

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir/Madam

Submission to the Competition Policy Review Issues Paper 14 April 2014

The Construction Material Processors Association (CMPA) is dedicated to the representation and service of its Members in the Victorian Earth Resources industry. As such, our response is consistent with the purposes stated in the CMPA Rules.

The CMPA represents a broad spectrum of businesses that extract and process hard rock, gravel, sand, clay, lime, soil, and gypsum. CMPA members also operate recycling businesses. CMPA members are typically small to medium sized family businesses, local government and utilities. Many are regionally based employers and service local construction, infrastructure and road maintenance needs.

The Extractive industry underpins growth and development in Victoria through supply of the construction materials described above, 58 million tonnes in 2010/11, approximately \$833 million (note that more up to date data is not yet available from the Victorian State Government). CMPA members account for approximately half of this production. The CMPA supports responsible, balanced legislation that is in the best interests of the State.

This submission is in response to the above Issues Paper released as part of the review of the Competition Policy. The CMPA has provided numerous submissions to a multitude of reviews of regulatory instruments over its 14 year life - the underlying plea in all submissions has been for more balanced regulation. Without question Australia and Victoria have developed an increasing range of business regulation over these years all of which adds costs in compliance. Compliance costs imposed on businesses impact at various levels on competition. Even if all the regulatory compliance costs are the same across the industry and the industry comprises similarly sized businesses they may not necessarily impact competition within the sector as all businesses may be equally affected. There are few businesses however that do not have substitute products and any costs even though they are evenly spread may force customers to utilize substitutes to the detriment of the

regulated sector. Moreover, regulatory costs add to the costs of entry to the industry and therefore act as a potential barrier to entry. This impedes competition and acts to stifle innovation.

All these negative impacts arising from regulatory costs are relevant in the extractive industry. However, due to the structure of the industry in Victoria where small businesses dominate the number of extractive business regulatory costs impact in another, equally ominous fashion – by fostering anti-competitive behaviour. For small businesses the regulatory costs impose a disproportionately greater impost on their businesses than for larger businesses. That is, the regulation takes no account of the size of the business (and therefore its impact). To compound this, generally speaking a large business will impact on the environment and local community to a proportionately larger extent than a small business. Therefore the poorly designed regulation acts in an anti-competitive manner by imposing a disproportionately greater level of costs on small businesses. So the anti-competitive issue is about the poorly-designed (one-size-fits-all) nature of the regulation.

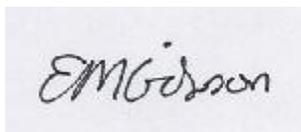
So, the cost of regulation on the extractive industry in Victoria acts as an impediment to competition within the industry and for new entrants to the industry. This is directly relevant to the Review of Competition Policy and the questions raised in the Issues Paper, primarily section 2, restrictions on land use.

This submission will identify the primary regulatory costs that impact directly on competition in relation to the extractive industry. These costs arise from:

- Excessive native vegetation and cultural heritage controls; and
- Excessive controls contained in the industry-specific regulation of the extractive industry in Victoria including in costs of the approvals process, appeals process, the anti-competitive nature of entry provisions and the unjustified rehabilitation bond system.

If you have any queries about this submission or would like clarification of any points made please do not hesitate to call me on 03 5781 0655.

Yours sincerely

A rectangular box containing a handwritten signature in black ink that reads "EM Gibson".

Dr Elizabeth Gibson
General Manager
CMPA

16 June 2014

REGULATORY RESTRICTIONS

1 The Native Vegetation Framework

Victoria's *Native Vegetation Management – A Framework for Action* (the Framework) 'establishes the strategic direction for the protection, enhancement and revegetation of native vegetation across the State'¹. Under Planning Scheme Amendment 52.17, the extractive industry was initially exempted from the application of the Framework due, it is expected, to its low level of impact; however, following establishment of a Memorandum of Understanding (MOU) in 2007 between the Department of Primary Industries (now Department of State Development, Business and Innovation (DSDBI)) and Department of Sustainability and Environment (now Department of Environment and Primary Industries (DEPI)) (but notably, not the industry) compliance with it became part of the Work Authority and Work Plan approvals process under the Mineral Resources (Sustainable Development) Act (MR(SD) Act).

