

“WHEN IS WASTE, WASTE?”

Tim Houweling* and Lyndsay Barrett**

ABSTRACT

*Clean fill and processed materials were never intended to be subject to the levy regime in Western Australia. In *Eclipse Resources Pty Ltd v The State of Western Australia* [No. 4] [2016] WASC 62 (*'Eclipse'*) (upheld on appeal in *Eclipse Resources Pty Ltd v The Minister for Environment* [No. 2] [2017] WASCA 90) Beech J adopted an expansive interpretation of 'waste' whereby the classification of material is determined from its source, irrespective of its later use.*

Under this broad definition, operators who use clean fill and processed materials may be liable to pay a landfill levy, notwithstanding that the material can be subsequently re-processed or re-used. This decision has widespread implications for the recycling sector. Significant concerns are raised for industries that have previously undertaken integrated activity and landfilling on the basis that clean fill and processed materials were not 'waste', and are now liable to pay backdated levies and penalties.

* (BA) (Curtin), (LLB) (Murdoch), (LLM) (UWA), Director, Cornerstone Legal; Adjunct Professor, Murdoch University, School of Law.

** (LLB) (Hons) (Murdoch), (GradCertBusAdmin) (Murdoch), Lawyer, Cornerstone Legal; Vice President, Western Australian Legal Theory Association Inc.
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I INTRODUCTION

In Western Australia, the recycling industry is governed by a convoluted statutory regime whereby levies are payable for all ‘waste’ ‘received at landfill premises in the metropolitan region’,¹ and ‘all waste collected within the metropolitan region ... and received at landfill premises outside the metropolitan region from 1 July 2008’.² Under this regime, the Chief Executive Officer of the Department of Water and Environmental Regulation (‘**DWER**’) is entitled to estimate the amount of waste ‘received’ and ‘disposed of to landfill’,³ and may seek to recover unpaid landfill levies.

Urgent reforms are necessary to confirm the legislative intent of the landfill levy and its application. Particularly, by amending the definition of ‘waste’ to ensure that the landfill levy does not apply in respect of clean fill and uncontaminated materials, which are properly regarded as a valuable resource and not ‘waste’.

II WASTE CLASSIFICATION AND THE RECYCLING SECTOR

According to the Environmental Protection and Heritage Council, on November 2009, the recycling and waste sector was valued at between \$7 and \$11.5 billion.⁴ Despite this, waste management strategies are failing to adequately account for Australia’s waste streams. With statistics demonstrating a rapid growth in waste generation in Australia (due to population increases and various other factors), recycling is becoming one of Australia’s fastest growing

¹ *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) (‘**Levy Regulations**’) reg 4(1)(a).

² *Ibid* reg 4(1)(b).

³ See, *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) reg 11.

⁴ Environmental Protection and Heritage Council, *National Waste Overview 2009* (November 2009) 1 <<http://www.scew.gov.au/system/files/resources/cc88088d-e2a3-449e-9a04-f87f46e3d2e1/files/wastemgt-nat-waste-overview-print-ver-200911.pdf>>.

industries. In Australia, ‘waste generation, resource recovery and landfill’ are comprised of four major waste streams: construction and demolition waste (‘**C&D waste**’); commercial and industrial waste (‘**C&I waste**’); municipal solid waste; and hazardous waste. In addition to this, DWER extends the definition of ‘waste’ to include clean fill that is no longer required.⁵

A Waste Diverted to Landfill

In recent times there have been significant increases in the amount of waste generated in Australia. The current rate of waste generation is increasing at an average rate of 4.5% per annum. Of the 5,247,000 tonnes of waste generated in Western Australia during this period, approximately 3,539,000 tonnes of waste disposed of to landfill, while only 33% of waste (or 1,700,000 tonnes) was recycled.⁶ Between 2006-2007 Western Australia recorded the lowest waste recycling percentages across all Australian jurisdictions. Other States are performing significantly better, with the Australian Capital Territory recycling approximately 75% of waste, South Australia 66%, Victoria 62% and New South Wales diverting 52% of waste from landfill.⁷ Recycling is thus a major waste management strategy in diverting waste from landfill.⁸

The Australian Government Department of Sustainability, Environment, Water, Population and Communities has identified a growing commercial drive for ‘business and industry to invest in activities that will create profit and improve environmental outcomes by extracting valuable resources from the C&D waste stream’. This involves the ability to turn unwanted or surplus material into

⁵ Environmental Protection and Heritage Council, *National Waste Overview 2009* (November 2009) 2 <http://www.scew.gov.au/system/files/resources/cc88088d-e2a3-449e-9a04f87f46e3d2e1/files/wastemgt-nat-waste-overview-print-ver-200911.pdf>.

⁶ *Ibid* 2.

⁷ *Ibid* 2.

