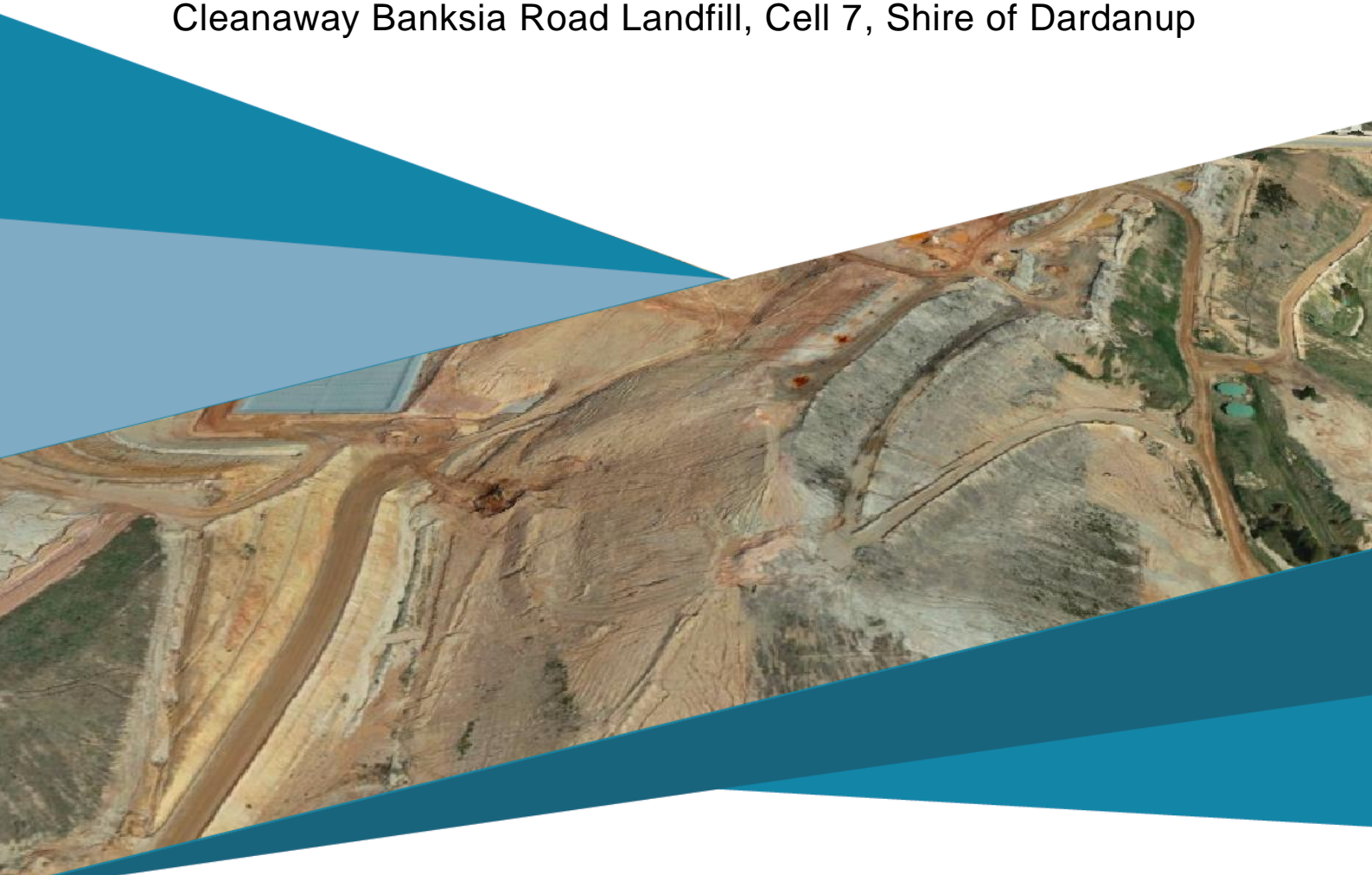




Government of **Western Australia**
Office of the **Appeals Convenor**
Environmental Protection Act 1986

Appeals Convenor's Report to the Minister for Environment

Appeal objecting to a licence amendment: L8904/2015/1
Cleanaway Banksia Road Landfill, Cell 7, Shire of Dardanup



Appellant	Shire of Dardanup
Licence holder	Cleanaway Solid Waste Pty Ltd
Authority	Department of Water and Environmental Regulation (DWER)
Appeal No.	030 of 2020
Date	August 2021

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Cover image: Aerial view Banksia Road Landfill [Cleanaway]

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Acknowledgement of Country

The Office of the Appeals Convenor acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community.

We pay our respects to all members of the Aboriginal communities and their cultures, and to Elders both past, present and emerging.

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1 Executive summary

1.1 Decision under appeal

Cleanaway Solid Waste Pty Ltd holds licence L8904/2015/1 for the operation of the Banksia Road landfill facility located near Dardanup, approximately 20 km southeast of Bunbury. The Department of Water and Environmental Regulation (DWER) amended the licence on 12 May 2020 under Part V of the *Environmental Protection Act 1986* (EP Act). The amendment authorises the burial of waste within the newly constructed Cell 7. The construction and operation of Cell 7 was previously assessed by DWER under an amendment to the licence in April 2017.

Please see Section 3.1 for a summary of the licence history and the current amendment. Maps of the site are provided in Appendix 1.

1.2 Grounds of appeal and appellant concerns

The appellant is the Shire of Dardanup, which has appealed on 5 grounds: odour, dust, stormwater, DWER's failure to exercise discretion under section 59B(8) of the EP Act and administrative matters. The appellant is seeking for DWER to re-evaluate its risk assessment for the premises and for the licence conditions relating to odour, dust and stormwater to be strengthened.

We summarise the appellant's main concerns in Table 1.

Table 1 Grounds of appeal

Ground	Main concerns the appellant submitted
1 Odour	There are no conditions on the licence relating to odour emissions.
2 Dust	The conditions on the licence for the management of dust are inadequate.
3 Stormwater	The conditions on the licence relating to stormwater are inadequate.
4 Failure to exercise discretion	DWER's failure to exercise discretion under section 59B(8) of the EP Act not to amend the licence following the Shire's decision that development is not in accordance with its town planning scheme.
5 Administrative matters	The licence and works approval summary require amendment to correct errors and to clearly indicate the licence holder's history of non-compliance.

