**IN THE HIGH COURT OF AUSTRALIA**
**MELBOURNE REGISTRY** No. M32 of 2016

B E T W E E N: **RESOURCECO MATERIAL SOLUTIONS PTY LTD**
**(ACN 608 316 687)**
First plaintiff

**SOUTHERN WASTE RESOURCECO PTY LTD**
**(ACN 151 241 093)**
Second plaintiff

AND:

**STATE OF VICTORIA**
First defendant

**ENVIRONMENT PROTECTION AUTHORITY**
Second defendant

# FIRST DEFENDANT'S SUBMISSIONS

HIGH COURT OF AUSTRALIA
FILED
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THE REGISTRY MELBOURNE

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## PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

## PART II: ISSUES

2. By further amended statement of claim filed 22 July 2016 [**DB 17**],[1] the plaintiffs allege that reg 26(3) (**the impugned regulation**) of the *Environment Protection (Industrial Waste Resource) Regulations 2009* (Vic) (**the Regulations**), made under the *Environment Protection Act 1970* (Vic) (**the Act**), is contrary to s 92 of the Constitution. By defence filed 9 August 2016 [**DB 24**], the first defendant (**the State**) contests that allegation. By reply and demurrer filed 16 August 2016 [**DB 44**], the plaintiffs plead and demur to the defence. The demurrer has been referred to the Full Court [**DB 56**].

3. The issue before the Court is whether the plaintiffs' demurrer should be allowed or overruled. In resolving that issue, the question arises whether, on the facts admitted or alleged by the State in the defence and therefore taken to be admitted by the plaintiffs for the purposes of the demurrer, the plaintiffs have established that the impugned regulation is contrary to s 92 of the Constitution. That involves consideration of the questions set out in paragraph 19 below. For the following reasons, those questions should be answered favourably to the State and the demurrer overruled.

## PART III: SECTION 78B NOTICE

4. Notice has been given in accordance with s 78B of the *Judiciary Act 1903* (Cth) [**DB 4**].

## PART IV: MATERIAL FACTS

### OUTLINE OF THE RELEVANT FACTS

5. The outline of the relevant facts at PS [8]–[11][2] is accurate but incomplete. In particular, it omits reference to the following factual matters, which must be taken to be admitted for the purposes of the demurrer.

6. *First*, the contaminated soil that the plaintiffs wish to transport interstate is category A waste being the category of waste that presents the highest hazard to the environment and human health (defence [5(a)], [5(b)] [**DB 25–26**]). Without treatment to reduce its hazard categorisation, it may not lawfully be deposited at an approved landfill facility in Victoria (defence [5(a)], [5(b)] [**DB 25–26**]). There is a single approved facility in Victoria that is capable of accepting for the purpose of disposal to landfill category A waste that has been treated and classified as category B waste (defence [19(d)(i)(D)] [**DB 30**]).

7. The disposal of prescribed industrial waste (**PIW**) can have negative effects on the surrounding environment including pollution to the soil, production of toxins, release of gases, dust and leachate (defence [19A(b)] [**DB 33**]). Because of the potential environmental harm from industrial waste being deposited in landfill:

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[1] "DB" references are to pages in the demurrer book filed 9 September 2016.

[2] "PS" references are to pages of the Plaintiffs' Summary of Argument filed 17 October 2016.

(a) landfill facilities require management and regulatory oversight into the future to minimise deterioration (defence [19A(c)] [**DB 33**]);

(b) the number of facilities that can receive higher hazard category waste in Victoria is limited (defence [19(d)(i),(ii)] [**DB 30**], [19A(f), (g)] [**DB 34**]);

(c) the Act and the Regulations, working together place avoidance of the production of waste as the most preferable response to environmental risk (defence [19A(e)] [**DB 33–34**]); and

(d) government policy is to minimise and eventually eliminate disposal of higher hazard category waste to landfill (defence [19A(i)] [**DB 34**]).

8. *Secondly*, the plaintiffs' outline omits the facts alleged in the various sub-paragraphs of paragraph 19 of the defence [**DB 28–32**] concerning the market.

9. *Thirdly*, the plaintiffs' outline omits the facts alleged in the various sub-paragraphs of paragraph 19A of the defence [**DB 33–36**] concerning the way in which the impugned regulation is directed to the policy of waste minimisation and reprocessing of hazardous waste to reduce the quantity and hazard level of this type of waste going to landfill. Among other things, those facts include that, the scheme for reducing the volume of category B PIW disposed of to landfill without prior treatment, by imposing higher levies for such disposal, relies essentially on the "better than" standard in the impugned regulation. Without that standard, producers of waste would avoid paying the higher levies by transporting such waste from Victoria to a place outside Victoria (defence [19A(p)] [**DB 36**]). The chart contained in Figure 5 of Schedule A to the defence [**DB 42**] — a clearer and colour copy of which is annexed to these submissions — demonstrates how well that scheme has worked since 2010.

10. *Fourthly*, the plaintiffs' outline omits the facts alleged in the various sub-paragraphs of paragraph 19B of the defence [**DB 39–40**] concerning the way in which the impugned regulation is directed to the policy that hazardous waste ought to be treated and disposed of close to its site of production. Among other things, those facts include (defence [19B(c)] [**DB 40**]) that the impugned regulation encourages the treatment and disposal of hazardous waste close to the site of its production.

## PART V: STATUTORY PROVISIONS

11. See Annexure B.

## PART VI: ARGUMENT

### GENERAL PRINCIPLES REGARDING s 92

12. Notwithstanding the apparently absolute terms of s 92 of the Constitution, settled doctrine — accepted by all parties in this case — is that s 92 does not prohibit *all* burdens on interstate trade

or commerce. It prohibits only:[3]

> measures which burden interstate trade and commerce and which also have the effect of conferring protection on intrastate trade and commerce of the same kind. The general hallmark of measures which contravene s 92 in this way is their effect as discriminatory against interstate trade and commerce in that protectionist sense.

13. The burdens to which s 92 is directed are not limited to discriminatory fiscal charges levied on transactions in interstate trade and commerce although they represent the paradigm form of protection.[4] Protection can be achieved by a variety of measures. The Court has noted as examples: tariffs, quotas on imports, differential railway rates, subsidies and discriminatory burdens on dealings with imports.[5] However, where as in this case, the burden is not fiscal but takes the form of the requirement to obtain regulatory approval and the criteria for that approval, it is important to recognise that s 92 leaves room for "genuine non-protective regulation of ... interstate trade".[6]

14. A law is "discriminatory" if:[7]

> it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained ... A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation.

In this context, the concept of discrimination "necessarily embraces factual discrimination as well as legal operation. A law will discriminate against interstate trade or commerce if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces such a result."[8]

15. It is necessary to establish both discrimination and protection before s 92 is engaged. Discrimination may be either overt or appear from a facially neutral provision and is a matter of substance not form. Once discrimination is found to exist, it is necessary to inquire as to whether there is protection, an "essentially objective inquiry" and one raising questions of fact and degree.[9]

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3 *Cole v Whitfield* (1988) 165 CLR 360 at 394. See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 451 [10], 456 [26], 460 [36] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 265 [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

4 *Cole v Whitfield* (1988) 165 CLR 360 at 395.

5 *Cole v Whitfield* (1988) 165 CLR 360 at 393.

6 *Cole v Whitfield* (1988) 165 CLR 360 at 403.

7 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 (Gaudron and McHugh JJ). See also *Cole v Whitfield* (1988) 165 CLR 360 at 399 and 408, applied in *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 at 199.

8 *Cole v Whitfield* (1988) 165 CLR 360 at 399. See also *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 464 [47] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

9 *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 265 [36]–[37] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

16. The subject of the protection afforded by s 92 is trade, not traders.[10] Thus, "[a]n individual trader can be no more than a surrogate or representative of the trade in which the trader participates and that is said to be the subject of the contested measure".[11]

17. A law which is "appropriate and adapted"[12] or "reasonably necessary"[13] to achieve a non-protectionist purpose will not be characterised as protectionist. That requires:[14]

> the existence of a "proportionality" between, on the one hand, the differential burden imposed on an out-of-State producer, when compared with the position of in-State producers, and, on the other hand, such competitively "neutral" objective as it is claimed the law is designed to achieve.

This involves "consideration of whether the burden imposed by the impugned measure was greater than that required for the reasonable attainment of the purpose that provided the 'acceptable explanation or justification' for the measure".[15] Thus, in determining whether a law can be justified, "the existence of reasonable non-discriminatory alternative means of securing that legitimate object suggests that the purpose of the law is not to achieve that legitimate object but rather to effect a form of prohibited discrimination".[16] On the other hand, it is not necessary to show that "the burden on interstate trade and commerce is absolutely necessary to achieve the legitimate purpose of the measure".[17]

18. It is important to highlight that the question of characterisation or justification can only be assessed in light of the alleged discriminatory burden that protects local industry. Whether an illegitimate barrier around local trade is erected by the impugned measure is a matter of fact and degree that will be determined by its precise parameters, including the extent of the burden.[18] The burden is measured by the extent to which there is protection in a relevant market. The questions of burden and justification are therefore necessarily interdependent.

19. Thus, relevantly, in a proceeding alleging a breach of s 92 the questions to be asked are as

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[10] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 268 [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ), at 272 [60], 274 [68]–[69] (Heydon J), 289 [113] (Kiefel J).

[11] *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at 65 [238] (Kenny and Middleton JJ).

[12] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[13] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 476-477 [98]–[103] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). As to the consistency between these two formulations, see *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at 63-64 [229]–[233] (Kenny and Middleton JJ).

[14] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 476-477 [101] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[15] *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at 63-64 [231] (Kenny and Middleton JJ).

[16] *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 471-472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[17] *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at [231] (Kenny and Middleton JJ).

[18] *Cole v Whitfield* (1988) 165 CLR 360 at 409.

follows:[19]

(a) Does the impugned regulation in its terms or practical operation discriminate against interstate trade or commerce because:

(i) it draws a distinction in terms between intrastate trade and commerce and interstate trade or commerce, otherwise than by reference to a relevant difference between them; or

(ii) it does not draw a distinction in terms between intrastate trade and commerce and interstate trade and commerce, notwithstanding a relevant difference between them?

(b) If so, is the impugned regulation protectionist in that it burdens interstate trade and commerce to its competitive disadvantage or to the competitive advantage of intrastate trade and commerce?

(c) If so, is the impugned regulation nonetheless reasonably necessary or appropriate and adapted for the State to achieve a legitimate non-protectionist purpose?

**THE DEMURRER**

20. As noted above, the matter before the Court is the plaintiffs' demurrer to the State's defence. The applicable general principles concerning the facts upon which the Court is to proceed on a demurrer are set out at PS [5]. In short, the facts expressly or impliedly alleged in the defence are taken to be admitted for the purposes of the hearing of the demurrer. However, four matters require some elaboration.

21. *First*, in their proceeding it is for the plaintiffs to establish that the impugned regulation erects a protectionist barrier to interstate trade. They allege, by way of a conclusory statement, that reg 26(3) "imposes a real burden" and confers a "competitive advantage on Victorian premises" (further amended statement of claim [19] [**DB 21–22**]. Those matters are denied. They are, accordingly, not taken to be established on the demurrer. Further, even if a burden and a competitive advantage can be inferred, there is no material or basis for the Court to gauge the extent of those matters for the purposes of determining the State's plea of justification.

22. *Secondly*, the reference to discarding statements in a pleading that are "no more than evidentiary" (PS [5.2]) must be approached with some caution. At all stages of the analysis necessary for the purposes of s 92 of the Constitution, it will be insufficient for one party merely to assert a conclusion. At a trial, the analysis would require close attention by the Court to more detailed factual propositions put forward to support any given conclusion.[20] It is not apparent that the plaintiffs submit that any such facts should be "discarded".

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[19] See *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 269 [52] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at 66-67 [243] (Kenny and Middleton JJ).

[20] See generally *Cole v Whitfield* (1988) 165 CLR 360 at 407–408; *Betfair v Western Australia* (2008) 234 CLR 418 at 479-480 (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 265 [37] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 274-275 [70] (Heydon J).

23. *Thirdly*, different approaches have been taken in this Court as to whether, on a demurrer, it is appropriate for the Court to have regard to documents referred to in the pleading to which the demurrer is directed.[21] Here, the demurrer book contains various such documents. In any event, nothing turns on those documents, so the propriety of referring to them need not be considered.

24. *Fourthly*, it may be accepted that, so far as a demurrer raises a question of the validity of a statute, as is the case here, the usual principles for ascertaining constitutional facts continue to apply, as explained in PS [6]. However, the cautionary approach of Heydon J in *Betfair Pty Ltd v Racing New South Wales*[22] is applicable in light of the plaintiffs' choice to proceed by way of demurrer. Adapting what his Honour said there, the plaintiffs have elected against proceeding, in the ordinary way, to a trial at which they would have "had the opportunity to try to prove any fact they liked by evidence. That must affect the willingness of the Court to embark on an attempt to illuminate with a flickering lamp constitutional facts only discernible from shadowy materials".

25. *Fifthly*, so far as any matter of fact is alleged in the further amended statement of claim and denied in the defence, the demurrer must proceed on the basis that the denial is accepted, i.e., that the fact alleged is not established.[23] As explained further below, this has significant consequences in this case.

## THE STATUTORY SCHEME

26. The impugned regulation does not exist in a vacuum. It forms part of a detailed regulatory regime for the protection of the environment set out in the Act and the Regulations. The principles of environment protection are set out in ss 1B to 1L of the Act. Those principles relate, amongst other things, to: ecologically sustainable development (s 1B); intergenerational equity (s 1D); the use of valuation, pricing and incentive mechanisms as a solution to environmental problems, including that persons who generate pollution and waste should bear the cost of containment, avoidance and abatement (s 1F); and the responsibility for the shared management with Government of environmental impacts including the ultimate disposal of any wastes (s 1G).

