



Law Council
OF AUSTRALIA

Legal Practice Section

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Committee Secretary
Senate Standing Committees on
Environment and Communications
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Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Sir/Madam

Submission on the Inquiry into Waste and Recycling Industry in Australia

This submission has been prepared by the Australian Environmental and Planning Law Group (AEPLG) of the Law Council's Legal Practice Section. The AEPLG welcomes the opportunity to provide comments on Inquiry into Waste and Recycling Industry in Australia.

Overview of Submission

1. A rapid increase to the landfill levy in Western Australia has resulted in the stockpiling of waste in the Perth metropolitan area.
2. The Western Australia (WA) Department of Water and Environmental Regulation (**DWER**) has put on hold its policy framework on the use of waste-derived materials following a recent decision of the WA Court of Appeal relating to the application of the landfill levy to a waste recycler.
3. DWER's proposed reform of the waste regime is unlikely to encourage the use of waste-derived materials in WA. A consistent, national approach is required to support the Australian waste recycling industry.
4. Inconsistency in landfill levies and over-aggressive waste management regulations can create increases in illegal and environmentally irresponsible activities. A consistent, national approach would reduce such incentives.
5. An approach lead by the federal government should reinforce the polluter pays principle in waste management and especially with respect to illegal dumping.
6. In designing a national approach to waste management, the government should ensure that the standards and obligations in such an approach can be easily integrated with State land use planning policies and frameworks.

The role of landfill levies in determining the end destination of material, including the hypothecation of collected levies for enforcement and waste diversion purposes

7. In WA, a landfill levy is imposed by the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) (**Levy Regulations**) and the *Waste Avoidance and Resource Recovery Levy Act 2007* (**Levy Act**). It is payable in respect of all waste received at landfill premises in the Perth metropolitan region, that is, licensed landfills under the *Environmental Protection Regulations 1987* (WA) (**EP Regulations**), or premises that are required to be licensed as landfills whether or not a licence is held.
8. Licensed landfills are defined in the Levy Regulations to mean premises that are licensed under category 63, 64, or 65 of schedule 1 to the EP Regulations. That is, Class I inert landfill site accepting more than 500 tonnes per year (category 63), a Class II or III putrescible landfill site accepting more than 20 tonnes per year (category 64) or a Class IV secure landfill site, which has no minimum amount.
9. The *Waste Avoidance and Resource Recovery Act 2007* (WA) (**WARR Act**) and *Waste Avoidance and Resource Recovery Regulations 2008* (WA), in effect, provide for when and in what manner a levy imposed under the Levy Act is due and payable. The WARR Act also establishes the WA Waste Authority.
10. Section 5(1) sets out the objects of the WARR Act as follows:
 - The primary objects of this Act are to contribute to sustainability and the protection of human health and the environment, in Western Australia and the move towards a waste-free society by -
 - (a) promoting the most efficient use of resources, including resource recovery and waste avoidance;
 - (b) reducing environmental harm, including pollution through waste; and
 - (c) the consideration of resource management options against the following hierarchy -
 - (i) avoidance of unnecessary resource consumption;
 - (ii) resource recovery (including reuse, reprocessing, recycling and energy recovery); and
 - (iii) disposal.
11. The primary object of the levy, assessed in light of the objects of the WARR Act, is to create a financial disincentive to the disposing of waste to landfill with the aim of reducing the amount of waste dealt with in that way, and to create a relative financial incentive to reuse, reprocess and recycle waste.
12. Whilst levies are largely positive for improved waste management, they provide both beneficial and detrimental incentives. They incentivise recycling and deter unnecessary deposits to landfills. However, they also incentivise stockpiling and illegal dumping. Levies should be designed to strike a balance between these beneficial and detrimental incentives. The federal government should take the lead in setting a standardised approach to levies to guard against State governments' vested

interests in uncontrolled increases in levies, given that levies are also a source of revenue.

