SUBMISSION BY CMPA

TO VCEC

BY CONSTRUCTION MATERIALS PROCESSORS ASSOCIATION

(CMPA) –

In search of 'balanced regulation'

---

20 October 2010

Contents

1. Executive Summary

Over many years the CMPA has provided comments, analysis and submissions to various regulators in response to proposals for new or expanded controls. Most have gone unheeded. The effort and cost of this work by the Association therefore is questionable when taken in a direct sense. However, the relentless imposition of costs by regulators demands that the Association maintain the interest. The Association's members will not go down without a fight!

The VCEC Inquiry is yet another opportunity to spend effort and limited available funds. Will it be worthwhile?

The houses and gardens owned by Victorians are built from, and utilise material produced by, the extractive industry in the State. Spiralling regulatory demands with attendant costs together with the insidious sterilisation of land from extractive and other productive operations are destroying the industry as we know it. The costs of the houses and gardens of Victorians will increase substantially as required extractive material will have to be imported from nearby States or overseas.

VCEC has the opportunity to highlight to the Government the very simple point that without energetic people who are prepared to risk their own capital in wealth creating markets, all the good-willed regulators cannot be funded. Important as they might be, regulators do not add to the value of productive goods and services. The demonstration of ever increasing regulatory burden attests to their lack of understanding of this basic fact. It is only reasonable to expect that the outcome of their efforts would be *balanced regulation*.

The plea by the Association is for *balanced regulation*. Balance in the quest of increasing social and environmental needs with the need of industry to be able to confidently risk its capital and ingenuity in the pursuit of profit-making ventures in a fiercely competitive environment.

The Inquiry's Terms of Reference are very broad. There is an element of desperation in their scope that seems to call for new ideas or slogans or gimmicks to address regulatory creep and to make the State more competitive. The CMPA believes there are no new solutions. It has all been said before. The Government has regulatory gate-keeping arrangements in place although they must be improved. **Regulatory balance is the key and is the answer**. This is not rocket science but demands grit and determination in the face of newly created regulatory demands from eminent, articulate and often convincing people, generally funded from the public's purse. It is too easy for Governments to go with the populist tide of emotive and plausible arguments presented by these good-willed people. Government must be about facing off these challenges in the knowledge that *balanced regulation* will provide long term sustainability for all the State's communities.

This submission will respond to the Inquiry's Terms of Reference by referencing data provided in the Association's earlier comprehensive report, *An Unsustainable Future - The Prohibitive Costs of Securing Access to Construction Material Resources in Victoria*, which showed in considerable detail the costs of entry into the industry. The submission will give an update on the ten case studies used in that report and provide an analysis of the impact of the spiralling levels of rehabilitation bonds on the industry. These levels have been the cause of collapse of some extractive operations already and the cessation of several major new extractive developments – both of which have economic and regional impacts.

2. Summation of the essential points

The following is a summary of the essential points made in this submission.

Regulation that is unnecessarily burdensome, complex, redundant or duplicative.

- The Work Authority approval process is beset with duplication and complexity.
- A 'standard' Work Authority application takes just over 2 years to be approved, more contentious proposals involving VCAT appeals, almost 4 years, while a proposal that requires an EES can take 5.75 years.
- The costs of the approval process range from $10,000 to $1.15 million including for a planning permit approval, with higher costs ranging from $1.9 to $5.1million where an EES approval is required. These costs are expended with no guarantee the application will be successful.
- A 1992 Victorian Parliamentary Committee report estimated the cost of developing a Work Authority at about $95,000 (2009 dollars). Over 17 years these costs have increased by a factor of three.
- Costs of the appeal process range up to $408,502.

Regulation that should be reformed/reduced as a priority

- The extended time and costs associated with the approval process and the unknown additional costs of regulatory compliance make investment in the industry highly questionable.
- Over the ten years 2000-2009 proposals for new extractive operations declined by 38% and applications had declined by 74 per cent, despite increasing levels of demand.
- The decreasing level of proposals and applications is illustrative of a growing falling off of interest in investing in the industry **once the sovereign risk is understood**.
- The lack development will lead to a decrease in supply and competition in the market place. This will cause an increase in the cost of construction materials, leading to an increase in building and infrastructure costs and a subsequent decrease in housing affordability. A future material supply shortage could give rise to price increases of 35% and above.
- The very extensive land holdings of the extractive industry tied up in buffer zones are not allowed to be used as an offset for native vegetation.
- Estimated costs for undertaking a flora and fauna study directed by the DSE could reasonably expected to be $20,000 per hectare. This does not take into account the future obligation of habitat hectare offset sites, a further potential financial burden.
- The Government's intention to dedicate additional land as reserves to provide land for offsetting is only a band-aid solution to the problem of sterilisation of land by native vegetation legislation.
- The initial costs of developing a cultural heritage management plan (CHMP) were estimated by the DPI to be $4-8,000 for a desktop study. Two years later the average desktop study is $25,000 and a complex study costs $120,000. A recent similar "desktop" study involving a sand deposit cost $88,000 and is unfinished.
- There are examples in the industry of a CHMP and associated investigations costing in excess of $3 million.
- The unpredictable and inexact nature of the assessment process makes the purchase (or lease) of land for extractive operations a black hole for a proponent's risk capital that can quickly exhaust investment interest.

- Because a bank guarantee is regarded by a bank as a debt of the business it reduces the holder's future access to credit. With recent spiralling bond levels, it may bring about the early failure of the business.
- Relinquishment of a Work Authority without completion of full rehabilitation is rare and over the last 20 years only 5 operations had their bond 'called in'.
- Despite this outstanding performance, over the 10 years to 2009 the value of rehabilitation bonds in the extractive industry has increased by 184% while the overall inflation rate was 43%.
- Five recent bond reviews have seen increases from $480,000 to $2,900,000 (504%); $12,000 to $78,000 (550%); $95,000 to $1,200,000 (1163%); $12,000 to $187,000 (1458%); and $64,000 to $1,021,000 (1495%).
- The Government spent $18,000 of bond funds in rehabilitating the five sites over the last 20 years. However, in only the last 10 years there has been in aggregate $420.7 million tied up in bonds or on average $42.7 million pa.
- There appears no justification for the presently used bond system. The industry is being severely punished with this high-cost instrument despite having achieved an extraordinarily good rehabilitation record and leaving a very small environmental footprint.
- The review process is unpredictable and favours big extractive businesses.
- Bond levels are inconsistently applied.
- More targeted inspections would minimise any 'risk' to Government of un-rehabilitated sites.
- The payment of a bond should be payable when evidence of a risk is shown.

Improving institutionalised frameworks

- Increasing regulatory burdens and associated costs when not applied retrospectively assign competitive advantages to existing industry participants over new operations.
- Where mobile crushing plants involve similar risks to extractive operations they should bear the same regulatory burdens.
- Where councils have their own quarry and receive an application for a new extractive operation in their area, the council should refer the application to an independent body for assessment because of the conflict of interest.

Framework for achieving the largest net reduction in red tape

- For the extractive industry, the much-promoted 'streamlined' amalgamated legislation has in fact not minimised controls but has caused increased red tape.
- Community engagement is a normal commercial process. By making the process mandatory the proponent loses control of the process leaving its direction and purpose unclear and therefore open to abuse.
- By revoking the requirement to return a bond no later than 6 years following cancellation of the Work Authority the new legislation allows the DPI to hold the Work Authority holder to ransom to carry out further rehabilitation beyond what would be considered reasonable.
- These new requirements have the potential to add considerable costs in time, organisation and consulting fees in the development of the plan. The monitoring and reporting requirements are 'over-the-top' regulatory demands that add unnecessary costs for operators as well as regulators. Clearly, this was a case where regulatory proposals were not adequately assessed for their costs and benefits.

3. The Construction Material Processors Association (CMPA)

The CMPA is an industry association representing a broad spectrum of those involved in construction material processing businesses engaged in the extracting, processing or otherwise working in hard rock, gravel, sand, masonry, clay, lime, soil, gypsum or recycling; industry consultants, industry suppliers and any industry worker. The Association was formed more than 10 years ago in response to burgeoning Government demands on the industry.

This submission is in response to the Government's inquiry into improving the State's regulatory framework being conducted by the Victorian Competition and Efficiency Commission (VCEC). The submission draws on the cases studies, findings and recommendations of the Association's 2009 report, *An Unsustainable Future (AUF)* and is framed around VCEC's four primary terms of reference which seek consideration of:

- Specific areas of Victoria's regulation which are unnecessarily burdensome, complex, redundant or duplicative;
- Those areas of regulation that should be reformed or reduced as a matter of priority;
- The scope for improvements in institutional frameworks which influence regulatory reform in Victoria, which could include consideration for reform to regulatory agencies and legislative processes; and
- Framework for achieving the largest net reductions in Victoria's 'red tape' burden on business.

4. Regulation that is unnecessarily burdensome, complex, redundant or duplicative

4.1 The unnecessarily burdensome, complex and duplicative Work Authority process

The *Mineral Resources (Sustainable Development) Amendment* Act 2010 (MRSDA Act) requires that a person cannot undertake extractive operations without an approved Work Authority. In essence the Work Authority; while it contains its own regulatory requirements including a Work Plan endorsed by the DPI, rehabilitation plan and payment of a rehabilitation bond; can only be approved once associated planning requirements are complied with. Planning requirements consist of a Planning Permit and in some instances an Environmental Effects Statement (EES).

Applying for a Work Authority is a three phase sequential process (see Figure 1):

- **Pre-application process:** This is an information gathering, data collection and analysis stage. At the successful completion of this stage the application will be endorsed by the DPI. This involves 5 separate steps including the preparation of a draft Work Plan, including a rehabilitation plan.
- **Planning process**: This involves making application under the *Planning and Environment Act* 1987 (P&E Act) for a Planning Permit to the council. This has 6 separate steps including a compulsory consultation process.
- **Final application process**: This is the culmination of the first two stages and involves formal application to DPI of the Work Plan and rehabilitation plan. This involves only 2 steps and is usually completed relatively quickly.

