Fact sheet - Assessing whether material is waste

Purpose

The purpose of this fact sheet is to:

(a) set out the matters relevant to determining whether material is "waste" within the meaning of the *Environmental Protection Act 1986* (EP Act) and the *Waste Avoidance Resource Recovery Act 2007* (WARR Act) and their associated regulations; and

(b) thereby provide information to industry on how the Department proposes to assess whether material is waste when exercising its powers and performing its functions under this legislation.

DWER considers that it is the responsibility of the person in possession of material to determine whether it is waste or not.

If you are unsure of whether the material you hold is waste or whether certain provisions in the legislation apply to you, DWER recommends that you seek your own legal advice.

Background

DWER administers Part V Division 3 of the EP Act, including the licensing of prescribed premises. A number of prescribed premises categories in the *Environmental Protection Regulations 1987* (EP Regulations) are defined by reference to activities involving waste occurring on the premises. There are also a number of offence provisions in the EP Act which make it an offence to do certain things with waste.

DWER also administers the WARR Act and the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WARR Levy Regulations). These regulations provide for a levy to be payable in respect of "waste disposed of to landfill" at certain categories of prescribed premises as defined in the EP Regulations (categories 63, 64 and 65).

The assessment of whether certain material is waste is therefore important to the application of these Acts and regulations.

The decisions of Justice Beech and the Court of Appeal in *Eclipse Resources Pty Ltd v the State of Western Australia* [No. 4] [2016] WASC 62 and *Eclipse Resources Pty Ltd v The Minister for Environment [No 2]* [2017] WASCA 90; (Eclipse case) provide guidance on the matters relevant to determining whether material is waste.

Ultimately, whether or not material is waste in a particular case will depend on all the facts and circumstances of that case.

Definition of waste

Waste is defined section 3(1) of the EP Act and section 3(1) of the WARR Act to include matter:

(a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged to the environment; or

(b) prescribed to be waste.

This inclusive definition is not exhaustive, meaning that the term ‘waste’ in the EP Act and WARR Act also has its ordinary dictionary meaning.

In the Eclipse case, the Courts confirmed that, "waste", at least, includes:

(a) “anything left over or superfluous, as excess material, by-products etc., not of use for work in hand” (i.e. unwanted or excess material, viewed from the perspective of its source); and/or

(b) any matter whether useful or useless which is gotten rid of into the environment.

Relevant factors in assessing whether material is waste

There are a number of relevant factors that should be considered in an assessment of whether material is waste, as set out below.

Whether certain material is waste must be assessed at a particular point in time. Material may cease to be waste, because, for example, it has been reprocessed into a new product or recycled. However, the new product or recycled material may become waste again if it becomes excess to the requirements of its owner.

Point of view of the source/producer

For the purposes of the licensing and waste levy regimes, whether material that is received at premises is waste or not must be assessed from the perspective of the person who is the source/producer of the material and not the receiver of the material.

Accordingly, the fact that the receiver of the material considers it useful (e.g. to fill their land) and economically valuable (e.g. as a substitute for purchased fill material) does not mean that the material is not waste.

If material is unwanted or excess to requirements, viewed from the perspective of its source/producer, the material is waste.

The source/producer of material that is excavated at one site and taken to another will be the owner of the material at its source. This will often be (but will not necessarily always be) the owner of the land from which the material is excavated.

Nature of the material

There is no requirement that material must be environmentally harmful in order to be waste. The nature/composition of material is not *determinative* of whether it is waste. However, the nature of material may be relevant in the broad sense that it may explain why the material is not wanted by its source/producer.

If material is contaminated with a substance that would prevent it (practically or legally) from being used for its ordinary purpose, this may be relevant to the assessment of whether or not it is wanted by its source/producer.

Concept of being 'unwanted'

Even if material is left over from, or a by-product of, a particular project and not wanted by its source/producer for that project, it may still be wanted by them for use for some other project (on the same site or a different site) or for sale to a third party.

Material wanted by its producer/source for use in some other project or for sale to another person is not considered to be waste.

For example, if the owner of a building demolished the building and did not want the bricks resulting from the demolition, the bricks would be considered waste. However, if the owner wanted the bricks to build a wall on another site that he/she owned or wanted them to sell to a third party for use by the third party, the bricks would not be considered waste.

Payments relating to the materials

Whether or not a third party pays for material or is paid to receive material from its producer/source, is a relevant consideration in assessing whether the material is waste.

