JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	PLANNING AND DEVELOPMENT (DEVELOPMENT ASSESSMENT PANELS) REGULATIONS 2011 (WA)
CITATION	**:**	A.M.I ENTERPRISES PTY LTD and PRESIDING MEMBER OF THE MID-WEST/WHEATBELT JOINT DEVELOPMENT ASSESSMENT PANEL [2018] WASAT 130
MEMBER	**:**	DEPUTY PRESIDENT, JUDGE PARRY MS M CONNOR (MEMBER)
HEARD	**:**	28-30 AUGUST 2018
DELIVERED	**:**	30 NOVEMBER 2018
FILE NO/S	**:**	DR 34 of 2018
BETWEEN	**:**	A.M.I ENTERPRISES PTY LTD First Applicant ROBERT HENRY CHESTER Second Applicant AND PRESIDING MEMBER OF THE MID-WEST/WHEATBELT JOINT DEVELOPMENT ASSESSMENT PANEL Respondent

Catchwords:

Town planning - Application to amend development approval so as to extend period within which development must be substantially commenced - Development approval for waste disposal facility comprising landfill - Development approval imposed two-year period for substantial commencement - Considerations in exercise of discretion as to whether to extend period within which development must be substantially commenced - Whether planning framework has changed substantially since development approval granted - Whether development would likely receive approval now - Draft amendment to local planning scheme as required to be modified from shortly after development approval was granted until shortly before development approval lapsed proposed to zone site as 'Special Use' for 'Waste Disposal Facility and associated infrastructure' - After extension application lodged draft amendment to local planning scheme required to be remodified to delete 'Special Use' zone and thereby prohibit development of site as waste disposal facility - Amendment to local planning scheme prohibiting waste disposal facility land use finally approved and gazetted - Weight to be given to prohibition of waste disposal facility land use in exercise of discretion as to whether to approve extension application - Whether holders of development approval have actively and conscientiously pursued implementation of development approval - Original proponent of waste disposal facility development decided not to proceed with development, surrendered works approval, precluded landowner under exclusivity agreement from selling land for approximately six months after development approval was granted and sought to enter into commercial arrangement with landowner precluding development of site as landfill facility while development approval was valid - Whether landowner has sought to 'warehouse' approval - Whether period for substantial commencement originally imposed was adequate - Whether total effective period for substantial commencement sought is excessive

Legislation:

Environmental Protection Act 1986 (WA), s 38, s 43, s 43(1), s 52, s 59A, s59A(1), s 59A(2)(e), Pt V
Planning and Development (Development Assessment Panels) Regulations 2011 (WA), reg 8, reg 17, reg 17(1)(a), reg 17(2)(a), reg 17(4), reg 18(2), reg 18(2)(a)
Planning and Development (Local Planning Schemes) Regulations 2015 (WA), reg 62(2), Sch 2 (deemed provisions), cl 77(1)(d)
Planning and Development Act 2005 (WA), s 87(1), s 87(2), s 87(2)(b), s 242
Rights in Water and Irrigation Act 1914 (WA)
Shire of York Local Planning Scheme No. 2, cl 3.2.4, cl 3.4, Sch 3

State Administrative Tribunal Act 2004 (WA), s 27(2), s 29(5), s 29(5)(b), s 31, s 31(1), s 37(3)

Result:

Development approval amended to extend period within which development must be substantially commenced to 8 March 2020

Summary of Tribunal's decision:

A.M.I Enterprises Pty Ltd (AMI), which is the proponent of the development, and Mr Robert Chester, who is the owner of the development site, sought review by the Tribunal of the decision of the Mid-West/Wheatbelt Joint Development Assessment Panel (JDAP) to refuse an application to amend a development approval so as to extend the period within which the approved development must be substantially commenced. The development approval is for a waste disposal facility comprising a lined landfill for putrescible wastes, with a landfill area of 36 hectares, on a 1,512.7 hectare rural property located approximately 18 kilometres from the York town centre. The development approval was granted on 8 March 2016 by the Tribunal in earlier review proceedings brought by SITA Australia Pty Ltd (now SUEZ Recycling & Recovery Pty Ltd) (SITA), the original proponent of the development, subject to 15 conditions. Condition 9 states that 'The development approved is to be substantially commenced within two years after the date of the approval, and the approval will lapse if the development is not substantially commenced before the expiration of that period'.
A works approval under the *Environmental Protection Act 1986* (WA) is required in order to carry out the landfill development. Prior to the hearing of the review application in relation to the development application, on 13 August 2015, the then Department of Environmental Regulation (now Department of Water and Environmental Regulation) (DWER) advised SITA that it intended to grant a works approval for the landfill, subject to conditions. Following the granting of development approval by the Tribunal in the earlier review proceedings, on 17 March 2016, DWER granted a works approval for the landfill to SITA (original works approval). The original works approval was valid until 20 March 2023.
However, shortly after SITA obtained the development approval and the original works approval, it decided not to proceed with the landfill development, because it had acquired another waste disposal business which operated an existing landfill. SITA applied to DWER to surrender the original works approval and DWER revoked the original works approval on that basis. SITA exercised options to extend its exclusivity agreement with Mr Chester until 30 September 2016 and offered Mr Chester a sum of money if he agreed to a restraint on the development of the land as a landfill site while the development approval was valid. Mr Chester

declined this offer and put the land back on the market, with the benefit of the development approval, as a landfill site.

Ultimately in early February 2017, Mr Chester entered into an Option Deed with AMI which wishes to carry out the approved development. AMI retained the same consultants who prepared the original works approval application on behalf of SITA to prepare a fresh works approval application on behalf of AMI. The fresh works approval application was lodged on 21 July 2017 and is still undetermined by DWER, some 16 months later, notwithstanding that DWER's target for determination of such applications is 60 working days and that it advised SITA that it intended to approve the original works approval application (which was materially and substantially the same as the fresh works approval application) four months and six days after it was lodged.

The Tribunal found that the planning framework has changed substantially since the development approval was granted, because, whereas at the time when development approval was granted 'landfill' was an innominate or unlisted use under the local planning scheme (and, therefore, permissible if the consent authority determined that the use is, or may be, consistent with the objectives and purposes of the General Agriculture zone), the use is now properly classified as 'waste disposal facility' and is prohibited on the site under the local planning scheme. Consequently, a waste disposal facility cannot now lawfully be approved on the site under the local planning scheme. The Tribunal observed that these findings are generally powerful considerations against approval of an extension application. However, the Tribunal also determined that the weight to be given to these findings in the exercise of discretion as to whether to grant the extension application is reduced for the following three reasons:

- the prohibition of waste disposal facility on the site only became a seriously-entertained planning proposal two months and three weeks after the extension application was lodged, four days after the DAP secretariat advised the applicants of the date on which the JDAP was scheduled to meet to determine the extension application and the day after the DAP secretariat confirmed that date and published the agenda and Responsible Authority Report;
- throughout the whole of the substantial commencement period (other than the first two weeks and the last three weeks), and when the extension application was made and for two months and three weeks after that, the site was proposed in a draft amendment to the local planning scheme (as required to be modified by the Minister for Planning) to be zoned 'Special Use' for 'Waste Disposal Facility and associated infrastructure' (with a condition that the development is to be undertaken generally in accordance with the Tribunal's decision granting development approval); and
- extraordinarily, the Shire of York failed to comply with its statutory obligation to modify the draft amendment to the local planning scheme in

those terms (as required by the Minister for Planning) and, had it done so, it is likely that the draft amendment to the local planning scheme would have been gazetted in those terms.

The Tribunal found that AMI and Mr Chester have actively and conscientiously pursued implementation of the development approval, in the case of Mr Chester, by seeking to sell the land as a landfill site, and, in the case of AMI, by applying for and prosecuting the application for the fresh works approval and by taking steps to facilitate construction of landfill stages 1 and 2 and the infrastructure stage. The Tribunal also determined that, although the period for substantial commencement originally imposed was adequate in the circumstances existing at the time when development approval was granted, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place. The changed circumstances in this case were highly unusual and involved the original proponent of the development deciding not to proceed with the development, after the development approval was granted and the original works approval was obtained, and applied to surrender the original works approval, which was then revoked on that basis, and that DWER has failed to determine the fresh works approval application, or even give the new proponent an indication of its position in relation to it, now for 16 months since it was lodged, even though DWER's target is to determine such applications within 60 working days and DWER took (only) four months and six days to assess the original works approval application (which was materially and substantially the same as the fresh works approval application) and to advise SITA that it intended to grant the works approval. The Tribunal observed that, in the circumstances of this case, these findings are powerful considerations in favour of granting the extension application.

The Tribunal determined that, on balance, in the exercise of discretion in all the circumstances of this case, the considerations in favour of granting the extension application outweigh the considerations against granting the application.

The Tribunal therefore extended the period within which the approved development must be substantially commenced to 8 March 2020.

Category: B

Representation:

Counsel:

First Applicant	:	Mr JC Skinner
Second Applicant	:	Mr JC Skinner
Respondent	:	Ms CA Ide

Solicitors:

First Applicant	:	LSV Borrello Lawyers
Second Applicant	:	LSV Borrello Lawyers
Respondent	:	State Solicitor's Office

Case(s) referred to in decision(s):

A v Corruption and Crime Commissioner [2013] WASCA 288; (2013) 306 ALR 491

ALH Group Property Holdings Pty Ltd and Presiding Member of the Metro Central Joint Development Assessment Panel [2018] WASAT 63

Kapila and City of Stirling [2016] WASAT 59

Opal Vale Pty Ltd and Shire of Toodyay [2013] WASAT 88

SITA Australia Pty Ltd and Wheatbelt Joint Development Assessment Panel [2015] WASAT 40

SITA Australia Pty Ltd and Wheatbelt Joint Development Assessment Panel [2016] WASAT 22

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 A.M.I Enterprises Pty Ltd (AMI) and Mr Robert Chester (together, applicants) seek review by the Tribunal, under reg 18(2)(a) of the *Planning and Development (Development Assessment Panels) Regulations 2011* (WA) (DAP Regs) of the determination made by the Mid-West/Wheatbelt Joint Development Assessment Panel (JDAP) on 10 April 2018 to refuse an application to amend a development approval so as to extend the period within which the approved development must be substantially commenced.

2 Mr Chester owns the land known as Allawuna Farm which comprises four lots[1] and has a total area of 1,512.7 hectares (land). The land is located within the district of the Shire of York (Shire or Council), approximately 18 kilometres from the York town centre, in an area known as St Ronans. Mr Chester, together with his late wife, Annie, and their family, conducted a farming business consisting of cropping and grazing on the land, until Mr Chester semi-retired in about 2014. Since that time, Mr Chester has leased parts of the land to neighbouring farmers and continues to live on the land.

3 As discussed later in these reasons, in early 2012, Mr Chester was approached by SITA Australia Pty Ltd (now SUEZ Recycling & Recovery Pty Ltd) (SITA), which was interested in purchasing the land for the purpose of developing a waste disposal facility, including a landfill, on a portion of the land (site). Mr Chester entered into a legal agreement with SITA, described as a 'Memorandum of Understanding', which was, in substance, an exclusivity agreement, under which Mr Chester was precluded from taking any steps to sell the land to any party other than SITA for the period of the agreement.

4 Mr Chester also gave owner's consent to the lodgement by SITA of an application for development approval under the *Shire of York Local Planning Scheme No. 2* (LPS 2 or Scheme) for a waste disposal facility, comprising a Class II lined landfill for putrescible wastes, at the site. On 17 December 2013, SITA lodged the application for development approval under LPS 2 with the Shire. Because of the value of the proposed development, the development application was a 'DAP application' which had to be determined by the JDAP under reg 8

[1] Lot 5931 on Deposited Plan 117294, Lot 9926 on Deposited Plan 126311, Lot 2634 on Deposited Plan 158679 and Lot 4869 on Deposited Plan 224502.

of the DAP Regs as though the JDAP were the responsible authority under the Scheme.

5 The JDAP refused the development application and SITA sought review of that decision by the Tribunal under reg 18(2) of the DAP Regs. In its reasons for decision in that proceeding (***SITA Australia Pty Ltd and Wheatbelt Joint Development Assessment Panel*** [2016] WASAT 22 (development application decision)), the Tribunal summarised the 'original proposal' for the development, which was refused by the JDAP, as follows at [3]:

> The original proposal contemplated a landfill operation on the Allawuna site with a 52 hectare footprint, located centrally to the subject land with a nominal or indicative lifespan of 37 years, based upon an input of between 150,000 and 250,000 tonnes of waste per year with a total volume of 11.1 million cubic metres. A 'composite liner system' with a series of 11 cells was proposed. Waste was to be confined to 'municipal household solid waste from commercial, retail, and industrial premises and construction waste'. No 'hazardous, liquid, noxious, or radioactive waste or toxic chemicals' were to be accepted.

6 As the Tribunal observed at [9] of the development application decision, during the course of the proceedings, the Tribunal granted leave to SITA to amend the development application and invited the JDAP to reconsider its decision to refuse the development application, having regard to the amended proposal, pursuant to s 31(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act): see ***SITA Australia Pty Ltd and Wheatbelt Joint Development Assessment Panel*** [2015] WASAT 40. The JDAP subsequently reconsidered its decision to refuse the development application and affirmed its refusal in relation to the amended development application.

7 In the development application decision, the Tribunal summarised SITA's amended proposal as follows at [11]:

> 1) A reduction from 52 to 36 hectares and a reduction of the total volume of waste from 11.1 to 5.1 million cubic metres.
>
> 2) A reduction in the nominal life of the landfill from 37 to approximately 20 years on forecast annual tonnages of 150,000 to 250,000 tonnes of waste per annum.
>
> 3) A reduction in the number of cells from 11 to 7.
>
> 4) A raising of the floor of the landfill to achieve at least a 2 metre clearance from the estimated maximum winter groundwater level.

5) A reduction in the maximum height of the waste deposited by 4.5 to 350.5 metres AHD.

6) Sequential development of three borrow areas (or pits) comprising a total of 20 hectares 'commencing from approximately year 10 onwards as a source of cover material and as a consequence of the reduction in material excavated from the now raised landfill'.

7) A reduction in the size and the extent of leachate ponds and stormwater dam.

(landfill development)

8 As Ms Kay Davies, who lives on an adjoining rural property to Allawuna Farm, said in her written submission to the Tribunal in this proceeding (made, with leave, under s 242 of the *Planning and Development Act 2005* (WA) (PD Act)), 'the landfill proposal has angered and stressed the community'. Both the landfill development application and the application to extend the period within which the approved development may be substantially commenced have resulted in significant local opposition, from a large number of residents in the Shire and from the Council of the Shire. When the landfill development application was advertised, it resulted in 287 public submissions, of which 284 were opposed to the landfill development and three (including one from Mr Chester and one from SITA) were in favour of the proposal. When the application to extend the substantial commencement period was advertised, it resulted in 474 public submissions, of which 471 were against approval of the extension application and three (including one from Mr Chester) were in support of the extension application being approved, as well as a petition with 138 signatures against the extension application being approved. Of the 471 submissions against the extension application, 407 were in a pro-forma letter form, some with additional points, all signed and dated, and overwhelmingly from residents of the Shire.

9 On 18 and 19 November 2015, the Tribunal (comprising a legally qualified senior member, a senior sessional member who is a town planner and a sessional member who is an environmental scientist) conducted the final hearing in relation to the review of the JDAP's decision to refuse the development application. On 8 March 2016, the Tribunal published the development application decision. For the detailed reasons given, the Tribunal determined that the landfill development application was capable of development approval and

merited conditional development approval under LPS 2. The Tribunal imposed 15 conditions. Condition 9 states as follows:

> The development approved is to be substantially commenced within two years after the date of the approval, and the approval will lapse if the development is not substantially commenced before the expiration of that period.

10 As discussed later in these reasons, shortly after the development approval was granted (and shortly after a works approval (original works approval) was granted by the Department of Environmental Regulation (now Department of Water and Environmental Regulation) (DWER) under the *Environmental Protection Act 1986* (WA) (EP Act)), SITA decided not to proceed to carry out the landfill development on the site, because it had agreed to purchase a waste disposal company which operated an existing landfill. SITA applied to the Chief Executive Officer (CEO) of DWER to surrender the original works approval and the CEO subsequently revoked the original works approval on that basis.

11 SITA exercised options under its exclusivity agreement with Mr Chester, which precluded Mr Chester from selling Allawuna Farm to any other person until after 30 September 2016. SITA also offered Mr Chester $200,000 if he agreed that he, his successors and assigns, would be restrained from developing a landfill facility at the site during the period when the development approval was valid. Mr Chester declined this offer and proceeded to market the land, with the benefit of the development approval as a landfill site, as soon as he was able to do so.

12 Ultimately, on 8 February 2017, Mr Chester and AMI entered into an option agreement for the purchase of the land by AMI, which required AMI, or its nominee, to make and pursue an application for a new works approval in respect of the landfill development under the EP Act (fresh works approval). As discussed below, Alkina Holdings Pty Ltd (Alkina), the nominee of AMI and a related company within the Instant Waste Management group of companies (IWM group), which is proposed to operate the landfill development, commissioned the same consultants who prepared the original works approval application to prepare the fresh works approval application, to enable the landfill development to be carried out. As also discussed below, a significant amount of work was carried out by the consultants in order to prepare the fresh works approval application, at considerable cost. Although there were some differences between the proposal in the original works approval application and the proposal in the fresh works approval

application, these differences are conceded by the Presiding Member of the JDAP (respondent) to be 'minor in nature' and, similarly, DWER has indicated that '[p]redominantly the two applications are the same'.

13 Following a pre-lodgement meeting with officers of DWER, the fresh works approval application was lodged with DWER on 21 July 2017. Whereas DWER had indicated to SITA four months and six days after the lodgement of the original works approval application that it intended to grant a works approval for the proposed landfill, subject to conditions, and notwithstanding that DWER's Guidance Statement says that it 'will target to determine applications for instruments in 60 working days, excluding stop-the-clock periods', DWER did not determine the fresh works approval application, or even indicate an intended position in relation to the fresh works approval application, within either of those periods (or subsequently).

