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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : ECLIPSE RESOURCES PTY LTD -v- THE STATE  
OF WESTERN AUSTRALIA  
[No 4] [2016] WASC 62

**CORAM** : BEECH J

**HEARD** : 16-27 NOVEMBER 2015  
(FINAL WRITTEN SUBMISSIONS 17 DECEMBER  
2015)

**DELIVERED** : 9 MARCH 2016

**FILE NO/S** : CIV 1364 of 2009

**BETWEEN** : ECLIPSE RESOURCES PTY LTD  
Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA  
First Defendant

THE CHIEF EXECUTIVE OFFICER OF THE  
DEPARTMENT OF ENVIRONMENT  
REGULATION  
Second Defendant

THE MINISTER FOR ENVIRONMENT  
Third Defendant

**FILE NO/S** : CIV 2385 of 2013

**BETWEEN** : THE MINISTER FOR ENVIRONMENT  
Plaintiff

AND

ECLIPSE RESOURCES PTY LTD  
Defendant

**FILE NO/S** : CIV 2416 of 2014

**BETWEEN** : ECLIPSE RESOURCES PTY LTD  
Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA  
First Defendant

THE CHIEF EXECUTIVE OFFICER OF THE  
DEPARTMENT OF ENVIRONMENT  
REGULATION  
Second Defendant

THE MINISTER FOR ENVIRONMENT  
Third Defendant

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*Catchwords:*

Constitutional law - Duties of excise - Whether levy imposed on waste disposed of to landfill is a duty of excise

Local government and environment - Waste management - Whether materials received are 'waste' - Whether materials received are 'accepted for burial' - Whether materials deposited and compacted in a void are 'waste disposed of to landfill'

*Legislation:*

*Environmental Protection Act 1986 (WA)*

*Environmental Protection Regulations 1987 (WA)*

*Waste Avoidance and Recovery Act 2007 (WA)*

*Waste Avoidance and Resource Recovery Levy Act 2007 (WA)*

*Waste Avoidance and Resource Recovery Levy Regulations 2008 (WA)*

*Waste Avoidance and Resource Recovery Regulations 2008 (WA)*

*Result:*

Eclipse's claims dismissed  
Government Parties' claims upheld

*Category:* A

**Representation:**

**CIV 1364 of 2009**

*Counsel:*

Plaintiff	:	Mr S Penglis and Mr P F Fletcher
First Defendant	:	Mr G R Donaldson SC and Ms J E Shaw
Second Defendant	:	Mr G R Donaldson SC and Ms J E Shaw
Third Defendant	:	Mr G R Donaldson SC and Ms J E Shaw

*Solicitors:*

Plaintiff	:	Fletcher Law
First Defendant	:	State Solicitor for Western Australia
Second Defendant	:	State Solicitor for Western Australia
Third Defendant	:	State Solicitor for Western Australia

**CIV 2385 of 2013**

*Counsel:*

Plaintiff	:	Mr G R Donaldson SC and Ms J E Shaw
Defendant	:	Mr S Penglis and Mr P F Fletcher

*Solicitors:*

Plaintiff	:	State Solicitor for Western Australia
Defendant	:	Fletcher Law

**CIV 2416 of 2014**

*Counsel:*

Plaintiff	:	Mr S Penglis and Mr P F Fletcher
First Defendant	:	Mr G R Donaldson SC and Ms J E Shaw
Second Defendant	:	Mr G R Donaldson SC and Ms J E Shaw
Third Defendant	:	Mr G R Donaldson SC and Ms J E Shaw

*Solicitors:*

Plaintiff	:	Fletcher Law
First Defendant	:	State Solicitor for Western Australia
Second Defendant	:	State Solicitor for Western Australia
Third Defendant	:	State Solicitor for Western Australia

**Case(s) referred to in judgment(s):**

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27

Anderson's Pty Ltd v The State of Victoria [1964] HCA 77; (1964) 111 CLR 353

Australian Capital Territory v Queanbeyan City Council [2010] FCAFC 124; (2010) 188 FCR 541

Australian Securities Commission v Marlborough Gold Mines Ltd [1993] HCA 15; (1993) 177 CLR 485

Betfair Pty Ltd v The State of Western Australia [2008] HCA 11; (2008) 234 CLR 418

Capital Duplicators Pty Ltd v Australian Capital Territory (No 2) [1993] HCA 67; (1993) 178 CLR 561

Carr v Western Australia [2007] HCA 47; (2007) 232 CLR 138

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; (2012) 248 CLR 378

Chugg v Pacific Dunlop Ltd [1990] HCA 41; (1990) 170 CLR 249

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

City of Fremantle and The Chief Executive Officer of the Department of Environment and Conservation [2013] WASAT 24

City of Kwinana v Lamont [2014] WASCA 112

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389

Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd  
[2000] FCA 1098; (2000) 102 FCR 42

Commissioner of Police v Eaton [2013] HCA 2; (2013) 252 CLR 1

Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55;  
(2012) 250 CLR 503

Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation [1981]  
HCA 26; (1981) 147 CLR 297

Dennis Hotels Pty Ltd v The State of Victoria [1960] HCA 10; (1960) 104 CLR  
529

Du Buisson Perrine v Chan [2016] WASCA 18

Eclipse Resources Pty Ltd v Chief Executive Officer, Department of  
Environment and Conservation [2013] WASCA 152; (2013) 45 WAR  
353

Environment Protection Authority v N (1992) 26 NSWLR 352

Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue [2011]  
WASCA 228; (2011) 43 WAR 186

Gosford Meats v New South Wales [1985] HCA 5; (1985) 155 CLR 368

Ha v New South Wales [1997] HCA 34; (1997) 189 CLR 465

Hematite Petroleum Pty Ltd v Victoria [1983] HCA 23; (1983) 151 CLR 599

Kelly v The Queen [2004] HCA 12; (2004) 218 CLR 216

K-Generation Pty Ltd v Liquor Licensing Court [2009] HCA 4; (2009) 237 CLR  
501

Kithock Pty Ltd v Commissioner for Australian Capital Territory Revenue  
[2001] HCA Trans 374

Knight v The State of Victoria [2014] FCA 369; (2014) 221 FCR 561

Lacey v Attorney General (Qld) [2011] HCA 10; (2011) 242 CLR 573

Logan Downs Pty Ltd v Queensland [1977] HCA 3; (1977) 137 CLR 59

Matthews v Chicory Marketing Board [1938] HCA 38; (1938) 60 CLR 263

Mijatovic v Legal Practitioners Complaints Committee [2008] WASCA 115;  
(2008) 37 WAR 149

MR Hornibrook (Pty) Ltd v Federal Commissioner of Taxation [1939] HCA 29;  
(1939) 62 CLR 272

Mutual Pools & Staff Pty Ltd v Commissioner of Taxation [1992] HCA 4;  
(1992) 173 CLR 450

Network 10 Pty Ltd v TCN Channel Nine Pty Ltd [2004] HCA 14; (2004) 218  
CLR 273

Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 228 CLR  
529

Philip Morris Ltd v Commissioner of Business Franchises [1989] HCA 38;  
(1989) 167 CLR 399

Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;  
(1998) 194 CLR 355

Queensland Nickel Pty Ltd v Commonwealth of Australia [2015] HCA 12;  
(2015) 89 ALJR 451  
TEC Desert Pty Ltd v Commissioner of State Revenue (WA) [2010] HCA 49;  
(2010) 241 CLR 576  
The State of Western Australia v Chamberlain Industries Pty Ltd [1970] HCA 5;  
(1970) 121 CLR 1  
Trajkoski v Director of Public Prosecution (WA) [2010] WASC 119; (2010)  
41 WAR 105  
Wilderness Society of WA (Inc) v Minister for Environment [2013] WASC 307;  
(2013) 45 WAR 471  
Zheng v Cai [2009] HCA 52; (2009) 239 CLR 446

**BEECH J:****1. Summary**

1       The plaintiff, Eclipse Resources Pty Ltd (Eclipse), carried out resource recovery operations at three sites in the metropolitan region between 1 July 2008 and 30 September 2014. Each site had been quarried, resulting in a void in the ground at the site. As part of its operations at each site, Eclipse received materials from third parties and progressively deposited and compacted some of those materials in the void.

2       These actions concern whether Eclipse is liable to pay a waste levy from 1 July 2008 to 30 September 2014. Liability to pay the waste levy arises under a somewhat convoluted legislative regime that, in essence, imposes levy when waste is accepted for burial at premises and disposed of to landfill.

3       Eclipse claims, in broad summary, that:

- (1)     the materials it received from third parties were not waste;
- (2)     if they were, Eclipse did not accept them for burial;
- (3)     the materials that Eclipse deposited and compacted in the void were not waste disposed of to landfill;
- (4)     for one or more of these reasons, Eclipse is not liable to pay levy;
- (5)     alternatively, if Eclipse is otherwise liable to pay levy, in its practical operation in relation to Eclipse's sites, or some of them, on the following three alternative bases the legislation imposing the levy is unconstitutional because it amounts to a duty of excise:
  - (a)     the levy is a tax on the materials received by Eclipse, and those materials, in Eclipse's hands, are a valuable commodity;
  - (b)     the levy is a tax in respect of products that are made by Eclipse when it removes compacted materials and uses them to make soil products;
  - (c)     the levy is a tax on or in respect of the sand and limestone quarried from one of the sites, in that the depositing and

compacting of materials constitutes necessary rehabilitation of the quarried area.

4           The State of Western Australia, the Chief Executive Officer of the Department of Environment Regulation and the Minister for Environment (Government Parties) submit to the contrary in relation to all of these contentions.

5           Apart from the excise questions, the issues regarding whether the levy regime applies to Eclipse's operations turn critically upon the proper construction of the legislative regime. I have resolved the issues of construction adversely to Eclipse, and found that the levy regime applies to its operations at the three sites.

6           I am not persuaded that, in its application to all or any of Eclipse's sites, the levy is an excise.

7           The balance of these reasons is organised as follows:

- (2) Findings of fact [8] - [443].
- (3) The legislative regime [444] - [518].
- (4) The parties' claims and the issues [519] - [534].
- (5) The proper construction of the levy regime [535] - [627].
- (6) Did Eclipse accept waste for burial at the Sites? [628] - [643].
- (7) Did Eclipse fail to comply with reg 10(6) of the Levy Regulations? [644] - [664].
- (8) Are the estimates of levy made by the CEO valid? [665] - [678].
- (9) Should Eclipse's claims for declarations relating to the return periods after 1 January 2012 succeed? [679] - [685].
- (10) Is the levy invalid as an excise in its application to Eclipse's Sites? [686] - [800].
- (11) Conclusion [801] - [803].



## **2. Findings of fact**

### **2.1 Introduction**

8           Both parties tendered a substantial volume of evidence and sought a very large number of detailed findings of fact. Each party filed a lengthy submission setting out the findings of fact for which it contended. These submissions were, in total, almost 200 pages long. Many of the findings sought relate to matters of fine detail, the relevance of which to the resolution of the issues in these actions is not entirely clear to me. Nevertheless, in deference to the parties' submissions, and in case the matter goes on appeal and different views are taken as to the relevance of certain findings to the case (as developed on appeal), with limited exceptions I have made, or considered making and decided not to make, all of the findings of fact invited by the parties. The exceptions relate to proposed findings on matters of very fine detail that I think have no significance.

9           Some of the findings of fact invited by Eclipse involve a detailed recitation of parts of a written statement of one of Eclipse's witnesses. In some such cases I have not made the particular findings invited by Eclipse because the subject-matter of that part of the written statement relied on by Eclipse is also dealt with by other evidence, and I have made broader findings which reflect my view of the evidence as a whole.

10          In the context of the substantial volume of evidence tendered by the parties, there were relatively few factual issues of any real magnitude. Many facts were agreed.<sup>1</sup> The most significant and most substantial factual issue relates to the timing and extent of Eclipse's 're-mining' of materials that it had compacted in the voids, and its intention to do so.

11          In submissions filed after the conclusion of the trial, each party identified those of the findings sought by the other party which it agreed should be made. Where all parties agreed that a finding of fact should be made, and where it accorded or was not inconsistent with any view of the facts that I had formed, I have made the finding of fact without having always given close attention to all of the references in the footnotes in the relevant party's submissions.

### **2.2 Eclipse's sites**

12          Since 1994, Eclipse has been the occupier of land on Flynn Drive in Carramar, Western Australia comprising:

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<sup>1</sup> See exhibit A and exhibit B.

- (a) lot 1 on diagram 46611, being the whole of the land contained in certificate of title volume 1385 folio 18 (now known as lot 9000 on deposited plan 74654, being the whole of the land contained in certificate of title volume 2831 folio 692); and
  - (b) lot 2 on diagram 48842, being the whole of the land contained in certificate of title volume 1434 folio 718,
- (together, the Flynn Drive Site).<sup>2</sup>

13 Eclipse is (and has been since April 2002 for lot 115 and since May 2005 for lot 2) the occupier of land on Abercrombie Drive in Postans, Western Australia comprising:

- (a) lot 115 on plan 48295 (formerly known as lot 180 on plan 213404), being the whole of the land contained in certificate of title volume 2602 folio 976); and
  - (b) lot 2 on plan 29392, being the whole of the land contained in certificate of title volume 2219 folio 775,
- (together, the Abercrombie Road Site).<sup>3</sup>

14 Since June 2009 (and previously between June 2002 and March 2004), Eclipse has been the occupier of land on Wanneroo Road in Neerabup, Western Australia comprising a portion of lot 12 on plan 9605, lot 12 on plan 9605 being the whole of the land contained in certificate of title volume 1925 folios 276 to 280 (Wanneroo Road Site).<sup>4</sup>

15 The Flynn Drive Site, the Abercrombie Road Site and the Wanneroo Road Site (Sites) are all within the metropolitan region within the meaning of s 4(1) of the *Planning and Development Act 2005* (WA).<sup>5</sup>

16 Each of the Sites contained a void created by the previous quarrying of sand or limestone (or both) when Eclipse took occupation of it.<sup>6</sup>

### **2.2.1 Abercrombie Road Site**

17 One of the lots comprising the Abercrombie Road Site (lot 2) was initially acquired by Eclipse, the other (lot 115) by a related company,

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<sup>2</sup> Exhibit A [23].

<sup>3</sup> Exhibit A [10].

<sup>4</sup> Exhibit A [17].

<sup>5</sup> Exhibit A [27].

<sup>6</sup> Exhibit A [13], [21], [24].

Bayardo Pty Ltd.<sup>7</sup> It appears from Eclipse's application in February 2010 to the Town of Kwinana for planning approval that at that time lot 2 was owned by Eclipse and lot 115 by Bayardo. By 1 January 2012, it appears, and I find, that Bayardo owned both lots.

18 On 1 January 2012, Eclipse and Bayardo entered into an agreement by which Eclipse was granted a licence to occupy and use the Abercrombie Road Site.<sup>8</sup> The agreement licenses Eclipse to use the Abercrombie Road Site for all of its activities for two consecutive five-year terms.<sup>9</sup> One of the conditions of the licence is that, having quarried the site, Eclipse progressively fills the resulting void with inert material that meets requisite environmental standards, compacting that material to specified geotechnical standards that are acceptable by Bayardo and appropriate to qualify the restored land for subdivision, sale and use for the construction of light industrial buildings.<sup>10</sup> No time limit is stipulated for compliance with that condition.

19 Eclipse agreed to pay a licence fee of 10% of gross turnover to Bayardo.<sup>11</sup>

20 After Eclipse's operations have ceased and the Abercrombie Road Site has been filled to its final level by Eclipse, Bayardo intends to develop the site as an industrial subdivision. No application for subdivision or planning approval in respect of the site has as yet been made.<sup>12</sup>

21 When Eclipse and Bayardo acquired the Abercrombie Road Site, Mr Delroy estimated that the total potential resources from the site were approximately 8 million tonnes (or about 5 million m<sup>3</sup>) of mainly good quality limestone and to a lesser extent yellow sand, a relatively small amount of which had already been mined prior to acquisition.<sup>13</sup>

22 As at July 2015, Eclipse had about 3 million tonnes of virgin limestone and sand left to mine at the site.<sup>14</sup>

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<sup>7</sup> Exhibit D1 [32]; exhibit A, attachment 20, pages 755, 757 and 761.

<sup>8</sup> Exhibit B [4], attachment S31.

<sup>9</sup> Exhibit B, attachment S31, cl 2, sch item 1.

<sup>10</sup> Exhibit B [4], attachment S31, cl 3.3.

<sup>11</sup> Exhibit B [4], attachment S31, cl 5.1, sch item 3.

<sup>12</sup> Exhibit A [16].

<sup>13</sup> Exhibit D1 [33.1].

<sup>14</sup> Exhibit D1 [36].

### 2.2.2 Wanneroo Road Site

23        The Wanneroo Road Site is currently uncleared. The vegetation is in good to excellent condition, except for the 11 ha site of the former limestone quarry. The quarry consists largely of the void created by the removal of the side of a hill.<sup>15</sup>

24        The Wanneroo Road Site was private property when Eclipse commenced operations on it.<sup>16</sup>

25        In 1999, 2002 and 2008, Eclipse and the then owners of the Wanneroo Road Site entered into deeds of agreement by which Eclipse was granted a licence to occupy and use the Wanneroo Road Site.<sup>17</sup>

26        In 2002, Eclipse entered into a deed of agreement with the family who owned the site, the Bourke family, to rehabilitate the quarry on the site.<sup>18</sup>

27        Around 750,000 m<sup>3</sup> of fill is required to reconstruct the original contours of the quarry site.<sup>19</sup>

28        The Wanneroo Road Site was reserved under the Metropolitan Region Scheme and the City of Wanneroo *District Planning Scheme 2* for 'Parks and Recreation' for many years before 2002. In around 2012, the Western Australian Planning Commission (WAPC) acquired the site from the Bourke family for the purpose of adding it to the adjacent 943 ha Neerabup National Park in the future. Pursuant to an agreement between the WAPC and the Bourke family, the WAPC agreed to be bound by the Bourke family's obligations under the licence granted to Eclipse.<sup>20</sup>

29        Eclipse and the WAPC entered into a new deed of agreement dated 22 August 2014.<sup>21</sup>

30        Each of the deeds of agreement entered into between Eclipse and the owners of the Wanneroo Road Site in 2008 and 2014 granted Eclipse a licence to occupy and use the Wanneroo Road Site. Pursuant to the deeds,

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<sup>15</sup> Exhibit A [21].

<sup>16</sup> Exhibit G1 [84].

<sup>17</sup> Exhibit A [18], attachments 4 - 8.

<sup>18</sup> Exhibit D1 [21].

<sup>19</sup> Exhibit D1 [22].

<sup>20</sup> Exhibit A [19].

<sup>21</sup> Exhibit A [20], attachment 9.

Eclipse was required, amongst other things, to fill the quarry void at the site by a certain date.<sup>22</sup>

- 31 When the quarry on the Wanneroo Road Site has been restored and revegetated by Eclipse, the WAPC intends to integrate it into the Neerabup National Park.<sup>23</sup>

### 2.2.3 Flynn Drive Site

- 32 When Eclipse first took occupation of the Flynn Drive Site in 1994, it consisted of two contiguous lots with a total area of approximately 98 ha. A large former limestone quarry with a void capacity of about 4 million m<sup>3</sup> and dilapidated lime kilns of heritage interest occupied the northern part of the site. The vegetation on the balance of the land was in good to excellent condition. The land was zoned 'Rural' in the Metropolitan Region Scheme and in the City of Wanneroo's *Town Planning Scheme No 1*. In 1995, before Eclipse commenced using the Flynn Drive Site, Eclipse put forward a proposal, which was subsequently approved, to rezone the land (except for the quarry) to 'Special Residential' and to rezone the quarry to 'Parks and Recreation' under the City of Wanneroo's *Town Planning Scheme*.<sup>24</sup>

- 33 Consulting engineers engaged by Eclipse prepared a landfill and earthworks management plan dated January 1995 for the Flynn Drive Site.<sup>25</sup> The report formed part of an application by Eclipse to the City of Wanneroo for development approval to conduct the proposed filling and earthworks at the site. Eclipse's ultimate proposed use of the site was for a residential subdivision of bush lots of approximately 2,000 m<sup>2</sup> to 3,000 m<sup>2</sup> in size.

- 34 On 11 October 1996, Eclipse and the City of Wanneroo entered into a deed the object of which was to satisfy the City's requirements for the finalisation of the rezoning of the Flynn Drive Site.<sup>26</sup> In effect, the deed provided that the former quarry on the site would become a recreation park that would be transferred to the City and managed by a Home Owners' Association established by Eclipse.<sup>27</sup>

- 35 By cl 7(b) of the deed, Eclipse acknowledged that the City would not issue final clearance for the first stage of the subdivision of the site until

<sup>22</sup> Exhibit A, attachments 8 and 9.

<sup>23</sup> Exhibit A [22].

<sup>24</sup> Exhibit A [24].

<sup>25</sup> Exhibit D1, attachment TD1.

<sup>26</sup> Exhibit D1, attachment TD2.

<sup>27</sup> Exhibit D1, attachment TD2, cl 2.3 and cl 2.4, annexure A.

landfilling in the former quarry was completed, unless and to the extent otherwise agreed.

36 The October 1996 deed was superseded by a deed dated 18 May 2009 between Eclipse, the City of Wanneroo and the mortgagee.<sup>28</sup> Under that deed Eclipse agreed to develop the quarry area, referred to as the Recreation and Equine Park, at its own expense and transfer it free of charge to the Home Owners' Association.<sup>29</sup> By cl 6(b), Eclipse again acknowledged that the City would not issue final clearance for the first stage of the subdivision until landfilling in the former quarry was completed.

37 In 2004, Eclipse prepared a document which identified how much peat and topsoil it would need to make water retentive soils that could be put over the whole 20 ha area of the quarry void at the Flynn Drive Site on the completion of shaping of the void. The document was subsequently modified as a live document.<sup>30</sup> I will say more about it in my findings about re-mining.

38 By 1 July 2008, the void at the Flynn Drive Site had almost been filled.<sup>31</sup> Much of the area of the void had reached its final levels, with the final cover of remediated peat having been placed over the fill and extensive revegetation having commenced.<sup>32</sup>

39 Eclipse completed progressive filling of the void at the Flynn Drive Site in June 2009. Since then, the area has been landscaped and vegetated so that it can be used as a park in accordance with the deed of 18 May 2009.<sup>33</sup>

40 The Flynn Drive Site had ceased accepting materials for fill by June 2009. By this time, the kilns on the site had been restored and Eclipse had received an approval dated 5 February 2010 from the WAPC to subdivide the site.

41 Eclipse had previously been granted subdivision approval by the WAPC in respect of the Flynn Drive Site. The first subdivision approval was granted in or around November 1999. The last subdivision approval was granted to the current landowner, Man O War Resources Pty Ltd, on

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<sup>28</sup> Exhibit A, attachment 41.

<sup>29</sup> Exhibit A, attachment 41, cl 2.3.

<sup>30</sup> Exhibit D4; ts 336 - 340.

<sup>31</sup> Exhibit G1 [102].

<sup>32</sup> Exhibit G1 [102].

<sup>33</sup> Exhibit A [25].

24 December 2013 and amended on 9 May 2014.<sup>34</sup> The site has not yet been subdivided into approved lots but developments in the form of reticulated landscaping, community facilities and retaining walls have been commenced and, in many instances, completed.<sup>35</sup>

### 2.3 Overview of Eclipse's operations

42        These three actions concern Eclipse's liability to pay levy in respect of its operations at the Sites between 1 July 2008 and 30 September 2014. More specifically, the proceedings relate to Eclipse's liability for the Flynn Drive Site, from 1 July 2008 to 30 June 2009, for the Abercrombie Road Site from 1 July 2008 to 30 September 2014 and for the Wanneroo Road Site from 1 June 2009 to 20 September 2014. I will refer to those periods for each site as the Relevant Period. (CIV 1364 of 2009 also concerns questions relating to the period from 1 July 1998 to 30 June 2008. However, by consent of the parties, the court made an order that the trial of that action, so far as it relates to the period before 1 July 2008, be deferred until the final determination of the parties' claims concerning the period after 1 July 2008.)

43        Eclipse carried out a number of different activities at each of the Sites during the Relevant Period.

44        As set out in more detail below, at its Flynn Drive Site during the Relevant Period, Eclipse:

- (a)       produced mulch for use on site;
- (b)       produced blended soils for use on site; and
- (c)       completed the filling of the former quarry void on the site.

45        Eclipse did not produce or sell any products from the Flynn Drive Site during the Relevant Period.<sup>36</sup>

46        As set out in more detail below, at its Abercrombie Road Site during the Relevant Period, Eclipse:

- (a)       quarried virgin, naturally occurring, sand and limestone (Quarry Materials) from the site, thereby increasing the size of the void created by the existing quarry;

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<sup>34</sup> Exhibit G1 [103].

<sup>35</sup> Exhibit A [26].

<sup>36</sup> ts 230 - 231.

- (b) produced mulch for sale;
- (c) produced blended soils for sale;
- (d) continued filling the quarry void on the site; and
- (e) at times from about July 2014, removed materials it had previously deposited and compacted in the quarry void on the site as fill.

47 As set out in more detail below, at its Wanneroo Road Site, during the Relevant Period, Eclipse:

- (a) excavated some remediated (previously acidic) peat buried by Eclipse at the Wanneroo Road Site between June 2002 and March 2004 (and the crushed limestone the peat was buried with in order to neutralise it) ;
- (b) produced mulch for sale;
- (c) produced blended soils for sale; and
- (d) continued filling the quarry void on the site.

48 Eclipse invites findings that at both Abercrombie Road and Wanneroo Road, among the blended soils that it produced for sale during the Relevant Period was water retentive landscape shaping soil.<sup>37</sup> As explained in more detail later in these reasons, I am not satisfied that Eclipse produced that product prior to July 2014.

49 During the Relevant Period at the Abercrombie Road Site Eclipse produced structural fill, some at least of which was produced for sale.<sup>38</sup>

50 Eclipse also invites a like finding in respect of the Wanneroo Road Site,<sup>39</sup> and findings that it produced fill for sale at both the Wanneroo Road Site and the Abercrombie Road Site,<sup>40</sup> by reference to what is said in Mr Sippe's witness statement.<sup>41</sup> Those parts of Mr Sippe's statement address what Eclipse 'produces' as at the time of the statement. I am not satisfied that during the Relevant Period Eclipse consistently made the

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<sup>37</sup> Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [9(c)], [10(c)].

<sup>38</sup> Exhibit A [40(c)], [62(1(i))].

<sup>39</sup> Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [10(d)].

<sup>40</sup> Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [9(e)], [10(e)].

<sup>41</sup> Exhibit G1 [34], [35].



same products that it was making when Mr Sippe's statement was signed in July 2015. Those parts of Mr Sippe's evidence do not satisfy me as to what occurred during the Relevant Period.

51 More generally, many parts of Mr Sippe's evidence in his statements are directed to describing Eclipse's then current practices and procedures, and are not expressed to relate to the position over the course of the six years comprising the Relevant Period. I am by no means satisfied that the position as at July 2015 can be taken to reflect the position in all relevant respects from July 2008 to September 2014. I will give other examples of this later in my reasons.

## **2.4 The nature of Eclipse's business**

52 Mr Sippe gave general evidence as to the nature of Eclipse's business. It was expressed in the present tense. As I have said, I am not satisfied that his description of Eclipse's current products applied throughout the Relevant Period. With that exception, I accept that Mr Sippe's statement of the current position in describing the general nature of Eclipse's business reflected the position during the Relevant Period.

53 Mr Sippe says that Eclipse operates an integrated business involving sequential land use and resource recovery operations and incorporating: limestone and sand mining; production of water retentive soils and mulches; and production of structural fill for off-site sales and for on-site projects.<sup>42</sup> Although perhaps not spelt out, an element of Eclipse's operations at each of the Sites was the filling of the void at the site.

54 Eclipse accepts only certain kinds of materials that are considered by it to be environmentally and geotechnically fit for Eclipse's purpose. Other parties usually pay Eclipse to take these materials, although Eclipse does pay for certain materials if they are needed for a specific purpose or to meet a sales order.<sup>43</sup> Eclipse accepts materials that it considers to be a resource from which, through processing, re-use or recycling, it can produce resaleable or re-usable commodities.<sup>44</sup> Mr Sippe says that Eclipse receives materials and processes them as required to render them suitable for:

- (a) the manufacture of water retentive blended soils;

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<sup>42</sup> Exhibit G1 [9].

<sup>43</sup> Exhibit F1 [46].

<sup>44</sup> Exhibit G1 [12].

- (b) the manufacture of mulches; or
- (c) use on-site or sale off-site as geotechnically and environmentally suitable fill.<sup>45</sup>

55 As I will explain in more detail below, Eclipse determined the environmental suitability of materials by reference to certain criteria published by the Department of Environment Regulation (DER).<sup>46</sup> These criteria are known as environment investigation levels (EILs) and health investigation levels (HILs).

56 Any material received that Eclipse considered to be environmentally and geotechnically unfit for Eclipse's purpose and that had no potential to be rendered fit for purpose, for example by remediation, was rejected and, with one exception, stockpiled to be taken, at Eclipse's expense, for disposal elsewhere. The exception is metals that Eclipse has from time to time stockpiled and sold as scrap metal. From the Abercrombie Road Site, unfit material is taken to the Millar Road Class III landfill operated by the City of Rockingham and, from the Wanneroo Road Site, to the licensed Tamala Park Class III facility run by Mindarie Regional Council. Any loads of material offered to Eclipse which Eclipse judges to be unsuitable or too expensive to process may also be directed to a nearby Class I landfill operated by Waste Stream Pty Ltd.<sup>47</sup>

57 Eclipse and its sister company, Eclipse Soils Pty Ltd, are part of a group of companies, known as the Marford Group, controlled and owned by Mr Trevor Delroy.<sup>48</sup> The Marford Group operates under the principles of sustainability.<sup>49</sup>

58 Eclipse and Eclipse Soils undertake significant research and development as part of their strategic planning.<sup>50</sup>

59 At each of its sites, Eclipse conducted its different operations as part of one integrated business.<sup>51</sup> By operating in this way, Eclipse was able to

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<sup>45</sup> Exhibit G1 [79].

<sup>46</sup> In these reasons, the term DER is also used to refer to predecessors of the Department of Environment Regulation, such as the Department of Environment and Conservation, the Department of Environment and the Department of Environmental Protection.

<sup>47</sup> Exhibit G1 [14].

<sup>48</sup> Exhibit D1 [1].

<sup>49</sup> Exhibit G1 [18]; exhibit F1 [43], [44].

<sup>50</sup> Exhibit D1 [43]; exhibit G1 [121] - [122].

<sup>51</sup> ts 204.

exploit what Mr Bowman describes as 'a logistical synergy' between its quarrying, soil blending and filling activities.<sup>52</sup>

60 Although integrated, the different operations are segmented and easily identifiable at the Abercrombie Road Site.<sup>53</sup> Different activities are and were conducted on different areas of the site, and materials directed to the appropriate place pending use, including as follows:

- (a) Materials to be used in the production of blended soils are taken and deposited in the soil blending area. This area is presently located in the north of the site, but is relocated from time to time as part of the management of site logistics.
- (b) Materials contaminated with hydrocarbons, pesticides or acid sulfates, which require remediation, are deposited in stockpiles positioned on lined waterproof pads prepared on a limestone base so that drainage waters or leachate cannot escape into the underlying soil. These pads are located in the north west of the site.
- (c) Plant material that has arrived at the gate of the site is directed by Eclipse staff to be deposited on flat hardstands of crushed limestone to await processing by grinding.
- (d) Materials for which Eclipse has no present use, including materials which are not suitable for blended soil production, are not plant material, and are not contaminated, may be used for filling the void.<sup>54</sup>

61 Eclipse's executives describe its business as involving sequential land use. Mr Sippe's evidence is that for Eclipse, and the Marford Group generally, sequential land use involves:

- (a) mining a strategic basic raw material like limestone or sand, or acquiring a site where mining has occurred or is still occurring, such that a void is being or has been created;
- (b) progressively filling the void with compacted inert material, which Eclipse is satisfied has no adverse environmental impacts and is geotechnically suitable for the development purpose;

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<sup>52</sup> Exhibit F1 [34].

<sup>53</sup> Exhibit E1 [18].

<sup>54</sup> Exhibit F1 [14], [15].

- (c) re-mining suitable deposited material and making recycled products for off-site sale in response to market conditions;
- (d) placing 1 - 2 m high quality suitable sand on top of compacted inert material for development, or water retentive blended soils for landscaping or parks; and
- (e) ultimately developing the land for a higher and better use. In the case of land owned by the Marford Group, the ultimate land use is either subdivision for residential or industrial purposes, or use as open space and community facilities as part of a residential development. In the case of the Wanneroo Road Site, which is not owned by the Marford Group, that land use is parks and recreation as a future addition to the Neerabup National Park.<sup>55</sup>

I will deal with the question of the extent to which re-mining of deposited and compacted material was part of Eclipse's activities during the Relevant Period later in these reasons. Subject to that, I accept Mr Sippe's evidence in this regard.

## **2.5 Eclipse's quarrying of naturally occurring sand and limestone**

### **2.5.1 Flynn Drive Site**

- 62 During its occupation of the Flynn Drive Site prior to 1 July 2008, Eclipse excavated Quarry Materials from the site for sale.<sup>56</sup> However, during the Relevant Period, Eclipse did not excavate any Quarry Materials from the site.<sup>57</sup>

### **2.5.2 Abercrombie Road Site**

- 63 Throughout the Relevant Period, Eclipse excavated, and contracted third parties to excavate, Quarry Materials from the Abercrombie Road Site. The excavation increased the existing quarry void at the site.<sup>58</sup>
- 64 The limestone extracted from the site by Eclipse during the Relevant Period was, where necessary, crushed and screened to meet specifications such as particle size distribution.<sup>59</sup>
- 65 Eclipse sold quarried sand and limestone from the Abercrombie Road Site. The third parties contracted by Eclipse to extract Quarry

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<sup>55</sup> Exhibit G1 [26].

<sup>56</sup> Exhibit D1 [19.2].

<sup>57</sup> Exhibit A [44].

<sup>58</sup> Exhibit A [37].

<sup>59</sup> Exhibit A [38].

Materials from the site during the Relevant Period also sold, or used for their own purposes, some of the Quarry Materials they extracted.<sup>60</sup>

66 Eclipse used some of the limestone and sand it and its contractors extracted from the site for:

- (a) the remediation of acid sulfate soils;
- (b) the production of water retentive blended soils;
- (c) the production of structural fill,

and in smaller quantities, for the construction of:

- (d) limestone pads and bunds used in the treatment of acid sulfate soils;
- (e) limestone pads used to stockpile and compost plant material;
- (f) stabilising areas used to erect fuel tanks and as parking space for machinery, trucks and other vehicles; and
- (g) pads for sheds and tracks for trucks and machinery travelling across the site.<sup>61</sup>

67 Eclipse uses and intends to use sand produced from the Abercrombie Road Site for the top one metre of final cover over compacted fill. Ultimately, to cover the 40 ha site that will require about 400,000 m<sup>3</sup> of sand. Sand has also been used from time to time in blended soil. Sand to be used for final cover is excavated ahead of the mining front and stockpiled. Any deficit of sand for final cover will most likely result in sand being purchased by Eclipse.<sup>62</sup>

### **2.5.3 Wanneroo Road Site**

68 During the Relevant Period, Eclipse did not excavate Quarry Materials from the Wanneroo Road Site for sale.<sup>63</sup>

69 Eclipse extracted limestone and sand from the site, including that which it had previously deposited and compacted in the void at the site between 2002 and 2004.<sup>64</sup>

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<sup>60</sup> Exhibit A [39].

<sup>61</sup> Exhibit A [40].

<sup>62</sup> Exhibit G1 [42]; ts 415.

<sup>63</sup> Exhibit A [41].

70 Eclipse used the limestone and sand it extracted from the site during the Relevant Period to:

- (a) construct vehicle access tracks, stabilising areas, hardstands, pads and bunds within the site;
- (b) remediate acid sulfate soils accepted at the site; and
- (c) produce water retentive blended soils.<sup>65</sup>

## **2.6 Eclipse's receipt of materials**

71 During the Relevant Period, Eclipse received and accepted materials from third parties at each of the Sites.<sup>66</sup>

72 Material received by Eclipse at the sites would generally be transported by a third party to a site in a large truck with a capacity of more than 20 tonnes.<sup>67</sup>

73 Materials were also delivered to some of the sites in skip bins. The final versions of the parties' respective closing submissions as to the facts suggest that the only issue in that regard is whether material was delivered to the Flynn Drive Site in skip bins.<sup>68</sup> I do not think anything turns on that question. In any event, I accept, based on Mr Delroy's evidence,<sup>69</sup> that skip bins were not brought to the Flynn Drive Site during the Relevant Period.

74 The materials received by Eclipse at the sites were given to it by persons who had no present use for the materials, who did not want the materials, and who generally paid Eclipse to accept them.<sup>70</sup>

75 Eclipse sometimes did not charge for, or paid for, materials it needed to produce blended soils.<sup>71</sup> There is no evidence that, and I am not satisfied that, Eclipse paid for any of the material that it received at the sites to be deposited and compacted in the voids at the sites.

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<sup>64</sup> Exhibit A [42].

<sup>65</sup> Exhibit A [43].

<sup>66</sup> ts 341.

<sup>67</sup> ts 341.

<sup>68</sup> See Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [18].

<sup>69</sup> ts 341.

<sup>70</sup> Exhibit G1 [12] - [13]; ts 341 - 342.

<sup>71</sup> Exhibit G1 [12], attachment RS03; exhibit F1 [46]; ts 342 - 343.

## **2.7 Eclipse's pricing for materials it received**

76 During the Relevant Period, Eclipse periodically published price lists for each of its sites, advertising the fees it charged to receive different types of material.<sup>72</sup>

77 Eclipse's overall pricing is set by the Chairman of the Marford Group in consultation with the Marford Group's Company Secretary/Chief Financial Officer (CFO), Eclipse's Manager of Operations (MO) and Eclipse's Managing Director (MD).<sup>73</sup>

78 Prices are and have at all relevant times been listed either on Eclipse's published price lists (categories G1, G3, G4, G5 and G6) or set through negotiation for 'special jobs' (categories 2A, 2B, 2C, 2D, 2E, 2F, and 2G). Special jobs are given a unique number in Eclipse's record system.<sup>74</sup>

79 Eclipse's published price lists for the Abercrombie Road Site effective for the Relevant Period are at items 4, 14, 18, 22, 24, 26, 28, 30, 33, 35, 37 and 39 of exhibit C.<sup>75</sup>

80 Eclipse's published price lists for the Wanneroo Road Site effective from 25 May 2009 to 30 September 2014 are at items 17, 19, 23, 25, 27, 29, 31, 34, 36 and 38 of exhibit C.<sup>76</sup>

81 Eclipse's published price lists for the Flynn Drive Site effective from 1 July 2008 until June 2009, when it ceased accepting materials, are at items 3 and 13 of exhibit C.<sup>77</sup>

82 During the Relevant Period, Eclipse charged 'cash on delivery' rates of:

- (a) between \$14/m<sup>3</sup> and \$23/m<sup>3</sup> plus GST for 'Grade 1 General Construction' and 'Grade 1 Clean - no sorting required (eg sand, bricks, concrete, stone)';
- (b) \$5/m<sup>3</sup> plus GST for 'Grade 3 Clean fill' and 'Grade 3 Clean sand - virgin excavated natural material';

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<sup>72</sup> Exhibit C, pages 3 - 4, 137 - 138, 141 - 143, 147 - 156, 160 - 166.

<sup>73</sup> Exhibit G3 [62].

<sup>74</sup> Exhibit G3 [63]; exhibit C, pages 3 - 4, 137 - 138, 141 - 143, 147 - 156, 160 - 166.

<sup>75</sup> Exhibit G3 [64].

<sup>76</sup> Exhibit G3 [65].

<sup>77</sup> Exhibit G3 [66].

- (c) between  $\$16/\text{m}^3$  and  $\$25/\text{m}^3$  plus GST for 'Grade 4 Loads difficult to manage (spaghetti reo/tin/pvc pipe etc)' and 'Grade 4 Minor sorting required';
- (d) between  $\$10/\text{m}^3$  and  $\$150/\text{m}^3$  plus GST for different types of green waste;
- (e) between  $\$25/\text{m}^3$  and  $\$33/\text{m}^3$  plus GST for 'GW4 Mixed load greens/rubble';
- (f) between  $\$70/\text{m}^3$  and  $\$150/\text{m}^3$  plus GST for 'Grade 6 Asbestos';
- (g) between  $\$40/\text{m}^3$  and  $\$45/\text{m}^3$  plus GST for 'Grade 5 General Construction with less than 40% timber'; and
- (h) between  $\$33/\text{m}^3$  and  $\$50/\text{m}^3$  plus GST for 'Grade 5 Load requires sorting'.<sup>78</sup>

83 For special jobs for which no price is given on Eclipse's published price lists, the price is provided on application through negotiation. Job-specific pricing is generally set as follows:

- (a) If the total revenue from the job is greater than approximately \$50,000, then the Chairman and one or more of the MD, CFO and MO set the price.
- (b) If the total revenue from the job is less than approximately \$50,000, then the MD, CFO and MO set the price and the Chairman is normally informed.<sup>79</sup>

84 In addition, the fees charged by Eclipse to receive materials from large 'special projects' during the Relevant Period were set by negotiation.<sup>80</sup> In his oral evidence Mr Delroy indicated, and I accept, that 'the great majority of [Eclipse's] business is done by negotiation nowadays'.<sup>81</sup>

85 In or about January 2010, Eclipse factored the levy (in part) into the prices it charged for some materials received at the sites.<sup>82</sup> It applied an increase of  $\$1.84$  per  $\text{m}^3$  on the basis that about 20% of materials received would be subject to the levy increase of  $\$9$  per  $\text{m}^3$ . It also factored in

<sup>78</sup> Exhibit C, pages 3 - 4, 137 - 138, 141 - 143, 147 - 156, 160 - 166.

<sup>79</sup> Exhibit G3 [67].

<sup>80</sup> ts 342.

<sup>81</sup> ts 342.

<sup>82</sup> ts 343 - 345; exhibit C, pages 157 - 159.



20 cents for exposure to a negative litigation outcome regarding the designated civil works area (see section 2.21 below).

## 2.8 Sources and nature of received material

86 This part of the reasons deals with materials received at the Sites, not specifically with materials that were deposited and compacted in the voids at the Sites. As I have said, given Eclipse's various activities at the Sites, only some of the materials received by Eclipse were deposited and compacted in the voids.

87 At each of the Sites during the Relevant Period, Eclipse accepted various different types of material from various different sources. The materials received by Eclipse at the Sites came from source sites located in various suburbs in Western Australia.<sup>83</sup>

88 At each of the Sites during the Relevant Period, Eclipse accepted plant material, including grass and tree branches, stumps and logs arising from vegetation clearing as part of site works for residential, commercial and industrial development, and from kerb-side pickups by local governments.<sup>84</sup>

89 At each of the Sites during the Relevant Period, Eclipse accepted materials that came from construction, demolition and remediation works and earthworks on other sites. These included works relating to tunnels, underground car parks, roads, railways, service trenches, basements, man-made inlets, larger-scale residential, commercial and industrial developments, and smaller-scale housing sites and swimming pools.<sup>85</sup>

90 The materials accepted by Eclipse included materials that had been excavated as part of the preparation of sites for development which were unsuitable for, or excess to the requirements of, the developer; surplus materials from construction and demolition projects; virgin material and construction and demolition material from site clean-ups; and materials arising from the demolition of buildings and infrastructure, being mainly concrete and bricks.<sup>86</sup>

<sup>83</sup> Exhibit 10 [49]; exhibit 7 [19], [23], [28], [34], [38], [50], [56], [68], [73], [79], [84], [90], [93]; exhibit 13 [15]; exhibit G1 [118] - [119], attachment RS32, pages 455 - 457; exhibit 2 [6] - [45], attachments CC1 - CC38.

<sup>84</sup> Exhibit A [69], attachment 46, pages 1691 - 1692; exhibit G1 [31(b)], attachment RS32, page 454; exhibit 9 [16], [26], attachment LIF15; exhibit 14 [86], [88], [91], attachment JD46I; exhibit 5 [32] - [33], [35], [60] - [61], [65], attachments CLW12 and CLW32; exhibit 7 [16], [26], [59], attachments SF5, SF6, SF9, SF11, SF13, SF16, SF18, SF21; exhibit 13 [15].

<sup>85</sup> Exhibit G1 [31(a)], [32(b)], [118] - [119], attachment RS32, pages 455 - 457.

<sup>86</sup> Exhibit G1 [43] - [44]; ts 345 - 348, 364.

91 The materials accepted by Eclipse at the Sites during the Relevant Period from the sources referred to in the two preceding paragraphs included the materials set out immediately below, as well as the materials referred to in the following paragraphs (namely [92] - [102]):

- (a) Soil (sometimes containing plant roots or other plant matter), sand, rocks, limestone (except at the Flynn Drive Site), clay, peat, silt and diatomaceous earth (at the Abercrombie Road Site only).
- (b) Bricks, pavers, concrete (including reinforced concrete), limestone blocks, bitumen, asphalt, gravel, roof tiles, other tiles, and small quantities of glass (for example, bottles), plasterboard, Hardifence panels and other rubble arising from construction and demolition works and earthworks.
- (c) Small quantities of plastic strapping (including green plastic brick strapping), wrapping, sheeting, bags and piping and other plastic (such as buckets and drink containers).
- (d) Small quantities of paper packaging, cardboard, wood (including wooden pallets), steel roof sheeting, corrugated metal sheeting, metal wires, and other metal (such as metal drainage grates and paint cans).
- (e) Small quantities of bicycles, bathtubs, fabric, carpet and insulation materials.<sup>87</sup>

92 The loads of materials accepted by Eclipse at the Sites often contained a mixture of various different types of material. There was soil mixed together with bricks, concrete, tiles and pieces of plastic, metal and paper. Some of the materials received at the Sites had previously been used or were broken, chipped, bent or otherwise damaged.<sup>88</sup>

93 Eclipse accepted materials containing asbestos wrapped in plastic at the Abercrombie Road Site between 1 July 2008 and June 2012.<sup>89</sup> Eclipse

<sup>87</sup> Exhibit G1 [31(a)], [32]; exhibit 14 [4] - [135], attachments JD2 - JD75; exhibit 9 [8], [16], [21] - [25], [27], [29] - [34], [36] - [42], attachments LIF11 - LIF14, LIF16, LIF18 - LIF35; exhibit 10 [7] - [12], [19], [27] - [38], [40] - [55], attachments RKR10 - RKR20, RKR22 - RKR30, RKR32 - RKR34; exhibit 13 [8] - [34], [39], [42] - [44], [47] - [56], attachments CAF1 - CAF15, CF18 - CAF19, CAF22 - CAF25; exhibit 5 [9] - [12], [26] - [34], [36] - [43], [46] - [48], [52] - [58], [60] - [69], [78] - [91], [95], [99], [103], [107], attachments CLW1, pages 27 - 30, CLW2, pages 37, 39 - 40, CLW9 - CLW11, CLW13 - CLW17, CLW20, CLW23 - CLW26, CLW28 - CLW34, CLW36 - CLW52; exhibit 7 [14] - [56], [64] - [93], attachments SF5 - SF37; exhibit B [2] - [3], attachments S1 - S30.

<sup>88</sup> See references to exhibits 5, 7, 9, 10, 13 and 14 in the preceding footnote.

