

The Department for Water and Environmental Regulation (DWER) has released a consultation paper outlining its long-anticipated proposals to address the application of the “landfill levy”, following Justice Beech’s decision in *Eclipse Resources Pty Ltd v The State of Western Australia [No 4]* (2016) WASC 62, handed down on 9 March 2016 in the Supreme Court of Western Australia. The release of the consultation paper provides an opportunity for government stakeholders to work together to ensure that these amendments deliver their intended outcomes, and to identify and resolve any unintended consequences of these amendments prior to them taking effect. Comments are invited until 2 February 2018.

The *Eclipse* decision clarified the application of the waste levy in Western Australia. It also had unintended consequences in relation to the use of clean fill for development in certain circumstances and liability for the waste levy under the Waste Avoidance and Resource Recovery Levy Act 2007 (WARR Levy Regulations) and licensing requirements under the Environmental Protection Act 1986 (EP Act).

Proposed Amendments

DWER has identified the need for amendments, which are intended to remove premises that only accept uncontaminated waste and “clean fill” from the scope of the levy and licensing regime. This will be achieved by:

- Amending categories 63-66 of Schedule 1, Environmental Protection Regulations 1987 (EP Regulations) to exclude “clean fill premises”
- Including a new definition of “uncontaminated fill” and amending the definition of “clean fill” in the DWER’s Landfill Waste Classifications and Waste Definitions document to replace the concept of waste that has “no harmful effects on the environment” with a prescriptive definition, specifying the types of uncontaminated materials that are clean fill

These amendments, examined in further detail below, intend to provide a level of certainty and clarity to industry stakeholders on the relationship between licence requirements, the waste levy and use of fill.

Amendment to Category 63 to 66, and 89 of the EP Regulations

DWER proposes to amend the category descriptions such that those sites that have only ever accepted “uncontaminated fill” or “clean fill” are not required to be licensed as category 63 to 66 prescribed premises, and consequently are not liable for the waste levy under regulation 12(1) of the WARR Levy Regulations for categories 63, 64 or 65.

The proposed category 63 to 66 amendments do not apply to those premises that have previously accepted or currently accept waste other than “uncontaminated” or “clean fill”. This excludes those sites that may pose a significant risk of harm to human health and the environment and prevents occupiers from avoiding potential levy liability.

Although not subject to the licensing regime under Part V Division 3 of the EP Act or the waste levy regime, category 89 putrescible landfill premises under Part 2, Schedule 1 of the EP Regulations, which may be registered by the occupier of those premises, are also proposed to be amended for consistency.

Amendment of Waste Definitions

DWER proposes to amend the Waste Definitions to include a definition for the term “uncontaminated fill” and amend the definition of “clean fill”.

The term “uncontaminated fill” consists of inert type 1 waste, excluding asphalt and biosolids, which meets specified maximum concentrations (thresholds) of chemical substances and limits of relevant physical attributes (set out in Table 6 of the Waste Definitions), as determined by specified sampling and testing requirements (set out in Table 7 of the Waste Definitions).

The existing definition of “clean fill” in the Waste Definitions is revised to be limited to raw excavated natural material that meets the following requirements:

- Has been excavated or removed from the earth in areas that are not contaminated with manufactured chemicals, or with process residues, as a result of industrial, commercial, mining or agricultural activities
- Does not contain any acid sulphate soil
- Does not contain any other type of waste
- Has not, since it was excavated or removed from the earth, been used or subject to processing of any kind

The revised definition of “clean fill” will be consistent with Justice Beech’s determination in the *Eclipse* decision, which excludes material containing building rubble such as broken concrete or brick.

The definition of “waste” in the Waste Definitions is also removed so as to ensure consistency with the definition of waste under 3(1) of the EP Act and section 3(1) of the WARR Act.

Further Action

The release of the consultation paper provides an opportunity for government stakeholders to work together to ensure that these amendments deliver their intended outcomes, and to identify and resolve any unintended consequences of these amendments prior to them taking effect. Comments are invited until 2 February 2018.

To discuss the amendments of the implications of the *Eclipse* decision for your business, please speak to your usual Squire Patton Boggs contact or one of the lawyers listed below.

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