1.3 Key issues and conclusions

This report relates to an appeal about a number of emissions and discharges from the premises that the appellant argues are not properly controlled. The key question for the appeal investigation to determine then is, are the conditions adequate and appropriate, having regard to the potential risks and impacts from the activity?

From the appellant's concerns, we have identified the 3 issues at the heart of the appeal. We summarise our conclusions for these issues below. Section 2 of this report then details our reasoning and Section 3 provides supporting information.

The other issues raised, including the exercise of discretion and administrative matters are considered to be outside our scope, but we discuss them briefly in Section 3.

Did DWER adequately assess odour emissions?

DWER acknowledged that its Guidance Statement: Odour Emissions (June 2019) should have been considered in assessing the licence amendment. On review, DWER recommended the licence conditions be strengthened by limiting the size of the active tipping area, requiring highly odorous waste be immediately buried and covered, and by requiring the licence holder to ensure odour from the premises does not unreasonably interfere with public health or wellbeing.

We agree that amending the licence conditions in this way is appropriate to mitigate the risk of odour emissions.

Are the regulatory controls for dust management adequate?

The operation of Cell 7 and the increased waste acceptance rate were assessed through previous licence amendments, with dust management conditions imposed based on risk. DWER considers that the licence conditions are adequate to mitigate unacceptable dust impacts. The available evidence supports this.

This ground of appeal should be dismissed.

Are the regulatory controls for stormwater adequate?

The licence includes conditions to mitigate the risk of contaminated stormwater discharging from the premises. Enforcement action in relation to non-compliance is a separate matter for DWER and beyond the scope of an appeal against a licence amendment.

We understand that the Shire in April 2021 amended the Development Approval for the premises to address the concerns about stormwater management related to the premises along the southern boundary.

This ground of appeal should be dismissed.

1.4 Recommendation to the Minister

We conclude that generally the conditions applied to the licence are adequate and appropriate for the operation of Cell 7, however we recommend the following conditions be strengthened as follows:

1. Odour from the premises does not unreasonably interfere with the health or wellbeing of persons not on the premises.
2. Highly odorous waste be immediately buried and covered.
3. The active tipping area be limited to 1 area no greater than 1,800 m², or 2 areas no greater than 1800 m² each for periods of up to 3 months when transitioning between cells.

Otherwise dismiss the appeal.

2 Reasons for recommendation

2.1 Did DWER adequately assess odour emissions?

Our conclusion is that DWER should have had regard to its contemporary guidance for odour emissions in its assessment of the amendment and that the licence could be improved by including conditions for the management of odour. We explain our reasoning below.

Consideration of Guidance Statement: Odour Emissions

The appellant submitted that:

- there are no licence conditions relating to odour
- as well as considering the final volume of waste as the causal element of odour emissions, DWER should have considered that the increased number of trucks arriving each day at the premises (5) as a consequence of the increased waste acceptance rate will result in an increase in odour emissions
- DWER did not consider its Guidance Statement: Odour Emissions (June 2019) in its assessments.

In its response to the appeal, DWER advised that its assessment did not consider odour as the operation of Cell 7 was considered in its assessment of the April 2017 amendment. DWER acknowledged that the Guidance Statement: Odour Emissions has since been released. DWER noted the guidance was not considered as part of the December 2019 assessment and therefore it should have been considered for the current amendment. We support DWER's position.

Revised risk assessment for odour

DWER reviewed its risk assessment and the scope and content of the licence conditions relating to odour. The revised risk assessment for odour is:

Consequence:	Minor (low impact to amenity)
Likelihood:	Possible (could occur at some time). This has increased from 'unlikely' in previous assessments.
Overall Risk:	Medium. ¹

DWER advised that, while the overall risk relating to odour has not changed, additional conditions could be imposed to mitigate the likelihood of odour emissions impacting on the local community and amenity.

Additional odour emission controls

DWER recommended new conditions could be included on the licence requiring:

- the active tipping area on the premises is limited to 30 m and 30 m (900 m²)
- highly odorous waste to be immediately buried and covered.²

The licence holder agreed to the requirement to immediately bury highly odorous waste.

The licence holder proposed 2 alternatives to the active tipping area limitation:³

¹ DWER Response to Appeal 030/20. Received 6 August 2020. Page 4.

² DWER Response to Appeal 030/20. Received 6 August 2020. Page 4.

³ Cleanaway Response to DWER s106 Report. Received 4 September 2020.

1. A condition requiring the licence holder to ensure that odour emitted from the premises does not unreasonably interfere with the health, welfare, convenience, comfort or amenity of any person who is not on the premises.
2. The imposition of a 1,800 m² maximum active tipping area. The licence holder's justification is provided in Section 3.2.

The licence holder subsequently advised that more than 1 active cell is required from time to time to allow a 'fluff' layer to be established on a newly opened cell.⁴ This is a specific waste type that is required to be deposited on the base of a new landfill cell that does not risk penetrating the cell. During this transition time (up to 3 months), higher risk waste is diverted to the existing operational cell, meaning 2 active faces would be temporarily required.

In relation to these alternate options, DWER advised:

- The proposal to increase the active tipping face to 1,800 m² (nominally 30 m x 60 m) is acceptable, noting the requirement for 3 trucks to offload concurrently and the necessary exclusion zones.⁵
- This condition, along with a condition requiring that odour does not unreasonably interfere with health or wellbeing of persons not on the premises, should be sufficient to manage the risk associated with odour while permitting the licence holder to meet the operational and safety requirements associated with its operation.
- The need for the licence holder to operate 2 active tipping faces for periods of up to 3 months to allow for transition between cells is accepted.⁶

We consider that the inclusion of an outcome focussed requirement to ensure that odour from the premises does not unreasonably interfere with the health or wellbeing of persons not on the premises is appropriate. We also consider that additional requirements to immediately bury and cover highly odorous waste and to limit the size of the active tipping area would support the achievement of this outcome and are therefore appropriate inclusions.

2.2 Are the regulatory controls for dust management adequate?

Our conclusion is that the current licence conditions for dust management are adequate to mitigate unacceptable dust impacts from the premises. We explain our reasoning below.

Conditions relating to dust suppression are adequate

The appellant submitted that DWER failed to include adequate conditions on the licence for the management of dust.

We understand that the operation of Cell 7 and the increased waste acceptance rate were assessed through previous licence amendments and that dust management conditions were imposed based on risk. From our review of the licence, we note there are a number of conditions that require the licence holder to undertake dust suppression measures. These are summarised in Section 3.3.

