



Court of Appeal ruling in relation to DiCOM

Summary

Last Friday, 16 August 2019, the Court of Appeal unanimously rejected an appeal by DiCOM AWT Operations Pty Ltd (**DiCOM**) against orders made by the Supreme Court last year in favour of the Western Metropolitan Regional Council (**WMRC**) concerning the waste supply agreement (**WSA**) for the Brockwaste alternative waste treatment plant (**Plant**) located at the WMRC's West Metro Recycling Centre.

The Supreme Court's decision, which has now been confirmed by the Court of Appeal, determined that DiCOM has not commissioned the Plant as required by the WSA and that the WMRC was not required to pay invoices issued by DiCOM for waste that had not been processed.

It was expressly conceded by DiCOM's Queen's Counsel in the appeal hearing that the Plant had not achieved Final Completion in 2017 as then claimed by DiCOM, and that the invoices issued by DiCOM to the WMRC in 2017 and 2018 were not valid.

The effect of the decision is that, as a consequence of the failure of the Plant to achieve its design specifications under its construction contract and the settlement entered into by DiCOM with the construction contractor, it is no longer possible for the WSA to be performed. This effectively brings the project to an end.

DiCOM has now been ordered to pay more than \$500,000 on account of the WMRC's legal costs of the Supreme Court and Court of Appeal proceedings.

WMRC CEO Stefan Frodsham said:

"The WMRC is very happy with the outcome and the quick and unanimous decision by the Court of Appeal. Final resolution of DiCOM's claims and confirmation of the Supreme Court's decision will allow the WMRC to put an end to a difficult period of uncertainty and risk of higher costs to member Council ratepayers paying for ineffective processing of waste."

"The DiCOM technology for diverting waste from landfill was promising in 2007 when the WMRC first agreed to support its development through the WSA. However, the inability of DiCOM to successfully commission the Plant over the past 12 years, and in the past 2 years its incorrect claims that the Plant was able to process waste as required by the WSA, has caused significant cost to the WMRC and has prevented the WMRC from exploring other options to deliver a better waste service to residents and ratepayers."

"The WMRC's focus now will be on maximising the value of the strategic location of the West Metro Recycling Centre as a transfer station more effectively servicing its central metropolitan catchment area, and continuing to reduce the cost of waste treatment and disposal to WMRC member Councils and manage waste to meet State Government waste recovery targets. "

WMRC Member Councils

Background and detail

In November 2017, the WMRC applied to the Supreme Court of Western Australia for orders clarifying the obligations of the WMRC and DiCOM under the WSA for the Plant located at the WMRC's West Metro Recycling Centre in Shenton Park.

The court action was necessary to resolve disputes as to DiCOM's claims that the Plant had achieved Final Completion and that DiCOM was entitled to be paid by the WMRC under the WSA. In public accounts released in 2018 to the Stock Exchange of Thailand by DiCOM's parent company, Star Universal Network Public Company Limited, the amount claimed by DiCOM from the WMRC and the City of Stirling together was stated as \$3,355,905

(<https://www.set.or.th/set/newsdetails.do?newsId=15419786714943&language=en&country=US>).

In a decision delivered on 8 August 2018, the Supreme Court held that the WMRC was successful in all of its arguments concerning the WSA. The Court determined that the Plant cannot achieve Final Completion or Practical Completion unless it is independently certified as having met the requirements for practical completion under the contract for its construction. The Plant has not, and now cannot, be certified as having achieved Practical Completion.

DiCOM appealed parts of the Supreme Court's decision concerning its obligations under the WSA to process waste and to achieve Practical Completion or Final Completion of the Plant.

DiCOM raised three grounds of appeal. Two of the grounds related to DiCOM's contention that the trial judge's findings as to what was required for Practical Completion under the WSA and Final Completion under the City WSA were incorrect. The third ground related to DiCOM's contention that the trial judge's finding as to what DiCOM must do in order to "process" the waste delivered to it under the WSA was incorrect.

During the hearing, Queen's Counsel for DiCOM made the following concessions to the Court of Appeal.

- DiCOM's assertion that Final Completion had been achieved on 1 November 2017 was not correct. Rather, Final Completion under the City of Stirling WSA and Practical Completion under the WMRC WSA has not been achieved.
- The Ramp-Up period under the WMRC WSA has not been completed.
- As a result of the above, the purported invoices that DiCOM sent to the WMRC were not properly issued.

The Court of Appeal unanimously rejected DiCOM's appeal. This means that all of the declarations made by the Supreme Court following trial were upheld.

" The practical effect of the original and appeal decisions 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;
- DiCOM cannot issue any invoices to the WMRC in the future; and
- The WSA can no longer be performed and DiCOM's entitlement to use the WMRC site for processing of waste pursuant to the WSA has come to an end.

Further background is set out in the WMRC's press release dated 8 August 2018, a copy of which is attached.

Next steps

The WMRC is pursuing payment from DiCOM in order to recover its costs of the court and appeal actions.

The WMRC is awaiting advice from DiCOM as to its plans to deal with the Plant on site.

-Ends-

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