<sup>89</sup> Exhibit G1 [33(d)]; ts 347.

also accepted soils containing or potentially containing asbestos chips at the Abercrombie Road Site during the Relevant Period.<sup>90</sup>

94 Asbestos is a material that was widely used in building materials up to 1987. It can be hazardous to human health and requires special management techniques for its safe handling.<sup>91</sup> It is common for a precautionary approach to be taken if any asbestos containing material is found on a development site; approximately 100 - 150 mm of topsoil across the site will be excavated for off-site disposal.<sup>92</sup>

95 Eclipse's receipt and management of wrapped asbestos and soil containing or potentially containing asbestos chips was governed by its management plan for the Abercrombie Road Site, which made specific provision for asbestos safety policies and procedures.<sup>93</sup>

96 Under the management plan, the process is and was as follows. The coordinates for areas of the Abercrombie Road Site that have been identified and designated by Eclipse for receipt and disposal of soil actually or potentially containing asbestos chips are plotted by Eclipse's consultant surveyors, McMullen Nolan Group (McMullen Nolan), on plans of the site. Site employees of Eclipse also mark the corners of the areas on the ground.<sup>94</sup>

97 Eclipse's employees direct trucks containing potentially or actually contaminated soil to the designated areas for disposal. Following the deposit of soil from the trucks, site employees of Eclipse promptly deposit suitable inert fill materials to cover the soil. This process occurs in relation to soil deposited from the bottom of the void up and until 5 m below final levels. The levels are determined by periodic surveys conducted by McMullen Nolan. The senior executives of the Marford Group get regular briefings from Eclipse's Operations Manager on levels within the designated asbestos area. This area is kept damp during active depositing by reticulated water supplied from Eclipse's two licensed on-site bores to avoid dust.<sup>95</sup>

98 Eclipse accepted soils contaminated with hydrocarbons and pesticides at the Abercrombie Road Site during the Relevant Period.<sup>96</sup> Hydrocarbons are organic compounds of hydrogen and carbon, such as,

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<sup>90</sup> Exhibit G1 [33(c)].

<sup>91</sup> Exhibit 11 [31] - [32].

<sup>92</sup> Exhibit G1 [43(g)].

<sup>93</sup> Exhibit G1 [72], [75]; see also the various management plans.

<sup>94</sup> Exhibit G1 [73].

<sup>95</sup> Exhibit G1 [74].

<sup>96</sup> Exhibit A [64]; exhibit G1 [33(b)]; ts 347, 354.

relevantly, those which are the chief components of petroleum and natural gas. Some of the hydrocarbon contaminated soils accepted by Eclipse came from various service station sites where the petrol drums and storage containers had leaked into the sand.<sup>97</sup>

99 Eclipse accepted acid sulfate soils (including peats) at the Abercrombie Road Site and the Wanneroo Road Site during the Relevant Period.<sup>98</sup>

100 Acid sulfate soils are naturally occurring soils that contain iron sulphide minerals. When acid sulfate soils are excavated or disturbed, the exposure of the iron sulphide minerals to atmospheric oxygen causes the oxidation of the minerals and the production of sulfuric acid. This sulphuric acid can cause environmental harm if it is allowed to escape into the surrounding environment.<sup>99</sup>

101 During the Relevant Period, a significant proportion of the materials received by Eclipse comprised soils, sand, peat, riverine silts, clay and limesand dredgings excavated from source sites that were (at the time of Eclipse's receipt of the materials or subsequently) classified under the *Contaminated Sites Act 2003* (WA).<sup>100</sup> Some of the source sites were classified as 'Contaminated - remediation required' or 'Possibly contaminated - investigation required'.<sup>101</sup> They were classified, in part, because of the presence of hydrocarbons, heavy metals, pesticides, asbestos and waste materials in the soils at the sites.<sup>102</sup> Some of them were former landfills (for example, Elizabeth Quay).<sup>103</sup> Eclipse accepted materials from classified sites with the intention that they would be remediated or bio-remediated.<sup>104</sup>

102 Occasionally, Eclipse received used motor vehicle tyres at the Abercrombie Road Site and the Wanneroo Road Site during the Relevant Period.<sup>105</sup> Some of these tyres were used by Eclipse on-site as markers.

<sup>97</sup> ts 364 - 365.

<sup>98</sup> Exhibit A [58]; exhibit G1 [33(a)]; ts 347, 354.

<sup>99</sup> Exhibit F1 [20].

<sup>100</sup> Exhibit G1 [118], attachment RS32; exhibit 2 [6] - [45], attachments CC1 - CC38; exhibit G2 [102] - [103]; ts 352 - 356, 362 - 369, 398 - 399. Division 2 of pt 2 of the *Contaminated Sites Act* provides for the classification of sites in accordance with the classifications set out in sch 1.

<sup>101</sup> Exhibit 2 [6] - [45], attachments CC1 - CC38.

<sup>102</sup> Exhibit 2 [6] - [45], attachments CC1 - CC38.

<sup>103</sup> Exhibit 2 [6] - [7], [22] - [26], [32], [36], [40], [42] - [43], attachments CC14 - CC18, CC24, CC28, CC32, CC33, CC35, CC36.

<sup>104</sup> ts 433.

<sup>105</sup> Exhibit 9 [8] - [16], [21] - [22], attachment LIF11; exhibit 14 [50] - [54], attachment JD32A.

Tyres were not used as fill.<sup>106</sup> Excess tyres were disposed of off-site following sorting.<sup>107</sup>

103 Quantities of rock and concrete in materials accepted by Eclipse has considerably decreased (although gradually) from 2008. Data with respect to quantities of rock and concrete are not collected by Eclipse. During the Relevant Period, on Mr Sippe's estimate no more than approximately 5% of material accepted by Eclipse comprised rocks and concrete.<sup>108</sup>

104 Eclipse uses the following classification coding for invoicing clients:

- (a) G1: Clean construction and demolition materials for which no sorting is required and which are established as meeting EILs by virtue of sampling and analysis, either before the material is transported or in accordance with Eclipse's testing protocol.
- (b) 2A: Natural Earth Material (predominantly sand) for which analytical data has been provided, before acceptance by Eclipse, showing that the material meets EILs.
- (c) 2B ASS - peat: Acidic peats containing organic matter for which analytical data has been provided by the producer or their consultants prior to acceptance that satisfies Eclipse that it should receive the materials because they are capable of remediation to counter their acidity and, following remediation and validation, will be usable for the manufacture of products.
- (d) 2C ASS - soil: Acidic soil for which analytical data has been provided by the producer or their consultants prior to acceptance that satisfies Eclipse that the soils are capable of remediation to counter their acidity and, following remediation and validation, will be usable for making products.
- (e) 2D: Soils suitable for bio-remediation; soils contaminated with hydrocarbons or some pesticides and for which analytical data has been provided by the producer or their consultants prior to acceptance that satisfies Eclipse that it should receive the materials because they can be bio-remediated in compliance with Eclipse's management plan and, once validated, will be usable for products.

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<sup>106</sup> Exhibit E2 [9.3], [14.2].

<sup>107</sup> Exhibit G1 [14].

<sup>108</sup> Exhibit G3 [17].

- (f) 2E: Any other special job (for example, one that requires special handling, processing or pricing). Normally, and if relevant, these are materials for which analytical data has been provided by the producer or their consultants prior to acceptance that satisfies Eclipse that it is able to receive and process the materials.
- (g) 2F: Soil actually or potentially containing asbestos chips. The presence of any asbestos chips, or the potential for any, in soil is normally identified in an environmental report provided by the producer or their consultant, or through visual inspection by a civil engineer, prior to acceptance by Eclipse. Usually it is identified by the producer's (typically, the property developer's) environmental or engineering consultants as part of planning the construction or demolition activity generating the materials.
- (h) 2G: Inert material for which analytical data has been provided before acceptance by Eclipse showing that the materials may exceed EILs but do not exceed HILs.
- (i) 2H: Structural fill. Product made from recycled and virgin materials to meet relevant customer specifications. This code was only introduced in September 2014.<sup>109</sup>
- (j) G3: Virgin materials. If these materials are coming from a site and a reputable operator known to Eclipse, they are usually accepted and then stockpiled for use in blended soils or for final cover. Otherwise, a site inspection of the originating area is usually carried out by Eclipse personnel before trucking.
- (k) G4: General inert construction and demolition materials with only minor sorting required. After sorting, those sorted materials which Eclipse is satisfied are fit for its purpose (that is, those that meet EILs by virtue of sampling and analysis in accordance with Eclipse's testing protocol, or that meet HILs) are used as fill.
- (l) G5: General inert construction and demolition materials with sorting required. After sorting, those sorted materials which Eclipse is satisfied are fit for its purpose are used as fill.
- (m) G6: Asbestos.<sup>110</sup>

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<sup>109</sup> Exhibit G3 [46].

<sup>110</sup> Exhibit G1 [43].

105 Between July 2010 and August 2012, Eclipse accepted at its Wanneroo Road Site approximately 10,000 tonnes of material, known as 'coarse heavies', that had come from a facility operated by BioVision under the management of SUEZ Environment (formerly known as SITA Australia Pty Ltd) in Neerabup (BioVision Facility).<sup>111</sup>

106 At the BioVision Facility, between July 2010 and August 2012, household waste set aside for kerb-side collection within various local government areas was processed, using specialist composting plant and equipment, into soil conditioner which was sold into different markets, including agricultural markets.<sup>112</sup> The coarse heavies received by Eclipse consisted of dense materials, less than 35 mm in size, extracted during the production process using various pieces of equipment and collected in a bin for off-site disposal.<sup>113</sup> In other words, they were an unwanted residue created as part of the soil conditioner production process.<sup>114</sup>

107 The coarse heavies received by Eclipse consisted of small fragments of material that included or may have included bones, bricks, stones, ceramics, coarse pieces of wood, ferrous and non-ferrous metals, 'fines' (part organic, part mineral material), glass, paper, cardboard, plastics (for example, plastic bottle and container tops and pegs), processible garden material (including grass clippings, leaves, soft plant material), unprocessable garden material (including high lignin prunings, plant cuttings, coco palm leaves, tree material), textiles and, potentially, other materials such as lighters, medication, drugs, dry cell batteries and wet batteries.<sup>115</sup>

108 On 16 August 2012, Eclipse received 20.58 tonnes of coarse heavies from the BioVision Facility at its Wanneroo Road Site.<sup>116</sup> DER Inspector James Donis observed the material deposited at the site on that date and advised the Site Manager that he did not consider that the material was appropriate to be accepted at the site.<sup>117</sup>

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<sup>111</sup> Exhibit 6 [1] - [3], [6], [16]; exhibit 4 [6]; exhibit G2 [44], [58] - [61].

<sup>112</sup> Exhibit 6 [4] - [5], [7] - [13]; exhibit 4 [7] - [9].

<sup>113</sup> Exhibit 6 [10] - [11], [14]; exhibit 4 [9].

<sup>114</sup> Exhibit 6 [6], [10] - [11]; exhibit 4 [9].

<sup>115</sup> Exhibit 4 [6], [10] - [14], attachment HTH1, pages 29 - 30; exhibit 9 [24] - [25], attachments LIF13, LIF14; exhibit 14 [73] - [74], attachments JD42, JD43; exhibit G2 [44], [67].

<sup>116</sup> Exhibit G2 [60], attachment RS48; exhibit 14 [68], [71], [73] - [75], attachments JD42, JD43.

<sup>117</sup> Exhibit 14 [74].

109 Following Mr Donis' inspection, Eclipse took that material to the  
 Tamala Park Class III landfill.<sup>118</sup> Since 17 August 2012, Eclipse has not  
 accepted any more coarse heavies at its Wanneroo Road Site.<sup>119</sup>

110 Eclipse accepted the coarse heavies because it considered that they  
 could not or would not be putrescible because they had undergone two  
 composting processes and were inert.<sup>120</sup>

111 I accept the unchallenged evidence of Mr Bowman, an experienced  
 environmental scientist, that when account is taken of the information  
 revealed by the sampling done by Dr Hofstede,<sup>121</sup> the various materials  
 comprising or potentially comprising the coarse heavies either present no  
 environmental risk or are present in such small proportions that they are  
 unlikely to create any significant environmental risk when placed in fill  
 for land development.<sup>122</sup>

## 2.9 Quality control, inspection and testing of materials

112 At all times during the Relevant Period, Eclipse prepared, and  
 undertook its operations pursuant to, management plans for each of the  
 Sites.<sup>123</sup>

113 Eclipse's management plans are live documents; any changes to  
 Eclipse's management practices and any amendments added as addenda  
 are incorporated as part of a periodic updating process.<sup>124</sup>

114 When there was no regulation by the State Government (that is,  
 before the passage of the *Environmental Protection Amendment Act 1998*  
 (WA) and the associated *Environmental Protection (Landfill) Levy Act*  
 1998 (WA), Eclipse developed and implemented its own quality control  
 standards.<sup>125</sup>

115 Eclipse's management plans for the Sites contain detailed quality  
 control procedures.<sup>126</sup>

116 As will be explained in more detail later in these reasons, in the first  
 half of 2009, at both the Abercrombie Road Site and the Wanneroo Road

<sup>118</sup> Exhibit G2 [60], attachment RS48.

<sup>119</sup> Exhibit G2 [59]; exhibit 6 [18].

<sup>120</sup> Exhibit G2 [59].

<sup>121</sup> Exhibit 4, attachment HTH1.

<sup>122</sup> Exhibit F2 [14].

<sup>123</sup> Exhibit A [32] - [34], attachments 42 - 50; exhibit G1 [36], [83], [99].

<sup>124</sup> Exhibit G3 [55].

<sup>125</sup> Exhibit G1 [108].

<sup>126</sup> See exhibit A, attachments 46, pages 1729 - 1759, 49, pages 2045 - 2051, 50, pages 2107 - 2110, 2128 - 2129.



Site, Eclipse divided its site into two areas, one designated the category 63 area and the other the civil works area. During that period, Eclipse adopted a protocol (Protocol) which contained formal testing procedures for materials deposited and compacted in the voids at both sites. The testing was based on the EILs set out in a document published by DER entitled *Assessment Levels for Soil, Sediment and Water*.<sup>127</sup>

117       The Protocol was developed by Eclipse in close consultation with its consultants, Coffey Environments and Coffey Mining.<sup>128</sup>

118       For high volume jobs, the source would normally provide data to Eclipse before delivery in the form of analyses done by a National Association of Testing Authorities, Australia (NATA) accredited laboratory as an email attachment or a compact disc. This data would then be compared with relevant criteria for EILs and HILs set out in DER's *Assessment Levels* document.<sup>129</sup>

119       Eclipse would also take samples, and have the samples analysed by a NATA accredited laboratory, to validate that materials deposited at the Abercrombie Road Site met EILs. If any sample showed that EILs had been exceeded, a management response would be initiated.<sup>130</sup>

120       The steps taken for testing purposes pursuant to the Protocol were as outlined by Mr Sippe.<sup>131</sup> It is not necessary to detail them.

121       The materials in respect of which Eclipse (or its external consultants) generally reviewed analytical data were earth materials such as sand, soil, clay and peat.<sup>132</sup> Eclipse did not test other construction and demolition materials received at its Sites against EILs. Eclipse considered those materials to be inert, and adopted what it called a 'risk-based approach', meaning that it considered that the low level of risk did not warrant testing.<sup>133</sup>

122       The portion of jobs for which comprehensive data sets are provided has increased over time, and most of the jobs now received by Eclipse are

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<sup>127</sup> Exhibit G3 [6] - [14].

<sup>128</sup> Exhibit G3 [9].

<sup>129</sup> Exhibit G1 [110].

<sup>130</sup> Exhibit G1 [111].

<sup>131</sup> Exhibit G3 [20].

<sup>132</sup> Exhibit A [47].

<sup>133</sup> Exhibit G2 [100.3]; exhibit G3 [9].

accompanied by data sets provided by the supplier of the material prior to Eclipse's acceptance of it.<sup>134</sup>

123 During the Relevant Period, Eclipse inspected materials received at each of the Sites by one or more of the following methods:

- (a) Eclipse's personnel inspected materials on their arrival at the Sites.
- (b) Eclipse's personnel inspected materials when they were unloaded at the Sites.
- (c) Eclipse's personnel inspected materials at their source site.
- (d) Eclipse's personnel took samples of materials (sometimes after they were laid out in the active fill area or deposited in the soil remediation and blending area of the site), which were analysed by NATA accredited laboratories. If appropriate, the results were then reviewed by Eclipse's environmental consultants.
- (e) Eclipse's staff or external consultants reviewed analytical data relating to the physical and chemical properties of material provided by the producer or their environmental consultant.<sup>135</sup>

124 When Eclipse received large quantities of materials from a particular source for which analytical data was provided and Eclipse had reviewed the data, it did not necessarily inspect each individual load of the material upon its arrival at the relevant site. Once the material was unloaded, Eclipse's personnel inspected the materials to check for visible problems.<sup>136</sup>

125 At trial and during closing submissions, the parties joined issue on the appropriateness of Eclipse's use of EILs in assessing material that it proposed to place in the voids at the Sites. In broad summary, the Government Parties contend and point to evidence that the intended use of EILs is as criteria for identifying contamination, not as desirable soil quality criteria and, further, that EILs apply only to soil, sediment and water and not to all of the materials received by Eclipse, such as bricks and rubble.<sup>137</sup> Eclipse correctly points out that when it began using EILs DER had not published any policy, guidelines, criteria or standards that prescribed desirable soil quality criteria or provided for testing of

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<sup>134</sup> Exhibit G3 [16].

<sup>135</sup> Exhibit A [46]; ts 419 - 420.

<sup>136</sup> Exhibit A [48]; see also exhibit G1 [46].

<sup>137</sup> See Government Parties' closing submissions pt VII [50] - [54].

materials such as bricks and rubble. Eclipse says that, taking into account expert evidence and industry practice, its use of EILs was reasonable and appropriate.<sup>138</sup>

126 In my view, it is neither necessary nor appropriate to resolve the parties' competing contentions about the appropriateness of Eclipse's use of EILs. The parties' submissions did not identify, and I am unable to identify, any respect in which my decision on any of the issues in these actions is affected by any conclusion about the appropriateness of the use of EILs by Eclipse. As I will explain later in these reasons, whether material was environmentally suitable for Eclipse's purposes, or whether using it as fill may have involved any risks to the environment, does not influence whether that material was waste disposed of to landfill.

127 Coffey Geotechnics Pty Ltd (Coffey) was engaged by Eclipse in April 2002 for the purpose of providing advice on how the placement and compaction of materials at the Abercrombie Road Site should occur to ensure that the rehabilitated site could support light steel structures.<sup>139</sup>

128 In February 2004, Coffey prepared a Quality Plan for Filling Operations by Eclipse at the Site (Quality Plan). The Quality Plan was prepared to provide a level of confidence to the council and other approving bodies that the site has been filled in accordance with a suitable level of geotechnical quality control. Adherence by Eclipse to the Quality Plan will ultimately provide a basis for Coffey to provide written certification that the site is suitable for the construction of light steel structures.<sup>140</sup>

129 The Quality Plan included advice provided by Coffey in 2002 and was supplemented to include reporting schedules and requirements for record keeping. Auditing by Coffey on a six-monthly basis was also included in the plan, and has subsequently occurred.<sup>141</sup> The Quality Plan is a live document and was prepared by Coffey in accordance with Australian Standard AS 2990 - Quality System Specification for Engineering and Construction Projects. This standard provides guidance on the recommended contents of a quality plan. Various revisions to the Quality Plan have been carried out by Coffey and superseding documents have been issued.<sup>142</sup>

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<sup>138</sup> See Amended Findings of Fact contended for by Eclipse Resources Pty Ltd [70] - [74].

<sup>139</sup> Exhibit E1 [25].

<sup>140</sup> See Exhibit E1 [55] - [68].

<sup>141</sup> Exhibit G1 [114].

<sup>142</sup> Exhibit E1 [28], attachments SE04 - SE08B.

130 Eclipse Soils also carries out testing on its products to ensure  
compliance with relevant Australian Standards.<sup>143</sup>

## 2.10 Directing and sorting of materials

131 Some of the trucks arriving at one of the Sites during the Relevant  
Period were directed to deposit their loads at the 'operational bench' in the  
void at the site.<sup>144</sup> A 'bench' is a horizontal strip or layer of fill deposited,  
mixed (as appropriate) and spread to a specified thickness.<sup>145</sup> That part of  
the operational bench where materials are deposited is often referred to as  
the 'tip face' or 'active tip face'.<sup>146</sup>

132 Active tipping areas at the Sites were often demarcated through the  
placement of tyres.<sup>147</sup>

133 Some materials were directed to be deposited in a dedicated sorting  
area at the site, or were directed to be deposited near the 'operational  
bench' for sorting.<sup>148</sup>

134 Eclipse sorted loads containing a mixture of different types of  
material received at its Sites when it considered necessary to do so.<sup>149</sup>  
Eclipse generally sorted the materials with the use of excavators and  
loaders equipped with rake buckets and specialised grabs.<sup>150</sup> Some  
materials were also manually removed by hand from the stockpiles by  
Eclipse's employees and contractors.<sup>151</sup>

135 Eclipse's procedure was that any large items of materials not  
considered by Eclipse to be fit for its purpose that had been deposited in  
the void would be removed from the operating face before a further load  
of fill was deposited there.<sup>152</sup>

<sup>143</sup> Exhibit G1 [80].

<sup>144</sup> Exhibit A [54]; ts 350, 351 - 352.

<sup>145</sup> Exhibit A [54].

<sup>146</sup> See, for example, exhibit 7 [27], [65]; exhibit 14 [20]; exhibit A, attachment 50, page 2090.

<sup>147</sup> Exhibit E1, attachment SE11, page 186; exhibit 5 [55], attachment CLW24; exhibit 9 [37], attachment LIF25.

<sup>148</sup> Exhibit G1 [71]; exhibit 10 [35], attachments RKR4, RKR17-RKR18; exhibit 14 [4] - [10], [15] - [19],  
[25] - [29], [36] - [40], [43] - [47], [50] - [53], [57] - [61], [68] - [72], [86] - [91], [121] - [125], [129] - [132],  
attachments JD1 - JD3, JD7 - JD9, JD17 - JD18, JD26A - JD26B, JD27 - JD29, JD32A - JD32B, JD33 - JD35,  
JD40 - JD41, JD46H - JD46J, JD56, JD64 - JD66, JD72 - JD73; exhibit 9 [8] - [16], [21] - [22],  
attachments LIF7, LIF11; exhibit 5 [9] - [10], [60] - [61], [65], attachments CLW1, page 29, CLW2, page 37,  
CLW32 - CLW33; exhibit 7 [24], [26], [33], attachments SF11, SF15.

<sup>149</sup> Exhibit A [49].

<sup>150</sup> Exhibit A [49].

<sup>151</sup> Exhibit A [49].

<sup>152</sup> Exhibit G2 [69].

- 136 In sorting materials, Eclipse removed, where it considered necessary:
- (a) materials such as plastic and timber and transported them off-site to a licensed Class III landfill for disposal;
  - (b) metals for separate stockpiling and subsequent sale by Eclipse as scrap metal; and
  - (c) plant material for separate stockpiling in its mulching area for use in the production of mulch.<sup>153</sup>
- 137 Eclipse removed the material referred to in subpars (a) and (b) of the preceding paragraph because that material was not suitable for use by Eclipse (due to environmental, geotechnical or other reasons).<sup>154</sup>
- 138 The remainder of the materials not removed from sorted loads were moved to the operational bench in the void at the site to be deposited and compacted there.<sup>155</sup>
- 139 For various reasons, mostly commercial in nature, Eclipse reduced the extent of sorting of materials at the Abercrombie Road Site and the Wanneroo Road Site during the Relevant Period.<sup>156</sup>

## **2.11 Eclipse's mulching operation**

- 140 During the Relevant Period, Eclipse produced mulch from plant material received at the Sites.<sup>157</sup> Mulch is a substance derived from plant material that is applied to the surface of soil to prevent evaporation of moisture, control weeds and to improve visual amenity.<sup>158</sup>
- 141 Plant material received at the Sites was stockpiled and then ground with the use of a tunnel grinder. At the Abercrombie Road Site, the grinding was carried out by Eclipse Soils. At the Flynn Drive Site and the Wanneroo Road Site, the grinding was carried out by Eclipse.<sup>159</sup>
- 142 Prior to approximately 25 February 2014, the ground plant material produced at the Wanneroo Road Site was stockpiled and then transported to the Abercrombie Road Site for processing into composted mulch by Eclipse. After approximately 25 February 2014, the ground plant

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<sup>153</sup> Exhibit A [50].

<sup>154</sup> Exhibit A [51].

<sup>155</sup> Exhibit A [53] - [54]; exhibit 10 [57], attachment RKR36, page 70 (see (xii)).

<sup>156</sup> Exhibit G1 [20] - [21].

<sup>157</sup> Exhibit A [69].

<sup>158</sup> Exhibit A [70].

<sup>159</sup> Exhibit A [71].

material produced at the Wanneroo Road Site was composted at that site.<sup>160</sup>

143       The remainder of the mulch produced by Eclipse at the Wanneroo Road Site and the Abercrombie Road Site during the Relevant Period was sold and distributed by Eclipse Soils.<sup>161</sup> There is little direct evidence as to the financial arrangement between Eclipse Soils and Eclipse.

144       Ownership of the mulch produced by Eclipse was transferred to Eclipse Soils at the point of sale; that is, when the mulch was ordered by a customer.<sup>162</sup>

145       Eclipse Soils reimbursed Eclipse for the costs of machinery, labour and other input materials used to produce soil products and mulch.<sup>163</sup>

146       The process of producing mulch is outlined in the Statement of Agreed Facts.<sup>164</sup>

147       Eclipse used a by-product of its production of mulch at the Sites, known as 'mulch fines', in the production of blended soils at the Sites.<sup>165</sup>

148       The ingredients of Eclipse Soils' blended soils and mulches include, and during the Relevant Period included, remediated acid sulfate soils, remediated hydrocarbon contaminated soils, topsoils recovered from land development sites, clays, fly ash, mulch fines and sand.<sup>166</sup>

149       The various Eclipse Soils' blended soils and mulches are produced by blending specific ingredient streams together according to formulae which have been predetermined by laboratory testing.<sup>167</sup>

## **2.12 Eclipse's soil remediation operations**

### **2.12.1 Acid sulfate soils**

150       During the Relevant Period, Eclipse remediated acid sulfate soils at the Abercrombie Road Site and the Wanneroo Road Site by mixing them with crushed limestone.<sup>168</sup>

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<sup>160</sup> Exhibit A [72].

<sup>161</sup> Exhibit G1 [16], [34(c)], [35(a)].

<sup>162</sup> Exhibit G1 [16]; exhibit A [125].

<sup>163</sup> Exhibit C, pages 190 - 195.

<sup>164</sup> Exhibit A [73].

<sup>165</sup> Exhibit A [73]; exhibit F1 [17] - [19].

<sup>166</sup> Exhibit F1 [26].

<sup>167</sup> Exhibit F1 [27].

<sup>168</sup> Exhibit A [58] - [60].

151        Some of the limestone used to remediate acid sulfate soils was  
received by Eclipse at the Sites, while some of the limestone was quarried  
from the Abercrombie Road Site.<sup>169</sup>

152        At each site, acid sulfate soils were remediated and tested in  
accordance with Eclipse's Acid Sulfate Soils Management Plan contained  
within its (then) current management plan for the site. This Acid Sulfate  
Soils Management Plan was prepared by Eclipse and, in respect of the  
plan for the Abercrombie Road Site, reviewed by its independent  
environmental consultants.<sup>170</sup>

153        There are a number of variables involved as to the length of time  
required for the ASS remediation process, including temperature,  
moisture, the nature of the acidic material and exposure to oxygen, but  
usually remediation is completed within a few weeks.<sup>171</sup>

154        Eclipse remediated acid sulfate soils by placing them on a pad of  
crushed and compacted limestone and mixing them with calculated  
amounts of crushed limestone of known alkalinity and neutralising  
capacity.<sup>172</sup>

155        In order to confirm whether the soils were sufficiently remediated,  
Eclipse took samples of them and used an independent NATA accredited  
laboratory to test the samples.<sup>173</sup>

156        The remediated acid sulfate soils produced during the Relevant  
Period were:

(a)       at the Abercrombie Road Site:

- (i)       predominantly used, and stockpiled for future use, by  
Eclipse to produce water retentive blended soils and  
structural fill at the Abercrombie Road Site; and
- (ii)      deposited and compacted in the void;

(b)       used, and stockpiled for future use, by Eclipse as the final cover  
material for filled areas of the void at the Wanneroo Road Site and  
the Flynn Drive Site;

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<sup>169</sup> Exhibit G1 [70], [81].

<sup>170</sup> Exhibit A [59].

<sup>171</sup> Exhibit G1 [67].

<sup>172</sup> Exhibit A [60].

<sup>173</sup> Exhibit A [61].

- (c) used, and stockpiled for future use, by Eclipse to produce water retentive blended soils at the Wanneroo Road Site.<sup>174</sup>

157 Any remediated acid sulfate soils that were not suitable, or were not at that stage wanted by Eclipse for the production of blended soils or as final cover materials, were deposited and compacted in the voids at the Sites.<sup>175</sup>

### 2.12.2 Bio-remediation

158 During the Relevant Period, Eclipse bio-remediated soils contaminated with hydrocarbons or pesticides at the Abercrombie Road Site by mixing them with composting plant material, nitrogen, fertiliser and water.<sup>176</sup>

159 During the Relevant Period, soils contaminated with hydrocarbons or pesticides judged by Eclipse on the basis of analytical data to be suitable for bio-remediation were placed onto two cells lined with high density polyethylene to form an impervious layer. The cells were constructed in accordance with a works approval granted to Eclipse by DER on 1 May 2008 (Works Approval W4424/2008/1). The cells will be decommissioned prior to the proposed final subdivision and development of the site.<sup>177</sup>

160 Eclipse bio-remediated and tested soils contaminated with hydrocarbons or pesticides in accordance with its Management Plan for the Bioremediation of Hydrocarbon and Pesticide Containing Material, included in its (then) current management plan for the site.<sup>178</sup>

161 Eclipse mixed the contaminated soil with micro-organisms and sources of carbon in the form of composting organic plant material, nitrogen and other nutrients in the form of fertiliser, and water.<sup>179</sup>

162 In order to confirm whether the soils were sufficiently remediated, Eclipse took samples of them and used an independent NATA accredited laboratory to test the samples.<sup>180</sup>

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<sup>174</sup> Exhibit A [62].

<sup>175</sup> Exhibit A [62(a)(ii)]. See also the 'ASS reuse options' section of the various versions of the management plan for the Abercrombie Road Site and the Wanneroo Road Site. Exhibit A, attachments 42, page 1167, 43, page 1296, 44, page 1438D, 45, page 1580, 46, page 1708, 47, page 1878, 48, page 1961T, 49, page 2048.

<sup>176</sup> Exhibit A [63] - [67].

<sup>177</sup> Exhibit A [64].

<sup>178</sup> Exhibit A [65].

<sup>179</sup> Exhibit A [66].

<sup>180</sup> Exhibit A [67].



163 The bio-remediated soils produced at the Abercrombie Road Site during the Relevant Period were:

- (a) used, and stockpiled for future use, by Eclipse as final cover material for filled areas of the void at the site;
- (b) deposited and compacted in the void at the site; and
- (c) used by Eclipse to produce water retentive blended soils at the site.<sup>181</sup>

164 Some of the soils received by Eclipse at the Sites which Eclipse considered suitable for bio-remediation are likely to have contained, and I infer that they did contain, materials that would interfere with the bio-remediation process, such as construction and demolition materials. I infer that in such cases Eclipse acted in accordance with its management plan by removing those materials and depositing them and compacting them in the void at the Abercrombie Road Site.<sup>182</sup>

165 Some soils contaminated with hydrocarbons or pesticides that could not be bio-remediated to the target contaminant concentrations for use in the production of blended soils were deposited and compacted in the void at the Abercrombie Road Site, in accordance with Eclipse's management plan.<sup>183</sup>

## 2.13 Eclipse's soil blending operations

166 During the Relevant Period, Eclipse produced a number of different types of blended soils at the Sites.<sup>184</sup>

167 Eclipse produced blended soils by mixing together different types of soils from stockpiles, together with other materials, such as mulch fines, clay, fly ash and sand.<sup>185</sup>

168 Eclipse used peat, which it had previously deposited at the Wanneroo Road Site between June 2002 and March 2004, and which it dug out of the site during the Relevant Period, to produce blended soils at the Wanneroo Road Site and the Abercrombie Road Site.<sup>186</sup>

<sup>181</sup> Exhibit A [68].

<sup>182</sup> See, for example, exhibit A, attachment 42, page 1177.

<sup>183</sup> Exhibit A, attachment 42, page 1182 under heading 'End Use Targets and Validation Procedures', and corresponding sections of subsequent versions of the management plan.

<sup>184</sup> Exhibit G1 [15], [34(c)], [35(a)], [85(a)], [98]; exhibit F1 [13(g)], [19], [27].

<sup>185</sup> Exhibit F1 [26]; exhibit D1 [29.2], [29.4].

<sup>186</sup> Exhibit G1 [30], [84] - [85], [98]; exhibit D1 [25] - [26].

- 169        Materials used in the production of blended soils were screened with the use of a screening machine to ensure they had a desired particle size range. Any 'oversize' materials produced as a result of the screening process not suitable to be used in the production of blended soils were deposited and compacted in the voids at the Sites as fill.<sup>187</sup>
- 170        At the Flynn Drive Site, Eclipse produced blended peat-based soils for use as final cover material over the area of the filled void at the site (but did not produce any blended soils for sale during the Relevant Period).<sup>188</sup>
- 171        At the Wanneroo Road Site, some of the blended soils produced by Eclipse were used, or stockpiled for use, as final cover material for filled areas of the void at the Site.<sup>189</sup>
- 172        The blended soils produced by Eclipse at the Abercrombie Road Site and the remainder of the blended soils produced at the Wanneroo Road Site (that is, those not used or stockpiled for use on-site) were marketed, sold and distributed by Eclipse Soils during the Relevant Period as 'Aquamor Soil Blend', 'Aquamor Soil Improver', 'Organic Soil Conditioner', 'Lightweight Garden soil', 'Planter Box Mix' and 'Rooftop Garden Soil'.<sup>190</sup> I will deal with the product known as 'Water Retentive Landscape Shaping Soil' in making my findings about re-mining.
- 173        Ownership of the blended soils produced by Eclipse was transferred to Eclipse Soils at the point of sale; that is, when the blended soils were ordered by a customer.<sup>191</sup>
- 174        Eclipse Soils retained the income from the sale of the blended soils. It reimbursed Eclipse for the costs of machinery, labour and input materials to produce the blended soils.<sup>192</sup>

## 2.14 Direct sale of some virgin materials received

- 175        Truckloads of virgin sand and limestone received by Eclipse at the Sites from third parties who did not want them were sometimes stockpiled and then screened (to ensure a more homogenous particle size

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<sup>187</sup> Exhibit G1 [81(d)]; exhibit F1 [32], [35].

<sup>188</sup> Exhibit D1 [19.4]; exhibit D4; ts 230 - 231, 336 - 340.

<sup>189</sup> Exhibit G1 [85(a)], [98].

<sup>190</sup> Exhibit G1 [16], [34(c)], [35(a)], [80]; exhibit D1 [25] - [26]; exhibit F1 [19]; exhibit A [126] - [127], attachments 93 - 94.

<sup>191</sup> Exhibit G1 [16], [80].

<sup>192</sup> Exhibit C, pages 192 - 195.

distribution) before being sold as 'structural fill' to different third parties for use off-site.<sup>193</sup>

## 2.15 Eclipse's filling operations

176 It is not in doubt that at each of the Sites throughout the Relevant Period:

- (a) Eclipse's operations involved the progressive filling of the void at the site with some of the materials accepted by Eclipse at that site; and
- (b) Eclipse did not line the voids at the Sites with any form of lining material before it commenced its filling operations.

177 At each of the Sites, Eclipse deposited and compacted more than 500 tonnes of material during each year of the site's operations.<sup>194</sup>

178 The materials deposited and compacted in the voids at the Sites as part of Eclipse's filling operations were materials for which, at the time they were deposited, Eclipse had no other use, for instance in the production of blended soils or mulch.<sup>195</sup> An element of Eclipse's operations is that, if material received has a higher use than as fill, it is removed and put to that higher use.<sup>196</sup> At the time Eclipse deposited and compacted materials in the void at the Abercrombie Road Site, depositing and compacting them in the void to fill the site to enable it to ultimately be used for a light industrial development was the most productive or efficient use of the materials from Eclipse's point of view.<sup>197</sup>

179 Removing materials that have been deposited and compacted in a void so that they can be re-used is a lot more expensive than simply removing them from surface stockpiles.<sup>198</sup> Wherever possible at the Abercrombie Road Site, material with a more immediate use is deposited outside, or on top of, the void as it can be located 'strategically' so that tramming costs (costs of internally transporting material from one part of the site to another) and excavation costs can be minimised.<sup>199</sup>

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<sup>193</sup> Exhibit G1 [70], [92], [95]; exhibit D1 [19.3], [29.3]; exhibit A, attachment 46, page 1690.

<sup>194</sup> Exhibit A [124].

<sup>195</sup> See, for example, exhibit A, attachment 42, page 1079; exhibit F1 [15], [34].

<sup>196</sup> Exhibit D1 [29] - [30]; exhibit G1 [92]; exhibit A, attachments 42, page 1079, 43, page 1213.

<sup>197</sup> ts 370 - 371, 379 - 381, 403.

<sup>198</sup> ts 378 - 379; exhibit D3 [9].

<sup>199</sup> Exhibit D3 [9].

180 Removal of material that has been compacted in the void may occur  
when and if it is economical to do so.<sup>200</sup> I will say more about this topic  
181 in the context of making findings about 're-mining' later in these reasons.

### 2.15.1 *The process of depositing and compaction*

181 Materials accepted at each of the Sites by Eclipse for depositing and  
compacting in the void were directed by Eclipse personnel, either  
immediately or after sorting, to the operational bench in the void.<sup>201</sup>

182 At the Abercrombie Road Site, wrapped asbestos, until June 2012,  
and soils containing or potentially containing asbestos chips were directed  
by Eclipse personnel to Eclipse's dedicated area in the void (sometimes  
referred to as a 'cell') for the disposal of such material after which they  
were promptly covered with 'other Class 1 inert materials'.<sup>202</sup>

183 After materials were deposited at the operational bench, Eclipse  
mixed or turned and spread them and covered them with sand or  
limestone as required, before compacting them in-situ by driving vehicles  
over the top of them.<sup>203</sup>

184 The materials were spread and mixed or turned with loaders and  
bulldozers.<sup>204</sup>

185 Finished benches were progressively covered with sand and  
limestone in accordance with the site management plans to ensure the  
Sites were easily traversable and had a neat and tidy appearance.<sup>205</sup>

<sup>200</sup> ts 379.

<sup>201</sup> Exhibit A [53] - [54]; exhibit G1 [52] - [53].

<sup>202</sup> Exhibit G1 [72] - [74]; exhibit A [32], attachments 42, pages 1114, 1146 - 1151, 43, pages 1245, 1275 - 1281, 44, pages 1389, 1421 - 1426, 45, pages 1527, 1558 - 1564 and 46, pages 1696 - 1703; exhibit 14 [108], [111], [119] - [120], attachments JD56, JD63; exhibit 13 [35] - [37], [40] - [41], [46], attachments CF17, CAF21; exhibit 5 [83], [95], [99], [107], attachments CLW47, CLW52; exhibit 7 [65], [67], [71], [74], [76], [81] - [82], [86], [89], [92], attachments SF24, SF26, SF28, SF30, SF33 - SF37; ts 373; exhibit G3 [3].

<sup>203</sup> Exhibit A [54] - [55], attachments 42, pages 1091 - 1092, 1208, 43, pages 1223, 1336, 44, pages 1367, 1474, 45, pages 1506, 1625, 46, pages 1659, 1688, 1744, 47, page 1815, 48, page 1906, 49, page 1974 and 50, page 2060; exhibit G1 [52] - [53], [55], [70], [95]; exhibit G2 [22] - [23], [32], [34], [51]; exhibit 14 [126], attachment JD67; exhibit 7 [29], [32], [47], [65], [78], [82], [89], attachments SF14, SF24, SF32, SF34, SF36; exhibit E1 [30] - [31].

<sup>204</sup> Exhibit A, attachments 42, pages 1092, 1208, 43, pages 1223, 1336, 44, pages 1367, 1474, 45, pages 1506, 1625, 46, pages 1659, 1688, 1744, 47, page 1815, 48, page 1906, 49, page 1974 and 50, pages 2060, 2072; exhibit G1 [62], attachment RS15; exhibit 14 [15] - [18], [20], [24], [30], [33], attachments JD14 - JD16, JD19, JD20; exhibit 10 [12], [19], [37] - [38], attachments RKR19 - RKR20; exhibit 7 [32], [47], [65], [78], [82], [89], attachments SF14, SF24, SF32, SF34, SF36.

<sup>205</sup> Exhibit A, attachments 42, pages 1092, 1132, 43, page 1262, 44, page 1407, 45, page 1545, 46, page 1777, 47, pages 1815, 1850, 48, pages 1906, 1947, 49, pages 1974, 2014 and 50, page 2060; exhibit 9 [20], attachment LIF10; exhibit G2 [32].

- 186           At the Flynn Drive Site and the Wanneroo Road Site, materials were compacted with loaders and bulldozers.<sup>206</sup>
- 187           At the Abercrombie Road Site, they were compacted with vehicles using rollers, in particular, a Caterpillar 825C Compactor and a Caterpillar CS76XT Vibratory Soil Compactor.<sup>207</sup> Materials were compacted in this way at the Abercrombie Road Site to maintain the integrity of the site and to ensure that the property would ultimately be suitable for development as a light industrial subdivision.<sup>208</sup>
- 188           The compaction of materials, through the use of vehicles, is standard land-filling practice.<sup>209</sup>
- 189           The materials deposited and compacted in the active filling areas of the void at each site were placed so as to progressively create benches, one next to another, and one on top of another, in such a manner as to build up the height of the land and fill the void.<sup>210</sup> Materials were deposited by trucks onto the operational bench in the void or stockpiled close to the operational bench. The materials were then laid out as a bench and progressively built up to the thickness allowed under the Quality Plan (depending upon depth in the vertical profile of the void). The objective is for the materials to form a solid, stable base and land surface as required by the Quality Plan.<sup>211</sup>
- 190           Details of the compaction process are set out in the Quality Plan.<sup>212</sup>
- 191           At the Abercrombie Road Site, the compaction of materials in the void was and is subject to regular, ongoing, independent geo-technical audits in accordance with the Quality Plan to ensure that the rehabilitated site is fit for its proposed ultimate use as a light industrial subdivision.<sup>213</sup> Records are and were kept by Eclipse that record compliance with the

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<sup>206</sup> Exhibit A, attachments 47, page 1815, 48, page 1906, 49, page 1974 and 50, page 2060.

<sup>207</sup> Exhibit A [55(a)], attachments 42, pages 1092, 1208, 43, pages 1223, 1336, 44, pages 1367, 1474, 45, pages 1506, 1625 - 1626, 46, pages 1659, 1688, 1744; exhibit G1 [55], [58], [62], attachment RS15, pages 123, 126; exhibit E1 [31].

<sup>208</sup> ts 370 - 371, 422.

<sup>209</sup> Exhibit 11 [37].

<sup>210</sup> Exhibit A [54], attachments 42, pages 1091, 1208, 43, pages 1219, 1336, 44, pages 1367, 1474, 45, pages 1506, 1625 - 1626), 46, pages 1659, 1688, 1744, 47, page 1815, 48, page 1906, 49, page 1974 and 50, page 2060; exhibit G1 [52] - [54], [59]; exhibit G2 [32], [51]; exhibit E1 [31] - [32]; exhibit 7 [27], [89], attachments SF12, SF36.

<sup>211</sup> Exhibit G1 [52].

<sup>212</sup> See, for example, exhibit A, attachment 46, pages 1744 - 1745.

<sup>213</sup> Exhibit A [57].

specifications in the Quality Plan as to the minimum number of passes by the machines over each bench of fill.<sup>214</sup>

192       The Quality Plan sets out Eclipse's responsibilities in terms of weekly reporting.<sup>215</sup>

193       Appendix A, s 3.2 of the Quality Plan specifies that the final 2 m of fill must comprise structural sand fill (as set out in s 3.2.1 of appendix A). The use of clean sand fill is typically required for filling operations where recycled material is used.<sup>216</sup>

194       Under the Quality Plan, testing of the final 2 m of clean structural sand fill must be carried out to ensure that adequate compaction has been achieved. Coffey carried out compaction testing on 18 March 2008 of one area of the Abercrombie Road Site that had been filled to within one metre of its final level.<sup>217</sup> The results of the testing show that an adequate level of compaction was achieved by Eclipse in this area.<sup>218</sup>

195       Under the Quality Plan, compaction testing should re-occur after the final one metre of structural sand fill has been placed. Compaction testing of final, or near final, filled areas is carried out using a Perth Sand Penetrometer.<sup>219</sup>

196       Eclipse personnel, under the supervision of the Sites Manager, performed penetrometer tests over the surface of each bench in the top 1 or 2 m of the void as each section was completed in accordance with a grid devised by the independent geo-technical consultant engineers engaged by Eclipse and Coffey. Eclipse personnel also conducted penetrometer tests at random intervals during the building of the benches. Coffey audited the benches in accordance with the Quality Plan. The test criteria are set out in relevant Australian Standards.<sup>220</sup>

197       As part of the validation process, settlement plates are installed to enable Coffey to monitor settlement rates over time. These were surveyed quarterly by McMullen Nolan and the results provided to Eclipse and to Coffey. At the conclusion of filling, the settlement plates for the final area of fill will be monitored for a minimum of six months to ensure that

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<sup>214</sup> Exhibit G1 [58].

<sup>215</sup> Exhibit E1 [33].

<sup>216</sup> Exhibit E1 [34].

<sup>217</sup> Exhibit E1 [37].

<sup>218</sup> Exhibit E1 [38].

<sup>219</sup> Exhibit E1 [37].

<sup>220</sup> Exhibit G1 [59].

any settlement is within tolerances for the proposed light industrial land use.<sup>221</sup>

198 Filling has been completed to 1 - 2 m below finished levels, and settlement plates have been installed, over the whole of that part of the Abercrombie Road Site comprising lot 115 (the western portion of the site).<sup>222</sup>

199 Geotechnical testing has not been carried out at the Flynn Drive Site or the Wanneroo Road Site.<sup>223</sup>

200 As part of monitoring and validating the compaction of materials in the void, Eclipse prepared a weekly compaction report illustrated with photographs taken from the same location each time: 'Site Inspection Sheet (QA1)'. These reports were provided to Coffey.<sup>224</sup> Each report records the nature of the material filled, the volume received (by truck capacity) and the location of the depositing and compacting.<sup>225</sup>

201 Since August 2004, Coffey has carried out independent auditing of the Abercrombie Road Site on a bi-annual basis as required by the Quality Plan. The audits involve a review of the weekly reports for the period (including photographs), a review of settlement monitoring data, and a visit to the site. Twenty-one Site Audit Reports were completed by Coffey during the Relevant Period in relation to the Abercrombie Road Site.<sup>226</sup> Each audit report contains observations from the site visit, any clarifications on site activities observed, and a summary of the weekly records provided by Eclipse.<sup>227</sup>

202 Once areas of the voids at the Sites were or are filled to the desired height, they were, or will be, topped with a layer of final cover material.