In response to the appeal, DWER advised it has reviewed its risk assessment and the scope and content of conditions relating to dust.⁷ DWER considers that the existing risk assessment and licence conditions are appropriate and adequate to effectively manage risks associated with dust.

⁴ Cleanaway Response to DWER s106 Report – further comments. Received 16 September 2020.

⁵ DWER additional advice. Received 17 September 2020.

⁶ DWER additional advice. Received 6 October 2020.

⁷ DWER Response to Appeal 030/20. Received 6 August 2020. Page 7.

Based on our review of the available information, we agree with DWER's position that the current licence conditions are adequate to mitigate unacceptable dust impacts from the premises.

The issue of dust, including the adequacy of the dust conditions imposed on the amended licence, was raised in recent appeals relating to the December 2019 amendment to the licence. We summarise the appeals in Section 3.4.

Based on the available evidence, the then Minister for Environment supported DWER's view that the conditions imposed are commensurate with the level of risk identified and dismissed the appeals.⁸ Consistent with the previous decision, noting the licence amendment authorises the use of Cell 7, and that the construction and operation of Cell 7 was assessed and authorised through the April 2017 amendment and the December 2019 amendment assessed the risk associated with the increased acceptance of waste, we recommend this ground of appeal is dismissed.

Application of Victoria's best practice environmental management for landfills

The appellant submitted that additional dust management conditions should be imposed consistent with the Environment Protection Authority Victoria publication Best Practice Environmental Management – Siting, design, operation and rehabilitation of landfills (BPEM; August 2015). The appellant submitted that the BPEM is relevant as it understands DWER is still in the process of developing best practice landfill guidance for Western Australia and therefore the Victorian equivalent should be used as a benchmark.

Refer to Section 3.3 for the requirements for the management of dust at landfills included in the BPEM.

In its response to the appeal, DWER advised that while some of the Department's predecessor organisations endorsed the BPEM for Western Australian landfills, DWER does not require the implementation of, or endorse, the BPEM for Western Australian landfills.⁹ DWER advised that instead, since 2017, it has applied its site-specific risk based regulatory framework for prescribed premises. We accept DWER's position.

Dust monitoring has not confirmed dust emissions impacting local residents

We understand the appellant's key concern is that there is no requirement for the licence holder to undertake and respond to real-time dust monitoring consistent with the BPEM. We note DWER's advice that dust monitoring recently conducted for a month at a complainant's residence did not confirm that dust emissions are impacting local residents.¹⁰

DWER's risk assessment for dust

The appellant suggested that DWER's risk assessment should be revisited because not all potential sources were accounted for. The appellant submitted that an extractive industry operation is also occurring on the property, as well as the stockpiling of sand and clay from the future Cell 8 on an adjacent property. The appellant also submitted that these activities are contributing to dust generation and should be considered by DWER.

We acknowledge the appellant's concerns, however the appeal right relates to the amendment made to the licence, which is the authorisation to bury waste within Cell 7. We

⁸ Minister's Appeal Determination (15 June 2020). Appeals against amendment of Licence L8904/2015/1, Cleanaway Banksia Road Landfill. Appeal Number 001 of 2020.

⁹ DWER Response to Appeal 030/20. Received 6 August 2020. Page 2.

¹⁰ DWER Response to Appeal 030/20. Received 6 August 2020. Page 8.

understand that DWER is conducting a licence review. We consider that broader concerns of the type raised by the appellant in respect to dust would be best raised directly with DWER for consideration through that process.

2.3 Are the regulatory controls for stormwater adequate?

Our conclusion is that the licence includes conditions to mitigate the risk of contaminated stormwater discharging from the premises. The management of compliance with licence conditions is a separate matter for DWER to administer and beyond the scope of an appeal against a licence amendment. We explain our reasoning below.

The appellant's concerns relate to alleged breach of Condition 1.2.1

The appellant's concern relates to the stormwater infrastructure constructed along the southern boundary of the premises. The appellant notes that Condition 1.2.1 of the licence requires that stormwater arising within, or which has had contact with, the active landfill area and the areas of the premises where landfilling, waste acceptance and processing and leachate containment occurs, must not discharge beyond the premises boundary.

The appellant submitted that DWER knew the licence holder was in breach of Condition 1.2.1 through evidence provided to it by a member of the public showing stormwater erosion along the southern boundary, which was impacting the adjacent Dardanup Conservation Park. The appellant submitted that DWER should have taken this into account in its assessment and that it should have imposed BPEM conditions relating to stormwater as part of the current amendment. Refer to Section 3.5 for the requirements for stormwater management at landfills included in the BPEM.

The appellant noted that DWER's Guideline: Risk assessment (February 2017) includes a step to ensure an acceptable level of risk is being maintained through periodic review. These reviews should consider reported incidents or events; relevant reporting and information submitted in accordance with regulatory instruments; period since the last review; new information relevant to risk; compliance inspection; complaints; and enforcement. The appellant submitted that regardless of whether stormwater was assessed by DWER in prior assessments, the stormwater issue evident along the southern boundary demonstrates the need for inclusion of BPEM conditions as part of the current amendment.

Photographs provided by the appellant showing the stormwater management issues at the southern boundary are in Appendix 2.

Licence includes conditions for the management of contaminated stormwater

In response to the appeal, DWER clarified its role in relation to the regulation of stormwater at prescribed premises:

- ensuring stormwater does not become contaminated from the activities on the premises and ensuring there are appropriate controls to prevent the discharge from the premises of stormwater which may have become contaminated
- ensuring stormwater does not impact on infrastructure or other control measures on the premises that are required to prevent and mitigate harmful emissions and discharges.¹¹

DWER also advised that the regulation of stormwater outside of these matters is not within the remit of the Part V licensing regime, but is typically managed under the Local Planning Schemes.

¹¹ DWER Response to Appeal 030/20. Received 6 August 2020. Page 6.

In this regard, we note that there are a number of conditions that require the licence holder to undertake stormwater management measures. These are summarised in Section 3.5. Importantly, condition 1.2.1 requires that stormwater be directed away from active areas and prevents contaminated stormwater from the premises being discharged to the environment. It is considered that this condition is consistent with BPEM requirements.

In response to the appeal, DWER advised that it has reviewed its risk assessment and the scope and content of conditions relating to stormwater.¹² DWER considers that the risk assessment and the existing licence conditions remain appropriate and are adequate to effectively manage risks associated with stormwater on the premises, including stormwater movement around Cell 7 and the management of stormwater that enters Cell 7.

