



# Policy effectiveness assessment of selected tools for addressing marine plastic pollution

Extended Producer Responsibility in South Africa



ENVIRONMENTAL LAW PROGRAMME





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Extended Producer Responsibility in South Africa

Report prepared by Climate Legal

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IUCN is pleased to acknowledge the support of its Framework Partners who provide core funding: Ministry for Foreign Affairs of Finland; Government of France and the French Development Agency (AFD); the Ministry of Environment, Republic of Korea; the Norwegian Agency for Development Cooperation (Norad); the Swedish International Development Cooperation Agency (Sida); the Swiss Agency for Development and Cooperation (SDC) and the United States Department of State.

Published by: IUCN Environmental Law Centre, Bonn, Germany

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Citation: Climate Legal (2020). *Policy effectiveness assessment of selected tools for addressing marine plastic pollution. Extended Producer Responsibility in South Africa*. Bonn, Germany: IUCN Environmental Law Centre. 19pp.

Cover photo: African Reclaimers Organisation

Layout by: IUCN Environmental Law Centre, Bonn, Germany

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## Abbreviations

CSIR	Council for Scientific and Industrial Research
DEFF	Department of Environment, Forestry and Fisheries
EPR	Extended Producer Responsibility
NWMS	National Waste Management Strategy
PROs	Producer Responsibility Organisations

# 1 Introduction

A recent analysis indicates that 40% of plastic waste generated in South Africa is mismanaged, while only 14% is recycled.<sup>1</sup> Steps are, however, being undertaken in terms of the National Environmental Management Waste Act 59 of 2008 (Waste Act) was adopted to better manage plastic and other wastes in the country, including through the mechanism of Extended Producer Responsibility (EPR). On 5 November 2020, the Minister in the Department of Environment, Forestry and Fisheries (DEFF) published an EPR notice (EPR Notice) under the Waste Act that applies EPR *inter alia* to paper, packaging and certain single-use products<sup>2</sup>. It includes targets for the plastics sector, a set of responsibilities for producers<sup>3</sup> and a call for producers to implement EPR measures ensuring collection, reuse, recycling and recovery of their products post-consumer use. The EPR Notice operates in conjunction with the more general Regulations Regarding Extended Producer Responsibility (EPR Regulations),<sup>4</sup> published on the same date, which include requirements for EPR schemes as outlined in Section 0 below.

This report contains an effectiveness analysis of the EPR measures contained in the EPR Notice and the EPR Regulations and is offered as a conceptual legal tool to address plastic leakage into the South African marine environment. The analysis contains a broad overview and discussion of the measures with a particular focus on legal, policy and institutional reforms underway to support the inclusion and participation of the informal sector. This report is a progression in the work of the legal and policy instruments discussed in the report “Legal, Policy and Institutional Frameworks Governing Marine Plastics in South Africa”, and is designed to focus and expand upon the EPR instruments outlined therein. The desktop analysis underpinning the report was informed by discussions and interviews with various stakeholders. Given that the EPR Notice and the EPR Regulations were published very recently, and their implementation is still nascent, the approach adopted in this report is primarily descriptive in nature. The findings and recommendations are observational and made with the *caveats* that EPR is still under development in South Africa and discussions of the application and potential further amendment of the EPR Notice and the EPR Regulations continue unabated.

## 2 Extended Producer Responsibility under the Waste Act

### 2.1 Extended Producer Responsibility (EPR)

As its name implies, EPR is a regulatory intervention that holds producers responsible for their product at the post-consumer use (waste disposal) stage of its lifecycle.<sup>5</sup> Consequently, EPR enforces the Polluter Pays Principle by imposing responsibility upon producers for their products, from design-to-disposal, thus compelling producers to internalise some of a product’s end-of-life costs and incentivising product-design that includes waste minimisation measures as a means to facilitate final disposal. EPR has the potential to reduce the burden typically placed on municipalities and taxpayers to manage end-

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<sup>1</sup> IUCN *National Guidance for Plastic Pollution Hotspotting and Shaping Action: Final Report for South Africa* (October 2020).

<sup>2</sup> Extended Producer Responsibility Scheme for Paper, Packaging and Some Single Use Products, as published in terms of Section 18 of the Waste Act in GN 1187, *Government Gazette* No. 43882 of 5 November 2020 (EPR Notice).

<sup>3</sup> Widely defined as “means any person or category of persons or a brand owner, who is engaged in the commercial manufacture, conversion, refurbishment or import of new and/or used products, paper, packaging and some single use products as identified by the Minister by Notice in the *Government Gazette* in terms of section 18 (1) of the Act”.

<sup>4</sup> Regulations Regarding Extended Producer Responsibility in GN 1184, *Government Gazette* No. 43879 of 5 November 2020 National Environmental Management: Waste Act (59/2008) (EPR Regulations).

<sup>5</sup> OECD *Extended Producer Responsibility Updated Guidance for Efficient Waste Management* (2016) available at <https://www.oecd.org/env/extended-producer-responsibility-9789264256385-en.htm>.

of-life product costs, reduce the amount of waste destined for final disposal and increase recycling rates.<sup>6</sup>

Although it can be conceptualised in different ways, EPR measures can apply to both the upstream phase (design and consumer use) and downstream (post-consumer use / waste disposal).<sup>7</sup> The OECD defines EPR instruments as falling within four broad categories. The first is product take-back requirements, which typically entails the setting of mandatory or voluntary collection targets for specific products and materials, and assigning responsibility to producers or retailers for end-of-life management in order to achieve these targets.<sup>8</sup> The second is economic or market based instruments, such as advance disposal fees,<sup>9</sup> deposit/refund schemes<sup>10</sup> and taxes.<sup>11</sup> As a third option, countries can also develop regulations and performance standards including technical standards and mandatory recycling rates, in addition to or instead of the above. Lastly, information based instruments that serve to raise awareness can also be used such as mandatory labelling requirements, and information campaigns about producer responsibility and waste separation.<sup>12</sup>

In practice, producers may be required to exercise their responsibility by collecting and sorting end-of-life products before disposal,<sup>13</sup> to finance such processes or to assume the operational and organisational aspects of the process from local governments.<sup>14</sup> In many instances, producers have established collective EPR systems managed by Producer Responsibility Organisations (PROs), although individual producers also run their own EPR systems.<sup>15</sup>

The Waste Act contains various novel provisions that seek to address the plastic waste lifecycle, including by allocating responsibility throughout the relevant value chains, and by imposing responsibilities on plastic waste producers, consumers, holders, and transporters and on local, provincial and national government. The EPR instruments discussed in this report are in addition to the many regulatory instruments available for the government to implement EPR under the Waste Act (as is canvassed in the earlier South African country report in this series),<sup>16</sup> including provisions allowing for the declaration of priority wastes and concomitant duties which may be imposed on producers of such wastes,<sup>17</sup> banning or restricting the production of certain products/packaging,<sup>18</sup> and providing for minimum design requirements for packaging.<sup>19</sup> To date, none of the powers under these provisions have been exercised as most of the developments have taken place under Section 28 and 18. These two sections enable the government to require whole sectors (such as the packaging sector) to assume EPR responsibilities in the form of a plan or a scheme. In 2018, the Minister of Environment, Forestry and Fisheries (Minister) called for the submission of Industry Waste Management Plans (IndWMPs) in terms of Section 28, but subsequently rejected the plans submitted and abandoned this process, instead electing to pursue the implementation of EPR under Section 18. As a result, this report is solely concerned with EPR mechanisms under Section 18 and the EPR Notice published thereunder as well

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Namely a fee levied on a particular product at the point of sale based on estimated costs of collection and treatment.

<sup>10</sup> An amount is paid at the point of sale and is fully or partially refunded when the product/its packaging is returned at a specific location.

