

Submission on the DWER Discussion Paper Proposed Legislative Framework for waste derived materials



December 2020

Status of this Submission

This Submission has been prepared through the Municipal Waste Advisory Council (MWAC) for the Western Australian Local Government Association (WALGA). MWAC is a standing committee of WALGA, with delegated authority to represent the Association in all matters relating to solid waste management. MWAC's membership includes the major Regional Councils (waste management) as well as a number of Local Government representatives. This makes MWAC a unique forum through which all the major Local Government waste management organisations cooperate.

This Submission therefore represents the consolidated view of Western Australia Local Government. However, individual Local Governments and Regional Councils may have views that differ from the positions taken here.

This Submission was endorsed by the Municipal Waste Advisory Council on Wednesday 9 December 2020.

1 Introduction

The Association appreciates the opportunity to comment on the Department of Water and Environmental Regulation (DWER) Discussion Paper – *Waste Not, Want Not: Proposed Legislative framework for waste derived materials* (Discussion Paper). Through the Waste Reform Advisory Group, MWAC had the opportunity for input into the Discussion Paper and appreciates that many of the issues raised have been addressed in the final draft. These amendments, and the worked examples included in the Discussion Paper, make the intent and process regarding the framework much clearer.

The scope of the Discussion Paper is waste-derived materials that are applied to land in amounts that are regulated by the Licencing system under the Environmental Protection Act. Waste-derived materials includes materials which are wholly or partly comprised of waste or wholly or partly derived from waste. The licence threshold used relates to the type of material – for example, a licence is required for a throughput of 1,000 tonnes or more per annum of construction and demolition materials, therefore the Framework would not apply to use of less than that amount.

In WALGA's previous Submissions on the establishment of a Legislative framework, the following key outcomes were identified that the framework:

- Risk based, fit for purpose standards – the standards should be based on the risk associated with the material and its use in specific applications.
- Streamlined approval process for waste derived materials – a process which does not require an application to be lodged with the Department for every use of material and that is supported by clear guidance documentation (developed in consultation with industry).
- WA specific evidence base – To be able to make risk based assessments DWER will need to establish a reliable WA specific evidence base, and secured staff with the necessary skills and experience to successfully implement a framework.
- Certainty and stability for markets - the establishment of a legislative framework for waste derived materials will not automatically create market demand for waste derived materials. A range of other initiatives are required to support uptake of these materials, such as active engagement with potential end users and the inclusion of recycled content targets in Government procurement.

2 Key Outcomes for a Legislative Framework

Key Outcome	Comment on Proposed Framework
Risk Based, Fit for Purpose Standards	<i>The proposed Framework meets this outcome.</i> The Discussion Paper identifies that a risk based approach will be used and that fit for purpose standards developed in collaboration with industry.
Streamlined Approval Process for Waste Derived Material	<i>The proposed Framework meets this outcome.</i> It is proposed that the producers do not have to apply for each application of product, if using the General WDM Determinations.
WA Specific Evidence base	<i>The proposed Framework may meet this outcome.</i> The specific resourcing of the development of the WDM is not discussed, however the Discussion Paper notes that “A collaborative approach to developing general WDM determinations would be undertaken with industry, particularly where they relate to waste-derived materials produced by multiple producers. Legislative amendments would require the CEO to consult with relevant stakeholders on proposed general WDM determinations.”
Certainty and Stability for Markets	<i>The proposed Framework has the potential to contribute to this outcome.</i> This is the area where the Framework has the largest potential to undermine certainty and stability for the market if the WDM Determinations are not truly fit for purpose and based on achievable outcomes for the industry.

3 Detailed Comments on the Discussion Paper

Section of the Framework	Comments
2.1 Overview The proposed legislative framework would empower the Chief Executive Officer (CEO) of the department to assess an application for, and grant or refuse to grant, a WDM determination.	It is recommended that the CEO should be empowered to grant approval, subject to amendment to a WDM determination. This will ensure that amendments can be made, rather than having to resubmit an application.
2.1 Overview The framework proposes that material does not cease to be waste until used in accordance with all the conditions of the relevant WDM declaration. This is because material that has been subject to some degree of processing may still be used inappropriately, resulting in harm to human health and the environment, or used in a way that constitutes disposal.	While the Association understands the rationale for the requirement for ‘use’ of the product, the proposed requirements on end users may impact on market acceptance of the materials.
2.3 Making a WDM determination 4. ‘principles for the use of a waste-derived materials’, being that it must be considered whether: o the use of the material would pose an <u>unacceptable risk</u> of harm to human health or the environment o where this is relevant to the proposal, the material will be used as a substitute for a recognised raw material or product and, <u>when compared with the material it replaces, has no greater potential risk of causing harm</u> to public health and the environment or is otherwise assessed to have acceptable and manageable risks (beneficial).	How ‘unacceptable’ is defined needs further clarification as this is a key principle in relation to whether a WDM can be used. The comparison of risk is one way to determine whether a product can be used. However there will be a potential gap in evidence in relation to the risks associated with the use of basic raw materials. The Discussion Paper identifies that the Department “would publish guidance on how the CEO would consider these matters, including further detail on the evidence applicants should provide in their application for a WDM determination.” For priority materials contained in the Waste Avoidance and Resource Recovery Strategy, for example