The destination of material collected for recycling, including the extent of material reprocessing and the stockpiling of collected material

13. In WA, the levy for inert material has increased from \$12/m³ in 2014 to its current rate of \$90/m³. From 1 July 2018 the levy for inert material will increase to \$105/m³. The WA government's intention is to divert 75% of construction and demolition waste (**C&D waste**) from landfill by 2020.¹
14. The implications of the rapid increase in the levy for the waste recycling industry in Perth have been significant. There is evidence of C&D waste stockpiles accumulating in the metropolitan area. A WA Waste Authority report estimates that stockpiles of C&D waste (both processed and unprocessed) at the end of June 2016 reached in excess of 1.6M tonnes.² Recycling the C&D waste is not an option because of little or no demand for the end product.³
15. There is anecdotal evidence of illegal dumping of C&D waste, as a consequence of the levy rate increases. Currently, there is no GPS tracking system in WA for vehicles that transport C&D waste which may provide a deterrent to illegal dumping. C&D waste is also being taken to landfill facilities outside the Perth metropolitan area to avoid the levy.⁴
16. The trend in stockpiling C&D waste has been exacerbated by a recent decision of the WA Court of Appeal,⁵ in which Eclipse Resources Pty Ltd (**Eclipse**) lost its appeal against the decision of the WA Supreme Court to impose \$21.5 million in overdue landfill levies and penalties.⁶
17. Eclipse conducted resource recovery operations at three sites in the Perth metropolitan area, which involved the use of waste-derived materials (including C&D waste and remediated soil that were considered to be environmentally and geotechnically fit for purpose) to backfill quarry voids. Eclipse did not pay the WA Government's landfill levy, arguing that the materials were being recycled and were not 'waste' or 'accepted for burial'. The WA Supreme Court disagreed and held Eclipse liable to pay the levy on its operations dating back to 2008, in addition to significant penalties. On 12 May 2017, this decision was upheld by the WA Court of Appeal.
18. The Court of Appeal held that 'waste' takes its ordinary meaning, being material that is 'unwanted by or excess to the needs of' the person who is the source of the material. The Court rejected Eclipse's argument that material is not waste if it is wanted by the party accepting it and has a useful purpose, such as to make land suitable for subdivision, a national park or private open space. Eclipse maintained that material

¹ Recycling Activity in Western Australia 2015-16, ASK Waste Management Consultancy Services, Waste Authority, August 2017, p.1.

² Recycling Activity in Western Australia 2015-16, ASK Waste Management Consultancy Services, Waste Authority, August 2017, p.13.

³ <http://www.perthnow.com.au/news/western-australia/was-broken-waste-policy-triggers-dumping-stockpiling/news-story/eb1fd10fe918745520304d51225a6aec>

⁴ <http://www.perthnow.com.au/news/western-australia/was-broken-waste-policy-triggers-dumping-stockpiling/news-story/eb1fd10fe918745520304d51225a6aec>

⁵ See *Eclipse Resources Pty Ltd v Minister for Environment (No.2)* [2017] WASCA 90.

⁶ See *Eclipse Resources Pty Ltd v Western Australia (No.4)* (2016) WASC 62.

re-used to make land suitable for another purpose takes on the character of a 'resource', but the Court held that if material is 'waste' at the point of receipt, there is nothing in the language of category 63 of schedule 1 to the EP Regulations to suggest that the material takes on a different character by virtue of the nature of the licence holder's business.

19. Eclipse's alternative argument that the levy was an unconstitutional State-imposed excise also failed because the levy does not have the characteristics of an excise duty.
20. The implications of the *Eclipse* decision for the waste recycling industry and development industry are significant. For example, businesses that receive and deposit waste-derived material into a void for environmental rehabilitation purposes may be caught by the levy. Also, there is the potential that the landfill levy is payable on clean fill deposited on development sites for the purposes of levelling land to be subdivided or developed. A development site may require a licence if clean fill is deposited in excess of 500 tonnes per year.
21. As a result of the *Eclipse* decision, DWER put on hold its end-of-waste administrative framework, including its planned review of its material guidelines for the use of clean fill and construction products. Prior to *Eclipse*, it was DWER's intention to adopt an administrative framework for waste-derived material that would aid the achievement of the State's landfill diversion targets. An administrative framework was favoured because it could be implemented sooner than a legislative framework to remove uncertainty for the markets for waste-derived material.⁷ The material guidelines were intended to aid DWER's assessment as to when certain waste-derived material could be regarded as having ceased to be waste. Where the production and use of a waste-derived material was in accordance with a published material guideline or a DWER written approval, it was DWER's intention not to regulate the material as waste under the EP Act, WARR Act or Levy Act.⁸
22. The absence of any policy for the use of waste-derived materials has contributed to stockpiling of C&D waste in the Perth metropolitan area. Anecdotally, it is reported that many soil recycling businesses are also stockpiling material until the uncertainty is resolved.
23. Since the *Eclipse* decision, DWER has published a discussion paper entitled, *Waste Reform Project: Proposed approaches for legislative reform*.⁹ In the discussion paper, DWER undertakes an analysis of the existing WA legislative framework, as well as a cross-jurisdictional review of other Australian jurisdictions, with the intention of improving both the waste levy framework and the environmental protection regime as they apply to waste generation, storage and disposal. DWER proposes to amend and streamline the landfill licensing categories in schedule 1 to the EP Regulations. However, DWER proposes a new landfill category that includes the application of waste to land (including spreading, ploughing and filling land). Arguably, this is likely to create a further disincentive for the recycling of waste-derived materials as activities