27. Recognising that not all forms of management of waste are of equal environmental benefit, s 1I provides for an order of preference from avoidance, through reuse and recycling to disposal as the least preferred form of management.

28. Part of the regime deals with industrial waste. Industrial waste is defined to include any waste arising from commercial, industrial or trade activities or waste containing substances or materials which are potentially harmful to human beings or equipment (s 4(1)).

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[21] Compare *South Australia v The Commonwealth* (1962) 108 CLR 130 at 152 (Windeyer J), approving *Metropolitan Theatres Ltd v Harris* (1935) 35 SR (NSW) 228 at 233 (Jordan CJ), with: *Goodwin v National Bank of Australasia Ltd* (1968) 117 CLR 173 at 175 (Barwick CJ); *Salemi v MacKellar [No 2]* (1977) 137 CLR 396 at 407–408 (Gibbs J); *The Commonwealth v Western Australia* (1999) 196 CLR 362 at 446 [163] (Kirby J). See also *Bloeman v Atkinson* [1977] Qd R 291 at 294–5 (Hanger CJ).

[22] (2012) 249 CLR 217 at 274–275 [70] (Heydon J).

[23] See generally *South Australia v The Commonwealth* (1962) 108 CLR 130 at 141–142 (Dixon CJ).

29. PIW is categorised by reference to its potential for harm to persons and the broader environment, with category A representing the highest risk. Within that context:

(a) section 20 prohibits an occupier of "scheduled premises" from undertaking a range of activities relating to waste including discharge, reprocessing, treatment, storage, disposal or handling waste unless licensed to do so under the Act. Detailed licensing provisions are provided for;

(b) fees are payable in respect of a licence (s 24), including an environment protection levy (s 24A);

(c) offences are created in relation to industrial waste including contravention of any regulations relating to industrial waste (s 27A); and

(d) section 50S requires that licence holders of certain premises that are prescribed as 'scheduled premises' must pay a landfill levy. Under s 50SA a rebate of the landfill levy is payable if the waste is removed from the landfill to enable it to be recycled, reprocessed, recovered or purified.

30. The transport of prescribed waste is dealt with in Pt IXA of the Act. The provisions operate in respect of different aspects of the transport of prescribed waste (covering the transporter, consignor, and producer of the waste):

(a) a person must not commence or conduct a transport business for the transport of prescribed waste without a permit (s 53A).

(b) a person must not cause or permit prescribed waste or PIW to be transferred on a highway from any premises owned or occupied by that person unless the vehicle is authorised by a permit or exempt (s 53B); and

(c) a producer of PIW (unless exempt by reg 26(8)) must take reasonable steps to ensure that PIW transported from any premises or place occupied by the producer is consigned to and received by:

(i) an occupier of licensed premises; or

(ii) an occupier of exempt premises (s 53D).

31. The statutory provisions respecting PIW are complemented by the Regulations. Regulations 14 to 25 address permits required by vehicle owners to use vehicles for the purposes of transporting PIW.

32. The statutory scheme does not recognise or seek to advance PIW as a desirable item of commerce. No doubt, the receipt, treatment, and disposal of PIW is a legitimate and necessary commercial endeavour. However, as the hierarchy makes clear, avoiding the production of PIW in the first place is preferable to treating it once created. Regulation 26 itself reflects the hierarchy by differentiating between reuse and recycling (dealt with in reg 26(3)(a)) and destruction or deposit of PIW which requires identification of a facility with better environmental standards.

33. Any examination of how the Act and Regulations deal with the transport of PIW cannot be divorced from how the scheme is applied to its production and treatment. The legal and practical operation of the impugned regulation has to be seen in the context of the regulatory regime as a whole and the priorities it reveals. As is explained in more detail below, there is no necessary analogy between the regulation of the movement of PIW and the transport of commodities such as wheat or barely. To that extent, no ready comparison can be made with observations dealing with the export of commodities considered by this Court in *Barley Marketing Board (NSW) v Norman*.[24] To compare wheat with toxic waste is to ignore entirely the regulatory regime that deals with the latter. To make the obvious point, a protectionist regime for locally produced wheat would have as its aim and effect either encouraging local production or maintaining prices for locally produced goods. That model does not translate to a regulatory regime that has as its purpose the elimination or reduction in locally produced waste for environmental reasons.

## DISCRIMINATION AND PROTECTIONIST EFFECT

34. There are three issues that arise at this point:

(a) Do the issues of discrimination and protectionist effect arise on the demurrer to the defence?

(b) If so, has the plaintiff established that the impugned regulation is a discriminatory protectionist burden?

(c) Is it necessary for the Court to determine not only whether there is a burden of a protectionist kind but also its nature and extent as a predicate for determining whether the burden is justified?

### (a) Discrimination and protection do not arise on the demurrer to the defence

35. Paragraph 18 of the further amended statement of claim [**DB 21**] alleges that the impugned regulation discriminates against interstate trade. That is an essential integer of the plaintiffs' claim. Although the plaintiffs submit that whether there is a protectionist effect to be inferred from the discriminatory burden on interstate trade is a "sub-issue" raised (PS [3.1]), that issue does not properly arise on the demurrer to the defence. On the demurrer, in relation to facts on which the plaintiffs carry the onus, they do not get the benefit of an assumption that the facts they allege are true.

36. Moreover, paragraph 18 of the defence [**DB 28**] denies that allegation. For the reasons in paragraph 25 above, to the extent that the allegation of discrimination is a matter of fact, the effect on a demurrer of the denial is that the fact must be taken as not having been established, and the demurrer must be overruled.

37. The plaintiffs' submissions do not address this difficulty. It appears that the plaintiffs' position is that discrimination against interstate trade or commerce is a conclusion of law, based simply on examination of the terms of the impugned regulation (see PS [24]–[26]). Assuming it arises on the demurrer that position should be rejected, for the reasons below.

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[24] (1990) 171 CLR 182.

38. The same may be said for the plaintiffs' submissions in relation to competitive advantage (PS [28]-[31]).

39. The allegation in paragraph 19 of the further amended statement of claim [**DB 21–22**] — that the impugned regulation imposes a competitive disadvantage on interstate trade — is denied in paragraph 19 of the defence [**DB 28**]. Once again, that is an essential element of the plaintiffs' claim and, to the extent that it is a matter of fact, the denial means that it must be taken on the demurrer not to be established.

40. The question of a competitive disadvantage is plainly a question of fact. As emphasised in *Betfair Pty Ltd v Western Australia*,[25] the analysis of the protectionist effect of an impugned measure is to be conducted with reference to the "real world" effect of the measure in the market. Thus, in *Betfair Pty Ltd v Racing New South Wales*,[26] it was not enough for Betfair Pty Ltd simply to establish that, by maintaining its current pricing structures, and given its low margin, the impugned fees absorbed a higher proportion of its turnover than the turnover of the local totalisation. Rather, it had to establish that the likely effect was a loss to it of market share or profit, or an impediment to increasing that share or profit.

41. Once it is concluded that the question whether the impugned regulation imposes a competitive disadvantage on interstate trade is a question of fact, the denial in paragraph 19 is fatal to the demurrer.

**(b) The allegations of discrimination and protection fail on their merits**

42. In order to rely on s 92 to invalidate the impugned regulation, the plaintiffs must show more than that the regulation treats the South Australian premises differently than licensed or exempt premises in Victoria. They have to show discrimination and protection.

43. Discrimination is not established merely by pointing to differential treatment. Different treatment accorded to two entities which are relevantly different will not amount to discrimination unless the criteria for difference are irrelevant to the object to be attained. On the one hand, the impugned regulation permits transport to premises that are licensed or exempt under the Act. Such premises are within the regulatory control of the Act. The provisions in Divs 2 and 3 of Pt III of the Act relating to the grant of a licence, including where required the need for a works approval under s 19A, contain significant regulatory measures. They are informed by the principles in ss 1B to 1L. Under s 20C, the Environment Protection Authority (**the Authority**) may have regard to policy in issuing, transferring or amending any "authorisation" which includes a works approval or licence.

44. All that can be seen on the face of the impugned regulation is that, in relation to the transport of waste for destruction or deposit, it draws a *distinction* between premises licensed or exempt under the Act and other premises which, as a matter of fact, will be interstate premises. Of itself, that distinction — which it may be accepted is observable as a matter of law — does not establish *discrimination* against interstate trade or commerce. That is so for the following reason.

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[25] (2008) 234 CLR 418 at 480 [114]–[116] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[26] (2012) 249 CLR 217 at 270-271 [55]–[56] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

45. The purpose of the scheme is to regulate the production, discharge and transport of industrial waste in aid of environmental protection. Activities or places that are regulated are subject to the conditions and restrictions that the scheme imposes. The measure of regulatory oversight in the case of an approval for destruction and deposit under regs 26(1)(c) and (6) is necessarily limited. Once such approval is given, the transport of the PIW to the unlicensed premises is approved to a destination which is outside of the regulatory sphere of the Authority.

46. Thus, it is not enough merely to observe the distinction drawn by the impugned regulation. That ignores the factual question of whether there is a relevant difference between the categories of premises identified in the impugned regulation. That factual question would involve consideration of whether the burdens imposed by a requirement to be licensed or exempt under the Act are such that premises so licensed or exempt are in a relevantly different position than other premises, so as to render a requirement to obtain "better" environmental performance standards non-discriminatory.

47. As noted in paragraph 22 above, the analysis required by s 92 of the Constitution calls for close attention to the facts. For the reasons above, that is so even in a case where a distinction is drawn by a provision on its face. It follows that the fact alleged in paragraph 18 of the further amended statement of claim **[DB 21]** is *not* simply a matter of law and that the denial of that allegation in paragraph 18 of the defence **[DB 28]** is fatal to the demurrer.

48. The problem is even more acute in relation to the allegation that the interstate trade is under a competitive disadvantage by reason of the regulation. As the plurality emphasised in *Betfair Pty Ltd v Racing New South Wales*:[27] "[i]t is the concept of protectionism which supplies the criterion by which discriminatory laws may be classified as rendering less than absolutely free trade and commerce among the States".

49. Because s 92 protects trade not traders, it is necessary to identify with precision the trade at issue. It is not "Victorian premises at which prescribed industrial waste is destroyed or deposited" (cf PS [28.1]). They are *traders*. The *trade* at issue is the management of hazardous waste (defence [19(c)] [**DB 29**]) (cf PS [29.1]).

50. Among other things, paragraph 19 of the defence alleges the following facts, which are taken to be accepted for the purpose of the demurrer:

    (a) category A waste cannot be disposed of to landfill in Victoria (defence [19(d)] [**DB 30**]);

    (b) there is little, if any, economic incentive for the transport of category C prescribed industrial waste comprising contaminated soil to interstate facilities (defence [19(g)] [**DB 31**]);

    (c) the "better than" standard in the impugned regulation does not apply to transport for reuse or recycling (defence [19(h)] [**DB 31–32**]);

    (d) the impugned regulation does not preclude the transport of prescribed industrial waste interstate and, to the contrary many approvals have been given (defence [19(hB)] [**DB 32**]);

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[27] (2012) 249 CLR 217 at 265 [36] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

(e) partly as a result of the impugned regulation, the quantity of category B prescribed industrial waste (including category A waste classified after treatment as category B) being transported, treated and finally disposed of to landfill is a small and shrinking proportion of the overall market for the management of hazardous waste in Victoria (defence [19(i)] [**DB 32**]); and

(f) since 2007, the generation of many types of solid prescribed industrial waste in Victoria, in particular category B waste, and the quantities of prescribed industrial waste deposited to landfill in Victoria have, in particular category B waste, have declined significantly (defence [19(iA)], [19(iB)] [**DB 32**]) (see also the annexed chart).

51. Thus, the impugned regulation affects, at most, a small and shrinking part of the market, i.e., the deposit or destruction of category B waste. It has no real effect on the deposit or destruction of category A waste (which cannot be disposed of to landfill in Victoria without first being treated and categorised as category B waste or lower) or category C waste comprising of contaminated soil (for which there is little or no incentive to transport interstate). Moreover, contrary to the usual case, in which a State may seek to protect its domestic trade in order to promote its growth and success, the effect of the impugned regulation in the context of the statutory scheme is not to *protect* domestic trade but to *shrink* the market, in particular for the deposit or destruction of category B waste. The impugned regulation actively reduces the scope for the growth and success of both intrastate and interstate trade in the deposit or destruction of category B waste. That is an unpromising foundation from which to characterise the impugned regulation as "protectionist" (cf PS [39]).

52. In these circumstances, it is insufficient for the plaintiffs to assert that the protectionist effect of the impugned regulation "follows inevitably" from its legal and practical operation (PS [27]). Just as in the cases referred to in paragraph 40 above, the plaintiffs must establish a loss of market share or profit, or an impediment to increasing that share or profit. Moreover, they must show that any such loss or impediment is different from that experienced by substitutable intrastate trade by reason of the intended effect of the impugned regulation, i.e., shrinking the relevant market. The analysis in PS [27]–[31] fails to do so.

**(c) The extent of the burden**

53. Even assuming that a protectionist effect can be identified from the face of the regulation and such meagre facts as are pleaded in the further amended statement of claim and admitted, it is necessary to gauge the extent of that impact as a foundation for determining any justification put forward by the State. Given that protection occurs in a market, it is not possible to ignore the parameters of the market for the purposes of assessing the extent of the burden. The plaintiffs submit that the relevant market is the interstate transport of non-liquid PIW for destruction or deposit and eschews the relevance of any broader conception of the market (PS [36.1]). The factual basis for that submission is not identified and is not consistent with the State's defence in relation to the market (defence [19(c)] [**DB 29**]) which is taken to be accepted on the demurrer. There it is pleaded that the disposal of hazardous waste is part of the national market for the management of hazardous waste.

54. The plaintiffs do not have the benefit of any facts as to the impact on the market of the impugned regulation as was critical in *Castlemaine Tooheys Ltd v South Australia.*[28] The plaintiffs are asking the Court to determine the extent and level of protection at a level of generality, not supported by facts, that precludes a proper foundation for the examination of the question of justification. For that further reason the demurrer should fail.

