

Supreme Court determines that landfill levy applies to clean fill

By Andrew Roberts

Local government operators of landfill sites are affected by a recent decision of the Supreme Court of Western Australia in *Eclipse Resources Pty Ltd v The State of Western Australia* [No.4] [2016] WASC 62, which confirmed that a statutory levy on 'waste' deposited at landfill applies to clean fill. Clean fill has to date typically been accepted by landfill operators without charge for use to cover and compact waste as an integral part of land fill operations. For this reason, local governments had been reluctant to acceptance that the levy on "waste" applied to clean fill. The Department of Environmental Regulation (DER), which administers the levy has also indicated that a statutory penalty of 20% interest per annum will be applied where there is any instances of non-payment of the levy.

Legal Framework

Under section 4 of the *Waste Avoidance and Resource Recovery Levy Act 2008* (WA) the Governor may on the recommendation Minister make regulations under the *Waste Avoidance and Resource Recovery Act 2007* prescribing a levy to be payable in respect of 'waste' received at 'disposal premises'. Disposal premises include landfill sites licensed under section 56 of the *Environmental Protection Act 1986* (**EP Act**), which are frequently operated by local governments. A levy was prescribed under the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (**Levy Regulations**), which applied the levy to all waste received at landfill premises on or after 1 July 2008.

The definition of waste under section 3 of the *Waste Avoidance and Resource Recovery Levy Act* (WA) 2008 includes '*liquids, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or prescribed by the regulations to be waste*'. The definition is generally worded and does not expressly include or exclude clean fill.

Regulation 14(1) of the *Levy Regulations* requires that a quarterly levy is paid to the DER no later than 28 days after the end of each return period and the calculation is based on records of waste received maintained by the Licensee. A significant penalty of 20% per annum on an unpaid levy is also imposed by section 76 of the *Waste Avoidance and Resource Recovery Act 2007*.

Under reg. 5 of the *Levy Regulations* a licensee may apply for an exemption to waste received at a licensed landfill in certain prescribed situations, which include clean fill used as 'final cover' and waste that is not disposed of to landfill but is collected and stored at a licensed landfill for reuse, reprocessing, recycling or use in energy recovery.

Summary of decision

In *Eclipse Resources Pty Ltd v The State of Western Australia* [No.4] [2016] WASC 62, *Eclipse Resources Pty Ltd* (*Eclipse*) operated an 'integrated business involving sequential land use and resource recovery operations' (at [53]). Though many

aspects of the company's operations were canvassed in the case, the case principally focused on Eclipse's receipt of materials (including clean fill) from third parties, which were compacted into voids it had quarried to abstract raw materials, or for other parties. To fill the voids, Eclipse only accepted materials that it considered to be geotechnically and environmentally fit for the later redevelopment of the land (at [54]). Subject to limited exceptions, the company expressly rejected materials it considered unsuitable for any of its purposes and only agreed to take materials from third parties if they could be re-used, recycled, or altered to produce resalable or reusable fill or other product. While Eclipse was prescriptive in the materials it accepted, the materials were nonetheless unwanted by the third parties delivering them and there was no evidence that Eclipse paid for any of the material (at [75]).

Eclipse claimed that in the context of its overall operations (being guided by principles of sustainability) the materials it received were not 'waste' and were in fact clean fill which represented a valuable resource for filling land. Further, Eclipse submitted that even if the materials were found to be waste, they were not 'accepted for burial' within the meaning of 'received for disposal'. The State submitted, and the Court agreed, that the issue was a question of construction of the legislation, particularly the proper construction of 'waste', 'accepted for burial' and 'disposed of to Landfill'.

In his decision, Justice Beech noted that reg. 5(2) of the Levy Regulations clearly contemplated that 'clean fill' was waste for the purposes of the levy being imposed. In this respect, regulation 5(1)(a) refers to the 'following waste' and goes on to refer to clean fill only being an exempt waste, where it is used as final cover, to a depth of 500 millimetres. His Honour also emphasised that the recipient's intentions after receipt of the clean fill, provided it is buried, are immaterial. It was sufficient that the material was unwanted by or excess to the needs of the source of the material. His Honour summarised the position in the following terms:

- In the context of 'waste received' and 'waste accepted for burial', 'waste' is any material that is unwanted by or excess to the needs of the source of that material.
- Clean fill, including sand and soil ... received from a source for whom they are unwanted, are waste.
- Material that is received with the intention that it will be or is likely to be put into the ground and buried is 'accepted for burial'.
- That applies equally to sand and soil.
- In the context of 'waste disposed of to landfill', whether material is waste is not determined by reference to whether it is excess to the requirements of the licensee who is said to be disposing of it. Material that was waste when received will be waste in this context, unless (perhaps) it has been substantially transformed.
- Any material, including sand or soil, clean fill ... that is placed into the ground and buried at a licensed landfill is 'waste disposed of to landfill'.
- The intention with which material is buried does not control or influence whether material is 'waste disposed of to landfill'.

With no focus on the recipient's intentions with the materials received, it is clear the interpretation is mechanical. If

materials are received and buried, whether or not they serve an additional purpose or have a future plan (such as future exhumation), those materials will be defined as waste, and be subject to the levy accordingly.

The focus of the reasoning in this case, as in the previous State Administrative Tribunal matter of *City of Fremantle v The Chief Executive Officer of the Department of Environment and Conservation* [2013] WASAT 24, was thus on the receipt and disposal of materials at the time of acceptance, rather than the quality or present or intended future use of those materials. This interpretation expands the ordinary meaning of waste to any material accepted for burial, which is unwanted by the party disposing of it. Justice Beech agreed that his interpretation of the myriad of legislation may have unintended results for parties receiving materials as fill.¹ That uncertainty will only be resolved by changes to the regulations and legislation, or further litigation on the matter.

As a result of the decision, materials received by Eclipse from July 2008 through to September 2014 were found to be the subject of a landfill levy in excess of \$10 million (at [523]). That levy, coupled with the high penalty rate, resulted in Eclipse being liable for tens of millions of dollars and the company has subsequently suspended its operations.

Implications

Some landfill operators may have previously been operating on the assumption that clean fill materials received and used for covering and compacting waste (not being final cover) was not 'waste' to which the levy applied. The judgment of Justice Beech, has now confirmed (subject to the appeal result) that clean fill used as daily cover does attract the levy. Landfill operators that do not pay the levy may be audited and further made subject to a significant statutory penalty of 20% per annum, which DER has demonstrated it is willing to pursue.

All materials accepted for burial at a licensed landfill site, including clean fill used as daily cover, should be included for the purpose of levy calculations unless an exemption is established. Given the high penalty rates, seeking an exemption proactively rather than retrospectively will always be preferable. Local governments operating landfill sites can only rely on the top 500 millimetres of clean fill used as final cover being exempt and the remainder of all materials received and buried, will attract the levy.

For further information in regard to the above, contact Alyce Jeffries on 9383 3133 or ajeffries@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.