203 At the Flynn Drive Site, this material consisted of clean sand, remediated (previously acidic) peat and some top soil of a thickness somewhere between 0.5 and 2 m.<sup>228</sup> (It is not necessary to resolve the minor differences between the parties as to the range of thickness.)

<sup>221</sup> Exhibit G1 [60]; exhibit G3 [4].

<sup>222</sup> Exhibit G1 [60], attachment RS13; exhibit E1 [17]; exhibit G3 [4].

<sup>223</sup> ts 430.

<sup>224</sup> Exhibit G1 [64].

<sup>225</sup> Exhibit G1 [56], [64] - [65], attachment RS17; exhibit E1 [33]; exhibit B [2] - [3], attachments S1 - S30.

<sup>226</sup> Exhibit E1 [39] - [40], attachments SE10 - SE24.

<sup>227</sup> Exhibit E1 [40].

<sup>228</sup> Exhibit A, attachment 42, page 1092; exhibit D1 [19.4]; ts 336.

204 At the Wanneroo Road Site, the final cover material will comprise water retentive blended soils, remediated (previously acidic) peat or virgin materials such as sand and limestone approximately 1 - 2 m thick.<sup>229</sup>

205 At the Abercrombie Road Site, areas in which filling has been completed to near final levels (for example, the western side of the site) have been covered with a layer of material such as limestone or sand to make them usable for Eclipse's other activities. As filling of the site progresses, a final layer of 2 m of structural fill comprising sand or limestone will be spread across the site, and no more than 10 cm of topsoil may be spread across the site over the surface of the structural fill.<sup>230</sup> Clean sand or limestone is required to be used as final cover material at the Abercrombie Road Site under the Quality Plan 'in order to reduce the likelihood of excavation of the building rubble fill and to allow services etc to be installed in clean fill'.<sup>231</sup>

206 Eclipse currently uses areas within the voids at the Abercrombie Road Site and the Wanneroo Road Site in which filling has been completed to near final levels to carry out its other activities, such as mulching and soil blending.<sup>232</sup>

### 2.15.2 *The nature of materials compacted in the voids*

207 It is not in dispute that the materials deposited and compacted in the voids at the Sites during the Relevant Period included soil, sand, rocks, limestone, bricks, concrete, building rubble, and remediated soil or sand. These are among the acceptable types of material said to be suitable for placement and compaction at the Abercrombie Road Site under Eclipse's Quality Plan.<sup>233</sup>

208 The Government Parties invite findings that, at various times during the Relevant Period, various other types of material were deposited and compacted in the voids.<sup>234</sup> Eclipse resists any such findings.<sup>235</sup> Although I do not think the resolution of any of the issues in the actions is affected by whether such findings are made, I proceed to make my findings in these respects.

<sup>229</sup> Exhibit A, attachment 49, pages 1966, 1972 - 1974, 1978 - 1979, 1988; exhibit D1 [29.5].

<sup>230</sup> See, for example, exhibit A, attachment 46, page 1745.

<sup>231</sup> Exhibit E1 [34].

<sup>232</sup> Exhibit G1 [39]; exhibit 7 [59], [83], attachments SF5, SF9, SF11, SF13, SF16, SF18, SF21, SF34.

<sup>233</sup> See, for example, exhibit E1 [29].

<sup>234</sup> Government Parties' closing submissions pt VII [145].

<sup>235</sup> Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [145].



209 I accept that, as the Government Parties submit,<sup>236</sup> the evidence in Eclipse's witness statements is not specific in identifying what types of material were and were not deposited and compacted in the voids. While resisting various findings invited by the Government Parties, Eclipse's closing submissions did not specifically identify the positive findings which Eclipse invited as to the range of materials that were compacted in the voids. I take Eclipse's case to be, in essence, that it should be inferred that only materials that were, under the relevant Quality Plan, appropriate to be deposited and compacted in the voids were in fact compacted in the voids. Even on that view, the inclusion of some of the material invited by the Government Parties would seem to be permissible. Building rubble is one of the acceptable types of inert material. By its nature, that material may include small quantities of wood, plastic or brick strapping. Mr Ellis' evidence, which I accept, is that the presence of pieces of metal including brick strapping, wood and plastic present within building rubble as minor inclusions does not affect the suitability of the site for its proposed end use.<sup>237</sup>

210 Throughout the Relevant Period, DER officers who had been appointed as Inspectors under the *Environmental Protection Act 1986* (WA), periodically visited Eclipse's Abercrombie Road Site and the Wanneroo Road Site to carry out inspections.

211 During various inspections of the Abercrombie Road Site carried out between 25 June 2009 and 23 September 2014, DER Inspectors observed and took photographs or videos of the following:

- (a) Materials including soil, sand, limestone, bricks, concrete, timber, plastic piping, plastic strapping (for example, green plastic brick strapping) and other plastic (for example, plastic buckets), HardiFence panels, metal, a small amount of plant material, cardboard, a mattress and other building rubble deposited in the designated civil works area.<sup>238</sup>
- (b) Materials including soil, concrete, bricks, plastic sheeting, plastic brick strapping and other plastic spread out as fill, or being spread out as fill, in the designated civil works area.<sup>239</sup>

<sup>236</sup> Government Parties' submissions pt VII [123] - [131].

<sup>237</sup> Exhibit E2 [6], [7], [10] - [11].

<sup>238</sup> Exhibit 10 [7] - [11], [12] - [19], [33], attachment RKR15; exhibit 14 [86] - [88], [94] - [98], [102] - [107], [108] - [112], [114] - [118], [129] - [131], [135], attachments JD46L - JD46N, JD47, JD53 - JD55, JD55A - JD55B, JD56, JD58 - JD59, JD60, JD62, JD75.

<sup>239</sup> Exhibit 14 [86] - [88], [93], attachments JD46K, JD47; exhibit 10 [12] - [19], [37] - [38], attachments RKR19 - RKR20.

- (c) Bricks, concrete, plastic and corrugated metal sheeting sticking out from the cover material on a ridge of fill in the designated civil works area.<sup>240</sup>
- (d) A tip face in the designated civil works area which had bricks, concrete and plastic sticking out from the cover material.<sup>241</sup>
- (e) Tip faces in the designated civil works area which contained soil, sand, bricks, concrete, plastic, metal, paper and timber.<sup>242</sup>
- (f) Soil, sand, limestone, rocks, bricks, concrete, building rubble, metal, material wrapped in green plastic, other plastic, and a small amount of plant material deposited in the designated category 63 area, some of which had been pushed over the tip face and some of which was sitting on top of the tip face.<sup>243</sup>
- (g) Soil, yellow sand, concrete, bricks, a plastic bucket, white plastic pipes and green plastic brick strapping being spread in the designated category 63 area.<sup>244</sup>
- (h) Green plastic, bricks, rocks, and a small amount of plant material sticking out from a covered bench in the designated category 63 area.<sup>245</sup>
- (i) Sand and soil mixed with bricks, rocks and plastic from the Bradken metal foundry deposited inside the designated category 63 area.<sup>246</sup>
- (j) Soil and building rubble deposited inside Eclipse's designated asbestos cell in the former quarry area in the north-eastern part of the Abercrombie Road Site for soil containing or potentially containing asbestos.<sup>247</sup>

<sup>240</sup> Exhibit 10 [12] - [19], [29] - [30], [33] - [34], [49] - [55], attachments RKR4, RKR11 - RKR12, RKR15 - RKR16, RKR32 - RKR34; exhibit 14 [92], attachment JD46J.

<sup>241</sup> Exhibit 10 [12] - [19], [40], attachments RKR4, RKR22.

<sup>242</sup> Exhibit 14 [108] - [113], [117] - [118], attachments JD56 - JD57, JD60 - JD61.

<sup>243</sup> Exhibit 14 [95] - [98], [101], [121] - [123], [127] - [128], attachments JD47, JD50 - JD52, JD70 - JD71; exhibit 10 [12] - [19], [27] - [29], [31] - [32], attachments RKR10 - RKR11, RKR13 - RKR1.

<sup>244</sup> Exhibit 14 [121] - [123], [126], [129] - [131], [134], attachments JD67 - JD69, JD74.

<sup>245</sup> Exhibit 10 [12] - [19], [32], attachments RKR13 - RKR14.

<sup>246</sup> Exhibit 10 [49] - [55], attachments RKR32, RKR34.

<sup>247</sup> Exhibit 13 [35] - [37], [39] - [41], attachments CF16 - CF17; exhibit 5 [10], attachment CLW2, pages 39 - 40, [78] - [83], [92] - [97], [99], [100] - [101], [103], [104], [106] - [107], attachments CLW35 - 38, CLW43 - 45, CLW47, CLW49, CLW52; exhibit 7 [64] - [65], [67], [69] - [71], [75] - [76], [78], [80] - [82], [85] - [86], [89], [92], attachments SF24, SF26 - SF28, SF30, SF32 - SF37.

- (k) Materials including concrete, bricks, sand, green plastic brick strapping, black plastic sheeting, metal wire, other building rubble and large quantities of soil deposited in the filling area in the former quarry area along the eastern side of the Abercrombie Road Site.<sup>248</sup>
- (l) Materials consisting primarily of bricks, concrete and a few small pieces of timber deposited on top of an operating bench close to the northern boundary of the site.<sup>249</sup>

212 During various inspections of the Wanneroo Road Site carried out between 27 October 2009 and 23 September 2014, DER Inspectors observed or took photographs or videos of the following:

- (a) Bricks, concrete, sand, soil (sometimes mixed with small amounts of plant material), plastic, metal (including corrugated metal sheeting and metal pipes), timber, roof tiles, plasterboard, corrugated fibro fencing and small amounts of paper deposited in the designated civil works area.<sup>250</sup>
- (b) Concrete, bricks, sand, soil (some containing plant roots), metal (including corrugated metal sheeting), plastic piping, strapping and other small pieces of plastic, cardboard, Hardifence panels, wood and other general building rubble in or on the operating bench or in the tip face in the designated civil works area.<sup>251</sup>
- (c) Plastic, bricks, concrete, metal, wood, cardboard, corrugated metal sheeting, sand, soil and a couple of bicycles deposited or spread in the designated category 63 area.<sup>252</sup>
- (d) Bricks, concrete, rocks, sand, soil, timber, cardboard, metal, plastic and other rubble in or on the operating bench or in the tip face in the designated category 63 area.<sup>253</sup>

<sup>248</sup> Exhibit 13 [39], [42], [45], [47] - [54], attachments CF18, CAF20, CAF22 - CAF23; exhibit 5 [10], [84] - [85], [87] - [89], [91], attachments CLW2, pages 39 - 40, CLW40, CLW42; exhibit 7 [64] - [65], [67], [69] - [71], [75] - [76], [80] - [81], attachments SF26 - SF28, SF30, SF33.

<sup>249</sup> Exhibit 13 [43] - [44], attachment CAF19.

<sup>250</sup> Exhibit 14 [4] - [7], [13] - [18], [20], [22] - [23], [36] - [38], [41] - [42], [50] - [52], [55] - [60], [63] - [64], [68] - [71], [76], attachments JD1, JD5 - JD6, JD7, JD13, JD26C - JD26F, JD32C - JD32E, JD33, JD37, JD40, JD44 - JD46.

<sup>251</sup> Exhibit 14 [15] - [18], [20], [22], [24] - [28], [32] - [35], [43] - [46], [48] - [49], [57] - [60], [63], [65] - [67], [77] - [81], attachments JD7, JD14 - JD17, JD20 - JD26, JD27, JD30 - JD33, JD38 - JD39, JD46A - JD46G; exhibit 9 [8] - [16], [27], [29] - [32], [42], attachments LIF7, LIF16 - LIF22, LIF35.

<sup>252</sup> Exhibit 14 [4] - [7], [11] - [12], [15] - [18], [20] - [21], [25] - [28], [30], [57] - [60], [62], attachments JD1, JD4, JD7, JD10 - JD12, JD17, JD19, JD33, JD36.

<sup>253</sup> Exhibit 9 [34] - [39], attachments LIF25 - LIF30.

- (e) Plastic, plasterboard, bricks, wood and cardboard sticking out from a covered or partially covered tip face in the designated category 63 area.<sup>254</sup>
- (f) Coarse heavies from the BioVision Facility deposited in, or on top of the operating bench in, the designated category 63 area.<sup>255</sup>
- (g) Sand, soil, rocks, limestone, bricks, concrete (sometimes containing steel wires), roof tiles, bitumen, pipes, other building rubble, a small amount of plant material, paper, timber, plastic and a few drink containers deposited on top of (including on the edge of), or in, a tip face in the north-west corner of the site and a tip face to the east of the tip face in the north-west corner.<sup>256</sup>
- (h) Bricks, concrete, corrugated metal sheeting, cardboard and plastic wrapping sticking out of a covered tip face and covered operating bench in the north-west corner of the site.<sup>257</sup>
- (i) Sand, plant material, concrete, limestone, bricks and other building rubble pushed into a hole on the western side of the operating bench in the north-west corner of the site.<sup>258</sup>

213 Eclipse submits,<sup>259</sup> and I accept, that the evidence of the DER Inspectors does not establish whether or not the materials other than soil, sand, limestone, bricks and concrete were subsequently sorted for removal by Eclipse staff after the DER Inspectors had left the site. Mr Sippe's responsive witness statement says, in effect, in respect of a number of photographs taken by DER Inspectors of the Abercrombie Road Site and the Wanneroo Road Site that, according to proper procedure, the materials shown in those photographs should and, it should be inferred would, have been further sorted, with the result that materials such as timber, plastic,

<sup>254</sup> Exhibit 9 [8] - [16], [23] - [24], [41], attachments LIF7, LIF12, LIF30, LIF33 - 34.

<sup>255</sup> Exhibit 9 [8] - [16], [24] - [25], attachments LIF7, LIF12 - LIF14; exhibit 14 [68] - [71], [74], attachments JD40, JD42 - JD43; exhibit G2 [44], [58] - [61], [67]; exhibit D2 [6], attachment TD4, page 8.

<sup>256</sup> Exhibit 13 [8] - [14], [17] - [27], [29] - [32], [34], attachments CAF3 - CAF9, CAF11 - CAF13, CAF15; exhibit 5 [9], [11], [26] - [30], [32] - [33], [36] - [43], [46] - [48], [52] - [56], [58] - [62], [64], [66] - [69], attachments CLW1, pages 27 - 28, 30, CLW3, page 48, CLW8, CLW9 - CLW10, CLW13 - CLW17, CLW20, CLW23 - CLW27 - CLW28, CLW30 - CLW31, CLW34; exhibit 7 [14] - [15], [17] - [18], [24], [27], [29] - [30], [32], [35] - [37], [39] - [44], [48] - [49], [51] - [54], attachments SF5, SF7 - SF8, SF12 - SF14, SF16 - SF222.

<sup>257</sup> Exhibit 13 [25] - [26], [28] - [29], [33], attachments CAF10, CAF14; exhibit 7 [20], [22], attachment SF10.

<sup>258</sup> Exhibit 5 [32] - [34], attachment CLW11; exhibit 7 [14], [16], [20] - [21], [24], [26], [39] - [40], attachments SF6, SF9, SF11, SF18.

<sup>259</sup> Eclipse's Detailed Response to the Facts which the Government Parties Contend Should be Found [136], [139].

metal and cardboard were removed before filling and compacting occurred.<sup>260</sup>

214 I think it is likely, and I am satisfied, that some of the materials shown in the photographs taken by Inspectors would have been removed prior to compacting. However, I am not satisfied that this occurred in every case. I am satisfied that material compacted in the voids at the Abercrombie Road Site and the Wanneroo Road Site at times included small quantities of timber, plastic, metal and cardboard. The major matters leading me to that finding are:

- (a) Mr Sippe gave generalised evidence as to what would or should happen if sorting procedures were followed. No specific evidence was given by any witness on behalf of Eclipse as to the extent to which sorting procedures were or were not complied with generally, or in relation to any of the material shown in any of the photographs.
- (b) Some of the photographed materials that, according to Mr Sippe's responsive witness statement, would have been sorted in accordance with Eclipse's sorting procedures were the subject of an environmental field notice. Eclipse disputed the issuing of this notice, including through its solicitor, 'strongly' denying that there was 'too much timber in the fill face'.<sup>261</sup>
- (c) Some plastic, metal, paper and a small amount of plant material was observed by DER Inspectors in materials that Mr Sippe has indicated would not have been further sorted by Eclipse.<sup>262</sup>
- (d) Plastic, cardboard, timber and metal were observed by DER Inspectors sticking out from already covered or partially covered tip faces.<sup>263</sup>
- (e) Some of the materials shown in the photographs referred to in the paragraphs above were directed to be deposited by Eclipse at or in the operational bench at the Sites,<sup>264</sup> as opposed to being

<sup>260</sup> Exhibit G2 [22] - [56].

<sup>261</sup> Exhibit D2 [6], attachment TD4, pages 9 - 15; exhibit C, pages 263 - 285.

<sup>262</sup> Exhibit 14 [24], [35], [49], [101], [116], attachments JD14 - JD16, JD24 - JD26, JD30 - JD32, JD50, JD57 - JD58; exhibit G2 [29], [32], [34], [38], [50], [53].

<sup>263</sup> Exhibit 14 [35], [67], [80] - [81], [93], [101], [117], attachments JD23, JD38, JD46G, JD46K, JD50, JD53 - JD54, JD60 - JD61; exhibit 9 [23] - [24], [29] - [31], [38], [41], attachments LIF12, LIF18 - LIF22, LIF28, LIF30, LIF33 - LIF34.

<sup>264</sup> Exhibit 14 [12], [20] - [21], [32], [34], [62] - [67], attachments JD4, JD10 - JD12, JD23, JD36 - JD39, JD44 - JD46; exhibit 9 [29] - [31], [37] - [39], attachments LIF18 - LIF22, LIF25 - LIF32; exhibit 13 [42], attachment CF18; exhibit G2 [22], [33], [45], [69], [72], [88].

stockpiled in the separate sorting areas maintained by Eclipse at the times the photographs were taken.<sup>265</sup>

215 It is neither necessary nor possible to quantify the extent to which quantities of timber, plastic, metal or cardboard were deposited and compacted in the voids.

216 The photographs and videos taken by the DER Inspectors support a finding that between June 2013 and 23 September 2014, the materials accepted and deposited in the filling areas at the Abercrombie Road Site had a higher proportion of soil and sand to other materials, as compared to the materials accepted and deposited in the filling areas at the site between 1 July 2008 and June 2013.

217 The photographs taken by the DER Inspectors and Eclipse's weekly compaction reports support a finding that the materials accepted during the period June 2013 to 23 September 2014 were not only soils. The materials deposited and compacted in the void in this period included building rubble.<sup>266</sup> Further, a large proportion of the soils accepted during the period were deposited in the designated category 63 area.<sup>267</sup>

## 2.16 Re-mining

### 2.16.1 Introductory observations

218 Eclipse uses the term re-mining to describe excavations of material that has been received and deposited on site, the purpose of the excavation being to produce products, principally structural fill or water retentive soil products.<sup>268</sup> Both in its records,<sup>269</sup> and in the evidence of its witnesses,<sup>270</sup> Eclipse uses the term re-mining to refer to that process regardless of whether material is excavated from what Eclipse has deposited and compacted or from uncompacted stockpiles, which may not be in the void. The evidence of Eclipse's witnesses and its records regarding re-mining

<sup>265</sup> Exhibit 9 [21], attachment LIF11; exhibit 14 [4] - [10], [15] - [19], [25] - [29], [36] - [40], [50] - [53], [57] - [61], [68] - [72], [86] - [91], [95] - [99], JD1 - JD3, JD7 - JD9, JD17 - JD18, JD26A - JD26B, JD27, JD32A - JD32B, JD33 - JD35, JD40 - JD41, JD46H - JD46J, JD47 - JD48.

<sup>266</sup> Exhibit 13 [43] - [44], [52], [55] - [56], attachments CAF19, CAF24 - CAF25; exhibit 5 [78] - [83], [84] - [85], [87], [92] - [95], [100] - [101], [103], [104], [106] - [107], attachments CLW35 - 38, CLW40, CLW45, CLW49, CLW52; exhibit 7 [65], [71], [92], attachments SF24, SF28, SF37; exhibit B [2], [3], attachment S30.

<sup>267</sup> Exhibit 13 [35] - [56]; exhibit 5 [78] - [83], [92] - [97], [99], [100] - [101], [103], [104], [106] - [107], attachments CLW35 - 38, CLW43 - 45, CLW47, CLW49, CLW52; exhibit 7 [64] - [93], attachments SF24 - SF27, SF30, SF32 - SF37.

<sup>268</sup> Exhibit D3 [3].

<sup>269</sup> Exhibit G3, attachment RS56, pages 244 - 249, 251 - 276.

<sup>270</sup> Exhibit G1 [22], [28], [39]; exhibit D3 [3].

have to be understood as using the term in that way. A reference by a witness or a record to re-mining does not necessarily refer to the extraction of material that has been deposited and compacted.

219 Mr Sippe gave evidence, in a general way, that material that has been compacted at the Sites after being deposited 'can' subsequently be re-mined and removed from the Sites and 'represents stockpiled material held by Eclipse which is available for reuse'.<sup>271</sup> I take that to be a statement as to the possibility of re-mining and the present availability of compacted material for re-use through re-mining. That statement is not probative of the purpose or intention of Eclipse during the Relevant Period, at the time when it deposited and compacted material. As I will explain, I find that when Eclipse deposited and compacted material in the void at any of the Sites, its intention was to progressively fill the land so that it could be used for the intended ultimate purpose of the relevant site; namely, subdivision or use as a national park or private open space.

220 In supplementary statements filed after the Government Parties' opening submissions had been received, Mr Sippe and Mr Delroy gave examples of re-mining. In the circumstances in which these statements were prepared, I proceed on the basis that Mr Delroy and Mr Sippe referred in their supplementary statements, and, in Mr Delroy's case, oral evidence, to all examples of re-mining of any substantial scale of which they were aware.

221 As I have indicated, many parts of Mr Sippe's evidence in his first witness statement are expressed to be directed to Eclipse's practice at the time he made the statement, July 2015. They are not expressed to be about the position during the six years of the Relevant Period. As I will explain, to the extent that Eclipse's case implicitly invites me to find that Eclipse's practice as to re-mining in 2015 was its practice throughout the Relevant Period, I do not accept that. I find that Eclipse's conduct and thinking as to re-mining materially changed during the Relevant Period.

### ***2.16.2 The Flynn Drive Site and the Wanneroo Road Site***

222 In about 2000, sand material received from the Graham Farmer Freeway construction project was deposited in the void at the Flynn Drive Site and subsequently extracted and sold.<sup>272</sup> The evidence does not reveal

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<sup>271</sup> Exhibit G2 [4].

<sup>272</sup> Exhibit D3 [4].

when this occurred, although it must have been sometime before June 2008.<sup>273</sup>

223 Mr Delroy gave evidence of what he called another example of re-mining involving 250,000 tonnes of acidic peat from the Ikea construction site in Innaloo that was received at the Flynn Drive Site in 2006. That material was remediated with crushed limestone in situ in the void. Mr Delroy's evidence does not make clear whether it was compacted in the void. I infer from what Mr Delroy says<sup>274</sup> that the material was not compacted, but was merely deposited in the void at the Flynn Drive Site to allow the remediation process to take place, in circumstances where there was no room for that to occur outside of the void. This inference is also supported by the evidence as to Eclipse's policy in relation to the compaction of remediated peat as at 2006, which is discussed further below.

224 Mr Delroy's evidence also refers to a further 100,000 tonnes of acidic peat from the Ikea construction site that was accepted at the Abercrombie Road Site and remediated, screened and then stored for re-use.<sup>275</sup> This material was not deposited in the void.<sup>276</sup>

225 Mr Delroy gave oral evidence that sometime before February 2005, Eclipse received 34,000 m<sup>3</sup> of peat and topsoil at the Flynn Drive Site.<sup>277</sup> Exhibit D4 is a spreadsheet used by Mr Delroy to help calculate how much topsoil and peat was needed as final cover material at the Flynn Drive Site, and to assess whether Eclipse had sufficient materials at the site for that purpose. The spreadsheet refers to 'stockpiles' of peat and soils. Mr Delroy's evidence was that this material was compacted in the void and later extracted and used as final cover material.<sup>278</sup> When asked whether the material was compacted, his initial response was that 'it would have been'. To the extent that Mr Delroy's evidence of compaction represented recollection rather than assumption, his recollection is inconsistent with DER policy after 18 December 2003 and with Eclipse's Acid Sulphate Soil Management Plan (ASSMP) for the Flynn Drive Site after March 2004.

226 The evidence supports an inference that in March 2004 Eclipse modified its management plan to ensure consistency with DER policy,

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<sup>273</sup> Exhibit G3 [26] - [27].

<sup>274</sup> Exhibit D3 [8].

<sup>275</sup> Exhibit D3 [7].

<sup>276</sup> Exhibit D3 [8].

<sup>277</sup> ts 336 - 337.

<sup>278</sup> ts 339 - 340.



including, relevantly, that peat would not be buried but would be remediated on a purpose built limestone hardstand.

227 DER policy after 18 December 2003 prohibited the burial of peat at inert landfills.<sup>279</sup> Consequently, in early 2004 DER requested that Eclipse amend the October 2003 version of the Flynn Drive Site ASSMP by removing reference to the burial of peat.<sup>280</sup> There is evidence that the next version of the Flynn Drive Site ASSMP, dated March 2004, was approved by DER.<sup>281</sup> This version is not in evidence. However, based on the evidence I have referred to and a later version of the Flynn Drive Site ASSMP,<sup>282</sup> it may be inferred that the March 2004 version provided that peat would not be disposed of to landfill at the Flynn Drive Site. Accordingly, to the extent that Mr Delroy recalled peat being buried at that site after March 2004, his recollection is inconsistent with the policies of both DER and Eclipse at that time.

228 Those matters were not put to Mr Delroy in cross-examination. However, in circumstances where his evidence about exhibit D4 was led orally with leave, on very little notice, and where Mr Delroy's first response to being asked whether the material was compacted was to say 'it would have been',<sup>283</sup> I am not satisfied that the peat was compacted.

229 In any event, if I were satisfied of that it would not make any difference to any finding of significance about re-mining. The peat the subject of exhibit D4 was intended to be used to landscape the site where it was remediated, not to produce other products for sale.

230 Eclipse occupied the Wanneroo Road Site from approximately 2002 to 2004 and during that period treated and deposited acidic peat in the former quarry under an agreement with the landowners.<sup>284</sup> About 425,000 tonnes of acidic peat was accepted and remediated by Eclipse at the site using crushed limestone.<sup>285</sup>

231 In 2008, Eclipse made a new agreement with the landowners which permitted Eclipse, among other things, to excavate the peat for blending

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<sup>279</sup> Exhibit C, page 255.

<sup>280</sup> Exhibit C, page 256.

<sup>281</sup> Exhibit C, page 260.

<sup>282</sup> Exhibit A, page 1167.

<sup>283</sup> ts 339.

<sup>284</sup> Exhibit G1 [84].

<sup>285</sup> Exhibit D1 [25].

with sand to produce water retentive soils for final cover, and for other purposes.<sup>286</sup>

232       The peat extracted from the Wanneroo Road Site was dealt with in various ways. Some was stockpiled for use as final cover material on the Wanneroo Road Site. Some was sold. Some was transported to the Flynn Drive Site for use in producing water retentive blended soils for the subdivision and development of the land there. Some was sold by Eclipse under an agreement with Richgro Garden Products.<sup>287</sup>

233       About 80,000 m<sup>3</sup> of peat has been excavated to date.<sup>288</sup> The excavation of the peat is ongoing.<sup>289</sup> The crushed limestone layered with the peat has also been, and continues to be, excavated and re-used.<sup>290</sup>

234       Eclipse has not paid any levy in respect of the peat it buried at the Wanneroo Road Site from 2002 to 2004, and the Government Parties do not make any claim for levy in respect of that peat.

235       The only evidence of re-mining at the Wanneroo Road Site during the Relevant Period is that relating to the peat and limestone I have already referred to. There is no evidence of any other re-mining at the site during the Relevant Period.

236       With the exception of the peat I have already referred to, Eclipse has not produced any company records relating to re-mining at the Wanneroo Road Site or the Flynn Drive Site.

237       There is no evidence that during the Relevant Period for the Flynn Drive Site, 1 July 2008 to 30 June 2009, Eclipse re-mined any of the materials that it had deposited and compacted in the void.

238       Further, I am not satisfied that Eclipse has re-mined materials that were deposited and compacted during the Relevant Period in the void at the Flynn Drive Site or the Wanneroo Road Site. I do not think that there is any evidence that this occurred. The examples given by Mr Delroy and Mr Sippe relate to materials that were deposited or compacted prior to the Relevant Period, or to the re-mining of materials from uncompacted stockpiles. Mr Sippe's general statement that at the Wanneroo Road Site Eclipse has extracted materials previously deposited by it in the void and

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<sup>286</sup> Exhibit G1 [85], [98]; exhibit G3 [34] - [41].

<sup>287</sup> Exhibit G3 [37] - [39].

<sup>288</sup> Exhibit G1 [98].

<sup>289</sup> Exhibit D3 [11]; exhibit G1 [98].

<sup>290</sup> Exhibit G3 [38].

from other stockpiles, both within and outside the void,<sup>291</sup> is not directed specifically to materials deposited during the Relevant Period.

239       The evidence does not satisfy me that Eclipse deposited and compacted any materials in the void at the Wanneroo Road Site or the Flynn Drive Site during the Relevant Period for later extraction or in order for them to be available for later extraction. I am not satisfied that later extraction or availability for later extraction was a substantial or operative purpose of the depositing and compacting of materials in the voids at these sites. In addition to what I have already said about the limited extent of any re-mining, that conclusion takes account of the following:

- (a)     The deeds pursuant to which Eclipse has operated the Wanneroo Road Site<sup>292</sup> require Eclipse to fill and rehabilitate the quarry. The only re-mining contemplated or authorised by the deeds relates to the peat I have already referred to.
- (b)     Apart from that peat, there is no mention in Eclipse's management plan for the Wanneroo Road Site of any re-mining.<sup>293</sup> The various versions of the plan state that Eclipse's intention is to rehabilitate the quarry void so that it could be incorporated into the surrounding national park.<sup>294</sup>
- (c)     There is no mention of re-mining in Eclipse's management plan for the Flynn Drive Site.<sup>295</sup> The stated objective is to fill and contour the quarry.

240       There is no evidence that, and I am not satisfied that, Eclipse has any intention to re-mine, now or in the future, materials that were deposited and compacted in the void at the Flynn Drive Site during the Relevant Period. Since the filling of the void at the site was completed in June 2009, none of the materials deposited and compacted in the void have been extracted. The area has been, and remains, landscaped as open space.<sup>296</sup>

241       Minutes from a board and management meeting of the Marford Group in October 2008 record that the meeting ratified an outline of a

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<sup>291</sup> Exhibit G1 [28].

<sup>292</sup> Exhibit A, attachments 8 and 9.

<sup>293</sup> Exhibit A, attachments 47, 48 and 49.

<sup>294</sup> Exhibit A, attachments 47, 48 and 49, pages 1809, 1813 - 1814, 1829, 1897 - 1898, 1904, 1910, 1921, 1965, 1972, 1978.

<sup>295</sup> Exhibit A, attachment 50.

<sup>296</sup> Exhibit G1, attachment RS23.

business model for Eclipse Soils.<sup>297</sup> Under the heading 'Inventory', the minutes record that part of the business plan was that '[a]ll material suitable for re-use in soils product [would] be inventoried in [an] appropriate [E]xcel sheet'.<sup>298</sup> In closing submissions, Eclipse points to this as evidence of an intention to re-mine.<sup>299</sup>

242        This aspect of the business plan was not limited to any particular Eclipse site or sites. It is unclear from the October 2008 minutes whether the inventory referred to in them was to include materials deposited and compacted in the voids at Eclipse's sites, as distinct from materials that were stockpiled 'upstairs', outside the void. In the absence of any other contemporaneous evidence of Eclipse's intention to re-mine these materials, I am not satisfied that the reference to '[a]ll material suitable for re-use' in the October 2008 minutes was intended to include materials deposited and compacted in the voids at the Sites.

### ***2.16.3 The Abercrombie Road Site***

243        Re-mining of materials compacted in the void at the Abercrombie Road Site did not occur in a substantial or organised way before 22 August 2014.<sup>300</sup> None of Eclipse's weekly compaction reports for the Abercrombie Road Site prior to July 2014 record or refer to any re-mining of material at the site.

244        Re-mining of materials that had previously been compacted in a bench occurred on many days from 30 July 2014 to 30 September 2014.<sup>301</sup>

245        Eclipse's witness statements do not identify with any precision when the decision to re-mine compacted material at the Abercrombie Road Site was made, and when re-mining commenced. Many features of the evidence support the conclusion that re-mining of material compacted in the void at the site was first identified in or about July 2014 as something Eclipse then wanted to pursue in a substantial way:

- (1) It is not mentioned in Eclipse's management plan for the Abercrombie Road Site until the management plan of 22 August 2014.

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<sup>297</sup> Exhibit C, pages 190 - 193.

<sup>298</sup> Exhibit C, page 191.

<sup>299</sup> ts 739 - 740.

<sup>300</sup> ts 378.

<sup>301</sup> Exhibit G3 [44], attachment RS56, pages 244 - 240, 277 - 307; see also exhibit 5 [86], [90]; exhibit 7 [70], [72], [76] - [79], [81], [88].

- (2) It was first mentioned in Eclipse's Quality Plan on 22 August 2014, having been referred to in a draft of that plan dated 30 July 2014.<sup>302</sup>
- (3) It is first mentioned in the twice yearly audit reports in October 2014.<sup>303</sup>
- (4) It is presented as a new initiative, requiring research and development, in the Research and Development Plan lodged in the latter months of 2014 by Eclipse with the Australian Taxation Office.<sup>304</sup>
- (5) Mr Sippe's evidence outlines the commercial environment during 2013 and into 2014 and other factors that explain why Eclipse has 'placed an accelerated emphasis on re-mining',<sup>305</sup> and that led to the commencement, in 2014, of Eclipse's production of a new product (Water Retentive Landscape Shaping Soil) using, amongst other things, material extracted from the void at the Abercrombie Road Site.<sup>306</sup>
- (6) The minutes of Eclipse's weekly managers' meetings of 20 August 2014, 27 August 2014 and 3 September 2014 suggest that the product which is going to be called Water Retentive Landscape Shaping Soil is still in a development phase, with the specifications for the product not by that stage worked out.<sup>307</sup> As at 3 September 2014, marketing of the product had not yet taken place.<sup>308</sup>
- (7) Mr Bowman describes the 'commencement' of operations to re-mine materials which had previously been deposited in the void and compacted as 'the most significant change in recent years'.<sup>309</sup>
- (8) Eclipse's photographic evidence in relation to re-mining does not establish that re-mining of compacted material occurred before July or August 2014. Attachment RS61 to exhibit G3 is two photographs that are said to show re-mining of compacted material

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<sup>302</sup> Exhibit G3, attachment RS64.

<sup>303</sup> Exhibit E1 [24E].

<sup>304</sup> Exhibit D3, attachment TD3, pages 32 - 33.

<sup>305</sup> Exhibit G1 [22].

<sup>306</sup> Exhibit G3 [30] - [33]; see also exhibit D3 [13].

<sup>307</sup> Exhibit C, pages 197, 203, 208.

<sup>308</sup> Exhibit C, pages 208 - 209.

<sup>309</sup> Exhibit F1 [34], [50], [51].

in September 2010.<sup>310</sup> While what can be seen in the photographs is not entirely clear, they appear to involve removal of material from a surface stockpile, not removal of compacted material. Mr Sippe attaches aerial photographs of June 2014 and October 2014, and shades areas where material was removed 'during that period'.<sup>311</sup> These photographs do not actually show any re-mining taking place. The photographs that are part of the weekly compaction records<sup>312</sup> from before August 2014 seem to me to show re-mining of uncompacted material. In any event, these records go back only as far as 30 June 2014.

246 I find that it was only in July or August 2014 that Eclipse formed an intention to extract, to any significant degree, materials that had been deposited in the void at the Abercrombie Road Site, in order to use the extracted materials to make other products.

247 The evidence does not satisfy me that at any time prior to that, Eclipse deposited and compacted materials in the void at the Abercrombie Road Site with the intention, even in part, that they be subsequently extracted or available for later extraction. I am not satisfied that subsequent extraction or availability for later extraction was a substantial purpose of Eclipse when it deposited and compacted materials in the void at the site during the Relevant Period, up to the end of June 2014.

248 In his supplementary statement, Mr Sippe gave evidence that, following discussions with Eclipse's Operations Manager, he identified 'in [his] mind' the opportunity for Eclipse to excavate and re-use material that had been deposited in the void at the Abercrombie Road Site in the same way that Eclipse intended to excavate and re-use the peat material that had been deposited by it at the Wanneroo Road Site, and the peat accepted at the Flynn Drive Site.<sup>313</sup> Mr Sippe says that he knew that, at least in relation to large jobs, Eclipse's records would provide it with enough information to enable decisions to be made, if the demand emerged, to re-excavate deposited and compacted material for re-use.<sup>314</sup>

249 That evidence falls well short of establishing that Eclipse deposited and compacted materials in the void at the Abercrombie Road Site during the Relevant Period with the intention that they would be available for later extraction. At best, Mr Sippe, and thus Eclipse, was aware of the

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<sup>310</sup> Exhibit G3 [52].

<sup>311</sup> Exhibit G2 [4], attachment RS41.

<sup>312</sup> Exhibit G3, attachment RS56.

<sup>313</sup> Exhibit G3 [28].

<sup>314</sup> Exhibit G3 [28].

possibility that this might occur. It was not a substantial purpose of the depositing and compaction of materials.

250 It is telling that the management plan for the site makes no mention of re-mining until 22 August 2014. The versions of the management plan in force during the Relevant Period set out the purpose of the depositing and compaction of materials; namely, to rehabilitate the quarry by backfilling it with materials fit to produce a site geotechnically suitable for subdivision.<sup>315</sup> The management plan also provides for progressive revegetation of the filled quarry, something that does not sit easily with an intention to re-mine.<sup>316</sup> If re-mining had been a substantial purpose of the depositing and compaction of material, it is to be expected that this would be clear from earlier versions of the management plan, as it is made clear in the management plan of 22 August 2014.

251 Mr Sippe's first witness statement describes in some detail the process of compaction of materials placed in the void at the Abercrombie Road Site.<sup>317</sup> What is said is expressed in terms of present practice rather than practice over the course of the Relevant Period. Mr Sippe says that 'materials are compacted whether or not they are likely to be re-mined', observing that '[t]his has the dual advantage of conserving space and, should the material remain in situ, not requiring it to be excavated and redeposited in accordance with [Eclipse's] Quality Plan'.<sup>318</sup> On the evidence as a whole, I am satisfied that Mr Sippe's evidence as to the practice in July 2015 in this respect substantially reflects Eclipse's practice since August 2014, but not before then. For reasons already given, I do not accept that re-mining to any substantial degree at the Abercrombie Road Site was actively in contemplation before in or about July 2014.

252 Mr Sippe also refers to Eclipse's system for recording where materials are compacted at the Abercrombie Road Site.<sup>319</sup> He describes how the void at the site is divided into four areas or cells. Cell 1 holds 'free draining sand', Cell 2 is for 'predominantly sand', Cell 3 is for 'clayey sand' and Cell 4 is for 'difficult to re-use materials and soil potentially or actually containing asbestos chips'.<sup>320</sup> Mr Sippe says that within each cell, blocks of similar material are identified and recorded to facilitate re-mining.<sup>321</sup> He says that Eclipse's Quality Plan contains details of this

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<sup>315</sup> See, for example, exhibit A, attachment 42, page 1079.

<sup>316</sup> See, for example, exhibit A, attachment 42, pages 1079, 1084, 1086 - 1087, 1091.

<sup>317</sup> Exhibit G1 [48] - [65].

<sup>318</sup> Exhibit G1 [55].

<sup>319</sup> Exhibit G1 [49].

<sup>320</sup> Exhibit G1 [49].

<sup>321</sup> Exhibit G1 [50].

system.<sup>322</sup> Again, this evidence is expressed to be directed to Eclipse's practice in July 2015.

253 The first version of Eclipse's Quality Plan to mention the system referred to by Mr Sippe is the 'Quality Plan for Filling and Remining Operations' dated 22 August 2014 (August 2014 Quality Plan).<sup>323</sup> Previous versions of this document do not mention the system and have no reference to re-mining in their title.<sup>324</sup> The August 2014 Quality Plan does not describe the system discussed by Mr Sippe in any detail. It does not mention the four cells, although it does contain a 'Material Classification' table setting out four types of material that generally correspond to the categories listed by Mr Sippe.<sup>325</sup> It also refers in general terms to a requirement that classified material be compacted 'within the designated "block" ' and the location of each block recorded to facilitate re-mining.<sup>326</sup> These elements of the August 2014 Quality Plan are present in the draft version of the plan dated 30 July 2014.<sup>327</sup>

254 The fact that the system referred to by Mr Sippe, and re-mining more generally, are first mentioned in the August 2014 Quality Plan reinforces my finding that Eclipse did not contemplate or intend substantial re-mining at the Abercrombie Road Site before in or about July 2014.

255 Mr Sippe also gave evidence that 'material for structural fill (for on-site use or off-site sales) is usually deposited in the void'.<sup>328</sup> That evidence is expressed to be directed to Eclipse's practice as at the time of the statement, and not to the practice during the six years of the Relevant Period. I take it to be limited to Eclipse's then current practice. I am not satisfied that the same practice existed throughout the Relevant Period. There is no evidence of any compacted structural fill, or other fill material, being removed from the void prior to July 2014. With the exception of the final 2 m of cover material, nothing in Eclipse's records or management plan states or supports a conclusion that, prior to July 2014, Eclipse deposited and compacted structural fill, or other fill material, in the void intending that the fill be removed and subsequently sold by Eclipse.

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<sup>322</sup> Exhibit G1 [51].

<sup>323</sup> Exhibit A, attachment 46, page 1728.

<sup>324</sup> Exhibit A, attachments 42, 43, 44, and 45, pages 1194, 1323, 1461 and 1610.

<sup>325</sup> Exhibit A, attachment 46, page 1753.

<sup>326</sup> Exhibit A, attachment 46, page 1753.

<sup>327</sup> Exhibit G3, attachment RS64, page 389.

<sup>328</sup> Exhibit G1 [48].



256 Mr Sippe also refers to a sale transaction that did not proceed.<sup>329</sup> In May 2014, Eclipse received an enquiry from a customer attaching specifications for sand to be purchased from Eclipse. By email of 25 September 2014, Mr Delroy provided a quote for sand in accordance with those specifications. The email stated that Eclipse had reserved a stockpile of screened sand for the order. Mr Sippe's evidence is that production of the sand the subject of the proposed sale used some materials extracted from previously deposited material.<sup>330</sup> Mr Sippe does not say when that production occurred. The evidence does not satisfy me that it occurred before July 2014.

257 I find that from about August or perhaps July 2014, Eclipse deposited material in the void in order to fill the void, but also so that the deposited and compacted material would be available for re-mining for use in the production of soil and sand products.

258 The Guideline for Remining Operations in the August 2014 Quality Plan states that '[i]t must be noted that any material placed within the void should be treated as permanent fill and therefore placed and compacted accordingly'.<sup>331</sup> The process of compaction, and the nature of the materials compacted, has not changed since the introduction of these Guidelines and the current management plan.<sup>332</sup>

259 At the Abercrombie Road Site, for the period 30 June 2014 to 30 September 2014, approximately 47,900 m<sup>3</sup> of materials were extracted from materials compacted in the void in accordance with the Quality Plan and were used to produce 50,677 m<sup>3</sup> of products, including fill sand and shaping soil.<sup>333</sup>

260 Eclipse's records do not enable the identification of what part of sales of structural fill was produced from materials extracted by Eclipse from previously compacted materials.<sup>334</sup> The Government Parties describe this as 'somewhat surprising'<sup>335</sup> but, in circumstances where Mr Sippe was not cross-examined on this evidence, I accept it.

261 In or about September 2014, structural fill was given its own invoicing code 2H, separate from the general code, G7, applicable to sales

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<sup>329</sup> Exhibit G3 [47], attachment RS58.

<sup>330</sup> Exhibit G3 [47].

<sup>331</sup> Exhibit A, attachment 46, page 1752.

<sup>332</sup> ts 377 - 378.

<sup>333</sup> Exhibit G3 [45], attachment RS56.

<sup>334</sup> Exhibit G3 [46].

<sup>335</sup> Government Parties' closing submissions pt VII [180].

of sand and limestone.<sup>336</sup> The search for sales under code 2H that is in evidence is for the date range 1 July 2008 to 31 October 2014, unlike the narrower search relating to sales under code G7.<sup>337</sup> I am not satisfied that the single sale reflected in the result of the search for code 2H<sup>338</sup> occurred prior to 30 September 2014. I infer that it was the sale transaction in October 2014 referred to in attachment RS59 to exhibit G3 (GST explains the apparent price difference). I note that, as Mr Sippe explained, much of the material the subject of this order was extracted during the Relevant Period from material compacted in the void.<sup>339</sup>

262 Whether and to what extent there will be future re-mining of materials compacted in the void at the Abercrombie Road Site will depend upon economic circumstances and commercial considerations.<sup>340</sup> The extent of any future re-mining is also constrained by the need to prevent the void from getting too big.<sup>341</sup>

## **2.17 Temporary closure of the Wanneroo Road Site for filling operations**

263 Eclipse closed the Wanneroo Road Site from about October 2012 to December 2013.<sup>342</sup>

## **2.18 Production or design capacity of Eclipse's Sites for the acceptance of waste for burial**

### **2.18.1 Flynn Drive Site**

264 When Eclipse first took occupation of the Flynn Drive Site, the former quarry on the site had a void capacity of approximately 4 million m<sup>3</sup>.<sup>343</sup> During the period of its operation, over 4 million m<sup>3</sup> of materials were placed in the void at the Flynn Drive Site.<sup>344</sup>

265 On 6 June 2006, Eclipse submitted an application for a licence in respect of the Flynn Drive Site to DER for a 'category 63 Inert Landfill Site' with a production or design capacity greater than 50,000 but less than or equal to 500,000 tonnes per annum.<sup>345</sup>

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<sup>336</sup> Exhibit G3 [46].

<sup>337</sup> See exhibit G3, attachment RS57.

<sup>338</sup> Exhibit G3, page 312.

<sup>339</sup> Exhibit G3 [48].

<sup>340</sup> Exhibit G1 [22] - [23], [27]; ts 379 - 380, 382.

<sup>341</sup> ts 386.

<sup>342</sup> Exhibit D2, attachment TJD4, page 13; exhibit 13 [8] - [16].

<sup>343</sup> Exhibit A [24].

<sup>344</sup> Exhibit D1 [20].

<sup>345</sup> Exhibit C, pages 168 - 171.

