

A new consultation on the waste levy and waste reform in Western Australia is open until November, but it does not address the issues arising out of the *Eclipse Resources* litigation.

The Department for Water and Environmental Regulation (DWER) has released the Waste Reform Project discussion paper, proposing amendments to the legislative framework of the waste levy and comparing the WA regime to the equivalent New South Wales, Victorian and South Australian legislation. The proposals would streamline the current levy regime, by combining five categories of landfill into one and would potentially extend the application of the levy to stockpiled waste. A longer term proposal is to incorporate the Waste Strategy into the Environmental Protection Act 1986 (WA) (EP Act).

It was anticipated that DWER would take the opportunity to clarify whether the landfill levy is intended to apply to clean fill used in development and subdivision, but the discussion paper does not consider the topic.

The decision of the WA Court of Appeal in *Eclipse Resources Pty Ltd v Minister for the Environment* [No. 2][2017] WASCA 90, handed down in May 2017, confirmed the broad interpretation of the word “waste” in the EP Act. This is the definition of waste that applies to the landfill levy regime under the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) (WARR Levy Regulations). The Court of Appeal also confirmed the view of the WA Supreme Court, that whether or not material is “waste” depends on its use in the hands of the source. Where it is unwanted by the source, it will be waste, regardless of whether it can be reused elsewhere by someone else.

Although not the subject of *Eclipse*, the unintended effect of the decisions of the Supreme Court and Court of Appeal is that inert “clean fill” waste (the product of C&D materials) that is used to level or fill a site is waste “disposed of to landfill”, within the meaning of the WARR Levy Regulations.

If the site accepts over 500 tonnes per year, it is required to be licensed as a Class 63 Class I inert landfill site, under the Environmental Protection Regulations 1987 (WA) and to pay the landfill levy. The landfill levy is currently AU\$90 per square-metre, rising to AU\$105 per square metre on 1 July 2018. It is calculated by volumetric surveys of the land, a method which the discussion paper suggests is unreliable.

The DWER has [previously indicated](#) that it would not complete its review of the material guidelines for clean fill and construction products until the outcome of *Eclipse* was known. We are now one step closer to clarity because the High Court of Australia last week declined to grant leave to *Eclipse Resources Pty Ltd* to appeal, bringing closure to the litigation.

The [discussion paper](#) is available to view on the government of Western Australia website. Comments are invited until 16 November 2017. To discuss the reforms or the implications of *Eclipse* for your business, please speak to Margie Tannock, partner, or Charlotte Osborne, senior associate.

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