Issues for the Industry with native vegetation

Offsets

Notwithstanding that Victoria is a small State with an increasing population, 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 Gain²

One of the measures adopted to ameliorate negative effects on the environment and ecology is the concept of offsetting. The experience of the extractive industry is that offsetting is increasingly being applied by regulators requiring Work Authority holders and proponents to purchase land (referred to as an offset site) to mitigate against perceived but not actual impacts. An offset site cannot be used for development or works. Therefore, for the extractive industry this practice sterilises land from future extractive development and operations.

Potential offset sites require a habitat hectare assessment to determine if they can generate the required parcels of land. The potential gains allocated to areas of retained native vegetation can be calculated using the DEPI gain calculator. As a rule of thumb for

¹ Refer to http://new.DSDBI.vic.gov.au/_data/assets/pdf_file/0016/37501/Mineral-sands-fact-sheet.pdf, published July 2010.

²

<http://www.DEPI.vic.gov.au/DEPI/nrenlwm.nsf/LinkView/99ADB544789FE7D4CA2571270014671E49A37B2E66E4FD5E4A256DEA00250A3B>

compensating like with like, for every one hectare of native vegetation removed 5 hectares of land must be provided and secured in perpetuity. As part of the Work Authority process where an applicant wishes to develop a greenfield site, the applicant must purchase sufficient land around the extractive operation to act as a buffer against noise or dust that may affect neighbours.

In its report on environmental regulation Victorian Competition and Efficiency Commission (VCEC) estimated the average cost of purchasing 'habitat hectares' is up to \$100,000 per habitat hectare. This cost applies irrespective of the land value. VCEC recommended³ the Government increase flexibility in the rules for determining offsets and 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 DEPI 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.

The Government gave only partial support to this recommendation and in September 2013, a planning scheme amendment introduced the Victorian Government's Reforms⁴ to Victoria's native vegetation permitted clearing regulations (the reforms). The reforms include amendments to various clauses of the Victoria Planning Provisions and a new incorporated document, *Permitted clearing of native vegetation – biodiversity assessment guidelines* (the guidelines). The guidelines outline the application, decision making and offset arrangements to meet the requirements of the reforms. The reforms will apply to all decisions on applications to remove native vegetation made following the amendment of planning schemes.

These reforms go nowhere to dealing with the fundamental problem but merely seeks to apply a band-aid solution.

³ Victorian Competition and Efficiency Commission, A Sustainable Future for Victoria, Getting Environmental Regulation Right, Final Report, July 2009, pages 88.
[http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/ASustainableFutureforVictoria-GettingEnvironmentalRegulationRight/\\$File/A%20Sustainable%20Future%20for%20Victoria%20-%20Getting%20Environmental%20Regulation%20Right.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/ASustainableFutureforVictoria-GettingEnvironmentalRegulationRight/$File/A%20Sustainable%20Future%20for%20Victoria%20-%20Getting%20Environmental%20Regulation%20Right.pdf)FullReportVer2/\$File/Environment%20Inquiry%20Draft%20Report%20-%20Full%20Report%20Ver2.pdf

⁴ http://www.depi.vic.gov.au/_data/assets/pdf_file/0009/198756/Transition-guidance-to-support-reforms-to-Victorias-native-vegetation-permitted-clearing-regulations.pdf

Offset requirements embedded in native vegetation and other regulatory instruments sterilise land from extractive operations because:

- They restrict the opening up of greenfield sites which limits expansion of production levels to meet increasing demands;*
- They accelerate business closure as brownfield sites exhaust their productive lives;*
- With regulatory costs acting as a disincentive to entry, there is no replenishment of businesses following closure, leading to existing Work Authority holders being required to meet the demand;*
- They increase transport costs and associated greenhouse emissions by restricting access to local supplies; and*
- They incur downstream impacts for manufacturing processes (discussed below).*
- There is a profound impact on smaller businesses due to having to purchase land with after tax resources.*

Downstream impacts

Sterilisation of land from extractive operations also flows on to the users of quarry product. For example, the CMPA is aware that at least three small to medium sized manufacturing operations cannot purchase sufficient material for use in concrete production. Some have elected to purchase quarries to secure a reasonable supply but even this is highly problematic for the reasons articulated in this submission. It is known that some products that were previously manufactured from local extractive material are now being supplied from overseas due to the drying up of supplies of extractive material. This has negative impacts on local businesses, employment and terms of trade. There can be no clearer illustration of the negative effects of unreasonable and inefficient regulation – the fracture of local societies and their economies.