266 Throughout the Relevant Period, the Flynn Drive Site was licensed  
by DER as having a 'nominal rated throughput' of not more than  
500,000 tonnes of 'waste accepted' per year.<sup>346</sup>

267 More than 500 tonnes of material was deposited on the Flynn Drive  
Site during each year of the Relevant Period.<sup>347</sup>

268 Surveys prepared by McMullen Nolan for the Flynn Drive Site for  
the period 1 July to 31 December 2008 report that 47,268 m<sup>3</sup> was  
deposited as fill at the site during that period.<sup>348</sup>

269 Surveys prepared by McMullen Nolan for the Flynn Drive Site for  
the period 1 January to 30 June 2009 report that 49,556 m<sup>3</sup> was deposited  
as fill at the site during that period.<sup>349</sup>

### **2.18.2 Abercrombie Road Site**

270 On 11 February 2005, Eclipse submitted an application for a licence  
in respect of the Abercrombie Road Site to DER for a 'category 63 Inert  
Landfill' with a production or design capacity greater than 50,000 but less  
than or equal to 500,000 tonnes per annum.<sup>350</sup>

271 On 3 August 2007, Mr Sippe emailed a DER officer in connection  
with amendments to its licence for the Abercrombie Road Site and  
advised that the 'Production/Design Capacity' for the Category 63 Class I  
Inert Landfill was '50,000 - 500,000 tpa' and Eclipse's 'Nominated Rate of  
Throughput' was '250,000 - 400,000 tpa'.<sup>351</sup>

272 On 17 April 2009, Eclipse applied to DER to amend its licence for  
the Abercrombie Road Site and advised DER that 'the capacities for the  
licence categories remain unchanged'.<sup>352</sup>

273 On 14 January 2010, Mr Sippe sent a letter to DER advising that:

[W]e are licensed currently under Category 63 for 50,000 - 500,000 tonnes  
per annum. In our application for an amended licence of 17 April 2009  
this remains unchanged. We are unsure of what the actual quantity of  
material deposited in the Category 63 licensed area will be ... We would  
think that the actual quantity will be closer to 50,000 tonnes/annum than

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<sup>346</sup> Exhibit A [31(a)(ii)], attachments 30 - 31.

<sup>347</sup> Exhibit A [124].

<sup>348</sup> Exhibit A [76(a)], [76(c)], attachment 53.

<sup>349</sup> Exhibit A [77(a)], [80(a)], attachments 54, 56.

<sup>350</sup> Exhibit A [28(a)(i)], attachment 12.

<sup>351</sup> Exhibit C, pages 261 - 262.

<sup>352</sup> Exhibit 10 [6], attachment RKR1, page 21.

500,000 ... we anticipate that the annual quantity [in our civil works area] will be within the range of 50,000 - 500,000 tonnes.<sup>353</sup>

274 On 19 January 2010, in an email to a DER officer in connection with an application by Eclipse for the re-issue of its licence for the Abercrombie Road Site, Mr Richard Kerr of Eclipse confirmed that the production or design capacity of the '63 - Class I inert landfill site' was still more than 50,000 but no more than 500,000 tonnes per annum.<sup>354</sup>

275 On 4 February 2010, Eclipse approved a revised draft Environmental Assessment Report for the Abercrombie Road Site that had been prepared by DER and amended by Eclipse. The report stated that the category 63 'Class I Inert Landfill' had a production or design capacity of 50,000 to 500,000 tonnes per annum.<sup>355</sup>

276 Throughout the Relevant Period, the Abercrombie Road Site was licensed by DER as having a capacity of 50,000 to 500,000 tonnes per annum for the category 63 'Class I Inert Landfill'.<sup>356</sup>

277 More than 500 tonnes of material was deposited on the Abercrombie Road Site during each year of the Relevant Period.<sup>357</sup>

278 Surveys prepared by McMullen Nolan for the Abercrombie Road Site for the period 1 July to 31 December 2008 report that 115,963 m<sup>3</sup> was deposited as fill at the site during that period.<sup>358</sup>

279 Surveys prepared by McMullen Nolan for the Abercrombie Road Site for the year 1 January to 31 December 2009 report that 81,751 m<sup>3</sup> was deposited as fill at the site, or in part of the site, during that period.<sup>359</sup>

280 Surveys prepared by McMullen Nolan for the Abercrombie Road Site for the year 1 January to 31 December 2010 report that 109,024 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>360</sup> That total represents the sum of the net figures for fill, after deduction of the amount cut, on each of the four quarterly surveys. In all of the surveys prepared

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<sup>353</sup> Exhibit 10 [57], attachment RKR36, page 69.

<sup>354</sup> Exhibit 10 [59], [61], attachments RKR37 - RKR38.

<sup>355</sup> Exhibit 10 [60], [62], attachment RKR39, pages 74 - 75.

<sup>356</sup> Exhibit A [28(a)], attachments 11, 13 - 15.

<sup>357</sup> Exhibit A [124].

<sup>358</sup> Exhibit A [76(b)], [76(d)], attachment 53.

<sup>359</sup> Exhibit A [77(b)], [79(a)], [80(b)], [81(a)], attachments 54, 55, 56, 58.

<sup>360</sup> Exhibit A [82(a)], [83(a)], [84(a)], [85(a)], attachments 59 - 62.

by McMullen Nolan, 'fill' refers to where the level of the site had gone up and 'cut' to where site levels had gone down.<sup>361</sup>

281 Surveys prepared by McMullen Nolan for the Abercrombie Road Site for the year 1 January to 31 December 2011 report that 85,619 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>362</sup> Again, that represents a sum of the net figures shown on each quarterly survey.

282 Surveys prepared by McMullen Nolan for the Abercrombie Road Site for the year 1 January to 31 December 2012 report that 52,337 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>363</sup> The quarterly surveys for this period also indicated a figure for the amount cut and a net figure for fill. The net figures for fill totalled 46,993 m<sup>3</sup>.

283 A survey prepared by McMullen Nolan for the Abercrombie Road Site for the period 1 January to 31 March 2013 reports that a total amount of 4,581 m<sup>3</sup> was deposited as fill and, when account is taken of the amount cut, 4,030 m<sup>3</sup> was the net amount deposited as fill at the site during that period.<sup>364</sup>

### 2.18.3 Wanneroo Road Site

284 The filling and rehabilitation of the former quarry on the Wanneroo Road Site requires around 750,000 m<sup>3</sup> of material.<sup>365</sup>

285 On 15 August 2008, Eclipse submitted an online application for a new licence for the Wanneroo Road Site to DER for a '63 Class I inert landfill site' with a capacity greater than 50,000 tonnes per annum.<sup>366</sup>

286 On 30 June 2009, Eclipse applied to DER to amend its licence for the Wanneroo Road Site and advised DER that the capacity of the category 63 'Class I inert landfill site' was '50,000 but not more than 500,000 tonnes per year'.<sup>367</sup>

287 On 11 January 2010, Mr Sippe emailed an officer of DER in connection with amendments to Eclipse's licence for the Wanneroo Road Site and advised that:

<sup>361</sup> ts 389.

<sup>362</sup> Exhibit A [86(a)], [87(a)], [88(a)], [89(a)], attachments 63 - 66

<sup>363</sup> Exhibit C, pages 172 - 186.

<sup>364</sup> Exhibit C, pages 187 - 189.

<sup>365</sup> Exhibit D1 [22].

<sup>366</sup> Exhibit 9 [2] - [4], attachment LIF1, page 18.

<sup>367</sup> Exhibit 9 [5], attachment LIF2, pages 19 - 20.

[W]e are licensed currently under Category 63 for 50,000 - 500,000 tonnes per annum. In our application for an amended licence of 30 June 2009 this remains unchanged. We are unsure of what the actual quantity of material deposited in the Category 63 licensed area will be ... We would think that the actual quantity will be much closer to 50,000 tonnes/annum than 500,000.<sup>368</sup>

288 Throughout the Relevant Period, the Wanneroo Road Site was licensed by DER as having a capacity for the category 63 'Class I inert landfill' of 50,000 to 500,000 tonnes per annum.<sup>369</sup>

289 More than 500 tonnes of material was deposited on the Wanneroo Road Site during each year of the Relevant Period.<sup>370</sup>

290 Surveys prepared by McMullen Nolan for the Wanneroo Road Site for the period 11 June to 31 December 2009 report that 6,081 m<sup>3</sup> was deposited as fill at the site, or in part of the site, during that period.<sup>371</sup>

291 Surveys prepared by McMullen Nolan for the Wanneroo Road Site for the period 1 January to 31 December 2010 report that 26,041 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>372</sup>

292 Surveys prepared by McMullen Nolan for the Wanneroo Road Site for the period 1 January to 31 December 2011 report that 36,439 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>373</sup>

293 Surveys prepared by McMullen Nolan for the Wanneroo Road Site for the period 1 January to 30 September 2012 report that 27,903 m<sup>3</sup> was deposited as fill in part of the site during that period.<sup>374</sup>

#### ***2.18.4 Conversion of cubic metres to tonnes***

294 During the Relevant Period, DER published landfill levy administration policies which provided for measurements of material in cubic metres to be converted into measurements of the material in tonnes by applying a conversion factor of 1.3t/m<sup>3</sup>.<sup>375</sup>

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<sup>368</sup> Exhibit 9 [7], attachment LIF4, page 40.

<sup>369</sup> Exhibit A [30(a)], attachments 23 - 26.

<sup>370</sup> Exhibit A [124].

<sup>371</sup> Exhibit A [77(c)], [79(b)], [81(b)], attachments 54, 55 and 58.

<sup>372</sup> Exhibit A [82(b)], [83(b)], [84(b)], [85(b)], attachments 59 - 62.

<sup>373</sup> Exhibit A [86(b)], [87(b)], [88(b)], [89(b)], attachments 63 - 66.

<sup>374</sup> Exhibit C, pages 172 - 186. This figure is a minimum figure as it includes the figure stated for the 'civil works area' but excludes the 3 different figures for the 'Cat 63 area' stated on pages 175, 176 and 177.

<sup>375</sup> Exhibit C, pages 437 - 460.

295 Mr Sippe's evidence is that the void at the Wanneroo Road Site is approximately 750,000 m<sup>3</sup>, which amounts to approximately 1,125,000 tonnes of sand.<sup>376</sup>

## **2.19 Licences granted to Eclipse under the EP Act**

### **2.19.1 Flynn Drive Site**

296 On 19 June 2006, a delegate of the CEO granted Eclipse licence 7103/10 under pt V of the EP Act in respect of the Flynn Drive Site.<sup>377</sup> The licence commenced operation on 5 July 2006 and stated that its date of expiry was 4 July 2011. The licence identified the Flynn Drive Site as a 'Category 63 - Class I inert landfill site' and a 'Category 67A - Compost manufacturing and soil blending' premises. Condition G2(a) of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) clean fill; (ii) Type I Inert waste; (iii) Type 2 Inert waste (tyres); and (iv) Type I Special waste (asbestos)'.

297 On 23 April 2009, a delegate of the CEO issued Eclipse with an amended licence 7103/1997/10 for the Flynn Drive Site.<sup>378</sup> The amended licence commenced operation on 23 April 2009 and stated that its date of expiry was 4 July 2011. The licence identified the Flynn Drive Site as a 'Category 63: Class I inert landfill site' and a 'Category 67A - Compost manufacturing and soil blending' premises. Condition G1(a) of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) clean fill; (ii) Type I Inert waste; (iii) Type 2 Inert waste (tyres); and (iv) Type I Special waste (asbestos)'.

### **2.19.2 Abercrombie Road Site**

298 On 28 September 2007, a delegate of the CEO granted Eclipse an amended licence 7766/2001/4 under pt V of the EP Act in respect of the Abercrombie Road Site.<sup>379</sup> The original licence granted to Eclipse amended by this licence had been issued on 31 March 2005 and had commenced operation on 28 April 2005.<sup>380</sup> The amended licence commenced operation on 28 September 2007 and stated that its date of expiry was 27 April 2010. The licence identified the Abercrombie Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 62 Solid Waste Depot' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 2 of the licence provided that Eclipse 'shall accept

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<sup>376</sup> Exhibit G2 [61].

<sup>377</sup> Exhibit A [31(a)(ii)], attachment 30.

<sup>378</sup> Exhibit A [31(a)(ii)], attachment 31.

<sup>379</sup> Exhibit A [28(a)(i)], attachment 11.

<sup>380</sup> Exhibit A [28(a)(i)], attachment 11, page 668.

and bury only the following types of waste at the premises: (i) Clean fill; (ii) Inert waste Type 1; and (iii) Special waste Type 1'.

299 On 15 April 2010, a delegate of the CEO granted Eclipse new licence 7766/5 under pt V of the EP Act in respect of the Abercrombie Road Site.<sup>381</sup> The licence commenced operation on 28 April 2010 and stated that its date of expiry was 27 April 2015. The licence identified the Abercrombie Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 61A Solid waste facility' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 1 of the licence provided that Eclipse 'shall only accept and bury the following types of waste at the premises: (i) Clean fill; (ii) Inert waste Type 1; and (iii) Special waste Type 1'.

300 On 7 July 2011, a delegate of the CEO issued Eclipse with an amended licence L7766/2001/5 for the Abercrombie Road Site.<sup>382</sup> The amended licence commenced operation on 7 July 2011 and stated that its date of expiry was 27 April 2015. The licence identified the Abercrombie Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 61A Solid waste facility' and a 'Category 67A Compost Manufacturing and Soil Blending' premises.

301 Condition 1 of this licence provided that Eclipse 'shall only accept the following types of waste at the premises: (i) clean fill; (ii) Inert Waste Type 1; (iii) Special waste Type 1 (Asbestos waste); (v) acid sulfate soils; (v) hydrocarbon contaminated material; and (vi) garden waste or green waste'. Condition 2 of this licence provided that Eclipse 'shall only bury or deposit the following types of waste at the premises: (i) clean fill; (ii) Inert Waste Type 1; (iii) hydrocarbon contaminated material meeting the contaminant threshold (CT), leachable concentration (ASLP) and concentration limit (CT) values in Tables 3, 4 and 5 of the document titled Landfill Waste Classification and Waste Definitions 1996 (As amended December 2009) for an inert class 1 landfill; and (iv) Special waste Type 1 (Asbestos waste)'.

302 On 11 August 2011, a delegate of the CEO issued Eclipse with an amended licence L7766/2001/5 for the Abercrombie Road Site.<sup>383</sup> The amended licence commenced operation on 11 August 2011 and stated that its date of expiry was 27 April 2015. The licence identified the Abercrombie Road Site as a 'Category 63 Class I Inert Landfill', a

<sup>381</sup> Exhibit A [28(a)(ii)], attachment 13.

<sup>382</sup> Exhibit A [28(a)(ii)], attachment 14.

<sup>383</sup> Exhibit A [28(a)(ii)], attachment 15.



'Category 61A Solid waste facility' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 1 of the licence provided that Eclipse 'shall only accept and bury the following types of waste at the premises: (i) Clean fill; (ii) Inert waste Type 1; and (iii) Special waste Type 1'.

### **2.19.3 Wanneroo Road Site**

303 On 19 February 2009, a delegate of the CEO granted Eclipse licence 8315/1 under pt V of the EP Act in respect of the Wanneroo Road Site.<sup>384</sup> The licence commenced operation on 19 February 2009 and stated that its date of expiry was 18 February 2014. The licence identified the Wanneroo Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 62 Solid Waste Depot' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 2 of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) Clean fill; and (ii) Inert waste Type 1'.

304 On 13 May 2010, a delegate of the CEO issued Eclipse with an amended licence 8315/2008/1 in respect of the Wanneroo Road Site.<sup>385</sup> The amended licence commenced operation on 13 May 2010 and stated that its date of expiry was 18 February 2014. The licence identified the Wanneroo Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 61A Solid waste facility' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 1 of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) Clean fill; and (ii) Inert waste Type 1'.

305 On 30 January 2014, a delegate of the CEO issued Eclipse with an amended licence 8315/2008/1 in respect of the Wanneroo Road Site.<sup>386</sup> The amended licence commenced operation on 30 January 2014 and stated that its date of expiry was 18 August 2014. The licence identified the Wanneroo Road Site as a 'Category 63 Class I Inert Landfill', a 'Category 61A Solid waste facility' and a 'Category 67A Compost Manufacturing and Soil Blending' premises. Condition 1 of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) Clean fill; and (ii) Inert waste Type 1'.

306 On 15 August 2014, a delegate of the CEO issued Eclipse with new licence 8315/2008/2 under pt V of the EP Act in respect of the Wanneroo

<sup>384</sup> Exhibit A [30(a)(i)], attachment 23.

<sup>385</sup> Exhibit A [30(a)(i)], attachment 24.

<sup>386</sup> Exhibit A [30(a)(i)], attachment 25.

Road Site.<sup>387</sup> The licence commenced operation on 19 August 2014 and stated that its date of expiry was 18 December 2014. The licence identified the Wanneroo Road Site as a 'Category 63 Class I inert landfill'. Condition 1 of the licence provided that Eclipse 'shall accept and bury only the following types of waste at the premises: (i) Clean fill; and (ii) Inert waste Type 1'.

## 2.20 Category 61A licences

307 The Abercrombie Road Site and the Wanneroo Road Site were not licensed for the entirety of the Relevant Period as category 61A prescribed premises. The Abercrombie Road Site was licensed as a category 61A prescribed premises for the first time on 15 April 2010 and the Wanneroo Road Site for the first time on 13 May 2010.

308 The reason for category 61A being added to Eclipse's licences for the Wanneroo Road Site and the Abercrombie Road Site was acknowledged in an email that Mr Sippe sent to DER on 27 October 2009.<sup>388</sup>

309 In the first paragraph of the email, Mr Sippe states:

The reason we want to change from category 62 to category 61A is because this was suggested by Paul Byrnes for our Abercrombie Rd site. We want to line up both sites as closely as possible because it makes management simpler for us. We have asked for a comparable licence amendment for our Abercrombie Rd site. Paul made the suggestion when issuing a works approval for a bioremediation cell for Abercrombie Rd which he did as a Category 61A. His view was that 61A was a better fit for ASS and bioremediation operations than Category 62, noting that when Abercrombie Rd (and Flynn Drive too) were first licensed, there was no Category 61A. We agree with Paul's position so have requested the change.

310 The Government Parties submit that it can be seen from this correspondence that, from both DER's perspective and Eclipse's perspective, the two sites were licensed as category 61A prescribed premises to cover Eclipse's remediation and bio-remediation operations, and not to cover Eclipse's operations in depositing and compacting materials into the voids.<sup>389</sup> As a matter of fact, I accept that this is so. However, in my view that finding does not bear in any way upon the resolution of the issues in these actions. In particular, it does not bear upon whether, on a proper construction of the levy regime, and on a

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<sup>387</sup> Exhibit A [30(a)(ii)], attachment 26.

<sup>388</sup> Exhibit 9 [6], attachment LIF3.

<sup>389</sup> Government Parties' closing submissions pt VII [301].

proper characterisation of Eclipse's activities at the Sites, the Sites were category 63 prescribed premises.

## **2.21 Eclipse creates separate 'category 63 area' and 'civil works area' and applies to amend its licenses**

311 On 20 April 2009, DER received an application from Eclipse to  
amend its licence for the Abercrombie Road Site.<sup>390</sup>

312 On 2 July 2009, DER received an application from Eclipse to amend  
its licence for the Wanneroo Road Site.<sup>391</sup>

313 The 'Background' section of each of the amendment applications  
indicated that Eclipse intended to start separating materials meeting  
'Class 1 acceptance criteria' as set out in the 2005 version of DER's *Waste  
Classification and Waste Definitions 1996* (and, in relation to the  
Abercrombie Road Site, asbestos) from 'clean fill' received at its  
Abercrombie Road Site and Wanneroo Road Site. The former would only  
be deposited into a designated area within each premises, referred to as  
the 'category 63 area', while clean fill would be deposited into the balance  
of the void at each site, which Eclipse referred to as its 'civil works site'.

314 By its amendment applications, Eclipse sought, in effect, to have its  
designated category 63 areas recognised as separate prescribed premises  
so that its licenses would only apply to those areas to the extent that they  
regulated its category 63 activities.<sup>392</sup>

315 Correspondence DER subsequently received from Eclipse indicated,  
as was the fact, that it had already instituted the separate areas on the two  
sites.<sup>393</sup> In its designated civil works area (Civil Works Area), it was  
depositing materials that it considered to be clean fill, including bricks  
and concrete in soil. In its designated category 63 area (Category 63  
Area), Eclipse was depositing materials in respect of which, in its view, an  
argument could be put that they were waste. These materials initially  
included wrapped asbestos.<sup>394</sup> They also included materials that did not  
meet EILs until mid-October 2012, when Eclipse decided to accept only  
materials that met EILs.<sup>395</sup>

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<sup>390</sup> Exhibit 10 [6], attachment RKR1; exhibit A [74].

<sup>391</sup> Exhibit 9 [5], attachment LIF2; exhibit A [74].

<sup>392</sup> Exhibit A [74].

<sup>393</sup> Exhibit A [77], attachment 54.

<sup>394</sup> ts 162.

<sup>395</sup> Exhibit G3 [12], [14].

316 The licence that had been issued to Eclipse for the Abercrombie Road Site fell due for renewal in April 2010 and so on 10 January 2010, before its amendment application had been determined, Eclipse applied for a new licence to be granted for the site.<sup>396</sup>

317 The new licence granted to Eclipse on 15 April 2010 did not provide for the Category 63 Area to be licensed as a separate prescribed premises.<sup>397</sup>

318 Subsequently, on 13 May 2010, the delegate of DER's CEO refused to amend Eclipse's licence for the Wanneroo Road Site to provide for the Category 63 Area to be licensed as a separate prescribed premises.<sup>398</sup>

319 The delegate refused to make the amendments requested by Eclipse for a number of reasons, including that the information available to him was that Eclipse was in fact disposing, and proposing to dispose, of waste other than clean fill outside of the Category 63 Area at each site.<sup>399</sup>

320 Eclipse brought proceedings in this court challenging the delegate's decisions. Eclipse was unsuccessful in its challenge.<sup>400</sup>

321 At all times during the Relevant Period, Eclipse held a licence for category 63 prescribed premises for the whole of the Abercrombie Road Site and the Wanneroo Road Site.<sup>401</sup>

## 2.22 Advice provided to Eclipse regarding filling treated acid sulfate soils

322 On 3 February 2004, a DER officer wrote to Eclipse and advised that as of 18 December 2003, DER had adopted a new policy position on the disposal of peat to landfills and that under the policy position no further landfilling or burial of peat would be permitted. The policy position states that:

1. Acceptance of peat (treated or otherwise) for uses other than rehabilitation is prohibited at all inert landfills on the grounds that peat is not inert waste ... 3. Rehabilitation of landfills should be conducted primarily with sand and loam to a depth not exceeding two metres and

<sup>396</sup> Exhibit A [28(a)(i)], [74], attachment 11.

<sup>397</sup> Exhibit A [28(a)(ii)], [75], attachment 13.

<sup>398</sup> Exhibit A [75].

<sup>399</sup> *Eclipse v Kieran McNamara [No 2]* [80(d)], [127], [133(a) - (b)]; *Eclipse Resources Pty Ltd v Chief Executive Officer, Department of Environment and Conservation* [2013] WASC 152; (2013) 45 WAR 353 [51] - [53].

<sup>400</sup> *Eclipse v Kieran McNamara [No 2]; Eclipse v CEO*.

<sup>401</sup> Exhibit A [28], [30], [75].

may involve the use of neutralised peat or other organic matter to aid soil structure, but not as the main ingredients.<sup>402</sup>

323 On 11 February 2004, an officer of DER wrote to Eclipse and repeated that advice.<sup>403</sup>

324 On 1 July 2005, an amended version of DER's *Landfill Waste Classification and Waste Definitions 1996* was published by the CEO of DER (CEO), which included a definition of 'Inert Waste Type 1' as follows:

Non-hazardous, non-biodegradable (half-life greater than 2 years) wastes containing contaminant concentrations less than Class I landfill acceptance criteria but excluding paper and cardboard (paper and cardboard are biodegradable materials and are therefore considered as putrescible waste) or materials that require treatment to render them inert (e.g. peat, acid sulfate soils).<sup>404</sup>

The amended publication also included the following statement in Table 2b relating to 'Putrescible waste':

Acid sulfate soils may only be accepted at Class II, III or IV landfills if they have been treated to neutralise acid-forming potential in accordance with the [DER] document *Treatment and Management of Acid Sulfate Soils* prior to disposal.<sup>405</sup>

325 On 12 December 2005, the CEO wrote to Eclipse's environmental consultants, ATA Environmental, in response to correspondence DER had received from them concerning proposed amendments to Eclipse's licence for the Abercrombie Road Site. The CEO's letter advised:

The [DER] reiterates that the *Landfill Waste Classification and Waste Definitions 1996* (as amended) states that acid sulfate soils may only be accepted at Class II, III or IV landfills if they have been treated to neutralise acid-forming potential. As such untreated or treated acid sulfate soils may not be buried at a Class I inert landfill.<sup>406</sup>

326 On 3 August 2008, the Manager of DER's Licensing and Permitting Branch sent a letter to Mr Sippe which advised:

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<sup>402</sup> Exhibit C, pages 257 - 258.

<sup>403</sup> Exhibit C, pages 255 - 256. This letter is dated 11 February 2003. However, it is clear from the text of the letter that the reference to 2003 is incorrect (the letter refers to Eclipse's Management Plan for Acid Sulfate Soils dated October 2003, the DER's policy position as of 18 December 2003, the letter is stamped 13 February 2004 and there is a handwritten notation on it saying 'Noted 19/2/04' followed by a signature.

<sup>404</sup> Exhibit A, attachment 81, page 2342.

<sup>405</sup> Exhibit A [112], attachment 81, page 2348.

<sup>406</sup> Exhibit C, page 260.

Class 1 Landfills (prescribed premises category 63) are premises where ASS, whether treated or not, are not accepted for burial but neutralised peat and/or ASS may be used as a minor component of materials used at Class 1 Landfills for rehabilitation and final landforming.<sup>407</sup>

327 On 17 April 2009, Eclipse wrote a letter to DER in which it stated:

Eclipse has written twice to [DER] (31 July, 2008 and 1 December, 2008) regarding disposal of remediated but unusable acid sulfate soils. Eclipse is yet to receive a written reply. However, the Manager, Licensing Policy Section advised by telephone that, notwithstanding the absence of environmental risk involved, [DER] was constrained by the wording in [DER's] 'Landfill Waste Classification and Waste Definitions' document and accordingly such material could not be disposed of in a Class I site.<sup>408</sup>

328 On 17 December 2009, an amended version of the *Landfill Waste Classification and Waste Definitions 1996* was published by the CEO. The definition of 'Inert Waste Type 1' and the statement in Table 2b relating to acid sulfate soils were repeated in the same form as the 2005 version.<sup>409</sup>

329 On 7 January 2010, a DER officer sent an email to Richard Kerr of Eclipse thanking him 'for confirming that contrary to an earlier anonymous report, Eclipse are not intending to accept treated Acid sulfate soil for burial at their Class I landfill in Postans'.<sup>410</sup> The email also directed Mr Kerr's attention to a draft policy DER had published for public comment which stated that appropriately treated acid sulfate soils may be accepted for burial in Class II, III and IV (but not Class I) landfills.

## 2.23 Levy exemptions granted to Eclipse

330 Upon its application dated 14 December 2007, Eclipse was granted exemptions on 10 June 2008 under reg 23 of the *Environmental Protection Regulations 1987* (WA) in relation to the Flynn Drive Site and the Abercrombie Road Site. These exemptions were stated to apply until 30 June 2009 for:

- (a) 'Greenwaste which must be recycled and removed off-site'; and

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<sup>407</sup> Exhibit 9 [6], attachment LIF3, page 36.

<sup>408</sup> Exhibit 10 [6], attachment RKR1, page 23.

<sup>409</sup> Exhibit A [113], attachment 82, pages 2368, 2374.

<sup>410</sup> Exhibit 10 [56], attachment RKR35.

- (b) 'Clean excavated material which is accepted free of charge for use as final cover in accordance with the Landfill Levy Administration Policy'.<sup>411</sup>

331 Upon its application dated 22 April 2009, Eclipse was granted an exemption on 6 July 2009 under reg 5 of the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) in relation to the Wanneroo Road Site, which was stated to apply from 25 May to 30 June 2009, for '[g]reenwaste which must be recycled and removed offsite'.<sup>412</sup>

332 Upon its application dated 22 April 2009, Eclipse was granted exemptions on 6 July 2009 under reg 5 in relation to the Flynn Drive Site, the Abercrombie Road Site and the Wanneroo Road Site, which were stated to apply from 1 July 2009 to 30 June 2010, for '[g]reenwaste which must be recycled and removed offsite'.<sup>413</sup>

333 Upon its applications dated 24 May 2010 and 21 December 2010, Eclipse was granted an exemption on 13 January 2011 under reg 5 in relation to the Abercrombie Road Site and the Wanneroo Road Site, which was of an unspecified duration, for 'greenwaste that is not disposed of to landfill but is collected and stored for recycling'.<sup>414</sup>

334 Upon its application dated 9 June 2011, Eclipse was granted exemptions on 5 September 2011 under reg 5 in relation to the Abercrombie Road Site and the Wanneroo Road Site, which were stated to apply from 1 July 2011 to 30 June 2012, for '[w]aste that is not disposed of to landfill but is collected and stored for reuse, reprocessing, recycling or use in energy recovery'.<sup>415</sup>

335 Upon its application dated 5 June 2012, Eclipse was granted an exemption on 30 July 2012 under reg 5 in relation to the Abercrombie Road Site and the Wanneroo Road Site, which was stated to apply from 1 July 2012 to 30 June 2013, for 'waste that is not disposed of to landfill but is collected and stored for reuse, reprocessing, recycling or use in energy recovery'.<sup>416</sup>

336 On 29 November 2012, Mr Delroy wrote to the Minister expressing concern in relation to one of the conditions attached to the exemption

<sup>411</sup> Exhibit A [130] - [131], attachments 97, 102, 104.

<sup>412</sup> Exhibit A [130] - [131], attachments 98, 110.

<sup>413</sup> Exhibit A [130] - [131], attachments 98, 103, 105; exhibit C, page 167.

<sup>414</sup> Exhibit A [130] - [131], attachments 99, 106.

<sup>415</sup> Exhibit A [130] - [131], attachments 100, 107, 111.

<sup>416</sup> Exhibit A [130] - [131], attachments 101, 108.

granted to Eclipse on 30 July 2012 insofar as it related to the Abercrombie Road Site.<sup>417</sup>

337 On 20 December 2012, in response to the concern raised by Mr Delroy, the CEO revoked the exemption granted on 30 July 2012 and granted Eclipse a new exemption, excluding the condition of concern.<sup>418</sup> This new exemption was stated to apply from 1 July 2012 to 30 June 2013 for 'waste that is not disposed of to landfill but is collected and stored for reuse, reprocessing, recycling or use in energy recovery'.

338 On 31 January 2013, Mr Sippe wrote to the CEO regarding his revocation of the exemption and issuing of the new exemption. The letter generally expressed concern that DER would or could seek payment of levy from Eclipse in respect of stockpiles of blended soils and mulches produced by Eclipse on the Abercrombie Road Site and stockpiles of materials used to make those products stored on the site.<sup>419</sup>

339 On 15 April 2013, the CEO wrote to Eclipse in response to Mr Sippe's letter of 31 January 2013 and advised that Eclipse could elect not to apply for exemptions.<sup>420</sup> The CEO's letter confirmed that, even in the absence of such an exemption, DER would not seek to charge Eclipse levy on waste accepted at its Abercrombie Road Site which was not disposed of to landfill but instead used to produce blended soils for sale. The letter indicated that this was based on DER's understanding that such an exemption was strictly unnecessary as the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) do not require a licensee to pay levy on any waste accepted at its site which is not disposed of to landfill.

## 2.24 Planning approvals for the Abercrombie Road Site

340 On 31 October 2001, Eclipse applied to the City of Kwinana (then the Town of Kwinana) for planning approval in respect of the Abercrombie Road Site (which then comprised lot 180 Abercrombie Road only) for a 'Resource Recovery Centre'.<sup>421</sup>

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<sup>417</sup> Exhibit A [132], attachment 114.

<sup>418</sup> Exhibit A [130] - [132], attachment 109.

<sup>419</sup> Exhibit A [132], attachment 116.

<sup>420</sup> Exhibit A [132], attachment 112.

<sup>421</sup> Exhibit A [28(d)(ii)], attachment 21, page 788.



341 Eclipse's application was accompanied by a cover letter which stated:

A copy of this letter and accompanying Management Plan has also been sent to [DER] along with the requisite application form to operate a Class 1 landfill.

... The Resource Recovery Centre we are proposing at Lot 180 Abercrombie Road is intended to focus on the waste stream emanating primarily from the Construction and Demolition sector.

... The enclosed Management Plan outlines in some detail the approach to be adopted in developing a Resource Recovery Centre where the emphasis is no longer solely on landfill but a range of integrated activities that include a Class 1 landfill.<sup>422</sup>

342 The management plan enclosed with Eclipse's application identified that Eclipse proposed to:

- (a) continue existing sand and limestone quarrying on the site;
- (b) mulch and compost greenwaste into soil amendment products;
- (c) provide a sorting facility for the bin industry to recover recyclables, re-useables and greenwaste and, once re-useable recyclables and greenwaste were removed, use the remaining Class 1 inert material as fill for the quarry rehabilitation process; and
- (d) rehabilitate the quarry by backfilling it with Class 1 materials that principally emanate from:
  - (i) the construction of new buildings, including the preparation of building sites where excess or unsuitable materials are removed off-site, and interim or post construction clean-ups of waste from the construction process;
  - (ii) the construction of new housing subdivisions and major road or freeway systems; and
  - (iii) the demolition of old buildings such as industrial office buildings and homes.<sup>423</sup>

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<sup>422</sup> Exhibit A, attachment 21, pages 785 - 786.

<sup>423</sup> Exhibit A [28(d)(ii)], attachment 21, pages 797 - 798.

343 Eclipse was granted planning approval for lot 180 in response to its application on 26 March 2002.<sup>424</sup>

344 This approval was granted subject to the following conditions:

33. The management plan being amended to include a rehabilitation and landscaping plan on a stage-by-stage basis, which provides for a stable landform and revegetation of the site using species indigenous to the locality to the satisfaction of the Manager of Planning/Building Services. The site rehabilitation plan shall include bench heights along with compaction details that should achieve sufficient and consistent compaction across the landfill site to safely support light steel structures in the future. A structural engineer must certify the required bench height, compaction details and the proposed levels.

34. The proponent implementing as part of the management plan, a compaction plan that will enable consistency of compaction and compaction levels referred to in Condition 33 to the satisfaction of the Manager Planning/Building Services.

...

38. Finished levels floor levels should maintain a level not less than 2.0 metres above the highest known ground water level.

...

55. Finished levels are to be as per the approval plan. A maximum 1:10 gradient must not be exceeded.<sup>425</sup>

345 The decision to give planning approval was made by the City council at its meeting on 13 March 2002.<sup>426</sup> The minutes of this meeting indicate that:

- (a) the City of Kwinana understood Eclipse's application for planning approval to relate to 'development of Landfill, Extractive Industry and Resource Recovery on PT Lot 180 Abercrombie Road';<sup>427</sup>
- (b) council considered whether the 'approval of the landfill could affect the quality of the environment on the lot, as operations could effectively create a potential contaminated site'; and whether the approval of the proposal might 'set an undesirable precedent for future applications for similar uses' in the various other quarry

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<sup>424</sup> Exhibit C, pages 310 - 316.

<sup>425</sup> Exhibit C, pages 312 - 313.

<sup>426</sup> Exhibit C, pages 287 - 309.

<sup>427</sup> Exhibit C, page 287.

sites within the City and that an impact of the proposal would be 'the diversion of recyclable building aggregate to landfill';<sup>428</sup>

- (c) there was consideration by the City as to whether the landfill component of the site would render it unsuitable for subsequent land uses and development that involved the building of structures. While there were no obvious immediate alternative development pressures for the land, council considered that any approval should seek to minimise the long-term foundation stability constraints that the proposed operation would create;<sup>429</sup> and
- (d) it was recommended to council (and ultimately accepted) that any approval granted to Eclipse for its proposed landfill be subject to a condition that Eclipse be required to landfill the site in such a manner as to achieve a relatively consistent level of compaction.<sup>430</sup>

346 On 23 December 2004, Eclipse applied to the City of Kwinana for planning approval in respect of lot 2 Postans Road for 'Extractive Industry and Resource Recovery'.<sup>431</sup>

347 Eclipse's application was accompanied by a cover letter which was headed 'Re (1) Extractive Industry and Inert Landfill Planning Application - Lot 2 Postans Road, Postans' and stated:

Reference is made to our recent discussion regarding our intention to shortly commence mining of the land owned by Eclipse Resources which is contiguous with the existing Abercrombie Road operation.

... The proposed operation will see no changes from the existing operations.

... A detailed management plan for the site's operation is attached.<sup>432</sup>

348 The management plan enclosed with Eclipse's application identified that Eclipse proposed to:

- (a) progressively excavate the limestone and sand from lot 2;
- (b) backfill the excavated area with inert/Class 1 materials;

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<sup>428</sup> Exhibit C, pages 291, 295.

<sup>429</sup> Exhibit C, page 293.

<sup>430</sup> Exhibit C, pages 294, 306.

<sup>431</sup> Exhibit A [28(d)(ii)], attachment 22, page 828.

<sup>432</sup> Exhibit A, attachment 22, page 825.

- (c) cover the filled areas with 2 m of structural fill (sand or limestone);
- (d) revegetate the site with local indigenous species as well as additional tuart plantings; and
- (e) extract materials suitable for reuse from the waste stream.<sup>433</sup>

349 Eclipse was granted planning approval for lot 2 on 28 April 2005.<sup>434</sup>  
This approval was granted subject to similar conditions to those imposed on the approval granted on 26 March 2002 in respect of lot 180.

350 The decision to give planning approval was made by the City council at its meeting on 23 March 2005.<sup>435</sup> The minutes of this meeting indicate that:

- (a) the City of Kwinana understood Eclipse's proposal to involve the mining of sand and limestone and the subsequent backfilling of the site with inert materials;<sup>436</sup> and
- (b) it was recommended to council (and ultimately accepted) that, given that the proposal represented an expansion and extension of Eclipse's existing operations, the development should be approved subject to conditions similar to those placed on lot 180.<sup>437</sup>

351 On 4 July 2007, Bayardo Pty Ltd (then the owner of lot 180) was granted a new planning approval for lot 180 as the previous approval had expired. This approval was granted on similar conditions to the previous approval.<sup>438</sup>

352 On 22 February 2010, Eclipse applied (on behalf of itself and Bayardo) for the coincidental renewal of planning approval for both lot 115 (formerly lot 180) and lot 2 for '[e]xtractive industries and inert geotechnically stable fill for future light industrial development, soil manufacture and amendment and green waste processing recycling and reuse'. Eclipse's application enclosed the earlier approvals. It stated that the site was being rehabilitated with inert material that is assessed for quality control and, so long as geotechnically suitable, used as fill.<sup>439</sup>

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<sup>433</sup> Exhibit A, attachment 22, pages 828L - 828O.

<sup>434</sup> Exhibit A [28(d)(ii)], attachment 20, pages 775 - 783.

<sup>435</sup> Exhibit C, pages 317 - 325.

<sup>436</sup> Exhibit C, page 317.

<sup>437</sup> Exhibit C, pages 317 - 318.

<sup>438</sup> Exhibit A [28(d)(ii)], attachment 20, pages 769 - 773.

<sup>439</sup> Exhibit A [28(d)(ii)], attachment 20.

353 Identical planning approvals for both lots were granted by the Town of Kwinana on 27 July 2010.<sup>440</sup> These approvals were granted subject to similar conditions to those imposed on all of the previous approvals.

354 The *Regionally Significant Basic Raw Materials* maps for the Swan Coastal Plain published by the Geological Survey of Western Australia (a division within the Department of Mines and Petroleum) identify the Abercrombie Road Site as within an area of 'Regionally Significant Basic Raw Materials - limestone'. Additionally, part of lot 115 and all of lot 2 are shown in the WAPC's current (2002) *Resource Protection Working Plans of Perth Metropolitan Region and Outer Areas* as being part of a 'Priority Resource Location (Limestone/limesand)'.<sup>441</sup>

355 When planning approval was initially granted in respect of lot 180 and lot 2, WAPC's *State Planning Policy No. 2.4 - Basic Raw Materials* (SPP 2.4):

- (a) recognised that a ready supply of basic raw materials close to established and developing parts of the metropolitan region is essential to keeping down the costs of land development and contributing to affordable housing;
- (b) was designed to facilitate the extraction of basic raw materials close to major markets in the metropolitan region and to avoid sensitive development close to basic raw material resources which could otherwise inhibit extraction of the resources;
- (c) was designed to recognise the importance of ensuring that the extraction of basic raw materials occurs with minimum detriment to the local amenity and environment and 'in a manner which allows for future use and development consistent with long-term planning intentions for the area';
- (d) provided that '[b]efore determining an application for an extractive industry operation the [WAPC] and/or local government should consider as appropriate ... the ability to rehabilitate the land to a form or for a use which is compatible with the long-term planning for the site and surrounding area'; and
- (e) provided that '[a]pplications for extractive industry operations are to be accompanied by a management plan and report which ... sets

<sup>440</sup> Exhibit A [28(d)(ii)], attachment 19.

<sup>441</sup> Exhibit 3, attachment NF2 [5.6].

out proposals for the progressive and ultimate rehabilitation of the site for its intended long-term use'.<sup>442</sup>

356 SPP 2.4 remains in force and its policy objectives are complemented by the provisions of a number of other WAPC policies and strategic plans, such as *State Planning Policy No. 2 - Environment and Natural Resources*; *State Planning Policy No. 6.1 - Leeuwin - Naturaliste Ridge*; *Basic Raw Materials - Demand and Supply Study for the Bunbury - Busselton Region* (2012); *Peel Region Scheme - Strategic Minerals and Basic Raw Materials Resource Policy* (2002); *Bunbury Region Scheme - Strategic Minerals and Basic Raw Materials Resource Policy* (2005); *Directions 2031 and Beyond - Metropolitan Planning Beyond the Horizon*; *Draft Perth and Peel @ 3.5 Million* (2015) and *Draft South Metropolitan Peel Sub-regional Planning Framework* (2015).<sup>443</sup>

357 When planning approval was initially granted in respect of lot 180 and lot 2, the City of Kwinana's *Extractive Industries Local Law* provided that a person seeking the issue of an extractive industries licence was required to submit the required form together with 3 copies of a 'rehabilitation and decommissioning programme' indicating:

- (a) the objectives of the programme, having due regard to the nature of the surrounding area and the proposed end-use of the excavation site;
- (b) whether restoration and reinstatement of the excavation site would be undertaken progressively or upon completion of excavation operations;
- (c) how any face would be made safe and batters sloped;
- (d) the method by which topsoil would be replaced and revegetated;
- (e) the number of types of trees and shrubs that would be planted and other landscaping features that would be developed;
- (f) how rehabilitated areas would be maintained; and
- (g) the programme for the removal of buildings, plant, waste and final site clean-up.<sup>444</sup>

<sup>442</sup> Exhibit A [35], attachment 51; exhibit 3, attachment NF2 [5.2] - [5.8].

<sup>443</sup> Exhibit 3, attachment NF2 [5.9] - [5.12].

<sup>444</sup> Exhibit A [128], attachment 95, pages 2763 - 2764.

358 Neither this local law nor its successor gazetted on 28 September 2011 specify the method or form that land rehabilitation following extraction of basic raw materials should take to achieve 'sequential land use'. They do not require that filling of the land take place or, more specifically, that filling of the land with waste be carried out.

359 When planning approval was initially granted in respect of lot 180 and lot 2, they were zoned 'Rural' in the Metropolitan Region Scheme (MRS) and 'Rural B' in the City of Kwinana's *Town Planning Scheme No. 2*.<sup>445</sup>

360 In 2000, the WAPC's *Fremantle-Rockingham Industrial Area Regional Strategy* showed the Abercrombie Road Site as remaining 'Rural'.<sup>446</sup>

361 In the City of Kwinana's draft *Local Planning Strategy* published in September 2003, the Abercrombie Road Site was classified for use in the short term for 'Medium Intensity Agricultural Pursuits' and in the long term for 'Light Industry/Transport Related Industry'. On 10 December 2014, the City council approved a revised draft *Local Planning Strategy* for public consultation. This revised strategy identifies the Abercrombie Road Site as 'Future Investigation (Industrial)'.<sup>447</sup>

362 Additionally, the Abercrombie Road Site appears to be within a 159 ha area in Postans designated for 'Potential long term non-heavy industrial sites (strategic landbank sites) (10 years +)' in the document *Economic and Employment Lands Strategy: non-heavy industrial, Perth metropolitan and Peel regions* published by the WAPC in April 2012.<sup>448</sup>

363 However, at present, the Abercrombie Road Site has yet to be re-zoned to 'Industry' under the MRS or the City of Kwinana's *Town Planning Scheme No. 2*. There is no guarantee as to if and when this re-zoning may occur. As indicated in the *Economic and Employment Lands Strategy* document, it may be in the longer term rather than the short term.<sup>449</sup>

## 2.25 Classification of Abercrombie Road Site

364 On 10 June 2010, DER received a report from Eclipse identifying the Abercrombie Road Site as a known contaminated site pursuant to the

<sup>445</sup> Exhibit A [13]; exhibit 3, attachment NF2 [4.1] - [4.2], [7.1] - [7.3].

<sup>446</sup> Exhibit 3, attachment NF2 [6.43].

<sup>447</sup> Exhibit 3, attachment NF2 [6.47].

<sup>448</sup> Exhibit A [15], attachment 3.

<sup>449</sup> Exhibit 3, attachment NF2 [6.49].

*Contaminated Sites Act* on the basis of 'asbestos fragments and sheeting being buried in accordance with [DER] Licence'.<sup>450</sup>

365 On 16 July 2010, a delegate of the CEO classified the Abercrombie Road Site as 'Possibly contaminated - investigation required' under the *Contaminated Sites Act* on the basis of its use as an asbestos landfill facility.<sup>451</sup>

366 As a result of this classification, DER lodged a memorial on the certificates of title for the Abercrombie Road Site pursuant to s 58(1) of the *Contaminated Sites Act*.<sup>452</sup>

## **2.26 Eclipse's surveys of the Sites for the return periods from 1 July 2008 to 31 December 2011**

367 On or about 11 July 2008, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, relating to its Abercrombie Road Site and Flynn Drive Site for the return period 1 April to 30 June 2008. These surveys served as 'baseline surveys' for the return periods after 1 July 2008.

368 On or about 7 April 2009, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 25,017 m<sup>3</sup> of fill was deposited at the Flynn Drive Site during the period 1 July 2008 to 30 September 2008;
- (b) 60,550 m<sup>3</sup> of fill was deposited at the Abercrombie Road Site during the period 1 July 2008 to 30 September 2008;
- (c) 22,251 m<sup>3</sup> of fill was deposited at the Flynn Drive Site during the period 1 October 2008 to 31 December 2008; and
- (d) 55,413 m<sup>3</sup> of fill was deposited at the Abercrombie Road Site during the period 1 October 2008 to 31 December 2008.<sup>453</sup>

369 On or about 28 July 2009, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

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<sup>450</sup> Exhibit 12 [36], attachment KJL1.

<sup>451</sup> Exhibit 12 [37] - [38], attachment KJL2.

<sup>452</sup> Exhibit 12 [39], attachment KJL3.

<sup>453</sup> Exhibit A [76], attachment 53.