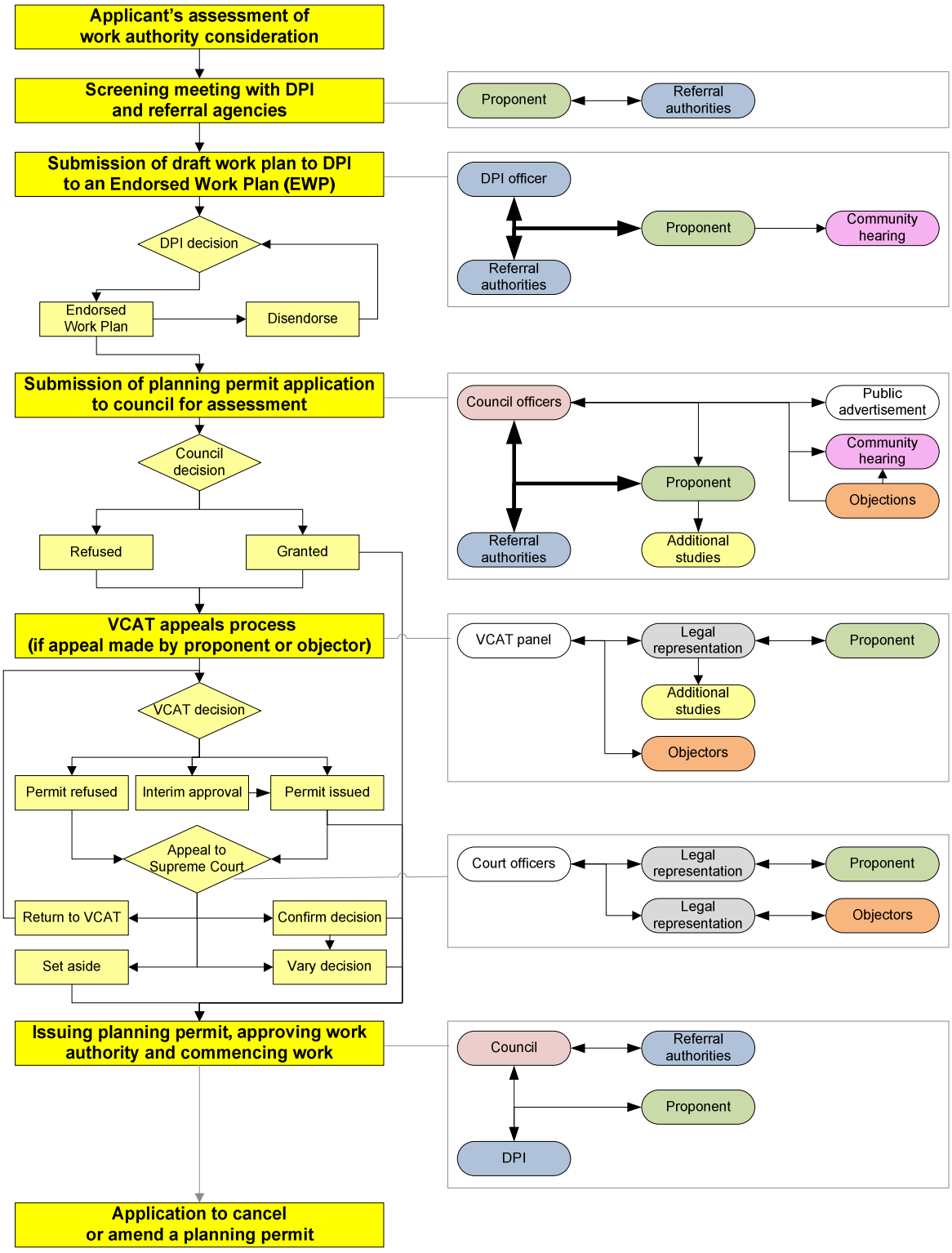
The MRSDA Act allows a Work Authority holder to apply for a variation of an approved Work Plan and Work Authority.

Appendix 3 graphically illustrates the duplication and complexity in the process. **The number of people involved in one application for approval to work the process can be as many as 117!** This section discusses the specific problems associated with this highly complex process.

Essential point:

The Work Authority approvals process is beset with duplication and complexity.

Figure 1 – Work Authority Approval Process



4.2 Time and cost of the Work Authority approvals process

4.2.1 Timeframes associated with the approvals process

The *An Unsustainable Future* (*AUF*) analysis revealed that to obtain approval (when it occurs) takes the following time:

- For 'standard' proposals, an average of just over 2 years (25 months) from the initial screening (on site) meeting to the granting of a Work Authority.
- For more contentious proposals involving VCAT appeals, an average of almost 4 years (46 months) is involved.
- A proposal that requires an Environmental Effects Statement (EES) can be expected to take on average 5.75 years.

Typically, set up, establishment and bringing an extractive operation to a position where it commences to make a reasonable return takes at least 5 years. This means that in view of the lengthy delays in obtaining an approval to proceed an investor cannot expect to commence achieving any return on **investment before 7 -10 years** depending on the complexity of the operation. The lengthy delays represent lost earnings for the proponent and lost economic development benefits for the community. Moreover, all the costs associated with the application and appeal process are expended without any assurance of the application being approved.

4.2.2 Costs of the approvals process

Table 1 shows application costs for each of the ten case studies used in the *AUF* report, the estimated tonnage in the first five years of proposed or actual production and the total costs of the application process. From this a financial impact cost is derived as a compliance cost rate per tonne and this is shown as a percentage of the unit rate for the material.

From the Table the costs of the approval process range from $10,000 to $1.15 million including for a planning permit approval, with higher costs ranging from $1.9 to $5.1 million where an EES approval is required. Additional costs are incurred by the applicant in the form of provision of a *rehabilitation bond* as well. This will be discussed in detail in the following section of this submission.

These costs spread over the first 5 years of production vary within a band $0.38-$1.79 per tonne or 3-12% of the unit rate for hard rock extraction and $0.20-$0.62 per tonne or 2-5% of the unit rate for sand and sand/soil extraction. This data in fact underestimates the current situation under the amalgamated MRSDA Act and the exponential costs associated with cultural heritage and native vegetation legislation.

Again, and of particular concern is that these costs are expended with no guarantee the application will be successful! All the costs may be completely lost if the application is rejected at the last hurdle, say by council or VCAT.

In contrast to these present costs, a 1992 Victorian Parliamentary Committee report estimated the cost of developing a Work Authority at about $95,000 (2009 dollars). **This suggests the costs of regulatory compliance over 17 years have increased by a factor of three!**

Table 1 Tonnage and costs of Work Authority process

Case Study	Material	First Five Year Tonnage	Total Application Costs	Financial Impact ($/t)	As a % of Unit Rate
1	Hard rock	5,000,000	$5,137,033	$1.03	7%
2*	Hard rock	700,000	$1,251,337	$1.79	12%
3	Sand	1,500,000	$669,895	$0.45	4%
4*	Hard rock	6,000,000	$1,876,134	$0.31	2%
5	Hard rock	450,000	$445,550	$0.99	7%
6	Hard rock	900,000	$871,800	$0.97	7%
7	Sand/soil	50,000	$10,200	$0.20	2%
8	Hard rock	1,000,000	$1,118,325	$1.12	8%
9*	Sand	150,000	$93,296	$0.62	5%
10*	Sand	800,000	$56,156	$0.07	1%

* Ongoing project, Work Authority yet to be granted, so costs and time are minimum values

4.2.3 Costs of appeals to VCAT

The *Planning and Environment Act 1987* provides that an applicant for a permit that is refused may appeal to VCAT. Usually a hearing date of an appeal for review under the Act will be set three to four months after the appeal is lodged. Extractive industry proposals are generally inspected by the Tribunal.

At an appeal an applicant can typically be legally represented and call as many as seven witnesses. Depending on the nature of the matter often hearings are conducted over several days and the expert witnesses are required for each sitting.

From a review of the transcripts of the hearings of four case studies used in the *AUF* study that were subject to the VCAT system each was represented by two legal counsel and 7-8 expert witnesses. Associated **costs of the appeal process for these case studies range up to $408,502**.

4.2.4 Update of the 10 case studies

As indicated, the *Unsustainable Future* report featured ten case studies of either new applications for a Work Authority or an application to vary an existing Work Authority. Some of the case studies were in progress while others had been finalised. Of the case studies in progress at the time of the report, that is, in August 2009, none have since been finalised. An update on each of the case studies that involved incomplete applications is contained in Appendix 2.

4.2.5 Overlapping and duplication in the Work Authority approval process

The area most often cited as a cause of additional regulatory costs to the industry is the duplication involved in satisfying the requirements of the referral authorities. Referral authorities include Aboriginal Affairs Victoria (AAV), Department of Sustainability and Environment (DSE), and local councils. Duplication occurs when the referral agency seeks information that is, strictly only a variation of existing information provided. However, this often involves re-working and re-badging the information.

The impact of this duplication adds considerable costs, including the costs of lost time and additional studies and surveys. Moreover, to worsen this already unreasonable situation sometimes a referral authority escalates its information requirement each time it is consulted. This can even occur within one organisation. The DPI is a case in point where a local DPI inspector provides advice to a prospective or existing Work Authority holder about information requirements. This advice is acted upon by the proponent only to be changed later when the draft Work Plan is submitted.

Overlap and duplication occurs often with the requirements of the DPI through the Work Authority process and local councils through the planning process. For example, councils often refer a Work Plan submitted as part of the planning permit process to referral bodies that have already been consulted as part of DPI's process. Surprisingly, a referral body may require additional information on the same proposal when their advice is sought by the council. This frustrates the process and unreasonably adds to the costs of compliance.

The process would be substantially improved if referral bodies were not slavishly consulted where it is apparent that they had already endorsed the proposal. This should occur where the referral body has seen and endorsed the proposal within a recent period, say 12 months and there had been no material change in the proposal. The DPI should be the coordinator of the applications up to endorsement of the work plan.

Essential points

A 'standard' Work Authority application takes just over 2 years to be approved, more contentious proposals involving VCAT appeals, take an average almost 4 years, while a proposal that requires an EES can be expected to take on average $5^{3/4}$ years.

The costs of the approval process range from $10,000 to $1.15 million including for a planning permit approval, with higher costs ranging from $1.9 to $5.1 million where an EES approval is required.

These costs are expended with no guarantee the application will be successful! All the costs may be completely lost if the application is rejected at the last hurdle by council or VCAT.

A 1992 a Victorian Parliamentary Committee report estimated the cost of developing a Work Authority at about $95,000 (2009 $'s). This suggests the costs of regulatory compliance over 17 years have increased by a factor of three!

Costs of the appeal process for the case studies used in the AUF study range up to $408,502.

4.3 Proposals for change and improvement

The *AUF* report made the following recommendations for change:

1. Introduce a refined Work Authority/Work Plan approval process with the following component parts:
   (a) A Code of Practice applicable to all quarries (A Code of Practice has been issued for small quarries);
   (b) Simplified work plans;
   (c) A Work Authority containing generic conditions, rehabilitation bond, code of practice and work plan provided to council with planning permit application;
   (d) Planning Permit application submitted to council at the same time as DPI grants Work Authority number;
   (e) Planning Permit conditions refer to only offsite impacts outside of the Work Authority boundary.
2. The Work Authority/Work Plan approval process should be centrally managed by the DPI. The DPI should be empowered to manage planning referral obligations to referral agencies to achieve an endorsed Work Plan, eliminating duplication of referrals. Council approval process should focus on offsite impacts with these aspects subsequently incorporated into the Work Plan.
3. DPI and local government should streamline the Work Authority/Work Plan approvals that recognise DPI's regulatory reach.
4. The administration of the MRSDA Act should aim at achieving performance-based outcomes that lower the costs and reduce the time or approvals for proponents.