⁸ *Ibid* 1.

‘valuable resources to supply the construction industry, which has traditionally been adverse to behavioural change’.⁹

B *Recycling Targets*

In the blueprint the *Western Australian Waste Strategy: Creating the Right Environment*,¹⁰ the State is endeavoring to divert 75% of construction and demolition waste from landfill by 2020. Notwithstanding this, in March 2016 Environmental Minister Albert Jacob observed that ‘Western Australia's use of recycled construction and demolition materials is significantly lower than in other States and we need to change this’ and further that ‘each year we generate three million tonnes of construction and demolition and WA sends two million tonnes to landfill. This is a valuable resource that we could be using in everyday construction projects’.¹¹ Urgent reforms are required to give effect to the purpose of the levy regime and objects of the landfill levy.

The purpose of the levy is to reduce the amount of material diverted to landfill by encouraging recycling and re-use.¹² The current construction of the levy regime set out in *Eclipse*, undermines this intent by imposing liability on operators that re-use and recycle clean fill and uncontaminated material. As a consequence, industries are actively discouraged from recycling material and instead resort to disposing of material at licensed landfill facilities, to avoid liability for significant levies.

III *ECLIPSE* DECISION

⁹ Australian Government Department of Sustainability, Environment, Water, Population and Communities, *Construction and Demolition Waste Guide – Recycling and Re-use Across the Supply Chain* (2012) 4 <<http://www.environment.gov.au/system/files/resources/b0ac5ce4-4253-4d2b-b001-0becf84b52b8/files/case-studies.pdf>>.

¹⁰ Waste Authority WA, *Western Australian Waste Strategy: Creating the Right Environment* (March 2012).

¹¹ Government of Western Australia, ‘\$10m for councils to recycle construction waste’ (10 March 2016) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/03/10m-for-councils-to-recycle-construction-waste.aspx>>.

¹² See, *Eclipse* [562], [613].

On 9 March 2016, Beech J determined that the definition of ‘waste’ extends to clean fill and processed material that is surplus to the needs of the owner.¹³ The activities undertaken by the plaintiff, Eclipse Resources Pty Ltd (**‘Eclipse’**) included compacting and depositing various materials (such as clean fill and processed materials) into voids during 1 July 2008 and 30 September 2014. In the first instance, Eclipse submitted that it was not liable to pay a waste levy on any of its three sites on the basis that:¹⁴

1. the materials accepted at the sites were not ‘waste’ under category 63 of the *Environmental Protection Regulations 1987 (WA)* (**‘EP Regulations’**) and the Levy Regulations;
2. if they were, Eclipse did not accept them for burial; and
3. the materials that were deposited and compacted in the void were not waste. Rather they are ‘a resource from which, through processing, re-use or recycling ... can produce resalable or reusable commodities’.¹⁵

Justice Beech ultimately determined that Eclipse had ‘received waste’ and ‘accepted waste for burial’, and ordered Eclipse to pay backdated landfill levies and penalties of approximately \$21.5 million in respect of its resource recovery operations.

A When Does Material Become ‘Waste’?

A significant development for recovery operators was Beech J’s expansive interpretation of ‘waste’ and the levy regime. His Honour confirmed that material is ‘waste’ when it is ‘unwanted by or excess to the needs of the source

¹³ See, *Eclipse Resources Pty Ltd v The Minister for Environment [No. 2]* [2017] WASCA 90.

¹⁴ *Eclipse* [3].

¹⁵ *Ibid* [54].

of that material', irrespective of its later use.¹⁶ Under this classification, it is irrelevant whether the material is capable of being subsequently recycled and sold for commercial value. Consequently, material remains the status of 'waste' even if the supplier can establish a demand to re-sell the product to a third party such as a property developer.

B First Instance Decision

In determining that the material received and accepted at the sites was 'waste received' and 'waste accepted for burial', primary judge Beech J made the following observations in respect of the levy regime:¹⁷

1. in the context of 'waste received' and 'waste accepted for burial', 'waste' is any material that is unwanted by or excess to the needs of the source of that material.
2. clean fill, including sand and soil, and what Eclipse calls Natural Earth Material, received from a source for whom they are unwanted, are waste.
3. material that is received with the intention that it will be or is likely to be put into the ground and buried is 'accepted for burial'.
4. that applies equally to sand and soil.
5. in the context of 'waste disposed of to landfill', whether material is waste is not determined by reference to whether it is excess to the requirements of the licensee who is said to be disposing of it. Material that was waste when received will be waste in this context, unless, (perhaps) it has been substantially transformed.

¹⁶ Ibid, [560], [627], [630].

¹⁷ Ibid [627].

6. any material, including sand or soil, clean fill or what Eclipse calls Natural Earth Material, that is placed into the ground and buried at a licensed landfill is 'waste disposed of to landfill'.
7. the intention with which material is buried does not control or influence whether material is 'waste disposed of to landfill'.