While we note that the appellant does not agree with DWER's view that that the stormwater is necessarily uncontaminated or that the stormwater on the southern boundary largely originates from the Dardanup Conservation Park,¹³ condition 1.2.1 (which requires that contaminated stormwater is prevented from leaving the premises) is clear and unobjectionable and compliance with this requirement is a matter for DWER that is beyond the scope of the appeal right.

Separately we understand that the licence holder has engaged with the Department of Biodiversity, Conservation and Attractions to develop a comprehensive stormwater solution on the southern boundary. We understand that the licence holder applied to amend its related Development Approval to enable the construction of an improved stormwater drainage system on the southern boundary of the premises, which the Shire approved in April 2021. In our view this is an appropriate way for this matter to be resolved.

We also note that the issue of stormwater management, specifically concerns relating to offsite stormwater impacts including to the adjacent Dardanup Conservation Park, was raised in recent appeals relating to the December 2019 amendment to the licence. We summarise the appeals in Section 3.4.

The then Minister for Environment accepted the Appeals Convenor's advice that these matters are beyond the scope of appeal.¹⁴

Consistent with the previous decision, noting the licence amendment authorises the use of Cell 7, and that the construction and operation of Cell 7 was assessed and authorised through the April 2017 amendment and the December 2019 amendment assessed the risk associated with the increased acceptance of waste, we recommend this ground of appeal is dismissed.

¹² DWER Response to Appeal 030/20. Received 6 August 2020. Page 6.

¹³ Shire of Dardanup additional comments. Received 7 September 2020.

¹⁴ DWER Response to Appeal 030/20. Received 6 August 2020. Page 6.

3 Supporting information

3.1 Licence history and the current amendment

The premises is licensed for:

- Category 61 (liquid waste facility) with a design capacity of 353,000 tonnes per year
- Category 64 (class II or III putrescible landfill site) with a design capacity of 350,000 tonnes per year.

The timeline of relevant licence amendments is summarised in Table 2. The licence was also amended in October 2015, July 2016, February 2019 and June 2019.

Table 2 Timeline of licence amendments¹⁵

Date	Relevant licence details
August 2015	Licence granted. Replaced ceased licence L7439/1998/9.
May 2016	Licence amended to authorise operation of Cell 12 and address upgrades to improve the capacity of the stormwater management system to retain stormwater on the premises for beneficial uses (e.g. dust and fire suppression). A number of licence conditions relating to stormwater management were imposed or amended.
April 2017	Construction and operation of 3 composite HDPE liner Class III landfill cells (Cells 6, 7 and 8) assessed and approved by DWER. Odour and dust considered in the assessment relating to the acceptability of the construction and operation of Cell 7. DWER undertook a risk assessment of fugitive dust emissions relating to the construction and operation of Cells 6, 7 and 8. The risk assessment took into consideration dust emissions arising from the acceptance, handling and disposal of waste; the extraction, mobilisation and placement of soils, clays and inert wastes; machinery, vehicle movements and earthworks; and dust from uncovered and non-rehabilitated landfill cover. Additional regulatory controls were added to the licence.
February 2018	Licence amended. Following construction of Cell 6, its use was authorised by DWER.
December 2019	Licence amended to authorise an increase in the rate of waste acceptance for Category 64: Class II/III putrescible landfill site activities from 303,000 tonnes per annual period to 350,000 tonnes per annual period. Odour was considered as part of the capacity increase. As part of this risk assessment, DWER reassessed the proximity of human and environmental receptors and the potential for them to be impacted by the proposed amendment. In both the 2017 and 2019 amendments, receptors were measured from the premises boundary and the operation of Cell 7 does not alter the assessed distance to receptors.

¹⁵ Includes information from DWER's Response to Appeal 030/20. Received 6 August 2020.

Date	Relevant licence details
	<p>DWER determined the increase in waste acceptance did not alter the nature and extent of potential emissions to that assessed in previous licence amendments, and therefore previously proposed emission controls for odour were acceptable to manage potential odour emissions.</p> <p>As part of the amendment assessment, DWER reassessed operational activities and dust risk areas on the premises to identify the sources with the highest risk for dust generation. DWER determined that further regulatory controls relating to dust were warranted.</p>
May 2020	<p>On 27 March 2020, the licence holder submitted compliance documentation for the completion of Cell 7 and an application to amend the licence to allow Cell 7 to commence accepting waste. DWER reviewed the compliance documentation and was satisfied that Cell 7 was constructed in accordance with the requirements of the licence.</p> <p>As the construction and subsequent operation of Cell 7 were assessed and approved under the previous licence amendment granted in April 2017, an additional risk assessment was not assessed under the 2020 amendment application.</p> <p>On 12 May 2020, DWER amended the licence to authorise the use of Cell 7. It is against this amendment that the appeal was made. Table 4 in DWER's Amendment Report summarises the conditions which were amended with the only effective change being to Table 1.4.4 of Condition 1.4.3 which states:</p> <p style="padding-left: 40px;">(a) Waste must only be disposed of by burial to the Active Landfill Area, Cell 6 or Cell 7. (emphasis added).</p>

3.2 Odour management

Licence holder's justification for maximum active tipping area

The licence holder provide the following justification for the imposition of a 1,800 m² maximum active tipping area:

...DWER has recommended an additional control of a 30x30m active face as per the Best Practice Environmental Management: Siting, Design, Operation [and] Rehabilitation of Landfills: EPA Victoria 2015. (BPEM)

Please note that the BEPM [sic] also states that the size of the tipping face will vary according to the volume of traffic.

Cleanaway requires a minimum of 50m x 30m active face, aligned with the BEPM [sic] reference to "dependant on transport". Site volumes require three trucks offloading concurrently, noting industry standard 10m exclusion zone between and around trucks and most yellow gear (larger vehicles).

...

The site averages 1500 tp/d. This volume is not spread evenly over the opening times of the site (12 hrs) therefore requiring a contingency for the ability to offload up to 3 trucks concurrently. Based on these safety requirements note the following:

- (4 x 10m exclusion zones) + (3 x 2.5m wide trucks) = 50m-60m wide active face

- As the areas of the face is not a fixed shape it is requested that this area not be fixed to 60mx30m rather a fixed area of up to 1800m².¹⁶

3.3 Dust management

Dust management conditions on the licence

Table 3 summarises the licence conditions relating to dust that we discussed in Section 2.2. We agree with DWER's assessment that the conditions are adequate.