14 On 24 November 2017, AMI and Mr Chester made an application under reg 17(1)(a) of the DAP Regs to amend condition 9 of the development approval so as to extend the period within which the landfill development must be substantially commenced from 8 March 2018 to 8 March 2020 (extension application). As discussed below, although the meeting of the JDAP to consider the extension application was originally scheduled for 27 February 2018, that meeting was cancelled and the extension application was ultimately considered by the JDAP at its meeting on 10 April 2018. At that meeting, the JDAP accepted the recommendation in the Responsible Authority Report to refuse the extension application and resolved to do so for the following reasons:

> 1. There has been a substantial change to the planning framework since development approval was granted in that:
>
> (a) Amendment 50 to Shire of York Local Planning Scheme No. 2 (LPS 2) was gazetted on 16 March 2018, which relevantly provides that 'waste disposal facility' is an X use within the General Agricultural zone.
>
> 2. The development would not likely receive approval now as:
>
> (a) The development is a "waste disposal facility" use under LPS 2, which is a prohibited use and cannot be approved.
>
> (b) It cannot be sufficiently demonstrated that the development is not detrimental to the environment, as:
>
> (i) there is no longer a works approval for a Class II landfill in place or at the very least, an

indication from the Department of Water and Environmental Regulation (DWER) that it is willing to grant a works approval; and

(ii) it cannot be presumed a work approval is forthcoming as the works approval sought by the Applicant differs from the works approval granted by the Department of Environmental Regulation (DER) previously for the site.

3. The holders of the development approval have not actively and relatively conscientiously pursued the implementation of the development approval in that:

(a) SITA/SUEZ publicly announced on 6 July 2016 it would no longer proceed with the development;

(b) SITA/SUEZ sought for its work approval to be cancelled by DER on 11August 2016;

(c) AMI Enterprises has not sufficiently pursued the approval to warrant the extension of the approval.

4. The extension of time in which to commence substantial development to 8 March 2020 (effectively two additional years) is excessive in the circumstances.

15 We will now set out our findings in relation to the factual background to the extension application based on largely uncontested evidence presented by the applicants. Next, we refer to the legal framework and principles which are applicable in this case. We will then discuss and make findings in relation to each of the matters for consideration which are relevant in this case and address submissions made by the Shire, Ms Kay Davies and Ms Robyn Davies under s 242 of the PD Act. Finally, we will determine whether to approve or refuse the extension application in the exercise of the discretion conferred by reg 17(4) of the DAP Regs, having regard to and balancing our findings in relation to each of the relevant matters for consideration.

Factual background

16 The background facts pertinent to the extension application are referred to in the documentary evidence tendered by consent and the witness statements of Mr Chester, Mr Jacob North-Hickey (Mr Hickey), who is the State Resource Development Manager of the IWM group, and Ms Liza Du Preez, a civil engineer and environmental consultant with 22 years' experience who holds the position of Principal Landfill

Engineer at Golder & Associates (Golder). Golder was the principal consultant and prepared the original works approval application on behalf of SITA, and is the principal consultant and has prepared the fresh works approval application on behalf of AMI. Although Mr Chester and Mr Hickey were cross-examined by Ms CA Ide, counsel for the respondent, their evidence as to the background facts was not challenged. We make the findings of fact set out in the introduction above and as follows based on the documentary evidence and the evidence of Mr Chester, Mr Hickey and Ms Du Preez.

17 In early 2012, Mr Chester was approached by SITA, which was interested in purchasing the land for the purpose of developing a waste disposal facility, including a landfill, on a portion of it. On or about 30 April 2012, Mr Chester entered into a legal agreement with SITA, which was termed 'Memorandum of Understanding', but which was, in substance, an exclusivity agreement, under which Mr Chester was precluded from taking any steps to sell the land to any person other than SITA during the period of the agreement from 30 April 2012 until 31 December 2014. In return, SITA paid Mr Chester a 'non-refundable sum' of $59,500. Furthermore, under the exclusivity agreement, SITA had the right to elect to purchase the land for $5,950,000, once it obtained any necessary approvals for the landfill development to take place.

18 On 19 September 2014, Mr Chester entered into a further legal agreement with SITA which extended the operation of the exclusivity agreement until 31 December 2015. On 2 December 2015, Mr Chester entered into a further legal agreement with SITA which extended the operation of the exclusivity agreement until 31 March 2016 and gave SITA two options to further extend the operation of the exclusivity agreement, in each case for three months, the first option to be exercised prior to 31 March 2016 to extend the exclusivity period to 30 June 2016, and the second option to be exercised by 30 June 2016 to extend the exclusivity period to 30 September 2016.

19 The landfill development proposal on the site was referred to the Environmental Protection Authority (EPA) for assessment under s 38 of the EP Act. On 8 July 2013, the EPA advised SITA that, although the proposal 'raises a number of environmental issues', the EPA had decided 'not to subject this proposal to the environmental impact assessment process and the subsequent setting of formal conditions by the Minister for Environment'. The EPA provided written 'advice' to SITA, as the proponent, and to relevant authorities, 'on the environmental aspects of the proposal'.

20 As indicated earlier, on 17 December 2013, SITA applied to the JDAP for development approval under LPS 2 for the landfill development (in the form referred to at [5] above). As also indicated earlier, Mr Chester gave owner's consent for the lodgement of the development application. On 14 April 2014, the JDAP refused the development application. On 31 August 2015, the JDAP affirmed its refusal in relation to the amended development application (in the form referred to at [7] above) upon reconsideration under s 31 of the SAT Act.

21 As indicated earlier, on 18 and 19 November 2015, the Tribunal heard the application for review in relation to the refusal of the development application and, on 8 March 2016, it published detailed reasons for decision in which it granted conditional development approval for the landfill development. The Tribunal determined at [50] of the development application decision that 'landfill' land use was 'a use neither listed nor defined under [LPS] 2'. As an innominate or unlisted use under LPS 2, the landfill development was capable of development approval under cl 3.2.4 of the Scheme if the local government (or the Tribunal on review) determined that the use is consistent with, or may be consistent with, the objectives and purposes of the relevant zone under LPS 2. The site was (and remains) zoned 'General Agriculture' under LPS 2. The Tribunal found at [91(4)] of the development application decision that the planning witnesses called by the parties agreed that the proposed landfill is:

> substantially consistent with the relevant objectives of the General Agriculture zone of [LPS] 2 in that it will have no impact on the continuation or expansion of broad hectare agriculture, and the benefits are both significant and tangible and have the potential to be substantially delivered.

22 It is unnecessary to recount the Tribunal's reasons concerning the issues in contention in relation to the development application generally. However, in light of a submission made by the respondent in this proceeding, and certain matters raised in the submissions made to the Tribunal under s 242 of the PD Act, it is useful to refer to certain observations and findings made by the Tribunal in the development application decision concerning 'environmental issues'.

23 As the Tribunal said at [15] of the development application decision, on 9 October 2015, the Tribunal granted conditional leave to the Avon Valley Residents Association Inc. (AVRA) (which was represented by the Environmental Defender's Office) to intervene in the proceedings under s 37(3) of the SAT Act:

> … in relation to groundwater issues only, including hydrogeology and the potential impacts upon water quality, on the condition that AVRA is not permitted to cross-examine any witnesses at the hearing other than any expert environmental witnesses in respect of groundwater issues only, including hydrogeology and the potential impacts to water quality.

24 However, as the Tribunal said at [20] of the development application decision:

> AVRA's leave was revoked when its expert geologist (Mr Lindsay Stephens) revised his opinion on certain groundwater issues following a conferral with other relevant experts. Counsel for the applicant, Mr P McGowan, accurately summed up the course of events, as follows:
>
> > … [the revised joint statement of hydrogeological and geological experts] involve[s] an unequivocal acceptance by all four who participated in [its] conclusions which should entirely satisfy the [T]ribunal that any question in relation to ground water, which was the primary driver of environmental concerns, has been comprehensively addressed. And what appeared to perhaps be at best an anomalous outcome in relation to certain bores and test pits that had been conducted has been completely and definitively explained away by Dr Appleyard [a hydrogeologist], who is supremely qualified to be able to express that view, a view with which his colleagues, Mr Waterhouse [a hydrogeologist], Ms [Du Preez, a landfill engineer] and Mr [Stephens] all agreed.
>
> > (T:11; 18.11.15)
>
> Consequently, we accept Mr McGowan's submission that the result of these processes of joint conferral is 'not that [the] environment in its broader sense is not an issue, but that it has comprehensively been addressed to the satisfaction of the experts'.

25 The Tribunal considered 'environmental issues' further at [27]-[36] of the development application decision as follows:

> 27 Of significant, particularly local, interest is the extent to which, if any, environmental concerns should play a role in this review. To this end, we will set out our understanding of the applicable environmental regulatory framework relevant to the proposed development.
>
> 28 We begin by noting that the Department of Environment [sic] Regulation (DER) regulates the licensing of landfills under Pt V of the *Environmental Protection Act 1986* (WA) (EP Act). In this State, the DER is the principal regulator as regards environmental matters.

29 In *Opal Vale Pty Ltd and Shire of Toodyay* [2013] WASAT 88 (*Opal Vale*) the Tribunal (constituted by Senior Member McNab and Sessional Member Hinwood) had to consider a proposed landfill development in an existing clay quarry. The environmental regulatory framework recorded in *Opal Vale* is essentially the same as that applicable here. That framework, at [6] - [9], was as follows:

> Apart from the planning regime, the proposed development is regulated under an instrument known as the *Landfill Waste Classification and Waste Definitions 1996*. This document (as at December 2009) is issued by the Chief Executive Officer of the [Department of Environment [sic] Regulation (DER)] 'to provide guidance and criteria to be applied in determining the classification of wastes for acceptance to landfills licensed or registered in Western Australia in accordance with Part V of the [*Environmental Protection Act 1986* (WA) (EP Act)]'.
>
> It is common ground that the facility would be regulated as a 'Class II Landfill Facility' requiring a [DER] works approval and a licence issued under Pt V of the EP Act.
>
> Table 1 of the *Landfill Waste Classification and Waste Definitions 1996* instrument provides, so far as is relevant, as follows:

Class II (Prescribed Premises Category 64 or 89)	Putrescible Landfill	• Clean Fill • Type 1 Inert Waste • Putrescible Wastes • Contaminated solid waste meeting waste acceptance criteria specified for Class II landfills (possibly with specific licence conditions) • Type 2 Inert Wastes (with specific licence conditions) • Type 1 and Type 2 Special Wastes (for registered sites as approved under the Controlled Waste Regulations)

> That table refers to 'Prescribed Premises Category 64'. This is a reference to 'Schedule 1 - Prescribed premises' in the *Environmental Protection Regulations 1987* (WA), as follows:
>
> > '[Category number] 64 [Description of category] Class II ... 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. [Production or design capacity] 20 tonnes or more per year.'

30 The Shire advertised the amended application for public comment between 22 April and 25 May 2015. The Shire sought specific agency comment from the DER.

31 On 7 April 2015, the applicant submitted to the DER a works approval application (W538/2015/1) for the amended proposal. The works approval was advertised on the DER's website on 27 April 2015. The DER accepted public submissions on the application until 3 July 2015.

32 Importantly, on 13 August 2015, the DER sent a letter to the applicant identifying that its assessment of the company's works approval and application had *not identified any relevant flaws relating to the siting or design of the proposed landfill*. The DER advised the applicant that it intended to grant a works approval for the proposed landfill, subject to certain conditions. The DER said:

> Based on the Department's assessment of the application and an absence of environmental[ly] fatal flaws, DER can advise that it intends to grant a works approval, subject to conditions for the proposed Allawuna Farm Class II landfill. A draft works approval and decision document are not yet available for your review [and] DER will not grant the works approval until planning approval for the proposal is in place.

33 The Shire, in its officers' report prepared for the respondent, did not outline any significant environmental issues as a reason for refusal.

34 We have already set out above the combined views of the hydrogeologists and related experts.

35 Accordingly, in the light of all of this, the respondent, properly, did not contend in this review that the proposal, if otherwise approved upon appropriate conditions, would be detrimental to the environment.

36 The conditions which we propose (designed with the Shire's input and which effectively reinforce or complement the DER's extensive regulation) are dealt with in these reasons below.

(original emphasis)

26 As indicated by the Tribunal in its reference at [29] of the development application decision to ***Opal Vale Pty Ltd and Shire of Toodyay*** [2013] WASAT 88 at [6]-[9], the landfill development, being a 'putrescible landfill site', constitutes 'prescribed premises' requiring a works approval from DWER in order to operate under Pt V of the EP Act. In particular, under s 52 of the EP Act, it is an offence for an occupier of any premises to carry out any work on or in relation to prescribed premises 'unless he does so in accordance with a works approval'.

27 As indicated by the Tribunal at [31] of the development application decision, on 7 April 2015, SITA submitted the original works approval application to DWER for 'the amended proposal'. The original works approval application was, in fact, specifically in relation to the construction of the first two cells of the landfill development. The original works approval application was prepared by Ms Du Preez and her colleague, Mr David Rushton, who holds the position of Senior Environmental Scientist at Golder. As Ms Du Preez said in her witness statement, the original works approval application comprised a document entitled *Works Approval Application Supporting Document - Allawuna Landfill* dated March 2015, together with the following appendices prepared by Golder and another consultant, Bowman & Associates (Bowman), on behalf of SITA:

(a) Appendix A - Allawuna Landfill Layout Plans and Sections[;]

(b) Appendix B - Allawuna Landfill Cell 1 and 2, Leachate Pond, Subsurface Drainage, Retention Pond and Stormwater Dam Construction Plans;

(c) Appendix C - Allawuna Landfill Infrastructure Constructions Plans;

(d) Appendix D - Allawuna Landfill Geotechnical Investigations for Landfill Development Report[;]

(e) Appendix E - Allawuna Landfill Hydrogeological Site Characterisation Studies Report and Surface Water, Groundwater and Leachate Management Plan;

(f) Appendix F - Allawuna Landfill Stability Analysis and Liner System Integrity Assessment Report[;]

(g) Appendix G - Allawuna Landfill Gas Assessment Report and Landfill Gas Management Plan;

(h) Appendix H - Allawuna Landfill Topsoil Handling and Sediment Management Plan;

(i) Appendix I - Allawuna Landfill Odour Assessment Report and Noise Assessment Report;

(j) Appendix J - Traffic Impact Statement;

(k) Appendix K - Allawuna Landfill Vegetation and Fauna Assessment Report;

(l) Appendix L - Allawuna Landfill Community and Stakeholder Consultation Report;

(m) Appendix M - Allawuna Landfill Technical Specification for Construction of Cell 1 and 2[;]

(n) Appendix N - Allawuna Landfill Environmental Risk Assessment;

(o) Appendix O - Allawuna Landfill Construction and Operational Health and Safety Risk Assessments;

(p) Appendix P - SITA Australia Environment Quality and Safety Management System Manual;

(q) Appendix Q - Allawuna Landfill Waste Acceptance Manual and Emergency Procedures Guide and Contingency Plan;

(r) Appendix R - Allawuna Landfill Fire Management Plan;

(s) Appendix S - SITA Australia Environmental Policy ISO14001:2004 Certification[;]

(t) Appendix T - EPA Advice Regarding Environmental Protection Act Part IV Referral;

(u) Appendix U - Allawuna Farm Conservation Covenant Notice;

(v) Appendix V - Allawuna Landfill Works Approval Reconciliation with the EPA Victoria BPEM; and

(w) Appendix W – Limitations[.]

28 As the Tribunal indicated at [31]-[32] of the development application decision, DWER advertised the original works approval application from 27 April 2015 until 3 July 2015 and, on 13 August 2015, wrote to SITA advising that its assessment of the original works approval application had not identified any relevant flaws relating to the siting or design of the proposed landfill and that it intended to grant a works

approval for the proposed landfill, subject to conditions. As Ms Du Preez said in her witness statement, DWER was also consulted about, and had input in relation to, the draft conditions of development approval presented to the Tribunal as part of the review hearing in relation to the development application.

29 On 17 March 2016, shortly after the publication of the Tribunal's decision granting development approval for the landfill development on 8 March 2016, DWER granted the original works approval (works approval number W5830/2015/1) to SITA. The original works approval stated that it was to be valid until 20 March 2023.

30 As indicated earlier, SITA exercised each of its two options to extend the operation of the exclusivity agreement to 30 June 2016 and then to 30 September 2016. However, in early April 2016, SITA informed Mr Chester that it had entered into an agreement to purchase waste disposal company Perthwaste, which had an existing landfill facility at North Bannister, and that if that purchase went ahead, SITA would not be proceeding with the purchase of the land from Mr Chester. On 5 April 2016, SITA wrote to Mr Chester confirming that it had entered into a conditional agreement to purchase Perthwaste and that, if that acquisition proceeded, then SITA 'will not be in a position to proceed with its nonbinding offer to purchase Allawuna Farm'. The letter states that the acquisition of Perthwaste was expected to be completed in late May or June 2016. In the letter, SITA also made an offer to Mr Chester that, in return for a payment of $200,000, Mr Chester, his successors and assigns and any person claiming an interest in Allawuna Farm, 'for the period of time that the planning approval is valid', 'are restrained from developing a landfill facility at Allawuna Farm'. Mr Chester did not accept this offer, because he wished to sell the land, with the benefit of the development approval, as a landfill site.

31 On 6 July 2016, SITA publicly stated that it had finalised the purchase of Perthwaste and would not be proceeding to implement the landfill development approval at the site. Shortly afterwards, SITA applied to the CEO of DWER to surrender the original works approval under s 59A(2)(e) of the EP Act. On 11 August 2016, the CEO of DWER revoked the original works approval on this ground, under s 59A(1) of the EP Act. Plainly, SITA surrendered the original works approval in order to seek to preclude any competitor from carrying out the approved landfill development at the site. Plainly, also, SITA's offer to Mr Chester to agree to a restraint on the development of a landfill facility at the site

for the period that the development approval was valid, in return for a payment of $200,000, was intended to achieve the same purpose.

32 Ultimately, Mr Chester was paid the sum of $100,000 by SITA (in addition to the initial payment of $59,500 in 2012), which Mr Chester said was 'for all the trouble that I had been through over the years that they had been having there' (ts 103, 28 August 2018). It appears that the $100,000 payment made by SITA to Mr Chester included payments that SITA was required to make to Mr Chester each time he agreed to extend the period of the exclusivity agreement between them (on 19 September 2014 and on 2 December 2015).

33 In anticipation of the expiry of the exclusivity agreement, Mr Chester engaged Elders Real Estate (WA) Pty Ltd in Belmont (Elders) to offer the land for sale. As Mr Chester said in evidence:

> … I took the $100,000 and put it back to [Mr] Woolcock [of Elders] and said, 'Sell the property. The okays are all here. And - and you can do it'.
>
> (ts 103, 28 August 2018)

By '[t]he okays', Mr Chester was clearly referring to the development approval and the original works approval for the landfill development.

34 In early August 2016, Mr Chester received an offer to purchase the land from Rhythmic Investments Pty Ltd (Rhythmic) for $5,500,000, which was subject to various conditions, including that Rhythmic apply for and obtain a transfer of the original works approval within 60 days from acceptance of the offer. Rhythmic was entitled to terminate the contract if this was not achieved. On 9 August 2016, Mr Chester accepted the conditional offer from Rhythmic. However, Rhythmic terminated the contract after it learned that the original works approval had been revoked after it was surrendered by SITA.