5. Regulation that should be reformed/reduced as a priority

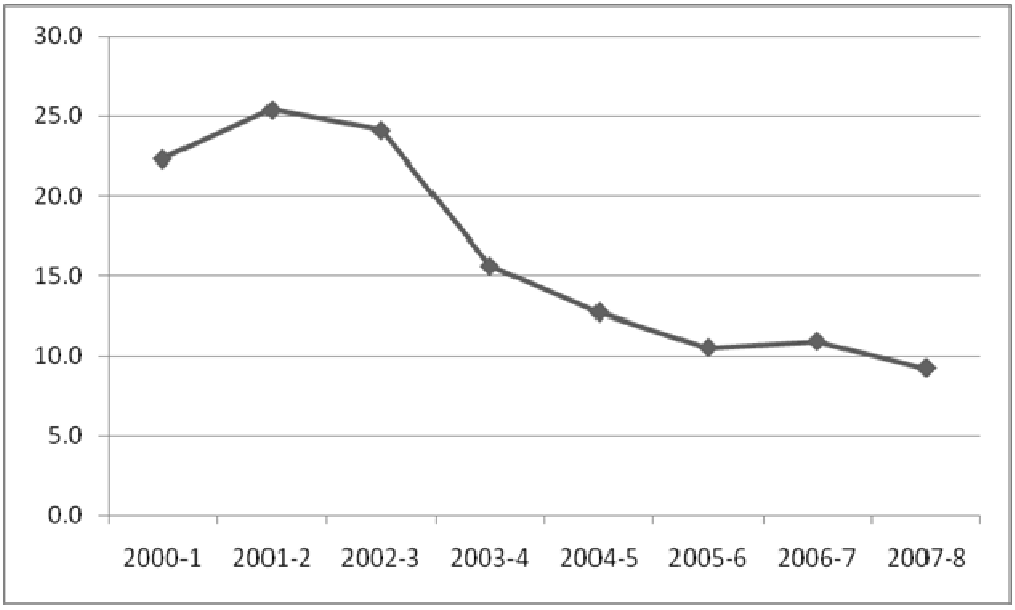
5.1 The anti-competitive nature of the Work Authority process

The extended time in making a financial return, the costs and risks associated with the application process and the unknown additional costs of regulatory compliance make investment in the industry highly questionable. This is supported by data contained in *AUF* which analysed Work Authority activity[1] data for the period 2000-1 to 2007-8. This revealed that:

- Proposals had declined by 38% but had remained relatively stable since 2002-3;
- Applications had declined steadily and by 74%;
- The number of Work Authorities increased by 22% but most of this increase occurred in a single year (2001-2 to 2002-3) when shallow extraction was included in the approval process;
- Total Work Authority activity increased by 2%;
- Applications as a proportion of proposals for each of the report years showed a decline in the number of proposals that reach the application stage from 2000-01 when it was 22% to 9 per cent in 2007-8. This occurred despite increasing levels of demand as illustrated by increasing production levels.

Figure 2 shows the percentage of proposals that reach the application stage. That is, it shows the drop off of interest once the full level of regulatory hurdles is known.

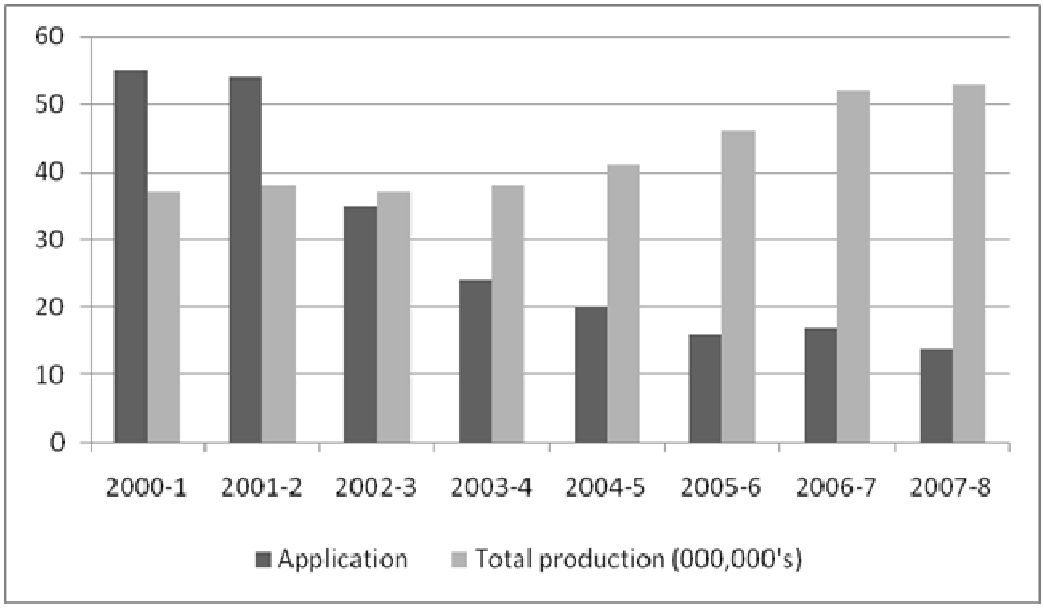
Figure 2 Percentage of proposals that reach application stage 2000-1 to 2007-8



This deterioration of investment interest occurred despite demand rising. There can be little doubt that the decreasing level of proposals that go on to the application stage is illustrative of a growing falling off of interest in investing in the industry **once the sovereign risk is understood**. Figure 3 shows applications relative to total production for the period 2001-2008.

[1] 'Activity' refers to the summation of all proposals, applications and Work Authorities that have been granted.

Figure 3 Applications relative to total production (millions) 2000-1 to 2007-8



At a time of increasing demand when new extractive operations would be expected to be developed, very few significant operations were in fact approved.

Of the 275 new Work Authorities granted between 2000-01 and 2007-08, only 18 (7%) were for significant operations (those with rehabilitation bond greater than $50,000).

Impact of entry constrictions

The lack of new extractive operations being developed or existing operations expanding, will lead to a decrease in supply and competition in the market place. In turn this will cause an increase in the cost of construction materials, leading to an increase in building and infrastructure costs and a subsequent decrease in housing affordability. With 10 tonne/person/year of construction material used within Victoria, a future material supply shortage could be expected to give rise to price increases of 35% and above. Such a price rise is a reasonable estimate given that there are existing examples of quarries without nearby competition that have ex-bin prices in excess of 30% above the industry average.

A 35% increase is equivalent to an additional $4.55/person/year (ex gate) or an extra $240 million/year cost for Victoria. Such a significant price increase has never occurred in the industry.

Essential points

Over the ten years to 2009 proposals for new extractive operations declined by 38% and applications declined by 74 per cent, despite increasing levels of demand.

The extended time, costs and uncertainty associated with the application process (the **sovereign risk)** and the unknown additional costs of regulatory compliance make investment in the industry highly questionable.

The lack development will lead to a decrease in supply and competition in the market place. This will cause an increase in the cost of construction materials, leading to an increase in building and infrastructure costs and a subsequent decrease in housing affordability. A future material supply shortage could give rise to price increases of 35% and above.

5.2 The anti-development nature of native vegetation legislation

5.2.1 The Native Vegetation Framework

Victoria's Native Vegetation Management – A Framework for Action 'establishes the strategic direction for the protection, enhancement and revegetation of native vegetation across the State'. Under Planning Scheme Amendment 52.17, the extractive industry was initially exempted from the application of the Framework; however, following establishment of a Memorandum of Understanding (MOU) in 2007 between the Department of Primary Industries (DPI) and Department of Sustainability and Environment (DSE) it has become part of the Work Authority and Work Plan approvals process under the EID Act.

5.2.2 Issues for the Industry with native vegetation

Offsets

The Framework adopts a principle that there should be a net gain in the extent/quality of native vegetation throughout the State, whereby there is:

> *A reversal, across the whole landscape, of the long-term decline in the extent and quality of native vegetation, leading to a Net Gain* [2]

One of the measures adopted is the concept of offsetting.

The experience of the extractive industry is that, increasingly, regulators require Work Authority holders and proponents to purchase land (referred to as an offset site) to mitigate perceived impacts (i.e. to offset "losses'' of "native vegetation").

Potential offset sites require a habitat hectare assessment to determine if they can generate the required offsets. The potential gains allocated to areas of retained native vegetation can be calculated using the DSE gain calculator. As a rule of thumb for compensating like with like, for every one hectare of native vegetation removed 5 hectares of land must be provided and secured in perpetuity.

The very extensive land holdings of the extractive industry tied up in buffer zones are not allowed to be used as an offset for native vegetation.

The CMPA has not attempted to quantify these costs specifically but it is important to note that in addition to those costs already identified, additional costs such as the capital costs of land purchased to cover offsets and the cost of conducting the study on the proposed offset site also are increasingly being incurred in complying with new and existing regulation.

[2] http://www.dse.vic.gov.au/DSE/nrenlwm.nsf/LinkView/99ADB544789FE7D4CA2571270014671E49A37B2E66E4FD5E4A256DEA00250A3B

In its recent report on native vegetation the VCEC estimated the average cost of purchasing 'habitat hectares' is $100,000 per habitat hectare. This cost applies irrespective of the land value. For example, the CMPA is aware that in one case a parcel of land was purchased for sand extraction at a very low price ($5,000) and the operator was subsequently forced to purchase land as an offset and this was valued at $100,000.

The methodology in calculating offsets is unreasonable. In its review VCEC noted:

> *Overwhelmingly, however, participants considered that the rules for calculating offsets impose excessive administrative and compliance costs, and time delays on Victorian businesses*[3].

Subsequently VCEC recommended[4]:

> *That the Victorian Government, to increase flexibility in the rules for determining offsets, simplify the rules by:*
>
> - *enabling offsets to be provided in any bio-region*
> - *limiting the* capacity *for councils to impose additional conditions on offsets when the Department of Sustainability and Environment has already specified the offsets to be provided*
> - *increasing flexibility for landholders by permitting offsets on public land, subject to appropriate transparency arrangements*
> - *clarifying the offset rules relating to the rehabilitation of mines and quarries.*

Cost of Compliance

It must be understood that there are examples in the AUF where the costs of developing flora and fauna studies can be in excess of $60,000 at that point in time. Presently, estimated costs for undertaking a flora and fauna study directed by the DSE could reasonably expected to be $20,000 per hectare. This does not take into account the future obligation of habitat hectare offset sites, a further potential financial burden.

Essential points

The very extensive land holdings of the extractive industry tied up in buffer zones are not allowed to be used as an offset for native vegetation.

Estimated costs for undertaking a flora and fauna study directed by the DSE could reasonably expected to be $20,000 per hectare. This does not take into account the future obligation of habitat hectare offset sites, a further potential financial burden.

The Government's intention to dedicate additional land as reserves to provide land for offsetting is only a band-aid solution to the problem of sterilisation of land by native vegetation legislation.

[3] Victorian Competition and Efficiency Commission, A Sustainable Future for Victoria, Getting Environmental Regulation Right, Draft Final Report, March 2009, pages 148-155. http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/EnvironmentInquiryDraftReport-FullReportVer2/$File/Environment%20Inquiry%20Draft%20Report%20-%20Full%20Report%20Ver2.pdf

[4] Ibid page 165.

5.2.3 Proposals for change

The AUF report

The AUF report made the following recommendations:

1. Mandatory timeframes for certain milestone decisions should be introduced and enforced, including Ministerial decisions.
2. The State Government should implement the recommendations of VCEC's environmental regulation inquiry concerning the mining and extractive industries (assuming they are as per the draft recommendations).
3. Referral agencies must be accountable. Regulators must be able to publicly defend their decisions.
4. The role of the independent 'Extractive Industry Warden' should be empowered to expedite decisions and ensure time frames in the Work Authority/Work Plan approval process are met. Such a role should be at the request of the proponent.