His Honour Beech J rejected Eclipse's construction of the levy regime and held that the material received by Eclipse at the three sites during the relevant period was 'waste accepted for burial'¹⁸ and that at all relevant times Eclipse's sites were category 63 prescribed premises,¹⁹ within the meaning of the Levy Regulations.²⁰ Eclipse ceased operations and faces threat of liquidation as a result of its liability for unpaid levies.²¹

C Appeal

In *Eclipse Resources Pty Ltd v The Minister for Environment [No. 2]* [2017] WASCA 90 Eclipse unsuccessfully appealed His Honour's decision on the following grounds:²²

1. in determining whether 'waste' 'is accepted for burial'²³, the purpose for which the material is accepted must be taken into account;
2. the material used by Eclipse to fill the voids on its sites does not constitute 'waste disposed of to landfill';

¹⁸ Ibid [629]-[630].

¹⁹ Within the meaning of Schedule 1 to the EP Regulations.

²⁰ *Eclipse* [10].

²¹ On 1 July 2016, the Supreme Court of Appeal (Buss and Newnes JJA) dismissed an application by Eclipse for orders suspending judgment pending the outcome of the appeal. See, *Eclipse Resources Pty Ltd v Minister for Environment* [2016] WASCA 110.

²² *Eclipse Resources Pty Ltd v The Minister for Environment [No 2]* [2017] WASCA 90 [111]-[116].

²³ Under Category 63 in Schedule 1 to the EP Regulations

3. the CEO's estimates were invalid because the CEO did not discriminate between the material measured; and
4. the tax imposed on Eclipse constituted an excise under section 90 of the *Commonwealth of Australia Constitution Act* (1900) (Cth) and was therefore invalid.

The Supreme Court of Appeal dismissed the appeal on all four grounds and ordered Eclipse to pay backdated levies and penalties from 1 July 2008 and 30 September 2014.²⁴ On 14 September 2017 Eclipse was refused special leave to appeal to the High Court of Australia.²⁵ As a consequence, Eclipse is now liable to pay backdated levies in excess of \$20million.

IV DISTINGUISHING *ECLIPSE*

It has been argued that *Eclipse* is distinguishable on the following grounds:

1. type of material – His Honour Beech J found that Eclipse accepted a variety of materials at its sites, including: motor vehicle tyres; glass; plasterboard; corrugated metal sheeting; bicycles; plastic; carpet; acid sulfate soils; wrapped asbestos; material containing asbestos; and other unwanted materials.²⁶ This provides a basis to distinguish processed materials such as C&D material.
2. material undergoes a 'substantial transformation' – Applying Beech J's construction of the levy regime, material may cease to have the character

²⁴ *Eclipse Resources Pty Ltd v The Minister for Environment* [No. 2] [2017] WASCA 90, 9 [1].

²⁵ See, *Eclipse Resources Pty Ltd v The State of Western Australia & Ors* (P22/2017) [2017]

HCASL 234. See also, High Court of Australia, 'Results of Applications Listed for Determination' (Melbourne, 14 September 2017)

<<http://www.hcourt.gov.au/assets/registry/special-leave-results/2017/14-09-2017Determin.pdf>>

²⁶ See especially, *Eclipse* [91]-[99].

of ‘waste’ it undergoes a ‘substantial transformation’.²⁷ In other words, operators who screen and process waste stream materials (such as C&D material) for re-sale or re-use, can potentially change the nature of the material so that it is no longer ‘waste accepted for burial’ and ‘disposed of to landfill’.

3. monetary value – In *Eclipse* Beech J was ‘not satisfied that the materials received ... at the Sites during the Relevant Period were saleable’.²⁸ There is scope to distinguish *Eclipse* in circumstances where operators are paid to accept materials and/or have the potential to re-sell the surplus materials. This includes, for example, reprocessing C&D material for re-use as road aggregate and building materials, so that it attributes commercial value.

Justice Beech accepted that a relevant consideration is whether the materials received by the plaintiff were ‘a valuable commodity or article of commerce’.²⁹ Oddly, clean fill was not regarded as a valuable commodity. This is because the construction adopted by Beech J requires the classification of material to be determined from ‘the perspective of the person who is the source of the material, not from the perspective of the party receiving or accepting it’.³⁰ As a result of the Supreme Court of Appeal decision, it is now increasingly difficult to distinguish *Eclipse*. This further reinforces the urgent need to reform the levy regime.

²⁷ Ibid [613]

²⁸ Ibid [734].

²⁹ Ibid [734].

³⁰ Ibid [560]. According to Beech J, reg 5(1)(a) of the Levy Regulations reveals a clear intention that uncontaminated soil or other clean fill received at premises is waste’ (at [577]).