Table 3 Dust suppression conditions on the licence

Condition	Dust suppression measure
1.4.15	Bituminise the main and southern haul routes by 31 July 2020.
1.4.16	During operational hours apply water via water cart to trafficable areas or use a street sweeper on bituminised trafficable areas.
1.4.17	During operational hours apply water or leachate via water cart to the active tipping area.
1.4.18	During operational hours undertake targeted wetting down of material during disposal and burial at the active tipping area where the licence holder is aware that such material has the potential to generate fugitive dust.
1.4.19	As far as practicable, apply a dust suppressant material to non-vegetated areas, landfill batters and within the laydown area when such areas have the potential to generate fugitive dust.
1.4.20	By 31 October of each annual period undertake an assessment of the potential for dust emissions generated within the premises and detail proposed controls for areas identified as high dust risk areas.
1.4.21	Submit this assessment to DWER within 14 days of its completion.
1.4.22	Ensure all operational vehicles pass through a wheel wash prior to exiting the premises.

Victoria's Best Practice Environmental management of Landfills

Section 6.7.4 of the BPEM states the following in relation to the management of dust at landfills:

Reactive management strategies should [be] put in place including real-time monitoring of PM₁₀. The monitoring may be required at the boundary of the premises both upwind and downwind of the active landfill area to assess any impact and guide mitigation actions.

An hourly trigger level of 80 µg/m³ should be used to assess the real-time data. If exceeded additional dust management practices, such as increased water sprays and dust suppressants should be applied.

Dust suppression measures to be applied at the site include:

¹⁶ Cleanaway Response to DWER s106 Report. Received 4 September 2020.

- vegetating or mulching of exposed areas and formation of internal roads, including sealing roads that are used regularly
- use of water or other dust suppressants on roads or stockpiles that are not sealed or vegetated
- where leachate is to be used for dust suppression it may only be applied to areas that are within the active landfill cell to ensure the leachate does not contaminate stormwater run-off.

3.4 Summary of similar recent appeals

There were 9 appeals in objection to the amendment of licence L8904/2015/1 in December 2019. The amendment authorised an increase in the rate of acceptance of Category 64 solid waste at the Banksia Road landfill from 303,000 tonnes per annual period to 350,000 tonnes per annual period. The key condition amendments required as a result of the change to the amount of waste accepted at the premises included conditions relating to dust, noise and windblown waste.

The main concerns raised in these appeals related to dust, operator history, noise, application of guidance, rehabilitation and necessity. The appellants also raised a number of other matters, including concerns relating to DWER's management of compliance, stormwater management, truck movements, cumulative amendments and assessment by the Environmental Protection Authority.

The appeals investigation found that DWER's decision was based on a risk assessment of the potential emissions associated with the increased rate of waste acceptance.¹⁷ Based on the available evidence it was considered that the additional conditions imposed by DWER were commensurate with the level of risk identified and were generally appropriate.

The then Minister for Environment dismissed the appeals.¹⁸

See www.appealsconvenor.wa.gov.au for the appeal reports and the Minister's appeal determinations.

3.5 Stormwater management

Victoria's Best Practice Environmental management of Landfills

Section 6.5.1 of the BPEM states the following in relation to stormwater management at landfills:

Good stormwater management design incorporates interception drains that direct stormwater away from the areas where waste is to be landfilled.

...

Stormwater can also contribute sediment to the environment if the catchment area is erodible due to a lack of vegetative cover. By retaining and re-establishing as much vegetative cover in the catchment area as possible, this potential for erosion is minimised.

...

¹⁷ Appeals Convenor (2020). Report to the Minister for Environment, Appeals in Objection to the Amendment of a Licence, L8904/2015/1: Banksia Road Landfill, Crooked Brook. Appeal Numbers 001.001–009 of 2020.

¹⁸ Minister's Appeal Determination (15 June 2020). Appeals against amendment of Licence L8904/2015/1, Cleanaway Banksia Road Landfill. Appeal Number 001 of 2020.

The discharge of stormwater from the site should only occur from dams, and only after confirmation that the water is not contaminated. This confirmation should at least be visual where the only possible contaminant source is sediment, but where other contaminants are possible, the water should be tested prior to discharging. The degree of testing will be determined by the risk of contamination and the sensitivity of the receiving environment. Water is not to be discharged if it is suspected or found to be contaminated.

Appellant's evidence for the source of stormwater

In support of its view that stormwater is largely originating from the premises, the appellant provided the following photographs.

Image of failed geotextile drain liner



Image of drain above adjacent Dardanup Conservation Park fire track



Image of drain above adjacent Dardanup Conservation Park fire track



Image of failed drain flowing into adjacent fire track



Image of failed drain flowing into adjacent fire track



Image of drain lower than fire track in vicinity of evaporation ponds



Stormwater management conditions on the licence

Table 4 summarises the licence conditions relating to stormwater that we discussed in Section 2.3. We agree with DWER’s assessment that the conditions are adequate.

Table 4 Stormwater management conditions on the licence

Condition	Stormwater management measure
1.2.1	Prevents stormwater from being directed to active areas, prevents the discharge of contaminated stormwater from the premises and sets specifications for stormwater management infrastructure.
1.2.2	Requires the submission of a stormwater management system compliance document (so that DWER can verify that the stormwater management system has been constructed appropriately).
1.2.3	The stormwater management system compliance document must meet the specified requirements.
1.3.2	The stormwater management system for the construction and operation of landfill Cells 6, 7 and 8 must meet the specified requirements.
1.4.5	Control stormwater runoff to prevent it entering vessels or compounds or cause erosion of embankments.

3.6 Planning matters

DWER failed to exercise its discretion under the EP Act

The appellant submitted that DWER failed to consider exercising its discretion under section 59B(8) of the EP Act to not amend the licence. The appellant submitted that section 59B(8) provides DWER the ability to abstain from making a decision on the licence amendment application while another decision-making authority has made a decision that has the effect of preventing implementation of the proposal. The appellant submitted that it is a decision-making authority as defined in the EP Act noting it is a local government authority that makes decisions on proposals under the *Planning and Development Act 2005* (P&D Act).

Section 59B(8) of the EP Act states:

If a decision-making authority makes a decision that has the effect of preventing the implementation of a proposal to which an amendment proposed under this section is related, the CEO does not have to make a decision on the amendment while the decision-making authority’s decision has effect.

