



2021 Australian Landfill and Transfer Stations Conference

‘Landfill + Transfer Station
Sector – Navigating
Jurisdictional Differences’

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Intro

- Environmental regulatory framework governed by Commonwealth and state/territory legislation.
- Fourfold challenge in the context of planning and environmental laws:
 - (a) sector is heavily regulated - the planning and environmental framework is complex/layered;
 - (b) each State and Territory Government has enacted its own legislation/policies;
 - (c) extremely fluid area of law - responding to political, social and economic drivers; and
 - (d) numerous regulators – don't all operate the same (expertise, systems and resources).

Challenging regulatory environment for:

- operators of landfill and transfer stations across Australia; and
- investors in the sector (particularly overseas players or local non trade players)

Key Topics

- Liability for Contamination
- Key Approvals – Planning and Environmental
- Pollution Incidents – Director/Manager Liability
- Financial Assurance/Financial Security

Liability for Contamination

- Each State and Territory Government has enacted contamination legislation.
- Similar principles/structures – key differences you need to be aware of:
 - (a) Duty to notify
 - For example: NSW - duty rests with the person who caused the contamination (the polluter) and the owner of the land. Victoria - new regime imposes duty to notify on any person in management or control of land.

Liability for Contamination

(b) Liability for Remediation

- Each framework contains a hierarchy of liability.
- As a general principle – the starting point is the polluter.
- Beyond that there are differences – NSW the hierarchy is the polluter, owner and then the notional owner. Victoria - person with management and control (typically the occupier) and the owner of land.

(c) Transfer of Liability

- Certain jurisdictions preclude contractual transfer of liability - other jurisdictions contain a statutory mechanism to enable it to occur (e.g. SA, WA)

Planning Approvals

- Each State/ Territory has enacted planning legislation – it is underpinned by a suite of strategic policies and plans.

Transaction/Legal DD Context

- any material landfill or transfer station across Australia would likely require planning approval (or existing use rights)
- planning approval instrument has different names in each jurisdiction
- certain states (such as NSW) planning approval is the material approval – and environmental approvals are ancillary
- other jurisdictions (such as WA) – planning approval is ancillary to the environmental impact assessment process.

Planning Approvals

Project Context

- approval pathways to facilitate the carrying out of a project (or expansion of a project) – vary significantly across jurisdictions.
- devil is in the detail – an approach in one state will not necessarily translate to another jurisdiction.
- different threshold tests at each stage such as for example the scope of a consent authority's modification power, triggers to determine the consent authority and different appeal rights.
- also key differences in assessment approach – NSW it is a merit assessment against specified heads of consideration whereas in QLD a more flexible codified system exists

Environmental Approvals

- Each State/ Territory has enacted environment protection legislation.
- Landfill and large-scale transfer station across Australia may require an environment protection license (or similar instrument). Different threshold triggers in each jurisdiction.
- Some states (such as WA and Victoria) also regulated by a works approval before the substantive 'operating licence' (being the EPL).
- EPLs personal and do not run with the land - so need to be transferred in an asset sale. Typically no change of control consent in a share sale. These are all common principles.
- Some facilities may also trigger the requirement to hold a trade waste agreement

Pollution Incidents

- Each State and Territory has introduced environment protection legislation.
- Most jurisdictions, except NSW, impose a general statutory duty not to cause environmental harm.
- The ACT, QLD, TAS and SA all recognise the tiers of environmental harm in a similar manner and take into account considerations such as impact, loss and costs and whether the offence is carried out with intent or recklessness.
- The NSW system is a tiered system - Tier 1 (wilfulness or negligence), Tier 2 (strict liability offences) and Tier 3 offences (penalty infringement).

Director/Manager Liability

- Each State and Territory has legislation imposing liability on directors/managers for environmental offences committed by their company
- Test varies - general principle is that if a corporation commits an environmental offence then each person who is a director/manager of the corporation is 'deemed liable' for the same offence
- In certain jurisdictions the prosecution must in certain circumstances prove that the director 'knowingly promoted or acquiesced' in the offence (SA and Tasmania)
- Statutory defences also vary. Key defences typically include the no influence and due diligence defence. In Tasmania and SA phrased slightly differently as the reasonable and practicable measures defence.

Director/Manager Liability

- Fundamental test as to whether the EPA will commence criminal proceedings against a director/manager is one of culpability – that is where there is evidence linking a director with the corporation's illegal activity.
- A director/manager could not be personally liable for a prior environmental offence for which it is not culpable or responsible – but ongoing pollution issues present a risk.
- Prosecution policy is generally similar across jurisdictions – although certain jurisdictions (such as NSW) appear to have greater appetite for this course of action.

Financial Security/Assurance

- Financial assurance/security conditions typically imposed in EPLs – and potentially planning approvals.
- Amount and approach will vary depending on the level of environmental risk – and applicable policy.
- Policy and legislative position is in a state of flux. For example - the NSW EPA is progressing its Draft Financial Assurance Policy.
- Regulators open to exploring other options for securing financial assurance such as voluntary planning agreements and public positive covenants.

Conclusions

- Environment and planning laws are jurisdiction specific - complex and multi layered.
- They share similar principles and structures – and similar strategies can be implemented.
- Important to recognise that the devil is in the detail - on key issues it is very important to drill into the detail of the applicable legislation.
- Legislative change brings risk but also opportunity for this highly competitive sector.

Questions?



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