Apply an 'environmental' value to extractive material

The value of the underground resource must be taken into account as an offset when considering the value of native vegetation. This will bring about some balance in regulating native vegetation and offset some of the spiralling costs. This is not a novel idea - there are precedents for extractive resources having a value already. For example, the regulated $0.85/tonne royalty for Crown land set in the Mineral Resources Development (Extractive Industries) Regulations. Also, VicRoads compensates an extractive operator when it acquires the operator's land for road purposes.

Sterilisation of land

By sterilising land from extractive operations the search for resources extends further from the point of demand. That is, supplies need to be sought from remote areas of the State. These often require the construction of access roads which, along with increased transportation, impacts on the carbon footprint of the industry, and, in turn, the State. Moreover, most required resources are not present in remote areas of Victoria and access to those areas with deposits is often restricted.

The CMPA considers there is a strong case therefore for extractive industries to again be exempted from the native vegetation controls.

Land ownership and compensation

The regulatory demands of the native vegetation legislation impose risks for landowners. Ownership no longer assigns rights to the landowner but shares these rights with potential claimants under the native vegetation legislation. This can only diminish the value of the land. Victoria's land tenure legislation must transparently acknowledge this share of rights.

The corresponding devaluation of land will have ramifications for the whole community, not least of which will be for the Government.

Once devaluation occurs, any costs associated with native vegetation including access to the land, should be compensable by the landowner from the beneficiary of the legislation. Compensation should be set at the highest value use of the land.

Need a strategic and balanced approach

A more strategically balanced approach is required to the regulation of extractive operations in native vegetation. Extensive new infrastructure projects are planned ($6bn) by the Government yet it considers the requirements for extractive product for these projects can come from existing extractive operations that currently serve the greater Melbourne area. However, half the quarries in the Urban Growth Initiative (UGI) are nearing the end of their productive lives. There will be little opportunity for them to extend their operations in adjacent areas because of development and other regulatory controls and this will force these operations to close and, where possible, re-locate in outer areas. The UGI has involved compulsory purchase of land in west Victoria for offsets for residential development in greater Melbourne but this does not apply to extractive operations. Why not?

While housing development can occur virtually anywhere in the State extractive operations can only occur where rock or sand is available. How is it logical that the Government plans massive infrastructure projects while sterilising material for the associated construction phases? There is clearly a disjoint in the conceptual phase (and associated public announcements) and the hard-nosed project management outcome phase. A strategically planned approach would have dealt with the constrictions on supply of essential raw material for these infrastructure projects.

Moreover, the footprint of extractive operations is hardly recognisable when compared with housing development. Funding regulatory costs for the development industry can be spread over the many allotment purchasers whereas all the costs for the extractive industry apply to the Work Authority holder only.

5.3 The unpredictable and costly nature of the cultural heritage legislation

5.3.1 The new legislative environment

Another area where regulatory creep has developed is in cultural heritage. Although regulatory controls have existed for many years additional, more stringent State legislation, the *Aboriginal Heritage Act* 2006 (AH Act) came into effect on 28 May 2007.

The AH Act changed requirements for permits or consents, and management of Aboriginal cultural heritage. Under the Act, the State has sole responsibility for its Aboriginal cultural heritage, whereas previously it was a combination of State and Federal legislation. The ultimate responsibility for issuing permission to disturb Aboriginal archaeological sites is the Minister for Aboriginal Affairs. Controls are no longer based on a Memorandum of Understanding and/or an archaeological report, but now through a 'Cultural Heritage Management Plan' (CHMP) required by the AH Act.

5.3.2 Issues for the Industry with cultural heritage

Costs of compliance

The new requirements are far more demanding, time-consuming to obtain, and the results more difficult to predict. Case studies in the AUF illustrated that the new requirements add considerable costs for land use proponents where costs of compliance for the same site altered from $5,600 under the former legislation to $40,000 under the AH Act within only two years! The initial costs of Aboriginal Affairs Victoria (AAV) investigations were estimated by the DPI in 2007 to be $4-8,000 for a desktop study. Now a desktop study is $25,000 and a complex study costs $120,000!

Moreover, a recent proposal was terminated by the proponent because of the costs of compliance and uncertain outcome. Another similar "desktop" study involving a sand deposit has cost $88,000 and is unfinished.

It cannot be known how these regulatory controls will develop in the near future. There are other examples in the extractive industry of a CHMP and associated investigations costing in excess of $3 million. Did the impact assessment for the new legislation anticipate these massive costs impositions? The Association is unaware of any published assessment of anticipated costs. What does this say about the consultative approach adopted at the time? Perhaps a more fundamental question is: was <u>any</u> cost assessment made by the Government for the legislation?

The Case Study 1 highlights the potential this uncertain constriction on land use has for rural development. Western Australia has a policy that no investigation of cultural heritage is required where findings are 'scattered'.

Unpredictability

Another primary issue of concern for the industry in administration of the cultural heritage legislation is the complete lack of predictability. Assessment of cultural heritage is not scientifically based and can be simply based on the 'feelings' of members of the local aboriginal community. This unpredictability and inexact nature of the assessment process makes the purchase (or lease) of land for extractive operations a black hole for a proponents risk capital that can quickly exhaust investment interest.

Essential points

The initial costs of AAV investigations were estimated by the DPI to be $4-8,000 for a desktop study. Now a desktop study is $25,000 and a complex study costs $120,000. A recent similar "desktop" study involving a sand deposit has cost $88,000 and is unfinished.

There are examples in the industry of a CHMP and associated investigations costing in excess of $3 million.

The unpredictable and inexact nature of the assessment process makes the purchase (or lease) of land for extractive operations a black hole for a proponents risk capital that can quickly exhaust investment interest.

5.3.3 Proposals for change

Land ownership and compensation

The cultural heritage legislation applies similar infringements on land ownership as native vegetation discussed earlier. That is, the regulatory demands of the cultural heritage legislation impose significant risks for landowners and ownership no longer assigns rights to the landowner but shares these rights with potential claimants under the legislation.

The Association infers no disrespect to the recognition of the country's heritage, and in particular aboriginal heritage. A balanced regulatory approach to regulation of this important aspect of the State's culture will see respect for all parties, the heritage of the country's forebears, alongside respect for current and most importantly, future generations. It is not a sustainable argument that bestowing respect for earlier generations at the expense of future generations is a balanced regulatory approach.

In view of the impact of the cultural heritage requirements it is proposed that compensation clauses also apply in the cultural heritage legislation where a landowner needs to spend money complying with the legislation merely to be able to conduct business for which the land was purchased. Compensation should be set at the highest value use of the land.

Case Study 1 - Regulatory imposts = no growth, no development and no new jobs

This involved an established company that wanted to extend its existing Work Authority operations in rural Victoria to another site. Product from the proposed site was planned to provide extractive material. The site has a long-term productive life and offers material largely unavailable elsewhere in Victoria.

Development of the site has the potential for significant economic benefits for the State including in regional employment, State domestic product, and in allied industries. Moreover, replacement of existing imports would involve environmental benefits in terms of a reduction in existing costs in transportation and in associated environmental emissions. Clearly, development of the site would provide a tangible contribution to the State's *regional development plan*.

Despite investing substantial funds in development and shoring up the proposal (the sovereign risk) the firm has now decided to abandon the project due to the continuing frustrations and blow-out costs of complying with regulatory demands and in particular cultural heritage requirements and the preparation of a cultural heritage management plan (CHMP).

The CHMP requires an initial 'walk-over' survey of the site to assess potential aboriginal relics. The results of the survey of the proposed site were unclear causing escalation of the compliance regime to involve a complete dig over a large area of the site (scraped to 50cm in depth), requisite in-fill, and a mapping and planning process. This was conducted by various consulting and other contractors for the proponent at a cost in excess of $150,000. The additional work resulted in a find of some flintstones. It is understood these were from the manufacture of an axe. That is, the flintstones were waste material from the axe-making process not the axe itself. An axe would normally be regarded as a cultural 'relic' or artefact. Flintstones of this sort are often very small and can be transported vast distances from their initial place by water run-off or even transported by living creatures.

The administering body, Aboriginal Affairs Victoria (AAV), has now advised the company to undertake further studies. Even if this is undertaken there is still no assurance that the Plan would be accepted.

During the course of undertaking these required compliance actions that have extended over several years, the company pursued other regulatory requirements associated with extending the Work Authority site with the Department of Primary Industries (DPI), Department of Sustainability and Environment (DSE) and the local council all with associated costs.

The complete lack of any assurance that the CHMP will be accepted or whether it will require a greater level of investment, combined with the uncertainties of the other regulatory processes has bought the company to the decision to not proceed further.

5.4 The unjustified and costly rehabilitation bond system

5.4.1 Costs and charges

Rehabilitation bonds are payable as part of the Work Authority approval process. The bond provides an assessed level of funds to carry out any incomplete rehabilitation of the site when a Work Authority holder relinquishes responsibility for the site. That is, the bond system theoretically acts as insurance for the Government against the costs of rehabilitating failed sites.

The DPI requires that the rehabilitation bond be in the form of a bank guarantee. Bank guarantees provide surety to the Government that should an authority holder fail to meet the rehabilitation requirements funds will be available for the Government to undertake the rehabilitation required for that particular site. A bank typically requires security for a bank guarantee from either cash or property. For most small extractive operations this requires the family home to be offered as security and/or the holder or applicant to enter into a loan arrangement with the bank (often a term deposit) to cover the amount of the required security.

Where land is offered as security, typically the bank will only provide surety for approximately 70% of the land value. That is, for a bond of $100,000 the land value will need to be $140,000. For holders who operate on leased land a mortgage over the lease can provide security, however this requires the landlord's agreement. In addition the bank will charge an annual service fee of between 2-6% depending on the level of exposure involved.

A bank guarantee is referred to by banks as a 'contingent liability' and the level of the bond is regarded as a debt of the business. This reduces the holder's future access to credit and can be a catalyst for business failure. Ironically, the bank guarantee along with the annual costs of servicing it might have the effect of restricting funds of the business being devoted to fulfilling the rehabilitation plan and may bring about the early demise of the business.

Appendix 4 provides details about the bond system.

5.4.2 Unreasonable response to good performance

Over the last ten years 110 Work Authorities have completed operations and the full bond has been returned to the holder. Relinquishment of a Work Authority without completion of full rehabilitation is rare and over the last 20 years only 5 operations were completed that involved calling on the bond. Over this period only $18,000 was called on for rehabilitation purposes.

Notwithstanding this outstanding industry performance there has been a recent surge in the level of bonds following review.

Industry-wide bond adjustment effects

Table 2 shows the dollar value of rehabilitation bonds for the extractive industry in Victoria over the last 10 years (2000-2009). The raw data was accessed from the DPI website. The data shows over the period the value of rehabilitation bonds debt in the extractive industry has increased by 184%. The overall inflation rate for this period was 43%. The Table also aggregates the value of bonds over the period and adjusts this to account for bank charges and interest that would have been earned.