<sup>11</sup> OECD (above note 5). These include taxes on virgin materials or upstream combination tax/subsidies, paid by producers and used to subsidise waste treatment.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> IUCN *Legal, Policy and Institutional Frameworks Governing Marine Plastics in South Africa* (July 2020)

<sup>17</sup> Section 14 of the Waste Act. This type of declaration would be appropriate to address specific plastic waste streams that prove to be particularly problematic and which warrant a unique approach specific to that waste stream, for example microbeads.

<sup>18</sup> Section 39A of the National Environmental Management Act 107 of 1998 (NEMA) and sections 14 and 15 of the Waste Act.

<sup>19</sup> Section 17(1)(b) of the Waste Act. In terms of this section the Minister may require a person or category of persons to include a determined percentage of recycled material in a product that is produced, imported or manufactured by them.



as the EPR Regulations, although it is certainly possible that in future the Minister may exercise her powers under the other EPR provisions in the Act.

The first approach to EPR (referred to in this report as the Section 28 approach), contemplates an industry led response. In terms of Section 28-30 of the Waste Act, the Minister may instruct an identified industry to develop an IndWMP and may specify the information included in, and topics covered by, the IndWMP. The identified industry then determines how to respond to the Minister's instruction including elaboration of measures and targets. In other words, these provisions anticipate a greater degree of self-regulation by industry, overseen by various monitoring and reporting requirements to government.

- The second type of industry-wide approach, referred to as the Section 18 approach in this report, is contained in what are commonly referred to as 'the EPR provisions of the Waste Act'. These provisions are, in reality, only one of many EPR mechanisms in the statute and provide the power for the Minister to identify a product or class of products in respect of which EPR applies and specify the particular EPR measures relating to the product or class of products and the persons or categories of persons who must undertake such measures.<sup>20</sup> Under this section the Minister has wider authority to impose industry-specific EPR obligations, including:
  - the requirements for EPR operation and implementation,
  - the financial and institutional arrangements of the waste minimisation programme;
  - the percentage of products to be recovered;
  - the labelling requirements "in respect of waste";
  - the requirements for the producer to undertake a lifecycle assessment in relation to the product/class of products;
  - requirements relating to design, composition or production, including:
    - the implementation of clean production measures;
    - the restriction of the composition, volume or weight of packaging; and
    - the design of packaging so that it can be reduced, reused, recycled or recovered.<sup>21</sup>

It is an offence for a 'person',<sup>22</sup> to fail to comply with a notice which specifies the above EPR measures. Upon conviction, a fine of up to ZAR 10 million and/or 10 years imprisonment may be imposed.<sup>23</sup>

The purpose behind the Section 18 industry-wide approach is to empower the Minister to prescribe measures for the industry where the Section 28 approach of industry-led IndWMPs has failed to achieve its objectives.<sup>24</sup> Government followed this consecutive approach (i.e. first following Section 28 and thereafter Section 18) in 2017, by initially calling, by way of notice published in the Government Gazette, for the submission to the Minister for approval of IndWMPs for the paper and packaging, electrical and electronic and the lighting industries.<sup>25</sup> Plastics were included within the broader ambit of the packaging sector referred to in the initial notice and the relevant IndWMPs were submitted for the Minister's approval in September 2018.<sup>26</sup> On 13 December 2019, the Minister published a notice withdrawing her decision to call for the abovementioned IndWMPs on the basis that none of those submitted for approval

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<sup>20</sup> Section 18(1) of the Waste Act.

<sup>21</sup> Section 18(2) of the Waste Act.

<sup>22</sup> Presumably also including 'categories of persons' which are an undefined entity under the Waste Act.

<sup>23</sup> Sections 67(1)(a) and 68(2) of the Waste Act.

<sup>24</sup> Whilst the relationship between the two approaches is not clear from the Waste Act, the National Waste Management Strategy (NWMS) has clarified that the 'extended producer responsibilities' in the section 18 (second) approach are to be used where the IndWMP (section 28) has proven to be ineffective and requires the Minister (and not industry) to specify the content of the required measures. It is unclear whether this was always the intention of the Waste Act, given the extensive revisions to section 28 and related provisions, to provide the Minister with more directive powers, but it suggests the need for the insertion of wording in the Act that clarifies the relationship between the two provisions.

<sup>25</sup> Call on the Paper and Packaging Industry, Electrical and Electronic Industry and the Lighting Industry to prepare and submit industry waste management plans to the Minister for approval in GN 1353 of 6 December 2017.

<sup>26</sup> Packaging SA Extended Producer Responsibility Plan Volume 1 (draft) (2018).

complied with the criteria specified in the initial notice.<sup>27</sup> The Minister stated that a new approach was required in order to achieve the same objectives and she elected to pursue the Section 18 approach to industry-wide EPR. On 5 November 2020, after a year of consultation with affected stakeholders, the Minister published the EPR Notice in terms of Section 18 and the EPR Regulations.<sup>28</sup> Taken together, the EPR Notice and the EPR Regulations seek to extend the financial and physical responsibility for the products to which they apply to the relevant producers, including responsibility in the post-consumer use (waste disposal) stage.

The EPR Regulations include general requirements for the implementation of EPR and are intended *inter alia* to serve as a framework for the development, implementation, monitoring and evaluation of EPR in South Africa; ensure the effective and efficient management of the identified end-of-life products; and, encourage and enable the implementation of the circular economy initiatives.<sup>29</sup> The EPR Regulations apply to products or classes of products identified by way of the separate Section 18 notice, and to producers. The term “producers” is broadly defined as “any person or category of persons or a brand owner who is engaged in the commercial manufacture, conversion, refurbishment or import of new and/or used products as identified by the Minister by Notice in the Government Gazette in terms of section 18(1) of the Act.”<sup>30</sup> In turn, a brand-owner is a person, category of persons or company who makes and/or sells any products under a brand label, i.e., an entity that owns the brand under which a product is sold.

The EPR Regulations also require individual producers of identified products to register with DEFF,<sup>31</sup> and either to develop their own PRO and implement an EPR “scheme” for the entire value chain or join a PRO with an existing scheme. The producer is individually accountable for its compliance with the scheme and must pay the relevant fees to fund the PRO.<sup>32</sup> The EPR Regulations also contain a detailed and extensive list of producer (and by implication their PRO) requirements,<sup>33</sup> including but not limited to those relating to: systems for the collection of fees, auditing requirements, data management, the undertaking of a lifecycle assessment and as a consequence of such assessment “factor changes” in the design, composition or production process of a product to reduce its impact; outsourcing and integration of the informal sector; development of secondary markets for recycled content; transforming the representativity of persons within the sector (including persons of colour, as well as the entire value chain particularly with regard to women, youth and people living with disabilities); implementing mandatory take-back of all a producer’s products at the end-of-life; and, implementing environmental labels and declarations for the identified products in accordance with local labelling standards.<sup>34</sup> In addition to these specific requirements, the “scheme” developed by the PRO must include measures for cleaner production (such as recyclability design and waste minimisation), waste reduction, re-use, recycling, recovery and treatment, disposal, implementation and reporting on: minimum recycled content standards, secondary materials utilisation, and recovery rates; and “compliance with the requirements for programmes planned to contribute to government priorities”, such as decent work creation (the term “decent work” is discussed in more detail in the section which follows).<sup>35</sup>

The EPR Regulations include detail on how the PRO fees are to be determined and the criteria to be taken into account for the fee’s calculation,<sup>36</sup> and provide for strong oversight of a PRO’s financial

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<sup>27</sup> Withdrawal of section 28 Notice Calling for Paper and Packing Industry, Electrical and Electronic Industry, and Lighting Industry Waste Management Plans in terms of section 28 of the National Environmental Management: Waste Act 59 of 2008 in GN 1659, *Government Gazette* 42909 of 13 December 2019.

<sup>28</sup>EPR Regulations above note 4.

