



8 August 2018 – Supreme Court Ruling in relation to DiCOM

Summary

In November 2017, the Western Metropolitan Regional Council (**WMRC**) applied to the Supreme Court of Western Australia for orders clarifying the obligations of the WMRC and DiCOM AWT Operations Pty Ltd (**DiCOM**) under the waste supply agreement (**WSA**) for the Brockwaste alternative waste treatment plant (**Plant**) located at the WMRC's JFR (Jim) McGeough Resource Recovery Facility in Brockway Road, Shenton Park.

The court action was necessary to resolve questions regarding DiCOM's attempts to commission the Plant and its claims for payment under the WSA. In the Supreme Court's decision today, the WMRC was successful in all of its arguments concerning the WSA.

The Court's ruling clarifies many technical and contractual matters concerning commissioning of the Plant and payments under the WSA.

Importantly, the practical effect of the ruling is that:

- DiCOM has not commissioned the Plant as required by the WSA;
- WMRC is not liable to pay any invoices issued by DiCOM to date; and
- DiCOM cannot issue any invoices to the WMRC in the future until the Plant is working.

DiCOM must also pay the legal costs incurred by the WMRC in the court action.

Background and detail

The WMRC and DiCOM entered into the WSA in 2007 for the purpose of diverting the bulk of household waste from landfill by capturing recyclables from the waste and converting its organic components to compost, biogas and electricity. The Plant was built between 2007 and 2013 and attempts to commission it continued through to 2016. The design and construction contractors were unable to meet the Plant specifications. The previous owners of the Plant placed it into care and maintenance in May 2016 and the operating companies were placed into administration in October 2016.

After 16 months in care and maintenance; and a change of ownership bringing DiCOM out of administration, in August 2017 DiCOM's new management asserted that:

- it was restarting the Plant from 1 September 2017;
- the Plant would complete ramp-up and achieve Final Completion from 1 November 2017; and
- DiCOM could issue invoices to the WMRC under the WSA for processing of waste from 1 November 2017, regardless of whether waste was actually diverted from landfill or not.

Since November 2017, DiCOM has issued many invoices to the WMRC and various other contractual notices to the WMRC, and suspended activities on site from February 2018. The WMRC denied that it was liable to pay any of the invoices and commenced the court action to obtain certainty as to its position under the WSA.

In the court action, DiCOM asserted, among other things, that "Practical Completion" under the WSA had occurred, the WMRC was obliged to deliver Municipal Solid Waste to the Plant and was obliged to pay

DiCOM's invoices despite the processing plant not reaching certain required milestones and even if "processing" at the Plant did not result in the extraction of recyclables and the production of compost, biogas or electricity.

DiCOM's assertions were tested before the Court in a trial earlier this year. The trial also involved the hearing of an action by the City of Stirling against DiCOM. The City of Stirling has a waste supply agreement with DiCOM which is very similar to the WSA.

This morning, Justice Archer ruled in favour of the WMRC on all matters the subject of the trial. As a result:

- Practical Completion under the WSA can only be notified when independently certified under the contract under which the Plant was constructed;
- DiCOM must actually "process" the waste delivered to it, capture recyclables and produce compost and biogas and value-add those products, such as by generating electricity; and
- compost derived from waste processed by the Plant is required to comply with the relevant Australian Standard AS4454-2003.

The issues considered by the Court were complicated given the nature of the Plant and the terms of the WSA. However, the practical benefit to ratepayers of the Court's judgment is that:

- none of the invoices issued by DiCOM to the WMRC to date are valid; and
- unless certain significant milestones are reached by DiCOM with respect to the operation at the Plant, DiCOM is not entitled to issue any invoices to the WMRC in the future.

Next steps

The WMRC will look to recover its costs of the court action against DiCOM.

A further court action is being prepared for trial. This action concerns the right of the WMRC to recover the costs of disposing of waste remaining after DiCOM's commissioning attempts and the question of whether DiCOM has breached the WSA.

Comment from Councillor Charles Hohnen (WMRC Chairman):

"The WMRC is very pleased with the successful outcome of the trial in the Supreme Court. Some much needed certainty has been provided by the Court's ruling. DiCOM is now prevented from continuing to issue invoices to the WMRC. The WMRC is hopeful that today's ruling will provide the impetus for resolution of all outstanding disputes. DiCOM's inability to deliver services under the WSA since 2009 (when the Plant was originally scheduled to commence operations) has limited the WMRC's ability to explore better waste outcomes for ratepayers of the western suburbs. Hopefully the WMRC and its Member Councils will soon be able to remedy that."

Member Councils of the WMRC are the Towns of Claremont, Cottesloe and Mosman Park, the Shire of Peppermint Grove and the City of Subiaco.

ENDS

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