



Director General
Department of Water and Environmental Regulation
Locked Bag 33
Cloisters Square WA 6850

Attention:
Project Manager
Proposed regulatory amendments to categories 63-66, 69

Dear Sir /Madam

**Submission on
Consultation Paper: Amendments proposed following the decision on Eclipse Resources
v The State of Western Australia [No. 4] (2016) WASC 62**

Please find attached Eclipse Soils' submission on the consultation paper.

Yours faithfully

A handwritten signature in black ink, appearing to read "R. Sippe", with a small flourish at the end.

**R.A.D. Sippe
Executive Director
2 February 2018**

**Eclipse Soils' submission on DWER's
Consultation Paper: Amendments proposed following the decision on *Eclipse Resources v The
State of Western Australia [No. 4] (2016) WASC 62***

BACKGROUND

Eclipse Soils

1. Eclipse Soils Pty Ltd is a sister company of Eclipse Resources Pty Ltd: both being members of the Marford Group of companies. Relevant expertise of Eclipse Soils' personnel is at Attachment A.
2. Eclipse Resources ceased trading once the judgement against it came out on 9 March 2016. The company went into Voluntary Administration on 27 September 2017.
3. Eclipse Soils has assumed the production of water retentive blended soils and mulches (as well as sales and marketing), fill, and remediation of acid sulfate soils and bioremediation of certain contaminated soils. There has been no back filling of land for subdivision or other purposes on any site operated by Eclipse Soils since the court's decision.

Eclipse Resources' operations 1994 – 2016

4. Eclipse Resources operated a sequential land use business. Sequential land use is where valuable basic raw materials are mined, the resultant voids backfilled with inert but lower value fill fit for purpose environmentally and geo-technically, and the land returned to its highest and best land use. This has been national Governments' policy since 1992 and State Government policy (through Statement of Planning Policy 2.4) since 2000.
5. In Eclipse Resources' case it filled a 4 million m³ void at Flynn drive Carramar and turned the land created into 20ha of landscaped open space for future residents. At Lot 12 Wanneroo Road, Neerabup, it was rehabilitating a former limestone quarry into land restored with indigenous vegetation suitable for seamless inclusion into the adjacent Neerabup National Park. At Abercrombie Road, Postans, it is part way through creating a light industrial subdivision.
6. In fact, it was not contended by the Government Parties at trial¹ that anything done by Eclipse Resources created any "environmental risk" or constituted "pollution", or "environmental harm. Further, water quality monitoring undertaken on or about 23 January 2015 established that the ground water immediately adjacent, and down-gradient to, the rehabilitated void at the Flynn Drive Site met World Health Organisation drinking water guidelines, as well as Australian Drinking Water Guidelines after nearly 20 years since the commencement of the filling of the void on site with inert materials. Eclipse Resources operated on the basis that all fill materials should meet EILs regardless of the end use of the land (see 9 below).

COMMENTS ON THE CONSULTATION PAPER

7. "Waste". The proposed DWER approach (the "**approach**") does not give industry guidance on how and when material that was once "waste" becomes a resource. The judgement in summary says that "waste" is material surplus to needs, whether virgin or otherwise (unless

substantially transformed²). The approach perpetuates the view that “once waste, always waste” with the implication that anything surplus to needs that is re-used or recycled (unless substantially transformed) remains waste. This contrasts to, for example, the findings in the South Australian Court of Appeal where that Court held that: “In both ordinary parlance and the definition in the Environment Protection Act, waste is a purposive concept and is a relative and not absolute concept. It is not an inherent characteristic of matter that it comprises waste: it must be assessed from the perspective of the person whose purpose is to be considered at the relevant time. For example, an industrial process might produce two products, such as separating seawater into salt and water. A salt producer may regard the water as a useless by-product and hence waste; a water producer may regard the salt as a useless by-product and hence waste; and a dual producer may regard both as products and neither as waste. Waste is the antithesis of a product in ordinary parlance”.³

8. “Unintended consequences”. It is false and therefore misleading to say that the judgement had unintended consequences. As early as 25 February 2009, Eclipse Resources’ solicitors wrote to the (then) Department of Environment and Conservation questioning the Department’s position (copy attached for ease of reference at Attachment B). This was before Eclipse Resources had served the writ against the Government parties claiming that the levy was unlawfully applied to the company. The judgement gave to DWER what it asked for in its claims in the proceedings. Moreover, the Minister of the day, Hon Cheryl Edwardes, and two senior public servants responsible for initiating the landfill levy, have said that it was never intended to apply to operations such as Eclipse Resources. This was confirmed again by the instructing officer for the Waste Avoidance and Resource Recovery Act 2008 and the Waste Avoidance and Resource Recovery Levy Act 2008. Copies of the Minister’s press release and statements from the (former) public servants are also attached (Attachment C).
9. “Maximum concentrations (thresholds) of chemical substances and limits of relevant physical attributes for uncontaminated fill”.

