

To: Chief Executive Officer From: Melanie Bainbridge, Climate Change Coordinator

Organisation: Date: 25 June 2008

Reference: 05-028-03-0002

Subject: National Greenhouse and Energy Reporting Act Obligations Priority: High

IN BRIEF

Operational Area:	Waste Management
Key Issues:	<ul style="list-style-type: none"> • Negotiation on the National Greenhouse and Energy Reporting Act and obligations for Local Government. • Legal advice pertaining to the 'constitutional corporations' issue relating to the above Act. • WALGA response to the above Act.
Action Required:	Immediate Attention – may require independent legal advice

National Greenhouse and Energy Reporting Act – Obligations for Local Government.

Background

The National Greenhouse and Energy Reporting Act, and subsequent papers detailing regulations and technical specifications regarding the Act, has provided an area of concern for Western Australian Local Governments responsible for the management of large landfills.

The Association has undertaken a broad suite of research and negotiation on what the implications of this reporting requirement for Local Governments might be, and what additional resourcing might be provided to ensure that Local Governments are equipped to cope with potential reporting requirements.

The Association has worked closely with the Australian Local Government Association (ALGA) in an attempt to bring this issue to the forefront of Federal Government considerations and have met with significant barriers to the resolution of this issue.

As part of this research it was identified that clarification would be required on whether or not Local Governments would be obliged to report to the Scheme as it was not clearly defined as to whether Local Governments are considered 'constitutional corporations' for this purpose.

Local Governments will be predominantly affected by this reporting scheme in relation to their waste facilities. In the Association's view few other functions are likely to, as discrete facilities, breach the 25kT facility reporting threshold for emissions production or energy usage.

Legal Advice

The Association has received legal advice on the question of whether local government authorities and regional councils in Western Australia are constitutional corporations and therefore obliged to comply with the reporting regime of the *National Greenhouse and Energy Reporting Act 2007* (Cth) ("NGER Act").

The advice received suggests that whether a local government authority or a regional council is a constitutional corporation will depend on the particular profile of those organisations.

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Characterisation will depend on whether the entity is a trading corporation within the meaning of the Constitution of Australia. That in turn requires an assessment of the particular local government authority or regional council as to whether any of its activities are trading activities.

If so, and they are a significant or substantial portion of the organisation's activities, then it should obtain specific legal advice as to its particular profile before making an assessment as to whether it is a constitutional corporation and therefore obliged to comply with the reporting regime of the NGER Act.

The fact that a local government authority is incorporated pursuant to s 2.5 of the Local Government Act 1995 (WA) does not preclude it from being a constitutional corporation. Section 2.5 of the Local Government Act deems a local government authority to be a corporation. Whether it is a constitutional corporation is a further question that must be determined by reference to the Constitution and case law.

Conclusion

There is some evidence from previous legal cases that suggests any income (such as rates) resulting from charges imposed by statute will not be considered trading income. Accordingly, if a local government authority has a high proportion of its income derived from rates and other statutory charges, it is unlikely to be a trading corporation.

However, it is not possible to state with certainty that every local government authority or regional council is or is not a constitutional corporation. The question is one that must be answered on a case-by-case basis.

Any local government or regional council whose activities include, to a significant extent, activities of a trading nature should undertake an assessment, supported by legal advice, to ascertain if they are likely to be found to be constitutional corporations.

The decision as to whether compliance with the NGER Act is required can only be made after such an assessment.

Recommendations

It is our opinion, based on the legal advice given, that Local Governments and Regional Councils can assume, until informed otherwise, that they will not need to report to the NGER Act. It is the Association's opinion that Landfills that operate as a statutory requirement of Local Government would not be considered a 'trading enterprise' and therefore do not fall under the provisions of the Act.

It is advised however that, should Local Governments or Regional Councils hold any doubt as to their legal obligations on the matter of whether they would be considered a 'constitutional corporation' for the purposes of the NGER Act reporting requirements, given the penalties prescribed therein, they seek legal advice to clarify their position. This is especially relevant given the deadline for registration within the scheme of July 1 2008.

Despite the fact that it seems unlikely that Local Governments or Regional Councils will be liable under the NGER Act, it is advisable that Local Governments with large landfills become familiar with greenhouse gas emissions reporting requirements as the waste sector is likely to be considered a 'covered sector' for the purposes of the National Emissions Trading Scheme (NETS). The scheme, purported to be delivered in 2010, will require the waste sector to report its greenhouse gas emissions, and is likely to employ a similar reporting framework to that which the NGER Act utilises. In order to familiarise itself with the reporting obligations of the NETS, and avoid being 'caught short' by reporting deadlines, the Association suggests that the waste sector in Local Government keep abreast of the

NGER information available on the Australian Government Department of Climate Change website, in particular the estimation methodology for greenhouse gas emissions. This information can be accessed via the website at <http://www.greenhouse.gov.au/reporting/index.html>

Future Considerations

Given that many Local Governments are significantly under-resourced and are therefore unlikely to be able to bear the costs of additional regulatory requirements passed down by the State and Federal Government, any implications of the NGERS for Local Government will need to have consideration made to appropriate resourcing, with particular focus on administrative needs and clarity on exactly which Local Government functions are likely to be affected by the regulations. This will be equally necessary for the National Emissions Trading Scheme to consider when it comes into effect.

The *National Greenhouse and Energy Reporting Act* and the additional *Technical Guidelines and Methodology for Estimation of Greenhouse Gas Emissions and Sinks* are complex and specific, and will require considerable attention by Local Governments to meet potential reporting obligations under the NGER Act or under a future National Emissions Trading Scheme.

The Association will continue its work in relation to the management of stakeholder relationships with regards to the National Greenhouse and Energy Reporting Act and its subsequent regulations and technical obligations.

Section 10 of *The Inter-governmental Agreement Establishing Principles Guiding Inter-governmental Relations on Local Government Matters* (COAG, 2006) should be acknowledged as the policy framework through which the aforementioned issues are required to be addressed.

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