<sup>29</sup> Regulation 2.

<sup>30</sup> Regulation 1.

<sup>31</sup> Regulation 4.

<sup>32</sup> Regulation 5(1).

<sup>33</sup> It appears the intention was for many of the requirements in Regulation 5 to apply to PROs, however the language makes them applicable to producers only.

<sup>34</sup> Namely South African National Standard (SANS) /ISO 14021 and SANS /ISO 14024. These standards are typically voluntary/best practice unless they are referred to as mandatory in regulations, as is the case here. See further <https://www.sabs.co.za>.

<sup>35</sup> Regulation 6.

<sup>36</sup> Regulation 7(3).

administration.<sup>37</sup> Detailed monitoring and reporting requirements are imposed, requiring the reporting of data at a relatively granular level,<sup>38</sup> with powers granted to DEFF to conduct verification audits.

Contravening provisions of the EPR Regulations are legally considered an offence, which, upon conviction, may result in an “appropriate fine” and/or imprisonment of up to 15 years.<sup>39</sup> By default this means that the penalty may only be a maximum jurisdictional value of the Regional Court, namely ZAR600 000. A further penalty is revocation of the producer’s registration under the Regulations (and thus its ability to lawfully operate) or the producer being asked to join another PRO, while the PRO may have its registration revoked.<sup>40</sup>

The EPR Regulations were published on the same day as the EPR Notice and the two instruments are intended to operate in tandem with one another.<sup>41</sup> The EPR Notice applies to all wastes arising from the use of plastic packaging, biodegradable and compostable plastic packaging; single use plastic products; single use compostable plastic products; single use biodegradable plastic products; but excludes plastic pallets and industrial bulk containers with a capacity exceeding 1000 litres.<sup>42</sup> The EPR Notice also identifies a lengthy set of products or classes of products to which EPR applies (within the context of paper, packaging and plastic products) that are too numerous to list comprehensively but which include – plastic packaging, polystyrene, “single use” plastic products;<sup>43</sup> injection moulded products: cups, tubs, cutlery (knives, forks, and spoons), stirrers; blow moulded products: bottles, containers, jars; extruded products: straws, sheets; and certain thermoformed products such as trays, punnets and cups, and various other types of plastics.<sup>44</sup> Producers of these products and wastes are required to develop an EPR Scheme as provided for in the EPR Regulations, by 5 May 2021. Lastly, the Notice contains a series of targets, applicable across the value-chain, for the five years commencing upon its publication including product design (recyclable content), reuse targets, collection targets and recycling targets.

There is a level of incongruence between the penalties imposed (fines) under the Notice and the EPR Regulations. A failure to comply with the Notice (which applies to the Packaging Sector specifically as discussed below) is an offence under the Waste Act,<sup>45</sup> which, upon conviction may result in a fine of up to ZAR 10 million and/or 10 years’ imprisonment. This is significantly higher than the fine contemplated of ZAR 600 000 under the EPR Regulations, but in relation to the same or similar offences, namely a failure to develop and/or implement an EPR Scheme, as specified. This is likely to have been an oversight and subject to review during the implementation phase of the Regulations. Until such time as this occurs, since the Waste Act is promulgated by Parliament, the penalty of up to ZAR10 million for a failure to implement the Notice (including a failure to develop, join and implement an EPR Scheme) would take precedence over any other lesser penalty under the EPR Regulations.

### 3 EPR institutions and organisational structures

This section discusses some of the primary institutions and organisations in South Africa’s plastic EPR scheme. In principle, the instrument is designed to address the whole waste management system, and

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<sup>37</sup> Regulation 7(4) -(8).

<sup>38</sup> Including on waste volumes generated, collected, diverted, exported and disposed of. In addition, annual external performance reports must be submitted on the achievement of targets, the breakdown of the EPR fee’s allocation, performance on all financial matters, “governance related matters”, “impacts to the environment”; recommendations in the event of non-compliance; “status of free riders”; and number of “decent jobs created” (Regulations 8(4) -(5)).

<sup>39</sup> Regulation 13(1).

<sup>40</sup> Regulation 13(2) and (3)

<sup>41</sup> EPR Notice above note 2.

<sup>42</sup> EPR Notice, sections 1 and 3.

<sup>43</sup> These are defined as “disposable plastics (petrochemicals, compostable & biodegradable), that are commonly used for plastic packaging and include items intended to be used only once before they are thrown away or recycled including but not limited to food packaging, bottles, straws, containers, tubs, cups and cutlery”.

<sup>44</sup> EPR Notice, section 4.y

<sup>45</sup> Section 67(1)(a) of the Waste Act.

in consequence, includes an incredibly broad array of actors, such as NGOs, the public, retailers, and a variety of government departments. This section, however, focuses on the PRO (as the primary organisational structure for implementation), together with DEFF and Municipalities, and related requirements under the EPR Regulations. It also briefly mentions other key stakeholders, without derogating from the importance and relevance of other actors not specifically mentioned herein.

Typical of EPR schemes worldwide, the South African EPR scheme places the PRO as the primary coordinating entity responsible for operating the EPR system within the boundaries of the Regulations. The Regulations require the PRO(s) to be an autonomous, not for profit entity,<sup>46</sup> in accordance with best practice.<sup>47</sup> The PRO may be established by “producers” or any person operating in any of the industrial sectors covered by the Section 18 notice, i.e. the plastics sector. It may represent either individual or collective producers.<sup>48</sup> The Regulations allow for individual producers to operate outside of a PRO, so long as they perform the same functions, because there are a number of PROs already in existence, such as PETCO, Polyco, MetPac-SA, Polystyrene Association of South Africa, SA Vinyls Association, The Glass Recycling Company and Fibre Circle, it is likely that these PROs will continue in operation, now under the rubric and direction of the EPR Regulations.

As noted above, producers are widely defined under the EPR Regulations, including the full value chain of manufacturers, converters, refurbishers, importers and brand-owners. This definition has led to discussion between industry and DEFF on the scope of the term. Existing PROs have proposed that it should be predominantly the brand owner, and in the case of product importers, then the “producer” should be the importer or licenced agent for that product. The reason for this proposed change is for a clearer allocation of responsibility and to avoid free-riders in the system.<sup>49</sup>

The Regulations have a strong focus on transparency and accountability of the PRO. Anti-corruption requirements include a legal requirement that the board of directors of the PRO is autonomous and established by due process, and may not have members of immediate family that have a “vested interest” in the particular waste stream.<sup>50</sup> As noted above, DEFF places a strong oversight role over the administration of the finances of the PRO. For example, PROs are required to submit annual financial plans, and budgets. The content of the financial plan and the budgets is also specified in some detail in the Regulations.<sup>51</sup> Equally, the administration fee is capped at 12% of collected revenue in the first year, and 9% of revenue in the second, an issue which has also been the point of ongoing discussion between industry and DEFF. Further, and as outlined above, there are extensive and detailed reporting requirements for the PROs to DEFF, coupled with powers of the Department to undertake verification audits.

The Regulations anticipate that the PRO plays a central and coordinating role within the sector. To this end they require the PROs to, amongst others, integrate informal waste collectors, reclaimers and pickers into the post-consumer collection value chain; cooperate with municipalities to increase the recovery of recyclables from municipal waste, and promote small businesses and entrepreneurs with a special focus on women, youth and persons living with disabilities; and implement “transformation”<sup>52</sup> across the entire value chain. The PRO must itself also be representative and must be composed of representatives from the entire value chain of their products.

South Africa has a relatively strong due process and public participation laws. These fair process requirements, such as the duty to subject certain documents and decisions to a public participation process, only apply to administrative action (as defined in the Promotion of Administrative Justice Act

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<sup>46</sup> Regulation 11(2)

<sup>47</sup> WWF 15 *Basic Principles: Establishing an effective extended producer responsibility (EPR) scheme for packaging* (2020)

<sup>48</sup> See the definition of PRO in the EPR Regulations.