- a. The criteria for “uncontaminated fill” (Table 1 in the approach) sets out yet another set of numbers for industry to cope with – all different. These new numbers (for maximum concentrations and for leachability) are in addition to DWER’s:

- Assessment levels for soils, sediment and water, Contaminated Sites Management Series, February 2010;
- the balance of Landfill Waste Classification and Waste Definitions 1996 (As amended); and
- the National Environment Protection (Assessment of Site Contamination) Measure 1999.

The various sets of criteria are confusing for industry. The approach should be simplicity not complexity. The failure to adopt a simple reference instead of multiple is costly not only for industry but also for Government in the administration and enforcement of them.

- b. Many of the new numbers in Table 1 are more stringent than EILs (ecological investigation levels under the *Contaminated Sites Act 2003*) and more stringent than the equivalent criteria used in South Australia⁴ but the justification for these is absent. What technical basis has been used to determine the new criteria? Does this in fact mean that the old criteria were wrong? Or that there is evidence of pollution or

environmental harm caused under them? It is inevitable that criteria such as those proposed will significantly reduce the amount of material that could be re-used/recycled as fill in a way that was environmentally and geo-technically sound. The DWER consultation paper says: *“DWER has identified the need for amendments such that the requirement for an EP Act licence, and consequently payment of the waste levy, do not apply to sites using fill that does not pose a risk of harm to the environment or human health”*. However, the proposed approach shows no justification that this approach is necessary and desirable to meet these objectives. As a result it is in clear conflict with the *Contaminated Sites Act 2003* introduced by the (then) Minister Hon Judy Edwards: widely acknowledged as good legislation.

- c. For example the following table presents a summary position of the criteria for some substances (mg/kg):

Substance	Proposed DWER criteria in Table 1	EILs	SA 'waste derived fill' standards	Comment
Barium	200	300	300	33% reduction against EILs
Cadmium	1	3	3	66% reduction against EILs
Chromium III	30	400	400	92% reduction against EILs
Cobalt	15	50	170	70% reduction against EILs
Copper	50	50	60	Same as EILs
Lead	110	600	300	82% reduction against EILs
Mercury inorganic	0.5	1	1	50% reduction against EILs
Nickel	10	60	60	83% reduction against EILs
Vanadium	25	50	-	50% reduction against EILs
Zinc	50	20	200	250% increase against EILs

- d. Cobalt, copper, and zinc are added to Western Australian soils as trace elements for plant growth. Vanadium is an essential plant element. Sources⁵ cite the mean value for normal surface soil worldwide for vanadium as ranging from 18-115 mg/kg with another citing 160 mg/kg.
- e. The criteria contained in DWER's Assessment levels for soils, sediment and water, Contaminated Sites Management Series, February 2010 have a range of numbers for substances depending on the land use. This is logical, practical and sensible. They have long been used by industry and environmental consultants as the de facto (but

scientifically logical) standards for fill. An argument by the Government parties in the recent court proceedings as to why they should not be so used (having already told the court that the Department had no quality criteria for fill) failed when a witness was called on to testify and the senior DWER officer giving evidence conceded as much⁶. Eclipse Soils is unaware of any evidence of environmental problems caused by the proper use of contaminated sites' criteria as industry standards for fill quality.

- f. A comparison of some DWER assessment levels for land uses for comparative purposes follows (mg/kg):

Substance	Proposed DWER in Table 1	EILs Ecological	HIL (A) Residential with garden, day care, pre-primary schools, primary schools	HIL (D) Residential with minimal soil access	HIL (E) Parks Recreation, open space playing fields, secondary schools	HIL (F) Commercial, industrial
Barium	200	300	15,000	-	-	190,000
Cadmium	1	3	20	80	40	100
Chromium III	30	400	120,000	480,000	240,000	600,000
Cobalt	15	50	100	400	200	500
Copper	50	100	1,000	1,200	600	5,000
Lead	110	600	300	6,000	3,000	1,500
Mercury inorganic	0.5	1	15	60	30	75
Nickel	10	60	600	2,400	600	3,000
Vanadium	25	50	550	-	-	7,200
Zinc	50	20	7,000	28,000	14,000	35,000

- g. The obvious question is: why should fill to be used in, for example, commercial or industrial premises need to comply with DWER's Table 1 levels when there is a huge difference in quality criteria? Consider this scenario: two pieces of adjacent land, one a former plant nursery where fertilisers and pesticides were used, the other a void from a former limestone mine. The land zoning changes to commercial. Under the *Contaminated Sites Act 2003* the former plant nursery land needs to fall under HIL(F) criteria. Under the DWER approach, the owner of the void would need to use fill meeting Table 1 criteria before developing the land (to avoid the levy liability) which are significantly more stringent. Yet both outcomes are acceptable to DWER.
- h. Cost of producing "uncontaminated fill" v. virgin sand from a sandpit. There are two sets of criteria to meet when producing fill from materials surplus to generators' needs. Firstly, physical properties such as particle size distribution, hydraulic conductivity and plasticity index, and secondly, chemical properties. Materials are

typically stockpiled, screened and blended to produce a consistent quality. The combined costs of materials handling and analyses are significant. To meet the significantly more stringent criteria in Table 1 may well condemn to rubbish tips, materials that would otherwise be perfectly good for use, and consequently cost potential generators disposal and levy fees. This is in direct conflict with the WA Waste Strategy objectives.

