

Submission to Government of Western Australia Department of Water and Environmental Regulation

Consultation Paper:

Amendments proposed following the decision on *Eclipse*

Resources Pty Ltd v The State of Western Australia [No.4] (2016)

WASC 62

Project Manager -

Proposed regulatory amendments to categories 63-66, 89

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Introduction

The Department of Water and Environmental Regulation (DWER) has asked for comments on its Consultation Paper: Amendments proposed following the decision on *Eclipse Resources Pty Ltd v The State of Western Australia* [No.4] (2016) WASC 62 a publication that discusses reforms to the *Environmental Protection Regulations* 1987 (EP Regulations), and the *Landfill Waste Classification and Waste Definitions* 1996 (as amended December 2009) (Waste Definitions). Urban Resources Pty Ltd would like to thank the DWER for providing the opportunity for comment on its proposed amendments.

Summary

Urban Resources understands that the proposed amendments consist of two elements which are intended to remove premises that have only accepted “uncontaminated fill” and “clean fill” from the scope of the levy and licensing regime. In summary, my response to the amendments posed by DWER are outlined in part 1 and 2 below:

- 1.** To amending the description of category 63 to 66 and 89 prescribed premises in Part 1, Schedule 1, *Environmental Protection Regulations* 1987 (EP Regulations) to exclude “uncontaminated fill’ or “clean fill” premises:
 - a)** Urban Resources agrees with the amendment to ensure that the use of ‘clean fill’ or ‘uncontaminated fill’ for development must continue without the requirement for a licence or liability for the waste levy.
 - b)** Urban Resources agrees with the amendment to allow for the use of uncontaminated fill that meets environmental and health standards after testing without the need for a licence or payment of the waste levy.

- 2.** To the amendments of the *Landfill Waste Classification and Waste Definitions* 1996 (as amended December 2009)¹(Waste Definitions).
 - a)** Urban Resources agree to the inclusion of a definition for the term “uncontaminated fill”.
 - b)** Urban Resources largely agrees with the amended definition of “clean fill; However, Urban Resources does not agree with item (d) of this definition.
 - c)** Although Urban Resources agrees with the removal of the definition of ‘waste’ to ensure consistency with the definition of waste under section 3(1) of the EP Act and section 3(1) of the WARR Act, the definition should be amended to expressly exclude ‘clean fill’ and ‘uncontaminated fill’.

The reasoning that supports my responses are set out below.

Amendments to category 63 to 66 and 89 of the EP Regulations.

1. To amending the description of category 63 to 66 and 89 prescribed premises in Part 1, Schedule 1, *Environmental Protection Regulations* 1987 (EP Regulations) to exclude “uncontaminated fill” or “clean fill” premises:

- a) Clean fill and uncontaminated materials are not ‘waste’ as they are not ‘unwanted’ nor are they surplus to the requirements of the original owner, rather such materials are valuable commercial resources.¹
- b) Processed and screened material for re-use and recycling intended as fill should not be subject to liability to pay a landfill levy. To do so would go against the purpose of the levy to encourage recycling and re-use.²

Amendments of Waste Definitions.

2. Amendments of the Landfill Waste Classification and Waste Definitions 1996 (as amended December 2009)¹(Waste Definitions).

- a) Urban Resources agree to the inclusion of a definition for the term ‘uncontaminated fill’. Sites using recycled material that do not pose a risk of harm to the environment or human health should not be subject to levy.
- b) Urban Resources largely agrees with the amended definition of ‘clean fill’; However, Urban Resources does not agree with item (d) of this definition. Raw excavated natural material is commonly subject to processing ‘of a kind’. For example, limestone or organic materials are often encountered in sand mining operations and require a process of screening the materials. More so, products such as limestone requires a process of crushing to meet customer specification. Hence, ‘clean fill’ materials are often required to be subject to processing ‘of a kind’. Therefore, unintended consequences of these amendments are present.
- c) Relying on the definition of waste provided under section 3(1) of the EP Act does not address the issue of its later use and must provide a construction that is consistent with the purpose of the statute.³ For example, the EP Act definition refers to matter as waste ‘whether useful or useless’. Alternatively Urban Resources believe that the definition of ‘waste’ should be afforded its natural meaning of materials that are unwanted and discarded. Therefore, any amendments to its definition should expressly exclude ‘clean fill’ and ‘uncontaminated material’.⁴

¹ Tim Houweling and Lyndsay Barrett, “When is Waste, Waste?”(2017) 8 *The Western Australian Jurist* 201, 202, citing Environmental Protection and Heritage Council, National Waste Overview 2009.

² *Eclipse Resources Pty Ltd v The State of Western Australia* [No.4] (2016) WASC 62, [562], [613].

³ Tim Houweling and Lyndsay Barrett, “When is Waste, Waste?”(2017) 8 *The Western Australian Jurist* 201, 215.

⁴ Tim Houweling and Lyndsay Barrett, “When is Waste, Waste?”(2017) 8 *The Western Australian Jurist* 201, 221, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].