## LEGITIMATE NON-PROTECTIONIST PURPOSE

56. Even if the impugned regulation discriminates against interstate trade in a protectionist way, it is nonetheless reasonably necessary to achieve, or reasonably appropriate and adapted to achieving, one or more legitimate, non-protectionist purposes, as alleged in paragraphs 19A and 19B of the defence [**DB 33–40**]. Those purposes are:

(a) waste minimisation and reprocessing of hazardous waste to reduce quantity and hazard level of waste in landfill; and

(b) treating and disposing of hazardous waste close to its site of production.

57. Before addressing those matters, it is necessary to address the "preliminary issue" at PS [41]–[49] concerning the identification of the purposes of a measure impugned on the ground that it infringes s 92 of the Constitution.

### (a) Identifying the purpose of an impugned measure

58. The plaintiffs submit that the relevant "objects" of a law for the purposes of s 92 of the Constitution are "the actual motivating objects of the law, determined according to the usual rules of statutory construction" not "any ex post facto justification for the operation of a law" (PS [42]). It is not apparent how this submission advances the plaintiffs' case. Nowhere in the plaintiffs' submissions is it submitted that the objects of the impugned regulation alleged in paragraphs 19A and 19B of the defence are not in fact the objects of the measure. Nowhere is it submitted that they are simply ex post facto justifications. Be that as it may, the plaintiffs' submission should not be accepted.

59. It has been recognised since *Cole v Whitfield*[29] that the relevant question for the purposes of s 92 of the Constitution is one of *characterisation*. That was clearly explained in *Castlemaine Tooheys*:[30]

> [W]e are concerned only with the proper characterization of the law as protectionist or not, in the sense described in *Cole v Whitfield*. Hence there is no place for a secondary test to invalidate laws which have been found to lack a protectionist purpose or effect. Rather, the two tests are combined as one inquiry into the characterization of the law as protectionist or otherwise.

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[28] (1990) 169 CLR 436 (***Castlemaine Tooheys)*** at 464, 467 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) referring to the case stated at 449. See also *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217 at 270 (Heydon J).

[29] (1988) 165 CLR 360 at 394.

[30] (1990) 169 CLR 436 at 471 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ), see also at 472. See further *Cole v Whitfield* (1988) 165 CLR 360 at 408.

So too, the reasons in *Betfair Pty Ltd v Racing New South Wales*[31] are replete with references to characterisation.

60. As was stated in *Castlemaine Tooheys*[32], the process of characterisation can be understood as an inquiry into whether the "true purpose" of the legislation is protectionist. However, the purpose that is sought is the objective intention of the legislature.[33] As Hayne J cautioned in *APLA Ltd v Legal Services Commissioner (NSW)*:[34]

> To attribute "purpose" to a law runs the risk of eliding a useful legal concept expressed in the metaphor of "intention", and the results of some attempted exercise in psychoanalysis of those associated with the making of the law. In the familiar language of the law, there is a risk that an objective concept is turned into a subjective inquiry about the purpose of an individual or the purposes of some group of individuals.

61. Accordingly, as stated in *Sportsbet Pty Ltd v New South Wales*,[35] whether a measure infringes s 92 of the Constitution "does not depend upon the subjective intentions or motives of those responsible for the adoption of the measure". To the contrary, the character of a law is determined by reference to the rights, powers, liabilities, duties and privileges which it creates,[36] including having regard to "the practical as well as the legal operation of the law".[37]

62. It follows that it is apt to mislead to search for "the actual motivating objects of the law" (PS [42]). That is to fall into precisely the error against which Hayne J cautioned in *APLA*. Moreover, it has the tendency to focus attention on the subjective intentions or motivations of those responsible for the adoption of a law, contrary to the injunction of this Court in *Sportsbet*.

63. Further, as Gummow J observed in *APLA*: "the level of characterisation required by the constitutional criterion of object or purpose is closer to that employed when seeking to identify the mischief to redress of which a law is directed or when speaking of 'the objects of the legislation'."[38] Consistently with the search for a legislative object in these latter contexts, it is contrary to principle to suggest — as is apparently suggested in PS [43] — that the scope of the

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[31] (2012) 249 CLR 217 at 265 [37], [38], 266 [42], 268 [46] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 272 [61] (Heydon J), 285 [102], 288 [110], 290 [120], 291 [122], 296 [139] (Kiefel J).

[32] (1990) 169 CLR 436 at 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[33] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 555–556 [82]–[84] (Kirby J); *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 (Dixon J).

[34] (2005) 224 CLR 322 (***APLA***) at 462 [423]. See also at 394 [178] (Gummow J); *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ.

[35] (2012) 249 CLR 298 (***Sportsbet***) at 320 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[36] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 352-353 (Brennan CJ and McHugh J), 372 (Gummow and Hayne JJ).

[37] *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby J).

[38] (2005) 224 CLR 322 at 394 [178].

inquiry is confined to an express statement of the objects of a measure, whether in a regulatory impact statement or an express objects provision in a statute.[39]

64. In light of the above, there is no difficulty identifying the objects of the impugned measure as including those alleged in paragraphs 19A and 19B of the defence.

65. Paragraph 19A alleges that an object is "the policy of waste minimisation and reprocessing of hazardous waste to reduce the quantity and hazard level of this type of waste going to landfill in order to minimise the harmful impacts of disposing of hazardous waste to landfill on human health and the environment" **[DB 33]**. That object may be readily discerned in the following materials:

(a) *first*, the factual allegations in paragraphs 19A(i)–(n) and (p) [**DB 34–36**]. They must be taken to be admitted on the demurrer;

(b) *secondly*, the *Variation to Industrial Waste Management Policy (Movement of Controlled Waste Between States and Territories) 2008* (Vic)[40] (**2008 Variation**), quoted at PS [45.2]. As acknowledged there, this was the origin of the impugned regulation. It made clear that its purpose was to avoid production of hazardous wastes, and to promote their reuse and recycling; and

(c) *thirdly*, the *Regulatory Impact Statement for the draft Environment Protection (Industrial Waste Resource) Regulations*[41] (**RIS**). It preceded the present regulations and expressly provided for the retention of the 2008 Variation.[42] It contains many references disclosing the object alleged in paragraph 19A of the defence.[43]

66. Paragraph 19B alleges that an object of the impugned regulation is "the policy that hazardous waste ought to be treated and disposed of close to its site of production" [**DB 39**]. That object may be readily discerned in the following materials:

(a) *first*, the 2008 Variation (quoted in PS [45.2]). It made clear that transport of waste to other states and territories for disposal would only be permitted where there was a countervailing environmental benefit;

(b) *secondly*, at the time the impugned regulation was made, it was well known that the movement of hazardous waste could have potential adverse impacts on the environment and

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[39] See, eg, *Municipal Officers' Assn of Australia v Lancaster* (1981) 54 FLR 129 at 153 (Evatt and Northrop JJ); *WBM v Chief Commr of Police (Vic)* (2012) 43 VR 446 at 456 [40] (Warren CJ).

[40] Victoria Government Gazette, S 208, 23 July 2008.

[41] Publication 1275, March 2009.

[42] See p 17 of the RIS. The draft of the impugned regulation was draft reg 27(2), contained in Appendix A.

[43] See eg pp 6, 7, 19-23, 25, 34, 54-57.

human health. So much is apparent from other provisions of the Regulations[44] and contemporaneous extrinsic material;[45] and

(c) *thirdly*, the RIS. Again, it contains many references supporting this object.[46]

67. It follows that, in this case at least, any debate as to the identification of objects is moot. Rather, the question is whether the impugned regulation is reasonably necessary to achieve, or reasonably appropriate and adapted to achieving, these objects.

**(b) Paragraph 19A of the defence: waste minimisation**

68. The plaintiffs admit that the policy of waste minimisation and reprocessing of hazardous waste is a legitimate non-protectionist purpose.[47] So much follows from the outcome in *Cole v Whitfield*.[48] So too, in *Castlemaine Tooheys*,[49] it was said:

> If we accept, as we must, that the legislature had rational and legitimate grounds for apprehending that the sale of beer in non-refillable bottles generates or contributes to the litter problem and decreases the State's finite energy resources, legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement.

69. Rather, the plaintiffs' attack on the object alleged in paragraph 19A is to submit that "protecting revenue" and "discouraging interstate transport" are "illegitimate means" (PS [51], [56]) because they are "protectionist means" (PS [53]). That submission must be rejected.

70. The question to which the justification limb of the s 92 analysis is directed is whether the *object* of a law is non-protectionist. If so, a reasonably necessary, or reasonably appropriate and adapted, burden on interstate trade will not infringe s 92. It is not apparent how, in this analysis, the plaintiffs seek to inject the notion of "protectionist means" (as opposed to "protectionist ends"). Indeed, the very purpose of the justification limb is to permit means with protectionist effects to be adopted, provided they are reasonably necessary, or reasonably appropriate and adapted, to a non-protectionist end. To ban interstate trade in crayfish below a certain size was a "protectionist means": it was held valid in *Cole v Whitfield*[50] because it was directed to a non-protectionist end.

71. The impugned regulation does not prescribe a fiscal impost. It does prevent the export of PIW unless it is possible to locate a facility with better environmental performance standards compared with facilities that are licensed or exempt under the Act and satisfy the Authority of that fact. It is a necessary corollary that PIW that cannot be exported for destruction or deposit must be, in

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[44] See, eg, regs 15(c), 27.

[45] See, eg, *Industrial Waste Management Policy (Movement of Controlled Waste Between States And Territories) 2001* (Vic), Victoria Government Gazette, S 222, 6 December 2001, cl 4(b); *National Environment Protection (Movement of Controlled Waste between States and Territories) Measure 1998* (Cth), cl 12.

[46] See eg pp 13–14, 21, 25, 34, 56.

[47] Par 3.3(a) of the Reply to the Defence [**DB 47**].

[48] (1988) 165 CLR 360.

[49] (1990) 169 CLR 436 at 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[50] (1988) 165 CLR 360.

practical terms either left at the site of production or transferred to a place licensed or exempt under the Act. That effect is not to preference local facilities but to keep the waste within the regulatory system in which it was created.

72. Within that regulatory system, the regulatory tools, including pricing, are available to discourage the production of toxic and harmful waste. It is also a necessary corollary that the fees that are levied in relation to the transport and treatment of the waste will be revenue in the hands of the regulatory Authority.[51] The effect of the plaintiffs' submission is that pricing of regulatory measures can never be a legitimate means of achieving a non-protectionist goal.

73. This case is thus distinguishable from those in which a State imposes a fee for the purpose of generating revenue for the State. It may be accepted that the imposition of a levy by a State for such a purpose in these circumstances is not a legitimate end.[52] For the reasons above, that is not this case (cf PS [52]). This is a case in which a levy is imposed so as to discourage conduct rationally considered by the State to be harmful and to prevent an avenue of waste disposal that would undercut the legitimate objective of waste avoidance and minimisation.

74. To the extent that any purpose or effect of the increased levies was to generate State revenue, that was entirely incidental: not only was such revenue directed to waste reduction measures (defence [19A(n)] [**DB 35**]), more importantly, if the scheme of which the impugned regulation forms a part achieves its end, that revenue will diminish to nothing as the conduct which attracts the levy is discouraged. There is no authority to support the proposition that imposing such a levy is an "illegitimate means" to achieve an end consistent with s 92 of the Constitution. It would be extraordinary if that were so. It would mean that a State is limited to prohibiting conduct outright and cannot take the less draconian step of discouraging it by a pricing mechanism.

75. The submission that "discouraging interstate transport" is an "illegitimate means" is inconsistent with *Cole v Whitfield*.[53] In that case, the interstate trade could be validly prohibited. Once again, if prohibition of interstate trade is permissible, discouragement without prohibition must likewise be permissible. The submission is also contrary to principle. The very notion of a "justification" limb of the s 92 analysis is to permit measures the effect of which is to make interstate trade less competitive with intrastate trade, and thus to discourage interstate trade. In a case where the trade involves interstate transport, it must follow that a measure directed to a legitimate end may permissibly make interstate transport less competitive than intrastate transport, and thus discourage interstate trade.

76. Once these submissions are rejected, the balance of the plaintiffs' attack on the justification alleged in paragraph 19A of the defence (PS [54]–[61]) falls away. The facts alleged in the

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[51] See: ss 70(3)(ab), (6) of the Act.

[52] *Sportsodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 80 [43]; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 478-479 [107]–[108] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Victoria v Sportsbet Pty Ltd* (2012) 207 FCR 8 at 83-84 [314]–[319] (Kenny and Middleton JJ).

[53] (1988) 165 CLR 360.

defence (which are taken to be accepted for the purposes of the demurrer) lead inexorably to the conclusion that the impugned regulation is valid. Those facts establish that:

(a) the scheme of imposing higher landfill levies was directed to a legitimate non-protectionist purpose of encouraging waste reduction etc, and ensuring waste producers bear a truer cost of waste disposal (defence [19A(l)], [19A(m)] [**DB 35**]);

(b) this scheme is working, as evidenced by the reduction in the generation of category B waste and in the proportion of category B waste sent for deposit without treatment (defence [19A(o)], [19(iA)], [19(iB)], [**DB 32, 35**];

(c) the scheme affects only a small and shrinking part of the overall market, in a relatively limited way (defence [19(i)]–[19(iB)] [**DB 32**]); and

(d) the "better than" standard is necessary to the functioning of this scheme (defence [19(p)] [**DB 36**]).

77. The necessity of the "better than" standard to the functioning of the scheme bears a close resemblance to the fact which was found to be critical in *Cole v Whitfield*.[54] On a demurrer, it must be taken to be accepted. In the face of that fact, it must follow that the "better than" standard in the impugned regulation is reasonably necessary, or reasonably appropriate and adapted, to the object alleged in paragraph 19A of the defence.