<sup>49</sup> Packaging SA *Motivation to support changes to the Draft EPR Regulations*, letter to the Director General: Environmental Affairs, 26 August 2020.

<sup>50</sup> Regulation 11(2).

<sup>51</sup> Regulation 7(4)-(8).

<sup>52</sup> An undefined term, in the context of South Africa typically understood as the empowerment of black persons.

3 of 2000)<sup>53</sup> or to documents developed by private bodies which legislation specifically identifies as being subject to a public participation process. The EPR Scheme would most likely fall into the latter category as it would most probably not amount to administrative action (on the basis that it arguably does not amount to the exercise by the PRO of a public power or the performance of a public function) but is rather a document developed by a private body for purposes that would, in the ordinary course, not be considered public in nature. In this context, the EPR Regulations are unusual to some degree as they do not require the PRO to publish the EPR Scheme for public comment, prior to submission. In this context, whilst the Regulations require the inclusion of various sectors and identified persons, and mandate specific actions within the scheme in relation to them, they do not subject the development of the scheme to public consultation. As a consequence, interested parties, including the informal sector, Municipalities, small business and entrepreneurs and identified vulnerable groups do not have an opportunity to comment on the manner of their inclusion, or on the merits of the scheme.

Another key role-player is Municipalities. Under the South African Constitution, Municipalities have exclusive competence over “refuse removal, refuse dumps and solid waste disposal”, and by default over the final disposal of plastic waste.<sup>54</sup> In relation to domestic refuse collection, recycling facilities and related disposal, primary responsibility lies with local Municipalities. In recognition of this Constitutional function, the Waste Act requires Municipalities “as far as reasonably possible” to provide containers or receptacles for the collection of recyclable waste that are publicly accessible.<sup>55</sup> Municipalities also are responsible for developing local bylaws regarding various issues within their Constitutional competence, such as litter, recycling collection schemes and separation of wastes within households. Municipalities are also charged with developing local integrated waste management plans.<sup>56</sup> The latter are required to contain, amongst other things, an assessment of quantities and types of waste generated, targets for waste minimisation, reuse, recovery and recycling as well as priorities and objectives for waste management.<sup>57</sup> Further, Municipalities are charged with implementing the National Domestic Waste Collection Standards (National Standards),<sup>58</sup> to ensure a basic level of service provision and equitable waste collection services from households. The Standards provide that ‘separation at source must be encouraged [by Municipalities] in line with the relevant industry waste management plans’ and that ‘domestic waste must be separated at source (households) in Metropolitan and secondary cities’.<sup>59</sup> At present, Municipalities remove solid waste from households and some of the larger metropolitan

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<sup>53</sup> Being any decision taken, or any failure to take a decision, by— an organ of state, when— (a) exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect... It is believed that the action is private in nature as it is one which, to date, has not been exercised by most government authorities and which has been voluntarily implemented by PROs. It is recognised that plausible arguments to the contrary could be made, namely that it is a Municipal function that is being transferred to the PRO. This in turn relates to the debate around the locus of responsibility for recycling, discussed elsewhere in this draft.

<sup>54</sup> Schedule 5B of the South African Constitution.

<sup>55</sup> Section 23 of the Waste Act. See also GN 21 of 21 January 2011 Domestic Waste Collection Standards. Section 4.2. The Act does not define recyclables, however the National Domestic Waste Collection Standards refer to the need for recycling facilities for both “mainstream recyclables (paper, cardboard, newspapers, magazines, plastic, glass, metal cans and tin” as well as “non-mainstream recyclables (electronic waste, scrap metal, batteries, fluorescent lights, used oil etc.)”.

<sup>56</sup> Ibid. Section 11 and 12 of the Waste Act.

<sup>57</sup> Ibid. Sections 11 and 12 of the Waste Act.

<sup>58</sup> GN No. 21 of 21 January 2011 in Government Gazette 33935: Domestic Waste Collection Standards.

<sup>59</sup> The Standards require Municipalities to provide an enabling environment for households to recycle domestic waste, such as kerbside collection or drop off centres within easy reach. Where the Municipality does not provide kerbside collection, it must cooperate with the recycling sector to create drop off facilities for collection by the recycling sector. The Standards make express provision for plastics (together with ‘mainstream recyclables’) to either be collected at households or from communal collection points by the Municipality or service providers (section 4.1. and 4.2). This requirement is subject to the recognition that the nature of minimum service levels may differ between remote rural areas, medium density settlements and high density settlements (section 3).

Municipalities sub-contract recycling activities within their jurisdictions,<sup>60</sup> however the majority do not do so.

The Waste Act does not clearly delineate the responsibilities of producers and Municipalities, and the appropriate allocation of responsibility for recycling is currently an issue of discussion between industry and the Department. One possible interpretation of the Waste Act, the EPR Regulations and the National Standards if read harmoniously to avoid a conflict between its provisions and the Constitution,<sup>61</sup> together with accepted rules of legal interpretation,<sup>62</sup> is that they contemplate joint cooperation between industry and Municipalities. This cooperation may be exercised with Municipalities having general facilitating roles and responsibilities over recycling, such as the placement of containers/receptacles for the collection of recyclable waste and issuing guidelines to households or publishing bylaws on separation at source.<sup>63</sup> Producers would then have more defined roles and responsibilities in relation to the specific products they have been charged with exercising EPR over. For example, the relevant producers would be responsible for collection, sorting, recovery and recycling relating to the end of life products for which they have been assigned EPR functions.<sup>64</sup> This is one interpretation of the relevant laws, however it is accepted that in their present form, the exact role of Municipalities in the context of EPR schemes requires further clarification, and would need to be addressed in dialogue between producers, DEFF and Municipalities.

Further, and as described in the preceding paragraph, DEFF maintains an oversight function over the PRO. It is the repository of the information and audits which are required to be submitted under the EPR Regulations. The Department also undertakes performance reviews of the scheme every five years or from time to time, as appropriate.<sup>65</sup>

In addition to producers, PROs, the Department and Municipalities, there are a number of interested stakeholders, including NGOs and the wider public. In recognition of the need for multi-stakeholder dialogue, a Plastics Colloquium was held in 2019 with representatives from government, the private sector and civil society. Its purpose was to build more effective partnerships to enhance plastic waste management. Specifically, its objectives included the creation of a national platform for information exchange, identification of economic opportunities and the incorporation of the informal sector, deliberation on mechanisms to ensure Municipal waste management service delivery, and discussions on technologies for plastic waste management, and ultimately the achievement of a circular economy.<sup>66</sup> Six working groups were established during the Colloquium to take forward the delivery of the key decisions arising from the meeting. The mandate of the working groups is not directly related to the

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<sup>60</sup> A survey in 2019 of 14 Municipalities in the Western Cape Province indicated that 84% implemented separation at source systems or programmes. Western Cape Government Department of Environmental Affairs and Development Planning Directorate: Waste Management “A Guide to Separation of Waste At Source” (2019).

<sup>61</sup> It is a well-established canon of statutory construction that “every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature”. *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13 at 24 and *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* (CCT68/19) [2019] ZACC 47; 2020 (2) SA 325 (CC); (2020 (4) BCLR 495 (CC) at [38]

<sup>62</sup> Namely the rule *maxim generalia specialibus non derogant* - meaning that the general does not detract from the specific. It suggests that a court would prefer specific provisions over ones of general application where they are in conflict.

<sup>63</sup> Separation at source generally refers to the practice of setting aside post-consumer waste materials within households and businesses, from generally mixed wastes, by having separate bags, but can also include drop-offs and buy back centres. A survey conducted by the Western Cape Province indicated that a majority of Municipal waste managers felt that a municipality should not run the separation at source initiatives, but a Municipality should build the infrastructure required and contract out running the initiatives to well-qualified contractors. Most waste managers also thought that municipalities should play a facilitating role and make recyclables available to recyclers. See Western Cape Guideline above (note 60).