35 Following the termination of the contract with Rhythmic, Elders continued to offer the land for sale on behalf of Mr Chester with the benefit of the development approval. In early October 2016, Mr Chester received an offer to purchase the land from York Land Holdings (WA) Pty Ltd (YLH) for $5,500,000, which was conditional upon 'the buyer completing their due diligence within 90 days from acceptance', and, if not completed within that period, 'then this dealing will be at an end'. On 13 October 2016, Mr Chester accepted this conditional offer, meaning that the 'due diligence' period ended on 11 January 2017. As the

'due diligence' was not completed within that period, the offer and acceptance with YLH came to an end on 11 January 2017.

36 Immediately following the expiry of the offer and acceptance with YLH, Elders was approached by AMI seeking to negotiate an option agreement for the purchase of the land. Following negotiations, Mr Chester received an offer from AMI to purchase the land by way of an 'Option Deed' for $5,500,000, which Mr Chester accepted on 8 February 2017. Under the Option Deed, AMI was required to 'use reasonable endeavours' to make and prosecute an application for a fresh works approval. As Mr Hickey observed in his witness statement, had SITA not applied to surrender the works approval and had the CEO of DWER not revoked the works approval on that ground, 'AMI would simply have had to apply for the [o]riginal [w]orks [a]pproval to be transferred to it under the EP Act'.

37 At the time when AMI was negotiating with Mr Chester with a view to entering into the Option Deed, the IWM group had obtained copies of all of the public documents relating to the original works approval, but had not made contact with any of the consultants involved in the preparation of those documents to discuss what would be required to prepare and lodge an application for a fresh works approval. Following the execution of the Option Deed, as Mr Hickey said, 'AMI began strategic preparation to achieve implementation of the [d]evelopment'. AMI also sought legal advice 'regarding the surrender and cancellation of the original works approval and the possibility of "reinstating" the original works approval in order to apply for it to be transferred'. As Mr Hickey said, it became clear, following this advice, that it would be necessary to make an application for a fresh works approval and that, in order to do this, 'it would be necessary to complete a full-scale review and update of the documentation upon which the [o]riginal [w]orks [a]pproval had been granted'.

38 In March 2017, AMI and Alkina sought referrals and feedback from industry contacts regarding suitable environmental and landfill design consultants. Following discussions with several of these contacts, Mr Hickey inquired whether Golder would be available to prepare a fresh application for a works approval for the landfill development. Golder initially had concerns regarding 'perceived conflicts' arising from its work for SITA in relation to the original works approval. However, Golder satisfied itself and indicated that it could be engaged by AMI and Alkina in relation to the landfill development.

39 As Ms Du Preez said in evidence, due to the surrender and revocation of the original works approval, Golder had to undertake 'a full-scale review of the scope of work required to complete and submit the [f]resh [w]orks [a]pproval [a]pplication'. It was not immediately clear to Golder as to what extent the documentation could simply be replicated from the original works approval application and to what extent the documentation would be required to be updated. On 15 May 2017, there was a meeting between officers of AMI, Alkina and Golder to discuss the scope of the work required to submit the fresh works approval application. On 16 May 2017, Golder provided a draft engagement proposal and, following some further discussion, a final engagement proposal was provided to Resource Recovery Solutions Pty Ltd (RRS), which is a further member of the IWM group and which is the company proposed to undertake the procurement necessary to implement the landfill development. The final engagement proposal contained a schedule indicating the steps necessary to lead up to the submission of the fresh works approval application, which was anticipated to be on 5 July 2017. In early June 2017, RRS formally agreed to engage Golder on the terms Golder proposed. Shortly before that formal engagement, on 31 May 2017, AMI elected to proceed with the option to purchase the land in accordance with the Option Deed and subsequently paid the option fee of $55,000 to Mr Chester.

40 In addition to Golder, AMI also engaged the environmental engineering consultancy Bowman, which had prepared a number of documents relevant to the development approval, and in support of the original works approval application. On 2 June 2017, representatives of the IWM group met with relevant employees of Golder and Bowman to coordinate the work required for the fresh works approval application. AMI engaged Bowman to carry out surveys, to prepare the relevant bill of quantities for the construction of the infrastructure component of the landfill development and to provide ancillary consultancy services.

41 At this time, AMI and the other companies in the IWM group had no concerns about their ability to achieve substantial commencement of the approved landfill development by 8 March 2018, in accordance with condition 9 of the development approval. Mr Hickey gave the following unchallenged evidence, which we accept:

> At this point, the [IWM] [g]roup had no concerns about the timing for the project. The physical works required to carry out the [d]evelopment, and particularly to achieve substantial commencement as required by the [d]evelopment [a]pproval, could not commence until the drier summer months - approximately November 2017. This timing worked out well,

> in that we estimated the works for substantial commencement would take between 2 and 3 months to complete, which meant that the works could be comfortably completed by 8 March 2018, being 2 years from the date of the grant of the [d]evelopment [a]pproval. We also thought, based on discussions with Golder, that there would be ample time between then and this timing for the commencement of works, for the [f]resh [w]orks [a]pproval [a]pplication to be prepared and then determined by the DWER, given that although it would be a new application, it would be for the same [d]evelopment that had been approved by the DWER just over 12-months previously by the [o]riginal [w]orks [a]pproval.

42 In June and July 2017, Golder carried out a detailed review of all of the documents provided with the original works approval application, updating these where required and recreating them where necessary, in order to be able to submit the fresh works approval application. Bowman also carried out work as required.

43 On 4 July 2017, Golder issued the draft design drawings and technical specifications for the fresh works approval application to the IWM group.

44 On 14 July 2017, a pre-lodgement meeting in relation to the fresh works approval application was held, attended by representatives of the IWM group, relevant employees of Golder, and DWER officers Ms Ruth Dowd and Ms Lauren Fox. The DWER officers suggested that an application for a clearing permit and an application for a right to take surface water should be submitted separately to the fresh works approval application.

45 On 21 July 2017, the fresh works approval application was finalised and submitted to DWER. As Ms Du Preez said in her witness statement, the fresh works approval application comprised a brief covering letter dated 19 July 2017 and the following attachments:

(a) Attachment A - Key Comparison of Allawuna [the project the subject of the original works approval application] and GSL (the reference to"GSL" being an abbreviation for "Great Southern Landfill", the name given to the project for the Fresh Works Approval Application);

(b) Attachment B - Works Approval and Licence Application Form;

(c) Attachment 1 - Ownership and Company Details;

(d) Attachment 2 - Maps for Proposed Premises;

(e) Attachment 3A - Proposed Activities;

(f) Attachment 4 - Other Approvals[;]

(g) Attachment 6 - Emissions and Wastes[;]

(h) Attachment 7 - Siting and Location[;]

(i) Attachment 8A - Works Approval Application - Supporting Geotechnical Information;

(j) Attachment 8B - Works Approval Application Great Southern Landfill - Review of Noise, Odour and Dust Assessments and Management Plans for Approved Allawuna Landfill;

(k) Attachment 8C - York Landfill (Due Diligence) Traffic Impact Statement Addendum;

(l) Attachment 8D - Works Approval Application - Desktop Assessment - Supporting Heritage Information;

(m) Attachment 8E - Great Southern Landfill Site - Desktop Review Surface Water Management;

(n) Attachment 8F - Hydrological Site Characterisation - Great Southern Landfill;

(o) Attachment 8G - Environmental Risk Assessment;

(p) Attachment 8H - Construction Health and Safety Ri[s]k Assessment;

(q) Attachment 8I - Operational Health and Safety Risk Assessment;

(r) Attachment 8J - Great Southern Landfill - Technical Specification for Constructions of Cell 1, Cell 2 and Ancillary Works;

(s) Attachment 8K - Great Southern Landfill - Construction Quality Assurance Plan for the Construction of Cell 1, Cell 2 and Ancillary Works;

(t) Attachment 8L - Great Southern Landfill Facility, Lot 4869 Great Southern Highway, Shire of York - Great Southern Landfill Management Plan;

(u) Attachment 8M - Great Southern Landfill Design Report;

(v) Attachment 8N - Works Approval Application - Desktop Assessment - Supporting Flora and Fauna Information; and

(w) Attachment 9 - Fee Calculation.

46 Both the original works approval application and the fresh works approval application relate only to cells 1 and 2 of the landfill development and ancillary works referred to on the plans. As Ms Du Preez said in evidence, 'there were minor differences in the detail [between the original works approval application and the fresh works approval application] relating to a minor change in the final configuration as part of the [d]evelopment's configuration'. Ms Du Preez agrees with the description of these differences by Ms Dowd in a letter from DWER to the respondent dated 25 May 2018 as follows:

> • The base of the landfill around the leachate sump has been raised by 0.5m, which would result in a larger separation between the base of the landfill at this location and groundwater;
>
> • The number of landfill cells has been increased from 6 to 7, however the size of the overall landfill footprint remains the same;
>
> • The waste input rate has been reduced from 250,000 tonnes per annum (tpa) to 200,000 tpa; and
>
> • For construction purposes, Alkina proposes to use the existing entrance rather than creating a new entrance (as proposed by [SITA]).

47 In DWER's letter to the respondent dated 25 May 2018, Ms Dowd states that '[p]redominantly the two applications are the same'. Furthermore, in this proceeding, the respondent accepts that the differences between the original works approval application and the fresh works approval application are 'minor in nature'.

48 Having regard to the description of the differences between the original works approval application and the fresh works approval application in DWER's letter, the respondent's acceptance that the differences are 'minor in nature', and on Ms Du Preez's evidence, we find that the fresh works approval application is materially and substantially the same as the original works approval application.

49 A significant amount of work was carried out by Golder to prepare the fresh works approval application. As an indication of the amount of work that was carried out to review and update the documents from the original works approval application in order to be submitted as part of the fresh works approval application, for the period up to early August 2017, Golder invoiced RRS for over $200,000 of work.

50 On 24 July 2017, Bowman issued drawings to AMI for the construction of the infrastructure component of the landfill development to be carried out on the site, including internal roads, culverts, buildings, weighbridge and fencing. AMI and Bowman decided to separate the infrastructure component of the development into two stages, being the infrastructure stage on the site (infrastructure stage) and the intersection upgrade of the Great Southern Highway required as part of the development approval. This was because the intersection upgrade would first require lengthy consultation with Main Roads WA before its design could be finalised. On 28 and 31 July 2017, Bowman issued the technical specification items and bill of quantities for the infrastructure stage. Having already paid Bowman $3,423 for their work to 21 June 2017, on 31 July 2017, RRS paid Bowman $17,160 for their further work to that date.

51 From late July through August 2017, AMI, Alkina and Golder undertook extensive work to assess and compare the documentation of the development approval and the fresh works application, for the purpose of settling the technical specifications for the project, to then be able to prepare the relevant bill of quantities that could be included in a request for tender for civil construction contractors to construct the development.

52 At the time when the fresh works approval application was lodged, DWER operated under a Guidance Statement entitled '*Decision Making - Part V, Division 3, Environmental Protection Act 1986*' (Guidance Statement) dated February 2017. The Guidance Statement says that DWER 'will target to determine applications for instruments in 60 working days, excluding stop-the-clock periods'. As Ms Du Preez said in evidence, DWER officers Ms Dowd and Ms Fox 'did not indicate [at the pre-lodgement meeting on 14 July 2017] any reason why the application would not be dealt with in accordance with the target timeframe in the Guidance Statement'. Ms Du Preez also gave the following unchallenged evidence, which we accept:

> Also, given the [o]riginal [w]orks [a]pproval had been issued only 16 months earlier, and had been current until March 2023, I did not anticipate any delays in the determination of the [f]resh [w]orks [a]pproval [a]pplication.

53 As indicated earlier, on 13 August 2015, DWER advised SITA that it intended to grant a works approval in relation to the original works approval application. That was four months and six days after the original works approval application was lodged. As also indicated

earlier, DWER granted the original works approval on 17 March 2016, shortly after development approval was granted for the landfill development. As we found earlier, the fresh works approval application is materially and substantially the same as the original works approval application which was approved by DWER on 17 March 2016. However, DWER did not determine the fresh works approval application, or even indicate an intended position in relation to the fresh works approval application, within its target timeframe, or subsequently. The fresh works approval application has now been pending before DWER for determination for 16 months. In DWER's letter to the respondent dated 25 May 2018, Ms Dowd states that DWER has 'placed the assessment of the application on hold pending the outcome of planning matters'. By 'planning matters' we infer that DWER is referring to the extension application. However, Ms Dowd's letter is dated over 10 months after the fresh works application was lodged. Further, while DWER advised SITA on 13 August 2015 that it 'will not grant the works approval until planning approval for the proposal is in place', it nevertheless advised SITA that is 'intends to grant a works approval, subject to conditions for the proposed Allawuna Farm Class II landfill'.

54 From late July through August 2017, Golder undertook extensive work to prepare the technical specifications and the bill of quantities that the IWM group could then include in the request for tender for civil construction contractors to construct the development. For the purpose of preparing the detailed specifications for the construction of the landfill component of the development, the landfill's construction was split into a first stage (landfill stage 1) and a second stage (landfill stage 2). Landfill stage 1 was specified to include the clearing, excavation and earthworks associated with the first cell. On 13 September 2017, Golder issued the IWM group with detailed specifications and a bill of quantities for the construction of both landfill stage 1 and landfill stage 2 to enable the IWM group to seek tenders from civil construction contractors for the construction of the first two cells of the development.

55 On 22 September 2017, RRS completed a review of the available geosynthetic clay lining (GCL) providers, who could then be subcontracted through the civil construction contractor, once the civil construction contractor was selected. On 22 September 2017, RRS also requested quotes from three principal GCL providers for the supply and installation of the GCL for cell 1. On 6 October 2017, RRS received quotes from the GCL providers for the supply and installation of the GCL for cell 1.

56 On 6 October 2017, Golder submitted an application to DWER for a licence to take surface water as part of the development under the *Rights in Water and Irrigation Act 1914* (WA) (beds and banks permit application). On 9 October 2017, Golder submitted an application to DWER for a native vegetation clearing permit under the EP Act in respect of some works required to implement the landfill development (clearing permit application).

57 On 9 October 2017, DWER requested further information regarding the fresh works approval application. On 18 October 2017, a site meeting was held at the land, attended by representatives of Alkina, relevant employees of Golder and officers from DWER, to discuss the further information being requested by DWER. As Ms Du Preez said in her evidence, 'the request for further information was generally related to cross correlation and referencing of the submitted documentation and did not raise any further environmental issues'.

58 On 25 October 2015, Golder submitted clarifications and further information to DWER in response to the queries raised at the site meeting.

59 Ms Du Preez gave the following evidence, which was not questioned or contradicted, and which we accept:

> Since the end of the advertising of the [f]resh [w]orks [a]pproval [a]pplication, I have - together with one of my colleagues and Alkina - contacted the DWER on several occasions to clarify -
>
> (a) any reasons for the delay to the determination of the [f]resh [w]orks [a]pproval [a]pplication, given the 60 day target timeframe in the DWER's own *Guidance Statement: Decision Making (February 2017)*; and
>
> (b) any issues requiring further information for the timely determination of the [f]resh [w]orks [a]pproval [a]pplication.
>
> I am aware of only 3 issues the DWER has raised as a result of the processing of the [f]resh [w]orks [a]pproval [a]pplication.
>
> The first issue that the DWER queried was in respect of AMI and Alkina's legal occupancy of the [s]ite. I was not directly involved in the response to this issue, but I understand that it was finally resolved in early January 2018 and that DWER confirmed this by correspondence to AMI and Alkina later that month.
>
> On 17 November 2017, the DWER raised a query in respect of the need for a clearing permit for the [d]evelopment. This issue was clarified to

> the DWER's satisfaction in that the [c]learing [p]ermit [a]pplication was being dealt with separately to the [f]resh [w]orks [a]pproval [a]pplication (as had been suggested by the DWER's officers at the pre-lodgement meeting in July 2017). Subsequently:
>
> (a) on 12 January 2018, Golder, with the assistance of Alkina, went to the [l]and to complete a tree survey for the purposes of the pending [c]learing [p]ermit [a]pplication;
>
> (b) on 17 January 2018, Golder submitted the tree survey to the DWER for the purposes of the pending [c]learing [p]ermit [a]pplication; and
>
> (c) a Preliminary Assessment Report in relation to the [c]learing [p]ermit [a]pplication was received on 31 January 2018, indicating in principle that the [c]learing [p]ermit [a]pplication would be granted upon approval of the [f]resh [w]orks [a]pproval [a]pplication (see Applicants' Bundle Document 14).
>
> On 19 December 2017, the DWER raised a third issue, being in respect of the [b]eds [and] [b]anks [p]ermit [a]pplication. I was instructed that the [IWM] [g]roup had removed that component of the [d]evelopment and so the [b]eds [and] [b]anks [p]ermit [a]pplication was withdrawn. Later, on 22 March 2018, the DWER confirmed that with this part of the [d]evelopment removed, such a licence would not be required for the [d]evelopment (see Applicants' Bundle Document 15).
>
> At no time has the DWER raised any environmental concerns or flaws in relation to the [f]resh [w]orks [a]pproval [a]pplication or any of the supporting documents lodged with it, despite repeated requests to the DWER for an update regarding the status of the[f]resh [w]orks [a]pproval [a]pplication and, in particular, for the DWER to provide details of any issues with the [f]resh [w]orks [a]pproval [a]pplication in order to enable them to be addressed.

60 During October 2017, RRS received and commenced its consideration of expressions of interest from civil construction contractors who had been invited to submit expressions of interest for construction of stages 1 and 2 of the landfill and the infrastructure stage. RRS was also working during this time on preparing a request for tender in relation to the construction of the development.

61 As Mr Hickey said, also during October 2017:

> … it became apparent to AMI and Alkina that the DWER was not going to determine the [f]resh [w]orks [a]pproval [a]pplication in accordance with their target timeframes, and there was a real prospect that the [f]resh [w]orks [a]pproval would not be issued until at least some time in December, and perhaps later.

> A delay in determining the [f]resh [w]orks [a]pproval [a]pplication and issuing the [f]resh [w]orks [a]pproval would mean a delay in being able to commence the works for the construction of the [d]evelopment, which would then put in jeopardy the ability to carry out the works required for substantial commencement of the [d]evelopment prior to 8 March 2018.

62 As a result, after seeking legal advice, AMI instructed its solicitors to commence preparing the extension application.