⁷ Consultation summary report, Guidance statement - regulating the use of waste-derived materials, Government of Western Australia, Department of Environment Regulation, November 2014, p.1

⁸ Consultation summary report, Guidance statement - regulating the use of waste-derived materials, Government of Western Australia, Department of Environment Regulation, November 2014, p.13.

⁹ Government of Western Australia, Department of Water and Environmental Regulation, July 2017.

which see the beneficial use of waste will be caught by the waste levy unless exempted.

24. The prevalence of stockpiling and illegal dumping is also attributable to the lack of an effective market for recycled materials. The Federal and State governments should consider policies to facilitate such a market.
25. The *Eclipse* case highlights current deficiencies in the treatment of recycling of waste-derived materials. Those issues can be partially addressed by State governments allowing for exceptions to the landfill levy where waste or waste-derived activities are recycled as they were in *Eclipse*. In situations like *Eclipse*, waste is used beneficially and the users should not be penalised. Any such exceptions should be supported by clear and detailed policies to ensure certainty in the treatment of waste-derived materials. These exceptions and policies should also be consistent across States. The Federal government should therefore take the lead in pushing for or incentivising their implementation.

The role of the Australian Government in providing a coherent, efficient and environmentally responsible approach to solid waste management, including by facilitating a federal approach

26. Inconsistency between States with respect to waste management regulation, and particularly landfill levies, creates an incentive for environmentally irresponsible waste management practices, such as inter-state 'waste dumping'. The Federal government should consider acting to ensure greater uniformity in solid waste management.
27. A recent Four Corners investigation revealed that New South Wales waste transport and freighting companies were regularly transporting waste originating from NSW to Queensland to avoid paying the NSW landfill levy.¹⁰
28. The *Protection of the Environment Operations (Waste) Regulation 2014* (NSW) was enacted to establish the 'proximity principle', which prohibits transport of waste for more than 150km from its place of generation. This principle was intended to prevent the kind of practices revealed by the Four Corners investigation.
29. The principle received significant criticism from its inception. In 2016, the NSW government settled a challenge to its constitutional validity.¹¹ It was also criticised for failing to address transport of waste by rail.¹² In any case, the law clearly failed to prevent widespread and systematic transportation of waste across state lines.
30. The interstate 'waste-dumping' allegations indicate two ways in which the federal government can intervene to establish a coherent and efficient approach to waste management.
31. First, the government can implement a more effective, Federal 'proximity principle'. There are, of course, constitutional issues with such a proposal. It is unclear if a

¹⁰ ABC News, 'Queensland premier "horrified" over NSW waste dumping, Four Corners allegations', ABC News Online, 8 August 2017 <<http://www.abc.net.au/news/2017-08-08/australias-organised-waste-trade-queensland-premier/8783820>>.

¹¹ *St Marys Recycling Pty Ltd ACN 603 780 767 v New South Wales*, Federal Court of Australia Proceeding NSD1735/2015.

¹² See, eg, Lucy Cormack, 'NSW waste still travelling across state borders prompting EPA investigations', *The Sydney Morning Herald* (online), 14 February 2016 <<http://www.smh.com.au/environment/nsw-waste-still-travelling-across-state-borders-prompting-epa-investigations-20160212-gmsnyn.html>>.

Federal proximity proposal could be supported by any head of legislative power in the Constitution. However, the power to implement such a principle could be referred to the Commonwealth under s 51(xxxvii) of the Constitution, as occurred for, e.g., the implementation of the Australian Consumer Law and the *Corporations Act 2001* (Cth).