<sup>64</sup> As contemplated by Regulation 5(1)(n) of the EPR Regulations.

<sup>65</sup> Regulation 9.

<sup>66</sup> Presentation by the Minister of Environment, Forestry and Fisheries to the Portfolio Committee on Environment, Forestry and Fisheries “Implications of Meat Safety Act; DEFF on single use plastics, extended producer responsibility and recent gazetted legislation on plastics, with Minister” (13 October 2020) available at <https://pmg.org.za/committee-meeting/31176/>.

implementation of EPR in the country, but a number of the issues addressed will facilitate the roll out of EPR measures. These issues include improved access to, and development of, additional infrastructure, collection, transport, landfills, buy-back centers, and infrastructure supporting end-use markets.<sup>67</sup> Similar working group issues include improved consumer education and awareness in schools, the development of guidelines to increased recycled content in packaging, and the development of a Waste Integration Guideline for the informal sector that is being workshopped with Municipalities (as discussed below).<sup>68</sup> This initiative operates together and alongside a number of initiatives to improve plastic waste management in the country, such as the South African Plastics Pact,<sup>69</sup> and the South African Alliance to End Plastic Waste.

Lastly, and without, derogating from their important role, the informal sector, also referred to as “waste reclaimers” or “waste pickers” plays a critical role in the functioning of the overall system. Discussions have been ongoing about the integration of this sector into the economy, including the future EPR system. The manner in which Municipalities, PROs, waste reclaimers and households engage with this sector going forward, and align policies and schemes to adapt to existing as well as new practices and developments, will be critical for the healthy functioning of the future EPR plastics scheme. The issue of integration is explored more fully in the section that follows below.

## 4 The informal sector

### 4.1 Background

In contrast to many developed countries, there is a great number of waste reclaimers in the informal sector engaged in recovery and recycling activities in developing countries, estimated at some 20 million across the world.<sup>70</sup> South Africa is no exception and, having operated on a voluntary and informal basis for many decades, a large and active informal sector of approximately 62 000 waste reclaimers emerged.<sup>71</sup> Like many developing countries with fairly unsophisticated waste management systems, South African waste reclaimers perform an important function by removing and recovering materials of potential value, and can generate positive economic and environmental impacts by reducing the volume of waste-to-landfill, providing an alternative and free collection service and supporting reduced municipal collection and disposal costs.<sup>72</sup> It is estimated that the informal waste sector collects between 80 to 90% (by weight) of post-consumer paper and packaging,<sup>73</sup> which in 2014 saved municipalities between R309.2–R748.8 million in landfill airspace, at no cost.<sup>74</sup> The recycling achievements documented to date suggest that this active and growing informal sector has “been very successful in bridging the service and value chain in spite of little-to-no integration (of the informal sector) into municipal waste management services.”<sup>75</sup>

Work by the OECD suggests that there are significant potential benefits to be gained by incorporating the informal sector in EPR systems, being that it assists in the achievement of recovery targets,

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> See <https://www.saplásticospact.org.za>. This group was formed in 2019, to serve as a collaboration platform between government, businesses, local authorities, NGOs and citizens.

<sup>70</sup> OECD (above note 5).

<sup>71</sup> State of Waste Report 2018. Some estimate the number as approximately 215 000 (Godfrey, L., Muswema, A., Strydom, W. et al. (2017) ‘Co-operatives as a development mechanism to support job creation and sustainable waste management in South Africa’ *Sustain Sci* 12, 799.

<sup>72</sup> OECD (above note 5).

<sup>73</sup> Godfrey, L., Strydom, W., Phukubye, R. (2016) ‘Integrating the Informal Sector into the South African Waste and Recycling Economy in the Context of Extended Producer Responsibility’ CSIR Briefing Note: Pretoria, South Africa.

<sup>74</sup> Ibid. These estimates are for 2014.

<sup>75</sup> Godfrey, L. and Oelofse, S. (2017) ‘Historical Review of Waste Management and Recycling in South Africa’ *Resources* 6:5.

facilitates affordable and sustainable financing in middle-income countries, and provides informal work opportunities that can generate sustainable livelihoods and improved health and social protection.<sup>76</sup>

Although members of the South African informal waste sector make a significant contribution to the functioning of the system, their livelihoods remain marginal with many being homeless or informal settlement dwellers who regularly live on-or-adjacent-to the landfills that are the focus of their activities.<sup>77</sup> Work is challenging, in many instances dangerous and precarious by nature. Waste pickers are often distrusted by local residents and, according to the most recent National Waste Management Strategy (NWMS), there is little collaboration between waste reclaimers, the private sector and municipalities.<sup>78</sup> Their low incomes are solely derived from the sale of recovered and recycled materials and they are not compensated for their other services, including collection, environmental contributions, waste diversion, salvage, preparation, transport and material-supply to industry.<sup>79</sup> Rather, while waste reclaimers undertake casual repair, reuse and refurbishment activities, these usually operate in tandem with formalised private sector buy-back centres, which purchase materials from waste reclaimers for subsequent recycling. Payments are small and typically calculated by weight. There are also deep and unequal power relationships between reclaimers and other parties in the waste sector rooted in race, class, and occupation,<sup>80</sup> which further exacerbate the vulnerability of the informal sector.

Many informal sector participants are members of representative organisations, such as the African Reclaimers Organisation (ARO) and the South African Waste Pickers Association (SAWPA). ARO was initially formed in response to the City of Johannesburg's decision to contract with formal sector (private) companies to collect recyclables from high-income areas, which, according to ARO, displaced the income of informal waste reclaimers in those areas.<sup>81</sup> Despite the activities of such organisations, research by the Council for Scientific and Industrial Research (CSIR) suggests that the majority of the latter would prefer to avoid membership of formal cooperatives, with the same research suggesting that municipalities tend to elicit a preference for working with cooperatives over the informal sector.<sup>82</sup> In discussion, ARO noted action by the City of Johannesburg to prefer cooperatives using a tender procurement system, instead of using reclaimers, which resulted in public protests and law enforcement action by the police against reclaimers. This, in turn, is believed to have resulted in nine of eleven of the Municipality's contracts being cancelled.<sup>83</sup>

In the context of the above, the introduction of an EPR system, particularly one that promotes or entails formal collection networks, must be sensitive to existing power and economic circumstances. A new EPR system may introduce new risks to informal livelihoods and associated benefits of reclaimers and pickers, and necessitates careful consideration of how the system should be designed.<sup>84</sup> This section outlines the challenges experienced with integration to date; the regulatory and policy provisions for achieving integration, and traces the discussions surrounding this process. It does so in the wider context of the local and international research and guidance on this question.

## 4.2 Challenges with integration

Work recently conducted by the CSIR for the Department of Science and Innovation (formerly the Department of Science and Technology), has engaged extensively with the issue of waste reclaimer integration.<sup>85</sup> This research observes that discussions on waste reclaimer integration typically assume

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<sup>76</sup> OECD (above note 5).

<sup>77</sup> Department of Environment, Forestry and Fisheries *National Waste Management Strategy 2020*.

<sup>78</sup> Ibid.

<sup>79</sup> Samson, M. (2020) 'Building from what Exists: Integrating Reclaimers into our Understanding of the Recycling Economy' Briefing Note, available at <https://wasteroadmap.co.za/completed-projects/evidence-based-guidelines-to-integrate-waste-pickers/>.

<sup>80</sup> Ibid.

<sup>81</sup> See the ARO website: <https://www.facebook.com/notes/312058682682209/>. ARO is branded as "African" as it incorporates all reclaimers regardless of their nationality.