- (a) 20,611 m<sup>3</sup> of fill was deposited at the Flynn Drive Site during the period 1 April 2009 to 30 June 2009;
- (b) 15,522 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 April 2009 to 30 June 2009; and
- (c) 4,473 m<sup>3</sup> of fill was deposited at the Wanneroo Road Site during the period 11 June 2009 to 30 June 2009.<sup>454</sup>

370 On the survey relating to the Abercrombie Road Site, the total of 15,522 m<sup>3</sup> was said in the survey to comprise the 'total fill' derived by adding 13,507 m<sup>3</sup> of 'fill' to 1,952 m<sup>3</sup> of 'stockpiles (fill)'.<sup>455</sup>

371 Eclipse's letter of 28 July 2009 enclosed a copy of the baseline survey for the Wanneroo Road Site.

372 That letter also informed the CEO that 6,615 m<sup>3</sup> of fill (in addition to the 15,522 m<sup>3</sup>) had been received and deposited and compacted within a designated part of the Abercrombie Road Site identified in the letter during the period 1 April 2009 to 16 April 2009.<sup>456</sup>

373 On or about 28 October 2009, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 7,362 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 July 2009 to 30 September 2009; and
- (b) 0 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 July 2009 to 30 September 2009.<sup>457</sup>

374 On or about 14 January 2010, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 28,945 m<sup>3</sup> of fill was deposited at the Flynn Drive Site during the period 1 January 2009 to 31 March 2009; and

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<sup>454</sup> Exhibit A [77], attachment 54.

<sup>455</sup> Exhibit A, attachment 54, page 2155.

<sup>456</sup> Exhibit A [78], attachment 54.

<sup>457</sup> Exhibit A [79], attachment 55.

- (b) 41,144 m<sup>3</sup> of fill was deposited at the Abercrombie Road Site during the period 1 January 2009 to 31 March 2009.<sup>458</sup>

375 On or about 27 January 2010, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 17,723 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 October 2009 to 31 December 2009; and
- (b) 1,608 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 October 2009 to 31 December 2009.<sup>459</sup>

376 On or about 28 April 2010, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 45,780 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 January 2010 to 31 March 2010; and
- (b) 17,350 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 January 2010 to 31 March 2010.<sup>460</sup>

377 On or about 28 July 2010, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 20,338 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 April 2010 to 30 June 2010; and
- (b) 3,663 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 April 2010 to 30 June 2010.<sup>461</sup>

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<sup>458</sup> Exhibit A [80], attachment 56.

<sup>459</sup> Exhibit A [81], attachment 58.

<sup>460</sup> Exhibit A [82], attachment 59.

<sup>461</sup> Exhibit A [83], attachment 60.

378 On or about 8 November 2010, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 22,881 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 July 2010 to 30 September 2010; and
- (b) 1,465 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant surveys during the period 1 July 2010 to 30 September 2010.<sup>462</sup>

379 One survey for the Wanneroo Road Site showed a net 1,465 m<sup>3</sup> of fill within the Category 63 Area. The other survey<sup>463</sup> also included figures relating to the entire premises. It stated that for the total area there was an identified total fill, from which the identified total cut was subtracted to produce a net fill figure of 32,908 m<sup>3</sup>. From that, the 1,465 m<sup>3</sup> for the Category 63 Area was deducted, as was the figure of 3,090 m<sup>3</sup> referable to stockpiles, to produce a total fill for the Civil Works Area of 28,353 m<sup>3</sup>.

380 On or about 28 January 2011, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 20,025 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 October 2010 to 31 December 2010; and
- (b) 3,563 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 October 2010 to 31 December 2010.<sup>464</sup>

381 On or about 28 April 2011, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 12,836 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 January 2011 to 4 April 2011; and

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<sup>462</sup> Exhibit A [84], attachment 61.

<sup>463</sup> Exhibit A, attachment 61, page 2178.

<sup>464</sup> Exhibit A [85], attachment 62.

- (b) 3,622 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 January 2011 to 31 March 2011.<sup>465</sup>

382 The survey relating to the Wanneroo Road Site indicated the existence and location, but not the volume, of a turf stockpile outside of the Category 63 Area.<sup>466</sup>

383 On or about 26 July 2011, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 23,017 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 5 April 2011 to 6 July 2011; and
- (b) 3,279 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 April 2011 to 30 June 2011.<sup>467</sup>

384 On or about 31 October 2011, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 29,404 m<sup>3</sup> of fill was deposited within designated parts of the Abercrombie Road Site identified in the relevant survey during the period 1 July 2011 to 30 September 2011; and
- (b) 27,877 m<sup>3</sup> of fill was deposited within a designated parts of the Wanneroo Road Site identified in the relevant survey during the period 1 July 2011 to 30 September 2011.<sup>468</sup>

385 One of the surveys relating to the Wanneroo Road Site set out figures for three parts of the site: the Category 63 Area, an area shaded blue on the survey, and an area shaded green. For 'Civil Works Area 1', shaded blue, the survey indicated that a stockpile shown on the survey was included in the total volume of material cut and filled in that area. The volume of the stockpile was not identified on the survey.<sup>469</sup>

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<sup>465</sup> Exhibit A [86], attachment 63.

<sup>466</sup> Exhibit A, attachment 63, page 2184.

<sup>467</sup> Exhibit A [87], attachment 64.

<sup>468</sup> Exhibit A [88], attachment 65.

<sup>469</sup> Exhibit A, attachment 65, page 2192.

386 On or about 30 January 2012, Eclipse provided to the CEO a letter enclosing volumetric surveys, prepared by McMullen Nolan, which included the surveyor's calculation that:

- (a) 20,362 m<sup>3</sup> of fill was deposited within a designated part of the Abercrombie Road Site identified in the relevant survey during the period 1 October 2011 to 31 December 2011; and
- (b) 1,661 m<sup>3</sup> of fill was deposited within a designated part of the Wanneroo Road Site identified in the relevant survey during the period 1 October 2011 to 31 December 2011.<sup>470</sup>

387 The survey relating to the Wanneroo Road Site indicated the location and volume of a grass stockpile outside of the Category 63 Area.<sup>471</sup>

388 Each of the letters provided to the CEO referred to in [368] - [386] above also enclosed a compact disc containing the raw survey data used to compile the volumetric surveys in an electronic format.<sup>472</sup>

389 Each of the fill volumes reported in the surveys submitted by Eclipse to the CEO was a net volume figure.<sup>473</sup> The figure was calculated by netting off the amount of fill and the amount of cut.

## 2.27 Estimations made by the CEO

### 2.27.1 General process of making estimations

390 At all times during the Relevant Period, officers employed within DER assisted the CEO in the performance of his specific duties and powers under the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) and the *Waste Avoidance and Resource Recovery Regulations 2008* (WA), including by keeping records and providing him with advice.<sup>474</sup>

391 The volumetric surveys submitted by Eclipse to DER for all return periods from 1 April 2009 to 31 December 2011 for the Abercrombie Road Site and all return periods from 1 July 2009 to 31 December 2011 for the Wanneroo Road Site (except for the period from 1 July to 30 September 2011) only reported the surveyor's calculation of the volume of material deposited as fill in the Category 63 Area, even though

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<sup>470</sup> Exhibit A [89], attachment 66.

<sup>471</sup> Exhibit A, attachment 66, page 2196.

<sup>472</sup> Exhibit B [5].

<sup>473</sup> ts 389 and see exhibit A, attachments 53 - 66.

<sup>474</sup> Exhibit 1A [3].

they contained raw survey data for other areas of the void.<sup>475</sup> On the survey diagrams, that data is shown by a series of small numbers which represent levels measured by the surveyor.<sup>476</sup>

392 The volumetric survey submitted by Eclipse to DER for the Abercrombie Road Site in respect of the return period 1 July to 30 September 2011 reported the surveyor's calculation of the volume of material deposited as fill in the Category 63 Area and, on a second survey diagram, separately recorded the volume of material deposited in an area referred to as 'the Civil/Blue boundary'. The volumetric survey submitted by Eclipse to DER for the Wanneroo Road Site in respect of the return period 1 July to 30 September 2011 reported the surveyor's calculation of the volume of material deposited as fill in the Category 63 Area and, on a second survey diagram, separately recorded the volume of material deposited in an area referred to as 'Civil Works Area 1' and an area referred to as 'Civil Works Area 2'.<sup>477</sup>

393 Eclipse advised DER on 20 April 2009 and 2 July 2009 that it was depositing, and would continue to deposit, material as fill in areas of the Abercrombie Road Site and the Wanneroo Road Site outside of the Category 63 Area.<sup>478</sup>

394 DER Inspectors who visited the Abercrombie Road Site and the Wanneroo Road Site during the Relevant Period also observed that Eclipse was depositing and compacting materials as part of its filling operations in areas outside of the Category 63 Area.<sup>479</sup>

395 The DER Inspectors who visited the Abercrombie Road Site during the period 1 July 2008 to 31 December 2011 generally observed that Eclipse was quarrying materials along the eastern side of the site; using the western side of the site for soil remediation, soil blending and mulching; and depositing and compacting materials in the central part of the site.<sup>480</sup>

<sup>475</sup> Exhibit 1A [23]; exhibit 1B [15]; exhibit A [74] (as clarified in the document 'Amendment to [74] and [75] of the Statement of Agreed Facts dated 25 August 2015 (Exhibit A)' dated 17 December 2015), [77] - [79], [81] - [89], attachments 54 - 55, 58 - 66; exhibit B [5]; ts 391, 424 - 427, 429.

<sup>476</sup> ts 388 - 393.

<sup>477</sup> Exhibit A [74] (as clarified in the document 'Amendment to [74] and [75] of the Statement of Agreed Facts dated 25 August 2015 (Exhibit A)' dated 17 December 2015), [88], attachment 65.

<sup>478</sup> Exhibit 10 [6], attachment RKR1; exhibit 9 [5], attachment LIF2; exhibit A [74].

<sup>479</sup> See [211], [212] above.

<sup>480</sup> Exhibit 10 [7] - [10], [12] - [19], [20], [22] - [34], [37] - [41], [43] - [44], [48], attachments RKR4, RKR6 - RKR16, RKR19 - RKR22, RKR30; exhibit 14 [95] - [102], [108] - [123], [126] - [128], attachments JD47 - JD63, JD67 - JD69, JD71. See also exhibit A, attachments 43, page 1244, 44, page 1387.

396 The DER Inspectors who visited the Wanneroo Road Site during the period 1 July 2008 to 31 December 2011 generally observed that Eclipse was filling in two different parts of the site, the Category 63 Area in the southern part of the void and the Civil Works Area in the north and north-eastern parts of the void, and that Eclipse was using the centre of the site for mulching.<sup>481</sup>

397 In February 2010, with the CEO's authorisation, officers of DER engaged Whelans to carry out an audit of the survey information DER had received from Eclipse for its Sites for the return periods from 1 July 2008 to 31 December 2009 and estimate, based on that information, the volume of waste disposed of to landfill within the whole of the Sites.<sup>482</sup>

398 In February 2011, with the CEO's authorisation, officers of DER engaged Whelans to carry out an audit of the survey information DER had received from Eclipse for the Abercrombie Road Site and the Wanneroo Road Site for the return periods from 1 January to 31 December 2010 and estimate, based on that information, the volume of waste disposed of to landfill within the whole of those sites.<sup>483</sup>

399 In March 2012, with the CEO's authorisation, officers of DER engaged Whelans to carry out an audit of the survey information DER had received from Eclipse for the Abercrombie Road Site and the Wanneroo Road Site for the return periods from 1 January to 31 December 2011 and estimate, based on that information, the volume of waste disposed of to landfill within the whole of those sites.<sup>484</sup>

400 DER received reports from David Purnell of Whelans describing the results of Whelans' audits on 9 June 2010, 27 July 2011 and 9 November 2012.<sup>485</sup>

401 Upon receipt of each of the Whelans reports by DER, a copy was provided to the CEO (who at all relevant times was Mr Kieran McNamara, except between 24 May and 2 July 2010 when he was on leave and Mr Robert Atkins acted in the position).<sup>486</sup>

<sup>481</sup> Exhibit 14 [4] - [7], [11] - [18], [20] - [28], [30] - [38], [41] - [46], [48] - [52], [55] - [60], [62] - [67], attachments JD1, JD4 - JD7, JD10 - JD17, JD19 - JD26, JD26C - JD26F, JD27, JD30 - JD32, JD32C - JD32E, JD33, JD36; exhibit 9 [8] - [18], [20] - [42], attachments LIF7, LIF9 - LIF35.

<sup>482</sup> Exhibit 1A [24].

<sup>483</sup> Exhibit 1A [39].

<sup>484</sup> Exhibit 1B [16].

<sup>485</sup> Exhibit 1A [26], [41], attachments KJM13 and KJM18; exhibit 1B [18], attachment KJMS6.

<sup>486</sup> Exhibit 1A [27] - [29]; [33], [42]; exhibit 1B [19].

**2.27.2 Estimations for the return periods 1 July 2008 to 30 December 2009**

402 On or about 18 June 2010, the Whelans report dated June 2010 was provided to Mr Atkins, then acting as CEO, together with a memorandum of advice dated 15 June 2010 from the Acting Director of the Strategic Policy and Programs Division of DER, Mr Stuart Cowie.<sup>487</sup>

403 The Whelans report was tendered on the basis that it was evidence of what was received by DER, including by Mr McNamara, but was not evidence of the truth of its contents.<sup>488</sup>

404 The Whelans report provided to Mr Atkins informed him that:

- (a) Whelans had audited the electronic volumetric survey data provided to it on compact discs by DER.<sup>489</sup> The survey data on the compact discs identified itself as having been collected by McMullen Nolan for Eclipse;<sup>490</sup>
- (b) Mr Purnell held a Masters of Science in Survey and Mapping and was a registered member of the Surveying and Spatial Sciences Institute;<sup>491</sup>
- (c) Whelans had imported the electronic volumetric survey data provided to it for each site into an industry standard software product and then used that software to calculate the volume of material placed within the areas of each of the sites within the surveyed boundary strings as they were delineated in Eclipse's survey data;<sup>492</sup>
- (d) the calculations were made by comparing the survey data for each site for each period with the survey data for that site during the preceding period. Such a comparison enabled areas of fill and areas of cut to be detected;<sup>493</sup>

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<sup>487</sup> Exhibit 1A [28] - [29].

<sup>488</sup> ts 454.

<sup>489</sup> Exhibit 1A, attachment KJM13, page 114.

<sup>490</sup> Exhibit 1A, attachment KJM13, pages 114, 126, 128, 130, 132, 134, 136, 139, 141, 143, 145, 148, 150, 152.

<sup>491</sup> Exhibit 1A, attachment KJM13, page 114.

<sup>492</sup> Exhibit 1A, attachment KJM13, pages 115 - 116.

<sup>493</sup> Exhibit 1A, attachment KJM13, pages 115 - 117.



- (e) in each of the Whelans survey diagrams attached to its report, areas of fill were shown by blue contour lines, while areas of cut were shown by pink contour lines;<sup>494</sup>
- (f) '[t]he difference between the cut and fill is referred to as the Net Volume. The Net figure is generally used when dealing with one type of material being placed. Typically there should be no cut, however, where material is stockpiled in one date and then subsequently moved a cut figure may occur';<sup>495</sup>
- (g) the 'W-Total' figure reported for each period for each site was Whelans' calculation of the total volume in the whole of the worked landfill area.<sup>496</sup> The areas of the void on each site the subject of Whelans' calculations were depicted on the plans attached to the report.<sup>497</sup>

405 Mr Cowie's memorandum advised Mr Atkins:

- (a) of the basis on which Mr Cowie considered that Eclipse had failed to comply with its obligations under reg 10 of the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA);
- (b) that DER had engaged David Purnell of Whelans in February 2010 to audit the survey information submitted to DER by Eclipse and provide an independent calculation of the volume of waste disposed of to landfill at each of its Sites;
- (c) that for the return periods 1 July to 30 September 2008, 1 October to 31 December 2008 and 1 January to 31 March 2009, the volumes of waste calculated by Whelans for each of the Sites accorded with the volumes reported in Eclipse's surveys within a reasonable tolerance;
- (d) that for those return periods, the CEO should make estimations under reg 11(2) of the *Waste Avoidance and Resource Recovery Levy Regulations 2008* (WA) for each of the Sites based on the volumes reported in Eclipse's surveys;

<sup>494</sup> Exhibit 1A, attachment KJM13, pages 127, 129, 131, 133, 135, 137, 140, 142, 144, 146, 149, 151, 153. This is noted in the small text at the bottom of each diagram, although on some of the diagrams in the copies of the report attached to exhibits 1A and A the text is difficult to read.

<sup>495</sup> Exhibit 1A, attachment KJM13, pages 116 - 117.

<sup>496</sup> Exhibit 1A, attachment KJM13, pages 117, 121, 123.

<sup>497</sup> Exhibit 1A, attachment KJM13, pages 116, 117, 123, 127, 129, 131, 149, 151; exhibit A [75] (as clarified in the document 'Amendment to [74] and [75] of the Statement of Agreed Facts dated 25 August 2015 (Exhibit A)' dated 17 December 2015).

- (e) that, for the remaining return periods in 2009, the volumes of waste calculated by Whelans for the Sites were significantly different to those reported in Eclipse's surveys;
- (f) for those return periods, the CEO should send Eclipse draft notices of estimation based on Whelans' calculations (as set out in the net 'W-Total' figures in its report) and invite Eclipse to comment on the appropriateness of Whelans' figures; and
- (g) that, subject to hearing from Eclipse as to the appropriateness of Whelans' figures, the CEO should make estimations of the volume of waste disposed of to landfill for the remaining return periods in 2009 based on Whelans' figures.<sup>498</sup>

406        Mr Atkins endorsed the approach recommended in the memorandum.<sup>499</sup>

407        On 18 June 2010, Mr Atkins, in his capacity as CEO, made estimations, based on the relevant surveys provided to him by Eclipse, that:

- (a) 25,017 m<sup>3</sup> of waste was disposed of to landfill at the Flynn Drive Site during the return period 1 July 2008 to 30 September 2008;
- (b) 60,550 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 July 2008 to 30 September 2008;
- (c) 22,251 m<sup>3</sup> of waste was disposed of to landfill at the Flynn Drive Site during the return period 1 October 2008 to 31 December 2008;
- (d) 55,413 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 October 2008 to 31 December 2008;
- (e) 28,945 m<sup>3</sup> of waste was disposed of to landfill at the Flynn Drive Site during the return period 1 January 2009 to 31 March 2009; and

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<sup>498</sup> Exhibit 1A, attachment KJM14.

<sup>499</sup> Exhibit 1A [29].

- (f) 41,144 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 January 2009 to 31 March 2009.<sup>500</sup>

408 On 18 June 2010, Mr Atkins sent Eclipse a letter enclosing finalised notices of those estimations.<sup>501</sup> The letter also enclosed copies of draft notices of estimation for Eclipse's Sites for the remaining return periods in 2009 and the Whelans report dated 9 June 2010 and invited Eclipse to comment on the draft notices within 14 days.<sup>502</sup>

409 Eclipse did not provide DER with any comments on the draft notices sent to it on 18 June 2010.<sup>503</sup>

410 After returning from leave and reviewing the Whelans report dated 9 June 2010, the memorandum from Mr Cowie dated 15 June 2010 and the letter sent to Eclipse on 18 June 2010, Mr McNamara decided that the approach recommended in the memorandum was appropriate.<sup>504</sup> Following that approach, Mr McNamara made final estimations in accordance with the draft notices of estimation sent to Eclipse on 18 June 2010.<sup>505</sup>

411 These estimations were made on 17 August 2010, and were as follows:

- (a) 31,735.40 m<sup>3</sup> of waste was disposed of to landfill at the Flynn Drive Site during the return period 1 April 2009 to 30 June 2009.
- (b) 48,474.66 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 April 2009 to 30 June 2009.
- (c) 6,011.05 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 April 2009 to 30 June 2009.
- (d) 42,996.13 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 July 2009 to 30 September 2009.

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<sup>500</sup> Exhibit A [90].

<sup>501</sup> Exhibit A [92], attachment 67.

<sup>502</sup> Exhibit 1A [30]; exhibit A [92], attachment 67.

<sup>503</sup> Exhibit 1A [32].

<sup>504</sup> Exhibit 1A [33].

<sup>505</sup> Exhibit 1A [36].

- (e) 28,010.87 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 July 2009 to 30 September 2009.
- (f) 64,527.50 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 October 2009 to 31 December 2009.
- (g) 40,997.40 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 October 2009 to 31 December 2009.<sup>506</sup>

412 Mr McNamara sent a letter enclosing notices of these estimations to Eclipse on 17 August 2010.<sup>507</sup>

### ***2.27.3 Estimations for the return periods 1 January to 31 December 2010***

413 The Whelans report dated 27 July 2011 was provided to Mr McNamara on 29 July 2011.<sup>508</sup> That report informed Mr McNamara of the same matters as set out in [404] above.<sup>509</sup> After considering that report, Mr McNamara decided to adopt the same approach to estimating the volume of waste disposed of to landfill at Eclipse's Sites during the return periods covered by it as had been taken in relation to the estimations for the earlier return periods.

414 He decided that where Whelans' calculation of the volume of waste disposed of to landfill during a period, as set out in the 'W-Total' figures in its report, accorded with the volume reported in Eclipse's survey for that period within a reasonable tolerance (not more than 5% different), he would adopt the volume in Eclipse's survey for the purpose of his estimation.<sup>510</sup> He further decided that where Whelans' calculation of the volume of waste disposed of to landfill during a quarter, as set out in the 'W-Total' figures in its report, was significantly different from the volume reported by Eclipse, he would adopt Whelans' calculation, subject to Eclipse providing him with any information that indicated that the calculation should not be adopted.<sup>511</sup>

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<sup>506</sup> Exhibit A [91].

<sup>507</sup> Exhibit A [92], attachment 68.

<sup>508</sup> Exhibit 1A [42].

<sup>509</sup> Exhibit 1A, attachment KJM18. The report informed him that the areas of the void on each site the subject of Whelans' calculations were depicted on the plans attached to the report: exhibit 1A, attachment KJM18, pages 268, 269, 272, 276, 278, 280, 282, 285, 287, 289, 291.

<sup>510</sup> Exhibit 1A [42] - [43]; exhibit 1B [7] - [8].

<sup>511</sup> Exhibit 1A [44].

415        On 29 July 2011, Mr McNamara made an estimation that 45,780 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 January 2010 to 31 March 2010.<sup>512</sup> This estimation was made on the basis of the volume reported in Eclipse's survey.<sup>513</sup>

416        On 29 July 2011, Mr McNamara sent Eclipse a letter enclosing a finalised notice of this estimation.<sup>514</sup> The letter also enclosed copies of draft notices of estimation for the Abercrombie Road Site and the Wanneroo Road Site for the remaining return periods from 1 January to 31 December 2010 and the Whelans report dated 27 July 2011 and invited Eclipse to comment on the draft notices within seven days.<sup>515</sup>

417        Eclipse did not provide DER with any comments on the draft notices sent to it on 29 July 2011.<sup>516</sup>

418        On 15 August 2011, Mr McNamara made the following estimations in accordance with the draft notices that he had sent to Eclipse:

- (a)      14,186 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 January 2010 to 31 March 2010.
- (b)      143,874 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 April 2010 to 30 June 2010.
- (c)      2,400 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 April 2010 to 30 June 2010.
- (d)      89,265 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 July 2010 to 30 September 2010.
- (e)      76,853 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 July 2010 to 30 September 2010.
- (f)      70,336 m<sup>3</sup> of waste was disposed of to landfill at the Abercrombie Road Site during the return period 1 October 2010 to 31 December 2010.

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<sup>512</sup> Exhibit A [94].

<sup>513</sup> Exhibit 1A [45]; exhibit A [94], [96], attachment 70.

<sup>514</sup> Exhibit A [96], attachment 70.

<sup>515</sup> Exhibit 1A [45]; exhibit A [96], attachment 70.

<sup>516</sup> Exhibit 1A [46].

- (g) 9,665 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 October 2010 to 31 December 2010.<sup>517</sup>

419 On 15 August 2011, Mr McNamara sent a letter to Eclipse enclosing notices of his estimations.<sup>518</sup>

***2.27.4 Estimations for the return periods 1 January to 31 December 2011***

420 On or about 29 November 2012, Mr McNamara was provided with the Whelans Report dated 9 November 2012 together with a memorandum of advice from the (then) Acting Director of the Strategic Policy and Programs Division of DER, Ms Sarah McEvoy dated 27 November 2012.<sup>519</sup>

421 The Whelans report generally informed Mr McNamara of the same matters as set out in [404] above.<sup>520</sup> The memorandum from Ms McEvoy advised Mr McNamara:

- (a) that Eclipse had submitted volumetric surveys for all return periods in 2011;
- (b) as in previous years, those surveys had only reported the volume of material deposited as fill within a designated part of each site;
- (c) the information available to DER indicated that Eclipse continued to dispose of waste outside of those designated areas;
- (d) that, as for previous years, DER had engaged Whelans to audit the survey information submitted to DER by Eclipse and provide an independent calculation of the volume of waste disposed of to landfill at the Abercrombie Road Site and the Wanneroo Road Site during each return period in 2011;
- (e) that for the return period 1 July to 30 September 2011, the volume of waste calculated by Whelans for the Wanneroo Road Site accorded with the volume reported in Eclipse's survey within a reasonable tolerance;

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<sup>517</sup> Exhibit A [95].

<sup>518</sup> Exhibit A [96], attachment 71.

<sup>519</sup> Exhibit 1B [19], attachment KJMS7.

<sup>520</sup> Exhibit 1B, attachment KJMS6. The report informed him that the areas of the void on each site the subject of Whelans' calculations were depicted on the plans attached to the report: exhibit 1B, attachment KJMS6, pages 31, 33, 36, 40, 42, 44, 46, 49, 51, 53, 55. Minor differences include that the electronic survey data supplied to Whelans was supplied to Whelans on a USB thumb drive as opposed to compact discs.

- (f) that for that return period, the CEO should make estimations under reg 11(2) based on the volume reported in Eclipse's survey;
- (g) that, for the remaining return periods in 2011, the volumes of waste calculated by Whelans for each site were significantly different to those reported in Eclipse's surveys;
- (h) that for those return periods, the CEO should send Eclipse draft notices of estimation based on Whelans' calculations (as set out in the net 'W-Total' figures in its report) and invite Eclipse to comment on the appropriateness of Whelans' figures; and
- (i) that, subject to hearing from Eclipse as to the appropriateness of Whelans' figures, the CEO should make estimations for the remaining return periods in 2011 based on Whelans' figures.<sup>521</sup>

422       After considering the Whelans' report dated 9 November 2012 and Ms McEvoy's memorandum dated 27 November 2012, Mr McNamara decided to adopt the approach recommended in the memorandum, which was the same as the approach taken in respect of previous estimations.<sup>522</sup>

423       On 30 November 2012, Mr McNamara made an estimation that 27,877 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 July to 30 September 2011.<sup>523</sup> This estimation was made on the basis of the volume reported in Eclipse's survey.<sup>524</sup>

424       As I have said, that survey stated that the grass stockpile in 'Civil Works Area 1', the volume of which was not identified, was included in the total volume of material filled in the Civil Works Area.<sup>525</sup>

425       On 30 November 2012, Mr McNamara sent Eclipse a letter enclosing a finalised notice of this estimation.<sup>526</sup> The letter also enclosed copies of draft notices of estimation for the Abercrombie Road Site and the Wanneroo Road Site for the remaining return periods during 2011 and the Whelans report dated 9 November 2012 and invited Eclipse to comment on the draft notices within seven days.<sup>527</sup>

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<sup>521</sup> Exhibit 1B, attachment KJMS7.

<sup>522</sup> Exhibit 1B [19] - [22].

<sup>523</sup> Exhibit A [98].

<sup>524</sup> Exhibit A [88], attachment 65.

<sup>525</sup> Exhibit A, attachment 65, page 2192.

<sup>526</sup> Exhibit 1B [23]; exhibit A [100], attachment 73.

<sup>527</sup> Exhibit 1B [23]; exhibit A [100], attachment 73.

426 DER received a letter from Eclipse's solicitor on 10 December 2012  
which advised that Eclipse 'does not accept the accuracy of the estimated  
volumes in the draft Notices. It appears, inter alia, that stockpiles of  
materials on the sites have been included'.<sup>528</sup>

427 On 20 December 2012, Mr McNamara wrote to Eclipse's solicitor  
requesting that he provide further information about the nature, location  
and volume of the stockpiles within 28 days. Mr McNamara advised that  
without such further information he was unable to revise the estimated  
volumes set out in the draft notices.<sup>529</sup>

428 Eclipse did not provide DER with any further information in respect  
of the draft notices sent to it on 30 November 2012.<sup>530</sup>

429 On 30 January 2013, Mr McNamara made the following estimations  
in accordance with the draft notices that he had sent to Eclipse:

- (a) 70,379.20 m<sup>3</sup> of waste was disposed of to landfill at the  
Abercrombie Road Site during the return period 1 January 2011 to  
31 March 2011.
- (b) 14,150.10 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo  
Road Site during the return period 1 January 2011 to 31 March  
2011.
- (c) 51,551.30 m<sup>3</sup> of waste was disposed of to landfill at the  
Abercrombie Road Site during the return period 1 April 2011 to  
30 June 2011.
- (d) 15,581.50 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo  
Road Site during the return period 1 April 2011 to 30 June 2011.
- (e) 32,156.5 m<sup>3</sup> of waste was disposed of to landfill at the  
Abercrombie Road Site during the return period 1 July 2011 to  
30 September 2011.
- (f) 64,073.60 m<sup>3</sup> of waste was disposed of to landfill at the  
Abercrombie Road Site during the return period 1 October 2011 to  
31 December 2011.

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<sup>528</sup> Exhibit 1B [24], attachment KJMS9.

<sup>529</sup> Exhibit 1B [25], attachment KJMS10.

<sup>530</sup> Exhibit 1B [26].



- (g) 29,161.90 m<sup>3</sup> of waste was disposed of to landfill at the Wanneroo Road Site during the return period 1 October 2011 to 31 December 2011.<sup>531</sup>

430 On 30 January 2013, Mr McNamara sent a letter to Eclipse enclosing notices of his estimations.<sup>532</sup>

### **2.27.5 Costs of making estimations**

431 The CEO incurred costs of \$7,727.50 for the purpose of making the estimations referred to at [407] and [411] above.<sup>533</sup>

432 The CEO incurred costs of \$5,225 for the purpose of making the estimations referred to at [415] and [418] above.<sup>534</sup>

433 The CEO incurred costs of \$4,950 for the purpose of making the estimations referred to at [423] and [429] above.<sup>535</sup>

### **2.28 Eclipse's refusal to pay levy**

434 Eclipse has not lodged returns for the Flynn Drive Site for the return periods between 1 July 2008 and 30 June 2009.<sup>536</sup>

435 Eclipse has not lodged returns for the Abercrombie Road Site for the return periods between 1 July 2008 and 30 September 2014.<sup>537</sup>

436 Eclipse has not lodged returns for the Wanneroo Road Site for the return periods between 1 April 2009 and 30 September 2014.<sup>538</sup>

437 Eclipse has not paid levy in respect of all levy return periods since 1 July 2008.<sup>539</sup>

### **2.29 Eclipse's financial assurance**

438 By letter dated 25 June 1998 and facsimile dated 27 July 1998, an officer of DER wrote to Eclipse advising that it was required in

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<sup>531</sup> Exhibit A [99].

<sup>532</sup> Exhibit A [100], attachment 74.

<sup>533</sup> Exhibit A [93], attachment 69.

<sup>534</sup> Exhibit A [97], attachment 72.

<sup>535</sup> Exhibit A [101], attachment 75.

<sup>536</sup> Exhibit A [103].

<sup>537</sup> Exhibit A [104].

<sup>538</sup> Exhibit A [105].

<sup>539</sup> Exhibit A [106].

accordance with reg 28 of the EP Regulations to provide the CEO with a financial assurance of \$97,078.<sup>540</sup>

439 On 6 August 1998, Eclipse provided DER with a financial assurance in the form of a bank guarantee from the National Australia Bank (NAB) for the amount of \$100,000 dated 28 July 1998.<sup>541</sup>

440 The bank guarantee was current on 1 July 2008, which was the date on which the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) came into effect.<sup>542</sup>

441 On 19 July 2010, the CEO wrote to NAB calling on the bank guarantee and on 21 July 2010 NAB paid out the bank guarantee of \$100,000 to DER.<sup>543</sup>

### 2.30 Environmental risks associated with inert landfills

442 While small quantities of non-inert waste, such as paper, timber and metals, may be buried alongside inert waste in inert landfills without causing harm to the environment, there is a risk of environmental harm if 'too much' non-inert material is accepted for burial.<sup>544</sup> As inert landfills are not required to be lined, protection of the quality of the land and the groundwater quality is primarily achieved by controlling the types of waste placed in inert landfills and ensuring that they are the types of waste permitted for disposal in inert landfills in accordance with the Waste Definitions.<sup>545</sup> The burial of non-inert material, such as putrescible and hazardous wastes, in an un-lined void in the ground creates a risk of leachate which may adversely affect soil and ground and surface water that it comes into contact with.<sup>546</sup> The burial of such non-inert material in a void also creates a risk of 'landfill gas' which, in the absence of a landfill gas management system, creates a risk of fire and explosion.<sup>547</sup>

443 That brings me to the legislative regime under which the waste levy is imposed.

<sup>540</sup> Exhibit A [107], attachments 77 - 78.

<sup>541</sup> Exhibit A [108], attachment 79.

<sup>542</sup> Exhibit A [109].

<sup>543</sup> Exhibit A [110] - [111], attachment 80.

<sup>544</sup> Exhibit 11 [28].

<sup>545</sup> Exhibit 11 [27].

<sup>546</sup> Exhibit 11 [27].

<sup>547</sup> Exhibit 11 [26].

### **3. The legislative regime**

444 The regime imposing the waste levy arises from an interlocking  
scheme of provisions contained in a number of Acts and regulations.

445 The levy is imposed under the *Waste Avoidance and Resource  
Recovery Levy Regulations 2008* (WA) (Levy Regulations).

446 The Levy Regulations are made under the *Waste Avoidance and  
Resource Recovery Act 2007* (WA) (WARR Act) and under the *Waste  
Avoidance and Resource Recovery Levy Act 2007* (WA) (Levy Act).

#### **3.1 The Levy Act**

447 Section 4 of the Levy Act provides that the Governor may on the  
recommendation of the Minister make regulations under the WARR Act  
prescribing an amount by way of levy that is to be payable in respect of  
waste received at disposal premises.

448 From 1 July 2008 until 8 December 2009, s 4 was in the same terms  
except that it was on the recommendation of the Waste Authority, rather  
than the Minister, that regulations could be made.

449 Thus, by s 4, the power to make regulations is in respect of 'waste'  
'received at' 'disposal premises'.

450 By s 3 of the Levy Act, '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.

451 The licence referred to in s 3 of the Levy Act is a 'licence'  
contemplated by s 56 of the *Environmental Protection Act 1986* (WA)  
(EP Act), to which I will come.

452 Section 5 imposes the levy through regulations. It provides as  
follows:

If an amount by way of levy is prescribed in respect of waste received at  
disposal premises, that levy is imposed in respect of waste received at the  
disposal premises.

453 Section 6 identifies the person who is liable to pay the levy imposed:

The holder of a licence in respect of disposal premises, or in the case of disposal premises in respect of which a licence is not in force, an occupier required under the EP Act to hold such licence in respect of the premises, is liable to pay the amount of any levy imposed in respect of waste received at the disposal premises.

### 3.2 The WARR Act

454 The long title to the WARR Act is that it is an Act to provide, among other things, for waste avoidance and resource recovery, and for levies on waste.

455 Broadly, the WARR Act, and the *Waste Avoidance and Resource Recovery Regulations 2008* (WA) made under it (WARR Regulations), provide for when and in what manner the levy imposed under the Levy Act is due and payable.<sup>548</sup> Section 76 provides for a penalty of 20% per annum on levy remaining unpaid.

456 Section 5(1) of the WARR Act sets out the primary objects of that Act. It provides as follows:

- (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.

457 Section 5(2) states that the principles set out in s 4A of the EP Act apply in relation to the objects of the WARR Act. Relevantly, s 4A of the EP Act includes principle 4, relating to improved valuation, pricing and

<sup>548</sup> See pt 7 of the WARR Act, especially s 73.

incentive mechanisms, and principle 5, the principle of waste minimisation. Principle 4 is in the following terms:

*Principles relating to improved valuation, pricing and incentive mechanisms*

- (1) Environmental factors should be included in the valuation of assets and services.
- (2) The polluter pays principle - those who generate pollution and waste should bear the cost of containment, avoidance or abatement.
- (3) The users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.
- (4) Environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

458 Principle 5 is that 'all reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment'.

459 Section 3 of the WARR Act provides that 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.

460 There is a provision in identical terms in s 3 of the EP Act.

461 'The environment' is not defined in the WARR Act.

462 It is common ground that in all relevant legislative contexts the word 'waste' has its natural and ordinary meaning as extended by the inclusive definition in s 3.

463 Section 3(2) of the WARR Act provides that if a term has a meaning in the EP Act, it has the same meaning in the WARR Act unless the contrary intention appears in the WARR Act.

### 3.3 The Levy Regulations

464 The Levy Regulations prescribe an amount that is to be paid in respect of waste received at certain types of disposal premises, namely 'landfill premises'. The regulations are noted as having been made under both the WARR Act and the Levy Act.

465 Regulation 4 delineates the waste to which the Levy Regulations apply. Subject to any exemption granted on application under reg 5, the Levy Regulations apply to, among other things, (a) 'all waste received at landfill premises in the metropolitan region on or after 1 July 2008; and (b) all waste collected within the metropolitan region, irrespective of where it is collected, and received at landfill premises outside the metropolitan region on or after 1 July 2008'.

466 Landfill premises is defined in reg 3 to mean:

- (a) a licensed landfill; or
- (b) premises that would, if the occupier of the premises held a licence in respect of the premises as required under the EP Act, be a licensed landfill.

467 'Licensed landfill' is defined to mean premises specified in category 63, 64 or 65 of sch 1 to the *Environmental Protection Regulations 1987* (WA) (EP Regulations) in respect of which a licence is held. 'Licence' has the same meaning in the Levy Regulations as it has in the EP Act, namely 'a licence granted under div 3 of pt V of the EP Act'.<sup>549</sup>

468 Regulation 3(2) provides as follows:

A reference in these regulations to a category followed by a designation is a reference to the category so designated in the first column of the *Environmental Protection Regulations 1987* Schedule 1.

469 Regulation 5(1) provides that a licensee may apply for an exemption for 'the following waste received at a licensed landfill', setting out nine situations in which an application can be made. The first two, pars (a) and (b), are in these terms:

- (1) A licensee may by application in an approved form claim an exemption from these regulations for the following waste received at a licensed landfill in any return period -

<sup>549</sup> Levy Act s 3; *Interpretation Act*, s 44(1).

- (a) uncontaminated soil or other clean fill that -
  - (i) is, or is to be, used after the completion of landfill operations to cover, to a depth of up to 500 mm, waste disposed of on the premises; and
  - (ii) was accepted by the licensee at no charge;
- (b) 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.

470 Regulations 10, 11 and 12 prescribe, among other things, the basis on which to calculate 'the amount by way of levy that is payable in respect of waste to which these regulations apply that is received at a category 63 landfill premises during a return period'.<sup>550</sup> The amount of levy is calculated under reg 12 by reference to the amount of waste 'disposed of to landfill' as determined under reg 10 or estimated under reg 11.

471 Regulations 10, 11 and 12 provide as follows:

**10. Volume of waste - category 63 landfills**

- (1) In this regulation -

*surveyor* means -

- (a) a licensed surveyor as defined in the *Licensed Surveyors Act 1909* section 3(1); or
- (b) a person who is, or is eligible to be, a member of -
  - (i) the Institution of Surveyors, Australia; or
  - (ii) the Spatial Sciences Institute.
- (2) The licensee of a category 63 licensed landfill must, in accordance with subregulations (3) and (4) -
  - (a) cause a survey of the premises to be conducted by a surveyor for the purpose of establishing a base from which the volume of waste subsequently disposed of to landfill on the premises can be measured (the *baseline survey*); and
  - (b) lodge with the CEO a report of that survey prepared by the surveyor (the *baseline report*).

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<sup>550</sup> Levy Regulations, reg 10.

Penalty: a fine of \$10 000.

- (3) The baseline survey must be conducted -
  - (a) after the licence is issued; and
  - (b) not more than 14 days before the licensee commences accepting waste for disposal to landfill on the premises.
- (4) The baseline report must be lodged within 14 days after the licensee commences accepting waste for disposal to landfill on the premises.
- (5) Subject to any exemption granted on application under regulation 5(3), after the end of a return period the licensee of a category 63 licensed landfill must cause a survey of the premises to be conducted by a surveyor for the purpose of calculating the volume of waste disposed of to landfill during that return period (a *quarterly survey*).
- (6) The licensee must lodge a report on a quarterly survey, prepared by the surveyor, with the return lodged under the *Waste Avoidance and Resource Recovery Regulations 2008* regulation 18 for that return period.

Penalty: a fine of \$10 000.

- (7) The report referred to in subregulation (6) must include the surveyor's calculation of the number of cubic metres of waste disposed of to landfill on the premises during the return period based on a comparison of the quarterly survey for that return period and the previous quarterly survey or, if there is no previous quarterly survey, the baseline survey for the premises or the estimated base established under regulation 11(1).
- (8) The volume of waste so calculated by the surveyor is to be the volume used for the purposes of determining the amount of the levy under regulation 12.

**11. CEO may make estimates if survey not conducted or category 63 premises not licensed**

- (1) If the licensee of a category 63 licensed landfill fails to comply with regulation 10(2) the CEO may establish an estimated base from which the volume of waste subsequently disposed of to landfill on the premises can be measured.
- (2) If the licensee of a category 63 licensed landfill fails to comply with regulation 10(6) in respect of a return period the CEO may estimate the number of cubic metres of waste disposed of to landfill on the premises during the return period.



- (3) The CEO must give written notice to the licensee of any estimated base established under subregulation (1) or any estimation made under subregulation (2).
- (4) If waste is received at premises -
- (a) in respect of which the occupier does not hold a licence as required under the EP Act; and
  - (b) that would, if the occupier of the premises held a licence as required under the EP Act, be a category 63 licensed landfill,
- the CEO may estimate the number of cubic metres of waste disposed of to landfill on the premises during any return period, and the estimate is to be the number that is used for the purpose of determining the amount of the levy under regulation 12.
- (5) For the purposes of this regulation the CEO may cause a survey of the kind referred to in regulation 10(2)(a) or (5) to be conducted in respect of the licensed landfill.
- (6) The costs incurred by the CEO under subregulation (1), (2) or (4) for the purpose of determining the amount of levy payable by a person under regulation 12 may be included in the amount of levy payable by that person and, if so included, are recoverable accordingly.
- (7) The CEO may call on or use the financial assurance provided by the licensee under the *Waste Avoidance and Resource Recovery Regulations 2008* regulation 15 to cover any costs incurred under subregulation (1) or (2) that are included in the amount of levy payable by a person.

## **12. Amount of levy**

- (1) The amount by way of levy that is payable in respect of waste to which these regulations apply that is received at a category 63 landfill premises during a return period is the amount (in dollars) equal to L in the formula -

$$L = (V \times R) - S$$

where -

V is the number of cubic metres of waste to which these regulations apply received at the landfill premises during the return period determined in accordance with regulation 10 or estimated under regulation 11(2) or (4); and

R is, if the first day of the return period is -

- (a) before 1 January 2010 - \$3;
- (b) on or after 1 January 2010 and before 1 January 2015 - \$12;
- (c) on or after 1 January 2015 and before 30 June 2016 - \$60;
- (d) on or after 1 July 2016 and before 30 June 2017 - \$75;
- (e) on or after 1 July 2017 and before 30 June 2018 - \$90;
- (f) on or after 1 July 2018 and before 30 June 2019 - \$105;
- (d) on or after 1 July 2019 - \$105;

and

S is -

- (a) in the case of licensed landfill premises, the lesser of -
  - (i) the cost incurred by the licensee in complying with regulation 10(5) and (6) in respect of the return period; and
  - (ii) \$2 000;

and

- (b) in any other case - nil.

- (2) The amount by way of levy that is payable in respect of waste to which these regulations apply that is received at a category 64 or 65 landfill premises during a return period is the amount (in dollars) equal to L in the formula -

$$L = (W \times 92\%) \times R$$

where -

W is the number of tonnes of waste to which these regulations apply received at the landfill premises during the return period determined in accordance with regulation 8 or 9; and

- R is, if the first day of the return period is -
- (a) before 1 July 2009 - \$7;
  - (b) on or after 1 July 2009 and before 1 January 2010 - \$8;
  - (c) on or after 1 January 2010 and before 1 January 2015 - \$28;
  - (d) on or after 1 January 2015 and before 30 June 2016 - \$55;
  - (e) on or after 1 July 2016 and before 30 June 2017 - \$60;
  - (f) on or after 1 July 2017 and before 30 June 2018 - \$65;
  - (g) on or after 1 July 2018 and before 30 June 2019 - \$70;
  - (h) on or after 1 July 2019 - \$70.

472 There is no room for any argument about whether the Levy Regulations are within the power to make regulations conferred under the Levy Act and the WARR Act. Section 102 of the WARR Act, inserted by the *Waste Avoidance and Resource Recovery Amendment (Validation) Act 2014* (WA), provides as follows:

- (1) The following regulations are to be taken to have been validly made and to have, and to have always had, full force and effect -
  - (a) the *Waste Avoidance and Resource Recovery Levy Regulations 2008*;
  - (b) the *Waste Avoidance and Resource Recovery Levy Amendment Regulations 2009*;
  - (c) the *Waste Avoidance and Resource Recovery Levy Amendment Regulations 2011*.
- (2) The rights, obligations and liabilities of all persons are to be taken to be, and to have always been, the same as if the regulations listed in subsection (1) had been validly made.
- (3) Anything done, or purportedly done, before the *Waste Avoidance and Resource Recovery Amendment (Validation) Act 2014* section 4 comes into operation is as valid and effective, and is to be taken to have always been as valid and effective, as it would have

been if the regulations listed in subsection (1) had been valid at the time the thing was done.

- (4) In subsection (3), a reference to the doing of anything includes a reference to an omission to do anything.

### 3.4 The WARR Regulations

473 The overall effect of the regime is that levy is payable quarterly. By reg 14(1) of the WARR Regulations, return periods are the periods 1 January to 31 March, 1 April to 30 June, 1 July to 30 September and 1 October to 31 December each year. Levy is payable by a licensee not later than 28 days after the end of each return period.<sup>551</sup>

474 Regulation 17 requires that upon receiving waste at a licensed landfill, the licensee must make a record in accordance with reg 17. Regulation 17(2) requires that, among other things, the record shows, in the case of a category 63 licensed landfill, the volume of the waste disposed of to landfill on the premises calculated in accordance with regs 10 or 11 of the Levy Regulations. By par 2(e) of reg 17, the record must also show a description of the type of waste.

475 By reg 18(2), a licensee of a licensed landfill is required to lodge a return in the approved form setting out details of waste received, completed on the basis of the details entered in the records referred to in reg 17 and any estimate made under regs 9 or 11 of the Levy Regulations.

476 By reg 18(3), the return must be accompanied by a remittance for the amount of the levy payable on the waste to which that return relates.

### 3.5 The EP Act

477 Some provisions in the EP Act impose obligations on, or relevant to, occupiers of premises. These provisions apply regardless of whether the premises are prescribed premises.

478 Specific provisions relevant to prescribed premises are found in div 3 of pt V of the EP Act.

479 Section 3 defines 'prescribed premises' to mean premises prescribed for the purposes of pt V. Part V, in which s 56 is contained, contains a large number and wide range of provisions concerning environmental regulation. Division 1 of pt V creates a number of pollution and environmental harm offences. Section 49A makes it an offence to

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<sup>551</sup> WARR Regulations, reg 18.

discharge or abandon waste other than with the consent of the person who controls and manages the place at which the waste is discharged or abandoned.