Essential points

The practice of 'offsetting' in native vegetation regulation is increasingly being applied by regulators requiring Work Authority holders and proponents to purchase land to mitigate against perceived but not actual impacts. This practice sterilises land from extractive operations. Sterilisation of land from extractive operations has multiple negative impacts.

2 The unpredictable and costly nature of the cultural heritage legislation

2.1 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.

2.2 Issues for the industry with cultural heritage

Costs of compliance

The new requirements under the AH Act are far more demanding, time-consuming to obtain, and the results more difficult to predict. Case studies in the CMPA's *An Unsustainable Future (AUF)*⁵ report in 2009 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 (now) DSDBI in 2007 to be \$4-8,000 for a desktop study. At the time of the *AUF* study in 2009, an average cost of a desktop study was \$25,000 although one study involving a sand deposit had cost \$88,000 and was unfinished. The average cost of a complex study was \$120,000!

With no regard to the impacts for industry or the economy generally, these costs have continued to balloon at a breathtaking rate to the extent where a typical desktop study in 2014 is now ~\$35,000, that is, ~ 9 times DSDBI's estimate seven years ago!

Of almost equal concern is the length of time the process takes. While the AH Act requires a registered Aboriginal party to respond to an application for a permit with 30 days (s39) there are no timeframes around which applicants can expect a resolution of their request. The Act is equally deficient with respect to CHMPs. The upshot is that applicants now must wait 1.5 to 2 years for these matters to be finalised!

⁵ *An Unsustainable Future – The Prohibitive Costs of securing Extractive Industry Access in Victoria, August 2009*
www.cmpavic.asn.au

These unjustified and unreasonable costs clearly cannot be sustained and only serve as a complete disincentive to investment in the State.

It cannot be known how these regulatory controls will develop in the near future. Already there are some examples where the conditions being imposed in order to accept a CHMP are ludicrously unrealistic involving associated investigations costing in excess of \$3 million. Did the impact assessment for the new legislation anticipate these massive costs impositions and associated dis-incentive to development activity? The Association is unaware of any published assessment of anticipated costs. What does this say about the consultative approach adopted and the regulatory impact assessment undertaken at the time? Furthermore, land developers are able to pass on costs to the home owner but the extractive industry has to build it into the cost of production and needs to have the funds available upfront.

Perhaps more importantly, it emphasises the populist approach to legislative enactments being adopted by governments and the complete lack of accountability to the economic ramifications.

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 DSDBI to be \$4-8,000 for a desktop study. At the time of the *AUF* study in 2009 an average desktop study cost \$25,000 although a study involving a sand deposit had cost \$88,000 and was unfinished. The average cost of a complex study was \$120,000. In 2014 a desktop study can costs \$35,000! These are unsustainable and unjustified costs that act as a disincentive to investment in the State.

Examples exist in the industry of a CHMP and associated investigations now 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.

2.3 Solutions

Apply an 'environmental' value to extractive material:

The value of the underground resource must be taken into account 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, such as the regulated \$0.85/tonne royalty for Crown land set in the Mineral Resources (Sustainable Development) (Extractive Industries) Regulations 2010. Also, VicRoads compensates an extractive operator when it acquires the operator's land for road purposes.

Cost associated with native vegetation legislation should be compensable:

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.

Extractive industries should be exempted from the more restrictive elements of native vegetation controls:

The carbon footprint of the industry is very small – for example, over the last five years to 2009 there have been 36 new Work Authorities approved for a combined area of 1,274 hectares including buffer zones or 0.01% of Victoria's land mass. Assuming 30% of this area is buffer zones, the total footprint is approximately 890 hectares or 0.004% of State land mass! It is for this reason the industry was initially excluded from the native vegetation controls.

There is a strong case for extractive industries therefore to again be exempted from the more restrictive elements of native vegetation controls

Costs associated with cultural heritage legislation should be compensable:

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, current landowners 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 be inserted in the legislation so that a landowner can be compensated for monies spent in complying with the legislation merely to be able to conduct business for which the land was purchased. In these cases compensation should be set at the highest value use of the land.

3 Industry-specific regulatory controls

While much has been said about the modernisation of Victoria's mining laws to ensure that regional Victoria benefits from more jobs and extra investment, the passing of the *Mineral Resources (Sustainable Development) Amendment Act 2010* [MR(SD) Act] made essentially incremental rather than fundamental changes. The extractive industry remains beset with a complicated, unsustainably costly approval process that hinders development and makes the Victorian industry un-competitive with other States.