If the producer of material pays a third party to receive it and dispose of it for them, this indicates that the producer does not want the material and it is waste. However, if material is sold by a producer to a third party, this will generally indicate that the material is a valuable commodity wanted by the producer for sale.

Substantially transformed

Material that is waste at a certain point in time may stop being waste if it is re-used in certain ways, sufficiently processed or is recycled.

It is recognised in categories 13, 39, 44, 61, 61A, 62 and 67A in Schedule 1 of the EP Regulations, in section 5(1) of the WARR Act and in regulation 5(1)(b) of the WARR Levy Regulations that waste may be transformed into something else through re-use, processing (including treatment), recycling or use in energy recovery.

However, the decisions of the courts in the Eclipse case confirmed that the use of waste *as fill* to be buried does not qualify as the "re-use" of waste within the meaning of the WARR Levy Regulations or WARR Act. Waste that is buried and used as fill is considered "waste disposed of to landfill" within the meaning of the Levy Regulations.

When assessing whether material is waste, or still waste, at any particular point in time it may be relevant to consider whether and how it has been transformed into a product or good and the extent of the transformation or conversion. A mere intent to convert waste into a product or good is not sufficient.

The fact that material has been subject to some degree of processing does not necessarily mean that it has become a product or ceased to be waste. For example, the courts have found that merely sorting waste to exclude some contaminants does not mean that the material is no longer waste.

Consideration of whether material that is waste at a particular point in time has been substantially or materially transformed and converted into a product or good so that it is no longer waste at a different point in time will depend on a number of factors, such as:

- the type of processes the waste has been subjected to;

- the degree or extent of the transformation of the material; whether the essential nature, form and/or utility of the material has been substantially or materially changed;

- whether any relevant specifications or standards (including environmental specifications and standards) have been met; and

- whether there is an economic demand for the material in its altered state.

Examples

Two examples are provided below to illustrate how these factors are used by DWER to assess whether material is waste.

Scenario 1

At Premises A mixed construction and demolition materials are accepted onto the premises from third parties and directed to a sorting area. The third parties bringing the materials to Premises A do not want them and either pay the owner/occupier of Premises A to take them or give them to the owner/occupier for free.

Large pieces of plastic, timber, metal and plant material are removed from the materials by an excavator. The residual 'sorted' materials are buried on Premises A to raise the level of the land and fill a void.

In this scenario, the incoming materials are unwanted by their sources. They are not processed to substantially or materially transform them into something new. Essentially the same materials that were accepted at the premises are deposited and buried to level the land. The materials buried are considered to be waste by DWER.

Scenario 2

At Premises B, mixed construction and demolition materials are accepted from third parties onto the premises. The third parties bringing the materials to Premises B do not want them and either pay the owner/occupier of Premises B to take them or give them to the owner/occupier for free.

- The materials are processed in a number of different ways including (but not necessarily limited to) the following:

- An excavator breaks up large materials and removes reinforced steel. The materials are also passed through a jaw crusher;

- The materials then pass through vibratory screens, air blowers and under belt magnets that remove plastics, metals and other undesirable materials;

- After initial screening the materials pass through a hand picking station where any residual contaminants are removed;

- Finally, the materials are passed through an impact crusher and two screens which separate the materials into different size fractions;

- The processed materials are tested for asbestos content and against relevant Main Roads material specifications;

- Subject to meeting asbestos and Main Roads specifications, the materials are sold as recycled fill sand, road base and drainage aggregate to third parties.

In this scenario, the incoming materials are regarded as waste by DWER at the time of their receipt at Premises B. However, the materials are substantially and materially transformed through processing into new products that are different to the materials accepted at the gate. There is also a market for these products. When purchased and used by consumers these products would not be classified as waste by DWER.

Any contaminant materials screened out during the processing of the construction and demolition materials received at Premises B that are not wanted by the owner/occupier of Premises B to make recycled fill sand, road base and drainage aggregate would remain waste in DWER's view.

Feedback and More Information

The Department is keen to receive feedback on this factsheet to ensure the content is clear and helpful.

If you wish to provide feedback or for further information, please email DWER at info@dwer.wa.gov.au or phone 6364 7000.

Legislation

This document is provided for information only. It should not be relied upon to address every aspect of the relevant legislation. Please refer to the State Law Publisher (SLP) for copies of the relevant legislation, available electronically from the SLP website at www.slp.wa.gov.au.