The question to be asked is: *How does the increase in the overall bond level reflect the Government's increased liability over this period when over this period less than $18,000 has been called up for rehabilitation purposes? How was this change in risk determined?*

Table 2 - Rehabilitation bonds in extractive industries (2000-2009) ($ millions)

Year	Total bond $	Change (%) from previous year	Aggregated Total	Total Interest Foregone ($)*
Jun-00	22.8	-	22.8	1.9
Jun-01	31.4	27.4	54.2	2.6
Jun-02	34.5	9.0	65.9	2.8
Jun-03	37.5	8.0	103.4	3.0
Jun-04	39.2	4.3	142.6	3.2
Jun-05	47.5	17.5	190.1	3.8
Jun-06	49.4	3.8	239.5	4.0
Jun-07	57.5	14.1	297.0	4.6
Jun-08	58.8	2.2	355.8	4.8
Jun-09	64.9	9.4	420.7	5.2

The MRSDA Act (s 83) allows the Minister to rehabilitate land that has been left in an un-rehabilitated state. It does not bestow an obligation on the Minister to rehabilitate land. Therefore, as at June 2009 a total of $443.5 million had been locked up over the previous 10 years in case the Minister decided the Government should require some rehabilitation to be undertaken! Moreover, interest forgone by Work Authority holders on bank guaranteed bond money totalled $35.4 million over the ten years when only $18,000 was spent in rehabilitation! This is a completely unjustifiable waste of financial resources that benefits no one except the banking system.

Individual bond adjustments

Re-assessment of a bond level is undertaken by a DPI Mines Inspector and the italicised text in Box 1 repeats verbatim a letter recently received by a Work Authority holder. The effect on the Work Authority holder can only be imagined! It means the holder will need to obtain an additional bank guarantee for $2.4 million above the existing bond level of $480,000! The operator would have arranged his/her financial position around existing commitments and debt levels.

The impact of this re-assessed bond level is likely to be catastrophic for this small business. If the bank would give a further guarantee, and there are additional costs and charges associated with a re-calculated bank guarantee, it is unlikely that it would allow any increased debt level because the bond level is considered by the bank to be a debt owed by the business. This therefore severely limits the business' credit ability and is likely to therefore curtail any plans for further development of the site and may even limit funding of the rehabilitation plan. It is, however, more likely that the bank would not give the guarantee in this particular case and this would bring about the demise of the business.

Box 1 - Letter from a Mines Inspector to a Work Authority holder, August 2010

I am writing to advise you of a proposed change to the bond for the above operation.
The current bond is $480,000 and an increase of $2,411,000 is proposed. The total revised bond would be $2,900,000.
This assessment results from a review of the operation.
In accordance with section 80 of the Mineral Resources (Sustainable Development) Act 1990, before serving notice of a requirement for a further rehabilitation bond the Department must consult with the holder of the Work Authority.
Should you wish to comment on the bond assessment or discuss the matter further please contact me within 28 days of the date of this letter.

Signed by the Mines Inspector

The above illustration is not an isolated case. A recent survey conducted by the Association of eighteen (18) Work Authority holders shows massive increases for several of the holders. Notable cases include increases of bond from $95,000 to $1,200,000, $12,000 to $187,000, $64,000 to $1,021,000. That is, the level of bonds for these five cases has risen by 1163%, 1458% and 1495% respectively. **Some of these will have a devastating impact for the business!**

Table 3 provides the detail of this survey. It also shows that almost half of the adjustments remain un-finalised and are subject to 'negotiation'. That is, whilst a common formula and Bond Calculator is used there remains room for adjustment. While at one level this is positive it adds further uncertainty and illustrates that the system is far from precise.

Table 3 - Survey of Work Authority holders with recent bond reviews

Site	Bond last reviewed	Bond level	Initial bond level proposed by the DPI after review	Variation	Final bond level figure for which a bank guarantee was required
1	Apr-10	$480,000	$2,900,000	504%	Still negotiating
2	2005	$40,000	$116,000	190%	Still negotiating
3	2005	$12,000	$78,000	550%	Still negotiating
4	Feb-04	$12,000	$187,000	1458%	Still negotiating
5	Apr-10	$8,500	$42,500	400%	Still negotiating
6	Apr-06	$233,000	$592,000	154%	Still negotiating
7	2009	$160,000	$262,000	64%	$236,000

Site	Bond last reviewed	Bond level	Initial bond level proposed by the DPI after review	Variation	Final bond level figure for which a bank guarantee was required
8	2009	$77,000	$131,972	71%	$130,000
9	2009	$114,000	$162,623	43%	$114,000
10	2010	$95,000	$1,200,000	1163%	Still negotiating
11	Aug-10	$120,000	$170,000	42%	$170,000
12	2010	$80,000	$380,000	375%	$320,000
13	Jul-07	$84,000	$233,000	177%	$123,000
14	Sep-10	$140,000	$810,000	479%	Still negotiating
15	2006	$50,000	$80,000	60%	$80,000
16	Nov-01	$50,000	$134,000	168%	$134,000
17	Apr-07	$25,000	$39,500	58%	$39,500
18	2005	$64,000	$1,021,000	1495%	Still negotiating

5.4.3 Issues for the industry

Rationale for bonds

Box 2 provides a discussion of the rationale for bonds. It shows there is very little risk for the Government in extractive operations being left un-rehabilitated. The Government spent $18,000 of bond funds in rehabilitating five sites over the last 20 years. However, from Table 2 in only the last 10 years there has been in aggregate $462.7 million tied up in bonds or on average $46.2 million pa.

Unpredictability

Notwithstanding the methodology and the Bond Calculator, the level of a bond following a review is unable to be predicted. It is like a lottery. It depends on the inspector involved. Evidence of this is seen in Table 3 where seven of the 18 bond assessments are still being negotiated. Because of this unpredictability, some Work Authority holders challenge a bond assessment. While this costs money in consultant's/legal fees it can be successful. For example, one initial assessment was $233,000 and following appeal it was set at $123,000. However, most small operators do not have the resources to challenge the assessments. This illustrates how the system is inequitable.

Unequal bond levels

Information from DPI's database shows that one operation that extracts 1.5-2m tonnes pa pays a $2.4m bond while a smaller operation of 0.4m tonnes pa pays $2.9m. While it is recognised that the bond system is based on the level of risk not production, clearly a small operation will have proportionately lower levels of risks than a larger producing operation. What then is the reason for this large discrepancy? It again points to an unequal system.

Box 2 - Rationale for the bond system –

No Government risk but massive burdens for industry - Punishment without a crime

Requiring a Work Authority holder to pay a rehabilitation bond provides an insurance cover for the Government in case the extractive industry site which is the subject of a Work Authority is left un-rehabilitated. This occurs extremely rarely but might occur where the Work Authority holder has quit the property because either the site is no longer viable, has been exhausted or the material being extracted is no longer in demand. About half Work Authority's are on leased land (either Crown or private land) and a Work Authority holder may quit because the lease has not been renewed or there may be some dispute with the leaseor.

Irrespective of the reason for the site being abandoned, where the land is being leased it can be expected that any rehabilitation responsibility would pass to the owner of the land. After all, the landowner has agreed to the activity; has been rewarded for the arrangement by being paid rent and royalty payments; and understands the regulatory requirements for rehabilitation. That is, the landowner understands the risks.

The DPI therefore would have cause to pursue the landowner to rehabilitate the land. The local council may also have powers to pursue the landowner to rehabilitate the land under its own jurisdictional powers. These matters may be escalated to litigation where a Court may issue a direction.

If the Government considers immediate action is required, it could have the site rehabilitated at its own expense and pursue the landowner for the costs. The value of the land if sold may indemnify against these costs. **What then is the risk for the Government?**

In the case where the abandoned land is owned by the Work Authority holder, it can be expected that the only risk for the Government would occur where the site has been exhausted of its extractive material. That is, when there would be no interest to operate the site by another party. Given the very limited number of new Work Authority's being issued in recent years and the continuing 'sterilisation' of available land as discussed earlier, it can be confidently anticipated that all vacated extractive sites would be closely examined for potential continued operation by other extractive operators or like activities.

Also, in the metropolitan area there is a high demand for 'air space'. Demand for solid inert space is valued at $7-$8/cu metre while for household waste it is approximately $10/cu metre. That is, an un-rehabilitated extractive site of 1million cu metres can be expected to have value of between $7-10 million.

Notwithstanding this, theoretically where a site is exhausted of its material and is abandoned without being rehabilitated the DPI would have cause to pursue the landowner for any rehabilitation. As before, the local council may also have cause to pursue and these matters may be finalised in a Court.

While Court action is not a preferred regulatory response, in the circumstances where there are negligible instances where sites are left in an un-rehabilitated state (5 in 20 years!) the value of the bond system is very questionable. The level of many bonds and their attendant debilitating costs for the operator is clearly unreasonable given the no or very limited risks for the Government.

In addition, the Work Authority holder has an obligation for ongoing rehabilitation of the site as indicated and the DPI inspector should check for this progress. This process itself provides insurance for the Government.

Conclusion

There appears no justification for the presently used bond system. The industry is being severely punished with this high-cost instrument despite having achieved an extraordinarily good rehabilitation record and leaving a very small environmental footprint.

More targeted inspections

The MRSDA Act gives inspectors wide-ranging powers over the industry to ensure compliance with Work Authority conditions including the rehabilitation plan. An inspector has power of entry, power to inspect and examine documents, require documents, seizure, take a photograph, take sample, issue a search warrant (authorised by a magistrate), require name and address and give a direction.

As the DPI encourages 'progressive rehabilitation' it is incumbent on the inspector to inspect ongoing compliance by the operator with the approved rehabilitation plan. The Act (s95D) requires the inspector to provide a report of any inspection of a site to the occupier. However, these reports do not cover progressive rehabilitation and assessment of the 'terminal face'.

The escalation in the level of bonds therefore reflects on:

- The inadequate supervision by DPI of 'progressive rehabilitation'; and
- A complete lack of understanding of the adequacy of the bond levels relative to the risk.

Were the reporting requirements on the inspector to include a detailed assessment of progressive rehabilitation including the level of expenditure incurred on rehabilitation over the period since the previous inspection (this shows the commitment by the holder), a better assessment of rehabilitation liability and therefore overall bond level should be made.

Payment of bonds

Payment of the bond is required as part of the approvals process. Until the site is working, why is it necessary to pay the bond and commence paying the associated bank charges up front? Many Work Authority's are created before production is required, some do not start working for 5 years. This is done for a variety of reasons including planning for future demands and planning for existing supplies to be exhausted. Given its unpredictability, proceeding through the Work Authority and planning approvals processes is a sound business practice. The payment of the bond should be left to when evidence of a risk is shown and the Work Authority commences operation.

Essential points

A bank guarantee is referred to by banks as a 'contingent liability' and the level of the bond is regarded as a debt by the business. This reduces the holder's future access to credit.

Relinquishment of a Work Authority without completion of full rehabilitation is rare and over the last 20 years only 5 operations had their bond 'called in'.

Over the 10 years (2000-2009) the value of rehabilitation bonds debt in the extractive industry has increased by 184% while the overall inflation rate was 43%.

Five recent bond reviews have seen increases from $480,000 to $2,900,000 (504%); $12,000 to $78,000 (550%); $95,000 to $1,200,000 (1163%); $12,000 to $187,000 (1458%); and $64,000 to $1,021,000 (1495%).