The EP Act defines a decision-making authority as:

a public authority empowered by or under —

- (a) a written law; or
- (b) any agreement —
 - (i) to which the State is a party; and
 - (ii) which is ratified or approved by an Act,

to make a decision in respect of any proposal and, in Division 2 of Part IV, includes, in relation to a particular proposal, any Minister prescribed for the purposes of this definition as being the Minister responsible for that proposal

DWER is primary agency responsible for environmental protection

The appellant submitted that there is no 20 m native vegetation buffer along the entire southern boundary of the premises and therefore the licence holder is in breach of:

- its Development Approval of 15 April 2016 (for stormwater infrastructure works) which required preparation, approval and implementation of a landscape plan providing a 20 metre wide native vegetation buffer along the entire southern boundary of the premises
- its Development Approval of 19 December 2016 (for construction of Cells 6, 7 and 8) which required that 'revegetation of the western section of Cell 6 are to occur within 6 months of Cell 7 being commissioned, and in addition revegetation of the bund on the southern section of the site *is to be brought into full compliance with the relevant landscape plan*' (original emphasis).

The appellant wrote to DWER on 30 April 2020 (i.e. before the amendment was granted) advising that if DWER declined to regulate stormwater, among other things, the Shire objected to the amendment. The appellant submitted that this ought to have led DWER to consider exercising its discretion under section 59B(8) of the EP Act to not approve the amendment to enable the appellant to discharge its obligation under the P&D Act to enforce and/or effectively implement the planning scheme. That is, DWER should have withheld the amendment until such time as the licence holder was brought into compliance with its Development Approvals.

By proceeding to grant the amendment, the appellant submitted that DWER is in effect compelling the Shire to initiate proceedings to enforce the planning scheme to protect the Western Australian environment and that:

- this is not the most cost-effective way of pursuing environmental protection goals
- as supported by a State Administrative Tribunal finding¹⁹, the appellant is not best placed to develop its own solutions and responses to the environmental problems created by a large multinational corporation such as the licence holder.

The appellant submitted that it placed the licence holder on notice that it was in breach of its Development Approval conditions, but that it only has 12 months within which to take action to enforce the planning scheme (in accordance with section 21 of the *Criminal Procedure Act 2004*).

The appellant considers that DWER is the primary agency responsible for environmental protection, that it is aware of breaches of its licence conditions (e.g. in relation to stormwater not being contained on site), and that it has unreasonably abrogated its duties by choosing not to take any enforcement action under the EP Act. The appellant submitted that by DWER granting the amendment it has unreasonably shifted the onus of enforcement to the Shire.

Shire responsible for determining compliance and administering enforcement

In response to the appeal, DWER advised:

In December 2016, the Shire of Dardanup resolved to grant development approval for the construction of Cells 6, 7 and 8 at Lot 2 Banksia Road, Crooked Brook. The Department is of the opinion that the Shire's decision to grant development approval for the construction of Cells 6, 7 and 8 is the relevant planning decision related to Cell 7.

While the Department will make every effort to ensure that granted instruments are not inconsistent with the requirements of planning approvals, the Department

¹⁹ SITA Australia Pty Ltd and Wheatbelt Joint Development Assessment Panel [2016] WASAT 22, 37-39.

considers that it is the relevant planning authority's responsibility to determine compliance and administer enforcement action relating to its own planning instruments.²⁰

The appellant provided the following response:

The Shire disagrees that the relevant decision is the planning decision to grant development approval for the construction of cells 6, 7 and 8.

...

There is no reason in the [EP Act] text to restrict the meaning of 'decision' to the original planning decision.

...

The Shire's view is that the decision that the licence holder has commenced, continued or carried on any development otherwise than in accordance with development approval conditions as set out in s.218(c) of the *Planning and Development Act 2015* [sic] is one which has the effect of preventing the implementation of a [proposal] to which the licence amendment relates.²¹

The appellant considers that DWER's position is not consistent with previous decisions it has made to grant or amend works approvals and licences in the absence of associated Development Approvals.²²

The appellant further advised that portions of Cells 1, 2, 3 and 4 appear not to have planning approval and that it is concerned that Cells 3 and 4 are being used by the licence holder for asbestos and quarantine placement.²³

Compliance with the P&D Act a matter for the Shire

While we acknowledge the appellant's concerns, we consider that compliance with the P&D Act is a matter for the appellant to administer.

Decisions relating to enforcement under the EP Act are separate matters for DWER to consider and are beyond the scope of the appeal right against a licence amendment.

3.7 Administrative issues

Additional concerns were raised by the appellant, primarily relating to the premises history. The appellant sought for errors in the Instrument Log to be corrected and for the licence to include a description of the history of non-compliance. The appellant's concerns and DWER's response are provided below. As these matters are beyond the scope of an appeal against a licence amendment, they are not considered further in the context of our investigation.

Instrument Log

The appellant submitted that rows 1 and 8 of the Instrument Log contain errors in that they reference appeals to the Minister for Environment against W2548/1998/1 and L7439/1998/5. The appellant submitted there is no record of appeals against these instruments on the Office of the Appeals Convenor's website and that around these times the Shire refused development applications which were overturned on appeal through planning legislation.

²⁰ DWER Response to Appeal 030/20. Received 6 August 2020. Page 9.

²¹ Shire of Dardanup additional comments. Received 10 December 2020.

²² Shire of Dardanup additional comments. Received 10 December 2020.

²³ Shire of Dardanup additional comments. Received 20 January 2021.

Figure 1 First 8 rows of the Instrument Log for the premises

Instrument log		
Instrument	Granted	Description
W2548/1998/1	13/11/1998	First works approval issued for site construction. Issued to Kingscape Holdings Pty Ltd (J&P Metals). Approval was appealed and subsequently dismissed by the Minister for Environment.
W2895/1999/1	29/11/1999	Second works approval issued as the first approval expired prior to issue of development approval.
L7439/1998/1	14/06/2000	First licence issued to authorise landfilling operations as a Class II landfill.
L7439/1998/2	6/06/2001	Licence reissued.
L7439/1998/3	1/07/2002	Licence reissued.
L7439/1998/4	23/06/2003	Licence reissued.
L7439/1998/4	8/06/2004	Licence reissued.
L7439/1998/5	23/05/2005	Licence reissued, including upgrade of landfill classification to Class III. Decision was appealed and subsequently dismissed by the Minister for Environment. First non-annual licence (3 years).