**(c) Paragraph 19B of the defence: treatment of waste close to its source**

78. As with paragraph 19A of the defence, it does not appear that the plaintiffs contend that the object alleged in paragraph 19B of the defence is an illegitimate end. Nor does it appear that the plaintiffs contest the benefits of treatment of hazardous waste close to its source alleged in paragraph 19B(a) and (b), or that the impugned regulation encourages that outcome as alleged in paragraph 19B(c). In any event, they are all matters of fact which must be admitted on the demurrer.

79. Rather, the plaintiffs' attack is on whether the impugned regulation is reasonably necessary, or reasonably appropriate and adapted, to the end of encouraging treatment and disposal of hazardous waste close to the site of its production. For the following reasons, the Court should conclude that it is.

80. *First*, it may be accepted that the impugned regulation is not directed to the end alleged as closely as a regulation framed expressly by reference to the distance between the source and place of deposit of the waste. But as explained in paragraph 17 above, the question is not one of "absolute" necessity. The complexity of a regime based more tightly on geographic proximity is apparent upon review of the New South Wales provision in PS [64.2] fn 60.

81. *Secondly*, contrary to PS [65], it is immaterial whether or not the impugned regulation has, on its face, a connection with the safety of road transport. The plaintiffs must accept on the demurrer

[54] (1988) 165 CLR 360 at 409.

that the impugned regulation encourages disposal and deposit of prescribed industrial waste closer to its source and that this, in turn, decreases the risks posed by the transport of hazardous waste and achieves the policy goal of making communities responsible for the environmental effects of the industries they rely on [defence [19B] [**DB 39-40**]]. That is sufficient to establish a rational connection between the impugned regulation and the asserted benefit. That is not denied by reference to administrative guidelines, which form no part of the impugned regulation or the legislative scheme (cf PS [65]).

82. *Thirdly*, the countervailing benefit obtained by the "better than" standard is neither "tenuous" nor lacking in sufficient connection with the burden on interstate trade (cf PS [66]). It is far too compartmentalised a view of the governmental interests of the States, and of environmental concerns generally, for them to be divided along State borders as submitted in PS [66.1]. It is a legitimate matter for the State to take into account the environmental benefits to Australia generally which may be obtained in exchange for the admitted detriments of destruction or deposit of waste further from its source. The suggestion that some precise weighing of the benefits is required (PS [66.2]) should be rejected. That would likely be an impossible task. At the least, it is not such a reasonably obvious alternative as to deny the reasonable necessity of the impugned regulation to this end.

83. *Fourthly*, for the reasons above, PS [67] is wrong to confine the State's legitimate sphere of interest to the environment within its borders. That is not to say that the State may seek to force its environmental standards on others (cf PS [55]–[56]). However, it is not illegitimate for the State to consider effects on the environment generally in the formulation and pursuit of its policies.

## PART VIII: ESTIMATE

84. The State estimates that presentation of its oral argument will require 2 hours.

Dated: 14 November 2016

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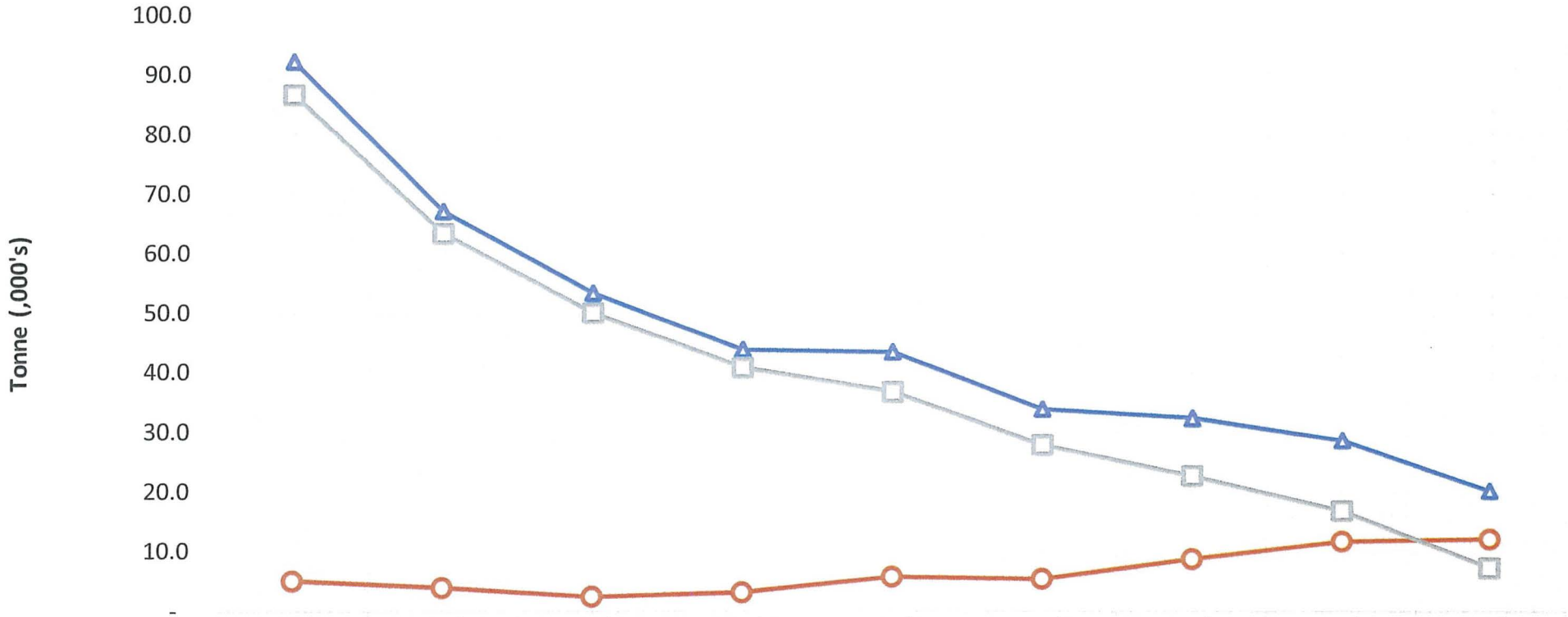
## ANNEXURE A

# Category B Soils & Manufacturing (In thousands of tonnes)




| | 2007/08 | 2008/09 | 2009/10 | 2010/11 | 2011/12 | 2012/13 | 2013/14 | 2014/15 | 2015/16* |
|---|---|---|---|---|---|---|---|---|---|
| Generation # | 92.2 | 66.9 | 53.4 | 43.8 | 43.5 | 33.7 | 32.4 | 28.4 | 20.2 |
| Treatment | 5.1 | 3.6 | 2.2 | 3.0 | 5.8 | 5.4 | 8.5 | 11.5 | 12.0 |
| Landfill | 86.5 | 63.2 | 50.1 | 40.8 | 36.8 | 27.7 | 22.7 | 16.6 | 7.3 |

*# Generation = Landfill + Treatment + Unknown. *FY 2016 data not yet complete*

## ANNEXURE B

## RELEVANT LEGISLATIVE PROVISIONS

**Environment Protection Act 1970 (Vic) (Authorised Version No 193 as at 1 July 2016)**

**1B Principle of integration of economic, social and environmental considerations**

(1) Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.

(2) This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.

(3) The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.

**1C The precautionary principle**

(1) If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(2) Decision making should be guided by—

(a) a careful evaluation to avoid serious or irreversible damage to the environment wherever practicable; and

(b) an assessment of the risk-weighted consequences of various options.

**1D Principle of intergenerational equity**

The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

**1E Principle of conservation of biological diversity and ecological integrity**

The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making.

**1F Principle of improved valuation, pricing and incentive mechanisms**

(1) Environmental factors should be included in the valuation of assets and services.

(2) Persons who generate pollution and waste should bear the cost of containment, avoidance and abatement.

(3) Users of goods and services should pay prices based on the full life cycle costs of providing the goods and services, including costs relating to the use of natural resources and the ultimate disposal of wastes.

(4) Established environmental goals should be pursued in the most cost effective way by establishing incentive structures, including market mechanisms, which enable persons best placed to maximise benefits or minimise costs to develop solutions and responses to environmental problems

**1G Principle of shared responsibility**

(1) Protection of the environment is a responsibility shared by all levels of Government and industry, business, communities and the people of Victoria.

(2) Producers of goods and services should produce competitively priced goods and services that satisfy human needs and improve quality of life while progressively reducing ecological degradation and resource intensity throughout the full life cycle of the goods and services to a level consistent with the sustainability of biodiversity and ecological systems.

**1H Principle of product stewardship**

Producers and users of goods and services have a shared responsibility with Government to manage the environmental impacts throughout the life cycle of the goods and services, including the ultimate disposal of any wastes.

**1I Principle of wastes hierarchy**

Wastes should be managed in accordance with the following order of preference—

(a) avoidance;

(b) re-use;

(c) re-cycling;

(d) recovery of energy;

(e) treatment;

(f) containment;

(g) disposal.

**1J Principle of integrated environmental management**

If approaches to managing environmental impacts on one segment of the environment have potential impacts on another segment, the best practicable environmental outcome should be sought.

**1K Principle of enforcement**

Enforcement of environmental requirements should be undertaken for the purpose of—

(a) better protecting the environment and its economic and social uses;

(b) ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements;

(c) influencing the attitude and behaviour of persons whose actions may have adverse environmental impacts or who develop, invest in, purchase or use goods and services which may have adverse environmental impacts.

**1L Principle of accountability**

(1) The aspirations of the people of Victoria for environmental quality should drive environmental improvement.

(2) Members of the public should therefore be given—

(a) access to reliable and relevant information in appropriate forms to facilitate a good understanding of environmental issues;

(b) opportunities to participate in policy and program development.

**4 Definitions**

(1) In this Act unless inconsistent with the context or subject matter

...

***industrial waste*** means—

(a) any waste arising from commercial, industrial or trade activities or from laboratories; or

(b) any waste containing substances or materials which are potentially harmful to human beings or equipment;

...

PART III - ENVIRONMENT PROTECTION

...

Division 2 - Works approval

**16A EXAMPLE**

(1) Example—

(a) example;

(i) example;

**19A Scheduled premises**

(1) The occupier of a scheduled premises must not do any act or thing, including the commencement of any construction, installation or modification of plant, equipment or process or any subsequent step in relation thereto, which is likely to cause—

(a) an increase or alteration in the waste discharged or emitted from, deposited to, or produced at, the premises; or

(b) an increase or alteration in the waste which is, or substances which are a danger or potential danger to the quality of the environment or any segment of the environment which are, reprocessed, treated, stored, contained, disposed of or handled, at the premises; or

(c) a change in any method or equipment used at the premises for the reprocessing, treatment, storage, containment, disposal or handling of waste, or of substances which are a danger or potential danger to the quality of the environment or any segment of the environment; or

(d) a significant increase in the emission of noise; or

(e) a state of potential danger to the quality of the environment or any segment of the environment—

except in accordance with a works approval or a licence or a requirement specified in a notice given by the Authority as the case may be unless the act or thing is only in the course of and for the purpose of general maintenance.

(2) The occupier of a scheduled premises must not construct, relocate or reduce the height of any chimney through which waste is, or may be, discharged or emitted to the atmosphere or carry out any work which is the commencement of or any subsequent

step in relation thereto, except in accordance with a works approval or a licence or a requirement specified in a notice given by the Authority as the case may be unless the work is only in the course of and for the purpose of general maintenance.

(3) The occupier of any premises must not do any act or thing in relation to those premises that would make those premises a scheduled premises except in accordance with a works approval, a research, development and demonstration approval or a notice issued by the Authority.

(4) The Authority may by notice in writing upon the application of the occupier of a scheduled premises in respect of which a licence is in force under this Act, or who is exempt from the need to hold a licence under this Act, exempt the occupier from compliance with subsection (1)(a) if the Authority is satisfied that the exemption will not result in a discharge, emission or deposit of waste which by reason of volume, location, constituency or manner—

(a) affects adversely the quality of any segment of the environment; or

(b) affects adversely the interests of any person other than the applicant.

(5) The Authority may by notice in writing upon the application of the occupier of a scheduled premises in respect of which a licence is in force under this Act, or who is exempt from the need to hold a licence under this Act, exempt the occupier from compliance with subsection (1)(b) or (1)(c) if the Authority is satisfied that the exemption will not result in the reprocessing, treatment, storage, containment, disposal or handling of—

(a) prescribed industrial waste; or

(b) substances which are a danger or a potential danger to the quality of the environment or any segment of the environment—

which by reason of volume, location, constituency or manner is or are likely to cause an environmental hazard or affect adversely the interests of any person other than the applicant.

(6) The Authority may by notice in writing upon the application of the occupier of a scheduled premises in respect of which a licence is in force under this Act, or who is exempt from the need to hold a licence under this Act, exempt the occupier from compliance with subsection (1)(d) if the Authority is satisfied that the exemption will not result in an emission of noise which by reason of volume, intensity, duration or location—

(a) affects adversely the quality of any segment of the environment; or

(b) affects adversely the interests of any person other than the applicant.

(6A) The Authority may, by notice in writing upon the application of the occupier of a scheduled premises in respect of which a licence is in force under this Act, or who is exempt from the need to hold a licence under this Act, exempt the occupier from compliance with subsection (2).

(6B) The Authority may grant an exemption under subsection (6A) if the Authority is satisfied that the exemption will not result in a discharge or emission to the atmosphere of waste which by reason of volume, intensity, location, constituency or manner affects adversely—

(a) the quality of any segment of the environment; or

(b) the interests of any person other than the applicant.

(7) An exemption given under subsection (4), (5), (6) or (6A)—

(a) may be general or limited in operation according to time or any other circumstances; and

(b) may be revoked or amended by a written notice given by the Authority.

(8) Subject to subsections (4), (5), (6) and (6A), the occupier of any scheduled premises in respect of which there is not applicable an exemption under the regulations who contravenes subsection (1), (2) or (3) is guilty of an indictable offence against this Act and liable to a penalty of not more than 2400 penalty units.