The Government spent $18,000 of bond funds in rehabilitating five sites over the last 20 years. However, in only the last 10 years there has been in aggregate $420.7 million tied up in bonds or on average $42.7 million pa. There is no benefit to the State in tying up these funds.

There appears no justification for the presently used bond system. The industry is being severely punished with this high-cost instrument despite having achieved an extraordinarily good rehabilitation record and leaving a very small environmental footprint.

The review process is unpredictable and favours big extractive businesses.

Bond levels are inconsistently applied.

More targeted inspections would minimise any 'risk' to Government of un-rehabilitated sites.

The payment of a bond should be left to when evidence of a risk is shown .

5.4.4 Proposed changes

The Association concludes that:

- There is little justification for the bond system as it operates at present;
- There is little justification for the level of bond increases sustained recently;
- There is little faith in the formula used in setting bonds including the Bond Calculator; and
- There is a need to make landowners jointly accountable with the Work Authority holder not the government.

On this basis the Association proposes that the whole bond system be reviewed by an independent and impartial body with inputs from both DPI and the industry. The review should make a pragmatic assessment of the obligations and risks for Government in needing to fund un-rehabilitated extractive sites. If risks are uncovered, the review should suggest least cost options to effectively deal with them. In examining the options the review should consider the landowners responsibilities in keeping the land in a safe and stable form. Even within the current Work Authority process there should be a simple method to recognise and clearly state the landowner's ongoing responsibility in this area.

Funding for this independent review should come from both the Government and the extractive industry.

5.5 Anti-competitive nature of MRSDA Act

5.5.1 Issues for the industry

Existing Work Authority operations are not so affected by the recent increased regulation and attendant costs because the new legislation was not retrospective. As has been discussed the additional costs in complying with the new legislative controls add directly to the unit cost of production. This makes new Work Authority holders and those who have had their Work Authorities varied uncompetitive in unit price compared to existing Work Authority holders. This is a concern particularly for this industry because the operations are typically over many years, some as long as 50 years. As the Work Authority ages, the comparative advantage it has over new operations increases.

A second concern in relation to competition is with mobile processing plants that provide crushing services. Because it is not a primary activity for the site these operations are not captured by the scope of the MRSDA Act. The work of these mobile plants however represents approximately 15% of total production for the industry. As these plants do not bear the compliance costs of 'other' extractive operations their unit rate of production is lower and therefore far more competitive.

In some instances, Councils consider applications for a planning permit for an extractive operation when the council itself has a quarry in the area. That is, the proposed extractive operation would be in direct competition with the Council's quarry. In these cases where there is a clear conflict of interest for the regulating authority, it should refer the application to an independent body for assessment.

Essential points

Increasing regulatory burdens and associated costs when not applied retrospectively assign competitive advantages to existing industry participants over new operations.

Where mobile crushing plants involve similar risks to extractive operations they should bear the same regulatory burdens.

Where councils have their own quarry and receive an application for a new extractive operation in their area, the council should refer the application to an independent body for assessment because of the conflict of interest.

6. Improving institutionalised frameworks

6.1 Duplication of roles of DPI and local councils

Councils appear to be unsure of their role in the Work Authority process and because of this uncertainty take an overly conservative approach. This is often evidenced when councils refer work plans back to the referral authorities in order to comply with the Planning & Environment Act. This is inconsistent with the Act (s 45) which states –

> *(1) A responsible authority must give a copy of an application to every person or body that the planning scheme specifies as a referral authority for applications of that kind without delay unless the applicant satisfies the responsible authority that the referral authority has –*
>
> *(a) Considered the proposal for which the application is made within the past three months; and*
>
> *(b) Stated in writing that it does not object to the granting of the permit for the proposal.*

One case study shows that a council when approving a planning permit attached the same conditions as were applied by the council for the last planning permit associated with a Work Authority it had considered. This was for a completely different site (at Mt Buller ski resort) which involved a more complex application involving significantly greater social and environmental implications. This showed a complete lack of understanding of the subject matter and no conception of the unreasonable impacts associated with the conditions.

Proposals contained in Section 4.3 of this submission, if implemented, will substantially improve and streamline the Work Authority process and assist councils in fulfilling their responsibilities.

6.2 Inconsistent regulatory interpretation and advice

Inconsistent interpretation and advice by regulators occurs not only where legislation changes and the regulators are not updated with the new requirements but also when different bodies and inspectors within the same organisation consider the same matter. This leads to an inconsistent provision of information to the industry which adds to compliance confusion and the total costs of compliance.

A consistent lack of consistency is a common theme when dealing with the variety of agencies across the State.

Authoritative advice is also required from the EES Technical Reference Group (TRG). The TRG is a key instrument in ensuring early and authoritative advice is provided to the proponent. Senior members of government agencies, supported by technical experts, should attend TRG meetings to ensure consistent, appropriate advice is actually provided. This should avoid last minute policy reversals by government agencies and continually shifting objectives that could potentially significantly impact on the project.

6.3 Agencies must apply Government regional development policies

Consistent application of Government policies will help industry. Case Study 2 highlights intransigence and obstructionism by regulators, which has been highlighted previously in this submission. It also illustrates how local regulators (EPA and council) operate in opposition to Government policy, namely regional development. **The Case Study is a classic example of the anti-business development attitude so evident amongst State Government and local government regulators.**

Case Study 2 - Regional development policy – ignored by regional regulators

This involved an established company in regional Victoria and its plans for expansion of its plant. The proposal involved substantial investment and would significantly increase local employment and add considerably to the local economy.
The proposed site is adjacent (140m) to a residential precinct. The company engaged consultants and contractors to ensure that the proposed development would not impact on the adjacent residences and the incumbent's utility or quality of life. Part of this involved sound-proofing the proposed buildings and developing engineering solutions that minimise sound, vibration and odour.

In applying to the EPA for a Works Approval the company was told by the local EPA representative that as EPA policy required a 500m buffer zone between such a facility and any residential development, the best solution was to re-locate the whole facility! That is, shut down the existing manufacturing operation and re-locate to another area that might be accepting of the facility and the proposed expansion.

Development of the proposal to that point had taken 2 years and the company had invested considerable sums in establishing the project.

In addition to pursuing the EPA Works Approval the company also approached the local council as a precursor to submitting an application for a planning permit. The company was told by the Council that it intended to change the zoning of the land from heavy industrial to residential. For this decision the council had consulted (only) the land development industry but not existing land users including the company. This blocking of industrial development by the council is in direct contrast to the State Government's regional development strategy.

Notwithstanding these negative responses, the company is pursuing the preparation of a draft Works Approval application and a planning permit. It hopes that the quality, detail and rigour of the applications and accompanying studies will be sufficiently convincing to obtain a balanced and positive outcome. Development of the site would bring increased employment and economic wealth for the local area and would be consistent with the State's regional development plan.

Essential point

Councils appear to be unsure of their role in the Work Authority process and because of this uncertainty take an overly conservative approach.

6.4 Proposals for change

The *AUF* Paper made the following recommendations:

- Regulatory bodies should make decisions based on evidence according to the triple bottom line of social-environmental-economic values without undue political pressure.
- DPI should focus on its role to improve approval outcomes;
- No new regulations should be introduced unless and until appropriate resources are devoted to administer the regulation effectively;
- Objectors in the VCAT process should provide substantiation of their claims;
- VCAT and Ministerial decisions should be based on relevant public information
- VCAT should provide a low cost mechanism for all parties;
- VCAT should take account of all the material already provided by proponents and relevant pre-existing studies rather than requiring consultants to present at the hearing; and
- An appeal mechanism for proponents should be introduced in the EES process.

7. Framework for achieving the largest net reduction in red tape

7.1 Introduction

The amalgamation of the former Extractive Industries Development Act with the Minerals Resources Development Act was heralded by the Government for its significant achievements in reducing red tape in licensing and regulatory administration. For the extractive industry, however, the much-promoted new legislation has in fact not minimised controls but has caused increased red tape. The Government needs to be honest with the people of Victoria. Before a new 'framework' is developed to get more 'red tape bang for the buck' a commitment must be given by Government to achieve red tape reductions – dishonest 'spin' in communicating with the community must be jettisoned.

This section deals with several areas of the new legislation where additional red tape has occurred. The Association submitted concerns about these matters to the DPI during the course of the development of the legislation. Notwithstanding this, the changes proceeded.

7.2 Consultative engagement process

Under the amalgamated Act, a community engagement process now needs to be included in an extractive industry's work plan in accordance with the new Mineral Resources (Sustainable Development) (Extractive Industries) Regulations 2010. This has been introduced to follow requirements that apply in the minerals sector.

The requirement for community engagement plans applies to all new work authorities and to any work plan variation application that may affect the relevant community. The Regulations set out in detail the requirements for a community engagement plan. It must:

a. identify any community likely to be affected by extractive industry activities authorised by the extractive industry Work Authority; and

b. include proposals, in relation to extractive industry activities authorised by the extractive industry Work Authority, for –
   - identifying community attitudes and expectations; and
   - providing information to the community; and
   - receiving feedback from the community; and
   - analysing community feedback and considering community concerns or expectations; and

c. include a proposal for registering, documenting and responding to complaints and other communications from members of the community in relation to extractive industry activities authorised by the extractive industry Work Authority.

Depending on the proposal a community engagement process will involve either a forum or workshop, set up of a community consultation committee, public meetings or information session. Establishing a committee is often done for larger projects and will typically involve engaging an independent chair rather than the proponent taking this role. DPI chaired several early committees but no longer carries out this role. For credibility an independent chair will be a recognised person and will be paid on an hourly basis.

Community engagement is a normal commercial process. By making the process mandatory the proponent loses control of the process leaving its direction and purpose unclear and therefore open to abuse. That is, without a driver the process is left to the devices of those with ulterior motives and can easily be hijacked by vexatious interests. This has very serious ramifications for the proponent as it can either delay or bring the proposal to a halt. The CMPA is aware of a recent case where a proposal was completely undermined by vexatious interests resulting in termination of the proposed multi-million dollar investment in rural Victoria. The Association is aware of similar problems in another State where an engagement process is mandatory.

These new requirements have the potential to add considerable costs in time, organisation and consulting fees in the development of the plan. The monitoring and reporting requirements are 'over-the-top' regulatory demands that add unnecessary costs for operators as well as regulators. Clearly, this was a case where regulatory proposals were not adequately assessed for their costs and benefits.

Notwithstanding that the requirements add unwarranted cost impositions for the industry they also duplicate the community engagement process required as part of the planning permit process.

7.3 Other additional burdens

Under the new legislation the DPI can require a proponent to engage an independent auditor to verify the bond. This is a new requirement with no known instances to date of the DPI requesting an independent auditor.

The new legislation also revoked the requirement to return a bond no later than 6 years following cancellation of the Work Authority. This gave some assurance to the Work Authority holder that the bond would be returned within a specified timeframe. However, the new legislation provides that a bond will only be returned once there is no potential for any long term damage. This is very open-ended and can include a wide range of potentialities including erosion control, slope stabilisation, drainage management, and protection of slimes dams. This may have the effect that negotiation for return of a bond may take many years and the holder will be held to ransom to carry out further rehabilitation beyond what would be considered reasonable.

Essential points

For the extractive industry, the much-promoted new legislation has in fact not minimised controls but has caused increased red tape.