63 On 15 October 2017, RRS shortlisted six of the civil works contractors that had provided expressions of interest and issued them with a request to tender for the construction of landfill stages 1 and 2 and the infrastructure stage. On 30 November 2017, four of the civil construction contractors submitted tenders for landfill stage 1. On 5 December 2017, RRS completed an assessment of the tenders for landfill stage 1 and also requested Bowman to provide a quote for the project management of the intersection upgrade of the Great Southern Highway required as part of the development. On 11 December 2017, Bowman provided RRS with a quote and proposed scope of work for the intersection upgrade. On 14 December 2017, the four civil construction contractors who had submitted tenders for landfill stage 1 submitted tenders for construction of landfill stage 2, and RRS commenced an assessment of those tenders. It shortlisted two contractors who were required to provide a detailed construction timeline and confirm that, as Mr Hickey said:

> … if they were contracted immediately, they would be in a position to commence construction works before the end of the year and would be able to complete the [l]andfill [s]tage 1 works by 8 March 2018.

64 On 24 November 2017, AMI and Mr Chester lodged the extension application with the Shire for determination by the JDAP.

65 On 12 February 2018, the DAP secretariat within the Department of Planning, Lands and Heritage (DPLH) informed AMI that the JDAP meeting to determine the extension application would be held on 27 February 2018. On 15 February 2018, the DAP secretariat confirmed by email the JDAP meeting date of 27 February 2018 to determine the extension application. The DAP secretariat also published the agenda, the Responsible Authority Report and corresponding attachments on the DAP website. However, on 26 February 2018, the DAP secretariat advised that the JDAP meeting, which had been scheduled to take place on the next day, had been cancelled and would be rescheduled to a later date for the following reasons:

1. Two recently appointed JDAP members (due to conflicts of interest of other members).

2. The Responsible Authority Report has a total of 1423 pages.

3. Presentation requests which incorporate detailed submissions from various parties including specialists and lawyers.

4. A presentation from the CEO of the Local Authority.

5. Information from the local authority in regard to the local scheme amendment, which is detailed and complex, and which all parties have not had the time to consider.

6. The timeframe required for any possible R.13 Request For Further Information to be prepared, lodged and responded to.

7. The requirement for the JDAP to seek and receive any information in respect to all of the above.

66 Reason 5 for the cancellation of the JDAP meeting on 27 February 2018 concerned 'the local scheme amendment'. This is a reference to Amendment No. 50 to LPS 2 (Amendment 50). We will review the relevant history of Amendment 50 in our discussion as to whether the planning framework has changed substantially since the development approval was granted and the weight to be given to any such change later in these reasons.

67 Having cancelled the originally scheduled meeting at which to consider and determine the extension application on 27 February 2018, the JDAP ultimately considered and determined to refuse the extension application at its meeting on 10 April 2018. Its reasons for doing so are set out at [14] above.

68 In total, RRS has paid in excess of $296,000 to Golder to prepare and pursue the fresh works approval application and associated approvals (that is, the clearing permit application and, prior to its withdrawal, the beds and banks permit application). RRS has also paid in excess of $20,000 to Bowman for the work carried out by that firm in relation to the fresh works approval application and work in relation to plans and specifications for the infrastructure stage of the landfill development. Furthermore, RRS has committed substantial internal resources (in Mr Hickey's words) 'in readying itself for implementation of the [d]evelopment [a]pproval, including preparing tenders for construction of the development'. The internal resources are estimated by Mr Hickey to be in excess of $270,000.

Legal framework and principles

69 Regulation 17 of the DAP Regs states, in part, as follows:

> (1) An owner of land in respect of which a development approval has been granted by a DAP pursuant to a DAP application may apply for the DAP to do any or all of the following
>
> (a) to amend the approval so as to extend the period within which any development approved must be substantially commenced;
>
> …
>
> (2) An application under subregulation (1)
>
> (a) may be made during or after the period within which the development approved must be substantially commenced; …
>
> …
>
> (4) The DAP may determine an application under subregulation (1) by
>
> (a) approving the application with or without conditions; or
>
> (b) refusing the application.
>
> …

70 Although the development approval for the landfill development on the site was granted by the Tribunal (on review), rather than by the JDAP, under s 29(5)(a) of the SAT Act, the Tribunal's decision to grant conditional development approval 'is to be regarded as, and given effect as, a decision of the [original] decision-maker [that is, the JDAP]'. Therefore, for the purposes of reg 17(1) of the DAP Regs, the development approval for the landfill development on the site is to be regarded as, and given effect as, 'a development approval [which] has been granted by a DAP pursuant to a DAP application'. Consequently, Mr Chester, being the owner of the land, could apply to the JDAP to amend the development approval so as to extend the period within which the approved development must be substantially commenced under reg 17(1) of the DAP Regs.

71 Regulation 18(2) of the DAP Regs confers a right of review to the Tribunal of the decision made by the JDAP on 10 April 2018 to refuse

the extension application under reg 17(4) of the DAP Regs, in the following terms:

> A person who has made … an application under regulation 17 may apply to the State Administrative Tribunal for a review, in accordance with Part 14 of the Act, of –
>
> (a) a determination by a DAP to refuse the application; …

72 In ***ALH Group Property Holdings Pty Ltd and Presiding Member of the Metro Central Joint Development Assessment Panel*** [2018] WASAT 63, we recently reviewed and set out applicable principles in relation to an application to amend a development approval so as to extend the period within which the development must be substantially commenced under reg 17(1) of the DAP Regs at [30]-[39] as follows:

> 30 The principles which are applicable in relation to an application to amend a development approval granted by a DAP so as to extend the period within which the approved development must be substantially commenced are not in dispute.
>
> 31 In *Kapila and City of Stirling* [2016] WASAT 59 the matter before the Tribunal was an application for review of the refusal by a local government to grant a further extension of the term of a development approval under a specific provision of the local planning scheme which enabled '[a] written request [to] be made to the Council for an extension of the term of planning approval at any time prior to the expiry of the approval period …'. The Tribunal observed in *Kapila and City of Stirling* at [38] that the local planning scheme which authorised the local government to extend the term of a planning approval did not 'prescribe any particular matters for consideration in the exercise of discretion as to whether to extend the term of a development approval'. The DAP Regs also do not prescribe any particular matters for consideration in the exercise of discretion as to whether to amend a DAP approval so as to extend the period within which the approved development must be substantially commenced. However, in *Kapila and City of Stirling* the Tribunal also observed that it was [38]:
>
> > … common ground between the parties that the three considerations identified by the Tribunal in *Claymont Westcapital Pty Ltd and East Perth Redevelopment Authority* [2008] WASAT 77 (*Claymont*), in the context of determining whether to approve an application to amend a development approval by stipulating an additional period of six months for substantial commencement of the approved development under the

> *East Perth Redevelopment Scheme*, are each also relevant considerations in the exercise of the Tribunal's discretion under cl 10.5.2 of LPS 3 in this case. …

32 In *Kapila and City of Stirling*, the Tribunal held as follows [39]:

> We agree that the three considerations identified in *Claymont*, namely:
>
> - whether the planning framework has changed substantially since the development approval was granted;
> - whether the development would likely receive approval now; and
> - whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval,
>
> are each relevant matters to be considered and balanced in the exercise of discretion under cl 10.5.2 of LPS 3.

33 In *Kapila and City of Stirling*, the Tribunal then held as follows [40]:

> However, the range of considerations under cl 10.5.2 of LPS 3 is not closed. …

34 The principles stated in *Kapila and City of Stirling* were followed and applied by the Tribunal in *Georgiou Property 2 Pty Ltd and Presiding Member of the Metro West Joint Development Assessment Pane*l [2017] WASAT 138 in an application for review of the refusal by a DAP of an application under reg 17(1)(a) of the DAP Regs to amend a development approval so as to extend the period within which the approved development must be substantially commenced. In *Georgiou Property 2 Pty Ltd and Presiding Member of the Metro West Joint Development Assessment Panel*, the Tribunal held as follows [58][60]:

> 58 The following three considerations are each relevant matters to be considered and balanced in the exercise of the Tribunal's discretion under reg 17(4) of the DAP Regulations:
>
> (a) whether the planning framework has changed substantially since the development approval was granted;
>
> (b) whether the development would likely receive approval now; and

(c) whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval.

See *Kapila and City of Stirling* [2016] WASAT 59 at [38]-[40] (*Kapila*) following *Claymont Westcapital Pty Ltd and East Perth Redevelopment Authority* [2008] WASAT 77 at [51]-[53] (*Claymont*).

59 However, the range of considerations was not closed in *Kapila*: see [39].

60 It is also noted that Kapila is not authority for the proposition that each of the three relevant considerations must be satisfied before an extension of time may be given: see for instance *Teimoori v Moreland City Council* [2015] VCAT 1969 at [2] and [20].

35 As indicated in the final paragraph of the passage set out immediately above, it is not necessary for each relevant matter for consideration to be answered in favour of an applicant for the decision-maker to be satisfied that an extension application should be approved. The considerations are not conditions precedent to the availability or the exercise of a discretion. Rather, the findings in relation to each relevant matter for consideration must be taken into account and balanced in the exercise of discretion conferred by reg 17(4) of the DAP Regs as to whether to approve the extension application, with or without conditions, or refuse the extension application.

36 As held in *Kapila and City of Stirling* at [40], 'the range of considerations' in the exercise of discretion as to whether to extend the period within which an approved development must be substantially commenced 'is not closed'. In this case, ALH contends (and the presiding member of the DAP does not dispute) that there are two other relevant considerations in relation to the exercise of discretion under reg 17(4) of the DAP Regs.

37 The first further consideration has been identified in Victorian planning authorities since at least 1975 and was stated in *Best and Zygier v City of Malvern* (1975) 1 VPA 284 (Town Planning Appeals Tribunal) as follows 286:

> Whether the time originally limited was in all the circumstances reasonable and adequate taking into

> account the steps which would be necessary before the construction could actually commence.

38 In *Kantor v Murrindindi Shire Council* [1997] VicSC 167; (1997) 18 AATR 285; [1997] VicAATRp 20, this consideration in relation to an application to extend the term of a development approval was endorsed by the Supreme Court of Victoria (Ashley J) as follows 314:

> … whether the time limit for use or development originally imposed (and, if it be the case, as thereafter extended) was adequate in all the circumstances. The mere fact that a particular limit was set must no doubt be relevant. But whilst not impugning the limit originally set (and the effect of any extensions) consideration of all the circumstances might persuade a responsible authority that more time ought to be allowed for the owner of land to proceed.

39 The second further consideration referred to by ALH (and not contested as a relevant matter by the presiding member of the DAP) was stated by Ashley J in *Kantor v Murrindindi Shire Council* as follows 313:

> … a responsible authority
>
> …
>
> • may rightly consider
>
> …
>
> • as a factor tending against the grant of an extension, any material which suggests that the owner of land is seeking to "warehouse" a permit. The objectives of the Planning Act do not include giving to an owner of land in respect of which there exists an unused permit for use or development the opportunity by grant of an extension of obtaining a windfall by selling the land.

73 It is common ground that each of the five considerations referred to in ***ALH Group Property Holdings Pty Ltd and Presiding Member of the Metro Central Joint Development Assessment Panel*** are also relevant considerations in the exercise of discretion under reg 17(4) of the DAP Regs as to whether to extend the period within which the approved

landfill development must be substantially commenced in this case. Those five considerations are:

- whether the planning framework has changed substantially since the development approval was granted;
- whether the development would likely receive approval now;
- whether (in this case, given that there have been two different proponents of the landfill development as well as the landowner, Mr Chester, involved) the holders of the development approval have actively and relatively conscientiously pursued the implementation of the development approval;
- whether the landowner has sought to 'warehouse' the development approval; and
- whether the time period for substantial commencement originally imposed was adequate.

74 Mr JC Skinner, counsel for the applicants, submits that there is 'a slightly different framing of the [fifth] consideration' or at least one that is 'highly analogous' to it (ts 73, 30 August 2018) that is relevant in this case. In substance, the submission made by Mr Skinner is that although the period for substantial commencement originally imposed was adequate in the circumstances then existing, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place.

75 Ms Ide submits that:

> [T]he case law as it stands at present doesn't acknowledge that as a justification or a head of relevant consideration being named …
>
> (ts 77, 30 August 2018)

76 Ms Ide also submits that the consideration advanced by Mr Skinner would have little utility as a discretionary factor:

> … because this would be a factor that would exist in every application for an extension of time. That is, it has turned out that the period for substantial commencement has eventuated as being insufficient. Well,

> that would occur in every situation where nearly every situation where an application is made because they're seeking more time.
>
> (ts 75, 30 August 2018)

77 Ms Ide does not submit that Mr Skinner's submission raises or involves an irrelevant consideration in the exercise of discretion as to whether to grant an extension application under reg 17(4) of the DAP Regs. Had such a submission been made, we would not accept it, because, as the Court of Appeal (Martin CJ & Murphy JA) held in ***A v Corruption and Crime Commissioner*** [2013] WASCA 288; (2013) 306 ALR 491 at [100] (citation omitted), in order for this matter to be an irrelevant consideration:

> … it must be established that the [impugned matter] … was one which the decision-maker was prohibited from considering, either by the express terms of the statute, or by implication arising from the subject matter, scope and purpose of the power being exercised [in this case, assessment of an extension application] …

78 As the Court of Appeal (Martin CJ & Murphy JA) also said in ***A v Corruption and Crime Commissioner*** at [90] (citations omitted):

> It must be recognised that, between matters a decision[-]maker is bound to take into account, and those irrelevant considerations which the decision-maker is prohibited from considering, there may be a wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law. It has been emphasised that a decision[-]maker is not to be criticised for failing to consider everything which the affected party has chosen to include in an exhaustive list of all matters which the decision[-]maker might conceivably regard as relevant …

79 There is nothing in the statutory framework which expressly, or by implication, prohibits a DAP (or the Tribunal on review) from considering whether the circumstances in which the period for substantial commencement originally imposed was adequate changed significantly, through no fault of the applicant, with the consequence that the period originally imposed was inadequate for substantial commencement to take place. It is, therefore, not an irrelevant consideration in the exercise of discretion as to whether to amend a development approval so as to extend the period within which the development must be substantially commenced and falls within the 'wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law'.

80 In our view, the matters raised in Mr Skinner's submission fall within the scope of the consideration as to whether the time period for substantial commencement originally imposed was adequate, or at the very least involve a highly analogous consideration. If the submission strictly raises a further matter for consideration, then, as held in ***Kapila and City of Stirling*** [2016] WASAT 59 at [40], and as applied in ***ALH Group Property Holdings Pty Ltd and Presiding Member of the Metro Central Joint Assessment Panel*** at [37]-[39], 'the range of considerations' in the exercise of discretion as to whether the extend the period within which an approved development must be substantially commenced 'is not closed'. In either case, the matters raised in Mr Skinner's submission are relevant.

81 We do not accept Ms Ide's submission that the matters raised in the submission advanced by Mr Skinner 'would occur in every situation' or 'nearly every situation where an application is made because they're seeking more time' and 'it has turned out that the period for substantial commencement has eventuated as being insufficient' (ts 75, 30 August 2018). That is not responding to the substance of Mr Skinner's submission. The substance of the submission is not that the period for substantial commencement has eventuated as being insufficient, but rather that the circumstances in which the period originally imposed was adequate have changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate. Moreover, the circumstances of this case referred to by Mr Skinner for the purposes of this consideration are highly unusual, and establish that, although the period for substantial commencement originally imposed was adequate in the circumstances then existing, those circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate.

82 The circumstances of this case are highly unusual in two important respects. First, whereas DWER had advised SITA prior to the hearing of the development application proceedings that it intended to grant the original works approval application, subject to conditions, and whereas DWER granted the original works approval application (with effect until 20 March 2023) shortly after the Tribunal granted development approval for the landfill development, the original proponent of the landfill development decided not to proceed to implement the development and applied to surrender the original works approval, in consequence of which the CEO of DWER revoked the original works approval. Secondly, whereas DWER aims to determine works approval applications within 60 working days, and whereas DWER was able to

assess the original works approval application (which was materially and substantially the same as the fresh works approval application) and to advise the original proponent that it intended to grant a works approval in four months and six days, DWER has failed to determine the fresh works approval application, or even to give the new proponent an indication of its position in relation to it, now for some 16 months since it was lodged.

83 Finally, in relation to matters for consideration, the respondent contends (and the applicants do not dispute) that, in the circumstances of this case, there is another relevant consideration in the exercise of discretion as to whether to extend the period within which the approved landfill development must be substantially commenced, namely:

- whether the effective total period of four years for substantial commencement sought by the applicants is excessive.

84 We will now discuss and make findings in relation to each of the matters for consideration we have referred to.

Has the planning framework changed substantially since the development approval was granted?

85 It is common ground between the parties - and plainly the case - that the planning framework has changed substantially as a result of the gazettal, on 16 March 2018, of Amendment 50 to LPS 2, which, among other things, included the land use class 'Waste Disposal Facility' in the Zoning Table of the Scheme and designated that use class as an 'X' (prohibited) use on land zoned General Agriculture (and in all of the other zones) under the Scheme. As indicated earlier, the landfill development was approved by the Tribunal on the basis that 'landfill' is an innominate or unlisted use in the Zoning Table of the Scheme (which could therefore be approved under cl 3.2.4 of LPS 2 where the local government (or the Tribunal on review) determined that the use is consistent with, or may be consistent with, the objectives and purposes of the General Agriculture zone) and it found, on the joint evidence of the town planning expert witnesses, that the proposed landfill is 'substantially consistent with the relevant objectives of the General Agriculture zone' ([91(4)]). The 'landfill' use approved by the Tribunal is now properly classified as 'waste disposal facility' and is prohibited under LPS 2. The planning framework has therefore changed

substantially (indeed, fundamentally) since the landfill development approval was granted.

86 Correspondingly, it is also common ground - and plainly the case - for the purposes of the next consideration (whether the development would likely receive approval now) that the development could not be approved now, because 'waste disposal facility' is a prohibited land use on the site under LPS 2.

87 As we said in ***ALH and Presiding Member of the Metro Central Joint Development Assessment Panel*** at [148], the fact that the planning framework has changed substantially since a development approval was granted, in that the use the subject of the development approval is now prohibited in the relevant zone, and the corresponding fact that the development cannot now lawfully be approved on the site, because it is prohibited, are generally 'powerful considerations against approval of [an] extension application'. The respondent submits that these factors 'ought to be given determinative, or in the alternative, significant, weight'. In contrast, the applicants submit that, in the particular and unusual circumstances of this case, these factors should be given less weight.