(9) A works approval, licence, requirement specified in a notice given by the Authority or an exemption in force before the commencement of section 5 of the **Environment Protection (Amendment) Act 2006** continues to have the same force and effect as it would have had if that section had not come into operation.

**19B Works approval**

(1) An application for a works approval shall be—

(a) made in accordance with a form and in a manner approved by the Authority;

(b) forwarded with the prescribed fee; and

(c) accompanied by such plans, specifications and other information and a summary thereof as may be required by the Authority within 21 days of receiving the initial application.

(2) The Authority shall not deal with an application which does not comply with subsection (1) and shall advise the applicant that the application does not comply with subsection (1).

(3) The Authority shall upon receiving an application for a works approval—

(a) refer a copy of the application and a copy or summary of the accompanying plans, specifications and other information to—

(i) any protection agency which the Authority considers may be directly affected by the application; and

(ii) the Secretary to the Department of Health; and

(iii) any responsible authority under the **Planning and Environment Act 1987** administering a planning scheme applying to the land for which the application for works approval is made; and

(iv) the Minister administering the **Mineral Resources (Sustainable Development) Act 1990**, if the application relates to exploration for minerals or mining; and

(b) publish in a newspaper circulating generally throughout Victoria notice—

(i) that the Authority has received an application for a works approval;

(ii) of the place or places at which a copy or a summary of the application and a copy or summary of the accompanying plans, specifications and other information may be examined;

(iii) that any person or body interested in the application may request and upon payment of the prescribed fee shall receive from the Authority a summary of the application and the accompanying plans, specifications and other information;

(iv) that any person or body interested in the application may within 21 days of the publication of the notice comment in writing on the application; and

(v) that any person or body interested in the application may ask the Authority in writing to be notified if the Authority issues a works approval.

(3A) A responsible authority to which a copy of an application is referred under subsection (3) must make a copy of the application and a copy of all accompanying documents available at its office for any person to inspect free of charge

(3B) If an application for a works approval is to be jointly advertised under section 20AA with a notice relating to the same proposal under the **Environment Effects Act 1978** this section applies as if—

(a) in subsection (3)(b) for subparagraphs (iv) and (v) there were **substituted** the following subparagraph—

"(iv) that comments by any person or body interested in the application must be made as a submission on the environment effects statement or be included in any submission on the environment effects statement;";

(b) subsections (6) and (6A) were **repealed**.

(4) The Secretary to the Department of Health and any protection agency to which a copy of an application for a works approval has been referred under subsection (3)(a) may within 21 days from the day upon which the copy was sent submit a written report to the Authority which may include any objections or recommendations in relation to the application.

(4A) A responsible authority to which a copy of an application for a works approval has been referred under subsection (3)(a)—

(a) must tell the Authority in writing within 21 days after the day on which the copy was sent whether—

(i) the proposed works are allowed by the planning scheme with or without conditions;

(ii) a permit is required under the **Planning and Environment Act 1987** for the proposed works;

(iii) a permit has been issued under the **Planning and Environment Act 1987** for the proposed works;

(iv) the responsible authority is considering an application for a permit under the **Planning and Environment Act 1987** for the proposed works;

(v) the proposed works are prohibited by the planning scheme; and

(b) may tell the Authority in writing within 45 days after the day on which the copy was sent whether it supports, does not object or objects to the application; and

(c) may ask the Authority in writing within 45 days after the day on which the copy was sent to include specified conditions in the works approval if it is issued.

(4B) The responsible authority must give the Authority a copy of any permit issued under the **Planning and Environment Act 1987** for the proposed works.

(4C) The Minister administering the **Mineral Resources (Sustainable Development) Act 1990** must advise the Authority within 21 days after he or she receives a copy of an application under subsection (3)(a)(iv)—

(a) whether the proposed works are prohibited by the planning scheme; and

(b) if so, whether an amendment to the planning scheme is to be prepared to allow the proposed works to proceed.

(5) The Authority shall—

(a) take into account any replies, reports, comments and information received under subsection (4), (4A) or (4B); and

(b) where the Secretary to the Department of Health submits a written report objecting to the issue of a works approval on the ground that the public health is likely to be endangered if a works approval is issued, refuse to issue a works approval; and

(c) if the proposed works are prohibited by a planning scheme, refuse to issue a works approval, unless the Authority has been advised under subsection (4C)(b) that an amendment to the planning scheme is to be prepared.

(5A) The Authority may issue a works approval for proposed mining or exploration works that will require an amendment to the planning scheme on the condition that the works approval does not take effect until the Minister or the planning authority approves the required amendment.

(6) At the expiration of 21 days from the publication of a notice under subsection (3) the Authority may if any written comments have been received from any person or body interested in the application in accordance with subsection (3)(b)(iv) hold a conference in accordance with section 20B.

(6A) If the Authority receives requests under subsection (3)(b)(v), the Authority must notify the people and bodies who made the requests that it has issued a works approval by—

(a) sending notice of the issue to each person and body who made a request (or if a request is made by a number of people or bodies jointly, to a representative of those people or bodies); or

(b) publishing notice of the issue in a newspaper circulating generally throughout Victoria.

(7) The Authority shall not later than 4 months after receiving an application for a works approval—

(a) refuse to issue a works approval; or

(b) issue a works approval subject to such conditions as the Authority considers appropriate and which conditions shall be specified in the works approval.

(7A) If a planning scheme requires a permit to be obtained under the **Planning and Environment Act 1987** for the proposed works and a permit has not been issued, any works approval issued by the Authority for the proposed works must be issued subject to a condition that the approval does not take effect until a copy of the permit is served on the Authority by the applicant.

(7B) Any works approval issued in contravention of subsection (5)(c) or (7A) is void.

(8) The occupier of any premises who contravenes any conditions specified in a works approval shall be guilty of an indictable offence against this Act and liable to a penalty of not more than 2400 penalty units.

**19C Power of Authority to amend works approval**

(1) Subject to subsections (2) and (3) the Authority may by notice in writing amend any works approval—

(a) by revoking or amending any condition specified in a works approval; or

(b) by inserting a new condition in a works approval.

(2) The Authority may only amend a works approval other than a works approval issued in respect of a scheduled premises used for the reprocessing, treatment, storage, containment, disposal or handling of prescribed industrial waste, or of substances which are a danger or potential danger to the quality of the environment or any segment of the environment under subsection (1) if the Authority is satisfied that the amendment will not result in a discharge, emission or deposit of waste which by reason of volume, location, constituency or manner—

(a) affects adversely to a substantial degree the quality of any segment or element of the environment; or

(b) affects adversely to a substantial degree the interests of any person other than the holder of the works approval.

(3) The Authority may only amend a works approval issued in respect of a scheduled premises used for the reprocessing, treatment, storage, containment, disposal or handling of prescribed industrial waste, or of substances which are a danger or potential danger to the quality of the environment or any segment of the environment under subsection (1) if the Authority is satisfied that the amendment will not result in the reprocessing, treatment, storage, containment, disposal or handling of prescribed industrial waste, or of substances which are a danger or potential danger to the quality of the environment or any segment of the environment, which by reason of volume, location, constituency or manner—

(a) is or are likely to cause an environmental hazard; or

(b) affect adversely to a substantial degree the interests of any person other than the holder of the works approval.

(4) An amendment of a works approval made before the commencement of section 6 of the **Environment Protection (Amendment) Act 2006** continues to have the same force and effect as it would have had if that section had not come into operation.

**19CA Duration of works approval**

(1) The Authority may specify in a works approval the day on which the works approval shall expire if the works in respect of which the works approval is issued have not commenced by that day to the satisfaction of the Authority.

(2) A works approval shall expire in any of the following cases—

(a) if the works to which the works approval relates have not been commenced to the satisfaction of the Authority by the day specified in the works approval or any later day specified under subsection (4);

(b) if a new works approval is issued in substitution for an existing works approval;

(c) if—

(i) a licence is issued under section 20 in respect of the premises to which the works approval relates; and

(ii) all works covered by the works approval have been completed to the satisfaction of the Authority;

(d) if—

(i) a licence is amended under section 20A; and

(ii) the amendment is made because of the works to which the works approval relates; and

(iii) all works covered by the works approval have been completed to the satisfaction of the Authority.

(3) If a permit has been issued for the proposed works under the **Planning and Environment Act 1987**, the Authority must specify an expiry day for the works approval under subsection (1) which must not be later than the day on which the permit expires for a failure to start the works.

(4) The Authority may extend the time within which any works to which subsection (3) applies must be commenced.

**19D Application for research, development and demonstration approval**

(1) The occupier of any premises which—

(a) is a scheduled premises; or

(b) would become a scheduled premises if works were carried out—

may apply to the Authority for a research, development and demonstration approval in respect of any research, development and demonstration project which would otherwise require a works approval.

(2) An application for a research, development and demonstration approval must be—

(a) made in a form and manner approved by the Authority and in accordance with any requirements of the Authority; and

(b) forwarded with a fee of 60 fee units.

(3) The Authority may require an applicant for a research, development and demonstration approval to provide any information relating to the application specified by the Authority.

(4) The Authority must not deal with an application which does not comply with subsection (2) or in respect of which a requirement under subsection (3) has not been complied with.

(5) A research, development and demonstration approval in force before the commencement of section 7 of the **Environment Protection (Amendment) Act 2006** continues to have the same force and effect as it would have had if that section had not come into operation.

**19E Consideration of application**

(1) The Authority must issue or refuse to issue a research, development and demonstration approval within 30 days of receiving an application which complies with sections 19D(2) and 19D(3).

(2) In determining whether the application relates to a research, development and demonstration project, the Authority must have regard to the scale, dimensions, purpose and duration and the potential environmental impact of the proposed works.

(3) The Authority may issue a research, development and demonstration approval subject to such conditions as the Authority considers appropriate and which conditions must be specified in the approval.

**19F Duration and effect of approval**

(1) Section 19CA applies in respect of a research, development and demonstration approval as if it were a works approval.

(2) The holder of a research, development and demonstration approval is exempted from the requirement to obtain a works approval in respect of the works specified in the approval.

(3) During the currency of a research, development and demonstration approval the Authority may by notice in writing—

(a) revoke the research, development and demonstration approval; or

(b) revoke or amend any condition to which the research, development and demonstration approval is subject; or

(c) attach new conditions to the research, development and demonstration approval.

**19G Offences**

(1) A holder of a research, development and demonstration approval who contravenes any condition to which the approval is subject is guilty of an indictable offence against this Act and liable to a penalty of not more than 2400 penalty units and in the case of a continuing offence to a daily penalty of not more than 1200 penalty units for each day the offence continues after a finding of guilt or after service by the Authority on the accused of notice of contravention of the condition.

(2) Where—

(a) premises are shared by a corporation and a subsidiary or subsidiaries of that corporation; and

(b) one of those corporations is the holder of a research, development and demonstration approval under this Act in respect of those premises; and

(c) there occurs on the premises a contravention of a condition to which the research, development and demonstration approval is subject—

the holder of the research, development and demonstration approval is in the absence of evidence to the contrary deemed to have caused that contravention.

(3) A holder of a research, development and demonstration approval is not liable to a penalty under this Act with respect to the discharge, emission or deposit of waste if the holder proves that the holder—

(a) complied with the conditions to which the approval is subject with respect to the discharge, emission or deposit; and

(b) complied with any requirement contained in a notice served under section 31A or 31B; and

(c) did not discharge or emit odours which are offensive to the senses of human beings in a residential area or in a public open space adjacent to a residential area.

(4) If a holder of a research, development and demonstration approval intends to prove any of the matters in subsection (3), the holder must within 21 days of the day on which the charge-sheet and summons alleging the offence is served on that person cause to be served on the informant a written statement specifying—

(a) any details, documents or other information upon which the holder intends to rely to establish those matters during the relevant period; and

(b) details of any discharge, emission or deposit of waste during the relevant period; and

(c) details of documents relating to the matters specified in paragraphs (a) and (b).

(5) The documents specified under subsection (4) must be made available for inspection by or on behalf of the informant.

(6) In subsection (4) ***relevant period*** means—

(a) the day or days on which the alleged contravention occurred; and

(b) the period of 2 days before and after each such day or days.

Division 3 - Control of Wastes and noise

**20 Licensing of certain premises**

(1) The occupier of a scheduled premises must not undertake at those premises—

(a) the discharge, emission or deposit of waste to the environment; or

(b) the reprocessing, treatment, storage, containment, disposal or handling of waste; or

(c) the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or potential danger to the quality of the environment or any segment of the environment; or

(d) an activity which creates a state of potential danger to the quality of the environment or any segment of the environment—

unless licensed to do so under this Act.

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(4) An application for a licence under this section shall be—

(a) made in accordance with a form and in a manner approved by the Authority; and

(b) accompanied by such plans, specifications and other information and a summary thereof as may be required by the Authority within 21 days of receiving the initial application.

(5) The Authority shall not deal with an application which—

(a) does not comply with subsection (4); or

(b) except as provided in subsection (7C) relates to a matter in respect of which—

(i) a works approval has been obtained and, in the opinion of the Authority, the works have not been satisfactorily completed in accordance with that works approval; or

(ii) a works approval is required to be obtained and has not been obtained and the works have not been completed or substantially completed—

and shall advise the applicant accordingly.

(6) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval is not required except an application referred to in subsection (8C), the Authority shall not later than 60 days after receiving the application—

(a) refuse to issue a licence; or

(b) issue a licence subject to such conditions as the Authority considers appropriate.

(7) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval has been obtained and, in the opinion of the Authority, the works have been satisfactorily completed in accordance with the works approval the Authority shall not later than 21 days after receiving the application issue a licence subject to such conditions which are not inconsistent with any conditions specified in the works approval as the Authority considers appropriate.