- i. Remediated acid sulfate soils as fill. It is not clear where remediated acid sulfate soils fit in the DWER approach. It is clear that acid sulfate soils don't in DWER's eyes meet the proposed new definition of "clean fill". However the DWER approach is silent on whether remediated acid sulfate soils meeting Table 1 criteria are considered "uncontaminated fill". Eclipse Soils notes that in the DWER licence for the Gateway project – one of the largest Government projects involving fill in recent years – that DWER says: "Reuse of treated Acid Sulfate Soil is DER's (sic) preferred position. Treated ASS is usually considered a resource, not a waste. Disposal at a landfill should only be used as a last resort".
10. Potential effect on the cost of Government projects. Without a full review of relevant data from Government civil works projects that generated or are likely to generate materials surplus to needs (and for past projects were not able to be sold into the market) the impact on the cost for those materials not meeting the definition of "clean fill" or "uncontaminated fill", and therefore liable for the levy, cannot be calculated. However the following table models the effect at current and future levy rates should those projects fail or have failed to meet relevant Table 1 criteria.

(continues)

Job Description	Material	Job Period	Estimated volume (truck m ³)	Levy at 1 July 2017 rates \$90/m ³ \$million	Levy at 1 July 2018 rates \$105/m ³ \$million
Perth Inner City Railway Tunnel, (William Street)	Sand, riverine silt, some mildly acidic	28/10/2004 – 24/07/07	291,502	26m	30.6m
Midland Redevelopment Authority, Railway Yard	Various	5/10/2004 – 20/12/08	274,918	24.7m	28.9m
Perth City Link, railway tunnel Northbridge	Various including ASS	6/10/2011 – 11/12/13	195,449	17.6m	20.5m
Elizabeth Quay	Various including ASS	30/01/2014 – 30/06/2015	206,000	18.5m	21.6m
Perth Arena, Wellington Street	Sand, soil including ASS	10/08/2006 – 18/05/12	125,634	11.3m	13.2m
Forrestfield Airport Link (tunnel boring and station excavations)	Acid Sulfate Soils, Sand and Clay	Stockpiling from 12/2016	1,000,000 (770,400 bank)	90m	105m
Woodman Point Waste Water Treatment Plant Upgrade	Sand and Limestone	07/2017	120,000 (100,000 bank)	10m	12.6m
New Museum Project	Sand	04/2017-12/2017	34,500 (based on 51,700 t)	3m	3.6m
Landcorp, Jane Brook	Clay Rock	10-11/2017	70,000	6m	7.4m

11. Retrospectivity. It is disappointing the DWER approach is proposed to apply retrospectively to existing sites. The proposed regulation 4 in the draft *Environmental Protection Amendment Regulations 2017* makes it clear that only sites that have ever met the criteria in Table 1 don't require licensing or are not liable for the landfill levy. There is no environmental protection justification for this. Consider this scenario: a property developer in the SE corridor has been filling low lying land for urban development using fill that meets, for example EILs (more stringent than HIL(A) criteria), but cannot prove that the fill met Table 1 criteria. Even if the developer switches to using fill meeting Table 1 criteria they would be still liable for licensing and the landfill levy. The only way out is to buy virgin sand from a sandpit because that is not "waste" and therefore falls outside the DWER approach with potential impacts on housing affordability. As well, does this mean that as a consequence of the *Waste Avoidance and Resource Recovery Amendment (Validation) Act 2014* and the judgement, that levy is due and payable on sites that have used as fill, material "surplus to (the generator's) needs" from 1

July 2008 onwards? Does this also mean that for sites such as those operated by Eclipse Resources using fill to EIL standards are condemned to becoming leviable rubbish tips from now on instead of sequential land use sites?

11. Don't dismiss self-interest as a regulating mechanism. Land is generally filled to increase its value and to change land use to a higher and better use (normally subdivision for residential or commercial/industrial purposes). It is clearly in land owners' interests not to contaminate their land such that it wouldn't meet *Contaminated Sites Act 2003* standards or had some sort of contamination stigma attached to it. This incentive can be a far more effective incentive than any DWER regulatory approaches.