88 In our view, for three reasons we will give later, in the particular and unusual circumstances of this case, the weight to be given to the fact that the planning framework has changed substantially since the development approval was granted, because the approved use is now prohibited in the General Agriculture zone, and the corresponding fact that the landfill development cannot now lawfully be approved on the site under LPS 2, is reduced. However, before giving those reasons, it is necessary to review the history of Amendment 50 insofar as it concerns landfill development of the site and to address certain submissions made by the respondent in that regard.

89 Amendment 50 is an omnibus amendment to LPS 2 which was initially adopted by the Council for the purposes of public advertising on 19 November 2012. The advertised version of Amendment 50 proposed to include the land use class 'Waste Disposal Facility' in the Zoning Table of the Scheme and to make that use class an 'SA' use (that is, a use which may be approved by the Council in the exercise of its discretion after giving public notice) in the General Agriculture zone and an 'X' (prohibited) use in all other zones. However, following public advertising and the receipt of submissions objecting to the proposal to make 'Waste Disposal Facility' an 'SA' use the General Agriculture zone,

on 15 April 2013, the Council resolved to remove reference to the land use class 'Waste Disposal Facility' from Amendment 50 when it adopted Amendment 50 for final approval and forwarded it to the Western Australian Planning Commission (Commission) and, ultimately, to the Minister for Planning (Minister) (then, Hon Donna Faragher MLC (Minister Faragher)) for final approval under s 87(1) of the PD Act.

90 According to a report to the Ordinary Council Meeting of the Shire on 14 April 2014, Amendment 50 was considered at the Commission's Statutory Planning Committee meeting on 23 July 2013 as a 'Confidential Item'. The reporting officer to the Ordinary Council Meeting on 14 April 2014 said:

> However, it is understood that references to waste management [sic] facilities [sic] were re-included in the Officer's recommendation; however Council has not been advised of the content of the recommendations. The amendment has been with the Minister for Planning for determination since the WAPC Committee Meeting.
>
> Correspondence has recently been received from the Minister for Planning advising that the amendment will be finalised following the Wheatbelt Joint Development Assessment Panel's determination of SITA's planning application for Allawuna Farm. …

91 At the Ordinary Council Meeting on 14 April 2014, the Council resolved as follows:

> …
>
> Request the Minister for Planning to make waste management [sic] facilities [sic] a prohibited use in the Shire of York Town Planning Scheme No. 2.

92 On 24 March 2016, the Commission sent the following letter to the Shire:

> Dear Sir
>
> **TOWN PLANNING SCHEME No. 2**
> **AMENDMENT No. 50**
>
> **MINISTERIAL DECISION FOR TOWN PLANNING SCHEME AMENDMENT - MODIFICATION**
>
> Pursuant to clause 87(2) of the *Planning and Development Act 2005* (the Act), the Minister for Planning determines that modifications to the amendment are required as set out in the attached schedule of modifications before final approvals [sic] given.

In accordance with clause 62(2) of the *Planning and Development (Local Planning Schemes) Regulations 2015*, the amendment documents are required to be modified in accordance with the Minister's decision, and returned to the Western Australian Planning Commission within 42 days of this letter being received.

In order for the amendment documents to be finalised in a timely manner, please ensure following [sic]:

- that maps in the modified document accurately reflect the intentions of the amendment as detailed in the amending text;
- in carrying out modification to the amendment document, previous Council resolutions pursuant to clauses 35(1), 41(3) and/or 50(3) are not be modified [sic]; and

Please email the final modified text of the amendment, in word version, to schemes@planning.wa.gov.au to assist in the reduction of Government Gazette publishing costs.

Please forward all correspondence directly to our Perth Office to alleviate any delays in the processing of the amendment.

Yours sincerely

Kerrine Blenkinsop
Secretary
Western Australian Planning Commission

93 Item 21 in the schedule of modifications attached to the letter from the Commission to the Shire dated 24 March 2016 states as follows:

Insert a new entry (SU8) into Schedule 3 for Allawuna Farm (Lots 9926, 26934, 4869 and 5831 Great Southern Highway, St. Ronans) for the Special Use 'Waste Disposal Facility' and sets out specific conditions that apply to this land as follows:

No.	Particulars of Land	Special Use	Conditions
7	Lots 9926, 26934, 4869 and 5931 Great Southern Highway, St. Ronans	1. Waste Disposal Facility and associated infrastructure on Lot 4869 (AA)	1. The waste disposal facility shall only accept waste types permitted for disposal at a Class I and Class II landfill (DER, *Landfill Waste Classification and Waste Definitions* 1996 (as amended)).

		2. Caretaker's dwelling on Lot 4869 (AA) 3. Single House on Lot 9926 (P) 4. Agriculture extensive (P)	2. The development is to be undertaken generally in accordance with the 8 March 2016 decision of the State Administrative Tribunal ([2016]WASAT22) and a development approval issued by the local government.

94 Section 87(1) and s 87(2) of the PD Act state as follows:

> (1) Subject to section 83, after advertisement under section 84 and compliance with sections 85 and 86, a local planning scheme prepared or adopted, or an amendment to a local planning scheme prepared or adopted, by a local government is to be submitted to the Minister for the approval of the Minister.
>
> (2) The Minister may, in relation to a local planning scheme or amendment submitted to the Minister under subsection (1) –
>
> (a) approve of that local planning scheme or amendment; or
>
> (b) *require* the local government concerned to modify that local planning scheme or amendment in such manner as the Minister specifies before the local planning scheme or amendment is resubmitted for the Minister's approval under this subsection; or
>
> (c) refuse to approve of that local planning scheme or amendment.

(emphasis added)

95 Regulation 62(2) of the *Planning and Development (Local Planning Schemes) Regulations 2015* (WA) (LPS Regs) states as follows:

> Within 42 days, or such longer period as allowed by the Commission, of being notified that, under section 87(2)(b) of the Act, the Minister requires the local government to modify the amendment to the local planning scheme, the local government *must* -
>
> (a) modify the amendment as required; and
>
> (b) execute the modified amendment; and
>
> (c) submit to the Minister a copy of the executed documents.

(emphasis added)

96 Thus, shortly after the Tribunal granted development approval for the landfill development (on 8 March 2016), the Minister required the Shire to modify Amendment 50 so as to create a Special Use Zone (SU8) in Sch 3 of the Scheme in relation to the site for the Special Use of 'Waste Disposal Facility and associated infrastructure', subject to conditions as to the type of waste permitted to be accepted (which is consistent with the development approval) and requiring that '[t]he development is to be undertaken generally in accordance with the [development application] decision of the … Tribunal … and a development approval issued by the local government'.

97 At all material times, cl 3.4 of LPS 2 has stated as follows:

> Special Use Zones are set out in Schedule 3 and are in addition to the zones in the Zoning Table. No persons shall use any land or any structure or buildings thereon, in a Special Use Zone *except for the purpose* set out against that land in Schedule 3 and subject to the conditions set out in Schedule 3 with respect to that land.
>
> (emphasis added)

98 Therefore, the effect of modification 21 required by the Minister (if it formed part of Amendment 50 when gazetted) was not only to enable the landfill development to take place, but also to preclude the land from being used for any purpose other than a waste disposal facility and associated infrastructure (or caretaker's dwelling, single house or agriculture-extensive).

99 It is clear from s 87(2) of the PD Act and reg 62(2) of the LPS Regs that the Shire had a statutory obligation to modify Amendment 50 as required by the Minister in item 21 of the schedule of modifications attached to the letter from the Commission to the Shire dated 24 March 2016, execute the modified amendment and submit a copy of the executed documents to the Minister within 42 days (or such longer period as allowed by the Commission). The word 'require' in s 87(2)(b) of the PD Act and the word 'must' in reg 62(2) of the LPS Regs plainly impose a mandatory obligation on a local government to carry out the modifications required by the Minister within the 42-day period specified. The Commission's letter of 24 March 2016 expressly referred to this obligation. As a report to the Ordinary Council Meeting of the Shire on 28 August 2017 states, 'Ministerial modifications are considered a "direction" and there is no ability for the Shire to appeal …'.

100 However, extraordinarily, the Council refused to comply with its statutory obligation. Rather than modifying Amendment 50 as required by the Minister, executing the modified amendment and submitting a copy of the executed documents to the Minister (or even seeking an extension of time from the Commission to do so), the Council refused to carry out its obligation and, instead, as Mr Skinner put it in opening 'enter[ed] into a bit of a debate' about the modifications (ts 35, 28 August 2018). At the Ordinary Council meeting on 27 June 2016, the Council resolved as follows:

> 1. To request the Chief Executive Officer to [w]rite to the Minister [for] Planning advising of:
>
> (i) Council's objection to the inclusion of a modification to rezone Lots 9926, 26934, 4869 and 5931 Great Southern Highway, St. Ronans from General Agriculture to Special Use No. 8; and
>
> (ii) That in the event that the Minister does not amend the modifications, advise of the Shire's position that the modification is significant and request that the Minister direct the Shire to re-advertise the amendment in accordance with Clause 46 and/or 56 of the Planning and Development (Local Planning Schemes) Regulations 2015[.]
>
> 2. In the event that the Minister [for] Planning directs to remove Special Use No. 8 from the modifications and Amendment No. 50, the modified Amendment No. 50 document be sent back to the Commission for execution.

101 On 26 July 2016, the Shire wrote to the Minister outlining objections to modification 21 required by the Minister and requesting the removal of the SU8 zone from the modifications.

102 On 6 September 2016, the Minister responded to the Shire's letter as follows:

> Dear Mr Martin
>
> **MINISTERIAL MODIFICATIONS TO SHIRE OF YORK TOWN PLANNING SCHEME AMENDMENT NO. 50 AND THE ALLAWUNA FARM LANDFILL SITE**
>
> Thank you for your letter of 26 July 2016 regarding the possibility of making modifications to Amendment 50 to retain the Rural zoning of the Allawuna site.

> As you will appreciate, the modifications reflect the development approval that was issued at the direction of the State Administrative Tribunal, and the associated development application and environmental review documents have been widely advertised and subject to public input.
>
> Last month I received correspondence from SUEZ advising that, for commercial reasons, they would not be proceeding with the development of Allawuna Farm as a waste disposal site. While I understand the Allawuna proposal will not be pursued by the same company, development approvals are issued for specific parcels of land, not to particular proponents, and it is possible that the site could be used for a landfill by another operator in the future.
>
> However, under clause 77(1)(d) of the deemed provisions of the *Planning and Development (Local Planning Schemes) Regulations 2015*, there is an ability for a development application to be cancelled, if the landowner makes application to the local government.
>
> Were development approval for the waste disposal facility at Allawuna Farm to be cancelled in accordance with clause 77, the need for the special use provisions in the scheme would fall away, and the current General Agriculture zone could remain in place. On this basis, I suggest that Council convene further discussions with the landowner to determine their intention for the use of the land. Once this is known, please advise me accordingly (including any cancellation of development applications [sic]) *when you submit the modified documents for Amendment 50.*
>
> I would then consider the Council's position, and that of the landowner, before I determine *if any further changes* to the schedule of modifications to Amendment 50 are required.
>
> I appreciate you raising this matter with me and trust the above information is of assistance.
>
> Yours sincerely
>
> Hon Donna Faragher JP MLC
> **MINISTER FOR PLANNING; DISABILITY SERVICES**
>
> (emphasis added)

103 The respondent submits that the letter from Minister Faragher to the Shire dated 6 September 2016 'reflects a progression in the position from the first modification' and shows that, once the Minister became aware that SITA did not intend to implement the development approval, 'she indicated she would revisit that modification … after considering the position of the Shire and the landowner' (ts 7, 30 August 2018). We do

not accept these submissions. The letter does not reflect a progression in the position 'from the first modification' and does not indicate that the Minister 'would revisit that modification'. Rather, the Minister required that modification 21 be made and asked for an update in relation to the landowner's and the Shire's positions at that point. The letter makes it clear that, if Mr Chester were to make an application for the development approval to be cancelled (under cl 77(1)(d) of the deemed provisions in local planning schemes in Sch 2 of the LPS Regs), then 'the need for the special use provisions in the scheme would fall away'. However, the Minister concluded this point as follows:

> Once this [that is, the landowner's position] is known, please advise me accordingly (including any cancellation of development applications [sic]) *when you submit the modified documents for Amendment 50*.
>
> (emphasis added)

104 It is plain from the words 'when you submit the modified documents for Amendment 50' that the Minister had not altered her requirement under s 87(2) of the PD Act and reg 62(2) of the LPS Regs, communicated on 24 March 2016 to the Shire, that the Shire was to modify Amendment 50 in accordance with the schedule of modification to that letter, including inserting the Special Use zone SU8 for the site in Sch 3 of the Scheme. This is further demonstrated by the following, penultimate paragraph of the letter:

> I would then consider the Council's position and that of the landowner, before I determine *if any further changes* to the schedule of modifications to Amendment 50 are required.
>
> (emphasis added)

105 The reference to 'if any further changes' to the schedule of modifications plainly indicates that there had been no 'progression in the position from the first modification' on the part of the Minister. As at 6 September 2016, the Shire remained subject to a statutory obligation to modify Amendment 50 to include the Special Use zone SU8 for the site and the Shire continued to breach that obligation.

106 Furthermore, although there was a change of government in March 2017 and the appointment of a new Minister, Hon Rita Saffioti MLA (Minister Saffioti), it is clear from a briefing note from Ms Gail McGowan, the Director General of DPLH, to Minister Saffioti dated 23 January 2018 that there had been no 'progression in the position from the first modification' as at 23 January 2018 on the part of the Minister.

The briefing note was prepared for the purposes of the Minister's visit to the Wheatbelt on 25 January 2018. The briefing note refers to Amendment 50 and states as follows:

> It is with you for final approval, with the most critical component being [m]odification 21 which seeks to insert Allawuna Farm as a Special Use site to allow it to be developed in accordance with a 2016 State Administrative Tribunal (SAT) decision, which permitted a landfill on the site.

107 After referring to the extension application and stating that it 'will be considered at a [JDAP] meeting in late February / March 2018', the briefing note states as follows under 'current situation':

> • If you were to remove [m]odification 21 from the Amendment, waste disposal facilities would become an 'X' (prohibited) use in all zones of the scheme, and any landfill proposal would need to go through a scheme amendment process. This approach would be strongly supported by the Shire and the local community.
>
> • If you were to determine the amendment with [m]odification 21 in place, the site would be zoned for a landfill, based on the approved development application. If this occurs, the Shire and local community will be disappointed, and would likely continue to oppose the proposal through all means available to them, including the DAP and SAT systems.
>
> • The proponent behind the 'reinvigorated' development application is Instant Waste Management, which is currently based in the Bayswater Industrial Estate (near the Tonkin Highway / Collier Road intersection). The company provides commercial and residential waste disposal solutions for all types of waste streams, including construction and demolition, commercial and industrial, liquid, hazardous and residential waste across the Perth metropolitan area.

108 It is clear from the reference in the briefing note to '[m]odification 21 which seeks to insert Allawuna Farm as a Special Use site' and the first two bullet points under 'current situation' that the current version of Amendment 50 as at 23 January 2018 included the Special Use zone SU8 for a waste disposal facility on the land. There was no 'progression in the position from the first modification' as at 23 January 2018.

109 The respondent also drew attention to an exchange of emails between Ms Cath Meaghan, a planning officer of DPLH, and Ms Carly Rundle, a planning officer of the Shire, in July and August 2017

concerning a possible 'sunset clause' in relation to Special Use zone SU8 in Amendment 50.

110 In an email from Ms Meaghan to Ms Rundle on 3 July 2017, Ms Meaghan said the following:

> Hi Carly
>
> As discussed last week, I've put something together that sets out the reason for using a sunset clause, and also the proposed wording.
>
> Let me know what you think, and then perhaps Council could respond to the attached, and we could get the ball rolling again?

111 In the attachment to the email, Ms Meaghan states that:

> … In December 2016, the Minister for Planning indicated a willingness to consider a 'compromise' approach to modification 21.
>
> The use of a sunset clause is proposed as a compromise, that would allow the site to be developed for a landfill while the existing development approval is in place, and for the approval to cease to have effect if construction of a landfill is not substantially commenced by the time the development approval expires.

112 The 'sunset clause' drafted by Ms Meaghan is in the form of a further modification to modification 21 to Amendment 50 by addition of conditions 3 and 4 in the fourth column as follows:

> 3. If development of the waste disposal facility is not substantially commenced prior to 8 March 2018, the provisions of SU 8 will cease to have effect, and use and development of the site shall be in accordance with the 'General Agriculture' zone.
>
> 4. If, [sic] a development approval is sought following expiry of the approval mentioned in point [sic] 2, the application is to be assessed under the requirements applicable to the 'General Agriculture' zone.

113 There is no evidence before the Tribunal, other than Ms Meaghan's assertion, that, in December 2016, the Minister indicated a willingness to consider a 'compromise' approach to modification 21. No documentary or other evidence before the Tribunal indicates such a willingness on the part of Minister Faragher as at December 2016 (or subsequently) or on the part of Minister Saffioti. During her opening, Ms Ide, after reading out Ms Meaghan's assertion that, in December 2016, the Minister indicated a willingness to consider a 'compromise' said the following:

> I'm not sure what the document is in December 2016. I will probably go back and check.
>
> (ts 67, 28 August 2018)

Ms Ide did not present any further evidence or make any submission in relation to that matter.

114 On 8 August 2017, Ms Rundle responded by email to Ms Meaghan's email of 3 July 2017 stating as follows:

> …
>
> The Shire's current position is as per Council resolution dated 27 June 2016 which requests removal of the Special Use zone, and the property to remain zoned 'General Agriculture'.
>
> Whilst the removal of the SU8 zone is still the Shire's preferred outcome, we provide the following comments to the proposed provisions if they were adopted by the Minister.
>
> …

115 Ms Rundle then proposed certain changes to condition 2 of modification 21 and to condition 3 drafted by Ms Meaghan as part of the 'sunset clause' idea, which Ms Rundle said 'reflect legal advice we obtained in regards to the proposed conditions'.

116 Ms Meaghan responded to Ms Rundle's email later on the same day, 8 August 2017, as follows:

> Thanks Carly and co
>
> I'll put the revised table in the Briefing Note for our Minister, and will ask to present this Ministerial at the next available opportunity.