(7A) Where the Authority receives an application following the issue of a works approval and the applicant subsequently notifies the Authority that the works have been satisfactorily completed in accordance with the works approval, the Authority shall not later than 45 days after being notified satisfy itself as to whether or not the works have been satisfactorily completed in accordance with the works approval and—

(a) if the Authority is satisfied that the works have been satisfactorily completed, subsection (7) shall be deemed to apply to the application and the Authority shall be deemed to have received the application on the day on which it became so satisfied; or

(b) if the Authority is not satisfied that the works have been satisfactorily completed, the Authority shall advise the applicant accordingly.

(7B) Unless an agreement is made under section 67A, if at the expiry of the period of 45 days specified in subsection (7A) the Authority has not made a decision as to whether or not the works have been satisfactorily completed, the Authority shall upon that expiry be deemed to be satisfied that the works have been satisfactorily completed and subsection (7A)(a) shall apply accordingly.

(7C) If a works approval has been obtained in respect of any premises, but only part of the works has been satisfactorily completed in accordance with the works approval, the Authority may issue a licence subject to any conditions that are not inconsistent with any conditions specified in the works approval that the Authority considers appropriate in respect of that part of the premises in which the works have been so completed.

(8) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval was required to be obtained and has not been obtained and the works have been completed or substantially completed the following provisions shall apply—

(a) the Authority shall refer a copy of the application and a copy or summary of the accompanying plans, specifications and other information to—

(i) any protection agency which the Authority considers may be directly affected by the application; and

(ii) the Secretary to the Department of Health; and

(iii) any responsible authority under the Planning and Environment Act 1987 administering a planning scheme applying to the land for which the application is made;

(b) the Authority shall publish in a newspaper circulating generally throughout Victoria notice—

(i) that the Authority has received an application to which this subsection applies;

(ii) of the place or places at which a copy or a summary of the application and a copy or summary of the accompanying plans, specifications and other information may be examined;

(iii) that any person or body interested in the application may request and upon payment of the prescribed fee shall receive from the Authority a summary of the application and the accompanying plans, specifications and other information;

(iv) that any person or body interested in the application may within 21 days of the publication of the notice comment in writing on that application; and

(v) that any person or body interested in the application may ask the Authority in writing to be notified if the Authority issues a licence;

(ba) a responsible authority to which a copy of an application has been referred under paragraph (a) of this subsection must make a copy of the application and a copy of all accompanying documents available at its office for any person to inspect free of charge;

(c) the Secretary to the Department of Health and any protection agency to which a copy of an application has been referred under this subsection may within 21

days from the day upon which the copy was sent submit a written report to the Authority which may include any objection or recommendations in relation to the application;

(ca) a responsible authority to which a copy of an application has been referred under paragraph (a) of this subsection must tell the Authority in writing within 21 days after the day on which the copy was sent whether—

(i) the works are allowed by the planning scheme with or without conditions;

(ii) a permit is required under the **Planning and Environment Act 1987** for the works;

(iii) a permit has been issued under the **Planning and Environment Act 1987** for the works;

(iv) the responsible authority is considering an application for a permit under the **Planning and Environment Act 1987** for the works; and

(v) the works are prohibited by the planning scheme;

(cb) the responsible authority may also—

(i) tell the Authority in writing within 45 days after the day on which the copy of the application was sent whether it supports, does not object or objects to the application; and

(ii) ask the Authority in writing within 45 days after the day on which the copy of the application was sent to include specified conditions in the licence if it is issued;

(cc) the responsible authority must give the Authority a copy of any permit issued under the **Planning and Environment Act 1987** for the works;

(d) the Authority shall—

(i) take into account any replies, reports, comments and information received under paragraph (c), (ca), (cb) or (cc); and

(ii) where the Secretary to the Department of Health submits a written report objecting to the granting of the application on the ground that the public health is likely to be endangered if a licence is issued, refuse to issue a licence; and

(iii) if the works are prohibited by a planning scheme, refuse to issue a licence;

(e) at the expiration of 21 days from the publication of a notice under paragraph (b) the Authority may if any written comments have been received from any person or body interested in the application in accordance with paragraph (b)(iv) hold a conference in accordance with section 20B;

(f) the Authority shall not later than six months after receiving the application for a licence issue or refuse to issue a licence;

(g) if a planning scheme requires a permit to be obtained under the Planning and **Environment Act 1987** for the works and a permit has not been issued, a licence issued by the Authority under this subsection must be issued subject to

a condition that the licence does not take effect until a copy of the permit is served on the Authority by the applicant; and

(h) any licence issued in contravention of paragraph (d)(iii) or (g) is void.

(8A) The Authority shall not deal with an application to which subsection (8) applies unless the applicant forwards to the Authority the fee which the Authority assesses to be the fee that would have been payable had the applicant applied for a works approval as required by section 19A.

(8B) If the Authority receives requests under subsection (8)(b)(v), the Authority must notify the people and bodies who made the requests that it has issued a licence by—

(a) sending notice of the issue to each person and body who made a request (or if a request is made by a number of people or bodies jointly, to a representative of those people or bodies); or

(b) publishing notice of the issue in a newspaper circulating generally throughout Victoria.

(8C) Subsections (8) and (8B) with any necessary modifications apply to any application under this section for a licence—

(a) in respect of premises which before 1 January 1985 were exempt from the requirement to hold a licence; and

(b) which relates to a matter for which works approval is not required.

(9) During the currency of a licence the Authority may by notice in writing served upon the holder of a licence—

(a) revoke or suspend the licence as it relates to a scheduled premises where—

(i) the Authority is satisfied that there has been a contravention of any of the conditions subject to which a works approval was issued to the holder of the licence;

(ii) the Authority is satisfied that there has been a contravention of any of the conditions to which the licence is subject;

(iii) a discharge, emission or deposit of waste or any category, type or volume of prescribed industrial waste is exempted by the regulations from requiring a licence under this section;

(iv) the licence holder has ceased to—

(A) discharge, emit or deposit any waste to the environment; or

(B) use the premises for the reprocessing, treatment, storage, containment, disposal or handling of waste; or

(C) use the premises for the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment; or

(D) undertake any activity which creates a state of potential danger to the quality of the environment or any segment of the environment;

(v) the current business address of the licence holder is unknown; or

(vi) the annual licence fee has not been paid;

(b) revoke or amend any condition to which the licence is subject; or

(c) attach new conditions to the licence.

(9A) A notice under subsection (9)(a)(vi) may provide that if the annual licence fee is paid within such further period as is specified in the notice the notice shall not operate to revoke or suspend the licence.

(10) During the currency of a licence the Authority may by notice in writing served upon the holder of a licence—

(a) correct any—

(i) clerical mistake or unintentional error or omission;

(ii) figure or figures that have been miscalculated;

(iii) misdescription of any person, thing or property referred to—

in a licence;

(b) make an administrative change to the format of a licence which does not alter the obligations of the licence holder;

(c) delete any discharge point which is no longer in use; or

(d) make any amendment to a licence as a result of an exemption under the regulations.

(11) If there are 2 or more licences under this section in respect of the same premises, the Authority may—

(a) amalgamate the licences into one licence; and

(b) revoke the original licences.

(11A) If a licence holder holds 2 or more licences under this section, the Authority may on the application of the licence holder—

(a) amalgamate the licences into one licence; and

(b) revoke the original licences.

(12) The date on which licences are amalgamated is deemed, for the purposes of section 24(1), to be the date on which the amalgamated licence was issued.

(13) If a licence is amalgamated before the anniversary of the day on which it was originally issued, the part of the fee which was paid for the licence which relates to the period between the amalgamation date and the anniversary of the day on which it was originally issued is to be credited towards the licence fees which become due and payable on the amalgamation date.

**20A Amendment of licence**

(1) The holder of a licence issued under section 20 may apply in writing to the Authority for an amendment of the licence by—

(a) the revocation or amendment of any conditions to which the licence is subject; or

(b) the attachment of new conditions to the licence; or

(c) the addition of a scheduled premises.

(2) An application for the amendment of a licence under this section shall be—

(a) made in accordance with a form and in a manner approved by the Authority;

(b) forwarded with the prescribed fee; and

(c) accompanied by such plans, specifications and other information and a summary thereof as may be required by the Authority within 21 days of receiving the initial application.

(3) The Authority shall not deal with an application under this section which—

(a) does not comply with subsection (2); or

(b) except as provided in subsection (5C) relates to a matter in respect of which—

(i) a works approval has been obtained and, in the opinion of the Authority, the works have not been satisfactorily completed in accordance with that works approval; or

(ii) a works approval is required to be obtained and has not been obtained and the works have not been completed or substantially completed—

and shall advise the applicant accordingly.

(4) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval is not required, the Authority shall not later than 60 days after receiving the application—

(a) refuse to amend the licence; or

(b) amend the licence subject to any conditions that the Authority considers appropriate.

(5) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval has been obtained and, in the opinion of the Authority, the works have been satisfactorily completed in accordance with the works approval, the Authority shall not later than 21 days after receiving the application amend the licence subject to such conditions which are not inconsistent with any conditions specified in the works approval as the Authority considers appropriate.

(5A) Where the Authority receives an application following the issue of a works approval and the applicant subsequently notifies the Authority that the works have been satisfactorily completed in accordance with the works approval, the Authority shall not later than 45 days after being notified satisfy itself as to whether or not the works have been satisfactorily completed in accordance with the works approval and—

(a) if the Authority is satisfied that the works have been satisfactorily completed, subsection (5) shall be deemed to apply to the application and the Authority shall be deemed to have received the application on the day on which it became so satisfied; or

(b) if the Authority is not satisfied that the works have been satisfactorily completed, the Authority shall advise the applicant accordingly.

(5B) Unless an agreement is made under section 67A, if at the expiry of the period of 45 days specified in subsection (5A) the Authority has not made a decision as to whether

or not the works have been satisfactorily completed, the Authority shall upon that expiry be deemed to be satisfied that the works have been satisfactorily completed and subsection (5A)(a) shall apply accordingly.

(5C) If a works approval has been obtained in respect of any premises, but only part of the works has been satisfactorily completed in accordance with the works approval, the Authority may amend a licence by including in the licence that part of the premises in which the works have been so completed.

(6) Where the Authority receives an application under this section which relates to a matter in respect of which a works approval was required to be obtained and a works approval has not been obtained and the works have been completed or substantially completed the following provisions shall apply—

(a) the Authority shall refer a copy of the application and a copy or summary of the accompanying plans, specifications and other information to—

(i) any protection agency which the Authority considers may be directly affected by the application; and

(ii) the Secretary to the Department of Health; and

(iii) any responsible authority under the Planning and Environment Act 1987 administering a planning scheme applying to the land for which the application is made;

(b) the Authority shall publish in a newspaper circulating generally throughout Victoria notice—

(i) that the Authority has received an application to which this subsection applies;

(ii) of the place or places at which a copy or a summary of the application and a copy or summary of the accompanying plans, specifications and other information may be examined;

(iii) that any person or body interested in the application may request and upon payment of the prescribed fee shall receive from the Authority a summary of the application and the accompanying plans, specifications and other information;

(iv) that any person or body interested in the application may within 21 days of the publication of the notice comment in writing on the application; and

(v) that any person or body interested in the application may ask the Authority in writing to be notified if the Authority amends the licence;

(ba) a responsible authority to which a copy of an application is referred under paragraph (a) must make a copy of the application and a copy of all accompanying documents available at its office for any person to inspect free of charge;

(c) the Secretary to the Department of Health and any protection agency to which a copy of an application has been referred under this subsection may within 21 days from the day upon which the copy was sent submit a written report to the Authority which may include any objections or recommendations in relation to the application;

(ca) a responsible authority to which a copy of an application has been referred under paragraph (a) must tell the Authority in writing within 21 days after the day on which the copy was sent whether—

(i) the works are allowed by the planning scheme with or without conditions;

(ii) a permit is required under the Planning and Environment Act 1987 for the works;

(iii) a permit has been issued under the Planning and Environment Act 1987 for the works;

(iv) the responsible authority is considering an application for a permit under the **Planning and Environment Act 1987** for the works;

(v) the works are prohibited by the planning scheme;

(cb) the responsible authority may also—

(i) tell the Authority in writing within 45 days after the day on which the copy of the application was sent whether it supports, does not object or objects to the application; and

(ii) ask the Authority in writing within 45 days after the day on which the copy of the application was sent to include specified conditions in any amendment of the licence;

(cc) the responsible authority must give the Authority a copy of any permit issued under the **Planning and Environment Act 1987** for the works;

(d) the Authority shall—

(i) take into account any replies, reports, comments and information received under paragraphs (c), (ca), (cb) and (cc);

(ii) where the Secretary to the Department of Health submits a written report objecting to the granting of the application on the grounds that the public health is likely to be endangered if the licence is amended, refuse to amend the licence; and

(iii) if the works are prohibited by a planning scheme, refuse to amend the licence;

(e) at the expiration of 21 days from the publication of a notice under paragraph (b) the Authority may if any written comments have been received from any person or body interested in the application in accordance with paragraph (b)(iv) hold a conference in accordance with section 20B;

(f) the Authority shall not later than 6 months after receiving the application for the amendment of a licence refuse to amend the licence or amend the licence subject to such conditions, limitations and restrictions if any as the Authority considers appropriate; and

(g) if a planning scheme requires a permit to be obtained under the **Planning and Environment Act 1987** for the works and a permit has not been issued, any amendment of the licence by the Authority under this section must be subject to a condition that the amendment does not take effect until it is endorsed by

the responsible authority administering the planning scheme to the effect that a permit has been issued under the scheme for the works; and

(h) any amendment made to a licence in contravention of paragraph (d)(iii) or (g) is void.

(7) The Authority shall not deal with an application to which subsection (6) applies unless the applicant forwards to the Authority the fee which the Authority assesses to be the fee that would have been payable had the applicant applied for a works approval as required by section 19A.