CONCLUSIONS AND RECOMMENDATIONS

12. If material is being used as a resource, and is environmentally and geo-technically fit for purpose, then it should not, by definition, be a "waste" and its use should not be levied.
13. Subject to 12 (above) the source of the material should not matter. The material should not be considered as "waste derived" or similar. Consider this: a designated sand pit sells sand alongside of a freeway extension that has surplus sand. The material is the same in both cases. The sand pit material is considered a resource and DWER does not regulate it for quality. The freeway material is considered "waste" because it is surplus to needs and under the DWER approach is (a) considered waste forever, and (b) would be regulated by DWER.
14. Stop looking at "band-aid" solutions to when waste becomes a resource - and should be defined as such - and fix the matter properly.
15. Remove proposals for turning a waste into a resource from DWER (which is a regulator), and transfer the responsibility to a resources-based portfolio that has as its mandate to promote innovation and opportunity. Any proposal that is environmentally significant would be referred to the EPA for environmental assessment (as is already required). Only waste that is truly waste (i.e. has no other use other than disposal to a waste disposal facility) should be regulated and audited by DWER.
16. Don't invent a new set of numbers with no discernible environmental or health justification. Use the sensible and practical numbers established for the *Contaminated Sites Act 2003* as the "bible" that industry and consultants already use. Address the issue of no leachate numbers by adding relevant criteria.
17. Use EILs as the standard for "uncontaminated fill" for two years until leachate numbers and extension to other land uses are reviewed. Justify and explain numbers chosen on the basis of potential environmental and health impacts, using internationally verified research findings, and following consultation.
18. Don't yet again use retrospective regulations. Provide for existing sites that have been demonstrably using *Contaminated Sites Act 2003* numbers as quality criteria for fill to meet the requirements for "uncontaminated fill". Moreover, sites that can undertake the necessary work to demonstrate that they don't "pose a significant risk of harm to human health and the environment" should be included in the approach. The starting point for this should surely be the *Contaminated Sites Act 2003* – after all, that's what it's designed to do.

NOTES

1. Letter from State Solicitor's Office, acting for the Government parties, to Fletcher Law dated 18 August 2015)
2. [2016] WASC 62 at [613]
3. [2017] SASCF 12 at [53]
4. SA Environment Protection Authority (2013) Standard for the Production and Use of Waste Derived Fill. Adelaide.
5. Kabata-Pendias, A. (2001) Trace Elements in Soils and Plants. CRC Press, LLC. USA.
Essington, M.E. (2004) Soil and Water Chemistry: An Integrative Approach. CRC Press, LLC. USA.
Landloch Pty Ltd (2014) Soil Assessment. Youngarillup Minerals Sands Mine. Doral Minerals Sand Mine Pty Ltd.
6. Transcript of proceedings: CIV 1364 of 2009, CIV 2385 of 2013 & CIV 2416 of 2014 Monday, 23 November 2015 pp 586 – 612.

ATTACHMENTS

- A. Eclipse Soils' expertise
- B. Letter from Solomon Bros to the DEC dated 25 February 2009.
- C. Press release from Hon Cheryl Edwardes 4 June 1997, Statement from Noel Davies 2 August 2016, Statement from Cameron Schuster 3 August 2016, Statement from Dr John Ottaway 29 July 2016.

ATTACHMENT A

Eclipse Soils' expertise

Chairman: Trevor Delroy. Following a career in banking and property development, established and led Eclipse Resources as part of the Marford Group of companies as a resource recovery operation in 1994. All companies operate under sustainability objectives and have a position of preeminent leadership in the WA business environment noted for innovation and quality control.

Executive Director: Rob Sippe. Held a number of senior executive positions with the WA EPA including Coordinator of EPA Services, Director of environmental impact assessment, and Director of strategic policy. Recognised internationally for expertise in environmental protection.

Director and Company Secretary: Rod Hansen. An MBA graduate and following a career in private enterprise, he has been with the Marford Group of companies for 14 years. He has an intimate knowledge of resource recovery operations and the industry in the metropolitan region.

Principal Scientist: Martin Bowman. A former partner in the very successful environmental consulting company Bowman, Bishaw and Gorham he is a well-recognised expert in a wide range of environmental protection matters. A former Adjunct Professor at Murdoch University. He continues to consult widely to industry.

Manager, Eclipse Soils: Mike Lambert. A graduate in geology originally, he has over 22 years' experience in environmental protection and contaminated sites matters. Formerly with Parsons Brinckerhoff and IT Environmental before joining Eclipse Soils three years ago.

Manager, Quality Control: Sean Bennett. An environmental science graduate, he has worked for a number of years in geo-technical investigations and environmental impact assessment of mining proposals in WA. He has been with Eclipse Soils for three years.

