however it is difficult to understand the mechanics and how it will work in practice. The RIS indicates that the 'Waste Levy Guideline' will provide the required detail on levy operation, exemptions etc. Making these guidelines available to consider alongside the draft Regulation would have been helpful to understand the proposed changes and their impacts on stakeholders. Without it, it is very difficult to understand the true impact on Local Government.

Stockpile limits

Proposed amendments to clause 10 of the Regulation (pg 71 of RIS document) provide that payment of the waste levy is triggered where the amount of waste stored is greater than the

stockpile limit and/or the waste is stored for more than 12 months. For some council reprocessing operations the 12 month limit is problematic as it can take longer to collect sufficient material to make the actual reprocessing cost effective. Requiring material to be processed in a shorter timeframe will affect the economics of such operations, and can also bring their long-term viability into question even though they are legitimate recyclers and reprocessors.

LGNSW would suggest that the EPA consider extending the time allowed for storage of waste – to 24 months - *providing that stockpile limits are not exceeded*. This would ensure that the facility is not becoming an ‘above ground landfill’ while still providing flexibility for the operator to resolve logistics and work with the market to see the material put back to good use. Without the additional time, a number of smaller operations (either in terms of volume or area) may be forced to close, further limiting the State’s ability to divert waste from landfill.

Procedure

There is also the issue of the timing of the introduction of the levy to reprocessing/recycling (‘intermediary’) facilities. Under the proposed changes to the process flow for levy payment, the intermediary facility will be liable for 100% levy on all material coming into the facility. Once the operator demonstrates the portion of that incoming product that was recycled, the EPA will credit the operator for that portion. The critical question then is how the change to the levy payments will be implemented for intermediary facilities on commencement of the new Regulation.

Will implementation involve a a simple calculation that commences on Day 1 of the change: tonnes received for the month minus tonnes taken off-site for the month (and verified as being recycled/re-used) x \$107.80 = levy payable for that month? Or at the commencement of the change to legislation, will the EPA want a volumetric survey conducted, and an upfront payment for the total tonnes held at the facility at that time, with the ongoing debit/credit adjustment as described above to take place each month thereafter?

If the latter approach is used there will be a significant impact on the facility operator’s cash flow, and this impact is likely to be passed on to councils by way of contract price variations. Some councils have calculated the impact of the latter approach could cost them in the order of \$400,000 in levy liabilities – a significant impost.

Exemptions for material used in landfill operations

In relation to materials exempted from the levy, materials that meet the specifications of the Waste Levy Guidelines that are used for roads are proposed to be exempt (Clause 15). LGNSW seeks that an exemption also be available for material used as daily cover, and that the definition of ‘roads’ be clarified to include road foundations/batter areas and for hardstand areas including transfer stations and recycling areas.

Interstate management of waste

The interstate movement of waste and applicability of the levy is a complex issue. LGNSW understands the intent of the current (and proposed) policy settings is to encourage NSW to manage its own waste rather than export it, thus transferring ‘the problem’ to a location with potentially unknown environmental controls. However there are circumstances where interstate transport and management of waste is the best environmental solution, and sometimes the only viable solution (environmentally, practically and economically) available to councils.

Under the terms of the draft Regulation, some councils will incur a levy liability on material that is transported out of NSW which will not be recoverable because landfilling will occur outside

NSW. However those same councils have been deemed ineligible to apply for *Waste Less Recycle More* grant funding because the waste is transported interstate, thus making it even more difficult to develop and establish viable infrastructure and reprocessing capacity within NSW. One such council has estimated that their levy liability in this circumstance is in the order of \$3 million in the first year, increasing each year thereafter.

The principle employed to date in distributing the waste levy has been that the levy be directed to those areas which contribute to the overall levy 'pool'. As such, if intermediary facilities in the NSW regulated areas incur levy liabilities then the logical conclusion is that those same Local Government areas should be eligible for funding.