Community engagement is a normal commercial process. By making the process mandatory the proponent loses control of the process leaving its direction and purpose unclear and therefore open to abuse.

By revoking the requirement to return a bond no later than 6 years following cancellation of the Work Authority the new legislation allows the DPI to hold the Work Authority holder to ransom to carry out further rehabilitation beyond what would be considered reasonable.

These new requirements have the potential to add considerable costs in time, organisation and consulting fees in the development of the plan. The monitoring and reporting requirements are 'over-the-top' regulatory demands that add unnecessary costs for operators as well as regulators. Clearly, this was a case where regulatory proposals were not adequately assessed for their costs and benefits.

7.4 Proposed changes

The *AUF* Paper made the following recommendations:

- Regulatory creep should not be accepted as the status quo and new regulations must only be introduced once an existing and equivalent cost requirement is eliminated
- A cost benefit analysis of new legislation should be conducted 5 years after implementation. If the legislation does not provide a net benefit, changes must be made to ensure this is achieved

Appendix 1 - Correlation of VCEC's Terms of Reference with issues raised and recommendations of *An Unsustainable Future*

VCEC Terms of Reference	Issues raised in An Unsustainable Future	Proposed actions in An Unsustainable Future
1. Regulation that is unnecessarily burdensome, complex, redundant or duplicative	Duplication and escalating information requirements	1. Introduce a refined Work Authority/Work Plan approval process with the following aspects: (f) A Code of Practice applicable to all quarries; (g) Simplified work plans; (h) A Work Authority containing generic conditions, rehabilitation bond, code of practice and work plan provided to council with planning permit application; (i) Planning Permit application submitted to council at the same time as DPI grants Work Authority number; (j) Planning Permit conditions refer to only offsite impacts outside of the Work Authority boundary. 2. The Work Authority/Work Plan approval process should be centrally managed by the DPI. The DPI should be empowered to manage planning referral obligations to referral agencies to achieve an endorsed Work Plan, eliminating duplication of referrals. Council approval process should focus on offsite impacts with these aspects subsequently incorporated into the Work Plan 3. DPI and local government should streamline the Work Authority/Work Plan approvals that recognise DPI's regulatory reach 4. The administration of the MRSDA Act should aim at achieving performance-based outcomes that lower the costs and reduce the time or approvals for proponents. 5. The role of the independent 'Extractive Industry Warden' should be empowered to expedite decisions and ensure time frames in the Work Authority/Work Plan approval process are met. Such a role should be at the request of the proponent.

2.	**Regulation that should be reformed or reduced as a matter of priority**	Increasing regulatory requirements Unreasonable time in processing applications Unacceptable costs of approvals process.	6. Mandatory timeframes for certain milestone decisions should be introduced and enforced, including Ministerial decisions. 7. The State Government should implement the recommendations of VCEC's environmental regulation inquiry concerning the mining and extractive industries (assuming they are as per the draft recommendations). 8. Referral agencies must be accountable. Regulators must be able to publicly defend their decisions.
3.	**Improvements in institutional framework**	Duplication of roles of DPI and of local councils Inconsistent regulatory interpretation and advice Unstructured and inequitable approach to community consultation Need for appeal system for EES decisions Unnecessarily complex and one-sided VCAT system	9. Regulatory bodies should make decisions based on evidence according to the triple bottom line of social-environmental-economic values without undue political pressure. 10. DPI should focus on its role to improve approval outcomes 11. No new regulations should be introduced unless and until appropriate resources are devoted to administer the regulation effectively 12. Objectors in the VCAT process should provide substantiation of their claims 13. VCAT and Ministerial decisions should be based on relevant public information 14. VCAT should provide a low cost mechanism for all parties 15. VCAT should take account of all the material already provided by proponents and relevant pre-existing studies rather than requiring consultants to present at the hearing 16. An appeal mechanism for proponents should be introduced in the EES process
4.	**Framework for achieving the largest net reduction's in Victoria's 'red tape' burden on business**	Inadequate assessment of the cost of new regulations Lack of resolve of regulatory agencies Lost opportunity in dollars and time	17. Regulatory creep should not be accepted as the status quo and new regulations must only be introduced once an existing and equivalent cost requirement is eliminated 18. A cost benefit analysis of new legislation should be conducted 5 years after implementation. If the legislation does not provide a net benefit, changes must be made to ensure this is achieved

Appendix 2 - Update of Case Studies in *An Unsustainable Future*

Case Study 1

This was a variation to an existing Work Authority and the process had commenced in 2001. There has been no progress with this application for a Work Authority. The Planning Minister's decision in 2008 effectively ended the process. There is no right of appeal to his decision to not put the EES on exhibition and therefore the project is effectively on hold. The applicant has not abandoned the project altogether, but feels there is no point in reviewing it with the current State Government still in place. The applicant considers the decision to stop the application was a political one, and until such time as the local and State political situation changes, the project will remain on hold.

As a result of the Government decision, and with demand for material increasing, the applicant is bringing stone into the area from other sites. This occurs at an increased cost and is also increasing the volume of heavy vehicles on the road. Interestingly, some of the local residents who opposed the quarry extension have also voiced concern about the additional heavy vehicle traffic and the carbon emissions (despite being told that this would be an outcome if the extension did not proceed).

It is also noteworthy that the concerned shire recently approved an extension to another extractive operation. The applicant considers the basis for the approval was consistent with all the reasons the applicant submitted in its application. However, in that case the shire vehemently opposed the application.

Case Study 3

This was an application for a new Work Authority that had commenced in January 2004. It had founded on concerns expressed by some local residents about, amongst other the matters, the impact of the proposed operations on the local ecology. In 2007 VCAT had rejected an appeal following disallowance of a planning permit. The applicant therefore considered the matter closed having lost approximately $700,000 in application expenses.

In June 2010 the DPI invited the applicant to attend a meeting concerning issues relating to "Green Wedge Proposals" which had relevance to the proposed Work Authority. The (former) applicant advised the DPI that it had made the decision not to proceed any further with the project as it had no assurance of it ever being accepted and could not afford further likely wasted expenditure.

Case Study 9

This involved an application for variation of a Work Authority and the process commenced in September 2006. At the time of the Report the application was still being considered and was with the applicant to prepare a draft Work Plan. This was presented to DPI in December 2009. The DPI required some changes but ultimately the DPI endorsed the work plan on 17/5/2010. This allowed the applicant to proceed to the planning permit stage of the process.

In August 2010 the shire advised the applicant it was ready to advertise the planning permit application and six signs were displayed onsite on 8 September 2010.

This process has taken 4 years so far for a relatively small extractive operation (30,000 tonnes pa) of sand and soil. It can be expected to take at least a further 6 months to be finalised if an appeal is not required. Costs to date for the application are in excess of $100,000.