Key external advisers

Noel Davies and Dr Greg Milner, Aurora Environmental

Stuart Smith, M & PE consultants

SCHEDULE

[NB: In each of examples 1 to 8 below the volume is greater than 500 tonnes per annum]

1. Depositing fill from off-site onto land in the course of preparing the land for subdivision for urban development.
For example, Stockland's "Vertu" development has taken in excess of 150,000 tonnes of fill, Cedar Woods Pty Ltd's "The Kestrels" development in excess of 100,000 tonnes, and the Satterley Property Group's "Heron Park" estate also required in excess of 150,000 tonnes of fill. W R Carpenter Properties' "Roselea Estate" deposited in excess of 300,000 tonnes. Graham Daws' "Bletchley Park" development took in excess of 180,000 tonnes.
2. The removal and burial onsite of soil for commercial developments.
For example the new Ikea store site took in excess of 200,000 tonnes and the Perth Arena development in excess of 40,000 tonnes.
3. The placing of dredge spoil from estuarine and marine sources onto land, including with respect to the construction of ports, marinas and boat harbours.
For example, the dredging of the marina part of Port Coogee and the deposition of dredge spoil to create land.
4. The placing of material for road base, abutments, causeways and embankments for road and rail.
For example, for the new Perth-Bunbury Highway, over 12 million tonnes of sand, 1.3 million of limestone and almost 1 million of crushed rock/gravel and almost 27,000 cubic metres of concrete have been placed (noting that the Highway to south of Paganoni Road is within the Metropolitan region).
5. The filling (re-nourishment) of beaches by mechanically depositing re-located beach sand.
For example, the Port Coogee development has a permanent sand bypassing pipeline through the marina and has budgeted to pump up to 25,000m³ of sand over the first five years from the north to the south of the marina.
6. The stockpiling of topsoil from basic raw material extraction.
For example, the consumption of basic raw materials in the Metropolitan area for 2005 (last available figures) was approximately 21 million tonnes.
7. The depositing of blended soils beneath mulches in the process of landscaping.
The market in the Metropolitan Region for blended and manufactured soils is estimated at approximately 250,000 tonnes of which a significant proportion would be used in amounts greater than 500 tonnes for major landscaping of urban developments and open space facilities for active recreation.
8. The excavation and encapsulation of contaminated material on development sites.
For example, the material from the former East Perth gas works of 10,000m³ would be captured, as would the 277,000m³ at Minim Cove (McCabe Street) Mosman Park if these proposals had been implemented post-2003. Ridgely Pty Ltd's Tonkin Park proposal for the encapsulation of 250,000m³ of contaminated materials on site would be captured as final approval post-dated 2003.

Attachment B

Solomon Brothers

Barristers, Solicitors, Attorneys

Level 40, Exchange Plaza, 2 The Esplanade, Perth, Western Australia. 6000
PO Box Z5360, St George's Terrace, Perth 6831 Telephone: + (618) 9282 5888 Facsimile: + (618) 9282 5855

25 February 2009

Our Ref: PFF/6377545
Enquiries: Paul Fletcher
Email: pfletcher@solbros.com.au

Your Ref: CEO108/08 & 1093/08

Department of Environment & Conservation
The Atrium
168 St Georges Terrace
PERTH WA 6000

Attention: Kelran McNamara
Director General

Dear Sir

ECLIPSE RESOURCES PTY LTD ("Eclipse Resources") – LANDFILL LEVY

We refer to your letter of 3 February 2009 and the threat contained therein to commence proceedings to recover levy payments, penalty and interest. We note that in relation to the first of our letters dated 13 November 2008 you have failed to respond to the question put as to what the Department has done, and is doing, to collect levy in respect of all depositions of material on land that fall within the various categories of "prescribed premises", including the seven examples listed in our letter. You have not accepted our client's invitation to discuss matters relevant to the levy issue. Moreover you have not taken account of the conditions under which our client has advised that it would "have no objection to paying a levy".

We note also that you have provided no response to the suggestion that an application be made to the Supreme Court for a declaration as to the proper construction of the section.

Our letter raises substantive issues and is deserving of a considered response. Why you have chosen to issue such a dismissive response is unclear but disappointing.

Our client, as a major and significant operator in the market and an acknowledged industry leader, reiterates that a negotiated outcome and/or a Supreme Court declaration is preferable to litigation.

However, we now attach a list of specific examples of activities answering the description of "landfill" which have occurred or are occurring involving amounts which deem the landfill sites to be "prescribed premises" for the purposes of the levy legislation according to the logic which appears to underpin the position you have taken. Please provide to us, within ten working days, a detailed explanation as to what, if any, action has been and is being taken by the Department to recover levy from the operators of those sites and, if no such action has to date been taken and/or is currently being taken to recover levy payable by those operators, the reasons for the inaction in that regard by the Department. Please note that unless such explanation is received within the timeframe specified, our client will assume that it is being discriminated against by the Department and will give urgent consideration to the issue of a writ of mandamus against the Department.