V STATUTORY FRAMEWORK

In Australia, management of waste is governed by each of the States and Territories through their respective environmental regulations and policies. The landfill levy was introduced in Western Australia in 1998 under the *Environmental Protection (Landfill) Levy Act 1998* (WA),³¹ to encourage recycling and divert waste from landfill, and is imposed under the Levy Regulations.³² According to the Department of Environment Regulation ('DER') (as it then was), '[t]he landfill levy is intended to discourage waste disposal to landfill and to encourage resource recovery'³³ by:³⁴

1. acting as an economic instrument to reduce waste to landfill by increasing the cost of landfill disposal; and
2. generating funds for a range of environmental purposes.

A Operation of the Levy Regime

Under the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA) ('Levy Act') and the Levy Regulations, a levy is payable to the Minister for the collection and receipt of waste at landfills.³⁵ The Levy Regulations, subject to

³¹ See, Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 10 <http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_Levy_Final_amended_March_2012.pdf>.

³² Made pursuant to the *Waste Avoidance and Resource Recovery Act 2007* (WA) ('WARR Act') and the *Waste Avoidance and Resource Recovery Levy Act 2007* (WA) ('Levy Act'). See *Eclipse* at [445]-[446].

³³ Department of Environment Regulation, 'Exemptions from the Landfill Levy', Landfill Levy Fact Sheet 2 <<https://www.der.wa.gov.au/images/documents/your-environment/waste/landfill-levy/fs-exemptions-from-the-landfill-levy-for-asbestos-containing-material.pdf>>.

³⁴ Department of Environment Regulation, *Review of Waste Avoidance and Resource Recovery Act 2007 Discussion Paper* (1 December 2014) 9. See also WARR Act and Waste Authority WA, 'Levy' <<http://www.wasteauthority.wa.gov.au/about/levy/>>.

³⁵ A levy is payable in respect of waste received at 'disposal premises'. See especially, Levy Act s 4(1), s 5, s 3 and Levy Regulations reg 4.

certain exemptions under regulation 5, apply to all waste received at metropolitan landfills and metropolitan waste received at landfills outside the metropolitan area.³⁶ Section 4 of the Levy Act establishes the power to prescribe an amount by way of a levy that is to be payable in respect of ‘waste’ ‘received’ at ‘disposal premises’.³⁷ ‘Disposal Premises’ is defined in section 3 of the Levy Act to mean premises:

- (a) which are used for the purpose of receiving waste; and
- (b) in respect of which the occupier is required to hold a licence [under section 56 of the *Environmental Protection Act 1986* (WA) (**‘EP Act’**)], whether or not such a licence is in force.³⁸

The primary purpose of the landfill levy, as stated in the Second Reading Speech to the Waste Avoidance and Resource Recovery Bill 2007 is:³⁹

... to provide resources to fund projects for advancing waste reduction and recycling... In many respects, the arrangements for the levy and account continue unchanged. However, they have also been updated....Levy funds are to be used only for purposes provided for in the legislation. Specifically, the funds will be applied to programs relating to the management, reduction, reuse, recycling and monitoring of waste. The funds could be used by DEC [Department of Environment Conservation (now DWER)] only for administration of the account and developing or coordinating the implementation of programs consistent with the purposes of the legislation. The levy is not to be used to fund other normal ongoing operations of DEC.

³⁶ Levy Regulations reg 4.

³⁷ See also, *Eclipse* [449]-[450].

³⁸ For a further discussion of the legislative framework see *Eclipse* [444]-[518].

³⁹ Waste Avoidance and Resource Recovery Bill 2007, Second Reading Speech, 7.

B Levy Liability For 'Prescribed Premises'

The EP Act makes it an offence for an occupier⁴⁰ to carry out work, or cause an emission or discharge on premises that is prescribed, unless done so in accordance with a works approval, a notice (such as a closure notice or an environmental protection notice) or a licence.⁴¹ The categories of 'prescribed premises' are specified in Schedule 1 of the EP Regulations.⁴² This includes, relevantly, a category 63 (Class I inert landfill site) on which more than 500 tonnes of 'waste is 'accepted for burial' each year.⁴³

C Landfill Levy Rates

The *Waste Avoidance and Resource Recovery Act 2007* (WA) ('**WARR Act**') and the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) ('**WARR Regulations**') provides for when a levy is payable and in what manner.⁴⁴ Landfill levy rates were increased from January 2015 in an attempt by the Western Australian government to 'help divert the amount of waste being dumped at tips in the metropolitan area and encourage investment in alternative waste treatment options and other government initiatives to support increased recycling'.⁴⁵ The objects of the WARR Act include 'promoting the most

⁴⁰ See EP Act s 6. 'The person liable to pay the landfill levy is the holder of a licence in respect of disposal premises ... or occupier required under the EP Act to hold such licence'.