(8) If the Authority receives requests under subsection (6)(b)(v), the Authority must notify the people and bodies who made the requests that it has made an amendment to a licence by—

(a) sending notice of the amendment to each person and body who made a request (or if a request is made by a number of people or bodies jointly, to a representative of those people or bodies); or

(b) publishing notice of the amendment in a newspaper circulating generally throughout Victoria.

**20AA Joint advertisement**

Any notice required to be given under section 19B(3)(b), 20(8)(b) or 20A(6)(b) may be combined with any notice—

(a) relating to the same proposal; or

(b) of the preparation of an amendment to a planning scheme—

which is required to be given under the **Planning and Environment Act 1987** or the **Environment Effects Act 1978**.

**20B Conferences**

(1) The Authority may if it is of the opinion that a conference of persons concerned in any matter under consideration by the Authority may assist in a just resolution of the matter, invite all or any of the interested parties to a conference.

(2) All persons invited to attend a conference under this section shall be advised in writing of the time and place at which the conference is to be held.

(3) A conference held under this section shall be presided over by the Chairman or a person nominated by the Chairman for the purpose.

(4) The Authority shall take into consideration the discussions and resolutions of any conference under this section and the recommendations of any person presiding at that conference.

**20C Consideration of policy**

(1) In this section—

***authorisation*** means—

(a) a works approval;

(b) a licence;

(ba) an accreditation;

(c) a research, development and demonstration approval;

(d) a permit to transport prescribed waste or prescribed industrial waste issued under Part IXA;

***relevant offence*** means—

(a) an indictable offence;

(b) an offence committed outside Victoria that would have been an indictable offence if it had been committed in Victoria on the date it was committed;

(c) a summary offence under this Act, the **Dangerous Goods Act 1985**, the **Occupational Health and Safety Act 2004** or the **Equipment (Public Safety) Act 1994**.

(2) In considering an application for the issue, transfer or amendment of an authorisation, the Authority must have regard to policy so that the authorisation and any condition in, or relating to, the authorisation is consistent with all applicable policies.

(3) The Authority may refuse to issue, transfer or amend an authorisation—

(a) if, in the opinion of the Authority, the issue, transfer or amendment would—

(i) be contrary to, or inconsistent with, any applicable policy; or

(ii) be likely to cause, or to contribute to, pollution; or

(iii) be likely to cause an environmental hazard; or

(b) if the person applying for the issue or amendment, or in the case of a transfer, the person to whom the authorisation is to be transferred—

(i) has been found guilty of one or more relevant offences in the 10 years immediately before the date the Authority received the application; and

(ii) as a result, the person is, in the opinion of the Authority, not a fit and proper person to hold the authorisation, or in the case of an application for amendment, to hold the authorisation in the amended form; or

(c) if the person applying for the issue, transfer or amendment is a corporation, and any director or person who is concerned in the management of the corporation—

(i) has been found guilty of one or more relevant offences in the 10 years immediately before the date the Authority received the application; and

(ii) as a result, the director or other person is, in the opinion of the Authority, not a fit and proper person to be involved in a corporation holding the authorisation, or in the case of an application for amendment, holding the authorisation in the amended form.

(3A) Despite anything to the contrary in subsection (2) or (4), in issuing, transferring or amending an authorisation, the Authority may impose conditions in relation to the authorisation that require the observance of standards that are more stringent than would be required by the applicable policy if the Authority is satisfied that—

(a) local environment conditions require a higher level of protection than would otherwise be provided; or

(b) the pollution control technology or noise control technology required to achieve more stringent standards is commonly available in the industry.

(4) Where a policy is declared or varied the Authority shall within such period of time as is reasonably practicable amend any licence which is in force so that the licence and any conditions to which the licence is subject are consistent with the policy.

(5) If the Authority amends a licence for the purposes of subsection (4) the Authority must if requested allow the holder of the licence as a condition of the licence a reasonable time within which to comply with the amendments.

**21 Special conditions**

(1) In issuing a works approval or a licence or amending a licence the Authority may specify that the works approval or licence or the amendment of the licence is subject to compliance, by the occupier of the premises in respect of which the works approval or licence relates with such of the following conditions as the Authority specifies—

(a) the occupier shall install pollution control equipment of a type specified by the Authority provided that such equipment is reasonably available;

(b) the occupier shall install and operate pollution control equipment in a manner specified by the Authority;

(ba) if the premises are—

(i) a scheduled premises prescribed as a scheduled premises requiring a financial assurance; or

(ii) premises at which more than the prescribed quantity or the prescribed concentration of a notifiable chemical are stored, processed or used—

the occupier must provide the Authority with a financial assurance satisfactory to the Authority in accordance with section 67B;

(c) the occupier shall take the measures specified by the Authority for the purpose of minimizing the possibility of pollution occurring as a result of any activity conducted or proposed to be conducted in any part of the premises;

(d) the occupier shall at the occupier's cost provide monitoring equipment specified by the Authority;

(e) the occupier shall at the occupier's cost carry out a monitoring program specified by the Authority for the purpose of providing the Authority with data and information relating to the characteristics, volume and effects of the waste to be or being discharged, emitted or deposited into the environment and the characteristics of that environment or relating to the characteristics, volume and effects of prescribed industrial waste being reprocessed, treated, stored, contained, disposed of or handled at the premises; and

(f) the occupier shall do or cause to be done any other act or thing specified by the Authority which the Authority considers necessary for the purpose of the protection of the environment or the prevention, control or abatement of pollution.

(2) All data and information recorded by a monitoring program shall be supplied to the Authority—

(a) at the intervals of time; and

(b) in the form and manner—

specified by the Authority in the works approval or licence.

(3) Without derogating from the generality of subsection (2), the Authority may specify in the works approval or licence that the results of a monitoring program shall be submitted in a report of a person or body registered by the National Association of Testing Authorities in respect of the testing required for that program.

**22 Power of Authority to require further information**

(1) The Authority may by notice in writing served on an applicant for a works approval, the issue of a licence, the amendment of a licence or the transfer of a licence require that applicant—

(a) to supply to the Authority within the time specified in the notice any information, plans and specifications specified in the notice which the Authority considers necessary and relevant to the consideration of the application; and

(b) participate in and where the Authority considers it appropriate bear the cost of a course of study as specified in the notice to enable the Authority to assess the likely effects of any discharge, emission or deposit of waste into the environment or of the reprocessing, treatment, storage or disposal of prescribed industrial waste on the environment.

(2) Where an applicant does not comply with a notice served under subsection (1) within the period of time specified in the notice any time limit imposed by this Act on the Authority in respect of that application shall be extended by the period of time after the expiry of that period for which the applicant continues that failure to comply.

**23 Register of works approvals and licences**

The Authority shall keep registers of works approvals and licences as are prescribed.

**23A Surrender of licence**

(1) The holder of a licence may apply in writing to the Authority to be permitted to surrender the licence and upon the Authority accepting the surrender of the licence the licence shall cease to be in force.

(2) The holder of a licence which applies in respect of more than one scheduled premises may apply in writing to the Authority to be permitted to surrender that part of the licence which relates to the scheduled premises the subject of the application.

(3) If the Authority accepts an application under subsection (2), the licence ceases to apply to the scheduled premises the subject of the application.

**24 Fees in respect of licences and works approvals**

(1) The fee prescribed in respect of a licence is due and payable—

(a) on the day on which it is issued and annually on the date fixed by the Authority while the licence continues in force; or

(b) if an application under subsection (1A) is granted, on such days and in instalments of such amounts (including an amount for interest on the balance at a rate not exceeding the rate per centum per annum as is prescribed from time to time for the purposes of section 172(2) of the **Local Government Act 1989** as is determined by the Authority) as the Authority determines

(1A) An applicant for a licence or the holder of a licence may on the ground of financial hardship apply by an application to the Authority in the form and manner approved by the Authority accompanied by such information as may be required by the Authority to pay the fee by instalments.

(2) The licence fee prescribed in respect of each licensed scheduled premises must not exceed 42 000 fee units with respect to each element of the environment being the atmosphere, land or waters to which waste is licensed to be discharged, emitted or deposited.

(2A) The licence fee prescribed in respect of a scheduled premises must not exceed 42 000 fee units with respect to each licensed scheduled premises used to reprocess, treat, store, contain, dispose of or handle waste, or substances which are a danger or potential danger to the quality of the environment or any segment of the environment.

(2B) The Authority may reduce the licence fee which is otherwise payable in respect of a licence if the Authority is satisfied upon application to the Authority for a reduction that in all the circumstances it is reasonable to do so.

(3) Where the fee required to be paid under subsection (1) is not paid within one month of that fee becoming due and payable the amount of the fee which is outstanding shall bear interest at such rate per centum per annum as is prescribed from time to time for the purposes of section 172(2) of the **Local Government Act 1989**.

(4) The fee prescribed in respect of an application for a works approval shall not exceed 4500 fee units.

(5) Where the Minister certifies that a body corporate or unincorporate—

(a) exists for a public, charitable or philanthropic purpose;

(b) is not conducted for profit;

(c) is financed primarily and principally by donation from members of the public and subscriptions from its members; and

(d) the payment of a fee otherwise payable under this Part by that body would be onerous having regard to its limited financial resources—

the Governor in Council may on the recommendation of the Minister by Order in Council published in the Government Gazette exempt that body from the payment of any fee.

(6) If a licence is—

(a) surrendered, or in the case of a licence amalgamated under section 20(11A), partly surrendered; or

(b) revoked, or in the case of a licence amalgamated under section 20(11A), partly revoked, as the result of an exemption by the regulations—

the person who held the licence is, from money lawfully available for the purpose, to be refunded a sum of money calculated from the day the Authority accepted the surrender or the revocation took effect at the rate of one-twelfth of the last annual fee paid in respect of the licence for each remaining whole month of the period in respect of which the fee was paid but no refund is payable if the sum calculated in accordance with this subsection is less than one-twelfth of the last annual fee paid.

(7) Where as a result of a licence being amended the annual fee payable is reduced the holder of the licence shall from money lawfully available for the purpose be refunded a sum of money calculated from the day the Authority amended the licence which represents the difference between the amount paid and the annual fee payable for the amended licence but no refund shall be payable if the sum calculated in accordance with this subsection is less than $10.

(8) Where as a result of a licence being amended the annual fee payable is increased, the holder of the licence must within 14 days of the day on which the Authority amended the licence pay to the Authority an amount calculated from the day the Authority amended the

licence which represents the difference between the annual fee payable for the amended licence and the amount already paid.

**24A Environment protection levy**

(1) Subject to and in accordance with this section, there is to be charged, levied and collected by the Authority a levy at the rate of 3 per cent of the licence fee payable under section 24 in respect of any scheduled premises prescribed as a scheduled premises in respect of which the levy is required to be paid.

(2) The levy is payable at the same time as the licence fee is payable under section 24.

(3) The Authority may after having regard to the record of compliance with the conditions applying to a licence in respect of any scheduled premises liable to pay the levy, exempt those scheduled premises in whole or in part from the payment of the levy as the Authority sees fit.

(4) If the levy in respect of any scheduled premises is not paid at the same time as the licence fee is payable under section 24 the Authority must suspend the licence or the application of the licence to the extent that it applies to those premises until the levy is paid and the amount of the levy which is outstanding shall bear interest at such rate per centum per annum as is prescribed from time to time for the purposes of section 172(2) of the **Local Government Act 1989**.

**25 Transfer of works approvals or licences**

(1) An application for the transfer of a works approval or a licence shall be—

(a) made in accordance with a form and in a manner approved by the Authority;

(b) accompanied by the prescribed fee; and

(c) accompanied by such plans, specifications and other information as the Authority may require.

(2) The Authority may—

(a) refuse to transfer the works approval or licence; or

(b) transfer the works approval or licence subject to such conditions if any as the Authority considers appropriate; or

(c) refuse to transfer and issue a new licence in respect of a scheduled premises currently included in a licence amalgamated under section 20(11A); or

(d) transfer and issue a new licence in respect of a scheduled premises currently included in a licence amalgamated under section 20(11A) subject to any conditions that the Authority considers appropriate.

(3) If a person who becomes the occupier of any premises in respect of which a licence is in force complies with the conditions of the licence previously in force and within 30 days of becoming the occupier of the premises applies under subsection (1) for the transfer of the licence or applies for the issue of a new licence, the person is not liable to any penalty under this Act for—

(a) the discharge, emission or deposit of waste to the environment; or

(b) the reprocessing, treatment, storage, containment, disposal or handling of waste; or

(c) the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment; or

(d) any activity which creates a state of potential danger to the quality of the environment or any segment of the environment—

without a licence.

(4) If the Authority refuses to transfer a licence or issue a new licence to a person to whom subsection (3) applies, the person must within 10 days of receiving notice of that refusal cease—

(a) the discharge, emission or deposit of waste to the environment; or

(b) the reprocessing, treatment, storage, containment, disposal or handling of waste; or

(c) the reprocessing, treatment, storage, containment, disposal or handling of substances which are a danger or a potential danger to the quality of the environment or any segment of the environment; or

(d) any activity which creates a state of potential danger to the quality of the environment or any segment of the environment.

## PART IX - RESOURCE EFFICIENCY

### Division 3 - Landfill Levy

#### 50S Landfill levy—amount payable

(1) The holder of a licence in respect of a scheduled premises prescribed as a scheduled premises required to pay the landfill levy must pay to the Authority a landfill levy for each tonne of waste that is deposited on to land at the premises.

(2) The holder of a licence in respect of a scheduled premises which is—

(a) prescribed as a scheduled premises required to pay the landfill levy; and

(b) licensed for the discharge or deposit to land of wastes that are prescribed industrial waste—

must pay to the Authority a landfill levy for each tonne of waste that is deposited on to land at the premises.

(2A) Subject to subsection (2AAA), the amount of the levy payable under subsection (1) is the amount specified in Schedule D for the relevant premises, period and type of waste.

(2AAA) In respect of each year on and after 1 July 2015, the amount of the levy payable under subsection (1) is the amount specified in fee units in Schedule DA for the relevant premises and type of waste.