Our client has instructed us to commence proceedings to recover past levy monies paid and in this regard the Supreme Court has issued a writ which is yet to be served. Please advise whether the State Solicitor's Office has been instructed to accept service of the writ.

Yours faithfully

A handwritten signature in cursive script, appearing to read "Solomon Broder".

Attachment C

MEDIA STATEMENT

GOVERNMENT OF WESTERN AUSTRALIA

June 04, 1997

MINISTER FOR THE ENVIRONMENT

Environment Minister Cheryl Edwardes today announced that an urban landfill levy on waste dumped in metropolitan rubbish tips would come into effect on July 1, 1998.

Mrs Edwardes said it would be a two-tiered levy consisting of a \$3 per tonne charge for commercial, industrial and household waste charge and a \$1 per tonne charge on waste produced by the demolition and construction industry.

The levy, an environmental first for Western Australia, would encourage major waste generators in the Perth metropolitan area to look seriously at implementing recycling and waste reduction programs.

"The landfill levy is part of a solution to WA's excessive waste problem," Mrs Edwardes said.

"Government is committed to protecting all aspects of the environment and the levy is part of that commitment.

"The average household only produces one tonne of waste a year which means that the \$3 per tonne levy works out at only six cents a week per home.

"The levy is there as an incentive for industry and local government to look at environmentally preferable alternatives to dumping. The less waste taken to landfill, the less levy paid."

Annual revenue from the levy has been estimated at \$4 million and will go into a trust fund solely for the purpose of developing and implementing waste management and recycling programs throughout the State.

"In particular, it will provide for the development of regional recycling plans," Mrs Edwardes said.

GOVERNMENT MEDIA OFFICE: 17th FLOOR, CAPITA CENTRE
197 ST GEORGE'S TERRACE, PERTH, WA, 6000. TEL: (09) 222 9595
FAX: (09) 322 6639 TELEX: AA95078

"It will also go towards developing better kerbside recycling services in the metropolitan area, as well as improve local markets for recycled materials. A cleaner production program to assist industry reduce its environmental impact will also be developed.

"This levy delivers on the Government's pre-election commitment."

The levy will apply to the whole of the metropolitan area, which extends north to Wanneroo, south to Rockingham and east to Swan, Mundaring, Kalamunda and Serpentine/Jarrahdale.

The programs funded by the levy will be based on those recommended by the 1993 State Recycling Blueprint and the 1995 Parliamentary Select Committee Inquiry into Recycling and Waste Management.

The Department of Environmental Protection and the State Advisory Council on Waste Management will discuss how the levy will work with stakeholders in local government and industry during the next two months.

The public will be able to comment on the proposed waste reduction and recycling programs contained in the draft State Waste Reduction and Recycling Policy due for release later this month.

Media contacts: Diana Russell Coote (08) 8421 77777 or 018 906 948
D.E.P. Cameron Schuster (08) 9222 0422

To Whom It May Concern

3 August, 2016
12 Coogee Road
Mount Pleasant WA
6153

Objectives for Establishing the Western Australian Landfill Levy

My name is Cameron Schuster, and from February 1994 to July 1998 I worked as the (Acting initially) then Director of Waste Management in the Office of Waste Management (OWM) and then in the Department of Environment Protection when OWM was integrated with that Department. I was also for 18 months in 2005 and 2006 a member of the State Waste Management Board which was charged with administering the funds collected through levy and disbursing them for purpose of diverting waste from landfill.

In these roles I was directly and intimately involved in formulating the policies and legislation that was associated with the introduction of a landfill levy in Western Australia. This work commenced before my direct involvement with a policy paper titled "Waste Management into the 21st Century" was published in 1991, by the WA Department of Health, which first formulated a formal proposal for a landfill levy in Western Australia. The proposal was subsequently included in the then Coalition Government's policy proposals for the 1996 State election, in which they were successful.

Following that election, policy development and public consultation on the proposal proceeded, which concluded with the introduction to the Parliament of the enabling legislation and its subsequent successful passage in 1998. As the senior public servant involved, I was the instructing officer for the Bill and along the way drafted the various Ministerial speeches on the policy, including the Second Reading speeches in the State Parliament.

Throughout the entire period, leading to the introduction of the levy in July 1998, it was intended that the levy be applied solely to waste products disposed of to landfills (rubbish tips as they were commonly called then). It was intended that the application of the levy would act to change community and industry behaviour to:

1. discourage the disposal of waste to landfill, to both conserve finite resources and prevent environmental damage from poorly managed landfills (to this end there was initially a differential levy between waste containing organic material and inert waste such as building material); and
 2. through the application of the funds raised from the levy to encourage recycling.
- The regulations, policies and practices which underpinned the application the levy were formulated to achieve an outcome where only operators of metropolitan landfills collected the levy (and only for waste deposited into their licensed landfill). It was not intended that any form of recycling would attract the levy.