32. Further, s 92 of the Constitution provides that ‘trade, commerce and intercourse between the States ... shall be absolutely free’. It is arguable that a proximity principle could breach s 92. Queensland Environment Minister Steven Miles was quoted as saying that ‘the constitution is very clear that there is nothing a state government can do to restrain trade between state boundaries’.¹³
33. However, s 92 does not operate with unqualified effect, and Mr Miles’ proposition appears to be an overstatement. Since the decision of *Cole v Whitfield* (1988) 165 CLR 360, the High Court has upheld numerous laws restraining trade between State boundaries in cases including *Cole v Whitfield* itself, *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 and *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12. It held that s 92 is directed only to restraints of trade that are discriminatory in a protectionist sense, and that even laws with protectionist effect are valid if they are reasonably appropriate and adapted, or proportionate, to a legitimate non-protectionist purpose.
34. Any uniform federal ‘proximity principle’ must be considered in light of s 92, but s 92 does not preclude the enactment of one. Further, it has been suggested that a national and uniform scheme, constituted by complementary Federal and State law applying to all trade or intercourse of the relevant kind, is unlikely to contravene s 92.¹⁴ The law on s 92 generally suggests that a uniform Federal scheme is significantly less likely to contravene s 92 than legislation enacted by the States individually. These considerations provide compelling reasons for the Commonwealth to consider enacting a national proximity principle and for the States to consider referring the constitutional power to do so.
35. Alternatively, the Federal Government could consider implementing uniform landfill levies. The primary motivation for interstate waste-dumping appears to be the avoidance of relatively high landfill levies in the waste’s place of generation. This advantage would disappear if uniform levies are introduced. Introduction of uniform levies may, however, be less politically feasible than a national proximity principle.

Any other related matters

36. Any national approach and/or policy should enshrine the polluter pays principle and should encourage integration of that approach with State land use planning systems.
37. The polluter pays principle is a generally accepted practice of environmental management.¹⁵ It provides that any costs resulting from pollution should be borne by the person who caused the pollution. The principle reflects two related considerations: first, the Pigouvian view that environmental costs should be ‘internalised’ to ensure that the real cost of environmental harms is recognised; and second, the moral

¹³ ABC News, above n 10.

¹⁴ *Cole v Whitfield* (1988) 165 CLR 360, 400.

¹⁵ See generally the Hon Justice Brian Preston, ‘Sustainable Development Law in the Courts: The Polluter Pays Principle’ (Paper presented at the 16th Commonwealth Law Conference, Hong Kong, 7 April 2009).

principle that an innocent land user or owner should not be required to pay for the misfeasance of another.

38. A recent review of the *Environment Protection Act 1970* (Vic) ('EPA Review') recommended that a decision-making principle for the Environment Protection Agency include 'shared responsibility, including recognition of the polluter pays principle' (Recommendation 5.4).¹⁶
39. The same recognition should be given to the polluter pays principle in any national scheme. The principle is raised in any situation where waste is dumped in contravention of an environmental law. In such situations, the party dumping the waste should be required to pay for any remediation or clean-up. A uniform national scheme would assist in the implementation of the polluter pays principle by ensuring that interstate polluters can be pursued for contravention of environmental laws. If the Federal government decides to intervene, it should enshrine the polluter pays principle in any resulting legislation.
40. If a uniform national scheme is implemented, the government should give careful consideration to, and be mindful of, the interaction between the scheme and State planning policies and frameworks.
41. Land use planning plays an essential role in waste management. It enables the management of health, safety and amenity issues relating to waste management facilities and landfills. A maximally effective waste management regime must be integrated with the existing land use planning framework.
42. The EPA Review already identified areas for improvement as including integration of land use planning mechanisms with EPA regulatory requirements (Recommendations 10.3 and 10.4). To ensure that national standards – whether relating to siting of waste management facilities, transportation of waste, or any other waste management issues – are simple and easily implemented through the planning system, the government must ensure that such standards can be integrated with State planning policies and frameworks.
43. The Federal Government could also assist or incentivise States to implement a consistent approach to land use planning around solid waste facilities, contributing to a coherent, efficient and environmentally responsible waste industry. This could be through grants, intergovernmental agreements or other non-legislative means. Further, it could develop a national policy or best practice for solid waste management.

¹⁶ Penny Armytage, Jane Brockington and Janice van Reyk, 'Independent Inquiry into the Environment Protection Authority' (June 2016).

Contact

The Committee would welcome the opportunity to discuss the submission further. Please contact John Farrell, Policy Lawyer, at john.farrell@lawcouncil.asn.au or (02) 6246 3714, if you would like further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jonathan Smithers', with a long horizontal line extending to the right.

Jonathan Smithers

Chief Executive Officer