Appendix 3 – Work Authority (New/Variation) Application & Approval Process

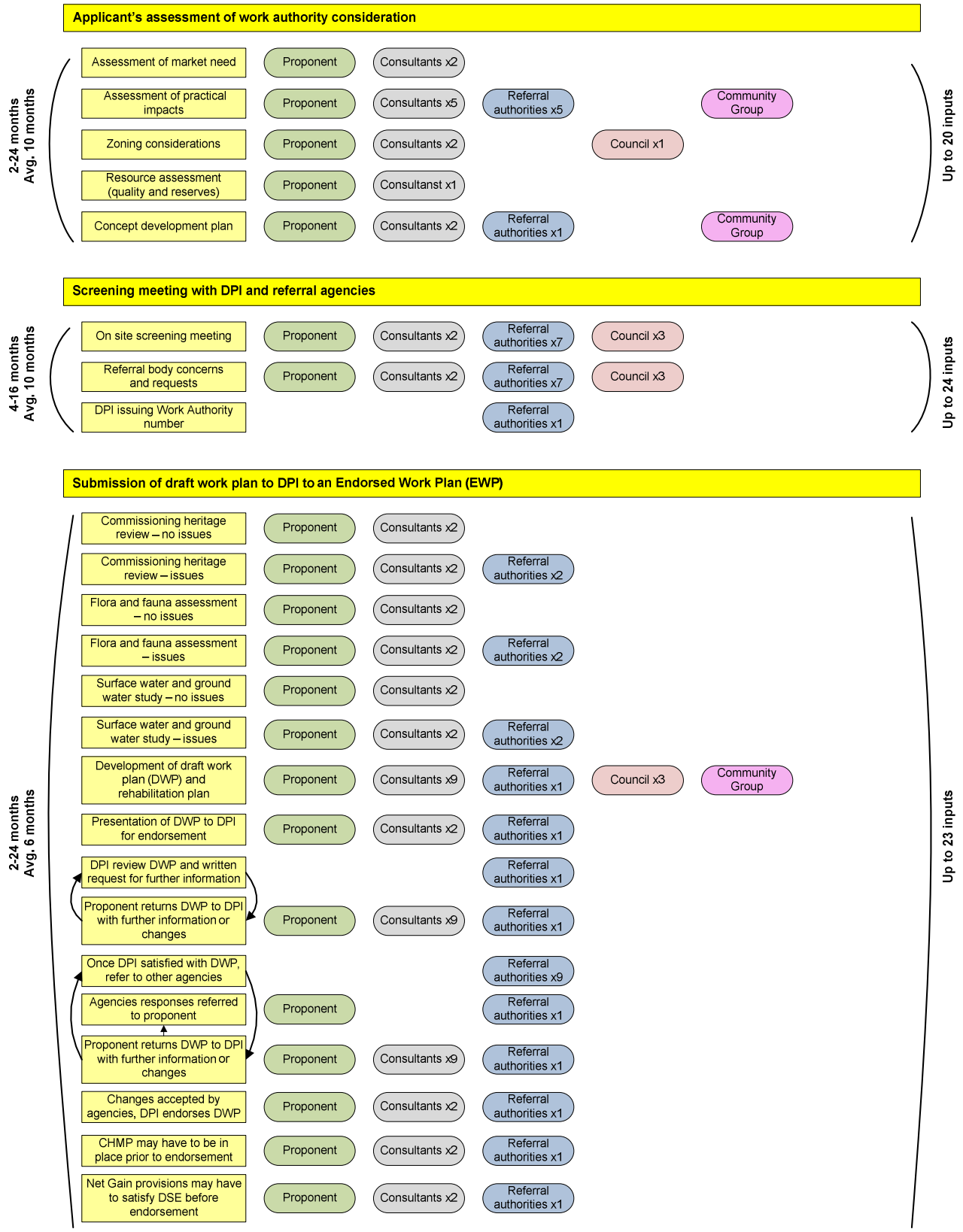


Chart continues overleaf

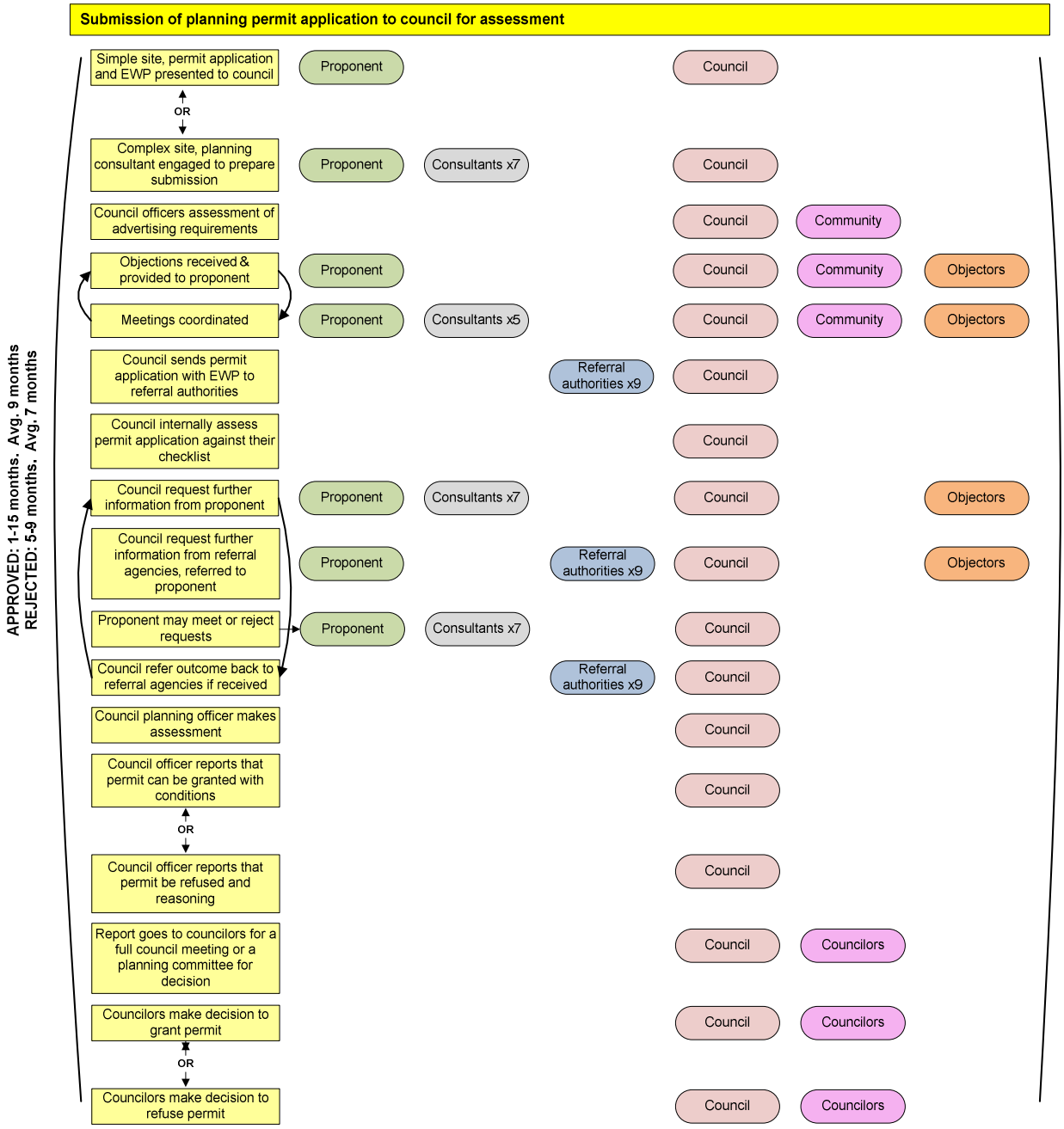
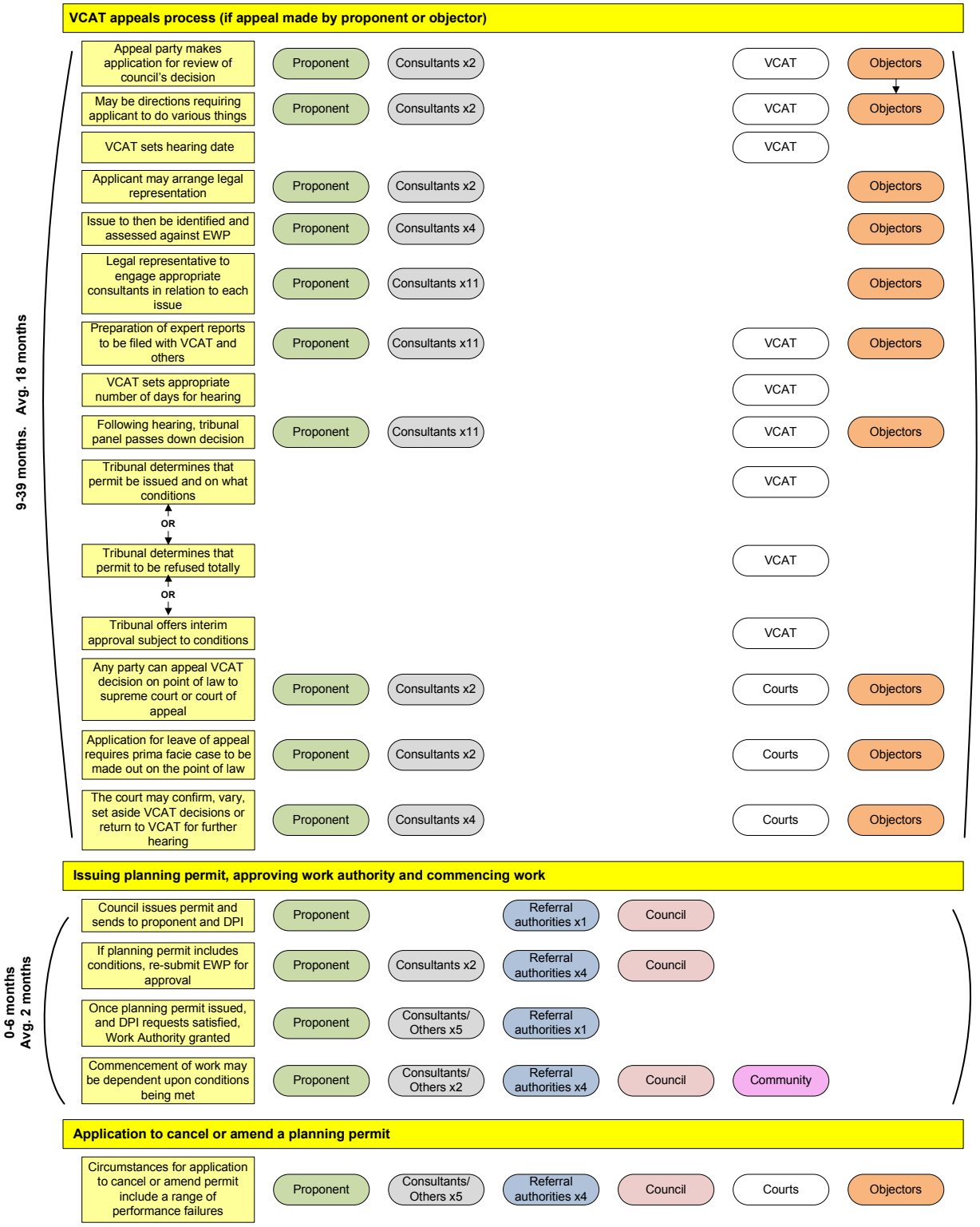


Chart continues overleaf



Note:
1. Inputs are defined as an individual or a party partaking in the process
2. The number of inputs will be dependant upon the complexity of application and level of objection
3. Assessed numbers in each input above may be greater or less depending on the complexity of the application
4. This diagram is based on section 3 of the report

Appendix 4 – Rehabilitation Bonds

Legislative framework

The *Mineral Resources (Sustainable Development) Act* 1990 (the Act) requires extractive industry Work Authority holders to rehabilitate land on which they are operating in accordance with the rehabilitation plan approved by the Department of Primary Industries (DPI). The Act requires rehabilitation works to be carried out prior to the Work Authority expiring. An agreed rehabilitation plan is required to be prepared by the Work Authority holder and must take into account:

- any special characteristics of the land and surrounding environment
- the need to stabilise the land
- the desirability or otherwise of returning agricultural land to a state that is as close as is reasonably possible to its state before the mining licence or extractive industry Work Authority was granted
- any potential long term degradation of the environment

In essence the plan requires the site to be left in a 'safe and stable' condition.

To ensure rehabilitation requirements are undertaken in accordance with the rehabilitation plan the Act requires a holder to provide a rehabilitation bond (s 80). The bond is 'for an amount determined by the Minister' (s80 (1)). The Act does not provide any guidance concerning the purpose of the bond, the matters which the Minister should consider in determining the bond amount, nor in any calculation of the bond amount.

From the DPI website the amount of bond is intended to be 'calculated to address in full the actual and foreseeable liability based on the works specified in the approved work plan'.

As the level of the bond depends on the nature of the particular extractive operation each bond will be different. The Ministers' determination cannot therefore be publicised by regulation or by gazettal but left to administrative processes through the DPI.

It is a condition of the approval of the rehabilitation plan that the authority holder rehabilitates the land in accordance with the plan and the Act allows the Minister to determine a new bond amount where '*he or she is of the opinion that the amount of the bond already entered into is insufficient.'*

The DPI website states "a rehabilitation bond can either be the life of the operation or can be staged so that the amount reflects the rehabilitation liability over the specified period of time". The website also states that '*rehabilitation bonds are periodically reviewed by the Department to ensure that they remain at appropriate levels during the life of the operation. The bond will also be reviewed when a work plan variation or transfer is proposed'.*

Payment of bond

A Work Authority cannot be granted under the Act unless the applicant has 'entered into a rehabilitation bond' (s 77I (3)). In practice this means that the bond is payable upfront and well before any operations have commenced. In some cases the operator may intend to commence operations several years after securing the Work Authority. In these cases the holder incurs

substantial costs in providing an 'insurance' cover for the Government against un-rehabilitated land without having disturbed the land or generated any income from it. Provision should be made that connects the payment of the bond with the working of the land.

Bond calculation

In 2008, a 'Bond Calculator' was introduced by DPI to provide a transparent and consistent approach to bond calculation, allowing operators to assess their own rehabilitation liability and understand how DPI has conducted and calculated the initial bond assessment. The introduction of the Bond Calculator coincided with the merging of the Mineral Resources Development Act with the Extractive Industries Development Act and the calculator is used for both mining and extractive industries.

Independent assessment of rehabilitation liability

Section 79A allows the Minister to require a holder to undertake an assessment of the rehabilitation liability for the purposes of determining the amount of a rehabilitation bond or the reviewed amount of an existing bond. The assessment may be an independent auditor.

Return of bonds

Section 82 of the Act requires the Minister to return a bond if rehabilitation satisfactory 'as soon as possible if the Minister is satisfied' that the land has or is likely to be successfully rehabilitated. If the operation is on private leased land, the bond cannot be returned until after the landowner and the local council have been consulted.

The EID Act (s36(6)) required the Minister to return as soon as possible after the end of the period of 6 years after the Work Authority ceased any part of the amount of the bond that has not been returned. This put a time limit on a holder completing any required rehabilitation and provided a closure of financial liability for the holder. With the merging of the EID Act with the MRSDA Act this 'end date' was deleted as it had not been applicable in the mining legislation. Instead, the new Act requires only that a bond be returned once there is no potential for any long term damage. This is an open-ended provision that can include a wide range of issues such as erosion control, slope stabilisation, drainage management, and protection of slimes dams.