⁴¹ EP Act Part V ss 52, 53, 56.

⁴² EP Regulations reg 5. See also EP Regulations Schedule 1.

⁴³ EP Regulations schedule 1.

⁴⁴ See WARR Act s 73.

⁴⁵ Department of Environment Regulation, <<https://www.der.wa.gov.au/about-us/media-statements/112-landfill-levy-rates-to-rise-from-january-2015>>.

efficient use of resources, including resource recovery and waste avoidance; and reducing environmental harm, including pollution through waste'.⁴⁶

D Exemptions

The levy exemptions in regulation 5 of the Levy Regulations apply in a limited range of circumstances. Relevantly, regulation 5(1)(b) of the Levy Regulations provides an exemption for 'waste that is not disposed of to landfill but is collected and stored at a licensed landfill for reuse, reprocessing, recycling or use in energy recovery'. The Chief Executive Officer has a broad discretion to grant or refuse to grant an exemption, grant an exemption subject to conditions, or limited to circumstances, specified in the notice; or revoke an exemption.⁴⁷

The commercial risk is that should DWER determine that the activity does not constitute an exempt activity, it follows that a landfill levy is payable. There is no basis then to argue that the material does not constitute 'waste'. Similarly, the exemption under regulation 5(3) provides that licensee of a category 63 licensed landfill may by application in an approved form claim an exemption from the requirements of regulation 10(5) and (6) in respect of a return period if no 'waste' has been disposed of landfill on the licensed landfill. The DER adopts a broad definition of the term 'waste' than previously had been thought would be caught by the Levy Regulations.

E Backdated Levies

If an occupier is found to have received waste and accepted waste for burial, they may be liable to pay backdated levies for the return periods, as well as penalties for contravening the levy requirements under the Levy Act and Levy Regulations. For the return period, the Chief Executive Officer may make

⁴⁶ WARR Act s 5(1).

⁴⁷ Levy Regulations reg 5(4).

estimations under regulation 11(2) of the Levy Regulations based on the volume of ‘waste disposed of to landfill’. Section 76 of the WARR Act imposes a penalty of 20% per annum on unpaid levies, calculated from the time the levy becomes payable.

VI MEANING OF ‘WASTE’

Liability under the levy regime depends on a fundamental question of whether ‘waste’ is accepted for burial and disposed of to landfill.⁴⁸ One of the most controversial aspects of the levy regime is the construction of the term ‘waste’. Section 3 of the EPA and the WARR Act defines ‘waste’ as:

1. whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
2. prescribed by the regulations to be waste.

Section 44 of the *Interpretation Act 1984* (WA) requires that expressions used in the regulations are, unless the contrary intention appears, to have the same meaning as in the Act. In another words, if the term ‘waste’ is defined in the Waste Recovery Act, the same definition should apply under the Waste Recovery Regulations. However, the Levy Act and Levy Regulations do not define the word ‘waste’.

There is a long line of cases stating that the correct approach to statutory interpretation requires that the words of a statutory definition be given their ordinary meaning unless the contrary is clearly intended.⁴⁹ The ordinary

⁴⁸ See, Levy Regulations reg 4, reg 10-12. See also, *Eclipse* [514]-[518] and Levy Act ss 4-6.

⁴⁹ See, eg *Coast Ward Ratepayers Association (Inc) v Town of Cambridge* [2016] WASC 239 [56]; *Kennedy Cleaning Services Pty Limited v Petkoska* (2000) CLR 286, [53] (Gaudron J),

meaning of ‘waste’ is broad and is capable of numerous meanings. The Macquarie Dictionary lists a large number of possible meanings, including:

1. anything left over or superfluous, as excess material. By-products etc not of use for the work in hand;
2. anything unused, unproductive or not properly utilised;
3. not used or in use;
4. left over or superfluous;
5. having served a purpose and no longer of use;
6. rejected as useless or worthless, or refuse;
7. relating to material unused by or unusable to the organism.

Section 18 of the Interpretation Act provides that a construction that is consistent with the purpose of the statute is to be preferred over one that is not. The proper approach to construing the term waste is that set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. There, the High Court observed that:

The duty of the court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, the meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁵⁰

⁵⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

The explanatory notes to the Waste Avoidance and Resource Recovery Levy Bill 2007 states:

[Section 4] enables the making of regulations to impose a levy on waste received at disposal premises. **It is intended that the levy be imposed on waste going to landfill and not on recycled materials** (emphasis added).

This note distinguishes waste from usable materials and recyclable materials. The primary purpose of the landfill levy is to provide resources to fund projects for advancing waste reduction and recycling, by encouraging recycling and re-use. The purpose is not to generate revenue, nor to deter operators from recycling and re-using materials. Taking into account the purpose of the legislation, as required by section 18 of the Interpretation Act, it is clear that ‘waste’ was never intended to extend to valuable resources such as clean fill and C&D material. Applying these principles, the term ‘waste’ should be read in light of legislative purpose by rewarding licensed landfills or premises for recycling materials that do not present environmental harm.