The levy funds were paid into a hypothecated trust fund maintained by the WA Treasury, with the levy funds being applied to divert waste from landfills and to promote waste re-use and recycling. For the purpose of transparency I should advise that I have not, and will not, receive any consideration in respect to the preparation of this letter.

Yours sincerely


Cameron Schuster

B Sc (For); Grad Dip Business (Acctg.); FAIM; MAICD;
Chair, Southern Metropolitan Regional Council

To Whom it May Concern

Objectives for Establishing the Western Australian Landfill Levy

My name is Noel Davies and from 1990 -1998 I worked in various senior roles relating to the regulation of waste management in WA within the Health Department of WA, as Assistant Director of the Office of Waste Management and Department of Environment and Conservation in its various names. I was also the inaugural Chair of the State Waste Management Board which was charged with administering the funds collected through levy and disbursing them for purpose of diverting waste from landfill.

In those roles I was directly and intimately involved in formulating the policies and legislation that was associated with the introduction of a landfill levy. This work commenced when I was seconded to the Health Department of WA to assist with drafting a policy paper titled Waste Management into the 21st Century published in 1991 which first formulated a proposal for a landfill levy.

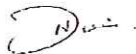
Throughout the entire period, leading to the introduction of the levy in July 1998, it was intended that the levy be applied solely to waste products disposed of to landfills (rubbish tips). It was intended that the application of the levy would act to change behaviour:

1. to discourage the disposal of waste to landfill; and
2. through the application of the funds raised from the levy encourage recycling.

As behaviour changed, it was expected that levy revenue would fall.

The regulations, policies and practices which underpinned the application the levy were formulated to achieve an outcome where only operators of landfills collected the levy and paid it into a hypothecated trust fund maintained by the WA Treasury with the levy funds being applied to divert waste from rubbish tips and to promote re-use and recycling.

Yours sincerely



Noel Davies

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TO WHOM IT MAY CONCERN

OTTAWAY COMMENTS ON THE INTENTS AND APPLICATION OF THE WASTE AVOIDANCE AND RESOURCE RECOVERY ACT 2007, THE WASTE AVOIDANCE AND RESOURCE RECOVERY LEVY ACT 2007, AND THE ENABLING 2008 REGULATIONS

From March 1984 to September 2009, I consecutively held senior positions in the Western Australian (WA) Government's environmental departments, commencing (in 1984) as Chief Environmental Officer and then as Assistant Director Pollution Control, Assistant Director Waste Disposal, Executive Officer to the Environmental Protection Authority, Principal Coordinator [Regulatory] Investigations, Principal Consultant to the Director General, and finally (in 2009), Principal Consultant to the Deputy Director General (Environment).

In 2004, the Acting Director General of the Department of Environment assigned me to be departmental *lead officer* and departmental *'instructing officer to Parliamentary Counsel'* for a project with the primary task to develop and finalise the Waste Avoidance and Resource Recovery (WARR) Bill and the Waste Avoidance and Resource Recovery Levy Bill. I was instructed to ensure extensive consultations with all key stakeholders and with the public generally, to progress the bills to tabling and consideration in Parliament, to support the Ministers in preparation for debating the bills in Parliament, and then, if and when the Acts were passed by Parliament, to facilitate the proclamation of the two Acts. In early 2008, the Director General of the Department of Environment and Conservation assigned me to ensure the drafting, finalisation, approval and gazettal of the appropriate enabling WARR regulations.

The two Acts were approved by WA State Parliament in December 2007, and the subsidiary regulations were gazetted in the first half of 2008, with the commencement date of 1 July 2008.

The main objects of the *Waste Avoidance and Resource Recovery Act 2007* (the "WARR Act 2007") are given in section 5 of the WARR Act 2007.

I have highlighted (see below) the parts of particular relevance to my opinion:

5. Objects of this Act

- (1) The primary objects of this Act are to contribute to sustainability, and the protection of human health and the environment, in Western Australia and the move towards a waste-free society by —
- (a) promoting the most efficient use of resources, including resource recovery and waste avoidance; and
 - (b) reducing environmental harm, including pollution through waste; and
 - (c) the consideration of resource management options against the following hierarchy —
 - (i) avoidance of unnecessary resource consumption;
 - (ii) resource recovery (including reuse, reprocessing, recycling and energy recovery);
 - (iii) disposal.

The purpose of the *Waste Avoidance and Resource Recovery Levy Act 2007* (the "WARR Levy Act 2007") was the same in 2007 as it was when the levy was first implemented in 1997 – to provide a significant administrative incentive, being a "levy that is to be payable in respect of waste received at disposal premises" (section 4(1), WARR Levy Act 2007) to reduce the amount of waste being disposed of in landfills. Again, the situation in 2007 was consistent with that of 1997, with the aims of the Acts to "encourage waste generators in the Perth metropolitan area to look seriously at implementing recycling and waste reduction programs" (Media Statement released by the Minister for the Environment, 4 June 1997, paragraph 3) and for the levy to be "... there as an incentive for industry and local government to look at environmentally preferable alternatives to dumping. The less waste taken to landfill, the less levy paid" (Minister's Media Statement, 4 June 1997, paragraph 7).