This section details the unnecessarily complex Work Authority process and translates these administrative and regulatory hurdles into a time and cost burden.

3.1 The unnecessarily burdensome and complex Work Authority process

The MR(SD) Act requires that a person cannot undertake extractive operations without an approved Work Authority. The Work Authority contains a Work Plan endorsed by the DSDBI, rehabilitation plan and payment of a rehabilitation bond. However, a Work Authority can only be approved once associated planning requirements are complied with. Planning requirements consist of a Planning Permit and, where required, an Environmental Effects Statement (EES). Applying for a Work Authority is a three phase sequential process:

- a) **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 DSDBI. This involves 5 separate steps including the preparation of a draft Work Plan, including a rehabilitation plan.
- b) **Planning process:** This involves making application under the *Planning and Environment Act 1987* (P&E Act) for a Planning Permit to the relevant council. This has 6 separate steps including a compulsory consultation process.
- c) **Final application process:** This is the culmination of the first two stages and involves final application to DSDBI of the Work Plan and rehabilitation plan. This involves only 2 steps and is usually completed relatively quickly.

The MR(SD) Act allows a Work Authority holder to vary an approved Work Plan and Work Authority. **There can be as many as 117 people involved in one application for approval to work!** This section discusses the specific problems associated with this highly complex process.

3.2 Time and cost of the Work Authority approvals process

3.2.1 Timeframes associated with the approvals process

The analysis in the *AUF* report revealed that the time involved in obtaining approval for a Work Authority or to have it refused is as follows:

- For 'standard' proposals, an average of just over 2 years (25 months) from the initial screening (on site) meeting to the granting of a WA.
- 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 5³/₄ 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, compounding this already high risk position all the costs associated with the application and appeal process are expended without any assurance of the application being approved.

3.2.2 Costs of the approvals process

The costs of the approval process were assessed in the *AUF* Report as in a 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 later in 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 MR(SD) 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 Victorian Civil and Administrative Tribunal (VCAT). In contrast to these estimated costs in 2009 a 1992 Victorian Parliamentary Committee report estimated the cost of developing a Work Authority at about \$100,000 (2009 \$'s)!

3.2.3 Costs of appeals to VCAT

The *Planning and Environment Act 1987* provides that an applicant for a planning permit to a local council 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 at the time ranged up to \$558,000.

3.2.4 Duplication of roles of DSDBI and local councils

Some regional councils may receive an application for a planning permit for extractive operations spasmodically, for some, one application in ten years. There is therefore no corporate knowledge or processes in place that can be brought to bear. Because of this councils appear to be unsure of their role in the Work Authority process and due to this uncertainty they often take an overly conservative approach.

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 5³/₄ years.

Costs of the approval process range assessed in the *AUF* Report ranged 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 \$100,000 (2009 \$'s). This suggests the costs of regulatory compliance over 22 years have increased by a factor of three!

3.3 Anti-competitive nature of MR(SD) Act

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. That is, the legislation acts as a disincentive to new, greenfield developments. This is a concern particularly for the extractive industry because the operations are typically long lasting, 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 MR(SD) 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.

Finally, 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 the council 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 potentially greenfield operations.

Where mobile crushing plants involve similar risks to small 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.

3.4 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 data for the period 2000-1 to 2009-10. This revealed that:

- Proposals had declined by 42 per cent but had remained relatively stable since 2002-3;
- Applications had declined steadily over the period and by 73 per cent overall;
- The number of Work Authorities increased by 23 per cent 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 per cent;
- 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 per cent to 10 per cent in 2009-10. This occurred despite increasing levels of demand as illustrated by increasing production levels.

Impact of entry constrictions

The lack of new extractive operations being developed or existing operations expanding, combined with the increasing sterilisation of land will lead to greater distances between customer and source material and less choice of material for customers. Overall, this 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.

These increasing price rises are fuelled by unreasonable regulatory costs not as a result of an inefficient industry, but a high-cost, low performing regulatory environment.

Essential points

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 of 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.

5.5 Solutions

The CMPA considers the Work Authority approvals process must be simplified and more targeted. This can be achieved without eroding regulatory objectives. The following recommendations for change contained in the *AUF* report should be implemented. The proposed changes are:

Refine the Work Authority/Work Plan approval process:

The process should be refined and include the following component parts:

- a) A Code of Practice that is applicable to all quarries (A Code of Practice has been issued for small quarries);
- b) Simplified or no work plans;
- c) A Work Authority containing generic conditions, simplified rehabilitation bond system reflective of the risks, a code of practice and work plan provided to council with planning permit application;
- d) Planning Permit applications automatically submitted to council when the DSDBI holds its required consultative meeting (i.e. when it assigns a Work Authority number);
- e) Planning Permit conditions refer to only offsite impacts, that is, outside of the Work Authority boundary.