Both our and DWER's records confirm the then Minister for Environment received and dismissed appeals for the 2 instruments identified by the appellant:

- the conditions of Works Approval W2548/1998/1 were appealed on 25 November 1998 (Appeal Number 177 of 1998). The appeal was dismissed on 15 March 1999
- the licence renewal for L7439/1998/5 was appealed by the Shire of Dardanup in June 2005 (Appeal Number 109 of 2005). The appeal was dismissed on 10 August 2005.

See <https://www.appealsconvenor.wa.gov.au> for the appeal reports.

Compliance history

The appellant submitted that the inclusion of clear statements on the licence about the licence holder's compliance history will support the aim of proactive compliance assessment and management consistent with DWER's Guidance Statement: Licence Duration (August 2016).

DWER advised it considers it inappropriate for a licence to include a listing or other documentation of instances of non-compliance associated with a premises.²⁴ It advised that operator history is a relevant consideration in establishing risk context and in determining risk likelihood criteria. DWER referred to the December 2019 licence amendment as an example where additional conditions relating to dust and windblown waste were imposed on the licence in response to community complaints and compliance investigations.

In relation to compliance generally DWER advised:

It should be noted that the Department will continue to undertake compliance inspections, complaint investigation and any required enforcement action related to Banksia Road landfill and other sites in the Dardanup Waste Precinct. The Department's officers have conducted a month-long dust monitoring campaign at the principal complainant's residence and have met with various members of the community in relation to concerns they have raised relating to the landfill and other sites within the Dardanup Waste Precinct. Since August 2019, Departmental officers have visited the landfill at least 19 times.²⁵

²⁴ DWER Response to Appeal 030/20. Received 6 August 2020. Page 9.

²⁵ DWER Response to Appeal 030/20. Received 6 August 2020. Page 10.

Appendix 1 Site map

The appendix shows the following maps and site:

Fig	Details	Source
2	Location of premises	Google Maps 2021
3	Premises layout. Cell 7 is located within the area 'Future landfill cells' which also includes future Cell 8.	DWER Licence L8904/2015/1, May 2020
4	Layout of Cells 7 and 8	DWER Licence L8904/2015/1, May 2020