480 Division 3 of pt V controls conduct on and use of prescribed premises in various respects.<sup>552</sup>

481 The scheme of the EP Act, especially pt V, was outlined by McLure P in *Eclipse Resources Pty Ltd v Chief Executive Officer, Department of Environment and Conservation*.<sup>553</sup>

482 Section 56 of the EP Act provides as follows:

- (1) Subject to this Act, the occupier of any prescribed premises who -
  - (a) causes or increases, or permits to be caused or increased, an emission; or
  - (b) alters or permits to be altered the nature of the waste, noise, odour or electromagnetic radiation emitted,from the prescribed premises commits an offence unless he is the holder of a licence issued in respect of the prescribed premises and so causes, increases, permits or alters in accordance with any conditions to which that licence is subject.
- (2) Subsection (1) does not apply if the emission is caused, increased or altered -
  - (a) as a result of anything done in accordance with a works approval; and
  - (b) while the works approval is in force.

483 'Emission' is defined in s 3(1) to mean:

- (a) discharge of waste; or
- (b) emission of noise, odour or electromagnetic radiation; or
- (c) transmission of electromagnetic radiation.

484 The definition of 'discharge' in s 3(1) means that a person discharges waste or other matter if they 'deposit it or allow it to escape, or cause or permit it to be, or fail to prevent it from being, discharged, deposited or allowed to escape'.

<sup>552</sup> See EP Act, s 52, s 53, s 56, and s 61.

<sup>553</sup> *Eclipse v CEO* [19] - [40].

485       As I have already indicated, s 3 also contains the same inclusive  
definition of waste as is found in s 3 of the WARR Act, set out above.

486       The 'environment' is defined in s 3(1) of the EP Act as, subject to  
subsection (2), meaning living things, their physical, biological and social  
surroundings and interaction between all of those.

487       Section 3(2) provides:

For the purposes of the definition of environment in subsection (1), the  
social surroundings of man are his aesthetic, cultural, economic and social  
surroundings to the extent that those surroundings directly affect or are  
affected by his physical or biological surroundings.

488       Section 3(2aa) provides:

A reference in this Act to the discharge, emission or transmission of  
anything (whether accompanied by the expression 'into the environment' or  
not) -

- (a) is a reference to discharge, emission or transmission onto or into  
land, water, the atmosphere or living things; and
- (b) in relation to discharge, emission or transmission from premises,  
includes a reference to discharge, emission or transmission onto or  
into land, water, the atmosphere or living things on, in, under,  
above or part of the premises.

### 3.6 The EP Regulations

489       Regulation 5 of the EP Regulations provides that the premises  
specified in sch 1 are prescribed premises for the purposes of pt V of the  
EP Act.

490       Schedule 1 of the EP Regulations sets out numbered categories. In  
each case, there is a description of the category, and, where applicable, a  
stipulation of its production or design capacity.

491       The categories in sch 1 identify prescribed premises by reference to  
the activities carried out on the premises and, in some cases, by reference  
to the production or design capacity of the premises.

492       Having regard to the definitions in the EP Act and the  
EP Regulations, the phrase 'prescribed premises', wherever it is used in  
the EP Act, means premises on or at which any prescribed activity (that is,

one coming within the description and production or design capacity in sch 1 to the EP Regulations) is conducted.<sup>554</sup>

493 What is permitted by a licence is the relevant prescribed activity on the nominated premises in accordance with any conditions to which the licence is subject.<sup>555</sup>

494 A licence licenses activities rather than premises.<sup>556</sup>

495 In sch 1 to the EP Regulations, category 63 has the following as its 'description of category':

Class I inert landfill site: premises on which waste (as determined by reference to the waste type set out in the document entitled 'Landfill Waste Classification and Waste Definitions 1996' published by the Chief Executive Officer and as amended from time to time) is accepted for burial.

496 The 'production or design capacity' is stated as '500 tonnes or more per year'.

497 Category 63 is to be construed in its context, which includes other categories. Categories 61A, 62, 64, 65, 66 and 67A are described as follows:

61A Solid waste facility: premises (other than premises within category 67A) on which solid waste produced on other premises is stored, reprocessed, treated, or discharged onto land.

62 Solid waste depot: premises on which waste is stored, or sorted, pending final disposal or re-use.

64 Class II or III putrescible landfill site: premises on which waste (as determined by reference to the waste type set out in the document entitled 'Landfill Waste Classification and Waste Definitions 1996' published by the Chief Executive Officer and as amended from time to time) is accepted for burial.

65 Class IV secure landfill site: premises on which waste (as determined by reference to the waste type set out in the document entitled 'Landfill Waste Classification and Waste Definitions 1996' published by the Chief Executive Officer and as amended from time to time) is accepted for burial.

<sup>554</sup> *Eclipse v CEO* [63], [79].

<sup>555</sup> *Eclipse v CEO* [82].

<sup>556</sup> *Eclipse v CEO* [79] - [84].

66 Class V intractable landfill site: premises on which waste (as determined by reference to the waste type set out in the document entitled 'Landfill Waste Classification and Waste Definitions 1996' published by the Chief Executive Officer and as amended from time to time) is accepted for burial.

67A Compost manufacturing and soil blending: premises on which organic material (excluding silage) or waste is stored pending processing, mixing, drying or composting to produce commercial quantities of compost or blended soils.

498 The production or design capacity for categories 64 - 66 are:

- (a) Category 64: 20 tonnes or more per year.
- (b) Category 65: Not applicable.
- (c) Category 66: Not applicable.

499 It is common ground that a particular site may be prescribed premises under more than one category.

### 3.7 Landfill Waste Classification and Waste Definitions 1996

500 As has been seen, the *Landfill Waste Classification and Waste Definitions 1996* (Waste Definitions) are referred to, in brackets, in the description of category 63. They are also referred to in the descriptions for categories 64 to 66.

501 The Waste Definitions define and describe the types of waste that each class of landfill site can accept. Table 1 sets out, for each Landfill Class (also identified by reference to categories 63 - 66 of sch 1 to the EP Regulations), a common name for the class and the waste types permitted for disposal at it. Table 1 is in the following terms:

LANDFILL CLASS	COMMON NAME	WASTE PERMITTED FOR DISPOSAL
Class I (Prescribed Premises Category 63)	Inert Landfill	<ul style="list-style-type: none"> <li>•Clean fill</li> <li>•Type 1 Inert Waste</li> <li>•Contaminated solid wastes meeting waste acceptance criteria specified for Class I landfills (possibly with specific licence conditions)</li> <li>•Type 2 Inert Waste (with specific licence conditions)</li> <li>•Type 3 Inert Waste (subject to DEP approval</li> <li>•Type 1 Special Waste</li> </ul>



Class II (Prescribed Premises Category 64 or 89)	Putrescible Landfill	<ul style="list-style-type: none"> <li>•Clean fill</li> <li>•Type 1 Inert Waste</li> <li>•Putrescible Wastes</li> <li>•Contaminated solid waste meeting waste acceptance criteria specified for Class II landfills (possibly with specific licence conditions)</li> <li>•Type 2 Inert Wastes (with specific licence conditions)</li> <li>•Type 1 and Type 2 Special Wastes (for registered sites as approved under the Controlled Waste Regulations)</li> </ul>
Class III (Prescribed Premises Category 64)	Putrescible Landfill	<ul style="list-style-type: none"> <li>•Clean Fill</li> <li>•Type 1 Inert Waste</li> <li>•Putrescible Wastes</li> <li>•Contaminated solid waste meeting waste acceptance criteria specified for Class II or Class III landfills (possibly with specific licence conditions)</li> <li>•Type 2 Inert Wastes (with specific licence conditions)</li> <li>•Type 1 and Type 2 Special Wastes</li> </ul>
Class IV (Prescribed Premises Category 65)	Secure Landfill	<ul style="list-style-type: none"> <li>•Clean Fill</li> <li>•Type 1 Inert Waste</li> <li>•Contaminated solid waste meeting criteria specified for Class II, Class III or Class IV landfills (possibly with specific licence conditions)</li> <li>•Type 2 Inert Wastes (with specific licence conditions)</li> <li>•Type 1 and Type 2 Special Wastes</li> </ul>
Class V (Prescribed Premises Category 66)	Intractable Landfill	<ul style="list-style-type: none"> <li>•Intractable and other wastes in accordance with the approvals for the site</li> </ul>

Note: Materials used for rehabilitation and final landforming (including Class I landfills) need not be wastes, and may include clean fill and soil mixes incorporating mulches, grass sods, peat and biosolids. Rehabilitation of landfills should be conducted primarily with sand and loam to a depth generally not exceeding two metres and may involve the use of neutralised peat or acid sulfate soils or other organic matter to aid soil structure, but not as the main ingredients.

502 Each of the waste types set out in the table is a defined term.

503 'Clean fill' is defined to mean:

Material that will have no harmful effects on the environment and which consists of rocks or soil arising from the excavation of undisturbed material.

For material not from a clean excavation, it must be validated to have contaminants below relevant ecological investigation levels (as defined in the document Assessment Levels for Soil, Sediment and Water, Department of Environment, 2003).

504 'Inert Waste Type 1' is defined to mean:

Non-hazardous, non-biodegradable (half-life greater than 2 years) wastes containing contaminant concentrations less than Class I landfill acceptance criteria but excluding paper and cardboard (paper and cardboard are biodegradable materials and are therefore considered as putrescible waste), or materials that require treatment to render them inert (eg. peat, acid sulfate soils).

505 'Insert Waste Type 2' is defined to mean:

Waste consisting of stable non-biodegradable organic materials such as tyres and plastics which require special management to reduce the potential for fires.

506 'Inert Waste Type 3' is defined to mean:

Waste material from DEP licensed secondary waste treatment plants, subject to appropriate assessment and approval of that waste and the specified inert landfill.

507 'Special Waste Type 1' is defined to mean 'Waste which includes asbestos and asbestos cement products'.

508 In defining 'Waste', the following is said:

For the purpose of these guidelines waste may mean one or more of the following:

- any substance that is discarded, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment;
- any discarded, rejected, unwanted, surplus or abandoned substance;
- any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, reprocessing, recovery, or purification by a separate operation from that which produced the substance;
- any substance described in regulations under the *Environmental Protection Act 1986* as waste.

509 Table 2 sets out a description (from the definition) and examples of various waste types. If waste can be classified according to table 2, no more detailed assessment is required.<sup>557</sup> Thus, the examples in table 2 are intended to have operative effect. Table 2 includes the following:

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<sup>557</sup> Waste Definitions, 7.

WASTE TYPE	DESCRIPTION
<b>Clean Fill</b>	Material that will have no harmful effects on the environment and which consists of rocks or soil arising from the excavation of undisturbed material
	<p><b>Examples:</b></p> <p>Virgin excavated natural material (e.g. clay, gravel, sand, soil and rock), or such material that is mixed with:</p> <ul style="list-style-type: none"> <li>•waste that has been excavated from areas that are not contaminated as a result of industrial, commercial, mining or agricultural activities, with manufactured chemicals, and does not contain sulfidic ores or soils (e.g. acid-sulfate soils and peats), or</li> <li>•Materials not from a 'clean excavation' that have been validated to meet relevant ecological investigation levels.</li> </ul>
<b>Inert</b>	<p>Wastes that are largely non-biodegradable, non-flammable and not chemically reactive. Inert wastes are subdivided into three separate classes:</p> <ul style="list-style-type: none"> <li>•Type 1 - Inert Wastes are listed below and contain contaminants in concentrations less than the specified criteria.</li> <li>•Type 2 - Wastes consisting of non-biodegradable organic materials such as tyres and plastics, which are flammable and require special management to reduce the potential for fires.</li> <li>•Type 3 - Waste material from DEP licensed secondary waste treatment plants, subject to appropriate assessment and approval of that waste and the specified landfill.</li> </ul>
	<p><b>Examples of Type 1 inert wastes:</b></p> <ul style="list-style-type: none"> <li>•Building and demolition waste (e.g. bricks, concrete and associated unavoidable small quantities of paper, plastics, glass, metal and timber<sup>1</sup> that should be recovered), being material resulting from the demolition, erection, construction, refurbishment or alteration of buildings or from the construction, repair or alteration of infrastructure-type development such as roads, bridges, dams, tunnels, railways, and airports, and which is not mixed with any other type of waste (specifically green and food waste), and does not contain asbestos.</li> <li>•Asphalt waste (e.g. resulting from road construction and waterproofing works).</li> <li>•Biosolids categorised for unrestricted use.</li> <li>•Casting sand (that does not contain leachable components which would require disposal in a higher class of landfill.</li> <li>•Blasting sand or garnet (including that used for stripping tributyl tin - containing paints).</li> </ul> <p><b>Examples of Type 2 inert wastes:</b></p> <p>Used, rejected or unwanted tyres (included shredded tyres or tyre pieces).</p>
Notes	1. Includes treated timber such as copper chrome arsenate (CCA), high temperature creosote (HTC), pigment emulsified creosote (PEC) and light organic solvent preservative (LSOP) treated timber.

### 3.8 The object of the levy regime

510 The levy applies only to landfill premises, and to waste that is disposed of to landfill.

511 The evident primary object of the levy, assessed in light of the objects of the WARR Act and the principles incorporated from the EP Act, is to create financial disincentive to the disposing of waste to landfill with the aim of reducing the amount of waste dealt with in that

way. That is reinforced by what was said in the Second Reading Speech for both the Environmental Protection Amendment Bill 1997 (WA) and the Waste Avoidance and Resource Recovery Bill 2007 (WA). To quote the latter, the levy 'functions as an economic instrument for influencing waste management practices, including reducing waste to landfill, by increasing the price of landfill disposal'.<sup>558</sup>

512 An element of how the levy functions is to reduce the disposal of waste to landfill by creating a relative financial incentive to re-use, reprocess and recycle waste. I adopt what was said by the Tribunal in *City of Fremantle and The Chief Executive Officer of the Department of Environment and Conservation*:<sup>559</sup>

[T]he purpose of the levy is to create a financial disincentive for waste to be taken to waste disposal/landfill premises, and thereby to minimise the generation of waste and its discharge into the environment, and to create a relative financial incentive for waste to be recycled. This is consistent with the objects of the [WARR Act] to contribute to sustainability, and the protection of human health and the environment, and the move towards a waste-free society, and the principles relating to improved valuation, pricing and incentive mechanisms, and the principle of waste minimisation, stated in the EP Act.

513 In essence, the object of the levy is to discourage the disposal of waste to landfill, and to encourage the recycling, re-use and reprocessing of waste.

### 3.9 The elements necessary for levy to be payable

514 In order for levy to be payable by Eclipse, it must be established that waste was 'received at a category 63 landfill premises' within the meaning of reg 12 of the Levy Regulations. If that is established, it would also engage reg 4(1)(a), which applies to 'waste received at landfill premises'. Landfill premises include (but are not limited to) category 63 landfill premises. Premises will be a 'category 63 landfill premises' if and only if the activities set out in category 63 under 'description of category' are conducted on the premises. That will be so whether the premises are licensed or unlicensed.

<sup>558</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 6313.

<sup>559</sup> *City of Fremantle and The Chief Executive Officer of the Department of Environment and Conservation* [2013] WASAT 24 [13].

515 Thus, the Government Parties must show, for each of the Sites and for each return period, the following:

- (1) The site was a category 63 landfill premises, within the meaning of sch 1 of the EP Regulations, adopted in the Levy Regulations. That requires that the site was premises on which 'waste' was 'accepted for burial'.
- (2) 'Waste' was 'received at' the site within the meaning of reg 4 and reg 12 of the Levy Regulations. That phrase is to be construed as having the same meaning as it has in s 4, s 5 and s 6 of the Levy Act.<sup>560</sup>

516 There is a third requirement, which arises in the following way. The amount of levy calculated under reg 12 of the Levy Regulations is founded on the volume of waste 'disposed of to landfill', which is to be determined under reg 10 (by calculation by a surveyor) or estimated by the CEO under reg 11.

517 Thus, no levy will be payable unless it is shown that:

- (3) 'Waste' was 'disposed of to landfill' within the meaning of regs 10, 11 and 12 of the Levy Regulations.

518 In summary, levy is payable if and only if, at a site during a return period, waste received at the site was accepted for burial, and waste was disposed of to landfill.

#### **4. The parties' claims and the issues**

519 Eclipse denies and the Government Parties assert that Eclipse is liable to pay levy in respect of each return period for each site for the Relevant Period. The three actions relate to different parts of the Relevant Period.

520 The effect of the pleadings is accurately summarised in the Government Parties' submissions, from which the following outline is substantially drawn. In these actions, Eclipse claims:

- (1) a declaration that s 4, s 5 and s 6 of the Levy Act, s 102 of the WARR Act and regs 10, 11 and 12 of the Levy Regulations are, in their application to Eclipse and any other entity engaged in

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<sup>560</sup> *Interpretation Act*, s 44(1).

activities of substantially the same nature as Eclipse, invalid and of no legal effect;

- (2) a declaration that Eclipse is not liable to pay the sum of \$1,243,159 plus penalties demanded from Eclipse by the CEO for unpaid levy for return periods between 1 July 2008 and 31 December 2009;
- (3) a declaration that, with the exception of the Abercrombie Road Site up to June 2012, no waste was accepted for burial by Eclipse at its Abercrombie Road or Wanneroo Road Sites during the periods 1 October 2010 to 31 December 2011, and 1 January 2012 to 30 September 2014;
- (4) a declaration that Eclipse is not liable to pay the amount of \$4,609,360.20 plus penalties claimed from it by the Minister for unpaid levy for return periods between 1 October 2010 and 31 December 2011;
- (5) a declaration that Eclipse is not liable to pay any levy in respect of its Abercrombie Road or Wanneroo Road Sites during the periods 1 October 2010 to 31 December 2011 and 1 January 2012 to 30 September 2014;
- (6) a declaration that no 'waste' was 'disposed of to landfill' within the meaning of the Levy Regulations in respect of either of the Abercrombie Road or Wanneroo Road Sites during the period 1 January 2012 to 30 September 2014;
- (7) in the alternative to (6), a declaration that insofar as it comprised Natural Earth Material and Construction and Demolition Material (as defined by Eclipse), the material deposited by Eclipse in the void on each site during the period 1 January 2012 to 30 September 2014 was not 'waste' or was not 'disposed of to landfill' within the meaning of the Levy Regulations;
- (8) in the alternative to (7), a declaration that insofar as it comprised Natural Earth Material, the material deposited by Eclipse in the void on each site during the period 1 January 2012 to 30 September 2014 was not 'waste' or was not 'disposed of to landfill' within the meaning of the Levy Regulations;
- (9) an injunction restraining the CEO, the State and the Minister from further seeking recovery of the sums referred to or any other

amount from Eclipse for unpaid levy in respect of the periods 1 July 2008 to 31 December 2009 and 1 October 2010 to 30 September 2014; and

- (10) an order that the State and the Minister pay Eclipse \$100,000 plus interest, being the amount of a bank guarantee provided by Eclipse to the CEO which was called on by the CEO in July 2010 to partially discharge the amount of unpaid levy then claimed by the CEO from Eclipse.

521 In support of its claims, Eclipse alleges, in broad summary that:

- (1) the levy is an excise duty within the meaning of s 90 of the *Commonwealth Constitution*;
- (2) subject to a qualification, the Levy Regulations do not apply to Eclipse's operations because:
  - (a) all of the materials accepted at its Sites, alternatively some of the materials accepted at its Sites, were not waste;
  - (b) the materials accepted at its Sites, alternatively some of those materials, were not 'accepted for burial' within the meaning of category 63 in sch 1 to the EP Regulations;
  - (c) its Sites were not category 63 licensed landfills within the meaning of the Levy Regulations;
- (3) none of the materials put into the voids at the Sites were 'waste'. Further or alternatively, none of them were 'disposed of to landfill' within the meaning of the Levy Regulations;
- (4) in the alternative to (3), insofar as the materials deposited by Eclipse in the void on each site comprised Natural Earth Material and Construction and Demolition Material, those materials were not waste. Further or alternatively, they were not disposed of to landfill within the meaning of the Levy Regulations;
- (5) in the alternative to (4), insofar as the materials deposited by Eclipse in the void on each site comprised Natural Earth Material, those materials were not waste. Further or alternatively, they were not disposed of to landfill within the meaning of the Levy Regulations;
- (6) the CEO's estimates are invalid;

- (7) the CEO has exacted the amount of the bank guarantee from Eclipse without lawful authority and Eclipse is entitled to recover the amount of the bank guarantee as a payment made to the CEO colore officei or under a mistake of law.

522 The qualification to proposition (2) is that Eclipse accepts that up to 30 June 2012 the Abercrombie Road Site was a category 63 licensed landfill because it accepted waste, in the form of wrapped asbestos, for burial.

523 The Government Parties deny that Eclipse is entitled to the various forms of relief that it seeks. The Minister also claims against Eclipse:

- (1) \$5,926,272.50 by way of unpaid levy plus penalties for non-payment for return periods between 1 July 2008 and 30 September 2010; and
- (2) \$4,609,360.20 by way of unpaid levy plus penalties for non-payment for return periods between 1 October 2010 and 31 December 2011.

524 In support of their claims, the Government Parties allege, in summary, that:

- (1) all of the materials received by Eclipse at its Sites which were deposited and compacted in the voids at the Sites between 1 July 2008 and 30 September 2014 were waste;
- (2) all of the materials received by Eclipse at its Sites and deposited and compacted in the voids at the Sites between 1 July 2008 and 30 September 2014 were 'accepted for burial' within the meaning of category 63 in sch 1 to the EP Regulations;
- (3) at all relevant times, Eclipse's Sites were prescribed premises specified in category 63 of the EP Regulations and were licensed landfills within the meaning of the Levy Regulations;
- (4) Eclipse failed to comply with reg 10(6) of the Levy Regulations in respect of each site in respect of each relevant return period from 1 July 2008 to 31 December 2011.
- (5) Eclipse was liable to pay levy on the volume of waste disposed of to landfill at the Sites between 1 July 2008 and 31 December 2011 as estimated by the CEO;



- (6) the levy is not an excise duty; and
- (7) the CEO was authorised to call on Eclipse's bank guarantee in partial discharge of the amount of levy it owed for the return period 1 July to 30 September 2008.

525 The Relevant Period can conveniently be divided into two for the purposes of identifying the essential issues in these actions. For the return periods from 1 July 2008 until 31 December 2011, the CEO made estimates of the levy payable. The Government Parties claim the amounts estimated by the CEO as levy payable for each return period. Since 1 January 2012, no estimates have been made and so the Government Parties do not make any claim. For the return periods after 1 January 2012, Eclipse seeks declarations to the effect that it is not liable to pay levy.

526 For the first part of the Relevant Period, namely from 1 July 2008 until 31 December 2011, in which the CEO made estimates, the issues may be summarised as follows.

527 The first issue is whether, for each return period at each site, some waste was received and accepted for burial. If not, Eclipse succeeds. If so, each site was a category 63 licensed landfill, in which case the second issue arises. (It is not in dispute that each site had a production or design capacity of more than 500 tonnes per annum.)

528 The second issue is whether Eclipse failed to comply with reg 10(6) of the Levy Regulations. If that is established, the CEO's power to make an estimate was enlivened. If not, the Government Parties' claims for the estimated amounts fail.

529 It is not in dispute, as a matter of fact, that the CEO made an estimate for each of the periods from 1 July 2008 until 31 December 2011.

530 The third issue is whether, for each return period, the estimate made by the CEO was valid.

531 For the return periods from 1 January 2012 until 30 September 2014, the issues may be summarised as follows:

- (1) In each return period at each site, was some waste received and accepted for burial?
- (2) Has Eclipse established that no waste was disposed of to landfill during this part of the Relevant Period?

- (3) Should it be declared that, insofar as they comprised Natural Earth Material and Construction and Demolition Material, alternatively insofar as they comprised Natural Earth Material, the materials deposited by Eclipse in the void on each site during the Relevant Period were not waste and, further or alternatively, were not disposed of to landfill?

532 Finally, for the entirety of the Relevant Period, there is an issue as to whether the levy regime is invalid as an excise. That issue should only be determined if and to the extent that levy is (otherwise) payable.

533 The structure of the balance of these reasons is informed by this distillation of the issues. It will be seen that, for both of the two parts of the Relevant Period, the first issue is whether some waste was received and accepted for burial at each site. That issue can conveniently be dealt with for both parts of the Relevant Period together. After that, I will deal with the issues relating to the first part of the Relevant Period, before turning to the issues relating to the second part of the Relevant Period.

534 The parties' competing contentions about these issues are founded on fundamentally different constructions of the levy regime. I begin analysis by considering the parties' contentions as to how the levy regime should be construed, and determining its proper construction.

## **5. The proper construction of the levy regime**

535 As has been explained, the following phrases, all using the word 'waste', must be construed:

- (1) 'Waste received at' premises within the meaning of reg 4 and reg 12 of the Levy Regulations.
- (2) Premises on which 'waste is accepted for burial' within the meaning of sch 1 of the EP Regulations, adopted in the Levy Regulations.
- (3) 'Waste disposed of to landfill', within the meaning of regs 10, 11 and 12 of the Levy Regulations.

536 The first two phrases can conveniently be dealt with together. I begin with some general principles concerning statutory construction.

## 5.1 Principles of statutory construction

537 The principles of statutory construction are well-known, and were not in dispute in this case.

538 The proper construction of a statute is 'reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.<sup>561</sup>

539 In the process of statutory construction, primary attention must be directed to the text of the statutory provisions.<sup>562</sup>

540 In *City of Kwinana v Lamont*,<sup>563</sup> the court said:

The High Court of Australia has iterated, and reiterated, that the starting point and ending point for the task of statutory construction is the statutory text. The context, including legislative history and extrinsic materials, has utility only to the extent that it assists in fixing the meaning of the statutory text: *Thiess v Collector of Customs* [2014] HCA 12 [22] (the court); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 87 ALJR 98, 107 [39] (the court); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 46 - 47 [47] (Hayne, Heydon, Crennan & Kiefel JJ). The duty of a court is to give the words of the statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, but not universally, that meaning will correspond with the grammatical meaning of the provision: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [78].

541 The language of the words of the statute must be interpreted having regard to their context.<sup>564</sup> Part of that context is the purpose of the legislation insofar as it may be discerned from what the legislation says, as distinct from any assumption about the desired or desirable reach or operation of relevant provisions.<sup>565</sup> A statutory purpose may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of the statute is not something which exists outside the statute. It resides in its

<sup>561</sup> *Zheng v Cai* [2009] HCA 52; (2009) 239 CLR 446 [28].

<sup>562</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [47]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 [39].

<sup>563</sup> *City of Kwinana v Lamont* [2014] WASC 112 [47].

<sup>564</sup> *Alcan* [4], [47]; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408.

<sup>565</sup> *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 [26].

text and structure, albeit it may identified by reference to rules of construction.<sup>566</sup>

542 The court must be mindful of the danger of inferring and giving weight to a broad legislative purpose and failing to give the text the detailed attention it deserves.<sup>567</sup>

543 When the purpose of legislation is established, a construction that would promote that purpose shall be preferred to a construction that would not do so.<sup>568</sup> Section 18 of the *Interpretation Act 1984* (WA) is not directed to a construction which better achieves the object of an Act. Rather, the section assists when there is a choice between a construction that would promote the underlying object and one which would not.<sup>569</sup> Nevertheless, as the principles set out above demonstrate, quite apart from the *Interpretation Act*, at common law the court has regard to the evident purpose and context in its wide sense when construing legislation.

544 The consequences of competing constructions, and any inconvenience or improbability of result arising from a construction, can be taken into account in choosing between constructional choices that are open on the language of the statute.<sup>570</sup> However, there are limits on the weight to be given to consequences.<sup>571</sup>

545 A provision of a statute must be construed consistently with the language and purpose of all of the provisions of the statute.<sup>572</sup>

546 Section 19 of the *Interpretation Act* identifies extrinsic material which a court may consider in order to determine the meaning of a provision in a written law, or to determine the meaning of a provision where there is ambiguity or obscurity in its ordinary meaning. That material includes any explanatory memorandum relating to the bill and the Second Reading Speech. However, secondary materials must not be substituted for the text of the legislation.<sup>573</sup> The words of the statute, not

<sup>566</sup> *Lacey v Attorney General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 [44].

<sup>567</sup> *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 [6]; *Alcan* [51].

<sup>568</sup> *Interpretation Act*, s 18.

<sup>569</sup> *Chugg v Pacific Dunlop Ltd* [1990] HCA 41; (1990) 170 CLR 249, 262.

<sup>570</sup> *CIC Insurance* (408); *Network 10 Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; (2004) 218 CLR 273 [11]; *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115; (2008) 37 WAR 149 [153] - [154].

<sup>571</sup> *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 320 - 321; *Wilderness Society of WA (Inc) v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471 [213].

<sup>572</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 [69].

<sup>573</sup> *K-Generation Pty Ltd v Liquor Licensing Court* [2009] HCA 4; (2009) 237 CLR 501 [53].

non-statutory words seeking to explain them, are of paramount significance.<sup>574</sup>

547 A definition is not to be construed in isolation from the operative provision(s) in which the definition is used. Rather, the operative provision is to be read by inserting the definition into the provision, and the provision then construed.<sup>575</sup>

548 Statutory texts enacted by the same legislature are to be construed so far as possible to operate in harmony and not in conflict.<sup>576</sup>

549 Where two or more statutory enactments comprise an overlapping legislative scheme, the enactments should be construed accordingly, and the court should endeavour to produce a rational, sensible, efficient and just operation, in preference to an inefficient, conflicting, or unjust operation.<sup>577</sup>

550 The principles relating to the construction of statutes apply to the construction of subsidiary or delegated legislation.<sup>578</sup>

## 5.2 'Waste received' and 'waste accepted for burial'

551 The statutory scheme must be construed as a whole. That is how I have approached the task.

552 I begin exposition by considering the meaning of the word 'waste' in the phrases 'waste received' and 'waste accepted for burial'.

### 5.2.1 *The proper construction of 'waste'*

553 The word 'waste' is used in many provisions in the EP Act. The parties agree that the focus of attention must be the notion of waste in the particular context of determining whether premises are category 63 landfills for the purpose of the Levy Regulations.<sup>579</sup>

554 Part of the context in which these phrases are to be construed is that, as can be taken to have been known to the legislature, the nature of activities at a licensed landfill is such that a substantial volume of a variety of materials may be expected to be received there. A construction

<sup>574</sup> *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529 [22].

<sup>575</sup> *Kelly v The Queen* [2004] HCA 12; (2004) 218 CLR 216 [84], [103]; *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASC 228; (2011) 43 WAR 186 [62], [150], [218].

<sup>576</sup> *Commissioner of Police v Eaton* [2013] HCA 2; (2013) 252 CLR 1 [98].

<sup>577</sup> *Trajkoski v Director of Public Prosecution (WA)* [2010] WASC 119; (2010) 41 WAR 105 [50] - [52].

<sup>578</sup> *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389, 398.

<sup>579</sup> Government Parties' submissions pt V [14] - [21]; ts 655 - 656, 688.

that reflects this reality by facilitating characterising material in bulk is to be preferred to one that requires a close analysis, load by load, of the individual components of a load received, or of a load deposited and compacted, in order to identify whether 'waste' has been 'accepted for burial' and what 'waste' has been 'disposed of to landfill'.

555 The parties' written submissions referred to many cases decided in other jurisdictions relating to legislation concerning waste. In the end I think both parties agreed that, given the markedly different legislative frameworks, the decisions from other jurisdictions are of quite limited assistance. Having read all of the cases referred to by the parties, that is my view.

556 In my view, the ordinary meaning of the word waste, in the Levy Regulations, and in its context in category 63 of sch 1 to the EP Regulations, is unwanted or excess material, viewed from the perspective of its source. In my view, an apposite dictionary definition of waste is 'anything left over or superfluous, as excess material, by-products, etc, not of use for work in hand'.<sup>580</sup> This definition was adopted in *City of Fremantle and The CEO*.<sup>581</sup>

557 Eclipse accepts that, in this context, 'waste' bears its ordinary meaning of unwanted or excess material.<sup>582</sup>

558 Eclipse submits that whether material is 'waste' accepted for burial is determined by whether the material is unwanted or excess material in the hands of, or from the perspective of, the party receiving it.<sup>583</sup> On Eclipse's construction, that will be so if and only if the party receiving the material receives it to deal with as waste. The position will be otherwise if the party receives it to be used as something other than waste, including by recycling, re-using or reprocessing it.<sup>584</sup> For example, the party will not accept waste for burial if they receive material to use it as fill.<sup>585</sup>

559 For the reasons that follow, I do not accept these submissions.

560 In my opinion, in the context of identifying whether there is 'waste received' at premises and 'waste accepted ...' at premises, whether material has the character of being unwanted or excess is to be determined by reference to the perspective of the person who is the source of the

<sup>580</sup> Macquarie Dictionary Online.

<sup>581</sup> *City of Fremantle and The CEO* [28].

<sup>582</sup> Eclipse's opening submissions [19]; ts 705.

<sup>583</sup> Eclipse's closing submissions [2.3], [176]; ts 705 - 706.

<sup>584</sup> Eclipse's closing submissions [177] - [178]; ts 705 - 706.

<sup>585</sup> ts 706 - 707.

material, not from the perspective of the party receiving or accepting it. As a matter of construction, at the point of receipt the character of material as waste is not determined, or in my view influenced, by what the recipient wants or intends to do with it, or by whether the material is useful to the recipient.

561 In my opinion, there are textual indications in the Levy Regulations, read as a whole, that the fact that a party receives material in order to re-use, recycle or reprocess it does not deny the character of the received material as waste. Regulation 5(1)(b) provides that a licensee may claim an exemption for waste received at a licensed landfill that is not disposed of to landfill, but is collected and stored at a licensed landfill for re-use, reprocessing, recycling or use in energy recovery. In my view, that exemption reveals that under the regulations, material received for re-use, reprocessing or recycling is nonetheless, on that account, waste upon its receipt. That is why an exemption is needed.

562 Eclipse submits that its construction of 'waste' is supported by consideration of the object and purpose of the levy regime - to encourage recycling, re-use and reprocessing of waste rather than the disposal of waste to landfill. I do not accept that this purpose supports the construction advanced by Eclipse. To the contrary, I think Eclipse's construction would tend to subvert the achievement of it.

563 The object of the levy regime is to discourage the disposal of waste to landfill, and to encourage recycling and re-use of waste. Of course, that statement of the object of the regime is expressed in terms of 'waste' and so itself invites attention to the ambit and proper construction of that term. Care must be taken not to make any assumption about the desired or desirable reach or operation of the levy regime.

564 On Eclipse's construction, if the receiving party receives material to use it as something other than waste, the material is not properly characterised as waste. Eclipse illustrates this contention by reference to sand and soil, submitting that it is unlikely that soil and sand unwanted by its source are intended to fall within the ambit of the levy regime. I will deal with the application of the regime to sand and soil later in this section of my reasons. As Eclipse accepts, on its construction, if a party received broken up bricks and concrete in order to use it to fill space in land, that would constitute an intention to use the material other than as waste, and thus the material would not properly be characterised as waste.<sup>586</sup> In my view, consideration of the levy regime as a whole, and the secondary

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<sup>586</sup> ts 707.

materials relating to it, reveals an intention that these hypothesised circumstances would be within the ambit of 'waste' in the context of 'waste received', 'waste accepted for burial' and 'waste disposed of to landfill'.

565 I agree that the legislation and regulations make a distinction between recycling, re-using and reprocessing on one hand, and disposal and disposal to landfill on the other. That distinction is also made in much of the secondary materials to which Eclipse refers.<sup>587</sup> The legislature's evident concern to advance recycling and re-use of waste in preference to disposal of it is reflected in the hierarchy of resource management options in the WARR Act. In my view, that concern is not given effect in the levy regime by construing 'waste' so as to exclude material received with the intention that it be re-used or recycled. Rather, that concern is given effect in the levy regime by making waste that is disposed of to landfill the only waste that is leviable. No levy is payable for material that is re-used and recycled, rather than being disposed of to landfill. In the case of category 63 premises, that result flows from the fact that levy is assessed on the volume of waste disposed of to landfill. For other categories of licensed landfills, that is reflected in the availability of the exemption under reg 5(1)(b).

566 Some of Eclipse's arguments as to how waste is to be construed are, in a sense, encapsulated in the following passage from the management plan for the Abercrombie Road Site:

If sustainability worldwide is to have practical application and we are to move from unsustainable consumption of raw materials, then we must ensure and adopt, wherever possible, that 'one person's waste becomes another person's resource'. Only material that has no other use whatsoever can then truly be described as waste.<sup>588</sup>

567 I do not doubt the desirability of the philosophy that one person's waste can and should wherever possible become another person's resource. That philosophy is reflected in the hierarchy in the WARR Act. But I do not accept that, in the context of the levy regime, that philosophy leads to a construction of waste as having a narrow ambit, encompassing only material that has no use whatsoever to anyone. Rather, that philosophy is reflected in a legislative and regulatory scheme that encourages re-use and recycling of waste in preference to its disposal to landfill.

<sup>587</sup> ts 169 - 172; Eclipse's closing submissions [9] - [21].

<sup>588</sup> Exhibit A, attachment 46, page 1646.



568       The levy applies to waste received that is accepted for burial and disposed of to landfill. The levy regime aims to discourage disposal of waste to landfill and encourage recycling, re-use and reprocessing. In the framework of that dichotomy, use of waste as fill to be added to the land at the premises and buried does not constitute 're-use' as distinct from disposal to landfill. To construe the regime so that received material is not waste because it is wanted by or useful to the licensee or occupier for use by it as fill to be added to the land on the premises and buried would subvert or undermine the purpose of the regime. A narrow conception of waste that encompasses only material unwanted by the recipient or only material to be used by the recipient as waste would unduly narrow the reach of the levy regime. A receiving party who wants material, and for whom it is useful, would then not be subjected to the economic disincentive the imposition of which is the object of the regime.

569       In my view, there is nothing in the purpose of the levy regime, or its broader context, that would justify reading 'waste' more narrowly than in its ordinary meaning as I have identified it.

570       Further, in my view, there is nothing in the other provisions of the Levy Regulations, or these statutory instruments as a whole, to suggest that any meaning narrower than the ordinary meaning I have identified should be adopted. To the contrary, as I will explain, there are a number of indications, in other provisions, that the word waste is intended to have a broad connotation in these provisions.

571       There is nothing in the ordinary meaning of the word waste, or in its statutory context, that requires that material be environmentally harmful in order that it be waste. No party suggested otherwise.

572       Eclipse submits that the broad construction of 'waste', and of the levy regime, advanced by the Government Parties would mean that all clean fill, or all clean fill unwanted by its source, is waste. Eclipse submits that this conclusion would have clearly unintended consequences, firmly militating against the Government Parties' construction. Eclipse points to the following scenarios as illustrating the consequences of the Government Parties' construction which, Eclipse submits, could not or would not have been intended:

- (1) A party accepting unwanted sand and soil material from civil earthworks to use it as fill in substitution for what that party would otherwise need to acquire in order to perform necessary filling of

land would require a licence and the premises would become a licensed landfill.

- (2) A property developer requiring a substantial quantity of fill at premises in order to perform earthworks who uses soil and sand obtained from a virgin excavation where it is not wanted, in quantities that exceed the limits mentioned in items 63 to 66 of sch 1 to the EP Regulations, would require a licence, and the premises would become a licensed landfill.
- (3) A property developer purchasing sand for that purpose would have the same consequence.<sup>589</sup>

573 The first two of Eclipse's scenarios invite attention to whether sand and soil from a source who does not want it are within the ambit of 'waste' in the levy regime. The third scenario raises the inclusive definition of waste, to which I will come later in this part of my reasons.

574 In support of its contentions as to what was and was not intended by the legislature, Eclipse pointed to what the Minister wrote in a letter to the Waste Authority in April 2012.<sup>590</sup> Nothing in correspondence from the Minister written after the legislation was passed assists in the process of statutory construction.

575 In weighing these submissions, it must be borne in mind that there is a limit to the weight that can be given in the construction process to consequences that are perceived to be unintended.<sup>591</sup> Textual indications must also be given due weight.

576 In my view, the following considerations sustain the conclusion that sand and soil unwanted by their source are waste within the meaning of category 63 in sch 1 of the EP Regulations and the levy regime generally.

577 First, to my mind reg 5(1)(a) of the Levy Regulations reveals a clear intention that uncontaminated soil or other clean fill received at premises is waste. The opening words of reg 5(1) refer to 'the following waste' set out in the paragraphs that follow. Paragraph (a) refers to uncontaminated soil or other clean fill. It is apparent from the language and structure of reg 5(1)(a) that uncontaminated soil and other clean fill received at premises are waste, and that a licensee can apply for an exemption in respect of them, but only in respect of the last 500 mm of fill, and only if

<sup>589</sup> Eclipse's closing submissions [110], [112], [124] - [125]; ts 177 - 178, 266 - 267, 699, 702.

<sup>590</sup> Exhibit M; Eclipse's closing submissions [114]; ts 703.

<sup>591</sup> See [544].

they were accepted at no relevant charge. Otherwise, uncontaminated soil and other clean fill added to the ground at the premises will attract the levy.

578        Secondly, in my view, for the reasons that follow, the conclusion that clean fill is intended to constitute waste is supported by consideration of the Waste Definitions as referred to in categories 63 to 66 of sch 1 to the EP Regulations.

579        Under the Waste Definitions, clean fill can be received and disposed of at all premises within categories 63, 64, 65 and 66. The Government Parties submit that this shows that clean fill is waste. In response, Eclipse submits that the Waste Definitions do not purport to, and do not, define what is and is not waste. Rather, they identify the types of material, when that material is waste, that a licence holder for each relevant category is permitted to receive.<sup>592</sup>

580        In large measure, I accept Eclipse's submissions as to the character and function of the Waste Definitions. Nevertheless, for reasons I will explain, I think the references to that document in sch 1 of the EP Regulations indicate that the levy regime classifies clean fill as waste.

581        Categories 63 to 66 are all described in sch 1 of the EP Regulations as premises on which waste, as determined by the Waste Definitions, is accepted for burial. Consequently, the only way of distinguishing between categories 63, 64, 65 and 66 is by reference to the type of waste that, under that document, that category of landfill site is permitted to accept.

582        I accept that the Waste Definitions do not in their terms purport to and do not determine or define what is waste. The definitions of waste in the EP Act and the WARR Act do not refer to them. I do not read the words in parenthesis 'as determined by reference to the waste type' as intended to direct attention to the waste types in the Waste Definitions in order to ascertain whether what is accepted for burial is waste. Rather, I consider that the intended function of the words in parenthesis is to identify which types of waste in the Waste Definitions are accepted for burial, so as to enable the identification of which of category 63, 64, 65 or 66 the site falls into. Nevertheless, to my mind the reference in sch 1 of the EP Regulations to the Waste Definitions suggests an assumption or intention that waste types referred to in the Waste Definitions, including clean fill, are waste. Accordingly, I think the references in sch 1 of the

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<sup>592</sup> Eclipse's closing submissions [111] - [113], [119] - [121].

EP Regulations to the Waste Definitions are consonant with, and supportive of, a reading of the levy regime that classifies clean fill received at premises unwanted by its source as waste.

583 Thirdly, regs 10 - 12 of the Levy Regulations calculate the volume of waste disposed of to landfill at category 63 licensed premises during a return period by comparing a survey of the premises at the beginning of the period with a survey from the end of the period. As I will explain in dealing with the construction of the phrase 'waste disposed of to landfill', in my view, that methodology indicates that an element of the levy regime is that whatever matter has been put into the ground at the premises and buried, so as to raise its level, is waste disposed of to landfill.

584 There is some force in Eclipse's submission that it is at least difficult to apply the evident object of the levy regime to soil and sand. The object of the levy regime is to encourage re-use and recycling and to discourage disposal to landfill. It is not easy to identify the use or form of recycling of soil and sand that is the preferred alternative to disposing of the material to landfill. Nevertheless, I think the textual indications I have referred to sustain the conclusion that clean fill, including soil and sand, received at premises is waste for the purposes of the levy regime. Further, in applying the ordinary meaning of 'waste' - material that is unwanted or excess to requirements - there is no sufficient foundation in the text to exclude unwanted material that is composed of sand or soil. Thus, I reject Eclipse's contention that what it terms Natural Earth Material is not waste for the purpose of the levy regime.<sup>593</sup>

585 In my view, the textual considerations to which I have referred sustain the construction I have adopted notwithstanding any perceived unlikelihood that the regime was intended to apply in the first two scenarios identified by Eclipse. On my analysis, if and insofar as it were thought that the reach of the levy regime is excessively broad, that would raise a question of policy as to whether an amendment to the regime is warranted.

586 I turn to the inclusive definition of waste.

587 The inclusive definition of waste in s 3 of the WARR Act, and s 3 of the EP Act, is that it 'includes matter whether liquid, solid, gaseous or radioactive and whether useful or useless, which is discharged into the environment ...'

<sup>593</sup> Statement of claim in CIV 1364 of 2009 (SC 1) [34.1], [34A.1]; defence in CIV 2385 of 2013 (D2) [52.1], [53.1]; statement of claim in CIV 2416 of 2014 (SC 3) [28.1], [29.1].

588 The parties agree that the word 'includes' in this definition is used in its conventional sense of leaving the ordinary meaning of the defined term to be applied, and to enlarge that meaning by adding that which is within the scope of the inclusive definition. The parties agree that the definition in s 3 is not to be read as an exhaustive statement of what constitutes waste. That is an orthodox construction of an inclusive definition.<sup>594</sup>

589 The inclusive definition of waste refers to matter which is 'discharged into the environment'. Section 3(1) of the EP Act defines 'discharge' to include, among other things, to deposit or fail to prevent something from being deposited. By s 3(2aa) of the EP Act, a reference in the Act to the discharge of anything is a reference to discharge onto or into land and, in relation to discharge from premises, includes a reference to a discharge onto or into land that is part of the premises.

590 There is a small measure of agreement as to the proper construction of the inclusive definition of waste. The parties agree that the effect of the inclusive definition is not that any solid matter deposited on the ground is waste for the purposes of the levy regime,<sup>595</sup> or, for that matter, for the purposes of the EP Act and the EP Regulations. The parties also agree that the inclusive definition of waste in the WARR Act and Levy Regulations is not intended to operate differently from the inclusive definition of 'waste' in the EP Act and EP Regulations.<sup>596</sup>

591 On this point, the Government Parties invite adoption of the reasoning of the Tribunal in *City of Fremantle and The CEO*,<sup>597</sup> as follows.<sup>598</sup> The definition in the EP Act of terms applies unless the contrary intention appears. To construe the definition of waste as including the deposit onto land of any material would, when that definition is inserted in the EP Act or in the levy regime, produce results that are plainly unintended. Reading the legislative regime as a whole, in the context of the inclusive definition of waste, the word 'discharged' should be given its ordinary meaning of 'to remove, send forth or get rid of', rather than a meaning informed by the definitions of 'discharged' in s 3(1) and s 3(2aa) of the EP Act.

592 The Government Parties further submit that, on a plain and direct reading of the inclusive definition, any matter that is discharged into the

<sup>594</sup> See *Du Buisson Perrine v Chan* [2016] WASCA 18 [56] - [57], [132] - [133].

<sup>595</sup> ts 266 - 267, Government Parties' closing submissions pt VIII [22].

<sup>596</sup> ts 277 - 279, Government Parties' closing submissions pt VIII [22].