VII WASTE CLASSIFICATION AND ITS IMPACT ON INDUSTRY

Under the Supreme Court of Appeal’s expansive interpretation of ‘waste’, industries are liable to pay a landfill levy for material that is excess to operational requirements, irrespective of whether the material can be processed, re-used or recycled at a later date. In other words, if the material is surplus to the needs of the original owner, use of that material may fall within the levy regime if it is ‘received’ or ‘accepted for burial’ at a disposal premises.⁵¹ Businesses that receive and deposit clean fill into a quarry or void for environmental rehabilitation purposes will be caught by the levy regime.

⁵¹ See, Levy Act ss 3-4.

A Valuable Resources Are 'Waste'

Adopting this broad definition of 'waste', it is irrelevant whether the material has a commercial value. This is inconsistent with the ordinary meaning of the word waste which refers to something that is disused and unwanted. DWER adopts a similar approach to clean fill and construction and demolition material that used for rehabilitation and environmental remediation purposes. *Eclipse* is being applied as authority for the proposition that clean fill is 'waste', and therefore attracts a landfill levy. This results in an absurd position that effectively undermines the Western Australian Government's attempts to promote recycling. Curiously, 'limited evidence has been presented that the landfill levy is directly effective as a disincentive for landfill or as a way to take account of the full environment and/or social costs for landfill'.⁵² As noted by the Municipal Waste Advisory Council in its *WALGA Background Paper Landfill Levy* observed that in Western Australia, '[t]he effect of the Levy increase, without the accompanying investment in waste management, has had a negative impact in relation to waste diversion activities'.⁵³

DER (as it then was) has applied *Eclipse* as a basis for recovering a landfill levy from sites within the Metropolitan Region that deposit more than 500 tonnes of clean fill per annum, since 1 July 2008. The occupier in that instance is alleged to have contravened the EP Act and EP Regulations, and may be assessed for unpaid levies. The levy regime was never intended to extend to materials that are a valuable commodity (such as those which have the potential to be used in building and construction, as road aggregate, or for use in environmental

⁵² Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 13
<http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_Levy_Final_amended_March_2012.pdf>.

⁵³ Ibid.

rehabilitation and remediation). Rather, its purpose was to increase recycling and recovery in Western Australia,⁵⁴ and ‘provide resources to fund projects for advancing waste reduction and recycling’.⁵⁵

The broad interpretation of ‘waste’ in *Eclipse* has widespread implications for recovery and construction and demolition industries, as well as developers. *Eclipse* identified a number of unintended consequences arising from the broad construction of ‘waste’, such as the potential for property developers who accept or purchase clean fill or sand (in order to build up the levels of land to use as fill for earthworks to raise soil levels for subdivision and development) to become a licensed landfill.⁵⁶

B *Clean Fill*

Traditionally clean fill has been accepted by landfill operators without charge, being regarded as ‘an integral part of landfill operations’.⁵⁷ Under the current waste regime, clean fill is classified as ‘waste’ notwithstanding that there is a demand for clean fill for use in rehabilitation and environmental remediation. Clean fill is also commercially valuable to satisfy obligations under a development approval, whereby it is common to include a condition for environmental remediation of the subject land.⁵⁸ Notwithstanding that there is a supply and demand for clean fill (and it therefore has a commercial value), DWER insists on the position that clean fill is ‘waste’ to which a landfill levy applies.

⁵⁴ See, Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 2-3.

⁵⁵ Waste Avoidance and Resource Recovery Bill 2007, Second Reading Speech, 7.

⁵⁶ *Eclipse* [572].

⁵⁷ Resource Recovery News, ‘Eclipse Loses Final Appeal Over Levy Challenge’ (14 July 2016) <<http://www.resourcerecovery.biz/news/eclipse-loses-final-appeal-over-levy-challenge>>.

⁵⁸ See, *Eclipse* [728].

The position adopted by DER (now DWER), and subsequently confirmed in *Eclipse*, is that a levy is payable by persons who deposit material into the ground. As an analogy, if clean fill is used for construction and residential purposes (such as the foundation for a residential dwelling) then it is not waste. However, if the same fill is deposited into the ground for rehabilitation purposes, it attributes the status of 'waste', and attracts payment of a landfill levy. This interpretation is inconsistent with ordinary definition of waste, which refers to something that is unwanted. The result is an absurdity in the legislation where valuable resources are characterised as 'waste' if they are surplus to the requirements of the original owner.