Centrally manage the process:

The Work Authority/Work Plan approval process should be centrally managed by the DSDBI. There is an MOU between DSDBI and Department of Planning and Community Development (now the Department of Transport, Planning and Local Infrastructure), but it is not recognised in legislation and is not supported by publicly available guidelines as to the services provided and in what circumstances. This is in contrast with some other states where the role of the lead agency is more clearly identified and defined. For example, Western Australia has a *Lead Agency Framework* which sets out the lead agencies for various industry sectors and the level of services those agencies will provide for different classes of project⁶. The DSDBI should be empowered to manage planning referral obligations to referral agencies to achieve an endorsed Work Plan, eliminating duplication of referrals. Council approval processes should focus on offsite impacts with these aspects subsequently incorporated into the Work Plan.

⁶ <http://new.DSDBI.vic.gov.au/earth-resources/whats-new/review-of-the-mineral-resources-sustainable-development-act-1990/discussion-paperno-1-lead-agency-approach>

Lower the costs of regulatory administration:

The administration of the MR(SD) Act should aim at achieving performance-based outcomes that lower the costs and reduce the time or approvals for proponents.

Improve the VCAT system:

The VCAT system should be streamlined and modernised. For example, objectors in the VCAT process should provide substantiation of their claims and VCAT's decisions should be based on relevant public information. VCAT should provide a low cost mechanism for all parties and 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. An appeal mechanism for proponents should be introduced in the EES process.

3.5 The unjustified and costly rehabilitation bond system

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 DSDBI requires that the rehabilitation bond be in the form of a bank guarantee. Bank guarantees provide surety to the Government so that should an authority holder fail to meet the rehabilitation obligations, 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.

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 25 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 completely unjustified recent surge in the level of bonds following review.

Over the past 10 years total bank guarantees increased from \$37.51million in June 2003 to \$110 million in June 2013.

As at June 2013 a total of \$515.8 million in aggregate had been locked up over the previous 14 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 \$41.2 million over the period 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 DSDBI Mines Inspector and the italicised text in Box 1 repeats verbatim a letter recently received by a Work Authority holder. The letter gives advice of a proposed change in bond level from \$480,000 to \$2,411,000! The effect on the Work Authority holder can only be imagined! It means the holder will need to obtain an additional bank guarantee of \$1.92 million above the existing bond level! 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 severely limits the credit ability of the business 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, far 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 survey conducted by the CMPA of eighteen (18) Work Authority holders in 2010 shows massive increases for several of the holders. Notable cases include increases of bonds from \$12,000 to \$235,000, \$95,000 to \$1,200,000, \$80,000 to \$380,000, \$140,000 to \$810,000 and \$480,000 to \$2,900,000. That is, the level of bonds for these five cases has risen by 1,858%, 1,162%, 375%, 479% and 504% respectively. ***Some of these will have a devastating impact for the business!***

Essential points

Extractive operations incur higher council rates to encourage rehabilitation and must also pay for rehabilitation through the Work Authority process and rehabilitation bonds. This shows Work Authority holders are paying twice for rehabilitation.

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 past 10 years total bank guarantees increased from \$37.51 million in June 2003 to \$110 million in June 2013.

Bond reviews conducted in around 2010 saw increases from \$12,000 to \$235,000 (1858%), \$95,000 to \$1,200,000 (1,162%), \$80,000 to \$380,000 (375%), \$140,000 to \$810,000 (479%) and \$480,000 to \$2,900,000 (504%). The Government spent \$18,000 of bond funds in rehabilitating five sites over the last 20 years.

However, in only the last 11 years there has been in aggregate \$515.8 million tied up in bonds or on average \$46.9 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.

6.2 Solutions

On the basis of the evidence produced by the CMPA it is clear that:

- There is no justification for the rehabilitation bond system as it operates at present;
- There is no justification for the level of bond increases sustained recently;
- There is a complete lack of faith in the formula used in setting bonds including the Bond Calculator; and
- There is a need to make landowners accountable for any necessary rehabilitation of the land.