<sup>82</sup> Samson above note 79.

<sup>83</sup> Interview with Mr Luyanda Hlatshwayo on 17 December 2020.

<sup>84</sup> OECD above note 5.

<sup>85</sup> See generally the works completed by the CSIR for the Grant Project "Evidence based guidelines to integrate waste pickers into South African municipal waste management system" available at:



that reclaimers perform marginal work and that their integration into municipal waste management systems and the recycling value chain would require specific support.<sup>86</sup> By contrast to such discussions, the CSIR found that reclaimers are already deeply integrated via a well-functioning 'separation outside source' system, developed and implemented by reclaimers themselves, through which recyclables are salvaged and sold into the formal recycling economy.<sup>87</sup> In the CSIR's view, working with waste reclaimers warrants an approach that engages with and around the 'separation outside source' system rather than seeking to impose a new top-down separation at source system using official integration programmes that do not accommodate this model.

The CSIR's report documents the experiences of two municipalities that had attempted to integrate or engage with waste reclaimers, and identified various logistical and other gaps, including that municipalities lack necessary funding, appropriate targets and the relevant guidance, training, and/or support to design and implement the integration of informal waste reclaimers into the municipal waste management systems and the recycling value chain.<sup>88</sup> Among the CSIR's recommendations is the need to establish an enabling environment to address the identified logistical and other gaps. Further, they recommended that this integration should be supported by funds from industry. The CSIRs also noted that municipalities and industry, in varying degrees, work using a "charity" model based on the assumption that municipal officials and waste sector professionals should be the authors of integration projects. The model *inter alia* regards reclaimers as being in need of charitable support rather than being entitled to fair remuneration for the provision of necessary services, and characterises reclaimers as lacking the knowledge relevant to official recycling programmes, and who should not be involved in the decision-making process but should, rather, be compliant and appreciative participants whose integration into the formal system should be achieved using special projects and not systemic approaches.<sup>89</sup> In consequence, this approach not only left reclaimers feeling infantilised and denigrated, but it resulted in practical challenges with individual projects failing to have long-term impacts. Similarly a failure to include them in decision-making led to outcomes that did not always meet their immediate priorities, provided inadequate equipment or led to training which many felt did not assist their work.<sup>90</sup> Cooperatives were upheld as the only means for integration, but many reclaimers did not want to join them, nor were they adequately supported by municipalities and industry.<sup>91</sup> Research also suggests that informal waste cooperatives have a 91.8% failure rate mostly due to lack of access to materials and markets and the need for business development support.<sup>92</sup> The CSIR noted further that "separation at source activities" (within households) implemented in addition to reclaimers' "separation outside source" activities leads to reductions in reclaimers' income and the quality of their working conditions, and inhibits their role in the recycling economy while negatively impacting their relationships with municipal residents.<sup>93</sup>

By contrast to the prevailing situation on-the-ground the CSIR concluded that:

"integrated [separation at source] that is negotiated with reclaimers, includes them as equals in planning and oversight, builds on the strengths of [separation outsource], and pays reclaimers for service provision. While municipalities struggle to roll-out [separation at source], integrated [separation at source] can be implemented quite quickly by recognising reclaimers, supporting and paying them to collect recyclables, and promoting resident participation... Rather than integrating individual reclaimers into a wholly new [separation at source] system, formally planned [separation at source] and recycling

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<https://wasteroadmap.co.za/completed-projects/evidence-based-guidelines-to-integrate-waste-pickers/>.

See specifically Samson, M. (2020) 'Technical report: Integrating reclaimers into our understanding of the recycling economy - Synthesis Report'.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Godfrey et al above note 71.

<sup>93</sup> Ibid.

programmes must be integrated with the existing [separation outsource] system through a process of learning from, and negotiating with, reclaimers”<sup>94</sup>

This system, which tracks existing systems and flexibly adapts around them, is supported by reclaimers themselves. As noted above there is a preference amongst reclaimers to remain within a fluid organisational structure, duly supported by Municipalities, producers and PROs, as well as residents. At present a registration system is being developed by the CSIR to register all waste reclaimers, irrespective of their nationality, which would entitle them to obtain a card and potentially other benefits as a result of registration.

### 4.3 National policy and regulation

For many years South African waste reclaimers were regarded as a nuisance and national policy focused on eradicating them from landfills and from the streets.<sup>95</sup> In 2011, however, an important policy shift set the objective of creating decent work in the sector through “formalising the role of waste pickers and expanding the role of [small and medium sized enterprises/SMEs] and cooperatives in waste management.”<sup>96</sup> Since then, discussions have focused on waste reclaimer “integration” although this is often based on the abovementioned assumption that reclaimers require support to be integrated into municipal waste management systems and the recycling value chain.<sup>97</sup>

The most recently revised National Waste Management Strategy 2020 (NWMS) echoes this sentiment but with increased recognition of the role of waste reclaimers in the circular economy and national efforts to reduce waste to landfill. The NWMS underscores the need for separation at source and highlights the scope for a variety of different models and tools for engaging the informal sector to achieve such separation, including “strengthening and expanding the role of waste pickers e.g. through integrated separation at source, in the waste management system and recycling economy, and supporting markets for source separated recyclables.”<sup>98</sup> To achieve this, the NWMS envisages the development and implementation of “innovative models through EPR and other approaches and tools” to engage the informal sector to achieve separation at source,<sup>99</sup> and contemplates the development of [Waste Picker] Integration Programmes (WPIPs) in all metropolitan municipalities and secondary cities, and the creation of 500 new jobs/livelihoods in the informal sector.<sup>100</sup> Under the NWMS, producers acting in terms of EPR schemes are identified as one of the actors who, together with the government and waste reclaimer associations, will achieve these objectives.<sup>101</sup> The NWMS specifically identifies plans by industry as an important vehicle in ensuring waste reclaimers are recognised and accommodated,<sup>102</sup> and underscores the opportunity for municipal facilitation of entrepreneurship and job creation through formalisation of the informal sector including by incorporating cooperatives into existing collection services.

Building on the above, a national Waste Picker Integration Guideline (Guideline) was developed by the DEFF, in 2019. The Guideline defines integration as:

“... the creation of an official recycling system that values and improves the present role of waste pickers, builds on the strengths of their informal system to collect and revalue materials, and includes waste pickers as key partners in its design, implementation, evaluation and revision”.

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<sup>94</sup> Ibid.

<sup>95</sup> Samson above note 79.

<sup>96</sup> Department of Environmental Affairs *National Waste Management Strategy* (2011)

<sup>97</sup> Samson above note 85.

<sup>98</sup> Department of Environment, Forestry and Fisheries *National Waste Management Strategy* (2020).

<sup>99</sup> Ibid.

<sup>100</sup> Outcome 2 of the National Waste Management Strategy 2020.

<sup>101</sup> Specifically the DEFF, local government, the South African Local Government Association, the Department of Cooperative Governance and Traditional Affairs

<sup>102</sup> NWMS at 54.

To this end it recognises that separation at source can be implemented by multiple actors, including waste reclaimers using both a formal and informal approach, and encourages the use of informal networks, as well as waste reclaimer cooperatives and contractual engagements with companies that employ waste reclaimers, i.e., a balanced approach to all forms. This accords with OECD recommendations that EPR systems need to find ways for informal operators to work with, rather than against, formal waste management systems.<sup>103</sup> The OECD notes that there may not be a one size fits all approach of either formalisation or total informalisation, and that the best-functioning systems tend to be those which embrace an open strategy that includes both informal collectors and the existing [private] value chain enterprises in the system.<sup>104</sup> In the case of using the existing informal sector, the Guideline contemplates the extension of existing waste reclaimer networks to grow from what exists. In the case of cooperatives, it recognises that formal contracts (instead of oral agreements) should be used, and that these initiatives need to be adequately compensated, allowed access to materials in high income areas, and supported in order to function. Lastly, the Guideline makes recommendations in relation to contracting, both in terms of existing contracts and new contracts with the private sector. With regard to existing contracts, it encourages the employment of reclaimers and payment of a collection fee and other compensation for their work, stating that these should pursue the most cost efficient, inclusive option and there should be full involvement of waste reclaimers and their organisations in the area, again with the payment of compensation for their work.