C Construction and Demolition ('C&D') Material

Under the current licencing regime, operators are required to obtain a licence if they intend to 'receive' and 'accept waste for burial'. This applies even in situations where C&D material undergoes processing and screening prior to being deposited as fill. C&D waste stream recovery operators are processing and screening material for re-use and recycling. However, under the current regulatory system, they are being subject to liability to pay a landfill levy. Business are faced with little, if any, incentive to go through the extensive and costly process of recycling material, with little certainty that they will be rewarded for their efforts. Or worse, they may be effectively punished for their efforts by subsequently being faced with levy liability.

As a consequence, businesses are more inclined to simply dispose of material to approved landfill facilities for a tipping fee, rather than risk a significant pecuniary penalty and commercial loss at a later date. DWER is assessing licence applications on a case by case basis, and there is little certainty that operators will be rewarded for the time and finance incurred with screening and processing C&D material or other waste streams for re-use and re-sale. In

practical terms, operators are required to refrain from undertaking any landfilling or integrated activities while DWER makes a determination about whether a category 63 licence is required. This is causing extensive delays in obtaining necessary licencing to carry out operations, while recovery operators have extensive capital tied up in inventory.

By assessing licence applications on a case-by-case basis, DWER maintains a broad discretion to approve or refuse licence applications. Due to what appears to be an inconsistent application of the licencing regime, certain operators are purporting to overcome the levy requirements by transporting materials outside of the metropolitan area, to rural landfill sites, thus subverting the purpose of the legislative framework.

VIII THE FUTURE OF THE AUSTRALIAN RECYCLING INDUSTRY

Clean fill and uncontaminated material were never intended to be caught by the levy regime in Western Australia. Legislative amendment and administrative changes need to be implemented by DWER to clarify the scope of the landfill levy regime, and to promote recycling. On 8 August 2016 an article was published in *The West Australian* entitled ‘Landfill levy surge fails to aid recycling’. There it was reported that of Western Australian Government’s target to recycle 60% of all C&D waste, only 42% of C&D waste was diverted from landfill.⁵⁹ Western Australia has fallen short of its recycling targets that were forecasted in the *West Australian Waste Strategy: Creating the Right Environment*, notwithstanding the significant increase in landfill levy payment

⁵⁹ Daniel Mercer, ‘Landfill levy surge fails to aid recycling’ *The West Australian* (8 August 2016) <<https://au.news.yahoo.com/thewest/wa/a/32262872/landfill-levy-surge-fails-to-aid-recycling/#page1>>.

since 2009.⁶⁰

Reforms are necessary to amend the licencing regime, taking into account the type of material used, its value, and the activity for which the material is being used. Broadly speaking, this requires two elements:

1. the definition of ‘waste’ should be afforded its natural meaning of materials that are unwanted and discarded (and expressly exclude clean fill and uncontaminated material); and
2. activities that facilitate environmental rehabilitation and remediation should be excluded from the requirement to obtain a licence.

A Amending The Definition Of ‘Waste’

Firstly, and arguably most importantly, it is essential to amend the definition of ‘waste’ in the EP Act and the WARR Act so that it is given its ordinary meaning of unwanted or excess material.⁶¹ Under that definition, uncontaminated fill and clean fill should be regarded not as ‘waste’, but as a valuable resource for use in recycling, reprocessing and rehabilitation. Similarly, then the meaning of ‘prescribed premises’ in the EP Regulations should be re-classified so that operators are not required to pay a levy if they are using clean, uncontaminated material.

B Drafting Proposals

In 2016 proposals in respect of the classification of ‘prescribed premises’ were submitted to Parliamentary Council’s Office for drafting. According to former Director General of DER (now DWER), Mr Jason Banks:

⁶⁰ For some categories of waste, the landfill levy has increased 800 per cent since 2009. See, Daniel Mercer, ‘Landfill levy surge fails to aid recycling’ *The West Australian* (8 August 2016) <<https://au.news.yahoo.com/thewest/wa/a/32262872/landfill-levy-surge-fails-to-aid-recycling/#page1>>.

⁶¹ See, *Eclipse* [557]-[558].

the proposed amendments will seek to revise the description of a prescribed premises category 63 (class I inert landfill) to allow the use of uncontaminated fill and clean fill for development without being subject to the licensing provisions in Part V of the EPA or the landfill levy.

Urgent action is required by industry to implement these proposals into the EP Regulations. If the proposed changes are made to the legislation, DWER will be required to revise its waste framework in a prompt manner to avoid persons being unjustly prejudiced as a consequence of the DWER's reliance on *Eclipse*. These proposals represent a step in the right direction for Western Australian recycling operations, but do not fully realise the purpose of the levy regime. Additional amendments are required to re-define 'waste' and re-classify the meaning of 'waste derived materials'.