	FOGO, the Association considers the Department should have a strong role in commissioning the data collection to inform the assessment.
2.3 Making a WDM determination In undertaking a risk assessment of the material's use, the department would apply the risk framework outlined in its <i>Guidance statement: Regulatory principles</i> .	The Guidance statement took effect 13 July 2015 and is due to be reviewed "no later than as soon as practicable following the fifth year of its commencement".
2.3 Making a WDM determination In circumstances where the use of the material is low risk, there may be fewer conditions in the WDM product specification and WDM declaration than for higher- risk material. This would ensure that WDM determinations do not create unnecessary regulatory burden.	Support, this is taking a risk based approach, however there will need to be a clear process for identifying what is high and low risk.
2.4 Types of waste-derived materials determinations General WDM determinations could be made on the department's initiative or on application from industry. The department would publish guidance on the information to be provided in applications. A collaborative approach to developing general WDM determinations would be undertaken with industry, particularly where they relate to waste-derived materials produced by multiple producers. Legislative amendments would require the CEO to consult with relevant stakeholders on proposed general WDM determinations.	Strongly support this approach as it is a streamlined process including collaboration with industry.
Questions from the Discussion Paper Which waste-derived materials and/or uses of such materials would you want to be addressed in general WDM determinations under the proposed legislative framework? Which material(s) would you wish to seek a case-by-case WDM determination for under the proposed legislative framework? Is there anything else that the department should consider in determining the priority of materials for developing general WDM determinations? Which materials do you think should be prioritised to be addressed in general WDM determinations issued upon enactment of the legislative framework for waste-derived materials?	<p>The Department leading the development of the general WDM Determinations would be most appropriate where the Determinations will assist in meeting the Targets of the WARR Strategy, Export Bans and potentially where there are multiple processors of the product. The Department also identifies other factors which are relevant, such as the tonnage of material generated.</p> <p>As significant resources will be required for the development of these resources the Department will need to focus on these materials.</p> <p>It is considered much less of a priority for the Department to lead the development of Determinations where the principal beneficiary is one organisation and the material is not related Targets in the WARR Strategy or the Export Bans.</p> <p>The materials it will be absolutely essential to have WDM Determinations in place for include: Organics – from FOGO, GO and from other collections sources Construction & Demolition waste</p>

	Glass Tyres and conveyor belts Asphalt.
2.6 Trials of waste-derived materials In implementing the framework, the department would publish guidance on the evidence required to demonstrate that a proposed trial of waste-derived material addresses the matters the CEO must have regard to in making a determination. This would enable researchers to ensure their trials address the matters required for a WDM determination to be made before submitting an application.	Strongly support.
2.7 Content of WDM product specifications (general or case-by-case) Producers of waste-derived materials would be required to provide users of the waste-derived material with a written statement of compliance stating that all the requirements set out in the WDM product specification have been met.	Concern has been expressed that this effectively labels the material a waste and could make any market development more difficult or impact on existing markets.
2.7 Content of WDM product specifications (general or case-by-case) In setting the conditions in a WDM product specification, the department would ensure consistency and avoid duplication with the requirements in licenses for prescribed premises that produce waste-derived materials	Strongly support. Some Local Government organics processors have indicated that their licences contain product specifications. It is considered that products are better regulated through the Framework as it will take a risk based, fit for purpose approach.
2.7 Content of WDM product specifications (general or case-by-case) Transitional arrangements The department acknowledges that a number of waste-derived materials may have been determined not to be waste with reference to the factsheet <i>Assessing whether material is waste</i> before the proposed waste-derived materials framework would come into effect. In developing a relevant WDM determination, the department may need to consider transitional arrangements for materials already produced and would consult with relevant producers as required.	Strongly support. This approach acknowledges work already undertaken and that materials are being used.
2.8 Content of WDM declarations (general or case-by-case) The WDM declaration would clearly articulate: 4. conditions, all of which the user(s) of the waste-derived material(s) must meet for the material to not be 'waste', such as: • holding a statement of compliance from the producer that all the conditions of the WDM product specification have been met at the time of receipt of the waste-derived material on site • information that must be provided by the supplier and <u>stored by the user(s)</u> (such as a statement of compliance from the producer and any other evidence of compliance)	The intent of the WDM declaration is to outline how the material can be used and sets conditions on the user of that material. The supplier can only guarantee the material at the time that it leaves their premises (see comments Section 2.14). This requires the user to store the various statements of compliance from the producer.