The Guideline provides more detail on the WPIPs contemplated in the NWMS as a way of kickstarting the integration process, and proposes a number of measures including:

- the education of staff on the role of waste reclaimers,
- the creation of a team for engagements with reclaimers together with regular meetings and exchange of information with them,
- support for their initiatives to self-organise,
- facilitation of access to recyclable materials,
- provision of access to basic infrastructure including places to sort and ablution facilities,
- enquiries as to their needs and agreement on how these will be met through ongoing engagements,
- registration of reclaimers within the municipality without discriminating on grounds of nationality and legal status, and payment to them for planning and implementing their own registration process,
- joint planning with them on how to develop a WPIP. Through partnerships with waste pickers, these plans are intended to be designed to achieve multiple objectives, but include the development of locally relevant (i.e. place specific) and cost effective recycling programmes aligned with waste picker integration, that ultimately benefit the livelihoods of waste pickers.
- Creation of an enabling environment including the alignment of bylaws and other regulations to implement the WPIP; ensuring the team has necessary skills; staff and public education initiatives on the role of waste pickers; and securing funding for implementation.
- Related to this is the need to institutionalise agreed upon actions, through the inclusion of the WPIP into other planning documents such as Municipal Integrated Development Plans, the creation of key performance indicators to ensure staff are incentivised to implement the plans, the creation of a permanent waste picker integration platform, and ultimately finalise, adopt and implement the WPIP, with monitoring and revision thereof.

The approach of having localised WPIPs developed for distinct geographic areas as a fundamental tool for integration, offers a measure of flexibility, as it encourages local dialogue, tailored solutions and flexible approaches to integration, working with what is already in place but also seeking to improve challenges and impediments to integration. This accommodating approach also allows for the case-by-

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<sup>103</sup> OECD above note 5.

<sup>104</sup> Ibid.

case implementation of the various distinct pilot programmes currently underway between individual producers, certain Municipalities, ARO and SAWPA. As these are not uniform in their approach, a flexible integrated planning process that includes all relevant actors potentially is more supportive of these individual initiatives and allows them to be scaled up where they achieve a level of traction. The design of these IWMPs and their implementation, however, would also need to take account of and be intimately aligned with the EPR scheme, as approved under the EPR Regulations.

In this regard, it is interesting that the EPR Regulations locate the duty to incorporate the waste reclaimer sector firmly within the developers of the EPR scheme, by requiring producers (and presumably also PROs) to “contract with the existing downstream value chain before outsourcing”, and imposing a legal duty to “integrate informal waste collectors, reclaimers and pickers into the post-consumer collection value chain”.<sup>105</sup> Not only is there a legal duty to “integrate” but producers must pay a “living wage, but not below minimum wage, to all registered informal waste collectors, reclaimers and pickers.”<sup>106</sup> This obligation is also echoed elsewhere in the Regulations where PRO schemes must include requirements for “decent work creation” and the payment of a “living wage” for activities performed “on behalf of” the producers.<sup>107</sup> The term living wage is not defined, but it is commonly understood as a wage that is “high enough to maintain a normal standard of living”.<sup>108</sup> Decent work is defined in the Regulations as work “that is productive and delivers a fair income, security in the workplace and social protection, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.” The scheme must contain requirements for “decent work creation”, and in the annual external performance report, the number of “decent jobs created” must be documented.<sup>109</sup> As such, the Regulations appear to frame producers and the schemes created by PROs as the architecture upon which the informal sector will be “integrated” into the recycling value chain and it appears to make producers the primary locus of such integration, at least in respect of the products for which they bear EPR. In this context it is notable that the EPR Regulations make no mention of WPIPs or engagements with Municipalities on their development. Going forward, and as noted above, the EPR scheme will need to be aligned with and work alongside the proposed WPIPs, to ensure that the respective legal requirements are satisfied and that the WPIPs support rather than undermine the approach of the EPR scheme.

Producer organisations have voiced some concern over the current formulation of the Regulations.<sup>110</sup> They cite a lack of certainty on the number of informal collectors and a lack of clarity on how an informal collector would be “classified” in terms of an employee/employer contract. Rather they propose additional dialogue with the informal sector on this score. Potentially as an alternative, they propose first rather registering reclaimers through an application system via existing organisations such as ARO and SAWPA. Using this platform, there may be various entry points for mentorship programmes should the reclaimer wish to engage on a more formal level. This registration platform would also help clarify the number of reclaimers and where they are located. They also note a risk overlap as the Regulations contemplate multiple EPR schemes under different PROs, each of which will be attempting to integrate the informal sector. They also note the need for additional dialogue taking into account other projects that have been proposed to Government via other Departments, such as the pending waste reclaimer registration project under development by the CSIR. For this reason PROs propose that the requirements for waste reclaimer integration be left out of the Regulations, as, in their view, it is fundamental and included in the negotiations of the implementation of an EPR scheme and would be context specific, i.e. partnerships with local Municipalities, informal sector as well as the private sector. Some commentators also voiced concern that the Regulations were too specific on “how” integration should be achieved (namely payment of a living wage) instead of leaving the issue up to discussions with stakeholders.

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<sup>105</sup> Regulation 5(1)(m) and (r).

<sup>106</sup> Regulation 5(1)(v).

<sup>107</sup> Regulation 6(9).

<sup>108</sup> Oxford English Dictionary.

<sup>109</sup> Regulation 8(4).

<sup>110</sup> Packaging SA above note 50, Annexure A. Comments on the EPR Draft Regulations submitted on 27 July 2020.

In discussion, waste reclaimer representative organisation ARO supports the legal requirement to pay a living wage, or at least compensation for services offered, in addition to payment for materials on a per kg basis, citing a need for a recognition of services rendered and for financial protections, particularly during times of stress, such as during the most recent lockdown because of the COVID 19 pandemic.

Based on the above, whilst much research, policy guidance and legislation has been developed on the issue of waste reclaimer integration, there remain a number of issues requiring further dialogue and clarification between stakeholders prior to there being acceptance, buy-in and uptake of the EPR Regulations. Such dialogue will continue through the course of 2021 on a number of issues, and will likely entail a postponement of the submission timeframes for the EPR schemes.

## 5 Behavioural change

Given the infancy of the EPR Regulations and the fact that a formal plastics EPR scheme thereunder is not yet in place, determinations on the extent to which the scheme has influenced behavioural changes across society would be premature. It is useful however to reflect on the extent to which the present voluntary EPR system implemented by PROs has influenced behaviour and existing attitudes towards EPR and informal sector integration, to contextualise how behaviour changes may evolve in future.