<sup>597</sup> *City of Fremantle and The CEO* [30] - [34].

<sup>598</sup> Government Parties' closing submissions pt VIII [21].

environment is waste, with the phrase 'discharged into the environment' to be given its ordinary meaning as just explained.<sup>599</sup>

593 Eclipse submits that, read in that way, a literal meaning of the inclusive definition as encompassing any matter that is discharged into the environment, that is removed, sent forth or gotten rid of into the environment, would produce absurd results.<sup>600</sup> Eclipse gives the following example. On the Government Parties' construction, if a developer purchased large quantities of virgin sand or otherwise uncontaminated soil to use to build up the levels of land to be developed, and if the seller delivered that material to the developer's land, on a literal application of the inclusive definition, the material could be said to have been discharged into the environment when it was unloaded, and thereby constitute waste. Further, the material could be said to have been accepted by the developer for burial. Thus, the premises would need to be licensed under category 63 of sch 1 to the EP Regulations.

594 Eclipse submits that s 3 has a considerably more limited scope and effect than is suggested by the Government Parties' construction. Eclipse submits that the object and effect of the section is to clarify two specific points about the meaning of waste, while leaving its ordinary and natural meaning to be applied.<sup>601</sup> The inclusive definition clarifies that 'waste' includes all forms and phases of waste, and that whether matter is useful or useless is irrelevant. On this construction, subject only to those two clarifications, only material that is waste within the ordinary meaning of the word will be waste.

595 That reading of s 3(a) invites attention to the question of what work is done and what effect is to be given to the words 'which is discharged into the environment' in s 3(a). Eclipse submits that the effect of those words is that only matter which is discharged into the environment is captured within the inclusive definition. In other words, if matter is not discharged into the environment, it will be waste only if it is within the ordinary sense of the word waste, and without regard to the inclusive definition.<sup>602</sup>

596 In my view, Eclipse's construction of the inclusive definition gives a rather strained meaning to the language of the definition. Moreover, it is difficult to see why it would be intended to remove doubt in the two

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<sup>599</sup> ts 293 - 295.

<sup>600</sup> ts 282 - 284.

<sup>601</sup> ts 279 - 280.

<sup>602</sup> ts 281 - 282.

respects stated in the definition only if matter were discharged into the environment.

597 I accept that the levy regime is not to be construed as applying to the hypothetical developer purchasing sand or soil in the scenario postulated by Eclipse. In my view, the plainly unintended result to which Eclipse points is to be avoided, but not by construing the inclusive definition in the manner contended for by Eclipse. Rather, it is to be avoided on the basis that a contrary intention appears, so that the inclusive definition does not apply.

598 In my view, if the inclusive definition is otherwise to be construed as contended for by the Government Parties, namely as meaning that any matter discharged into the environment is thereby waste, then a contrary intention appears in sch 1 to the EP Act, and in the levy regime, such that the inclusive definition of waste does not apply to determining whether waste was accepted for burial in the context of sch 1 to the EP Act and the levy regime.

599 The mechanism in regs 10 - 12 of the Levy Regulations for determining the volume of waste disposed of to landfill may be seen as consistent with the Government Parties' construction of the inclusive definition applied to the levy regime as meaning that all material discharged into the environment is thereby waste. Nevertheless, on balance I think the consequences identified by Eclipse are sufficiently unlikely to have been intended to sustain the conclusion that a contrary intention appears, so as to exclude application of the inclusive definition.

600 For these reasons, in assessing whether waste was received and whether waste was accepted for burial, I construe waste as bearing its ordinary meaning of material that is unwanted by, or excess to the requirements of, the party from whom it comes.

### ***5.2.2 Accepted for burial***

601 Eclipse submits that:

- (1) it is clear from a consideration of the language of categories 61A and 63 that waste 'accepted for burial' must be distinguished from and contrasted with waste 'discharged on to land';
- (2) burial connotes permanency - waste is accepted for burial if it is accepted for the purpose of entombing it or interring it;

- (3) waste is not accepted for burial if it is accepted with the intention of using it in some way, including using it as fill;
- (4) waste in the form of soil or sand that is accepted so as to be put in the ground, and covered with more material, including more soil and sand, is not 'accepted for burial', rather, it has been deposited and thus discharged onto the land.<sup>603</sup>

602 I accept the first of these submissions. However, I do not accept the balance of them.

603 In my view, as a matter of ordinary language, material is accepted for burial if it is received with the intention that it will be or is likely to be buried. Material is buried when it is put in the ground and covered, usually with sand or soil, so that it cannot be seen.

604 Sand or soil that is received at premises in order that it will or may be used as fill - put in the ground at the premises, or in a void in the ground there, and covered with similar material - is, on my construction of the levy regime, 'accepted for burial'. I think the intention that the levy regime operate in this way is apparent from, among other things, the indications I have already referred to that clean fill, including sand and soil, is within the ambit of 'waste' in the context of the levy regime and, unless an exemption is granted, will attract the levy if it is added to the ground. As a matter of ordinary language, I do not think that sand or soil that is to be put into a void and covered with more material is 'discharged onto land' within the language of category 61A. I also refer to my reasons relating to the proper construction of 'waste disposed of to landfill', to which I now turn.

### 5.3 Waste disposed of to landfill

#### 5.3.1 *Eclipse's submissions*

605 Eclipse submits that:

- (1) in assessing whether material is waste, in the context of whether it is 'waste disposed of to landfill', the focus is on whether the material is unwanted or excess from the perspective of the party who is said to be disposing of it;<sup>604</sup>

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<sup>603</sup> Eclipse's closing submissions [131] - [133], [179] - [181]; ts 699 - 702.

<sup>604</sup> Eclipse's closing submissions [182]; ts 705.



- (2) if material was, when received, 'waste', there is no need for it to be reprocessed in any way in order for it to cease to be waste by the point in time at which it is said to have been disposed of to landfill. To require reprocessing for there to be a change in character of the material is inconsistent with the purpose of the legislation of encouraging re-use;<sup>605</sup>
- (3) used as a verb, 'landfill' is the act of disposing of waste to land 'qua waste' or, as a noun, a place used in order to dispose of waste 'qua waste';<sup>606</sup>
- (4) the scheme of the levy regime makes clear that there is a distinction between waste that is 'discharged onto the land' (category 61A) and waste 'disposed of to landfill' (category 63);<sup>607</sup>
- (5) putting soil and sand into the ground so as to fill a void for a commercial purpose is not 'disposing of waste to landfill'. Rather, it is using soil and sand for its primary or sole purpose. That is re-use or recycling of it, which is the type of conduct encouraged by the levy regime.<sup>608</sup> Further, the use of remediated acid sulfate soil as fill represents its highest and best use, so that it would be absurd to construe the regime as applying to such material used in that way;<sup>609</sup> and
- (6) whether material has been disposed of to landfill invites attention to the intention and conduct of the party said to have disposed of the waste to landfill. Eclipse submits that the word 'disposed' involves an element of permanency or 'getting rid of' material. In that respect, Eclipse relies on what is said in *Environment Protection Authority v N*;<sup>610</sup> that to 'dispose of' means to get rid of, and that involves an intention on the part of the person alleged to be disposing of the waste.<sup>611</sup>

<sup>606</sup> For the reasons that follow, with the exception of the fourth point, I do not accept these submissions.

<sup>605</sup> Eclipse's closing submissions [142], [180] - [182].

<sup>606</sup> ts 178; Eclipse's closing submissions [136].

<sup>607</sup> ts 699, 714.

<sup>608</sup> ts 178 - 179, 704.

<sup>609</sup> ts 729 - 730.

<sup>610</sup> *Environment Protection Authority v N* (1992) 26 NSWLR 352, 355.

<sup>611</sup> Eclipse's closing submissions [137]; Eclipse's opening submissions [24] - [25].

### 5.3.2 *The proper construction of 'waste disposed of to landfill'*

607 The phrase 'waste disposed of to landfill' should be construed as a composite phrase. The individual words used in the phrase should not be construed in isolation from each other.

608 When that is borne in mind, I do not think the observations in *EPA v N*, made in the context of an offence of disposing of waste in a manner likely to harm the environment, shed light on the proper construction of 'waste disposed of to landfill' in the levy regime.

609 As to Eclipse's fifth submission, I refer to what I said in [565] and [568] above. In the framework of the dichotomy identified by the levy regime, the use of waste as fill does not constitute 're-use' as distinct from disposal to landfill.

610 The phrase 'waste disposed of to landfill' must be construed in its context in regs 10 - 12 of the Levy Regulations. In that context, the phrase is directed to determining the amount of levy payable in respect of waste to which the regulations apply received at premises during a return period. It is the receipt of waste, when it is accepted for burial, that engages the operation of the Levy Regulations. In my view, the legislative scheme proceeds on the basis that the 'waste disposed of to landfill' at premises will be a subset of the waste received at the premises.

611 As I have explained, the character of material as waste when it is received is determined by reference to whether it is unwanted or surplus material, from the perspective of the party supplying it.

612 Under the Levy Regulations, there are two elements involved in finding that levy is payable for a category 63 licensed landfill. The first is that waste is received and accepted for burial; the second that waste is disposed of to landfill. The process of identifying and measuring the volume of waste disposed of to landfill falls to be done in the context of waste having been accepted for burial at the premises. On a proper construction, the process of identifying waste disposed of to landfill is not a standalone process, wholly independent of and unrelated to that first element.

613 In my view, on a proper construction of the levy regime, the character of material that is waste when received is not altered by the fact that, at the time of its alleged disposal to landfill, the material is by then in the hands of the licensee. In this statutory setting, I think the starting point is that if material is waste when received and accepted for burial, in

determining whether it is 'waste disposed of to landfill', it continues to have the character of waste at least unless it has been substantially transformed between when it was received and when it is (allegedly) disposed of to landfill. In other words, no new process of characterisation arises simply from the fact that, by the time of the alleged disposal to landfill, the material is in the licensee's hands. The levy regime applies to waste accepted for burial and disposed of to landfill. Its purpose is to discourage disposal to landfill and encourage re-use, recycling and reprocessing. As I have said, in that setting, to construe the regime so that material is not waste because it is wanted by the licensee or occupier for use by it as fill on the premises would subvert the evident legislative purpose. I think that applies equally to both 'waste disposed of to landfill' and to 'waste accepted for burial'.

614        In any event, in my view, as a matter of proper construction, the intention revealed by the levy regime as a whole is that any material placed into the ground and buried by the licensee of a licensed landfill is 'waste disposed of to landfill'.

615        First, the mechanism prescribed by regs 10 - 12 of the Levy Regulations for the calculation of the volume of waste disposed of to landfill seems to me to reveal an intention that any material placed into the ground at the premises and buried, thereby raising the level of the ground, is waste disposed of to landfill. The levy, if any, payable by a licensee is to be calculated in accordance with regs 10 - 12. The calculation to be made is governed by reg 12, which controls the 'amount by way of levy that is payable in respect of waste to which these regulations apply that is received at category 63 landfill premises during a return period'. One integer of the formula stipulated in reg 12 is V - 'the number of cubic metres of waste to which these regulations apply received at the landfill premises during the return period determined in accordance with regulation 10 or estimated under regulation 11(2) or 11(4)'.

616        Regulations 10 and 11 create two alternative mechanisms for the determination of integer V:

- (1)        determination by a surveyor of the number of cubic metres of waste 'disposed of to landfill' on the premises during the return period; or
- (2)        an estimate by the CEO of the number of cubic metres of waste 'disposed of to landfill' on the premises during the return period.

617        Thus, both mechanisms are founded on the volume of waste disposed of to landfill on the premises during the return period. I accept that this waste is to be distinguished from waste that has been 'deposited onto land' (category 61A). The comparative survey mechanism is capable of distinguishing between material that has been deposited onto land and material that has been disposed of to landfill by being buried. But, as I will explain, that mechanism seems to me to be incapable of distinguishing, in a workable way, between different forms of buried material and between material buried with different intentions or purposes.

618        Regulation 10 provides for a specific and singular mechanism for the calculation by a surveyor of the volume of waste disposed of to landfill on the premises. That mechanism is a calculation based on a comparison of a survey of the premises at the end of the return period (a quarterly survey made under reg 10(5)) with the previous quarterly survey or, if there is none, by comparison with the baseline survey under reg 10(2). The quarterly survey must be conducted by the surveyor for the purpose of calculating the volume of waste disposed of to landfill during that return period. Regardless of the nature of material put into the ground, and regardless of the purpose for which it is put there, when material is put into the ground so as to raise the level of the ground, that will be reflected in the results of the comparison by the surveyor of the two surveys. In my view, the methodology for calculation prescribed by the Levy Regulations reveals an intention that any material that is put into the ground will, to the extent that it raises the level of the land, be 'waste disposed of to landfill'. The mechanism prescribed is not consistent with a construction of that phrase which requires an analysis of different materials put into the ground and buried to determine which of it is waste disposed of to landfill. The prescribed mechanism would not work if an analysis sensitive to the qualities and, from the licensee's perspective, utility of the various sorts of material that had been buried was required in order to determine the volume of waste disposed of to landfill.

619        Secondly, I refer to the conclusion I have reached that clean fill, including sand and soil, and what Eclipse refers to as Natural Earth Material received at premises are waste for the purposes of the EP Act, the EP Regulations and the levy regime insofar as they are unwanted by their source.

620        Further, I do not think that, on a proper construction of the regime, the intention with which material is buried bears upon whether the material is 'waste disposed of to landfill'. The focus of that phrase is on

the status of the waste, and what has been done to it, rather than upon the licensee or occupier's act of disposal. I construe the levy regime as revealing an intention that the volume of waste disposed of to landfill is objectively ascertainable, and is not subject to the uncertainties that would be inherent in its being influenced or determined by the intention with which the licensee acted. Further, the mechanism for determination of the volume of waste disposed of to landfill does not sit well with the operation of the regime being sensitive to intention in that way.

#### 5.4 Other submissions of Eclipse

621 Eclipse's closing submissions made extensive reference to sequential land use and to planning policy documents and other governmental publications that endorse and explain that concept.<sup>612</sup> I do not think what these documents say about sequential land use is of any substantial assistance in construing the levy regime.

622 Eclipse also points to the consequences for it of a conclusion that the levy applies to its operations as an indication that the regime should not be construed so as to apply to them. Eclipse submits that:

- (1) its operations are a paradigm example of sustainability and resource recovery in action, advancing the evident objects of the levy regime;
- (2) the application of the levy, at the rate to which it increases from 30 January 2015 to 30 June 2016, will 'destroy operations such as Eclipse'.<sup>613</sup>

623 More generally, some of Eclipse's submissions commenced with focus on the nature of its operations, and then contended that for various reasons the levy regime did not apply to it, or should be construed as not applying to it.

624 To my mind the analytical steps involved in determining whether the levy regime applies to Eclipse's operations are to:

- (1) identify the proper construction of the statutory scheme;
- (2) find the facts relating to Eclipse's operations; and
- (3) apply the construction to the facts found.

<sup>612</sup> Eclipse's closing submissions [29] - [40].

<sup>613</sup> Eclipse's closing submissions [183], referring to exhibit D1 [50] - [58].

625       The order in which the first two of these are done is not important. What is important is that both are done separately, before moving to the third step, and that the task of statutory construction is undertaken with a view to identifying, as far as possible, a coherent construction of the regime as a whole, giving appropriate weight to considerations of text, object, context and consequences. In my view, when that is done, the consequences for Eclipse of the application of the levy regime to its operations does not attract significant weight in the process of statutory construction.

626       If the view were taken that Eclipse's operations advance the public interest in sustainability, sequential land use, resource recovery and waste management, that might invite attention to whether an amendment to the legislative regime is warranted; for the reasons already given, on my analysis it does not attract significant weight in the process of statutory construction. In any event, as I have said, in the process of statutory construction there is a limit to the weight that can be given to consequences. I have weighed considerations of consequences with those of text, context and object in coming to my construction of the regime.

## **5.5 Summary of conclusions on construction**

627       In summary, I would construe the levy regime as follows:

- (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.

- (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'.

## **6. Did Eclipse accept waste for burial at the Sites?**

628 Eclipse contends that the material it received and accepted at the Sites was not waste.<sup>614</sup> Its contention is founded on the construction of the levy regime which it advances.<sup>615</sup>

629 I have rejected Eclipse's construction of the levy regime. In short, the result of my construction of the levy regime when applied to Eclipse's operations is that at each site, during each return period in the Relevant Period, Eclipse accepted waste for burial.

630 On my construction of the levy regime, in the context of 'waste received' and 'waste accepted for burial', any material received at premises that is unwanted by or excess to the needs of its source is waste.

631 Applying that construction of the ordinary meaning of waste, the material received by Eclipse at the Sites during each return period in the Relevant Period was, and certainly included, waste. As I understood it, Eclipse concedes that this is so.<sup>616</sup>

632 I refer to my findings in section 2.6 above. The parties supplying materials to Eclipse at the Sites did not want them, and evidently had no present use for them. Both Eclipse's executives said as much in their evidence.<sup>617</sup> It is also clear from the nature and source of the materials received. The materials were mostly the unwanted by-products of, or unused or excess materials left over from, excavation, clearing, construction, demolition and other similar works at various other sites. They were evidently not wanted for work being carried out there, and had to be disposed of elsewhere. That is reflected in the fact that those bringing the materials to the Sites paid Eclipse to accept them.<sup>618</sup>

633 That is sufficient to dispose of Eclipse's argument on 'waste received'.

<sup>614</sup> Eclipse's closing submissions [2.3], [130].

<sup>615</sup> Eclipse's closing submissions [130], [176] - [181].

<sup>616</sup> ts 155, 174; Eclipse's closing submissions [129].

<sup>617</sup> Exhibit G1 [13]; ts 341.

<sup>618</sup> Exhibit G1 [12]; ts 342.

634 Not all of the waste received by Eclipse at the Sites during the Relevant Period was 'accepted for burial'. For example, materials to be used in the production of mulch or blended soil products were not accepted for burial. More generally, materials that were not received to be deposited and compacted in the voids were not accepted for burial.

635 Eclipse contends that the materials that it received, or at least the overwhelming majority of them, were not accepted for burial. Rather, they were waste that was 'stored, processed, treated or discharged onto land' and so within category 61A rather than category 63.<sup>619</sup> That contention is founded on Eclipse's argument that, on a proper construction, waste in the form of soil or sand that is accepted so that it will be put in the ground and covered with more material is not 'accepted for burial', but has been deposited and thus 'discharged onto land'. I have rejected that construction of the phrase 'accepted for burial'.

636 On my construction, material is accepted for burial if it is received with the intention that it will be or is likely to be buried; that is, put in the ground and covered with other material. On my construction, that applies equally to sand and soil and to what Eclipse calls Natural Earth Material.

637 I am satisfied that Eclipse accepted (some) waste for burial at each site during each return period during the Relevant Period.

638 I refer to my findings in sections 2.8 and 2.9. Materials received by Eclipse at the Sites would generally be transported by a customer of Eclipse to a site in a large truck with a capacity of more than 20 tonnes.<sup>620</sup> Before the materials arrived at the site, Eclipse would often have already received environmental tests from the provider, and, where deemed appropriate or necessary, Eclipse may have done some testing of its own.<sup>621</sup> Some of the trucks arriving at a site were directed to deposit their loads at the operational bench in the void at the site.<sup>622</sup>

639 In my view, whenever trucks arrived at a site with materials and were directed by Eclipse staff to tip those materials in the void, those materials were accepted for burial. Eclipse's intention was that materials tipped in the void would be compacted. As Mr Delroy put it, 'essentially if it goes in the void, it has to be compacted'.<sup>623</sup>

<sup>619</sup> Eclipse's closing submissions [131] - [132]; ts 699 - 700.

<sup>620</sup> ts 341.

<sup>621</sup> ts 419 - 420.

<sup>622</sup> ts 350, 351 - 352; exhibit G1 [52]; exhibit A [54].

<sup>623</sup> ts 379.



640 I have made detailed findings about the process of compaction in section 2.15.1 of these reasons. Materials were compacted in a series of horizontal layers referred to as 'benches', usually 1 - 2 m in depth. That ongoing and consistent practice during the Relevant Period supports the conclusion that materials deposited in the void and compacted were accepted for burial.

641 Eclipse's closing submissions did not refer to the re-mining element of its case in the context of whether waste was 'accepted for burial'. To the extent that Eclipse contends that it did not accept materials for burial because it intended to deposit and compact them in the void so that they would be available for later extraction, I do not accept that contention. For present purposes, it is not necessary to refer to my factual findings as to Eclipse's intention when material was deposited and compacted. If it is accepted that Eclipse had the intention it asserts, as I find in relation to much of the return period from 1 July 2014 to 30 September 2014 for the Abercrombie Road Site, I find that Eclipse nevertheless accepted materials for burial. Materials received with the intention that they be buried are accepted for burial notwithstanding that the receiving party intends that, depending on future contingencies, the materials may be exhumed at a later stage.

642 Some materials shown in photographs as having been deposited in the Civil Works Area at the Wanneroo Road Site can be considered as an illustrative example of materials that, on my construction, are waste accepted for burial but, on Eclipse's construction, are not. Exhibit 14, attachments JD26, JD30 - 32 show building rubble and sand at the tip face or operating face of the Civil Works Area. Mr Sippe's evidence is that those photographs show materials that have been deposited on the operational face and that will have sand and soil added to them to form a bench, with no sorting required.<sup>624</sup>

643 That brings me to the second issue relating to the first part of the Relevant Period, namely the return periods up to 31 December 2011. This issue is whether the CEO's power to estimate the volume of waste disposed of to landfill arose. That turns on whether Eclipse failed to comply with reg 10(6) of the Levy Regulations.

## **7. Did Eclipse fail to comply with reg 10(6) of the Levy Regulations?**

644 Some of the CEO's estimates were made in circumstances where Eclipse provided a survey and report after the 28-day deadline. In those

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<sup>624</sup> Exhibit G2 [34], [38].

cases, the CEO's estimate was the volume calculated in accordance with the survey and report submitted by Eclipse. In this category of cases, I accept the Government Parties' submission that the power to estimate arose because:

- (1) Regulation 10(6) requires the relevant material to be submitted within 28 days after the end of the return period; and
- (2) Eclipse did not comply with that requirement because the material was not submitted within time.<sup>625</sup>

645 Eclipse did not make any submissions to the contrary, nor any submissions directed to this category of estimates. In any event, if I were wrong in that respect, levy would be calculated under reg 12 by reference to the amount determined under reg 10, which produces the same amount.

646 The issue between the parties as to Eclipse's compliance with reg 10(6) relates to the estimates made by the CEO in circumstances where Eclipse provided a survey report that related to only part of the active void at the Abercrombie Road Site and at the Wanneroo Road Site.

647 It is an agreed fact that from the date of the lodgment of the applications for reduced category 63 areas to the end of 2011, Eclipse submitted volumetric surveys to DER which contained raw survey data for areas of the voids at the sites outside of the Category 63 Area, but which only reported the surveyor's calculation of the volume of material filled within the Category 63 Area (except for the survey for each site for the period 1 July to 30 September 2011, which reported the surveyor's calculation of the volume of material filled within the Category 63 Area and also included a second survey diagram).<sup>626</sup>

648 The Government Parties submit that, in providing DER with survey reports that were limited to the Category 63 Area, Eclipse failed to comply with reg 10(6).

649 Eclipse submits that the court should not be satisfied that it failed to comply with reg 10(6) in respect of each return period for each site because:

- (1) no waste was disposed of to landfill; or

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<sup>625</sup> Government Parties' closing submissions [8], [43], [44]; ts 678.

<sup>626</sup> Exhibit A [74].

- (2) no waste was disposed of to landfill outside of the Category 63 Area, and Eclipse lodged a complying report on a quarterly survey in respect of the waste disposed of to landfill in the Category 63 Area.<sup>627</sup>

650 Eclipse concedes that if the court is satisfied that waste was disposed of to landfill outside of the Category 63 Area, then Eclipse did not comply with reg 10(6).<sup>628</sup>

651 Eclipse's submission that no waste was disposed of to landfill is put on two bases.

652 First, Eclipse says that in its hands, at the time that material was deposited and compacted in the void, it was not waste, it was a resource. Eclipse used it as fill to perform its filling contracts. Further, in some cases the material had been processed, remediated or bio-remediated, and in all cases Eclipse had ensured its environmental and geotechnical suitability for the purpose for which it was being used. That system delivers an identical outcome to Eclipse purchasing fill from a third party. Accordingly, the material is not waste, it is a resource. Further, taking sand and soil as a paradigm example, Eclipse was using it as a resource for its intended and primary or sole purpose. That is what the levy regime aims to encourage.<sup>629</sup>

653 Secondly, Eclipse says that it did not dispose of waste to landfill because it was not getting rid of material. It was placing it there with the intention that it would continue to be available to Eclipse for re-use.<sup>630</sup>

654 Eclipse's first set of contentions depend critically on the proper construction of the provisions of the levy regime. As explained in section 5 of these reasons, I do not accept the construction advanced by Eclipse. On my construction, none of the matters pointed to by Eclipse deny the conclusion that the material it deposited and compacted in the void, having received it from a party for whom it was unwanted or excess to requirements, was waste disposed of to landfill.

655 Eclipse's second contention is founded in part on the construction it advances, and in part on the factual findings which it invites as to its intention to re-mine.

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<sup>627</sup> Eclipse's closing submissions [153] - [156]; ts 411, 684 - 685.

<sup>628</sup> Eclipse's closing submissions [156.2].

<sup>629</sup> ts 173 - 178, 704; Eclipse's closing submissions [138.1], [182] - [183].

<sup>630</sup> Eclipse's closing submissions [138.2]. See, for example, exhibit G2 [4].

656 I do not accept Eclipse's submission that, in order for waste to be disposed of to landfill, the party said to be disposing of it must have intended to permanently get rid of it.

657 Material that is deposited and compacted with the intention that it might be later exhumed is nevertheless 'disposed of to landfill'. I construe the levy regime as meaning that whether waste is 'disposed of to landfill' is an objective question that is not governed by the intention of the licensee or occupier of the premises. For waste to be 'disposed of to landfill' it does not have to be permanently and immutably dealt with in that way.

658 Further and in any event, with the exception of the return period 1 July 2014 to 30 September 2014 for the Abercrombie Road Site, I have found that when Eclipse deposited and compacted material in the void at one of the Sites it did not do so with the intention or substantial purpose that it be available for re-use after re-mining.

659 Eclipse's alternative proposition that no waste was disposed of to landfill outside the Category 63 Area is founded on its contention that Natural Earth Material and Construction and Demolition Material (as it defines those terms), when put into the ground and covered with similar materials, are not waste disposed of to landfill.<sup>631</sup> That contention depends upon the construction of the levy regime advanced by Eclipse.

660 In section 5.3.2 of these reasons I rejected Eclipse's contentions about the proper construction of 'waste disposed of to landfill'. On my construction:

- (1) Sand and soil, clean fill, and what Eclipse calls Natural Earth Material, are waste when received if they are unwanted by or excess to the requirements of their source.
- (2) Any such materials that are put into the ground and buried by the licensee of a licenced landfill will be waste disposed of to landfill.

661 When my construction is applied to Eclipse's activities, it is clear that Eclipse disposed of waste to landfill outside of the Category 63 Area. Eclipse regularly filled the void outside the Category 63 Area in the Civil Works Area. The material deposited and compacted in the Civil Works Area was largely sand and soil, together with some construction and

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<sup>631</sup> SC 1 [34.1], [34A.1]; D2 [52.1], [53.1]; SC 3 [28.1], [29.1].

demolition rubble, that had been sent to Eclipse from excavation, cleaning, demolition or construction works at other sites.

662 On Eclipse's case, only clean sand, soil and other Natural Earth Material or Construction and Demolition Material that, in all cases, is established as meeting EILs, and which Eclipse characterises as clean fill, was deposited into the Civil Works Area at the Abercrombie Road Site and the Wanneroo Road Site.<sup>632</sup> The Government Parties submit that because what was deposited included building rubble such as broken concrete or bricks, it was not clean fill as defined in the Waste Definitions but, rather, was 'Type 1 inert waste'.<sup>633</sup> I accept that this is so. But in any event, on my construction of the levy regime, whether the materials were clean fill or Type 1 inert waste makes no difference to whether they were 'waste disposed of to landfill'. On my construction, clean fill received from a source that does not want it which is then put into the ground and buried is waste disposed of to landfill. Accordingly, on Eclipse's case as to what occurred in the Civil Works Area, waste was disposed of to landfill.

663 For these reasons, I find that Eclipse disposed of waste to landfill outside of the Category 63 Area at the Abercrombie Road Site and the Wanneroo Road Site in each relevant return period, and that, accordingly, Eclipse did not comply with reg 10(2).

664 The consequence of these findings is that the power of the CEO under reg 11(2) to estimate the volume of waste disposed of to landfill was enlivened. As I have said, it is not in doubt that as a matter of fact, the CEO made estimates. The next (and final) issue relating to the return periods up to 31 December 2011 is whether the CEO's estimates are valid.

## **8. Are the estimates of levy made by the CEO valid?**

665 It is for Eclipse to establish that the CEO's estimates are invalid.

666 Eclipse contends that they are invalid because the CEO misconstrued the Levy Regulations, in particular the meaning of 'waste' and 'waste disposed of to landfill'.<sup>634</sup> In this respect, in effect Eclipse relies on the construction arguments that I have already considered and rejected. That being so, Eclipse's claim that the CEO misconstrued the levy regime fails.

<sup>632</sup> See, for example, Eclipse's closing submissions [155]; ts 162; exhibit G3 [7] - [8], [11] - [13]; exhibit C, pages 157 - 159.

<sup>633</sup> Government Parties' closing submissions pt VIII [48] - [52].

<sup>634</sup> Eclipse's closing submissions [163]; ts 645, 654, 681, 684.

Eclipse has not demonstrated that the CEO's estimates, or any of them, were founded on a misconstruction of the levy regime.

667 Eclipse's closing submissions assert that:

- (1) the CEO's estimates did not seek to differentiate between different types of material deposited in the voids or even between the area marked as the Category 63 Area and the rest of the void;
- (2) the CEO's position was that everything deposited in the void was 'waste disposed of to landfill' irrespective of whether or not it was in a stockpile, irrespective of the nature of the material and irrespective of what area it had been deposited in within the void; and
- (3) in making his estimates, the CEO knew of Eclipse's 'various contentions'.<sup>635</sup>

It is unclear whether Eclipse thereby submits that as a result of the CEO's failure to exclude stockpiles, his estimates are invalid. Certainly, nothing said in Eclipse's oral submissions in closing suggested that this contention was being put. To the contrary, Eclipse submitted that its contention that the CEO's estimates are invalid was founded on his misconstruction of the Levy Regulations, as already explained. Nevertheless, for the sake of completeness, I will explain why I do not accept that the CEO's estimates are invalid on the ground that he failed to exclude stockpiles.

668 In short, at no time prior to December 2012 did Eclipse convey to the CEO that it considered that stockpiled materials should be excluded from an estimate based upon the surveys that it provided. Further, in all cases where the CEO proposed to make an estimate materially different from the volume reported in Eclipse's survey report, the CEO provided to Eclipse a draft of his proposed estimate for Eclipse's comment, and, prior to December 2012, Eclipse did not respond at all. In particular, Eclipse did not suggest that stockpiles had been wrongly included in the estimate.

669 Many of the surveys provided by Eclipse did not identify any stockpiles. Where they did, in some cases they did not identify the volume of stockpiles.<sup>636</sup> Thus, in many cases Eclipse did not give the CEO enough information to exclude stockpiles from his estimates.

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<sup>635</sup> Eclipse's closing submissions [159] - [161].

<sup>636</sup> Exhibit A, attachment 63, page 2184; exhibit A, attachment 65, page 2192.

670       The first survey provided by Eclipse that did identify a stockpile was the survey of the Abercrombie Road Site for the period April to June 2009.<sup>637</sup> Nothing in that survey stated or suggested that the stockpiled material was to be excluded. To the contrary, the survey reported a figure of 13,570 m<sup>3</sup> of fill, to which was added 1,952 m<sup>3</sup> of 'stockpile (fill)' to produce the 'total' of 15,522 m<sup>3</sup>. Nothing in the letter from Eclipse that enclosed this survey suggested that stockpiled material should be excluded. The CEO sent draft estimates to Eclipse in June 2010.<sup>638</sup> Eclipse did not comment on the draft estimates. In particular, Eclipse did not suggest that stockpiles should be excluded.

671       None of the surveys provided by Eclipse to the CEO stated in a clear way that stockpiled material should be excluded. The survey of the Wanneroo Road Site for the period 1 July 2010 to 30 September 2010<sup>639</sup> provided details that enable a calculation to be made of the amount of fill including or excluding stockpiles. That survey may be open to an interpretation that suggests that stockpiled material should be excluded, but that is far from clear. Nothing in Eclipse's covering letter referred to stockpiles or suggested that stockpiled material should be excluded. Again, a draft of the CEO's estimate was sent to Eclipse for comment, and there was no response.

672       The first and only time that Eclipse stated to the CEO that stockpiles should be excluded was by letter of 10 December 2012. That letter was sent in response to the CEO's letter of 30 November 2012, which enclosed a notice of estimate for the return period 1 July 2011 to 30 September 2011, together with draft notices of estimate for the remaining return periods for 2011. The CEO's estimate in respect of the return period 1 July 2011 to 30 September 2011 was based upon the volume reported by Eclipse for that period.<sup>640</sup> Thus, there would be no merit in any contention by Eclipse that the CEO's estimate for the period 1 July 2011 to 30 September 2011 was invalid on the ground that it included stockpiled material.

673       The CEO responded to Eclipse's letter of 10 December 2012 by a letter of 20 December 2012 requesting further information.<sup>641</sup> The CEO's letter of 20 December 2012 pointed out, correctly, that without information as to the volume of the stockpiles of materials referred to by

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<sup>637</sup> Exhibit A, attachment 54, page 2155.

<sup>638</sup> Exhibit A, attachment 67.

<sup>639</sup> Exhibit A, attachment 61, page 2178.

<sup>640</sup> Exhibit A, attachment 73, page 2277.

<sup>641</sup> Exhibit 1B, attachment KJM10.

Eclipse the CEO could not revise the estimated volumes set out in the draft notices. Eclipse did not provide DER with any further information.<sup>642</sup>

674 In these circumstances, and for these reasons, I would reject any contention that the CEO's estimates are invalid on the ground that he failed to exclude stockpiles.

675 The result of my findings in this section and the two preceding sections is that for the return periods from 1 July 2008 to 31 December 2011:

- (1) Eclipse accepted waste for burial during each return period of the Relevant Period at each site and, as a consequence, each site was a category 63 licensed landfill;
- (2) Eclipse did not comply with its obligations under reg 10(6), with the consequence that the CEO's power under reg 11(2) to estimate the volume of waste disposed of to landfill was enlivened; and
- (3) the estimates made by the CEO were valid.

676 The result of these findings is that the Government Parties' claims for the amounts estimated by the CEO succeed, and Eclipse's claims and defences fail.

677 Further, the Government Parties' claims for penalties also succeed. These penalties arise from s 76 of the WARR Act. Eclipse did not address any submissions to the Government Parties' claims for penalties.

678 I turn to the remaining issues concerning Eclipse's claims for declarations relating to the return periods after 1 January 2012.

**9. Should Eclipse's claims for declarations relating to the return periods after 1 January 2012 succeed?**

679 As outlined in section 4, Eclipse claims declarations relating to the return periods during the Relevant Period after 1 January 2012 to the following effect:

- (1) No waste was accepted for burial.
- (2) Eclipse is not liable to pay any levy in respect of the Abercrombie Road Site or the Wanneroo Road Site.

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<sup>642</sup> Exhibit 1B [26].



- (3) No waste was disposed of to landfill in respect of either of those sites.
- (4) Insofar as they comprised Natural Earth Material and Construction and Demolition Material, alternatively insofar as they comprised Natural Earth Material, the materials deposited by Eclipse in the void on both sites were not 'waste' and, further or alternatively, were not 'disposed of to landfill'.

680 In essence, for the reasons already explained, my conclusions as to the proper construction of the levy regime are fatal to all of these claims.

681 My conclusions in section 6 of these reasons apply to the first declaration claimed.

682 The second declaration claimed is founded on the success of one of the other claims to a declaration.

683 The third declaration claimed is founded on Eclipse's contentions that I considered and rejected in section 7 of these reasons. The conclusions I reached in section 7 relating to the return periods up to 31 December 2011 apply equally to the return periods after 1 January 2012.

684 The same is true of the fourth declaration claimed. The claim for that declaration is founded on Eclipse's construction arguments, considered and rejected in sections 5, 6 and 7 of these reasons.<sup>643</sup> Those conclusions apply equally to the return periods after 1 January 2012.

685 For these reasons, Eclipse's claims for declarations relating to the return periods from 1 January 2012 fail.

## **10. Is the levy invalid as an excise in its application to Eclipse?**

686 Eclipse puts three contentions that, in different respects and for different reasons, in its application to Eclipse's operations at the Sites, the waste levy is invalid as an excise.<sup>644</sup>

687 First, in respect of all three Sites, Eclipse contends that the levy is a tax upon the materials received by Eclipse that are ultimately used as fill, such materials being a valuable commodity that is taxed when Eclipse uses it as fill.

<sup>643</sup> See [572] - [585], [614] - [619], [635] - [639] and [659] - [663].

<sup>644</sup>ts 286 - 289.

688 Secondly, in relation to the Abercrombie Road Site and the  
Wanneroo Road Site, Eclipse says that the levy is a tax on a step in the  
production of valuable products, water retentive soil and structural fill,  
insofar as the levy applies to materials deposited in the void that are or  
may be subsequently re-mined and then used for the purpose of  
manufacturing those products.

689 Thirdly, in relation to the Abercrombie Road Site only, the levy is a  
tax on the rehabilitation of the site and that rehabilitation is a necessary  
step in the mining, sale and distribution of valuable commodities in the  
form of the Quarry Materials, namely limestone and sand, that are mined  
from the site.

690 It is not in doubt that the levy is a tax.

691 I will deal with Eclipse's three contentions in turn. Before doing so, I  
will outline the legal principles relevant to whether a State governmental  
impost is an excise.

### 10.1 Excise duties - general principles

692 Section 90 of the *Commonwealth Constitution* provides that the  
power to impose duties of excise is exclusively held by the  
Commonwealth. Consequently, a law of a State which imposes a duty of  
excise is invalid.

693 Like a customs duty, an excise duty is a tax on a good, or on a step  
taken in dealing with goods. Customs duties are taxes on the importation  
of goods. Duties of excise are, by contrast, 'an inland tax'.<sup>645</sup>

694 Duties of excise are taxes on a step in the production, manufacture,  
sale or distribution of goods, whether of foreign or domestic origin.<sup>646</sup>

695 In *Parton v Milk Board*, in a passage cited with approval many  
times,<sup>647</sup> Dixon J said that an excise duty includes 'a tax upon a  
commodity at any point in the course of distribution before it reaches the  
consumer'.<sup>648</sup> His Honour explained that is because such a tax produces  
the same effect as a tax upon the manufacture or production of the  
commodity. I will say something more about the point at which a

<sup>645</sup> *Ha v New South Wales* [1997] HCA 34; (1997) 189 CLR 465, 499.

<sup>646</sup> *Ha* (490, 499).

<sup>647</sup> See, for example, *Ha* (490); *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* [1993] HCA 67; (1993) 178 CLR 561, 586.

<sup>648</sup> *Parton* (260).

commodity reaches the consumer, and the boundaries that creates for what is an excise, later in these reasons.

696 In *Ha v New South Wales*, the High Court firmly rejected the contention that a duty of excise is confined to goods of domestic manufacture or production. One of the objectives of the movement to federation was 'inter-colonial free trade on the basis of a uniform tariff'.<sup>649</sup> That objective could not be achieved if the States retained the power to place a tax on goods within their borders. Accordingly, the State power to tax goods, whatever their place of production or manufacture, was given up to the Commonwealth.<sup>650</sup> By the *Constitution*, the States yielded up, and the Commonwealth acquired to the exclusion of the States, the power to impose taxes upon goods which, if applied differentially from State to State, would necessarily impair the free trade in those goods throughout the Commonwealth.<sup>651</sup>

697 Thus, s 90 serves the object of ensuring that the Commonwealth has 'real control of the taxation of commodities'.<sup>652</sup> The object of s 90 is not limited to the protection of the integrity of the tariff policy of the Commonwealth.<sup>653</sup> As Hanks, Gordon and Hill suggest,<sup>654</sup> this approach to s 90 involves restricting the power to implement tariff, revenue, social and economic policies through commodity taxes to the Commonwealth.

698 In determining whether a State law imposes an excise duty, the court must examine the effect of the law in and upon the facts and circumstances to which it relates; in other words, its practical operation, as well as its terms.<sup>655</sup> Thus, the statutory criterion of liability is not the sole determinant of whether a State law has the character of an excise.

699 I accept Eclipse's submissions<sup>656</sup> that whether in its practical operation the levy is properly characterised as an excise is to be assessed by reference to contemporary conditions, not by reference to what the position was in 1901.<sup>657</sup>

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<sup>649</sup> *Ha* (494).

<sup>650</sup> *Ha* (495).

<sup>651</sup> *Ha* (497); *Capital Duplicators (No 2)* (585).

<sup>652</sup> *Ha* (495), citing Dixon J in *Parton* (260).

<sup>653</sup> *Ha* (495 - 496); *Betfair Pty Ltd v The State of Western Australia* [2008] HCA 11; (2008) 234 CLR 418 [12] - [13].

<sup>654</sup> Hanks P, Gordon F and Hill G, *Constitutional Law in Australia* (3<sup>rd</sup> ed, 2012) [6.92].

<sup>655</sup> *Ha* (498); *Queensland Nickel Pty Ltd v Commonwealth of Australia* [2015] HCA 12; (2015) 89 ALJR 451 [53].

<sup>656</sup> Eclipse's closing submissions [187] - [188]; ts 751 - 752.

<sup>657</sup> *Betfair* [19] - [20].

700 The nature and extent of the connection between a tax and a step in the dealing (by way of production, manufacture, sale or distribution) in a good or commodity must be assessed so as to determine whether the tax is in substance a tax on the relevant step.<sup>658</sup> By its nature, this process of characterisation involves questions of degree. Many factors may be relevant. Not all will be present in every case. Factors may have different weight in different cases.<sup>659</sup> Relevant factors may include the 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the relevant step in manufacture, production or distribution, and the form and content of the legislation that imposes it.<sup>660</sup>

701 By their nature, taxes that are excises have a tendency to be reflected in the ultimate price of the relevant good or commodity. The extent to which that is so may be relevant to the characterisation process, but it is certainly not decisive, and is not a criterion for the characterisation of an excise.<sup>661</sup>

702 A tax is not an excise simply because it is likely to be passed on to consumers.<sup>662</sup> The fact that a tax will affect the overall cost of the production, sale or distribution of a commodity, and thus be likely to enter in some way into its cost to consumers, does not of itself make the tax an excise.<sup>663</sup>

703 The nature and extent of the connection between the amount of the tax and any relevant step in the production or distribution of a good or commodity is a factor in determining whether the tax has the character of an excise. That is illustrated by *Matthews v Chicory Marketing Board*.<sup>664</sup>

704 In *Matthews*, a majority of the High Court held that a levy on producers of chicory, calculated on a rate for every half acre of land planted with chicory, was invalid as it constituted an excise duty. Dixon J held that to be an excise, a tax must be imposed in respect of commodities.<sup>665</sup> An excise is not restricted to duties calculated directly on

<sup>658</sup> *Philip Morris Ltd v Commissioner of Business Franchises* [1989] HCA 38; (1989) 167 CLR 399, 435 - 436, quoting Barwick CJ in *Anderson's Pty Ltd v The State of Victoria* [1964] HCA 77; (1964) 111 CLR 353, 365.

<sup>659</sup> *Anderson's* (365); *Hematite Petroleum Pty Ltd v Victoria* [1983] HCA 23; (1983) 151 CLR 599, 633, 658 - 659, 666; *Gosford Meats v New South Wales* [1985] HCA 5; (1985) 155 CLR 368, 384.

<sup>660</sup> See the cases in the previous footnote.

<sup>661</sup> *Parton* (259); *Anderson's* (365); *Dennis Hotels Pty Ltd v The State of Victoria* [1960] HCA 10; (1960) 104 CLR 529, 583, 585, 590; *Logan Downs Pty Ltd v Queensland* [1977] HCA 3; (1977) 137 CLR 59, 76.

<sup>662</sup> *Australian Capital Territory v Queanbeyan City Council* [2010] FCAFC 124; (2010) 188 FCR 541 [141] - [142].

<sup>663</sup> *Ha* (497); *ACT v Queanbeyan City Council* [141] - [142].

<sup>664</sup> *Matthews v Chicory Marketing Board* [1938] HCA 38; (1938) 60 CLR 263.

<sup>665</sup> *Matthews* (300).

the quantity or value of goods.<sup>666</sup> Any tax directly affecting commodities will be an excise.<sup>667</sup> Dixon J observed that, the subject-matter of the levy, the area planted, had a 'natural although not a necessary relation' to the quantity of the commodity produced.<sup>668</sup> The existence of a natural although not necessary relationship has been relied on in other cases.<sup>669</sup> Dixon J reasoned that the area planted was a controlling element of, and an essential step in, the production of chicory. The impost was computed quantitatively on that essential step.<sup>670</sup>

705 To be an excise, a tax must bear a close relation to the production or manufacture, sale or consumption of goods and must be of such a nature as to affect them as the subjects of manufacture or production, or as articles of commerce.<sup>671</sup> But if the substantial effect of a tax is to impose a levy in respect of a commodity, the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax being a duty of excise.<sup>672</sup>

706 Rich and Starke JJ both also held that the planting of chicory was an essential step in its production and that, properly characterised, the levy was a tax in respect of the commodity produced for sale.<sup>673</sup> As Rich J put it, by taxing according to planting, you affect or influence an operation upon which the extent of attempted production depends.<sup>674</sup>

707 In *Hematite Petroleum*<sup>675</sup> Brennan J said that, while not decisive, the presence or absence of a proportionate relationship between a tax and the quantity or value of goods is a relevant and important factor in ascertaining whether the tax is an excise.

708 A tax on the acquisition of raw materials may be a tax on the production or manufacture of a product made from the raw materials.<sup>676</sup>

709 In the context of s 90 of the *Constitution*, the reference to goods as the subject of a tax is to be understood in its widest sense. An excise embraces a tax on commodities produced, as well as a tax on

<sup>666</sup> *Matthews* (302 - 304); *Hematite Petroleum* (632, 657, 665).

<sup>667</sup> *Matthews* (303).

<sup>668</sup> *Matthews* (303).

<sup>669</sup> For example, *Logan Downs* (78).

<sup>670</sup> *Matthews* (303).

<sup>671</sup> *Matthews* (304); applied in *ACT v Queanbeyan City Council* [143] - [144].

<sup>672</sup> *Matthews* (304); cited with approval in *Hematite Petroleum* (632 - 633).

<sup>673</sup> *Matthews* (281, 286).

<sup>674</sup> *Matthews* (281).

<sup>675</sup> *Hematite Petroleum* (657).

