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Proposed regulatory amendments to categories 63-66, 89
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CONSULTATION PAPER: AMENDMENTS PROPOSED FOLLOWING THE DECISION ON ECLIPSE RESOURCES PTY LTD VS THE STATE OF WESTERN AUSTRALIA [NO.4] (2016) WASC 62

WA Limestone is one of the largest suppliers of clean fill in Western Australia and also operates inert landfills.

As such WA Limestone has been significantly impacted by the Department of Water and Environmental Regulation's interpretation of the Eclipse decision and resulting changes to waste management regulation.

WA Limestone commends the department for taking measures to address the unintended consequences caused by the Eclipse decision. However the proposed changes appear to only deal with the treatment of "clean" material and do not address the significant issues and unintended consequences caused to inert waste recycling and the use of recycled materials.

Definition of "waste"

The principal "unintended consequence" of the Eclipse decision results from Justice Beech's determination of what material constitutes waste, and by consequence what material attracts the Landfill Levy.

The Eclipse decision determined waste to be: *"where material is unwanted by the source, it will be waste, regardless of whether it can be reused elsewhere by someone else"*.

Significantly Justice Beech found the sole test of whether material is waste or not, to be whether the material is "unwanted" or not.

The decision clearly sets out that physical properties, chemical composition, and contamination levels, etc. of the material are not relevant considerations in determining whether material is waste or not. This is reinforced by the statement *"regardless of whether the material can be reused elsewhere"*.

If "waste" material is accepted by a recycler and processed into a new product then the source of the processed material becomes the recycler. It then follows that if that if the processed material is wanted (i.e. has value) to the recycler, then that material is no longer waste and should not attract the Landfill Levy.

However the departments proposed amendments to the waste definitions seeks to differentiate materials based solely on the physical properties and composition of the material, with no consideration of whether the material is "wanted" or not. This approach appears to be entirely inconsistent with the Eclipse decision and therefore unsustainable.

WA Limestone notes the intent of the *Waste Avoidance and Resource Recovery Levy Act 2007* and imposition of the Landfill Levy is to encourage recycling and discourage disposal of waste by landfill.

However in practice the implementation of the Landfill Levy and waste definitions by the state actively discourages and hinders recycling.

To address the unintended consequences of the Eclipse decision, and to resolve the current hurdles preventing recycling, appropriate amendments must be made to the EP Act, subsidiary legislation and waste definitions, to exclude as "waste" any recycled material regardless of physical property, chemical composition, contamination, etc. where that material can be proven to be "wanted" i.e. have commercial value.

Clean Fill

WA Limestone acknowledges that in specific circumstances predominantly relating to land development, "clean fill" may potentially be classified as waste by the definition provided in the Eclipse decision.

Equally however it would be a perverse outcome for clean fill to be treated as waste (e.g. attract the Landfill Levy, require disposal at landfill, etc.). WA Limestone therefore supports the proposed amendment to exclude clean fill from the waste definitions, regardless of whether it is considered to be "wanted" or not.

However the proposed definition of clean fill contains a number of issues that are likely to undermine the intent of the amendments and cause unintended consequences.

The nomination of mining activities (i.e. excavation) as a polluting activity suggests that naturally excavated material may be by default not considered clean fill.

The proposed definition also states that clean fill must not be subject to processing of any kind. Naturally excavated material that has been crushed, screened, washed, etc. (i.e. standard practice for basic raw material excavation) would no longer be considered clean fill.

As currently proposed, if the material is not considered "clean" then the only option for the operator would be to satisfy the prohibitive testing requirements for uncontaminated fill, or the material be classified as waste, subjected to the Landfill Levy and unable to be used for construction and land development.

Clearly it would be a perverse outcome for naturally excavated material and quarry products to be potentially classified as "waste" and/or subjected to prohibitively onerous and unnecessary testing. This would have further unintended consequences to the price and availability of clean fill and quarry products, significantly impacting the cost of development in Western Australia.

With respect to the "clean fill" definition, WA Limestone recommends the following:

- Delineation of areas of contamination precluding "clean fill" to be consistent with the classification of sites under the *Contaminated Sites Act 2003*.
- "Mining" activities to specifically exclude include Basic Raw Material excavation (i.e. the act of excavating clean fill should not by default be considered to contaminate the material).
- The prohibition on processing clean fill should exclude activities prescribed under Categories 12 & 70 Schedule 1, EP Regs.

"Uncontaminated Fill"

The testing and sampling requirements for the proposed "uncontaminated fill" specification are grossly excessive and prohibitive. Quotations from laboratories received by WA Limestone to test a single material sample to the required standard were in excess of \$1,400 per test, and with a required sampling rate of 1 test per 25m³ of material, is simply an unviable proposition.

Notwithstanding this, in the highly unlikely event that a person would undertake the testing to the proposed standard, and the tested material is found to comply then WA Limestone agrees that it would be a perverse outcome for that material to be treated as waste.

WA Limestone queries why asphalt is specifically excluded from the uncontaminated fill definition given that the proposed testing requirements appear to capture all potential contaminants from asphalt. Recycled asphalt is a valuable and highly sought after material for use in construction and land development. It would be a perverse outcome for asphalt (an easily recycled and non-polluting material) to be considered waste, subjected to the Landfill Levy, and have to be sent to landfill.

The proposed pH limits would also exclude concrete which typically ranges between 9 and 13. Again concrete is an easily recyclable, safe and non-polluting substance, which accounts for a significant proportion of inert waste. It would be a perverse outcome if concrete was unable to be recycled and was forced to be sent to landfill.

Additional waste classifications

The intent and purpose of the *Waste Avoidance and Resource Recovery Act 2007* was to reduce the disposal of waste in landfill and encourage recycling. However the Department's current interpretation and enforcement of the Act has made recycling of waste commercially unviable and almost entirely prevented construction and development projects from using recycled materials.

The proposed changes appear limited in scope to dealing with "clean" material and do nothing to redress the current issues facing the recycling of waste.

To be consistent with the Eclipse decision requires that where a proponent can demonstrate a recycled material has value, then that material must be excluded from the waste definitions and the Landfill Levy.

Confirmation that a recycled material is not waste would allow for that material to be used for construction and land development, thereby removing the current barrier causing the significant stockpiling of recycled waste and enable commercial recycling.

To achieve any meaningful rate of waste recycling, appropriate mechanisms need to be put in place to allow for proponents to develop and have endorsed, additional specifications for recycled materials where that material can be demonstrated is "wanted" i.e. have commercial value.

The majority of inert waste can be successfully recycled and used with no adverse impact to human health or the environment, as is commonplace in many jurisdictions worldwide.

Clearly however there needs to be appropriate mechanisms to protect human health and the environment which can be addressed in the material specification by including:

- Physical properties
- Chemical composition, contaminant limits, etc.
- If relevant, restrictions on the source of the input material(s)
- If relevant, any restrictions on where the material may be used and/or in which applications.
- Material specific and risk-based testing and sampling regime, appropriate to the material and nominated use applications.

Provided that the material satisfies the requirements of an endorsed recycled material specification, then that material would no longer be considered waste and thereby not attract the Landfill Levy or require licensing for the use of the material.

Sincerely



Roger Stephens
WA Limestone