117 On 22 August 2017, Ms Meaghan sent a further email to Ms Rundle stating, in relevant part, as follows:

> Hi Carly
>
> I have news on both these amendments:
>
> **Amendment 50** the Minister's office has indicated that the 'recommended modifications appear appropriate' regarding the sunset clauses [sic]. So, please go ahead and carry out the modifications to Amd 50 and submit those to WAPC. I've attached a revised schedule of

> modifications, with new text in red, and modified text shown in strikethrough. Aside from Allawuna, there are also modifications regarding DCPs/DCAs, which you have been discussing with Ryan. We got to the bottom of it, and we should have picked up these changes when the Regulations were introduced.
>
> In the covering letter, please indicate that the modifications have been carried out in accordance with Min Ref: 72-04338. Please also indicate that some administrative errors were identified in relation to the introduction of the Regulations, and these have been corrected.
>
> …
>
> I note that a works approval has been lodged with DWER for the former Allawuna site. I guess this will play out in much the same way as it did previously with appeals to the Minister for the Environment and so on. We shall see.
>
> Please be in touch if any queries.
>
> Cath

118 Item 21 in the 'revised schedule of modifications' attached to Ms Meaghan's email to Ms Rundle on 22 August 2017 states as follows:

> Insert a new entry (SU8) into Schedule 3 for Allawuna Farm (Lots 9926, 26934, 4869 and 5831 Great Southern Highway, St. Ronans) for the Special Use 'Waste Disposal Facility' and sets out specific conditions that apply to this land as follows:

	No.	Particulars of Land	Special Use	Conditions
SU8	8	Lots 9926, 26934, 4869 and 5931 Great Southern Highway, St. Ronans	1. Waste Disposal Facility and associated infrastructure on Lot 4869 (AA) 2. Caretaker's dwelling on Lot 4869 (AA) 3. Single House on Lot 9926 (P) and on the other three lots in the event that the	1. The waste disposal facility shall only accept waste types permitted for disposal at a Class I and Class II landfill (DER, *Landfill Waste Classification and Waste Definitions* 1996 (as amended)). 2. The development is to be undertaken ~~generally~~ in accordance with the 8 March 2016 decision of the State Administrative Tribunal

			waste disposal facility is not developed on Lot 4869. 4. Agriculture extensive (P)	([2016]WASAT22) and a development approval issued by the local government. 3. If development of the waste disposal facility is not substantially commenced prior to 8 March 2018, the SU8 provisions other than this condition and condition 4 will cease to have effect, and use and development of the site shall be only in accordance with the 'General Agriculture' zone and use permissibility for the General Agriculture zone in the Zoning Table. 4. If, [sic] a development approval is sought following expiry of the approval mentioned in point [sic] 2, the application is to be assessed under the requirements applicable to the 'General Agriculture' zone.

119 There is no evidence before the Tribunal as to whether the 'Briefing Note for our Minister' referred to by Ms Meaghan in her email of 8 August 2017 to Ms Rundle was ever prepared or provided to the Minister. Furthermore, although Ms Meaghan states in her email of 22 August 2017 to Ms Rundle that 'the Minister's office has indicated that the "recommended modifications appear appropriate" regarding the sunset clauses', there is no evidence as to who in the 'Minister's office' indicated that. The email does not state that the Minister herself gave that indication. Neither the 'Minister's office' nor an officer of DPLH has authority to 'revise' or alter modifications required by the Minister to be made under s 87(2)(b) of the PD Act.

120 Ms Rundle provided a report to the Ordinary Council Meeting on 28 August 2017 which she said in the report had the following purposes:

- To provide an update on the progress of Scheme Amendment No. 50 and Council resolution 27 June 2016 objecting to *the inclusion of the Special Use No. 8 zone (SU8), required by the Minister's modifications for Scheme Amendment No. 50*.

- To consider a potential modification to the SU8 zone and determine whether to support this modification in a response to the Minister for Planning.

(emphasis added)

121 After setting out the history of Amendment 50, Ms Rundle said the following:

> As outlined above, the Shire has undertaken numerous actions requesting the modification requiring the inclusion of the SU8 zone be removed from Scheme Amendment No. 50.
>
> The Shire's preferred outcome is that the property remains zoned 'General Agriculture' and if the landfill development is commenced, the use becoming a 'non-conforming' use, with non-conforming use rights, and a future separate scheme amendment proposed by the landowners could be proposed. This approach resolves many of the reasons for the objections to the rezoning as outlined above (that proper and orderly planning processes have not been followed), allowing an amendment to be progressed in a proper and orderly manner, with community consultation and consideration by Council.
>
> However, given the actions that have occurred to date, officers are not confident that this outcome will be achieved.
>
> If an application were to be received at the current time for a modification or extension or even a new development application for a landfill on this site, it would be considered against Shire of York Town Planning Scheme No. 2 where it is currently a 'use not listed', although *Scheme Amendment No. 50 and the approved provisions (Minister modifications) are required to be given due regard which reflect a rezoning of the site to 'Special Use Zone No. 8' for the purposes of a 'Waste Disposal Facility'*. This allows for extension and modification to occur to the planning approval even after the development approval expires, particularly given the uncertainty of the wording of condition 2, which limits 'generally' to the existing planning consent.
>
> *The WAPC's proposed inclusion* of conditions 3 and 4 introduces a 'sunset clause' to the SU8 zone, specifying that if development is not substantially commenced by 8 March 2018, that the provisions of the SU8 will cease to have effect. Whilst this does not resolve all of the objections previously raised by Council (i.e still makes changes above that contemplated by the development application and has not followed proper planning processes such as advertising of significant modifications) it is a preferred outcome over the inclusion of the SU8 zone as currently proposed as it removes the ability for extension of the existing planning consent.

> It is therefore recommended that the *WAPC's 'sunset clause' modification* be supported, as it is a preferred outcome over the inclusion of *the SU8 zone currently proposed by the Minister for Planning*. It will still be at the discretion of the Minister for Planning as to whether the additional conditions reflecting the 'sunset clause' be included.
>
> (emphasis added)

122 As indicated in this extract, the Shire's officers were not confident, as at 28 August 2017, that the Minister would remove the proposed Special Use SU8 zone from Amendment 50. Ms Rundle, therefore, recommended that the Council should endorse the Commission's 'sunset clause' modification, 'as it is a preferred outcome over the inclusion of the SU8 zone currently proposed by the Minister for Planning'.

123 At the Ordinary Council Meeting on 28 August 2017, the Council accepted Ms Rundle's recommendation and resolved as follows:

> That Council:
>
> 1. Requests the CEO to write to the Minister for Planning advising that:
>
> (a) Council's preferred position is that the Special Use Zone No. 8 be removed and Lots 9926, 26934, 4869 & 5931 Great Southern Highway, St Ronan's [sic] remain zoned General Agriculture;
>
> (b) Should the Minister choose not to remove the Special Use Zone No. 8, Council supports the inclusion of the 'sunset clause' into the Special Use Zone No. 8 to read as follows:

	No.	**Particulars of Land**	**Special Use**	**Conditions**
SU8	8	Lots 9926, 26934, 4869 and 5931 Great Southern Highway, St. Ronans	1. Waste Disposal Facility and associated infrastructure on Lot 4869 (AA) 2. Caretaker's dwelling on Lot 4869 (AA) 3. Single House on Lot 9926 (P) and on the other three lots in the	1. The waste disposal facility shall only accept waste types permitted for disposal at a Class I and Class II landfill (DER, *Landfill Waste Classification and Waste Definitions* 1996 (as amended)). 2. The development is to be undertaken in accordance with the 8 March 2016 decision of the State

			event that the waste disposal facility is not developed on Lot 4869. 4. Agriculture extensive (P)	Administrative Tribunal ([2016]WASAT22) and a development approval issued by the local government. 3. If development of the waste disposal facility is not substantially commenced prior to the expiration of 2 years from the date the SAT approval is taken to have had effect, the SU8 provisions other than this condition and condition 4 will cease to have effect, and use and development of the site shall be only in accordance with the 'General Agriculture' zone and use permissibility's [sic] for the General Agriculture zone in the Zoning Table. 4. If, [sic] a development approval is sought following expiry of the approval mentioned in point [sic] 2, the application is to be assessed under the requirements applicable to the 'General Agriculture' zone.

2. In the event that the Minister [for] Planning modifies the Special Use No. 8 zone, authorises the CEO to send the modified Scheme Amendment No. 50 documents to the Western Australian Planning Commission for execution.

124 Ms Rundle's report to Council on 28 August 2017 confirms that, as far as the Shire was aware, modification 21 required to be made by Minister Faragher on 24 March 2016 remained the position of Minister Saffioti. In particular, Ms Rundle refers to 'the inclusion of the SU8 zone' as 'currently proposed by the Minister for Planning'. Ms Rundle also states that the version of Amendment 50 to which due regard would be given in relation to an extension application as at 28 August 2017 was one 'which reflect[s] a rezoning of the site to "Special Use Zone No. 8" for the purposes of a "Waste Disposal Facility"'. Furthermore, Ms Rundle refers to the 'sunset clause' option as proposed by the Commission, not as proposed (much less required) by the Minister.

125 Following the Ordinary Council Meeting on 28 August 2017, on 1 September 2017, Mr Skinner wrote a letter to the Minister on behalf of AMI, Alkina and Mr Chester in which he recounted the relevant history of Amendment 50, referred to the recommendation to Council made at the Ordinary Council Meeting on 28 August 2017 and set out his clients' position regarding modification 21, the Commission's draft 'sunset clause' conditions and the Shire's recommendation for removal of Special Use zone SU8 to the Minister. At paragraph 24 of the letter, Mr Skinner states his clients' position as follows:

> (a) support the Minister's Modification and the provisions of SU8 as proposed by the then Minister;
>
> (b) oppose the WAPC Draft Conditions, introducing the sunset clause as part of SU8; and
>
> (c) oppose the Shire's Recommendation.
>
> (original emphasis)

126 Mr Skinner concluded his letter to the Minister by requesting a meeting between representatives of AMI and Alkina with the Minister 'to discuss the above and related matters, before any final decision is made in relation to the provisions of [Amendment] 50 directly impacting on the [land] and the Landfill Proposal'.

127 The respondent submits that the letter from Mr Skinner to the Minister dated 1 September 2017 indicates that the applicants had 'sufficient concern' as a result of the Minutes of the Ordinary Council Meeting of 28 August 2017 and 'demonstrates that the applicants were aware of the potential changes to [A]mendment 50 from August 2017 and have put their position on those potential amendments to the Minister and requested a meeting' (ts 9, 30 August 2018).

128 As indicated earlier, on 23 January 2018, Ms Gail McGowan, the Director General of DPLH, provided a briefing note to Minister Saffioti in relation to Amendment 50 for the purposes of the Minister's visit to the Wheatbelt on 25 January 2018. Consistently with the other evidence as to the history of Amendment 50 reviewed above, the briefing note indicates that, as at 23 January 2018, Amendment 50 relevantly included modification 21 as required to be made by Minister Faragher on 24 March 2016. Moreover, there is no reference in the briefing note to the 'sunset clause' suggested by Ms Meaghan in July and August 2017 and accepted (in the alternative) by the Shire on 28 August 2017.

129 The respondent does not submit that the 'sunset clause' proposal in the form of conditions 3 and 4 drafted by Ms Meaghan or as accepted (in the alternative) by the Shire was ever a seriously-entertained planning proposal forming part of Amendment 50. Had such a submission been made, it would not be accepted by us, because there is no evidence before the Tribunal that the Minister (rather than the 'Minister's office') ever supported a 'sunset clause', much less so any evidence that the Minister required Amendment 50 to be further modified to include a 'sunset clause'.

130 It is clear that, at all material times, the Council was strongly opposed to the landfill development on the site and strongly opposed to the inclusion of Special Use zone SU8 for 'Waste Disposal Facility and associated infrastructure' in the Scheme, and for those reasons failed to comply with its statutory obligation under s 87(2)(b) of the PD Act and reg 62(2) of the LPS Regs to modify Amendment 50 to include Special Use zone SU8. However, it is also clear that draft Amendment 50, as it stood from 24 March 2016 to 15 February 2018, included modification 21 required by the Minister on 24 March 2016 and, in particular, Special Use zone SU8 for the Special Use 'Waste Disposal Facility and associated infrastructure' on the land. The period during which the Special Use zone SU8 formed part of draft Amendment 50 (as required by the Minister to be modified) coincided with the whole of the two-year period in which the development approval for the landfill development could be substantially commenced under condition 9, other than the first two weeks and the last three weeks. Furthermore, draft Amendment 50 (as required by the Minister to be modified) was in this form when the extension application was lodged and for two months and three weeks after that.

131 On 16 February 2018, Minister Saffioti signed a document requiring the Shire to modify Amendment 50 under s 87(2)(b) of the PD Act in the following manner:

> **Shire of York Local Planning Scheme 2 Amendment 50**
>
> The Minister for Planning requires the Council to modify the amendment documents in the following manner before the amendment is submitted for final approval:
>
> (i) Delete Special Use Site 8 relating to Allawuna Farm (Lots 9926, 26934, 4869 and 5831 Great Southern Highway, St Ronans).

132 On 20 February 2018, the Commission advised the Shire of the Minister's requirement on 16 February 2018 that the Shire modify

Amendment 50 under s 87(2)(b) of the PD Act before Amendment 50 is resubmitted for the Minister's approval under s 87(1) of the PD Act.

133 On the very next day, that is 21 February 2018, the Shire complied with the Minister's requirement to modify Amendment 50 under s 87(2)(b) of the PD Act (including the deletion of Special Use zone SU8) and resubmitted Amendment 50 for the approval of the Minister under s 87(1) of the PD Act. On 8 March 2018, the Minister gave final approval for Amendment 50. As indicated earlier, on 16 March 2018, Amendment 50 was gazetted in a form which includes 'Waste Disposal Facility' as a use class in the Zoning Table of LPS 2 and makes it an 'X' (prohibited) use in the General Agriculture zone (and in all other zones) of the Scheme.

134 As indicated earlier, the extension application was lodged with the Shire for approval of the JDAP on 24 November 2017. As also indicated earlier, on 12 February 2018, the DAP secretariat informed AMI that the JDAP meeting to determine the extension application would be held on 27 February 2018 and, on 15 February 2018, the DAP secretariat confirmed that the JDAP meeting to determine the extension application would be held on 27 February 2018 and published the agenda, the Responsible Authority Report and corresponding attachments on the DAP website.

135 It is common ground between the parties - and plainly the case - that although the Shire had been agitating for the removal of the Special Use zone SU8 from Amendment 50 (and, thereby, for the prohibition of the land use class 'Waste Disposal Facility' on the site) since it received the Minister's direction to modify Amendment 50 in April 2016, the deletion of Special Use zone SU8 and the prohibition of the land use class 'Waste Disposal Facility' on the site only became a seriously-entertained planning proposal on 16 February 2018, when the Minister signed the document requiring the Shire to modify Amendment 50 under s 87(2)(b) of the PD Act by deleting Special Use zone SU8. This was two months and three weeks after the extension application was lodged, four days after the DAP secretariat advised the applicants of the date on which the JDAP would meet to determine the extension application, and the day after it confirmed that date and published the agenda, including the Responsible Authority Report and corresponding attachments.

136 The planning framework has changed substantially (indeed, fundamentally) since the development approval was granted, because the landfill development is now properly classified as 'Waste Disposal

Facility' under LPS 2 which is a prohibited use in the General Agriculture zone (including on the site) under the Scheme. Consequently (for the purposes of the next consideration, as to whether the development would likely receive approval now), the landfill development cannot now lawfully be approved on the site under LPS 2. As indicated earlier, these factors are generally powerful considerations against approval of an extension application.

137 However, in the particular and unusual circumstances of this case, in our view, the weight to be given to these factors in the exercise of discretion as to whether to approve, with or without conditions, or to refuse the extension application under reg 17(4) of the DAP Regs is reduced, for the following three reasons.

138 First, as we found earlier, the removal of Special Use zone SU8 from Amendment 50 and the prohibition of the land use class 'Waste Disposal Facility' on the site only became a seriously-entertained planning proposal on 16 February 2018, some two months and three weeks after the lodgement of the extension application, four days after the DAP secretariat advised the applicants of the date on which the JDAP was scheduled to meet in order to determine the extension application and the day after it confirmed that date and published the agenda for that meeting, the Responsible Authority Report and corresponding attachments.

139 Secondly, as we also found earlier, during the whole of the two-year period in which the development approval for the landfill development could be substantially commenced under condition 9, other than the first two weeks and the last three weeks, and at the time when the extension application was made and for two months and three weeks after that, draft Amendment 50 as required to be modified included a Special Use zone SU8 for 'Waste Disposal Facility and associated infrastructure' on the site. As indicated earlier, cl 3.4 of LPS 2 precludes use of land in a Special Use zone 'except for the purpose set out against that land in Schedule 3 and subject to the conditions set out in Schedule 3 with respect to that land'. As Mr Skinner submits, throughout the whole of the period during which the development approval could be substantially commenced (other than brief periods at the beginning and at the end), Amendment 50:

> … was in fact a positive change for this proposal, because when the [T]ribunal had granted its planning approval in March of 2016 and when it had heard the matter in November of 2015, there was no [S]pecial [U]se zone, and it dealt with the development as a use not listed and went

> through the process of determining whether or not it was consistent with the zone and whether it was an appropriate development, and as I say, ultimately decided that it was and granted the approval.
>
> But the change that was proposed from then on was in fact to introduce a [S]pecial [U]se zone to specifically accommodate that approval. So as I say, it was a positive change in favour of the development rather than against it, and right at the last minute, it was a 180 degree shift and it became a prohibited development rather than a [S]pecial [U]se zone, expressly allowing for …

(ts 43, 28 August 2018)

140 The respondent submits that Minister Faragher's letter to the Shire dated 6 September 2016 'indicated she would revisit the modification after considering the position of the [S]hire and the landowner' (ts 39, 30 August 2018) and, given that the letter was noted in the Ordinary Council Meeting minutes of 28 August 2017, the applicants 'became aware in August 2017 that the First Modification … did not represent Minister Faragher's final position on the amendment…'. However, it is clear from Minister Faragher's letter of 6 September 2016 that modification 21 required by her on 24 March 2016 remained her *current* position as at 6 September 2016. The Minister's letter contemplates that the Shire will comply with its statutory obligation to modify Amendment 50 in accordance with the Minister's direction on 24 March 2016, because, after stating that if the landowner applies for the development approval to be cancelled 'the need for the special use provisions in the scheme would fall away' and suggesting that '[o]n this basis', the Council should 'convene further discussions with the landowner to determine [his] intention for the use of the land', the Minister then says:

> Once this is known, please advise me accordingly (including any cancellation of development applications [sic]) *when you submit the modified documents for Amendment 50*.

(emphasis added)

141 Furthermore, the Minister's contemplation that the Shire would comply with its statutory obligation is clearly apparent from the following, penultimate paragraph of the letter:

> I would then consider the Council's position, and that of the landowner, before I determine *if any further changes* to the schedule of modifications to Amendment 50 are required.

