

# By the letter of the law – preparing for when consulting goes to court

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**“do you want to be an expert  
witness?”**

# Yes, but...

- Client expectations
- NSW EPA v Grafil (2018) NSWLEC 99
- NSW EPA v Grafil (again) (2019) NSWCCA 174

[image: actual photo of me when undertaking a site inspection on an expert witness investigation]



# Client expectations



- **Defensible** sampling regime

# Guidelines



# Guidelines

## South Australian Guidelines



# Client expectations



- **Defensible** sampling regime
- **Fast**
- **No** material origin
- **No** site history
- **Cheap**

# Costs – Analytical Suites

NSW waste classification suite

- TRH/ PAH/ OCP/ OPP/ Phenols/ Phthalates/ Acid Herb/ 2.4-DNT/ Nitrobenzene/ VOC/Metals (As, Be, Cd, Pb, Hg, Mo, Ni, Se)/Cr6+/CN Total/CN Free/ Total Fluoride
- \$230/sample

Compared with targeted analysis:

- TRH/BTEX/Metals: \$45/sample
- TRH/BTEX/PAH/Metals: \$77/sample

Stockpile of 11,000 m<sup>3</sup> at a sampling density of 1/250 m<sup>3</sup> [as per EPA VIC (2009)] = 44 samples (assuming homogeneity and excluding QA/QC sampling)

Full suite vs targeted analysis = **\$10,120 vs \$1,980**



# **NSW EPA v Grafil (2018) NSWLEC 99**

Justice Pain: "*potentially absurd and impractical*" to classify an entire stockpile as asbestos waste on the basis of the presence of one piece of asbestos of any type or size.

However, NSW EPA (2014) **Waste Classification Guidelines:**

*"Asbestos waste means any waste that contains asbestos"*

**Excavated Natural Material Order 2014**

*"does not include material... that contains asbestos"*

# NSW EPA v Grafil (2019) NSWCCA 174

Justice Pain “*erred by finding that whether waste “contains asbestos” was a **matter of fact and degree depending on the nature of the waste and the volume**”*

To clarify...

*“The definition of asbestos waste, being “**any waste that contains asbestos**”, does not depend on the absolute or proportionate amount of asbestos contained in the waste...”*

*“...waste that **includes asbestos** or has asbestos as its contents or constituent parts **is asbestos waste**”*

**Current feels:**



## Conclusions

- Argus Filch: *“You’re going into the forest after all. Got to have your wits about you eh?”*
- Refer to other jurisdictions’ guidelines
- Keep abreast of legal findings
- Benefit of foresight



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