C Re-Classifying Waste Derived Materials

One of the recommendations suggested by the Waste Management Association of Australia ('WMAA') in its submissions to DER (now DWER) Guidance Statement: Regulating the Use of Waste Derived Materials was '[t]hat [DWER] give consideration to classifying waste derived material, that is compliant with the relevant Guidelines, as a 'product' [as opposed to 'waste']'.⁶² In addition, the WMAA argued that a clear statement as to the benefits of a material no longer being classified as a waste needs to be developed into DWER's material guidelines. A further advantage of the 'product' classification, as noted by WMAA, is that the material would be brought under regulation of the Australian Consumer Law.⁶³ If the levy regime is not amended to provide certainty about

⁶² Waste Management Association of Australia Submission on the Department of Environment Regulation Guidance Statement: Regulating the Use of Waste Derived Materials <<https://www.der.wa.gov.au/images/documents/our-work/consultation/submissions/eow/waste-management-association-of-australia-submission.pdf>>.

⁶³ Ibid.

the materials and its use, recovery operators may be disinclined to engage in recycling.⁶⁴

D State Grants To Recovery Operators

Economic funding is required to promote recycling and achieve the desired outcomes of diverting waste from landfill. A suggested reform is for the Western Australian Government to provide economic grants to recovery operators and businesses that engage in re-use and recycling activities. This can be achieved by directing funds from the landfill levy into recycling facilities and operations. The State has received approximately \$187 million in levies and penalties since the commencement of the Levy Regulations in July 2008, and is estimated to receive further \$104 million in 2015-2016.⁶⁵ The WARR Act requires that at least 25% of the forecast levy amount in each year be allocated by the Minister for Environment to the WARR Account.⁶⁶ The WARR Act requires funds from the levy collection to be applied to ‘fund programmes relating to the management, reduction, reuse, recycling, monitoring or measurement of waste’.⁶⁷ Funds from the landfill levy are currently being used to fund programs supporting the Waste Strategy through the Business Plan⁶⁸ together with operations of the Waste Authority and the implementation of the WARR and WARR Levy Acts and Regulations.⁶⁹ The balance of funds from the landfill levy are not directly funding recycling, but are being attributed to purposes such as: supporting the Waste Strategy through the Business Plan;

⁶⁴ Ibid.

⁶⁵ Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 3.

⁶⁶ WARR Act Part 7, Division 2, especially s 79(2) and s 79(3B).

⁶⁷ WARR Act s 80(1)(a) and s 80(1)(d).

⁶⁸ Ibid s 80.

⁶⁹ Ibid s 80(1).

supporting operations of the Waste Authority; and the implementation of the WARR Act and the Levy Act, and regulations.⁷⁰

In March 2016 former Environmental Minister Hon. Albert Jacob MLA announced that '[u]p to \$10 million in State Government funding is now available for local councils to use recycled construction and demolition waste in their civil engineering projects such as building roads, car parks and drains'.⁷¹ Similar grants should be made to private enterprises in the recycling sector to provide an incentive to increase recycling and recovery and divert waste from landfill. This is consistent with the purpose of the levy to promote recovery of valuable resources and 'significantly increase the recycling rate in Western Australia'.⁷²

IV CONCLUDING REMARKS

The purpose of the licencing regime is to reduce the volume of material diverted to landfill, by encouraging recycling and re-use.⁷³ There is no direct evidence that high landfill levies have a correlation with high levels of recycling. Rather, the increased levy rate in Western Australia has been counterproductive in encouraging resource recovery⁷⁴ and is discouraging industries from using processed and uncontaminated materials.⁷⁵ Uncertainty has arisen as to when

⁷⁰ Waste Authority WA, 'Levy' <<http://www.wasteauthority.wa.gov.au/about/levy/>>.

⁷¹ See, Government of Western Australia '\$10m for councils to recycle construction waste' (10 March 2016) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2016/03/10m-for-councils-to-recycle-construction-waste.aspx>>

⁷² Waste Avoidance and Resource Recovery Amendment (Validation) Bill 2014, Second Reading Speech, 2-3.

⁷³ See *Eclipse* [562], [613].

⁷⁴ Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 15 <http://www.wastenet.net.au/Assets/Documents/Content/Information/Background_Paper_Levy_Final_amended_March_2012.pdf>.

⁷⁵ Municipal Waste Advisory Council, 'WALGA Background Paper Landfill Levy' (February 2012) 15

materials are properly regarded as 'waste'. Amending the definition of 'prescribed premises' in category 63 to remove uncontaminated and clean fill from the licensing regime presents a positive step forward for industry. To give effect to the purpose of the EP Act, the definition of 'waste' requires amendment so that it expressly excludes clean fill and other uncontaminated material. 'Waste' should be afforded its ordinary meaning so that material that has a commercial value does not attract payment of a landfill levy. The Western Australian recycling industry must make clear that these amendments are urgently required.