(emphasis added)

142 It is clear from Minister Faragher's letter that modification 21 as required by her on 24 March 2016 remained part of the schedule of modifications to Amendment 50 which the Shire was required to make. Certainly, the letter indicates that, particularly if Mr Chester were to have applied to cancel the development approval, then the Minister might remove the Special Use zone SU8, because 'the need for the special use provisions in the scheme would fall away'. However, as Mr Skinner submits, this is a 'very long way' (ts 40, 30 August 2018) from the respondent's interpretation of the letter.

143 Furthermore, as we found earlier, there is no evidence before the Tribunal that the Minister ever supported Ms Meaghan's suggestion of a 'sunset clause' to Special Use zone SU8, much less so any evidence that the Minister required Amendment 50 to be further modified to include a 'sunset clause' under s 87(2)(b) of the PD Act. In this regard, notwithstanding Ms Meaghan's statement in her email to Ms Rundle on 22 August 2017 that 'the Minister's office has indicated that the "recommended modifications appear appropriate" regarding the sunset clauses', and her request to Ms Rundle to '… please go ahead and carry out the modifications to [Amendment] 50 and submit those to WAPC' as set out in a revised schedule of modifications attached to her email, as we said earlier, neither the 'Minister's office' nor any officer of DPLH has authority to 'revise' or alter modifications required by the Minister to be made under s 87(2)(b) of the PD Act.

144 Thirdly, and as we said earlier, extraordinarily, the Shire failed to comply with its statutory obligation under s 87(2)(b) of the PD Act and reg 62(2) of the LPS Regs to modify Amendment 50 to include Special Use zone SU8 for 'Waste Disposal Facility and associated infrastructure' on the land, within 42 days of 24 March 2016 (or subsequently), and, in our view, had the Shire complied with its statutory obligation, it is likely that Amendment 50 would have been finally approved by the Minister and gazetted in that form. The 42-day period within which the Shire was required to modify Amendment 50, execute the modified amendment and submit the executed documents to the Minister ended on about 5 May 2016. As indicated earlier, SITA only publicly announced that it would not be proceeding to implement the development approval about two months later, on 6 July 2016. We accept the respondent's submission that 'the inclusion of SU8 shortly after the development approval was granted by the Tribunal' demonstrates Minister Faragher's 'responsiveness' to 'the status of the development approval on the site'.

Furthermore, as indicated earlier, once the Shire complied with the Minister's requirement to modify Amendment 50 (on 21 February 2018), the Minister gave final approval for Amendment 50 only about two weeks later (on 8 March 2018) and Amendment 50 was gazetted about a week after that (on 16 March 2018). Thus, it took only about three weeks from the time the Shire modified Amendment 50 as required by the Minister for Amendment 50 to be finally approved and gazetted.

145 Consequently, it is likely, in our view, that had the Shire modified Amendment 50 as required by the Minister by about 5 May 2016, Amendment 50 would have been finally approved by the Minister and gazetted prior to the public announcement by SITA that it would not proceed to implement the development approval. Had that occurred, while there would have been a substantial change to the planning framework since the development approval was granted, as Mr Skinner submits, that change would have been 'a positive change for this proposal' (ts 43, 28 August 2018), because the land would be subject to a Special Use zoning, not only contemplating the use of the land as a 'Waste Disposal Facility', but precluding the land from being used for any purpose other than that use and associated infrastructure (or caretaker's dwelling, single house or agriculture-extensive).

Is the development likely to receive approval now?

146 As the landfill development is now properly classified as 'Waste Disposal Facility' under LPS 2, which is a prohibited use in the General Agriculture zone, the landfill development would obviously not receive development approval now under the Scheme. The landfill development is now prohibited under LPS 2 on the site and cannot lawfully be approved. However, as indicated earlier, in our view, for the three reasons set out at [138]-[145] above, the weight to be given to this factor in the exercise of discretion in the circumstances of this case is reduced.

147 The respondent also submits that the landfill development is not likely to receive development approval now, on a merit assessment, because of environmental considerations and, in particular, as 'it can now no longer be demonstrated that … the application is not detrimental to the environment'.

148 As indicated earlier, the Tribunal granted development approval in the context of advice from DWER to SITA that it intended to grant a works approval, subject to conditions, for the proposed landfill ([32]) and having acknowledged that DWER is 'the principal regulator as regards

environmental matters' in Western Australia ([28]). Furthermore, the respondent submits (and we accept) that DWER's advice in the previous proceedings 'was a material consideration in the [JDAP] not putting [environmental matters] in issue in the [development application] proceedings'.

149 The respondent also submits that, in this case, unlike the development application proceedings, 'there is no in principle support from DWER to grant a works approval' and, therefore, 'a precondition to the acceptance as to the sites' [sic] environmental suitability *has* changed' (original emphasis).

150 The respondent also refers to statements by Ms Kelly Faulkner, Executive Director, Regulatory Services (Environment) at DWER in her letters to Mr Hickey dated 10 April 2018 and to Mr Skinner dated 3 July 2018 concerning the possibility that the Minister for Environment, Hon Stephen Dawson MLC, may direct the EPA to re-assess the landfill development proposal on the site under s 43(1) of the EP Act, 'due to new information on the proposed landfill becoming available since it was last considered by the EPA in 2013' (letter dated 10 April 2018). In the letter dated 10 April 2018 to Mr Hickey, Ms Faulkner states that DWER 'is aware' that the Minister for Environment 'has requested advice' from the EPA as to whether the Minister should direct the EPA to re-assess the proposal. In her letter dated 3 July 2018 to Mr Skinner, Ms Faulkner states that she is aware that the Minister for Environment is 'considering the advice provided by the [EPA] on the matter'.

151 Section 43(1) of the EP Act states as follows:

> The Minister may -
>
> (a) if the Authority considers that a proposal referred to it under section 38 should not be assessed by it under this Part; or
>
> (b) during or after the assessment by the Authority of a proposal referred to it under that section,
>
> and after consulting the Authority, direct the Authority to assess that proposal, or to assess or re-assess that proposal more fully or more publicly or both, as the case requires, in accordance with that direction, and the Authority shall comply with that direction.

152 As indicated earlier, the landfill development proposal on the site was referred to the EPA for assessment under s 38 of the EP Act before the development application was made. As also indicated earlier, the

EPA advised SITA on 8 July 2013 that, although the proposal 'raises a number of environmental issues', it had decided 'not to subject this proposal to the environmental impact assessment process and the subsequent setting of formal conditions by the Minister for Environment'. There is no evidence before the Tribunal as to what 'new information on the proposed landfill [has] becom[e] available since it was last considered by the EPA in 2013'. There is also no evidence before the Tribunal as to whether the Minister for Environment has made a decision to direct the EPA to re-assess the landfill development proposal on the site under s 43(1) of the EP Act.

153 For the following reasons, we do not accept the respondent's submission that the landfill development on the site is not likely to receive development approval now (assuming that it were still capable of development approval under LPS 2), because of environmental considerations.

154 As indicated earlier, the original works approval was granted by DWER shortly after development approval was granted by the Tribunal. The original works approval was valid until 20 March 2023 (had it not been surrendered and then revoked under s 59A of the EP Act). As we found earlier, the fresh works approval application is materially and substantially the same as the original works approval application. Although there are some minor differences between the proposal the subject of the fresh works approval application and the proposal the subject of the original works approval application, DWER considers that '[p]redominately the two applications are the same' and the respondent accepts that the differences 'are minor in nature'.

155 Furthermore, and significantly, Ms Du Preez gave unquestioned and uncontradicted evidence (which we accept) that DWER has raised only three issues as a result of the processing of the fresh works approval application (over a considerable period) and that each of those three issues have been satisfactorily addressed (see [59] above). There is no evidence before the Tribunal as to any change in the environmental characteristics or circumstances of the site or the locality between the hearing of the development application proceedings and now. Significantly, as Ms Du Preez also said in her unchallenged evidence (which we accept):

> At no time has the DWER raised any environmental concerns or flaws in relation to the [f]resh [w]orks [a]pproval [a]pplication or any of the supporting documents lodged with it, despite repeated requests to the DWER for an update regarding the status of the [f]resh [w]orks

> [a]pproval [a]pplication and, in particular, for the DWER to provide details of any issues with the [f]resh [w]orks [a]pproval [a]pplication in order to enable them to be addressed.
>
> …
>
> I am not aware of any environmental reasons why the DWER would not grant the [f]resh [w]orks [a]pproval [a]pplication.

156 It is certainly curious that DWER has not determined the fresh works approval application, or at least indicated its intention in that regard, for 16 months, given the following:

- DWER's 60-working-day target to determine such applications;
- DWER advised SITA that it intended to grant the original works approval application, subject to conditions, (only) four months and six days after that application was lodged with it;
- The fresh works approval application is materially and substantially the same as the original works approval application;
- The original works approval was granted until 20 March 2023;
- There is no evidence before the Tribunal as to any change in the environmental characteristics or circumstances of the site or the locality between the hearing of the development application proceedings and now; and
- Ms Du Preez's unchallenged evidence that:

> At no time has the DWER raised any environmental concerns or flaws in relation to the [f]resh [w]orks [a]pproval [a]pplication or any of the supporting documents lodged with it, despite repeated requests to the DWER for an update regarding the status of the [f]resh [w]orks [a]pproval [a]pplication and, in particular, for the DWER to provide details of any issues with the [f]resh [w]orks [a]pproval [a]pplication in order to enable them to be addressed.
>
> …

> I am not aware of any environmental reasons why the DWER would not grant the [f]resh [w]orks [a]pproval [a]pplication.

157 Although the respondent is correct in its submission that in this case, unlike the development application proceedings, 'there is no in-principle support from DWER to grant a works approval', having regard to matters referred to in the preceding paragraph, there is no reason on the evidence before the Tribunal as to why the fresh works approval would not be granted by DWER.

158 Furthermore, although it is correct that the development approval was granted by the Tribunal in the context of DWER's advice to SITA that it intended to grant the original works approval and having acknowledged that DWER is 'the principal regulator as regards environmental matters' in this State, there was considerable environmental evidence before the Tribunal on the basis of which the Tribunal found that '[the] environment in its broader sense … has comprehensively been addressed to the satisfaction of the experts' ([20]).

159 In relation to the indication in correspondence from DWER on 10 April 2018 (to Mr Hickey) and on 3 July 2018 (to Mr Skinner) that the Minister for Environment has requested and is considering advice from the EPA as to whether he should direct the EPA to re-assess the proposal in accordance with s 43 of the EP Act 'due to new information on the proposed landfill becoming available since it was last considered by the EPA in 2013', as indicated earlier, there is no evidence before the Tribunal as to what the 'new information on the proposed landfill' is or as to any change in the environmental characteristics or circumstances of the site or locality since the development application decision, and Ms Du Preez's unchallenged evidence is that DWER has not raised any environmental concerns or flaws in relation to the fresh works approval application or the supporting documents. Ms Du Preez also gave unchallenged evidence (which we accept) that it is 'particularly strange' that the EPA may be directed to re-assess the landfill development proposal where DWER has acknowledged that there are only minor differences between the fresh works approval application and the original works approval application. Ms Du Preez also gave the following unchallenged evidence (which we accept):

> I cannot think of anything further, from what the EPA considered in 2013 when it determined not to assess the [d]evelopment, that would result in the EPA changing its position.

160 Furthermore, and in any case, (assuming that the landfill development were capable of development approval now under LPS 2), even if development approval were granted now for the proposal, the development could not lawfully proceed without approval of the fresh works approval application by DWER and the grant of development approval would not preclude the Minister for Environment from referring the proposal for a further assessment by the EPA under s 43 of the EP Act.

161 In all of the circumstances, we do not accept the respondent's submission that the landfill development on the site is not likely to receive development approval now (assuming that it were still capable of development approval under LPS 2), because of environmental considerations.

Have the holders of the consent actively and relatively conscientiously pursued implementation of the development approval?

162 There have been effectively three 'holders of the consent' in this case, namely the two proponents, initially SITA and then AMI, and the landowner, Mr Chester. As the respondent submits, it is appropriate, when considering whether the holders of the consent have actively and relatively conscientiously pursued implementation of the development approval, 'to consider the diligence of all holders of the approval, rather than only the [a]pplicants in the Tribunal'.

163 It is common ground - and plainly the case - that SITA did not actively or conscientiously pursue implementation of the development approval. Indeed, quite to the contrary, having entered into a conditional agreement to purchase Perthwaste, and then having proceeded with that purchase and consequently having decided not to proceed to implement the development approval, SITA sought to preclude anyone else from carrying out the approved landfill development at the site. It sought to do so by exercising each of its two options to extend the operation of the exclusivity agreement to 30 June 2016 and then to 30 September 2016, applying to the CEO of DWER to surrender the original works approval under s 59A(2)(e) of the EP Act, and offering Mr Chester $200,000 to agree to a restraint on the development of a landfill facility at the site for the period that the development approval was valid.

164 However, the relevance of SITA's conduct to whether the holders of the consent have actively and relatively conscientiously pursued implementation of the development approval ceased on 30 September

2016, when its final option term expired. At that point in time, a little less than three-quarters of the two-year period for substantial commencement of the approved landfill development remained.

165 As indicated earlier, even prior to the expiry of SITA's second option period, and in anticipation of the expiry of the exclusivity agreement, Mr Chester engaged Elders to offer the land for sale. Mr Chester proceeded to do so, on reasonable terms, throughout the period from early August 2016 to early February 2017 (see [33]-[36] above).

166 The respondent submits that Mr Chester did not actively and relatively conscientiously pursue implementation of the development approval, because of the way he structured his business affairs with SITA and, in particular, because he did not, in the exclusivity agreement, require SITA to carry out the landfill development once all of the approvals were in place. The respondent also criticises Mr Chester for not having obtained appropriate legal or other advice in relation to the terms of the exclusivity agreement and subsequent agreements to extend its operation.

167 In our view, the respondent's criticism of Mr Chester is misplaced. The criticism relates to conduct prior to the grant of development approval, not conduct subsequent to the grant of development approval, when implementation of the development approval could have been pursued. In any case, Mr Chester's conduct in entering into legal agreements with SITA was entirely reasonable and appropriate for a person in his position, being a semi-retired farmer wishing to sell his property at a premium to a developer wishing to develop the property as a waste disposal facility. Furthermore, we find that Mr Chester actively and conscientiously pursued implementation of the development approval by, when he was legally able to do so, seeking to sell the land, with the benefit of the development approval, as a landfill site. As Ms Ide accepted in her closing submissions, Mr Chester 'wanted someone to develop his site for a landfill' (ts 29, 30 August 2018).

168 The respondent concedes that AMI made and 'progressed the application for the [fresh] works approval promptly, and absent that, it could not have substantially commenced the development'. This concession is properly made, having regard to the significant amount of work done by companies in the IWM group and, on their instruction, by Golder and Bowman, at considerable cost, in relation to the preparation, lodgement and prosecution of the fresh works approval

application (see [38]-[49], [51], [56]-[58] and [68] above). We find that AMI actively and conscientiously pursued implementation of the development approval by commissioning, making and pursuing approval of the fresh works approval application, the approval of which is necessary in order to be able to lawfully carry out the development, in consequence of s 52 of the EP Act. We also find that AMI actively and conscientiously pursued implementation of the development approval by RRS commissioning drawings from Bowman for the construction of the infrastructure stage of the landfill development, commissioning Golder to undertake work to prepare technical specifications and the bill of quantities for construction of landfill stages 1 and 2, seeking expressions of interest from civil works contractors for the construction of landfill stages 1 and 2 and the infrastructure stage, and assessing and processing expressions of interest, and obtaining quotes from GCL providers (see [50]-[51], [54]-[55], [60] and [63] above).

169 The respondent criticised AMI for not having pursued compliance with certain conditions of development approval imposed by the Tribunal, in particular conditions 1, 2 and 14. These conditions are as follows:

> 1) Prior to commencement of any filling activities, a Fire Management Plan shall be prepared and approved by the local government with advice from the Department of Fire and Emergency Services. The Fire Management Plan shall be implemented in full and maintained in implementation until closure and during rehabilitation of the facility.
>
> 2) A Revegetation Plan for the Thirteen Mile Brook within the boundary of the subject land shall be prepared to the satisfaction of the local government prior to commencement of landfill. The Revegetation Plan is to address the revegetation of disturbed areas of the brook with native species, and is to be implemented in full and maintained in implementation until completion of rehabilitation of the facility.
>
> …
>
> 14) Prior to the commencement of any filling activities, the operator of the facility is to convene a Community Reference Group (CRG) comprising representatives of the operator, the local government, and the community. The CRG should meet quarterly for the duration of the operation as a principal point of contact and dialogue between the community, the operator, and the local government, unless all parties do not require any further meetings.

170 However, as Mr Hickey said when cross-examined in relation to these conditions, they are expressed to only require compliance 'prior to commencement of any filling activities' or 'prior to commencement of landfill'. Furthermore, as Mr Hickey and Ms Du Preez said in evidence, certain actions have been taken by AMI, or by Golder on its behalf, towards compliance with these conditions. In particular, as Mr Hickey said in relation to the requirement in condition 1 for the preparation of a Fire Management Plan, AMI has reviewed the fire management plan that was prepared in the context of the development application and provided comments on it to DWER. In relation to condition 2, which requires a Revegetation Plan for the Thirteen Mile Brook within the boundary of the land, as Ms Du Preez said in evidence, the revegetation plan prepared as part of the development application process has been reviewed, 'but it was decided not to do anything at this point in time, as it wasn't necessary', although 'the longer-term plan is to come up with a phased approach and then implement it as and when is appropriate for planting different types of vegetation' (ts 138, 28 August 2018).

171 AMI's conduct in relation to compliance with the conditions of development approval was entirely appropriate. By their terms, the conditions in question only require compliance by the commencement of the landfill use of the site. Furthermore, in circumstances where the landfill development could not lawfully be commenced without an operative works approval under the EP Act, it was entirely reasonable and appropriate for AMI to pursue approval of the fresh works approval application, rather than seek to comply with the conditions of development approval.

172 We therefore find that both Mr Chester and AMI have actively and conscientiously pursued implementation of the development approval. They have done so, collectively, over a substantial period of time, approximately three-quarters of the substantial commencement period, which was the only part of the substantial commencement period when they were able to do so.

173 Furthermore, we accept Mr Hickey's evidence, which was not questioned or contradicted, that, once a works approval is granted, substantial commencement of the approved landfill development could be effected within a three to four month period (provided that it is during a dry part of the year) and that:

> AMI and Alkina remain committed to purchasing the Land and carrying out the Development, in the event that the [e]xtension [a]pplication and the [f]resh [w]orks [a]pproval [a]pplication are granted.