Figure 2 Site location

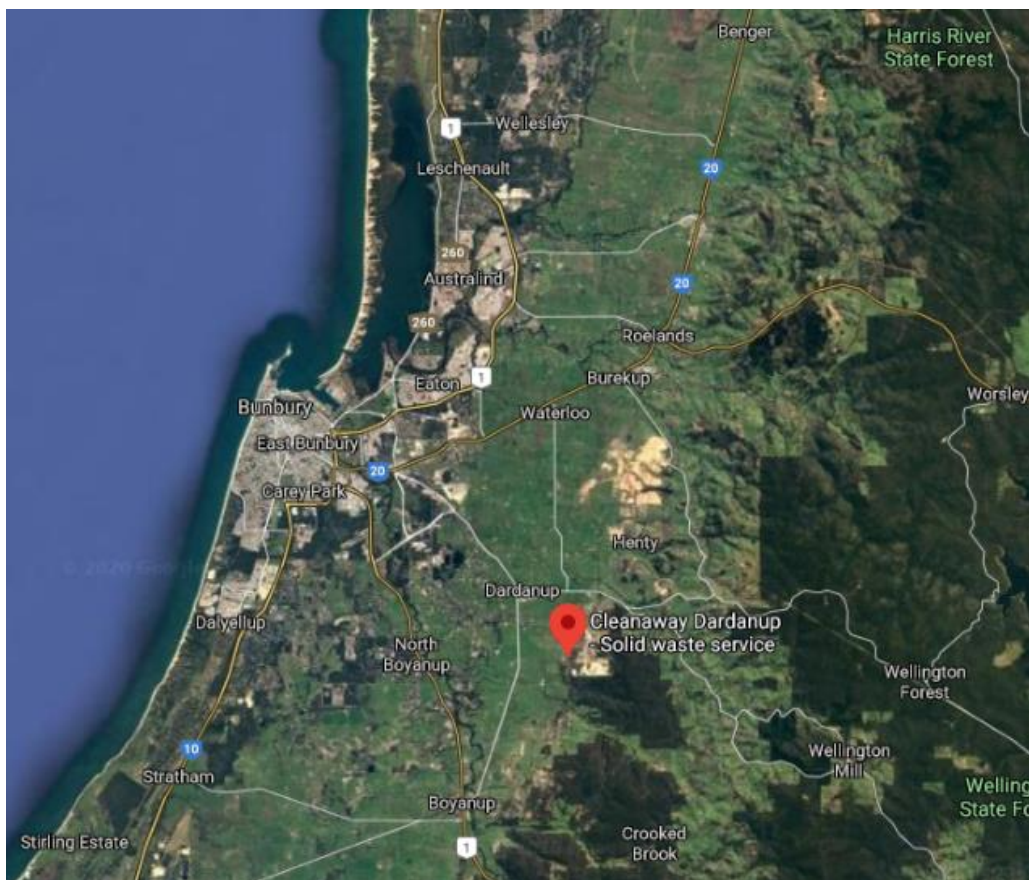


Figure 3 Premises layout

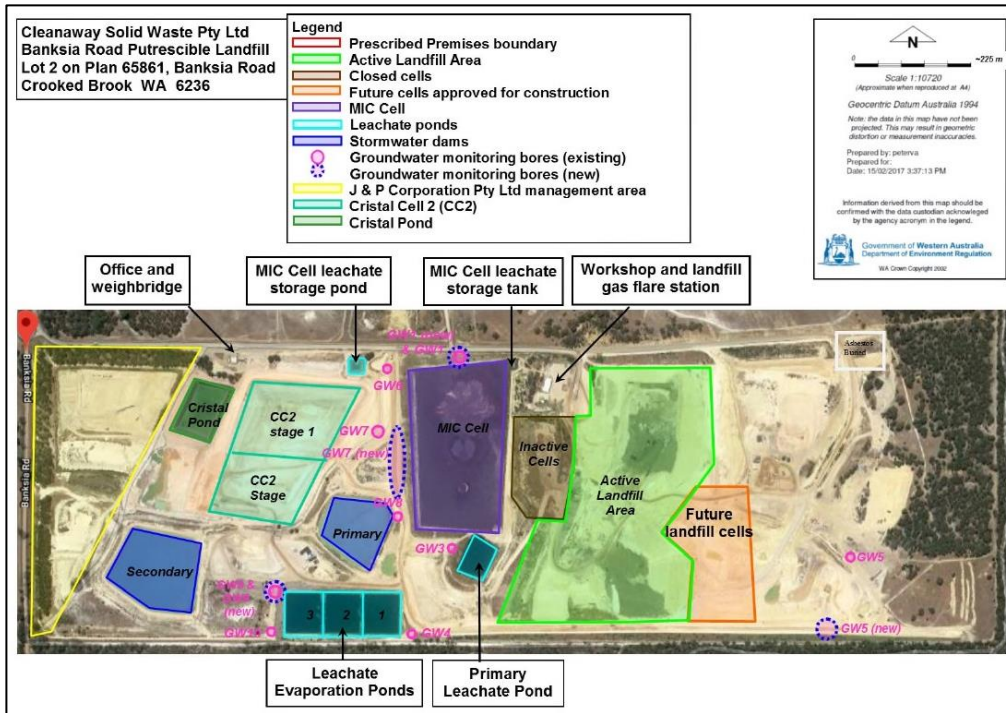
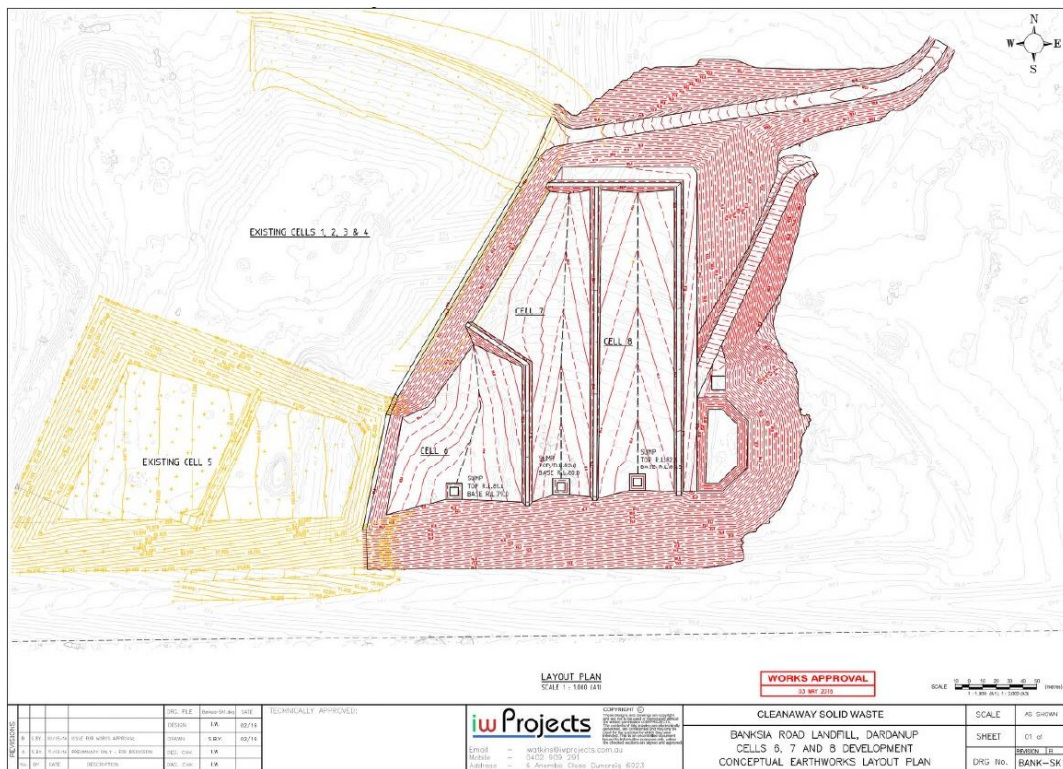


Figure 4 Layout of Cells 7 and 8



Appendix 2 Site photographs

The appellant provided photographs of the southern boundary of the premises showing the stormwater management issues.

Fig	Details	Source
5	The southern boundary of the premises showing the issue with stormwater management	The appellant
6	Photograph of turbid water that the appellant submitted was discharged from the southwest corner of the premises as a result of upstream erosion where the exposed surfaces would have contained contaminated dust.	The appellant

Figure 5 The southern boundary of the premises showing the issue with stormwater management



Figure 6 Stormwater discharge from the premises



Appendix 3 Appeal process

The Minister assesses the merits of a decision

Environmental appeals follow a merits-based process. This means the Minister can consider all the relevant facts, legislation and policy aspects of the decision and decide whether it was correct and preferable.

However, for appeals relating to a licence amendment, the Minister can only consider matters directly linked to the amendment. Appeal rights do not extend to parts of the licence that were not amended.

A merits review cannot overturn the original decision to grant a licence. But if the appeal is upheld, the licence conditions might change or an amendment might not go ahead.

We report to the Minister, as does the decision-making authority

To decide an appeal's outcome, the Minister for Environment must have a report from both:

- the Appeals Convenor [see section 109(3) of the EP Act], and
- the authority that originally made the decision under appeal [see section 106(1)].

To properly advise the Minister in our report, our investigation included:

- reviewing DWER's report and additional advice received from DWER
- reviewing responses from the licence holder on DWER's report
- reviewing responses from the appellant on DWER's report
- meetings with the appellant and representatives from Cleanaway Solid Waste Pty Ltd.

Table 5 Documents we reviewed in the appeals investigation

Document	Date
Environmental Protection Authority Victoria. Best Practice Environmental Management – Siting, design, operation and rehabilitation of landfills. Publication 788.3	August 2015
DER Guidance Statement: Licence duration. Part V <i>Environmental Protection Act 1986</i>	August 2016
DWER. Guidance Statement: Risk Assessments. Part V, Division 3, <i>Environmental Protection Act 1986</i>	February 2017
DWER. Guideline Odour emissions. Activities regulated under the <i>Environmental Protection Act 1986</i> and <i>Environmental Protection Regulations 1987</i>	June 2019
DWER. Application for Licence L8904/2015/1 amendment. Amendment Report	May 2020
DWER. Response to Appeal 030/20	6 August 2020
Cleanaway Solid Waste Pty Ltd. Response to DWER s106 Report	4 September 2020
Shire of Dardanup additional comments	7 September 2020
Cleanaway Solid Waste Pty Ltd response to DWER s106 Report – further comments	16 September 2020

Document	Date
DWER additional advice	17 September 2020
DWER additional advice	6 October 2020
DWER. Compliance and Enforcement Policy	November 2020
Shire of Dardanup additional comments	10 December 2020
DWER. Guideline: Risk assessments. Part V, Division 3, <i>Environmental Protection Act 1986</i>	December 2020
Shire of Dardanup additional comments	20 January 2021