

2 February 2018

Project Manager
Amendments proposed following the Eclipse decision
Department of Water Environmental Regulation
Locked Bag 33
CLOISTERS SQUARE WA 6850

By email: wastereform@dwer.wa.gov.au

Dear Sir/Madam

Submission on the Eclipse decision Consultation Paper

1. This submission has been jointly prepared by the Australian Environmental and Planning Law Committee of the Law Council of Australia's Legal Practice Section¹ and the Law Society of Western Australia. We welcome the opportunity to provide comments on the WA Government's 'Consultation Paper: Amendments proposed following the decision on *Eclipse Resources Pty Ltd v The State of Western Australian* [No.4] 2016 WASC 62' (Consultation Paper).

Overview of submission

2. The burial of inert waste type 1, which satisfies the requirements of 'uncontaminated fill', will not require a licence under Part V of the *Environmental Protection Act 1986* (WA) (**EP Act**) and, therefore, will not be subject to regulatory oversight. There will be no reporting process (which currently exists with licensing) to ensure that the buried waste meets the thresholds in Table 1.
3. The proposed regime does take into account the end land use in determining the suitability of fill for burial. Subject to appropriate regulatory oversight, an expanded definition of 'uncontaminated fill' may facilitate the use of waste-derived materials for beneficial uses that do not meet the thresholds in Table 1. Alternatively, a new legislative mechanism may be required to encourage the re-use of waste-derived materials.
4. Consistent with the objects of the *Waste Avoidance and Resource Recovery Act 2007* (WA) (**WARR Act**), specific exemptions to the waste levy should be created for the re-use of waste-derived materials.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

Absence of regulatory oversight for 'uncontaminated fill'

5. The Consultation Paper proposes that premises which accept 'clean fill' or 'uncontaminated fill' for burial (known as 'clean fill premises') will not be prescribed premises for the purposes of Part V of the EP Act and, therefore, will not require a licence.
6. Each of the categories of landfill sites (categories 63-66, and 89 of schedule 1 to the *Environmental Protection Regulations 1987 (Regulations)* will be amended to exclude 'clean fill premises'.
7. These amendments are required to address the unintended consequences of the *Eclipse* decision, particularly the potential requirement on developers to hold a Part V licence and to pay the waste levy when depositing clean fill on development sites.
8. The Consultation Paper proposes that the terms 'clean fill' and 'uncontaminated fill' will be defined in the Regulations by reference to the *Landfill Waste Classification 1996* (as amended December 2009) (**Waste Definitions**).
9. Relevantly, the proposed definition of 'uncontaminated fill' in the Waste Definitions is as follows:

'Uncontaminated fill means inert waste type 1 (excluding asphalt and biosolids) that meets the requirements set out in Table 1, as determined by sampling and testing carried out in accordance with the requirements set out in Table 2.'

10. Examples of inert waste type 1 are provided at page 9 of the Waste Definitions. Those not excluded from the definition of 'uncontaminated fill' are building and demolition waste (eg bricks, concrete and associated unavoidable small quantities of paper, plastics, metal and timber that should be recovered), casting sand (that does not contain leachable components which would require disposal in a higher class of landfill) and blasting sand and garnet (excluding that used for stripping tributyl tin-containing paints).
11. The inclusion of building and demolition waste in the definition of 'uncontaminated fill' (provided the material complies with the thresholds in Table 1) may help address some of the unintended consequences of the *Eclipse* decision, including the stockpiling of this form of waste in the Perth metropolitan area (as these wastes will be exempt from the levy). However, it will also mean that 'clean fill premises' that receive this waste will not require a licence and, therefore, will not be subject to DWER's regulatory oversight. The current licensing regime provides for reporting obligations which assist with compliance but the Consultation Paper does not provide for any certification or reporting process.

Definition of 'uncontaminated fill' to account for end land use

12. Further, we observe that the thresholds set out in Table 1 may be suitable for some development sites, but fill material that does not meet these thresholds may have

other beneficial uses. The thresholds in Table 1 do not assist in determining the suitability of fill material for a particular end use.

13. The *National Environment Protection (Assessment of Site Contamination) Measure 1999* as amended (**ASC NEPM**) establishes assessment criteria for the re-use of soil in specific circumstances (such as commercial/industrial land use) which are different than the thresholds set out in Table 1.
14. The Department may wish to consider amending Table 1 so that it includes the assessment criteria for commercial/industrial land contained in the ASC NEPM or provide some other mechanism to facilitate the re-use of waste-derived materials that do not meet the thresholds in Table 1 but may be suitable for re-use depending on the proposed end land use. This could be achieved, for example, by including in the definition of 'uncontaminated fill' the following words:

...or as otherwise determined having regard to the proposed land use and a validation report prepared by a site auditor accredited under the *Contaminated Sites Act 2003* (WA) confirming the suitability of the fill for re-use.
15. A policy and/or legislative framework that encourages the re-use of waste-derived materials meets the objects of the WARR Act. One of the primary objects in s. 5 of the WARR Act is to move towards a waste-free society by the consideration of resource management options against the following hierarchy:
 - (a) avoidance of unnecessary resource consumption;
 - (b) resource recovery (including reuse, reprocessing, recycling and energy recovery); and
 - (c) disposal.
16. In light of these objects, the re-use of waste-derived materials should not attract the waste levy because imposing levy on the waste recycling industry creates a financial disincentive to resource recovery in WA. Under the proposed changes, only 'clean fill' and waste that meets the requirements of 'uncontaminated fill' as set out in Table 1 will be exempt from the levy.

Inclusion of statutory definition of 'waste'

17. The Consultation Paper proposes the removal of the existing definition of 'waste' from the Waste Definitions to ensure consistency with the EP Act and WARR Act. It may be helpful to industry if the Department were to insert or cross-reference the statutory definition of 'waste' in the Waste Definitions.
18. To provide guidance to industry, the existing definition of 'waste' could be retained in the Waste Definition as relevant examples of waste.

Contact

We would welcome the opportunity to discuss the submission further. Please contact Mary Woodford, General Manager Advocacy, at mwoodford@lawsocietywa.asn.au or (08) 9324 8646 if you would like further information or clarification.

Yours sincerely

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Jonathan Smithers
Chief Executive Officer

A handwritten signature in blue ink, appearing to read 'Hayley Cormann', with a long horizontal stroke extending to the right.

Hayley Cormann
President