<ul style="list-style-type: none"> • record-keeping and reporting requirements, including registration with the department, <u>depending on the level of risk.</u> 	<p>This requirement means that the user of product potentially has to register with the Department. This is a significant requirement and how 'risk' is defined in this context needs to be clearly identified. Record keeping and reporting also puts significant onus on a user of waste derived materials.</p>
<p>2.14 Compliance and enforcement Non-compliance with the conditions in a WDM product specification (producers) Amendments would be made to the EP Act to make it an offence to produce and supply a waste-derived material, other than in accordance with all the conditions in the relevant WDM product specification. The maximum penalty for breaching conditions of a WDM product specification would be \$50,000 upon conviction for an individual and \$100,000 upon conviction for a body corporate.</p>	<p>Noting that there are significant penalties for supply of material which does not meet specifications.</p>
<p>2.14 Compliance and enforcement Providing a false statement of compliance WDM product specifications would require that the producer of a waste-derived material provide a statement of compliance to users of waste-derived materials, stating that the conditions of the WDM product specification have been met. This statement would provide assurance that, at the <u>time of delivery</u> of material to the users, all the conditions of the WDM product specification had been met.</p>	<p>It would be difficult for a processor to warrant at the time of delivery that the material meets an output unless they are also responsible for the transport of the product. The statement should provide assurance that, at the time of production, all the conditions had been met.</p>
<p>2.14 Compliance and enforcement Non-compliance with the conditions of a WDM declaration (users of the product) In instances where a user does not comply with the conditions of a WDM declaration, the department will identify the appropriate enforcement action in accordance with its <i>Compliance and Enforcement Policy (2017)</i> and <i>Enforcement and Prosecution Policy (2013)</i>. The intent behind requiring users to comply with conditions of a WDM declaration is not only to protect human health and the environment, but to also ensure the use is genuine reuse, rather than a means of waste disposal and levy evasion. Where a user does not comply with a WDM declaration, reliance on the WDM declaration becomes null and void and the licensing and levy frameworks would apply. The user may then be committing an offence if they did not hold the requisite licence (under s.52 and s.56 of the EP Act), the maximum penalty for which would be: a \$50,000 fine and/or a daily penalty of \$10,000 for an individual a \$100,000 fine and/or a daily penalty of \$20,000 for a body corporate.</p>	<p>The Association understands the Department is motivated by ensuring that material is used correctly, to minimise impact on human health and the environment and minimise any Levy evasion. However, these are significant potential penalties for use of a product, which are likely to have a negative impact in relation to existing markets and market development for waste derived materials.</p> <p>Compliance and Enforcement Policy (2017) is an interim policy and the final Policy (consulted on 2019) has yet to be released. Enforcement and Prosecution Policy (2013), was due for review "no longer than four years from the approval date of the current version", it is not clear if this has occurred.</p>

In addition, consideration may need to be given to levy evasion under s.78 of the WARR Act.	
<p>The conditions of the WDM declaration would require the user to:</p> <ul style="list-style-type: none"> - maintain evidence that demonstrates compliance with the conditions of the declaration (e.g. a statement of compliance from the producer of the material stating that all conditions of the WDM product specification were met) - produce evidence and records relating to the declaration if requested by an inspector authorised under the EP Act (e.g. records of the quantity of material received and the name and address of the supplier). 	Again this is a significant impost on the user to keep records relating to this and have to produce them. Any such requirements need to be time bound rather than in perpetuity and the requirement to produce records be based on evidence that there is some cause for concern.

4 Implementation and Administration of the Legislative Framework

As the agency responsible for the legislative framework for waste derived materials, the Department of Water and Environmental Regulation will need to dedicate resources to its implementation and administration. This will include the development of WDM Determinations, guidance and/or supporting documents, the establishment of a streamlined assessment and approval process, and the delivery of compliance and enforcement activities. To be successful, the framework will need to be resourced with staff that have an appropriate level of skill and experience.

5 Review mechanism

In NSW, an approach has been taken where specific orders and exemptions are reviewed every two years on a rolling basis. The Discussion Paper identifies that the WDM Determinations would be “subject to periodic review on initiation by the CEO to ensure the determinations continue to be appropriate”. As the Framework for the Determination is part of the WARR Act and EP Act it is anticipated that it would be reviewed at the same time as the Acts. A review of the WARR Act is currently underway, so potentially the Framework would not be reviewed until 2025. The Association suggests that the Framework should be assessed not later than 2 years after implementation, to ensure it is meeting its objectives.

6 Conclusion

Local Government appreciates the opportunity to comment on the Discussion Paper and the resolution of many of the issues raised through the Waste Reform Advisory Group process. An outcomes based approach needs to be used in the development of the legislative framework, with the requirements that fit for purpose waste derived materials must fulfil clearly articulated in guidance and/or supporting documents. Where waste derived materials fulfil these requirements they can be used. There is an expectation that guidance and/or supporting documents will be developed in consultation with industry in a timely manner. WALGA looks forward to working with the Department as it develops a legislative framework for waste derived materials.