174 Finally, we note that the fresh works approval application was submitted to DWER on 21 July 2017 (following a pre-lodgement meeting with DWER officers on 14 July 2017), seven-and-a-half months before the expiry of the substantial commencement period imposed by condition 9 of the development approval. Had DWER determined the fresh works approval application within its target timeframe, or even in the period it took to indicate to the original proponent that it intended to grant the original works approval application, there would have been adequate time to substantially commence the approved landfill development over the period between December 2017 and 8 March 2018. As Mr Hickey said in evidence, the two shortlisted civil construction contractors for landfill stages 1 and 2 confirmed in December 2017 that, if they were contracted immediately, they would be able to complete landfill stage 1 works by 8 March 2018.

175 In the circumstances of this case, although SITA sought to preclude implementation of the development approval, Mr Chester and AMI have actively and conscientiously pursued implementation of the development approval over a substantial period of time. This is a factor in favour of granting the extension application.

Has the landowner sought to 'warehouse' the development approval?

176 It is common ground - and plainly the case - that Mr Chester has not sought to 'warehouse' the development approval. Rather, as the respondent concedes on the evidence, Mr Chester wants 'someone to develop his site for a landfill' (ts 29, 30 August 2018). Furthermore, AMI and Alkina are committed to purchasing the site and carrying out the landfill development, in the event that the extension application and the fresh works approval application are granted.

177 This is, therefore, not a factor tending against approval of the extension application in the circumstances of this case.

Was the two-year period for substantial commencement originally imposed adequate?

178 It is common ground - and we accept - that the two-year period for substantial commencement originally imposed was adequate *in the circumstances existing at the time when development approval was granted*. Although the original works approval had not yet been obtained at the time when development approval was granted by the Tribunal on 8 March 2016, as indicated earlier, DWER had advised SITA that it

intended to grant the original works approval, subject to conditions. Furthermore, we accept Mr Hickey's unquestioned evidence that, once a works approval is in place, substantial commencement of the approved landfill development could be effected within a period of three to four months (provided that it is during a dry part of the year).

179 However, we accept the applicants' submission that although the period for substantial commencement originally imposed was adequate in the circumstances existing at the time when the development approval was granted, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place.

180 The two-year period for substantial commencement originally imposed was adequate in the circumstances existing at the time when development approval was granted, because, although a works approval is required in order to lawfully carry out the approved landfill development, DWER had indicated to the original proponent that it intended to grant the original works approval application, subject to conditions, and because the evidence establishes that, once a works approval is in place, substantial commencement could be effected over a period of three to four months (in a dry part of the year). However, the circumstances changed significantly, through no fault of the applicants, because the original proponent of the landfill development decided not to proceed with the development (after it obtained development approval and works approval) and applied to surrender the works approval, which was then revoked by the CEO of DWER on that basis, and DWER has failed to determine the fresh works approval application, or even give the current proponent an indication of its position in relation to it, now for 16 months, even though its target is 60 days and it took (only) four months and six days to assess the original works approval application (which was materially and substantially the same as the fresh works approval application) and to advise the original proponent that is intended to grant a works approval. In consequence of the change in circumstances, which occurred through no fault of the applicants, the two-year period originally imposed was inadequate for substantial commencement to take place.

181 In the circumstances of this case, this is a factor in favour of granting the extension application.

Is the length of time sought for substantial commencement excessive?

182 The respondent contends that the effective total period of four years sought for substantial commencement of the landfill development is excessive, particularly given that the extension application was made in November 2017. The respondent submits that, if an extension is granted, it should be limited to no more than an additional year, that is, until 8 March 2019.

183 In our view, the total effective period of four years for substantial commencement sought by the applicants is not excessive in the circumstances of this case. As Mr Hickey explained in evidence, it was only in October 2017 that it became apparent to AMI and Alkina that 'DWER was not going to determine the [f]resh [w]orks [a]pproval [a]pplication in accordance with their target timeframes' and that, consequently, AMI's ability to carry out substantial commencement of the development prior to 8 March 2018 was 'put in jeopardy'.

184 Furthermore, although the evidence establishes that, once a works approval is in place, substantial commencement of the approved landfill development could be effected within three to four months (during a dry period of the year), given the substantial length of time DWER has taken in the assessment of the fresh works approval application to date and that it has advised the respondent that it has 'placed the assessment of the application on hold pending the outcome of planning matters' (that is, the extension application), and given that the extension application has been before the JDAP and then the Tribunal for about a year, the extension of the substantial commencement period to 8 March 2020 is not excessive.

185 Finally, given that DWER has placed assessment of the fresh works approval application on hold, an extension of the substantial commencement period to 8 March 2019 would be inadequate to enable substantial commencement to take place.

186 In the circumstances of this case, the total effective period sought for substantial commencement is not excessive and is not a factor against approval of the extension application.

Section 242 submissions

187 The Tribunal granted leave to the Shire, Ms Kay Davies and Ms Robyn Davies to make submissions under s 242 of the PD Act.

188 In its submission, the Shire recounts the history of Amendment 50 to LPS 2, which we have already discussed at length earlier in these reasons. The Shire submits that the decision of the Minister on 16 February 2018 to require Amendment 50 to be modified by deleting the Special Use SU8 zone, and thereby prohibit use of the site as a waste disposal facility, and the decision of the Minister made on 8 March 2018 to finally approve Amendment 50 in that form, 'had significant effects relevant to orderly and proper planning', including:

- the provisions of LPS 2 'came into alignment with the intent of the Council, which consistently since April 2014 had been that the use "Waste Disposal Facility" should be prohibited in the General Agriculture zone as well as other zones';

- the prohibition of Waste Disposal Facility in the General Agriculture zone 'became consistent with' the objectives and purposes of the General Agriculture zone under the Scheme; and

- it avoids 'the anomalous situation of a substantial commercial Waste Disposal Facility operating at Allawuna in the heart of a General Agriculture zone' when it was 'the clear intent of the Planning Minister since 24 March 2016 that the use "Waste Disposal Facility" should be an "X" use in all zones, including the General Agriculture zone'.

189 We acknowledged earlier in these reasons that it has been the clear intent of the Council since April 2014 that the use class 'Waste Disposal Facility' should be prohibited in the General Agriculture zone (including on the site), as well as in all other zones. However, in relation to the Council's second point, that the prohibition of Waste Disposal Facility use in the General Agriculture zone is consistent with the objectives and purposes of the General Agriculture zone, as indicated earlier, the Tribunal in the development application decision accepted the joint planning evidence of the planning witnesses called by the parties at [91(4)] that:

> The proposed landfill is substantially consistent with the relevant objectives of the General Agriculture zone of [LPS] 2 in that it will have no impact on the continuation or expansion of broad hectare agriculture, and the benefits are both significant and tangible and have the potential to be substantially delivered.

190 In relation to the Council's third point, that the prohibition of Waste Disposal Facility use by Amendment 50 as gazetted avoids 'the anomalous situation' referred to, that 'anomalous situation' was expressly provided for by modification 21 required by the Minister on 24 March 2016. Plainly, the Special Use SU8 zone was not inconsistent with 'the clear intent of the Planning Minister [on] 24 March 2016', because she specifically required modification of Amendment 50 to provide for 'Waste Disposal Facility' use on the site.

191 The Shire also submits that the extension application should not be approved, because the waste disposal facility 'will be a non-conforming use, with the normal non-conforming use entitlements and consequences'. In particular, it would be open to the operator of the landfill, or the owner of the land, to apply for development approval under cl 7.2 of LPS 2 to alter or extend the waste disposal facility, or to erect, alter or extend a building used in connection with the landfill. However, the fact that the landfill development approved by the Tribunal on 8 March 2016 has become a 'non-conforming use' under LPS 2 is a product of the prohibition of that use by Amendment 50. Furthermore, and in any case, there is no evidence that either Mr Chester or AMI proposes to do anything with the site of the development approval other than to carry out the approved landfill development.

192 The Shire also submits that 'it was SITA that undertook the very significant work and expense involved in obtaining the SAT approval of 8 March 2016' and that, therefore, 'the circumstances of the present case would not be favourable to the [a]pplicants' in relation to whether they have actively and conscientiously pursued implementation of the development approval. However, as we found earlier, Mr Chester and AMI have actively and conscientiously pursued the implementation of the development approval after SITA ceased its involvement in relation to the proposal. In particular, AMI and related companies in the IWM group, and their consultants, Golder and Bowman, have undertaken a significant amount of work, at considerable cost, in an effort to implement the development approval, by the fresh works approval application and by facilitating the construction of stages 1 and 2 of the landfill and the infrastructure necessary to support it, to the point of shortlisting two civil construction contractors which indicated that they were able to construct stage 1 in the period between December 2017 and 8 March 2018.

193 Ms Kay Davies has lived in the Shire for over 40 years. She provided a lengthy and impassioned submission to the Tribunal

against the extension of the substantial commencement period. Ms Davies submits that the landfill development is contrary to the objectives of the General Agriculture zone. However, as indicated earlier, the Tribunal found in the development application decision to the contrary. Ms Davies also submits that AMI 'has not provided any extra research into the area and the effects of landfill on the St Ronans environment', but rather it relies on 'old and outdated' and 'flawed and incomplete' research utilised by SITA for the purposes of obtaining the development approval. However, DWER granted the original works approval (on the basis of information and research submitted on behalf of SITA) until 20 March 2023, there is no evidence before the Tribunal of any change in the environmental characteristics or circumstances of the site or locality since the development approval was granted, and DWER has not raised any environmental concerns or flaws in relation to the fresh works approval application or any of the supporting documents lodged with it.

194 Ms Kay Davies also submits that AMI has failed to actively and conscientiously pursue implementation of the development approval, because it has failed to satisfy conditions of the development approval to date. In particular, Ms Davies submits that if AMI 'was serious about having a works approval granted I believe [condition 1] would have been met early in 2017'. She considers that the failure by AMI to satisfy conditions of the development approval demonstrates 'a lack of commitment to commence the landfill'. For reasons set out earlier, we do not accept this submission. As we found at [168] above, AMI has actively and conscientiously pursued implementation of the development approval. The conditions in question need only be complied with prior to the commencement of the landfilling operations on the site. As found at [171] above, it was entirely reasonable and appropriate for AMI to have pursued approval of the fresh works approval application, rather than having sought to satisfy the conditions of development approval. Without approval of the fresh works approval application, the landfill development cannot lawfully take place.

195 Ms Kay Davies also makes a legal submission that, by reason of s 29(5)(b) of the SAT Act, the two-year substantial commencement period in fact commenced on 31 August 2015 (when the JDAP made the most recent reviewable decision to refuse development approval upon reconsideration under s 31 of the SAT Act) and that, therefore, the substantial commencement period expired in September 2017. She submits that, because the extension application was only made on

24 November 2017, after the expiry of the substantial commencement period, it should not be granted.

196 This submissions is misconceived. Section 29(5)(b) of the SAT Act states as follows:

> The decision maker's decision as affirmed or varied by the Tribunal or a decision that the Tribunal substitutes for the decision maker's decision
>
> …
>
> (b) unless the enabling Act states otherwise or the Tribunal orders otherwise, is to be regarded as having effect, or having had effect, from the time when the decision reviewed would have, or would have had, effect.

197 Thus, the Tribunal's decision made on 8 March 2016, which substituted a decision to grant conditional development approval for the JDAP's decision to refuse to grant development approval, is to be regarded as having had effect from the time when the JDAP refused the amended development application on 31 August 2015. However, Condition 9 of the development approval states as follows:

> The development approved is to be substantially commenced *within two years after the date of the approval*, and the approval will lapse if the development is not substantially commenced before the expiration of that period.
>
> (emphasis added)

198 Although the Tribunal's decision made on 8 March 2016 is deemed to have had effect from 31 August 2015, 'the date of the approval' referred to in condition 9 was 8 March 2016.

199 Furthermore, and in any case, reg 17(2)(a) of the DAP Regs enables an application to amend a development approval so as to extend the period within which an approved development must be substantially commenced to be made 'during or after the period within which the development approved must be substantially commenced'.

200 In her submission, Ms Robyn Davies made some of the same points as Ms Kay Davies which we have addressed earlier. In addition, Ms Robyn Davies submits that 'the current proposal involves an entirely new application and new works approval application' and that, consequently, the applicants should make 'an entirely new application' for approval. However, as found earlier, the fresh works approval

application is materially and substantially the same as the original works approval application. Although there are some differences, they are minor. In the circumstances, it is open to the applicants to seek an extension of the substantial commencement period in order to implement the approved development. The works proposed in the fresh works approval application are broadly consistent with the approved development.

201 Ms Robyn Davies also submits that the overall period for substantial commencement now sought by the applicants 'is excessive and they have had plenty of time for opportunity to pursue this'. However, as we found earlier, the total effective period of four years for substantial commencement is not excessive in the circumstances of this case. In order to lawfully carry out the approved development, the proponent must have an operative works approval under the EP Act. Consequently, AMI could not substantially commence the development without approval of the fresh works approval application. Given that the original works approval was surrendered and revoked, a fresh application had to be made. The fresh works approval application was made on 21 July 2017, about five-and-a-half months after Mr Chester accepted AMI's offer to purchase the land by way of an Option Deed on 8 February 2017. As indicated earlier, under the Option Deed, AMI was required to 'use reasonable endeavours' to make and prosecute an application for a fresh works approval. In our view, AMI did use reasonable endeavours to make and prosecute the application for the fresh works approval and has acted promptly, both in the lodgement of the application and in prosecuting its approval.

202 Finally, we recognise that the submissions made by Ms Kay Davies and Ms Robyn Davies against approval of the extension application reflect widely held community views in the Shire against the landfill development proposal. As we indicated earlier, a significant number of objections (significant in both absolute and relative terms for a rural Shire) to the proposal have been made. We have reviewed each of the 471 submissions against the extension application and the petition. However, as the Responsible Authority Report dated 16 March 2018 to the JDAP said:

> Submissions received were in essence similar to those submitted on the original and amended application refused by the JDAP and approved by SAT, indicating that these concerns have not been addressed to satisfy community concerns, or perhaps have been renewed by the presence of a new applicant. As part of the SAT 'Reasons for Decision of the Tribunal' and associated orders, SAT determined that in regard to

> environmental matters, that the DER (now DWER) is the principle [sic] regulator in the State. As DWER had indicated it would give approval upon extensive conditions, it was considered appropriate by the SAT to approve and consideration was given to conditions of both approvals so as to avoid duplication. Submissions regarding environmental matters are noted, although have been determined by SAT as appropriate for consideration by DWER at the works approval application stage.

Exercise of discretion

203 Under s 27(2) of the SAT Act, the purpose of this review proceeding is 'to produce the correct and preferable decision at the time of the decision upon the review'. In exercising the discretion as to whether to approve, with or without conditions, or to refuse the extension application under reg 17(4) of the DAP Regs, the Tribunal must balance its findings in relation to each of the matters for consideration set out earlier in these reasons. As we have found, the planning framework has changed substantially since the development approval was granted, because, whereas at the time when development approval was granted 'landfill' was an innominate or unlisted use under LPS 2 (and, therefore, permissible if the Council (or the Tribunal on review) determined that the use is consistent with, or may be consistent with, the objectives and purposes of the General Agriculture zone), that use is now properly classified as 'waste disposal facility' which is prohibited on the site under the Scheme. Consequently, a waste disposal facility cannot now lawfully be approved on the site under the Scheme.

204 As we observed earlier, these findings are generally powerful considerations against approval of an extension application. However, as we have also determined, the weight to be given to these findings in the exercise of discretion as to whether to approve, with or without conditions, or to refuse the extension application is reduced in the circumstances of this case for three reasons, namely:

(1) The prohibition of the land use class 'Waste Disposal Facility' on the site only became a seriously-entertained planning proposal two months and three weeks after the extension application was lodged, four days after the DAP secretariat advised the applicants of the date on which the JDAP was scheduled to meet to determine the extension application, and the day after the DAP secretariat confirmed that date and published the agenda and Responsible Authority Report;

(2) Throughout the substantial commencement (other than the first two weeks and the last three weeks), and when the extension application was made and for two months and three weeks after that, the site was proposed in draft Amendment 50 to LPS 2 (as required to be modified by the Minister) to be zoned 'Special Use' for 'Waste Disposal Facility and associated infrastructure' (with a condition that the development is to be undertaken generally in accordance with the development application decision); and

(3) Extraordinarily, the Shire failed to comply with its statutory obligation to modify Amendment 50 in those terms, as required by the Minister, and, had it done so, it is likely that Amendment 50 would have been gazetted in those terms.

205 As we have also found, although SITA sought to preclude implementation of the development approval, Mr Chester and AMI have actively and conscientiously pursued implementation of the development approval by, in the case of Mr Chester, seeking to sell the site as a landfill site, and, in the case of AMI, by applying for and prosecuting the application for the fresh works approval and by taking steps to facilitate construction of landfill stages 1 and 2 and the infrastructure stage. Furthermore, as we have found, although the period for substantial commencement originally imposed was adequate in the circumstances existing at the time when the development approval was granted, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place. The changed circumstances in this case were highly unusual and involved the original proponent of the development deciding not to proceed with the development (after it obtained development approval and works approval) and applying to surrender the original works approval, which was then revoked by the CEO of DWER on that basis, and DWER's failure to determine the fresh works approval application, or even give the new proponent an indication of its position, now for 16 months since it was lodged, even though DWER's target is to determine such applications within 60 working days and DWER took (only) four months and six days to assess the original works approval application (which was materially and substantially the same as the fresh works approval application) and to advise the original proponent that it intended to grant the works approval. In our view, in

the circumstances of this case, these factors are powerful considerations in favour of granting the extension application.

206 In our view, on balance, in the exercise of discretion under reg 17(4) of the DAP Regs and in all the circumstances of this case, the considerations in favour of approval of the extension application (that Mr Chester and AMI have actively and conscientiously pursued implementation of the development approval and that, although the two-year period for substantial commencement originally imposed was adequate in the circumstances existing at the time when development approval was granted, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place) outweigh the considerations against approval of the extension application (that the planning framework has changed substantially since the development approval was granted and that the landfill development cannot now lawfully be approved on the site under LPS 2). This is particularly the case, because the weight to be given to the findings that the planning framework has changed substantially and that the development cannot now lawfully be approved under the Scheme is reduced for the reasons given earlier.

207 The correct and preferable decision at the time of the decision upon the review is to amend the development approval so as to extend the period within which the approved development must be substantially commenced to 8 March 2020.

Orders

208 For these reasons, the Tribunal makes the following orders:

1. The application for review is allowed.

2. Condition 9 of the development approval granted by the State Administrative Tribunal on 8 March 2016 is amended by deleting the words 'within two years after the date of the approval' and substituting 'by 8 March 2020'.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MF
ASSOCIATE

30 NOVEMBER 2018