With regard to existing consumer attitudes, whilst a measure of recycling success has been achieved by PROs and relatively high recycling input rates, it appears that this is largely as a result of the activities of South Africa's large and productive informal sector, and private sector investments in recycling infrastructure.<sup>111</sup> According to the Second National Household Waste Recycling Behaviour Study by the Institute of Waste Management of Southern Africa,<sup>112</sup> Surveys from 2010 and 2015 demonstrated that an increasing number of households are starting to recycle their household waste, although still at a disappointingly slower pace than envisaged.<sup>113</sup> In this study, the number of households that show dedicated recycling activity (recycling a fair number of recyclables on a frequent basis) increased from 4.0% in 2010 to 7.2% in 2015.<sup>114</sup> Little appears to have changed in the intervening period since this survey. A 2019 survey of 1000 participants by PETCO, a PRO for PET plastics concluded that:

“Most consumers interviewed, across all demographics and age-groups, were simply not motivated to start recycling...Even if they did want to start recycling, they didn't know how to start, what to do with their recyclables, where to take them, or whether recycling was worthwhile or not [not knowing what is done with the post-consumer recyclables].”<sup>115</sup>

Different economic groups were found to be differently motivated to recycle. Within low-income households respondents said they first became aware of recycling from waste collectors and friends and family. Major impediments included a lack of storage space at home and the absence of “easily accessible” recycling depots. For middle-and-high income groups the drivers to recycle were environmental in the majority, although job creation was also a motivator.<sup>116</sup> The survey concluded that there was a considerable need for recycling education in order to reverse the trend. This need is also recognised in the NWMS which recognises the lack of public awareness and includes as an objective the development of a national public awareness campaign on the benefits of recycling, EPR programmes, and where possible, economic incentives.<sup>117</sup> This initiative has been taken up as part of

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<sup>111</sup> Strydom, W. and L Godfrey, L. (2016) 'Household waste recycling behaviour in South Africa – has there been progress in the last 5 years?' Proceedings of the 23rd WasteCon Conference 17-21 October 2016, Emperors Palace, Johannesburg, South Africa.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> See the survey available at: <https://petco.co.za/new-survey-shows-majority-south-africans-apathetic-recycling/>

<sup>116</sup> Ibid.

<sup>117</sup> NWMS 2020.

the Department's "Good Green Deeds" campaign.<sup>118</sup> Interestingly the EPR Regulations do not contain a requirement that producers or PROs themselves develop and implement awareness campaigns, although they do require the budget of the PRO to make provision for "costs for public communication and awareness- raising (on waste prevention, litter reduction, separate collection, etc.)"<sup>119</sup>

Another important behavioural shift that will hopefully emerge during the course of EPR implementation is increased social integration of waste reclaimers. According to Dr Melanie Samson, who has worked extensively on this issue, a vital part of the integration of this sector is participation in decision making and recognition of their services. This social integration necessitates a transformation of how waste reclaimers are seen, appreciated and valued by residents, industry and government officials.<sup>120</sup> Some interesting pilot projects have achieved measures of success on this front. For example, pilots in the City of Johannesburg and Metsimaholo Municipality demonstrated that the provision of uniforms and name tags to reclaimers improved residents' opinions interactions,<sup>121</sup> although this led to a deterioration of residents' relationships with reclaimers without uniforms thus demonstrating a need for inclusivity in integration initiatives. Research, however, suggested that simply educating residents on the environmental need for recycling and how to separate recyclables was insufficient, given the range of positions they tended to adopt in relation to recycling that were linked to their perspectives on broader social, political, economic, and development issues.<sup>122</sup> In this context, the research recommended that residents be engaged with directly in the development of separation at source policies and programmes to garner their support for the approach adopted. During this process residents should be educated on the work of reclaimers, their contributions, the importance of payment for services and the need to value and appreciate reclaimers regardless of how they are dressed or where they work at that time.<sup>123</sup>

Ideally all stakeholders, including DEFF, Municipalities, and reclaimer organisations should invest in such educational initiatives, without the actions of one necessarily excluding the other. This appears to be taking place at present, with for example, relatively successful pilot campaigns being led by ARO in schools, and directly with residents, focusing on awareness raising, addressing stigmatisation and creating respect. Equally, the intention of the Guidelines to promote awareness of officials within Municipalities of the role and importance of waste reclaimers and the informal economy will also help foster a change in attitudes and behaviour.

## 6 Outcomes

The EPR Regulations contain detailed monitoring and reporting requirements and it will be interesting to track their effectiveness over the coming years as this information becomes available. PROs are required to monitor a range of things including the extent to which they have achieved their targets, as well as "impacts on the environment". It is unclear what the latter entails but potentially this will include more detailed information on the extent to which the scheme is positively or negatively affecting plastic pollution rates, including marine pollution.

Much, however, hangs on the success of the EPR Regulations themselves. As the discussion above indicates, industry concerns with the Regulations remain, including regarding how their content will impact the success of the EPR Scheme, once implemented. A primary issue expressed by industry relates to the wide definition of "producer" which (in industry's view) should encompass the notion of the 'brand-owner' (in the case of imported products, the Importer or Licensed Agent), given that this entity has the greatest influence over packaging design. If the definition is too wide there is a concern within industry that there will be too many free riders in the system and the effectiveness of the EPR

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<sup>118</sup> See <https://www.gov.za/goodgreendeeds>

<sup>119</sup> Regulation 7(4)(g).

<sup>120</sup> Groundup "Reconsidering South Africa's Approach to Waste Pickers" 22 February 2019 <https://www.groundup.org.za/article/reconsidering-south-africas-approach-waste-pickers/>

<sup>121</sup> Samson above note 85.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

scheme would be undermined.<sup>124</sup> Similarly the effectiveness of the Scheme will also turn on the ambitiousness of the targets within the EPR Regulations and the extent to which they are achieved. At present, industry is in discussion with the Department regarding these targets and, ultimately, any revision thereto will have a material impact on the successfulness of the EPR scheme and recycling rates within the country.

## 7 Conclusion and recommendations

South Africa has a relatively comprehensive policy and legal regime for the implementation of EPR. It is now ripe for implementation, and the recent gazetting of the EPR Notice and EPR Regulations heralds an important moment for nationally legislated EPR. The EPR Regulations benefit from the existence of a healthy and well-established voluntary EPR sector for plastic waste, and their application will build on the gains already achieved in this sector. One of the major benefits of the Regulations is that they bring clarity and certainty as to the targets for design, re-use, collection and recycling, and they are extensive in their guidance as to what the roles and responsibilities of PROs and producers are. They are also a welcomed legislative step as some 11 years have passed since the promulgation of the Waste Act without the application of any EPR measures therein.

As the analysis above suggests, however, a number of issues and points of clarification remain the subject of discussion between DEFF and producers, and it is likely that implementation may be marginally delayed into 2021 in order for these to be resolved. This includes concerns around the definition of producers, the locus of responsibility between Municipalities and producers, and amongst other issues, the legislated responsibilities placed on producers regarding waste reclaimer integration. The penalty provisions between Section 67(1)(1) of the Waste Act and the EPR Notice, and those specified in the EPR Regulations also need to be revisited and aligned. With that in mind, ongoing discussions inclusive of all stakeholders in the sector remain of utmost priority to ensure that there is buy-in and support for the Regulations. In this context, although not required by the EPR Regulations, it is recommended that PROs for the plastic sector voluntarily engage in extensive stakeholder engagement and comment in the preparation and submission of their EPR scheme and related plans required under the EPR Regulations, including with waste reclaimer organisations, NGOs, academia, and the wider public.

In respect of waste reclaimers integration, South Africa has conducted extensive research that is both context specific and also draws on international lessons. Considerable efforts have been made to develop a Guideline to support all actors within the sector, and to build from what exists. The application of this Guideline and the proposals for WPIP within each Municipality will require human capacity, funds and stakeholder collaboration to achieve success, and adequate financing and support of these initiatives are crucial to their success. As noted above, it will also be important for EPR schemes to be aligned with and work alongside the proposed WPIPs, to ensure that the respective legal requirements are satisfied and that the WPIPs support rather than undermine the approach of the EPR scheme. In this context, it will be important for all stakeholders to continue working collaboratively to ensure that this marginalised sector is supported and that the work opportunity and environmental benefits to be gained by their continued participation are realised.

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<sup>124</sup> Free riders are understood by industry as meaning Producers or members of the Obligated Industry that do not fulfil their legal obligations, either by not joining a PRO, by not reporting all their consumption or sale of Controlled Products to PROs or by not contributing fully to a PRO of which they are a member.

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