Recording and measurement of waste

Clause 35 of the draft Regulation proposes that all levy-paying scheduled waste facilities must have a weighbridge installed, whereas previously this requirement only applied to facilities receiving more than 5,000 tonnes per annum. LGNSW notes that funding to assist with weighbridge installation is available from the NSW Government, for up to 50 per cent of the cost (maximum \$75,000). Local Government welcomes funding assistance. However some councils will not be able to raise the matching funds, let alone provide the required staffing or cover ongoing administration and reporting costs. There is also concern that it will not be possible (from a logistics standpoint) to install weighbridges at all the required facilities by the 1 July 2015 commencement date.

Appendix B of the RIS document states that the EPA will grant an exemption for a levy-paying facility receiving less than 5,000 tonnes per annum from the requirement to install a weighbridge if it is proven impractical for the smaller facility to do so. What is the process for demonstrating a weighbridge would be 'impractical'? Is the detail on how to apply for an exemption to be included in the Waste Levy Guidelines?

Clause 36 requires all scheduled waste facilities (even those not required to pay the levy) to measure and record the quantity of waste transported in and out of the facility. As outlined in the Waste Levy section above, the lowered Schedule 1 thresholds mean that there will be a wider number of premises that will potentially need to upgrade their infrastructure and site administration. We would suggest that the use of electronic tracking and docketing would no doubt assist with streamlining the administrative burden on all parties, including the EPA.

Rural and regional councils will be affected by the new thresholds and reporting requirements, particularly if the waste levy is extended state-wide. Some councils may have multiple affected facilities, which may be unstaffed, with no gate fee and minimal recording of waste received/out. The draft Regulation creates a significant administrative burden for these councils for little benefit, as these remote facilities are rarely used by 'rogue operators' nor pose significant threat of stockpiling. The forecast increases in costs for administration and reporting will call into question the viability of some facilities, which if we were to look at solely from a purely economic perspective may provide the simple answer of 'just close the facility'. However Local Government has a duty to consider the needs of the community as a whole, in terms of what is economically and environmentally sustainable and socially acceptable. Alternatives to closure need to be considered and provided for within the Regulation and policy settings.

Some councils have also suggested that a longer timeframe than the 56 days proposed for monthly returns on levy contributions is required. A 90 day period would better align with the cash flow requirements of landfill facilities. To match these reporting requirements, it would

also be appropriate for the Regulation to include a 90 day timeframe within which the EPA is to review levy deduction applications.

Tracking and transport of waste

Local Government is often left with cleaning up illegally dumped loads of waste that contain asbestos and/or tyres. It has been the LGNSW position that all hazardous waste generators, transporters and facilities should be licensed by the NSW EPA. As such, we welcome the additional tracking and monitoring of tyre and asbestos movements as a mechanism for managing unlawful disposal and illegal dumping of waste.

In some instances council staff members remove asbestos that has been illegally dumped rather than engaging an asbestos removal contractor. If the new Regulation requires councils to track this waste, it should not be an administrative burden on councils. For councils, this reporting requirement where relevant should be streamlined with, or linked to, the application for funding under illegal dumping programs (i.e. the NSW Environmental Trust's Illegally Dumped Asbestos Clean Up Program (IDACUP)) to reduce the administrative burden on councils. Under IDACUP, councils must seek the EPA's authorisation to expend funds on clean up prior to moving the material. If the tracking system included a prompt that enables councils to automatically apply for the authorisation this would assist in streamlining the process for councils.

Consumer packaging

Of the options considered by the EPA for this aspect of the Regulation, LGNSW supports retaining the existing provisions pending a decision in relation to the Packaging Impacts Decision RIS. LGNSW does not support the other options canvassed as they do not reflect an extended producer responsibility approach to the management of packaging.

Local Government NSW has advocated strongly for a state and national Container Deposit Scheme for many years, and ideally would prefer to see the Regulation specifically provide for such a scheme in due course. Until that time there should be no diminution of the existing requirements.

Land Pollution Offences

The draft Regulation includes a definition of land pollution, with the intent of this addition being to enable easier prosecution of offences involving these wastes. We support the concept of streamlining the process, however would question whether the thresholds set for asbestos and tyres are in fact too high.