Hence, an important intent of these legislative instruments was to change the behaviours of waste generators and waste disposers: to move them away from

the longstanding practice of cheap, convenient disposal (dumping) of basically useful materials into landfill sites (also known as '*rubbish tips*' or '*rubbish dumps*'). One main approach was to impose financial penalties (through the levy) on the materials going into landfill sites for disposal, which effectively created a financial incentive for businesses to recover, re-use and/or recycle those materials.

An important point is that the levy was to be applied directly, and only, to materials *disposed of in metropolitan landfill sites which were required to be licensed*, whether or not those landfill sites were actually licensed (see the extracted section 3(b) of the WARR Levy Act 2007, below).

Another important point is that the levy was never intended as a Government general revenue-raising tool as such, with the one exception of the levy covering the departmental administration costs of collecting and disbursing levy funds. In fact, I was instructed by successive Directors General to make the point at every opportunity during the extensive public and stakeholder consultations that one measure of the success of the levy would be when there was a clear trend of declining levy income – due to the increasing amounts of 'waste' being diverted from the traditional form of landfill sites.

However, there were several fundamental issues which were acknowledged during the public consultations, but which were left unresolved for future considerations – probably also involving further extensive public consultations and discussions.

One issue was the problematic definition of 'waste'. Another was the definition of '*disposal premises*', and related to that whether there should be prescribed '*disposal premises*' (subject to the levy) outside of the Perth metropolitan area. A third issue was the definition of '*waste facility*'.

Research by project team members found there were numerous definitions of 'waste' in use by regulatory agencies in other jurisdictions in Australia and overseas, and many which had quite different intents and applications than others.

Likewise, project team members found little consistency between jurisdictions in the definitions of '*disposal premises*' and '*waste facility*'.

Hence, we settled on the definitions used, with considerable reservations, so we could move on to other aspects of progressing the bills.

Because of the pressure, from successive Ministers and others, for the department to progress those Bills to Parliament, a decision was taken based entirely on bureaucratic expediency: use exactly the same definition of 'waste' as was used in the WA *Environmental Protection Act 1986*, and leave the required debates on better definitions for 'waste', 'waste facility' and 'disposal premises', for some future time and for other forums.

We settled on the definitions of 'Waste' and 'Waste facility' as defined in section 3 of the WARR Act 2007. Again, the highlights are mine, indicating some of the issues:

3. Meaning of terms used in this Act

waste includes matter —

- (a) whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment; or
- (b) prescribed by the regulations to be waste;

waste facility means premises used for the storage, treatment, processing, sorting, recycling or disposal of waste;

"Disposal premises" was defined in section 3 of the WARR Levy Act 2007:

3. Interpretation

disposal premises means 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, whether or not such a licence is in force;

However, it was acknowledged that those definitions could create absurdities which would need to be recognised and carefully managed by the departmental administrators and regulators. For example, considering the definitions of 'waste' and 'waste facility', it could be argued that the construction of new roads (effectively, linear landfill sites) could be captured by the WARR Act 2007 and WARR Levy Act 2007, and hence the levy could be applied to new *roads and highways* and to the materials

used in *road and highway-building* (such as the bitumen surface layers, the virgin sand and gravel, and the crushed and re-used construction and demolition 'wastes').

Clearly, during the 2005 — 2007 stakeholder consultations and to now, that was and still would be an unreasonable application, even if the levy was only applied to the crushed construction and demolition 'wastes' which are sometimes used as the road-base/ highway-base bedding layer material.

Another example of an absurdity would be from the refurbishment of existing roads, where the levy could be applied to the old bitumen material excavated and returned to bitumen plants for re-use as feedstock for making new road-building bitumen material (a clearly *unreasonable* application of the levy). However, the levy could be and is applied to that same old-road bitumen material disposed of in landfill sites (a *reasonable* application of the levy consistent with the overall intent of the Acts).

Similarly, in my opinion, based in part on the instructions I received from successive Directors General regarding the intents and purposes of the proposed Acts, in part on the tenor of the public consultations, and in part on discussions I had directly with the relevant Government Ministers of that 2004—2008 period, it is, firstly, unreasonable, and secondly, against the intents of the WARR Act 2007 and the WARR Levy Act 2007 to apply the waste levy to construction and demolition materials which have been selectively recovered from general construction and demolition waste streams, then sorted, checked for environmental acceptability, and, finally, re-used for some other beneficial purpose such as infilling terrain voids as part of land development.

You are welcome to contact me directly should any further information or further explanation be required from me.

Yours sincerely.

 **OEEC**

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