

## Are you dealing with “waste”?

Do you deal with matter in any state or form, whether useful or useless, that is sent forth or removed from one place to another? If so, you may be dealing with “waste” for the purposes of the *Environmental Protection Act* and the *Waste Avoidance and Resource Recovery Act*.

### Local Government Update

In *City of Fremantle v The Chief Executive Officer of the Department of Environment and Conservation* [2013] WASAT 24, the State Administrative Tribunal has adopted a very broad interpretation of “waste”, which may have significant implications for the application of provisions in these Acts.

#### Background

As part of the resolution of a long-running issue, the City of Fremantle entered into an agreement with Moltoni No.1 Pty Ltd, under which Moltoni was to provide approximately 90,000m<sup>3</sup> of fill to stabilise an embankment between land owned by Moltoni and land owned by the City (“**Embankment Works**”).

The City’s land happened to be a licenced landfill site and the embankment was located across the boundary of the two properties, with the fill being placed on the City’s land.

The Embankment Works were carried out in accordance with a detailed engineering specification and under planning approvals granted by the City.

During the carrying out of the Embankment Works the City, as licensee of the landfill site, submitted quarterly reports to the Department of Environment and Conservation (“**DEC**”) as required under the *Waste Avoidance and Resource Recovery Act* and the *Waste Avoidance and Resources Recovery Levy Act* (“**Waste Acts**”) regarding payment of the landfill levy provided for in the Waste Acts. As part of the quarterly reports, the City notified the DEC of the material being used for the Embankment Works, but excluded this from the calculation of the amount of the levy to be paid on the basis that the material was not “waste” being disposed of to landfill.

#### Who does this affect?

- Local Governments
- Landfill operators

#### Article Highlights

- A recent decision by the State Administrative Tribunal concerning the definition of the term ‘waste’ could have implications on business operations for both local governments and landfill operators.



After the conclusion of the Embankment Works, the DEC sought payment of the landfill levy from the City in respect of the 90,000m<sup>3</sup> of material used for the Embankment Works – an amount in excess of \$1M.

While not agreeing that the material attracted the levy, the City applied for an exemption from the landfill levy under the provisions of the Waste Acts. This was refused by the DEC for several reasons, including the DEC's view that an exemption from the landfill levy could not be granted retrospectively (ie. after the end of the return period and the date upon which the levy would be due and payable).

The City applied to the State Administrative Tribunal to review the DEC's decision.

### **Preliminary issues as the scope of "waste"**

The parties identified three preliminary issues which were the subject of the Tribunal's decision.

The issue of most interest is whether the material used for the Embankment Works was "waste" as that term is defined in the Waste Acts, which provides that *"waste includes matter whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment"*.

Importantly, the term "discharged into the environment" is defined in the *Environmental Protection Act ("EP Act")* to include *"depositing material ... onto or into land, water, the atmosphere or living things"* – and section 3(2) of the Waste Acts provides that a term used in the Waste Acts has the same meaning as its meaning in the EP Act, unless the contrary intention appears.

The Tribunal did not accept various submissions on behalf of the City seeking to limit the apparently broad scope of the definition of "waste" in the Waste Acts, having regard to the provisions of the EP Act and the ordinary and natural meaning of the term "waste".

The Tribunal instead found that the term "discharged into the environment" when used in the Waste Acts has a different meaning to the same term as defined in the EP Act, despite the relationship between the two Acts and the provisions of section 3(2) of the Waste Acts. The Tribunal found that the term "discharged into the environment" in the definition of "waste" in the Waste Acts *"involves the ordinary meaning of the verb 'to discharge', namely, 'to remove, send forth or get rid of' any material into the environment, and is not intended to be satisfied merely by depositing matter onto or into land, water, the atmosphere or living things"* (at [32]).

### **Contact**



**Julius Skinner**

PARTNER

t: +61 8 9426 6874

e: [j Skinner@jacmac.com.au](mailto:j Skinner@jacmac.com.au)



**Simon Di Rosso**

ASSOCIATE

t: +61 8 9426 6820

e: [SDiRosso@jacmac.com.au](mailto:SDiRosso@jacmac.com.au)



Although it appears that the Tribunal might have been narrowing the scope of the term “discharge” from the definition in the EP Act, the Tribunal went on to find that the material in question, although only brought to the City’s landfill site for the purpose of being used for the Embankment Works, in accordance with the engineering specifications and planning approvals issued for the Embankment Works, *“was discharged, that is removed, sent forth or gotten rid of, into the environment, when it was dispatched from its source site”*. As such, it is difficult to see how the Tribunal’s ordinary meaning of the term “discharge” differs in practice from the meaning set out in the EP Act.

The Tribunal also concluded that the definition of “waste” in the Waste Acts enlarges or extends the ordinary and natural meaning of the term *“to include all matter, in whatever state, and whether useful or useless, that is removed, sent forth or gotten rid of into the environment”* (at [34] and [36]) – and the fill used for the Embankment Works was therefore “waste” in accordance with the expanded definition in the Waste Acts (at [38]).

Further, the Tribunal held that because of its findings referred to above regarding the definition of the term “waste” in the Waste Acts, it was unnecessary to determine whether the material used for the Embankment Works was waste according to any ordinary and natural meaning of the term. In other words, the Tribunal found that the definition in the Waste Acts enlarges the meaning of the term so that anything falling within the extended meaning is “waste” for the purposes of the Waste Acts, even if it would not be waste within any ordinary and natural meaning of the term.

### **Implications of the Tribunal’s decision**

For reasons noted below, the Tribunal’s decision on the definition of “waste” in the Waste Acts did not effect the final outcome of the matter, but the implications of such a broad interpretation of the term “waste”, even if it only applies to the Waste Acts, are significant.

The decision is directly relevant to all operators of landfill or other waste disposal facilities, insofar as it deals with the application of the landfill levy in circumstances where it might not otherwise be contemplated.

The Waste Acts also deal with various matters other than the payment of the landfill levy and the Tribunal’s decision may have unintended consequences for those matters.



More importantly, the definition of "waste" in the Waste Acts is identical to the definition in the EP Act. Although the Tribunal sought to distinguish the definitions in the two Acts by different interpretations of the term "discharged into the environment", in practice as noted above there appears to be little scope for different application of the definitions. The Tribunal's interpretation of "waste" may have very serious consequences indeed if applied to the EP Act and the various Regulations made under it. Alternatively, it appears that the same term, although defined identically in two closely-related Acts, may have different meanings in the two Acts – which itself may lead to uncertainty and difficulties.

Finally, the Tribunal's decision appears to depart from the approach to the determination of whether material is "waste" (at least in the ordinary and natural meaning of the term) in a series of decisions in other jurisdictions, culminating in **Environment Protection Authority v Terrace Earthmoving Pty Ltd & Page** [2012] NSWLEC 216.

### **Final outcome**

As indicated above, the Tribunal's decision that the material used for the Embankment Works was "waste" under the Waste Acts did not effect the final outcome of the matter. In answer to one of the other preliminary issues, the Tribunal determined that an exemption from the landfill levy can be granted retrospectively. In light of this decision, the DEC agreed to orders granting the exemption sought by the City. As such, the landfill levy was ultimately not payable in respect of the material used for the Embankment Works.

*Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.*

### **Contact Us**

**t** +61 8 9426 6611 **f** +61 8 9321 2002 **e** [jacmac@jacmac.com.au](mailto:jacmac@jacmac.com.au)

**a** Level 25, 140 St Georges Terrace, Perth, Western Australia 6000  
GPO Box M971, Perth, Western Australia 6843

**[www.jacmac.com.au](http://www.jacmac.com.au)**