LGNSW understands that proposed amendment seeks to clarify what constitutes land pollution in a similar manner to the way in which 'water pollution' is defined in Schedule 5 of the *Protection of the Environment Operations (General) Regulation 2009* (NSW) (the POEO General Regulation).

Schedule 5 of the POEO General Regulation lists 'prescribed matter for the definition of water pollution' such as plant matter, ashes, soil, gas other than oxygen and oil and does not limit the definitions by prescribing a volume or weight for these matters. This is a sound approach as the quantity of a prescribed matter deposited in the environment is not necessarily the sole or key determinant in the potential for that matter to cause harm. Other factors may include the way in which the matter is deposited, the composition of the matter, the concentration of a

matter and the receiving environment. Furthermore, for water pollution the POEO General Regulation makes clear that no amount of these matters should be deposited in the environment.

In relation to asbestos, a smaller quantity of loose and friable asbestos may have more potential to cause harm than a larger quantity of non-friable asbestos as friable asbestos is more likely to release asbestos fibres into the environment. It is not the weight of asbestos material that is the most important factor, but rather its condition, composition, any covering and handling. However, none of these factors negate the illegality of depositing asbestos

Local Government NSW supports an amendment which clearly communicates that depositing asbestos-containing material on land that is not an appropriate waste facility constitutes pollution. In our view, the quantity of asbestos is not relevant as no amount of asbestos should be deposited on land that is not an appropriate waste facility. Setting a threshold may have unintended negative consequences, for example the provision could be interpreted literally to mean that only more than 10 tonnes of asbestos waste is considered land pollution and that less than this weight of asbestos is not considered land pollution. Communicating that any amount less than the threshold value does not constitute land pollution may send mixed messages to the community and undermine existing communications campaigns if misconstrued to indicate that less than 10 tonnes of asbestos waste is not a risk to human health.

The threshold value appears to be arbitrary and the RIS fails to explain the rationale behind the threshold. The threshold value is excessively high, as in practical terms 'more than 10 tonnes of asbestos waste' (or 10,000 kilograms of asbestos waste) is over 667 – 769 sheets of super 6 roof sheeting as each sheet is generally around 13 – 15 kg (personal communication from WorkCover NSW, November 2013).

Appeal Rights

The draft Regulation does not provide appeal rights for licensing decisions made by the EPA, despite the Act providing this head of power. This is an important element of due process, and LGNSW believes appeal rights should be included in the Regulation.

Definitions

There are some views within Local Government that, in order to encourage a true shift towards treating waste as a resource, the definition of waste must be revised. In line with (or informed by) the approach taken in the European Union, when material has a new purpose it should no longer be classified as waste. LGNSW notes that the draft Regulation proposes to carry forward from the 2005 Regulation certain elements of the definition of waste (see clause 6: *Definition of "waste" - prescribed circumstances and substances*), however it is understood that a major overhaul of the definition would require an amendment of the *Protection of the Environment Operations Act 1997*. While it is unlikely that such an overhaul would be considered as part of this round of changes, we would request that a review of the definition be investigated.

Conclusion

Local Government is the only sphere of government in NSW with an on-ground presence in waste, and it is a key player in the delivery of waste avoidance and resource recovery services and community education and awareness.

Whilst we support the intent of the changes in the draft Regulation (i.e. to provide a more level playing field for all those involved in the recovery, reprocessing and disposal of waste) there are concerns that some aspects of the draft Regulation will only serve to increase the burden on law-abiding operators that comprise the majority of the waste sector. In particular, there is a view in Local Government that the additional controls on intermediary facilities will do little to prevent illegal dumping that Local Government is faced with cleaning up, as this activity is usually perpetrated by householders or small business operators.

Without access to the finer detail of how the proposal to include intermediary facilities within the levy system will operate it is difficult to understand and calculate the true impact on Local Government. Furthermore, the current consultation on the extension of the waste levy to the remainder of State also raises uncertainties, but carries the potential to significantly increase the impact on Local Government.

It is imperative that Local Government and the waste sector are provided with the Waste Levy Guidelines as soon as possible so that impacts can be assessed, and any forward planning can get underway in light of the expected commencement of the Regulation on 1 July 2015.