<sup>676</sup> *Hematite Petroleum* (665).

manufactured articles.<sup>677</sup> In determining whether particular objects are properly described as goods or commodities, it may be useful, although not determinative, to consider whether they are saleable.<sup>678</sup>

710 In *Mutual Pools & Staff Pty Ltd v Commissioner of Taxation*, Dawson, Toohey and Gaudron JJ observed that 'goods' is not a word of precise meaning, but in the context of excise duties, it signifies articles of commerce or things which, even if not saleable or without any discernible sale value, may be the subject of trading or commercial transactions.<sup>679</sup>

711 A tax on land or on something that forms part of land is not an excise.<sup>680</sup>

712 In *Ha* the plurality took into account, among other things, the size of the charges imposed in determining whether, properly characterised, the impugned law simply imposed a licence fee as an element of a scheme to regulate businesses selling tobacco.<sup>681</sup> The plurality took the amount of the fee into account in concluding that it was a 'revenue-raising inland tax on goods'.<sup>682</sup> There are many other cases which also take into account the level of fees as a factor in the characterisation process. See, for example, *Hematite Petroleum*<sup>683</sup> and *Capital Duplicators (No 2)*,<sup>684</sup> both of which were concerned with whether a licensing fee was a tax. In the latter case, the plurality concluded that the purpose of exacting the licensing fee was not simply regulatory, but had a very substantial revenue purpose.

713 The principles outlined in the preceding paragraph relate to whether an impost has the character of a tax, as distinct from a different character such as a licensing fee in the context of a regulatory scheme. But, in this case, it is not in doubt that the waste levy is a tax. Although Eclipse made substantial reference to this aspect of the case law in its written closing submissions,<sup>685</sup> in oral submissions it accepted that, given that it was conceded that the levy is a tax, this aspect is of no assistance.<sup>686</sup>

714 There is a question as to whether duties of excise include taxes that apply after goods reach the hands of a consumer. There are many cases

<sup>677</sup> *Mutual Pools & Staff Pty Ltd v Commissioner of Taxation* [1992] HCA 4; (1992) 173 CLR 450, 454, citing *Matthews* (293 - 303).

<sup>678</sup> *Mutual Pools* (454).

<sup>679</sup> *Mutual Pools* (467).

<sup>680</sup> *Mutual Pools* (454).

<sup>681</sup> *Ha* (501 - 502).

<sup>682</sup> *Ha* (503).

<sup>683</sup> *Hematite Petroleum* (623, 647).

<sup>684</sup> *Capital Duplicators (No 2)* (596 - 597).

<sup>685</sup> Eclipse's closing submissions [290] - [306].

<sup>686</sup> ts 751.

which have described an excise duty as a tax imposed at some step in the production, manufacture or distribution of goods or commodities before they reach the hands of the consumer.<sup>687</sup>

715 The question of whether a tax imposed after goods have reached the hands of the first consumer is an excise has been considered by the Full Federal Court. In *Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd*,<sup>688</sup> the Full Federal Court held that the effect of previous decisions of the High Court is that a tax on goods after they have reached the hands of consumers is not an excise.<sup>689</sup> Thus, a tax imposed on used or second-hand motor vehicles was not an excise.

716 The High Court refused to grant special leave to appeal from that decision.<sup>690</sup>

717 I must follow the decision in *Kithock* unless satisfied that it is plainly wrong.<sup>691</sup> The parties accepted that I should follow the Full Federal Court's approach.<sup>692</sup>

718 This approach requires the identification of the relevant first consumer. In *Knight v The State of Victoria*<sup>693</sup> a levy had been imposed in relation to cigarettes to be purchased by prisoners. The levy was challenged as being invalid under s 90. For reasons not necessary to detail, the challenge failed. Mortimer J recorded her agreement with the respondents' concession that, if the levy had been characterised as a tax, then it should have been characterised as an excise. The levy was added as part of the prison's internal pricing process prior to the cigarettes being available for sale to prisoners in prison canteens. Accordingly, this was a case where the tax was on a step 'at the end of the line' before the product was placed in the hands of the consumer, namely the prisoners.<sup>694</sup>

719 A State tax that applies to a wide range of transactions may be an excise in its application to some of those transactions, notwithstanding that it is not an excise in its application to all of them. In *Logan Downs v Queensland*, a State law imposed a tax on livestock. Some livestock

<sup>687</sup> See, for example, *Hematite Petroleum* (628); *Mutual Pools* (453).

<sup>688</sup> *Commissioner for Australian Capital Territory Revenue v Kithock Pty Ltd* [2000] FCA 1098; (2000) 102 FCR 42.

<sup>689</sup> *Kithock* [21] - [31].

<sup>690</sup> *Kithock Pty Ltd v Commissioner for Australian Capital Territory Revenue* [2001] HCA Trans 374.

<sup>691</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485, 492.

<sup>692</sup> ts 675, 733.

<sup>693</sup> *Knight v The State of Victoria* [2014] FCA 369; (2014) 221 FCR 561.

<sup>694</sup> *Knight* [96].

(cows and sheep) were kept for production purposes, whilst others (horses) were not. A statutory majority of the High Court held that the tax was an excise in its application to livestock used for production and was invalid accordingly.<sup>695</sup> The fact that the tax was not in every instance a duty of excise did not mean that it was not in any instance a duty of excise.<sup>696</sup>

## 10.2 Eclipse's first excise contention: is the levy a tax on the materials received by Eclipse?

720 Eclipse's primary contention is that the materials that it received and used to fill the voids at the Site are a valuable commodity or article of commerce in its hands and the levy is a tax imposed upon and in respect of that commodity or article.<sup>697</sup>

721 Eclipse's submissions contend that the materials received by Eclipse are a valuable commodity in its hands. Insofar as what is ultimately put into the ground by Eclipse might, in some cases, differ from what Eclipse had received, Eclipse's submissions on excise do not point to the status and character of what was put into the ground, as distinct from what Eclipse received.

722 Eclipse contends that when the levy is applied to materials that it receives and uses as fill in the void, the levy is an excise because it is applied to the movement of those materials into consumption by their disposal to landfill.<sup>698</sup> It makes the following submissions. An indication of the character of the levy as an excise in this respect is its tendency to be passed back up the line to the suppliers of the materials.<sup>699</sup> That is an intended effect of the levy regime. The regime intends to create a financial burden on, and act as a disincentive to, the generation and production of waste that will be disposed of to landfill.<sup>700</sup> Thus, it is a burden on the waste materials as a commodity.<sup>701</sup>

723 Further or alternatively to the proposition outlined in the preceding paragraph, Eclipse submits that when materials are received and are deposited and compacted, that is a step in the distribution of those materials as fill for the benefit of the owner of the site, who wants the land

<sup>695</sup> *Logan Downs*.

<sup>696</sup> *Logan Downs* (71, 78); see also *The State of Western Australia v Chamberlain Industries Pty Ltd* [1970] HCA 5; (1970) 121 CLR 1, 15.

<sup>697</sup> Eclipse's closing submissions [186.7], [193], [200] - [211], [229]; ts 734.

<sup>698</sup> Eclipse's closing submissions [217].

<sup>699</sup> Eclipse's closing submissions [218].

<sup>700</sup> Eclipse's closing submissions [219].

<sup>701</sup> Eclipse's closing submissions [220] - [221].



form to be restored and has contracted with Eclipse for that purpose.<sup>702</sup> Eclipse submits that the ultimate consumer of the materials as fill is the site owner.<sup>703</sup>

724 Further, Eclipse submits that the levy is a tax on the materials received, as a commodity; it is not a tax on land.<sup>704</sup>

725 Eclipse also contends that the materials received by Eclipse were not already in circulation amongst consumers and are not second-hand goods,<sup>705</sup> and that the levy is not a consumption tax.<sup>706</sup>

726 The following propositions are essential elements of Eclipse's first excise contention:

- (1) the materials received by Eclipse are a valuable commodity or article of commerce in Eclipse's hands, in respect of which the levy is a tax;
- (2) properly characterised, the levy is a tax on that commodity and is not a tax on land or something that forms part of the land.

727 For the reasons that follow, I do not accept either of these propositions and consequently do not accept Eclipse's first excise contention.

### ***10.2.1 Are the materials received by Eclipse a valuable commodity or article of commerce in Eclipse's hands?***

728 In support of its contention that the materials that it received and used to fill the voids at the Sites are a valuable commodity or article of commerce in its hands, Eclipse submits that:

- (a) the fact that Eclipse is paid by the suppliers of the materials to take them, and the fact that the materials have the statutory character of waste, is not decisive.<sup>707</sup> Examples from other contexts of the use of waste illustrate this;<sup>708</sup>
- (b) fill is a commodity and an article of commerce. It can be required by a developer of land, or someone engaged in construction, where

<sup>702</sup> Eclipse's closing submissions [228]; Eclipse's opening submissions [34(c), (d) and (e)].

<sup>703</sup> Eclipse's closing submissions [284]; ts 747.

<sup>704</sup> Eclipse's closing submissions [233] - [263]; ts 736 - 739.

<sup>705</sup> Eclipse's closing submissions [281] - [282].

<sup>706</sup> Eclipse's closing submissions [283] - [286].

<sup>707</sup> Eclipse's closing submissions [201] - [203].

<sup>708</sup> Eclipse's closing submissions [205].

the land surface needs to be built up or its composition and constitution changed;<sup>709</sup>

- (c) DER has published a guidance statement regulating the use of waste-derived materials that implicitly accepts that there is a commercial market for materials to be re-used as fill;<sup>710</sup>
- (d) the materials obtained by Eclipse and used as fill are commercially valuable to Eclipse to use to meet its obligations, contractually and under conditions of local government approvals, to fill and rehabilitate the voids at the Sites;<sup>711</sup>
- (e) as the Government Parties accept,<sup>712</sup> but for the receipt by Eclipse of the materials from its suppliers, Eclipse would be obliged to purchase or accept free of charge suitable materials to be used as fill.<sup>713</sup>

729 I accept that the fact that Eclipse was paid to take materials, and the fact that the materials it received had the statutory character of waste, are not fatal to a conclusion that those materials are a valuable commodity or article of commerce. If, for example, the levy was imposed on all waste received, and if a licensee took a substantial quantity of waste that was received, and sold it as a separate product, the levy would, to that extent, be a tax on or in respect of a commodity, notwithstanding that the licensee had been paid to receive it and that it had the statutory character of waste. Nevertheless, in determining whether the materials received are a commodity, it is relevant that Eclipse was paid to receive them, and that they had the statutory character of waste.

730 There is very little evidence as to whether, during the Relevant Period, there was a market for the materials received by Eclipse at the Sites, or whether any other party would have been willing to pay Eclipse for the materials it received.

731 Eclipse relies on a DER guidance statement regulating the use of waste-derived materials.<sup>714</sup> That statement was published in November 2014, to take effect from 14 November 2014, and thus was published outside the Relevant Period. I accept that it is capable of

<sup>709</sup> Eclipse's closing submissions [206].

<sup>710</sup> Eclipse's closing submissions [207].

<sup>711</sup> Eclipse's closing submissions [208], [209].

<sup>712</sup> Defence in CIV 1364 of 2009 [26.12]; reply in CIV 2385 of 2013 [13], [16]; defence in CIV 2416 of 2014 [20.7].

<sup>713</sup> Closing submissions [209].

<sup>714</sup> Exhibit A, attachment 86.

supporting a conclusion that, at least for the final part of the Relevant Period, fill materials were something for which there was or may have been a commercial market.

732        Although not referred to in Eclipse's submissions on excise, there is also some general evidence from Mr Foley, the planner called by the Government Parties. Mr Foley agreed with the statement in SPP 2.4 that the availability of basic raw materials close to Perth was declining as the city expanded, saying it was true in 2000, 2008 and 2014.<sup>715</sup> Mr Foley gave evidence that, although he was unsure of the amount of current supply, depending on where new land was developed, most of the new land that could be developed for Perth's growth is likely to be in areas that need a lot of fill.<sup>716</sup>

733        Both these pieces of evidence are very general in nature. They are not specifically directed to the material received by Eclipse, including sand and soil from various sites mixed with varying degrees of other types of construction and demolition material, at the times and places that it was received. In this industry, transport costs are a significant factor in whether there is a viable market for something.<sup>717</sup>

734        On the whole of the evidence, I am not satisfied that the materials received by Eclipse at the Sites during the Relevant Period were saleable by it. Again, I do not suggest that this is determinative, but it is relevant.

735        Eclipse has used the materials it received, relevantly, to fill the voids at the Sites. To the extent Eclipse was not the landowner of a site, Eclipse has not been paid by the landowners of the Sites to use the materials it received to fill the voids at the Sites. I proceed to explain that finding by reference to each site.

736        Prior to the Relevant Period, Eclipse paid the owners of Wanneroo Road an initial fee of \$100,000.<sup>718</sup> The agreement of 4 June 2008 also required Eclipse to pay an initial fee of \$100,000, as well as a further \$100,000 to be released to the owners when Eclipse became entitled to commence its operations.<sup>719</sup> Clause 8.14 of the agreement provides that Eclipse is exclusively entitled to all proceeds it generates from charging others for the acceptance of fill and placing it in the quarry at the Wanneroo Road Site.

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<sup>715</sup> ts 467.

<sup>716</sup> ts 467.

<sup>717</sup> Exhibit D1 [33.4]. See also exhibit A, attachment 51 [3.1].

<sup>718</sup> Exhibit A, attachment 4.

<sup>719</sup> Exhibit A, attachment 8.

737 The agreement of 4 June 2008 also provides that Eclipse will perform 'the Works' and will exercise reasonable effort to complete the Works within four years.<sup>720</sup> The Works are defined in sch 2 as being, in broad summary, the filling and rehabilitation of the relevant area of the site in accordance with a management plan to be approved by the owners, and in accordance with the requirements of pars (a) to (f) of sch 2. The replacement deed between Eclipse and the WAPC, by then the owners of the Wanneroo Road Site, provides that the Works include filling the quarry utilising materials that meet the Rehabilitation Standard (as defined), requiring the meeting of 'HIL level E', and for the final one metre of cover, EILs.<sup>721</sup>

738 Eclipse owned the Flynn Drive Site from before 1996 until, it appears, at least February 2010. Eclipse owned the Flynn Drive Site in 1996.<sup>722</sup> It continued to own the site in May 2009.<sup>723</sup> Eclipse was granted sub-division approval for the Flynn Drive Site in February 2010.<sup>724</sup>

739 By December 2012, the site was owned by Man O War Resources Pty Ltd (Man O War).<sup>725</sup> Man O War is a sister company of Eclipse and part of the Marford Group.<sup>726</sup> It is unclear on the evidence when Man O War became the owner of the Flynn Drive Site. There is no evidence of any arrangement between Eclipse and Man O War.

740 In any event, filling of the void at the Flynn Drive Site was completed by 30 June 2009. I find that Eclipse owned the Flynn Drive Site during the period in which the void was filled.

741 The Abercrombie Road Site comprises two lots of land. Initially one (lot 2) was owned by Eclipse, the other (lot 115) by a related company, Bayardo.<sup>727</sup> By 2012, Bayardo owned both lots. Under the deed, Eclipse pays a licence fee to Bayardo.<sup>728</sup> Under the deed between Eclipse and Bayardo, Eclipse is obliged to progressively fill the void to stipulated standards.<sup>729</sup> I construe the deed as meaning that Eclipse's obligation to fill arises only in relation to that part of the void which it creates by

<sup>720</sup> Exhibit A, attachment 8, cl 3.2, cl 6.1.

<sup>721</sup> Exhibit A, attachment 9.

<sup>722</sup> Exhibit A, attachment 40, recital A.

<sup>723</sup> Exhibit A, attachment 41, recital A.

<sup>724</sup> Exhibit A [26]; exhibit A, attachment 36.

<sup>725</sup> Exhibit A, attachments 37, 38.

<sup>726</sup> Exhibit G1, attachments RS01, page 43, RS02, page 54.

<sup>727</sup> Exhibit D1 [32]; exhibit A, attachment 20, pages 755, 757, 761.

<sup>728</sup> Exhibit B, attachment S31, cl 5.1.

<sup>729</sup> Exhibit B [4], attachment S31, cl 3.3.

extracting Quarry Materials. But a contrary construction in that respect does not alter my thinking on the excise question.

742 Thus Eclipse did not, during the Relevant Period, generate any revenue from its use of the materials it received as fill on the Sites. All of Eclipse's revenue in respect of such materials was generated from the payments it received from the parties supplying the materials to it. (Of course, Eclipse also generated revenue from the sale of products and other activities on the Sites, but in considering Eclipse's first excise contention, the focus is on the materials used as fill. That is what attracts liability for the levy.)

743 Insofar as Eclipse may suggest<sup>730</sup> that what it receives is the subject of a trading transaction between it and the supplier, I do not think that this assists Eclipse's case. Eclipse was paid by suppliers to take the materials. While that is not in itself fatal, it is not an indication that favours a characterisation of the materials received by Eclipse as an article of commerce or a valuable commodity. The substance of the transaction is that Eclipse was paid a fee for its services in enabling the supplier to dispose of the materials.

744 The essence of Eclipse's case is that Eclipse required these materials, and would otherwise have needed to purchase fill, to discharge its obligations under the agreement governing the Wanneroo Road Site, and under local government approvals in relation to the other sites. The contractual obligations that Eclipse undertook in relation to the Wanneroo Road Site were part of the price it paid for its right to occupy that site, and its ability to receive waste for a fee and conduct its operations there. Eclipse's obligations under the local government approvals were:

- (1) for the Flynn Drive Site, conditions of the sub-division approval it held during 2008 to 2009 and obligations under the deed that it made with the City of Wanneroo;<sup>731</sup> and
- (2) for the Abercrombie Road Site, conditions of the planning approvals for use by Eclipse of the site in the manner proposed by it.<sup>732</sup>

745 In the cases of the Abercrombie Road Site and the Flynn Drive Site, Eclipse did not have any obligation to do any specific amount of filling, or to complete the filling within any specified time.

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<sup>730</sup> Eclipse's closing submissions [204].

<sup>731</sup> Exhibit A, attachments 40, 41.

<sup>732</sup> Exhibit A, attachment 19; see also attachment 20, pages 758, 762.

746       The materials used as fill were not a commodity in the hands of the suppliers. When received by Eclipse, they were useful to Eclipse, but not in a way that involved Eclipse's selling them, or using them as an input for a product or service for which Eclipse was paid. To my mind, an element of trading or tradability inheres in the notion of a good or commodity. I think a good or commodity must have an external element of value, or use in trade or commerce, beyond being useful to a single party. That external element may be found in its saleability (or the transferability of lesser rights such as hire). It may also be found in its use as an input into the production of something to be sold or that is otherwise the subject of a commercial transaction, or something from which the producing party will otherwise derive income. I do not suggest that the foregoing exhaustively encapsulates what might satisfy that necessary element.

747       The value that Eclipse derived from the materials it received and put into the voids was that they enabled Eclipse to fulfil its contractual obligations and obligations under local government approvals in order for it to conduct its activities on the Sites. I am not persuaded that the existence of that benefit for Eclipse renders the materials Eclipse received a valuable commodity or article of commerce, for the purposes of characterising the levy, in circumstances where:

- (1)     the materials were of no value to the parties supplying them; Eclipse was paid to take the materials;
- (2)     I am not satisfied that the materials were of value to anyone apart from Eclipse, or that Eclipse could have sold them to any other party;
- (3)     no party paid Eclipse to dispose of the materials to landfill by putting them in the voids; and
- (4)     Eclipse did not use (this part of) the received materials as an input into a product that it sold.

748       While the matter is by no means free of doubt, I am not satisfied that the utility of the materials to Eclipse in the circumstances of this case renders materials received by Eclipse a valuable commodity or article of commerce in the sense required in determining whether a tax is to be characterised as an excise.

**10.2.2 Is the levy a tax on waste received by Eclipse as a commodity, or is it a tax on something that forms part of the land?**

749 Eclipse contends that the levy is a tax on waste received as a commodity and not a tax on land.<sup>733</sup>

750 In support of that contention, Eclipse submits that:

- (1) the levy is based upon the relationship of Eclipse as licensee with the waste that it received, not its relationship with the land;<sup>734</sup>
- (2) the levy regime imposes levy on waste, not on land as such, nor upon the land in its altered state. Consequently, the levy is not imposed on waste 'in its capacity as part of the land';<sup>735</sup>
- (3) the levy is not imposed on the owner of licensed premises; it falls upon the licensee, or, if there is no licensee, on the occupier;<sup>736</sup>
- (4) the levy is imposed on Eclipse as licensee by reason of, and by reference to, Eclipse's dealings with waste, namely its receipt and disposal to landfill, and not by reference to Eclipse's dealing with land;<sup>737</sup>
- (5) the present case is different from *Mutual Pools* because in that case the swimming pool did not exist independently before it was put into the ground, whereas in this case the waste, including soil and sand, existed as tangible personal property before it was disposed of to landfill.<sup>738</sup>

751 For the reasons that follow, I do not accept these submissions. In my opinion, the levy is properly characterised as a tax on something that forms part of the land, rather than a tax upon a good or commodity, and, for that reason, is not an excise.

752 A tax on land, or a tax on something that forms part of the land, is not an excise.<sup>739</sup>

<sup>733</sup> Eclipse's closing submissions [233] - [263], ts 736 - 739.

<sup>734</sup> Eclipse's closing submissions [234].

<sup>735</sup> Referring to the reasons of Deane J in *Mutual Pools* (462); Eclipse's closing submissions [248] - [251]; ts 738.

<sup>736</sup> Eclipse's closing submissions [252].

<sup>737</sup> Eclipse's closing submissions [254]; ts 737.

<sup>738</sup> Eclipse's closing submissions [235] - [239], [242] - [245]; ts 737.

<sup>739</sup> *Mutual Pools* (454).

753 In *Mutual Pools*, the High Court held that a tax imposed on swimming pools constructed in situ was a tax on land and not a tax on goods, and so was not an excise duty. Mason CJ, Brennan and McHugh JJ contrasted the position in that case with the position in *MR Hornibrook (Pty) Ltd v Federal Commissioner of Taxation*.<sup>740</sup> In *Mutual Pools*, the tax was levied when the construction of the pool in situ had been completed.<sup>741</sup> In *MR Hornibrook*, reinforced concrete piles manufactured under a bridge building contract for incorporation into the structure of a particular bridge were held to be manufactured articles, and thus goods, before losing that character when they were incorporated into the structure and became part of the realty. The tax was levied on the piles before they were incorporated into the structure of the bridge.<sup>742</sup>

754 In *Mutual Pools*, Mason CJ, Brennan and McHugh JJ said that the swimming pool had no separate existence as goods independent of the realty of which it formed part, but that a swimming pool manufactured away from the site of its permanent installation would stand in a different position. Further, their Honours said that some of the constituent elements of a completed swimming pool, such as tiles, might properly be characterised as goods.<sup>743</sup>

755 I accept that the present case is not on all fours with *Mutual Pools*, or with *MR Hornibrook*. In the latter case, the tax was levied on the piles before they lost their character as goods.<sup>744</sup> In *Mutual Pools*, the swimming pool had no separate existence as goods before it was incorporated into the land.<sup>745</sup> Assuming it is a good or commodity, the waste material had a separate existence before it was put into the ground.

756 In *Mutual Pools*,<sup>746</sup> in characterising the tax, Mason CJ, Brennan and McHugh JJ focused close attention on the point in time at which the tax was levied relative to the status of the commodities as separate goods, distinct from the land. In my view, while not necessarily determinative, in deciding a characterisation question of this kind whether commodities are separate goods or have become part of the land at the point at which the tax is imposed is of central significance. That the tax is levied on goods while they are separate means or strongly suggests that the tax is an excise. A tax levied on something only when or after it becomes part of

<sup>740</sup> *MR Hornibrook (Pty) Ltd v Federal Commissioner of Taxation* [1939] HCA 29; (1939) 62 CLR 272, 279.

<sup>741</sup> *Mutual Pools* (454).

<sup>742</sup> *Mutual Pools* (454 - 455).

<sup>743</sup> *Mutual Pools* (455).

<sup>744</sup> *Mutual Pools* (454 - 455).

<sup>745</sup> *Mutual Pools* (455), (464), (467).

<sup>746</sup> *Mutual Pools* (454 - 455).



the land is, or is very likely to be, a tax on something that forms part of the land and not an excise.

757 For the reasons that follow, I think the waste levy is of the latter character.

758 I do not accept Eclipse's contention that, in substance, the levy is a tax upon waste received.<sup>747</sup> In form and in substance, the levy is imposed only if and to the extent that waste is disposed of to landfill. The manner of its assessment is integral to determining what the levy is formally and substantively imposed on, and to the proper characterisation of the levy. I refer to what I have said about regs 10 - 12 of the Levy Regulations.<sup>748</sup> Although I accept that the levy is imposed on and in respect of waste, no tax is imposed unless and until waste is disposed of to landfill. Levy is payable only to the extent that waste is disposed of to landfill. In substance, levy is imposed only if and when waste becomes part of the land by being disposed of to landfill.

759 The means of calculation of the levy supports this characterisation of it. Under regs 10 - 12 of the Levy Regulations, the levy is calculated by reference to the amount by which the level of the land has been increased, as revealed in comparative surveys.

760 The levy can be seen as a tax on the filling of, or the building up of the level of, land through the burial of waste.

761 I do not think that the fact that the levy is imposed on the licensee, rather than on the owner of the premises, weighs heavily in favour of Eclipse's characterisation of the levy. In substance, the levy is imposed on the occupier of the premises; it is they who will be the licensee under s 56 of the EP Act. The occupier has a significant relationship with the land of which the waste becomes part when it is disposed of to landfill. Thus, the target of the levy is consistent with the characterisation that I prefer.

762 Eclipse further submits that materials that have been compacted in the void have, nevertheless, not become part of the land, given Eclipse's intention that the materials deposited there be available for re-mining.<sup>749</sup>

763 Whether personal property has become so attached to land as to become part of the land depends upon the degree of its annexation and the

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<sup>747</sup> Eclipse's closing submissions [270] - [271]; Eclipse's opening submissions [35(b)].

<sup>748</sup> See [615] - [618].

<sup>749</sup> Eclipse's closing submissions [255] - [263].

object of its annexation.<sup>750</sup> For the reasons that follow, I am satisfied that materials received by Eclipse and deposited and compacted in the void became part of the land.

764 First, I refer to the findings I have made as to Eclipse's intentions regarding re-mining.<sup>751</sup> With the exception of the last return period of the Relevant Period in relation to the Abercrombie Road Site, I have found that Eclipse did not deposit and compact materials in the void at the Sites during the Relevant Period with the intention that the materials be available for re-mining. Availability for re-mining was not a substantial purpose of the depositing and compacting of the materials. Secondly, in relation to materials deposited and compacted at the Abercrombie Road Site in the return period from 1 July 2014 to 30 September 2014, I accept that Eclipse intended that materials deposited in the void and compacted during that period be available for re-mining. However, in my view that subjective intention on the part of Eclipse does not overcome the conclusion from the objective facts that, having been put into the ground within the void and buried with further materials, the waste disposed of to landfill became part of the land.

765 For these reasons I find that, in its application to the materials received by Eclipse and disposed of to landfill, the levy is a tax on something that forms part of the land, and is not an excise.

766 For the reasons I have given, I reject Eclipse's first excise contention.

767 Eclipse submits that a tax on the use of a commodity is an excise, pointing to the reference to 'use' in the well-known statement by Dixon J in *Matthews*.<sup>752</sup> Following the Full Federal Court decision in *Kithock*, a tax on the use of a commodity can be an excise so long as the tax is imposed before the commodity reaches the hands of a consumer. A tax imposed on goods after they have reached the hands of a consumer is not an excise.<sup>753</sup>

768 On Eclipse's first excise contention, a question arises whether, by the time Eclipse disposes of materials to landfill, they have earlier reached the hands of a consumer, namely Eclipse. Eclipse's answers to that question are:

<sup>750</sup> *TEC Desert Pty Ltd v Commissioner of State Revenue (WA)* [2010] HCA 49; (2010) 241 CLR 576 [24]; *Epic Energy (Pilbara Pipeline) Pty Ltd v Commissioner of State Revenue* [2011] WASCA 228; (2011) 43 WAR 186 [36], [160].

<sup>751</sup> See section 2.16 above.

<sup>752</sup> Eclipse's closing submissions [190] - [191]; ts 731 - 732.

<sup>753</sup> *Kithock* [21] - [31].

- (1) the landowner, not it, was the consumer of the materials as fill;<sup>754</sup>
- (2) the materials did not constitute the commodity of fill before they reached Eclipse's hands; and<sup>755</sup>
- (3) further or alternatively, Eclipse's use of the materials as fill did not amount to consumption.<sup>756</sup>

769        Given the conclusions I have reached, it is not necessary to deal with this question. Similarly, it is unnecessary to decide whether, if the materials received by Eclipse were goods, they would have been second-hand goods.

### 10.3 Eclipse's second excise contention: is the levy a tax on the Products?

770        Eclipse's second excise contention relates to the Abercrombie Road Site and the Wanneroo Road Site. Eclipse says that, at those sites, the levy is a tax on a step in the production of valuable products (Products), namely water retentive soil and structural fill.<sup>757</sup> This contention is put in two slightly different ways. First, it is said that the levy is an excise insofar as materials are deposited and compacted as a stockpile for future use in making the Products.<sup>758</sup> Secondly, the levy is said to be an excise insofar as materials deposited in the void were subsequently re-used for the purpose of making the Products.<sup>759</sup> Beyond this, Eclipse's second excise contention was not developed in further detail in written or oral submissions.

771        The factual findings I have made as to Eclipse's intention to re-mine, and as to the re-mining that it conducted, largely but not entirely remove the factual premises for Eclipse's second excise contention. With the exception of the return period 1 July 2014 to 30 September 2014 for the Abercrombie Road Site, I have found that:

- (1) re-mining or availability for re-mining was not a substantial or operative purpose of the depositing and compacting of materials in the voids at the Sites;

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<sup>754</sup> Eclipse's closing submissions [284]; ts 747.

<sup>755</sup> Eclipse's closing submissions [282].

<sup>756</sup> Eclipse's closing submissions [286], [289].

<sup>757</sup> Eclipse's opening submissions [34(a)]; Eclipse's closing submissions [184.2], [186.3] - [186.5], [186.8], [214] - [216], [228.1]; ts 287, ts 739 - 740; SC1 [28.3].

<sup>758</sup> Eclipse's opening submissions [34(a)]; Eclipse's closing submissions [184.2], [186.3], [228.1].

<sup>759</sup> ts 287; Eclipse's closing submissions [215].

- (2) Eclipse's purpose in depositing and compacting materials in the voids was for them to be used to fill space in the voids;
- (3) the evidence does not establish that any materials deposited and compacted in the voids at the Sites during the Relevant Period were re-mined and used to make Products during the Relevant Period.

772        Thus, I do not accept that materials were deposited and compacted  
'as a stockpile for future use' in making the Products.

773        The position is different in relation to the period 1 July 2014 to  
30 September 2014 at the Abercrombie Road Site. I have found that  
during that period, Eclipse deposited and compacted materials in the void  
in order to fill the void, but also so that the deposited and compacted  
materials would be available for re-mining. I have also found that during  
that period, about 47,900 m<sup>3</sup> of materials were extracted from the void and  
used to produce just over 50,000 m<sup>3</sup> of Products, including fill sand and  
shaping soil.

774        For the reasons that follow, I am not persuaded that the levy operates  
as an excise in relation to the period 1 July 2014 to 30 September 2014 at  
the Abercrombie Road Site in the respect asserted by Eclipse's second  
excise contention.

775        As explained in section 10.1 of these reasons, in determining whether  
a tax is an excise, it is necessary to assess the nature and extent of the  
connection between the tax and the relevant step in the manufacture,  
production or distribution of the goods, in order to determine whether it is,  
in substance, a tax on that step. Factors relevant to that assessment may  
include the indirectness of the tax, its immediate entry into the cost of the  
goods, the proximity of the transaction it taxes to the relevant step in  
manufacture, production or distribution, and the form and content of the  
legislation imposing it.

776        None of these factors support the characterisation of the levy in its  
application to the Products as an excise. There is no evidence to suggest  
that the levy enters into the cost of the Products, directly or indirectly.  
Nor is there any natural tendency for that to occur. The transaction taxed  
by the levy is not proximate to the production of the Products. What is  
taxed by the levy is the disposal of waste to landfill. Nothing in the form  
or content of the levy regime favours its characterisation as an excise in  
relation to the Products.

777 To be an excise, a tax must bear a close relation to the production of goods. In this case, there is not a sufficiently close relation between the levy and the production of the Products to sustain a characterisation of the levy as, in substance, a tax on that production. When waste is disposed of to landfill, by definition it is not then being used to make Products. When the materials were put into the ground, that reflected Eclipse's decision that, from its perspective, that was the most efficient and productive use of them at that time.<sup>760</sup> The materials were compacted on the basis that they would be 'treated as permanent fill and therefore placed and compacted accordingly'.<sup>761</sup> Compacted materials may or may not be re-mined, depending on later economic circumstances and the materials available to Eclipse at later times.<sup>762</sup> The existence of that possibility does not sustain a conclusion that the levy bears a close connection to the production of Products that may or may not, at some uncertain subsequent time, be produced from materials disposed of to landfill during the return period in question. The disposal of materials to landfill in these circumstances is not an essential or natural step in the production of the Products from that material.

778 There is no proportionate relationship between the amount of the levy and the amount or value of any of the Products. Nor is there any 'natural' connection between them. The position is quite the opposite. The levy only applies to what has been disposed of to landfill. By definition, in dealing with materials in that way, Eclipse decided that it did not then propose to use them to make Products, but rather to add them to the void. Waste received and not put in the void, but used to produce Products, is not disposed of to landfill and so is not subject to the levy.

779 Eclipse submits that there is a proportionality between the levy and the Products in that the amount of levy payable is directly related to the volume of materials available in the void, in the nature of a stockpile, for potential future production of Products.<sup>763</sup> I do not accept that this is the right way to assess the nature and extent of the relationship between a tax and the goods a step in the production of which is said to be burdened by the tax. The enquiry is directed to the connection, if any, between the amount of levy payable and the quantity or value of the Products. There is no connection between the amount of levy payable and the quantity or value of any Products made during a given return period. Any connection

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<sup>760</sup> ts 379, 380, 381.

<sup>761</sup> Exhibit A, attachment 46, page 1752.

<sup>762</sup> ts 379 - 382.

<sup>763</sup> ts 742 - 743.

is founded on what might happen in the future, not on what has happened during the return period in which the levy becomes payable.

780           Moreover, if and when Eclipse later decided to remove some material to use it to produce a relevant product, subject to a qualification, in the return period in which that occurred Eclipse would be given a credit in respect of that 'cutting' from the void. The qualification is that if during a return period, there was a net cut from a site, the return would be shown as zero, not a negative figure. Consequently, no credit would be given for re-mining if and to the extent it produced a net negative figure during the return period. During the Relevant Period, there was no return period for Abercrombie Road or Wanneroo Road in which there was a net cut.

781           For these reasons, I do not accept Eclipse's second excise contention.

#### **10.4 Eclipse's third excise contention - is the levy a tax on Quarry Materials?**

782           Eclipse's third excise contention is that the levy is a tax on a step in the production of the limestone and sand quarried at the Abercrombie Road Site because in order to mine these Quarry Materials it is necessary to rehabilitate the land, and the levy is a tax on the rehabilitation of the land.<sup>764</sup>

783           In more detail, Eclipse submits as follows:

- (1)       The Quarry Materials are a valuable commodity.<sup>765</sup>
- (2)       The Quarry Materials would not be mined if the site was not going to be rehabilitated to an appropriate standard to permit its subsequent industrial use. Rehabilitation is required by the conditions of the Town of Kwinana's planning approval for the quarrying.<sup>766</sup>
- (3)       The only suitable material that can economically be used as fill is the inert material acquired by Eclipse for that purpose.<sup>767</sup>
- (4)       Filling the void is a necessary element of mining the Quarry Materials because:

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<sup>764</sup> Eclipse's opening submissions [34(b)]; Eclipse's closing submissions [184.2.3], [272] - [280]; ts 287, 742, 744 - 745, 747 - 749.

<sup>765</sup> Eclipse's closing submissions [272].

<sup>766</sup> Eclipse's closing submissions [273] - [275].

<sup>767</sup> Eclipse's closing submissions [276].

- (a) that was a condition of approval by the Town of Kwinana;<sup>768</sup> and
  - (b) after mining all of the Quarry Materials, Eclipse intends to subdivide the site for industrial use, and it should be inferred that, if Eclipse could not rehabilitate the site using inert material, Eclipse would not have quarried it.<sup>769</sup>
- (5) In order to extract maximum limestone and sand, it is necessary to fill the resultant void with lower value material than what was quarried; the void cannot be permitted to get too big. That shows the close temporal connection between the mining of the Quarry Materials and the filling of the void.<sup>770</sup>
- (6) There is a proportionate relationship between the amount of levy payable and the quantity of Quarry Materials because there is a direct proportionate relationship between the volume of materials quarried and the volume of fill required to rehabilitate the site.<sup>771</sup>
- (7) For these reasons, there is a direct connection between the depositing of fill in the void and the production of the Quarry Materials. The filling of the void with the inert material used by Eclipse is a necessary step in the mining of the Quarry Materials.<sup>772</sup>
- (8) Thus, in its practical operation in relation to Eclipse's Abercrombie Road Site, the levy is an excise.

784 In its terms and in its direct operation, the levy is a tax on or in respect of the waste disposed of to landfill, and not upon or in respect of the Quarry Materials taken from the land. The question is whether in its practical operation the levy is indirectly a tax upon or in respect of the Quarry Materials because it is a tax on the rehabilitation of the site and that rehabilitation is a necessary step in the mining of the Quarry Materials.

785 It is unclear which Quarry Materials are said by Eclipse to be burdened by the levy for which it became liable during the Relevant Period. Is it the Quarry Materials the earlier mining of which created the

<sup>768</sup> Eclipse's closing submissions [278]; ts 748 - 749.

<sup>769</sup> Eclipse's closing submissions [279] - [280].

<sup>770</sup> Eclipse's closing submissions [279]; ts 745.

<sup>771</sup> ts 742.

<sup>772</sup> Eclipse's closing submissions [277].

part of the void that was filled during the Relevant Period? Or is it the Quarry Materials that were mined during the Relevant Period? As I understand Eclipse's argument, it is the former, but I have given attention to both in considering the third excise contention.

786 As outlined in section 10.1, to be an excise, a tax must bear a close relation to the production, manufacture, or distribution of goods and must be of such a nature as to affect them as the subjects of manufacture or production, or as articles of commerce. The question of characterisation of a tax involves questions of degree, in relation to which a number of factors may be relevant but not decisive.

787 For the reasons that follow, I am not satisfied that there is a sufficiently close relationship between the levy and the mining and sale of the Quarry Materials to sustain a characterisation of the levy in its application to the Abercrombie Road Site as an excise.

788 I refer to my detailed findings of fact relating to the planning approvals for the use of the Abercrombie Road Site, set out in section 2.24 above. The filling of the void with waste was proposed by Eclipse, not imposed by the Town of Kwinana. From the outset, it was an element of Eclipse's proposal that it would rehabilitate the quarry by landfilling it with class 1 waste materials from construction and demolition projects.<sup>773</sup> That is how the council of the Town of Kwinana understood the proposal.<sup>774</sup> The Town of Kwinana imposed conditions. The object of the conditions was to ensure that landfilling with class 1 inert waste materials, as proposed by Eclipse, would be done in a way that would enable a subsequent use of the site for light industrial purposes. The conditions did not specify the nature and source of the materials to be used as fill.

789 Similarly, the 2004 application regarding lot 2 attached a management plan that said that the excavated area would be backfilled with inert class 1 materials.<sup>775</sup> That is how the proposal was understood by council.<sup>776</sup> The same position pertained in relation to the 2010 application.

790 Under SPP 2.4, in force when planning approval for the Abercrombie Road Site was initially granted, applications for extractive industry operations would be accompanied by a management plan and report

<sup>773</sup> Exhibit A, attachment 21, pages 797 - 798.

<sup>774</sup> Exhibit C, for example, at pages 287 and 291.

<sup>775</sup> Exhibit A, attachment 22, pages 828L - 828N.

<sup>776</sup> Exhibit C, page 317.



setting out proposals for the progressive and ultimate rehabilitation of the site for its intended long term use.<sup>777</sup> SPP 2.4, and its predecessors and successors, do not set out requirements as to the methods of rehabilitation of land in achieving sequential land use. The refilling of a void with specific materials such as inert waste is not required by any planning policy.<sup>778</sup>

791 When planning approval was initially granted, the Town of Kwinana's Extractive Industry Local Law required an applicant to submit, among other things, a rehabilitation and decommissioning programme. Neither the Local Law nor its successor specified the method or form that land rehabilitation should take. They did not require that filling of the land take place, or that filling of the land with waste be carried out.

792 Mr Neil Foley, an experienced planner, gave evidence that the filling of the Abercrombie Road Site with inert waste was not the only option for preparing the land for a sequential land use after the extraction of sand and limestone by Eclipse.<sup>779</sup> The land could have been filled with lower value clean fill, or other material sourced from elsewhere.<sup>780</sup> Further, depending on the sequential use or uses proposed and thought appropriate, a plan could have been prepared providing for a limited amount of fill sufficient to enable the quarry to remain a safe, stable structure.<sup>781</sup>

793 Eclipse submits that Mr Foley's evidence is theoretical in nature, in that he has not been to the Abercrombie Road Site, and has not assessed whether in all the circumstances it was practically possible to use any of the other approaches to rehabilitation that he has identified.<sup>782</sup> I accept that this is so. However, on the whole of the evidence, Eclipse has not satisfied me that there was no practical alternative to using waste as fill to rehabilitate the site following mining of the Quarry Materials. In any event, even if I were so satisfied, in light of the other matters to which I have referred, and refer to below in this section 10.4, I am not satisfied that the levy operates as an excise on or in respect of the Quarry Materials.

794 When Eclipse initially sought planning approval, it would have been open to the Town of Kwinana to approve alternative sequential uses for the quarry that did not involve a landfill and that were consistent with the

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<sup>777</sup> Exhibit 3, attachment NF2 [5.7].

<sup>778</sup> Exhibit 3, attachment NF2 [6.3] - [6.4].

<sup>779</sup> Exhibit 3, attachment NF2 [6.38].

<sup>780</sup> Exhibit 3, attachment NF2 [6.38].

<sup>781</sup> Exhibit 3, attachment NF2 [6.38] - [6.40].

<sup>782</sup> Eclipse's closing submissions [60].

rural zoning of the land.<sup>783</sup> Further, other alternative sequential uses could have been approved by the Town of Kwinana if a request for a rezoning amendment had been successful and finalised.<sup>784</sup>

795        Among the factors relevant to the assessment of the nature and extent of the connection between a tax and the production of goods are the indirectness of the tax and its immediate entry, or otherwise, into the costs of the goods.

796        There is no evidence that the waste levy has been factored into the price of the Quarry Materials. I am not satisfied, in the circumstances of the case, that there is any significant tendency for that to occur. Eclipse is paid by suppliers of waste to take the waste. The evidence does not establish with precision the relative scale of what Eclipse earns from doing that, as against income earned by Eclipse from the sale of Quarry Materials, but it can safely be said that the latter is dwarfed by revenue from the suppliers of the waste. A summary attached to Mr Sippe's third witness statement provides some information as to Eclipse's income from the sales of, among other things, Quarry Materials.<sup>785</sup> I am not satisfied that this revenue was substantial when put in the context of Eclipse's other revenue at the Abercrombie Road Site, including from the fees paid to it by suppliers of waste. Eclipse's records indicate that total revenue at the Abercrombie Road Site from July 2008 to May 2012 from suppliers of the materials received by Eclipse was in the order of one hundred times its income from the sale of Quarry Materials during the Relevant Period.<sup>786</sup> Any tendency for the levy to affect prices charged by Eclipse would, on the evidence, seem to lie in the price to be charged by Eclipse for materials it received, and not in the price at which Quarry Materials were sold.

797        Moreover, it should not be overlooked that, for some of the Relevant Period, third party contractors extracted Quarry Materials from the Abercrombie Road Site and sold or used for their own purposes some of the extracted materials.<sup>787</sup> There is no evidence of the extent of mining by the contractors for their own benefit, as compared to the extent of mining of Quarry Materials by Eclipse. There is no evidence that Eclipse passed on or attempted to pass on to the contractors any part of the levy paid by Eclipse or claimed by the Government Parties to be due by Eclipse.

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<sup>783</sup> Exhibit 3, attachment NF2 [7.1] - [7.13].

<sup>784</sup> Exhibit 3, attachment NF2 [7.13].

<sup>785</sup> Exhibit G3 [46], attachment RS57.

<sup>786</sup> See exhibit C, pages 29, 36, 61, 81, 94, 117 and 126 and the preceding footnote.

<sup>787</sup> Exhibit A [39].

798 The transaction the subject of the levy is not proximate to the mining of the Quarry Materials. There is no necessary or close temporal connection between the mining of the Quarry Materials and the filling of the site, the latter being the conduct that attracts the levy. At the Abercrombie Road Site, Eclipse is not under any obligation to fill the void at any particular rate. When the rehabilitation of the area mined during the Relevant Period will occur, making levy payable in respect of it, is uncertain. It may be years away. When the mining occurred of the area that was filled during the Relevant Period is, on the evidence, unclear. Some quarrying had occurred before Eclipse took possession of the site.<sup>788</sup> There is no reason to suppose that filling of an area occurred soon after that area had been mined.

799 In support of its submission that there is a close temporal connection between the mining of Quarry Materials and the filling of land, Eclipse points to Mr Delroy's evidence that 'the void is never allowed to get too big ... in case something goes wrong and you are left with a huge hole that you can't fill'.<sup>789</sup> That evidence was given in relation to re-mining of materials deposited and compacted in the void, not in relation to the mining by Eclipse of Quarry Materials. In any event, the effect of that generalised statement is that, if an unidentified limit is reached, the need to ensure that the void is not too big may constrain the extent of mining. That evidence does not satisfy me that there is a close temporal connection between the mining of the Quarry Materials and the filling of the void. For the reasons already given, I am not satisfied that there is any such close connection.

800 For these reasons, I am not satisfied that there is a sufficiently close connection between the levy and the mining of the Quarry Materials to sustain a characterisation of the levy as a tax upon or in respect of the Quarry Materials. Consequently, I do not accept Eclipse's third excise contention.

## **11. Conclusion**

801 My major conclusions may be summarised as follows:

- (1) My construction of the levy regime is explained in section 5 of the reasons and summarised in section 5.5.
- (2) At each site during each return period in the Relevant Period, Eclipse received waste and accepted waste for burial (section 6).

<sup>788</sup> Exhibit D1 [33].

<sup>789</sup> ts 386.

- (3) Consequently, each site was a licenced category 63 landfill at all times during the Relevant Period.
- (4) Waste was disposed of to landfill at each site, including outside of the Category 63 Area of each site, during each return period in the Relevant Period. Consequently, the power of the CEO to make estimates of the levy payable by Eclipse was enlivened (section 7).
- (5) The estimates of levy made by the CEO in the return periods from 1 July 2008 to 31 December 2011 are valid. In making those estimates, the CEO did not misconstrue the levy regime (section 8).
- (6) As a result, the Government Parties' claims for the levy estimated and for penalties succeed.
- (7) The declarations sought by Eclipse regarding return periods after 1 July 2012 should not be made (section 9).
- (8) In its application to Eclipse's operations at the Sites, the waste levy is not invalid as an excise (section 10).

802 In light of those conclusions, Eclipse's actions against the Government Parties should be dismissed. On the face of it, the other orders that should be made would seem to be those identified in the Government Parties' closing submissions.<sup>790</sup>

803 However, I will hear further from the parties as to the orders that should be made in light of these reasons, including orders as to costs.

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<sup>790</sup> Government Parties' closing submissions part XII [2] - [4].