(2AA) The amount of the levy payable under subsection (2) is the amount specified in Schedule E for the relevant category of prescribed industrial waste.

(3) The levy must be paid in accordance with section 50SB.

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#### 50SA Rebate for recycled waste

(1) This section applies if waste is removed from a scheduled premises prescribed as a scheduled premises required to pay the landfill levy to enable it to be recycled, reprocessed, recovered or purified by an operation separate from that which produced it.

(2) The holder of the licence in respect of the premises is entitled to a rebate for each tonne of that waste that is removed from the premises within 12 months of being deposited at the premises.

(3) The amount of the rebate is the amount of the landfill levy that applies to a tonne of waste deposited at the premises at the time the waste is removed from the premises.

## PART IXA—TRANSPORT OF PRESCRIBED WASTE

### 53 Exemptions

Without limiting the powers of the Authority under this Act, the Authority may exempt a person from the requirement to hold a permit under this Part if the Authority is satisfied that the person holds a valid authorisation to transport prescribed waste under the law of another State or Territory.

### 53A Permit required

(1) A person must not commence or conduct any business—

(a) the purpose of which is to transport prescribed waste; or

(b) the operation of which includes the transport of prescribed waste—

on a highway unless there is in force a permit to transport prescribed waste.

(2) Any public authority including any municipal council and any regional waste management group established under Part IX which performs as one of its functions the transport of prescribed industrial waste must obtain a permit to transport prescribed industrial waste.

(3) Any person who or public authority which contravenes this section is guilty of an indictable offence against this Act and liable to a penalty of not more than 2400 penalty units and in the case of a continuing offence to a daily penalty of not more than 1200 penalty units for each day the offence continues after conviction or after service by the Authority on the accused of notice of contravention of this section.

### 53B Obligation of consignor of waste

(1) A person must not cause or permit any prescribed waste or prescribed industrial waste to be transported on a highway from any premises or place owned or occupied by that person unless the vehicle used to transport the waste—

(a) is authorised by a permit to transport prescribed industrial waste; or

(b) the vehicle is exempted by the regulations from the requirement to be authorised by a permit to transport that waste.

(1A) A person who contravenes subsection (1) is guilty of an indictable offence.

Penalty: 2400 penalty units.

(2) It is a defence to a charge brought under subsection (1) if the person charged establishes that the person used all due diligence to prevent the contravention.

### 53C Obligation to record and notify

(1) A person who does all or any of the following—

(a) causes or permits prescribed industrial waste to be transported from any premises or place occupied by that person; or

(b) transports on a highway any prescribed industrial waste; or

(c) receives prescribed industrial waste at any premises or place—

must comply with any of the regulations applying to that person which require the identification of the waste, the making and keeping of records about the waste or the movement of the waste, the notification and reporting of information about the waste and the movement of the waste.

(2) A person who contravenes subsection (1) is guilty of an indictable offence.

Penalty: 2400 penalty units.

**53D Obligation of producers of waste**

(1) A producer of prescribed industrial waste must take reasonable steps to ensure that prescribed industrial waste that is transported from any premises or place occupied by that producer is consigned to and received by—

(a) an occupier of scheduled premises licensed to reprocess, treat, store, contain, dispose of or handle that prescribed industrial waste; or

(b) an occupier of premises exempted by the Authority from requiring a licence to reprocess, treat, store, contain, dispose of or handle that prescribed industrial waste at the premises.

(2) A person who contravenes subsection (1) is guilty of an indictable offence.

Penalty: 2400 penalty units.

**53E Contravention of permit condition**

A permit holder must not contravene a condition of a permit that is imposed by the Authority and specified in the permit or that is prescribed by the regulations.

Penalty: 600 penalty units and a daily penalty of not more than 240 penalty units for each day during which the offence continues after conviction or after service by the Authority on the permit holder of a notice of contravention whichever occurs first.

**53F Issue of transport permits**

(1) The Authority may, in accordance with the regulations, issue, renew, transfer, suspend or cancel a permit to transport prescribed waste or prescribed industrial waste.

(1A) The Authority may issue or renew a permit to transport prescribed waste or prescribed industrial waste for up to 5 years.

(2) A permit may only be applied for, issued, refused, renewed, transferred, suspended or cancelled in accordance with the regulations.

(3) The Authority may issue a permit to a person referred to in section 53A(1) or a public authority or regional waste management group referred to in section 53A(2) in respect of each vehicle used or to be used to transport the waste or in respect of all vehicles used or to be used by that person or authority to transport the waste.

(4) The Authority may issue a permit subject to any conditions specified by the Authority or prescribed by the regulations.

(5) Without limiting any other power of the Authority, the Authority may refuse to issue, renew or transfer a permit unless the applicant provides the Authority with a financial assurance satisfactory to the Authority in accordance with section 67B.

**53G Fees**

(1) The Authority may charge the fees prescribed by the regulations for applications for the issue, transfer and variation of permits and for the renewal of permits.

(1A) A fee for the issue or renewal of a permit to transport prescribed waste or prescribed industrial waste must be paid—

(a) in advance as a lump sum constituted of the fees for each year of the permit; or

(b) as an annual fee for each year of the permit.

(2) An application fee must not exceed 200 fee units.

(3) An annual fee for a permit must not exceed 200 fee units in respect of each vehicle to which the permit applies.

**Environment Protection (Industrial Waste Resource) Regulations 2009 (Vic) (authorised Versions No 003 as at 29 April 2015)**

**14 Application for a permit to transport prescribed industrial waste for the purpose of Part IXA**

(1) The owner of a vehicle may apply for a permit to transport prescribed industrial waste under section 53F of the Act by submitting to the Authority—

(a) an application for a permit; and

(b) a declaration that the vehicle to which the permit will apply is fit for the purpose of transporting the prescribed industrial waste specified in the application; and

(c) the prescribed fee for the permit.

(2) The Authority must issue, or refuse to issue, a permit within 21 days after receiving—

(a) an application for the permit that complies with subregulation (1); or

(b) any other information requested by the Authority in accordance with regulation 20—

whichever is the later.

**15 Conditions of permit**

In addition to any conditions specified in a permit by the Authority, a permit is subject to the following conditions—

(a) no wastes other than those listed in the permit are to be transported under the permit;

(b) the permit holder must advise the Authority as soon as is practicable of any change in the information provided to the Authority in the application for the permit;

(c) the permit holder must ensure that when a vehicle to which the permit applies is used to transport prescribed industrial waste—

(i) the prescribed industrial waste does not escape, spill or leak from the vehicle at any time;

(ii) prescribed industrial wastes of different types are not transported together unless they are compatible with each other;

(iii) the containers used to contain the prescribed industrial waste are compatible with the prescribed industrial waste;

(iv) only drivers who have undertaken training approved by the Authority drive the vehicle;

(v) the vehicle meets any relevant requirements under Schedule 4;

(d) where a vehicle to which the permit applies is used to transport waste requiring placarding in accordance with Schedule 4, the permit holder must ensure that the vehicle complies with any determinations with regard to prohibited routes made under the **Dangerous Goods Act 1985**;

(e) the permit holder must ensure that any spillage, leak, escape or other loss is reported to the Authority immediately;

(f) the permit holder must ensure that where a declaration has been made by the permit holder to the Authority that the vehicle to which the permit applies is fit for the purpose of transporting the prescribed industrial waste as specified in the permit in accordance with regulation 14 or 19, the vehicle and associated insurance and approvals are maintained in accordance with that declaration whenever the vehicle is transporting prescribed industrial waste.

**16 Duration of permit and expiry**

(1) If the Authority issues a permit it must record in the permit the expiry date of the permit.

(2) A permit expires at the end of the day recorded as the permit expiry date unless it is earlier revoked, suspended or surrendered.

**17 Notice of renewal of permit**

(1) The Authority must send a permit holder a notice to renew stating that the permit will expire if it is not renewed on or before a specified date.

(2) If the Authority fails to send a notice of renewal, the permit expires on the date specified in the permit.

(3) When the Authority sends a notice to renew under subregulation (1), the Authority must require a permit holder to provide a declaration that the vehicle to which the permit applies is fit for the purpose of transporting the prescribed industrial waste as specified in the permit.

**18 Renewal of permit**

A permit holder may apply for renewal of the permit by submitting to the Authority—

(a) an application for renewal of the permit; and

(b) payment of the prescribed permit fee for renewal of the permit for the relevant period; and

(c) a declaration by the applicant that the vehicle to which the permit will apply is fit for the purpose of transporting the prescribed industrial waste as specified in the application.

**19 Application for transfer or amendment of permit**

(1) The owner of a vehicle may apply to the Authority for a permit in respect of the vehicle to be transferred or amended by submitting to the Authority—

(a) an application for transfer or amendment of the permit; and

(b) a declaration by the applicant that the vehicle to which the permit will apply is fit for the purpose of transporting the prescribed industrial waste as specified in the application; and

(c) the prescribed fee for transfer or amendment.

(2) The Authority must transfer or amend, or refuse to transfer or amend, a permit within 21 days after receiving—

(a) an application for transfer or amendment of the permit that complies with subregulation (1); or

(b) any other information requested by the Authority in accordance with regulation 20—

whichever is the later.

**20 Authority may ask for more information**

(1) The Authority may require by notice in writing a person who has made an application under regulation 14 or 19 to provide to the Authority within a reasonable time specified in the notice any additional information concerning the application that the Authority considers necessary to enable the Authority to properly assess the application.

(2) The Authority may refuse the application if the person does not provide the Authority with the additional information requested within the time specified in the notice.

**21 Authority-initiated amendment of permit**

(1) If the information taken into consideration by the Authority in granting or transferring a permit has changed, the Authority may vary the permit to take account of the changed circumstances by giving the permit holder written notice of the variation.

(2) The Authority may make an administrative amendment to the content or format of a permit that does not alter the obligations of the permit holder by giving the permit holder written notice of the amendment.

(3) If the Authority decides to vary or amend a permit under this regulation, the Authority must specify in the written notice to the permit holder the date and time from which the variation or amendment takes effect.

**22 Surrender of permit**

(1) A permit holder may surrender a permit by returning the permit to the Authority with a document signed by the permit holder stating that the permit holder surrenders the permit.

(2) If a permit is surrendered more than 30 days before the date the next annual fee is due, the Authority must refund to the person who held the permit the unexpired portion of the current annual fee, calculated to the nearest day.

**23 Suspension of permit**

(1) The Authority may suspend a permit during any time the Authority is unable, despite reasonable attempts to make contact, to contact the permit holder at the address given in the application as the principal place of business of the permit holder.

(2) The Authority may suspend a permit for a specified period, not exceeding 60 days, if it has reasonable grounds for believing that the permit holder has not complied with any obligation imposed on the permit holder by these Regulations or has not complied with a condition specified in the permit.

**24 Cancellation of permit**

The Authority may cancel a permit if it is satisfied that—

(a) any information supplied by the permit holder in applying for the permit was false or misleading; or

(b) any other information taken into consideration by the Authority in issuing the permit has changed and the continued use of the permit is likely to result in an unacceptable risk of harm to the environment; or

(c) the permit holder has not complied with any obligation imposed on the permit holder by these Regulations or has not complied with a condition specified in the permit; or

(d) the permit holder has been found guilty of one or more relevant offences (as defined in section 20C(1) of the Act) and as a result, the person is, in the opinion of the Authority, not a fit and proper person to hold a permit.

**25 Procedure to be followed before cancellation**

(1) Before cancelling a permit, the Authority must—

(a) give the permit holder a written notice that—

(i) gives details of the action the Authority intends to take; and

(ii) gives the reasons why the Authority intends to take that action; and

(iii) invites the permit holder to comment on the Authority's proposed course of action within the time specified in the notice; and

(b) consider any comments that are made by the permit holder within the time specified in the notice.

(2) The Authority must not specify a period of less than 7 days under subregulation (1)(a)(iii).

(3) If the Authority decides to cancel a permit, the Authority must specify in a written notice to the permit holder the date and time from which the cancellation takes effect.

**26 Transporting prescribed industrial waste**

(1) A person must not transport prescribed industrial waste or cause or permit it to be transported from any premises to another premises unless—

(a) the receiving premises is licensed under the Act to receive that category of prescribed industrial waste; or

(b) the receiving premises is exempt under the Act or has been exempted by the Authority from requiring a licence to reprocess, treat, store, contain, dispose of or handle that prescribed industrial waste at the premises; or

(c) the transport has been approved by the Authority under subregulation (6).

(2) A person may apply to the Authority to transport prescribed industrial waste to a premises other than a premises described in subregulation (1)(a) or (1)(b).

(3) The Authority must not approve the transport of prescribed industrial waste for the purposes of subregulation (1)(c) unless—

(a) the Authority is satisfied that the proposed transport of the prescribed industrial waste to the premises is for the purposes of reuse or recycling in accordance with the principle of wastes hierarchy; or

(b) in the case of a proposal to transport non-liquid prescribed industrial waste for destruction or deposit, the Authority is satisfied that the waste will be destroyed or deposited at a premises at which there is a facility with better environmental performance standards than a facility at a premises described in subregulation (1)(a) or (1)(b).

(4) The Authority may impose one or more of the following conditions on an approval granted under subregulation (6)—

(a) the consignment or consignments of prescribed industrial waste in respect of which the approval is granted;

(b) the specified volume of prescribed industrial waste in respect of which the approval is granted;

(c) the class or classes of prescribed industrial waste in respect of which the approval is granted;

(d) the commencement and duration of the approval;

(e) any other condition that the Authority considers appropriate.

(5) Within 7 days of receiving an application under subregulation (2), the Authority must provide written confirmation of receipt of the application to the person who lodged the application.

(6) Within 28 days after the Authority confirms receipt of an application under subregulation (2), the Authority must determine whether to approve or refuse to approve the application.

(7) If the Authority does not, within 7 days after the end of the period specified in subregulation (6), advise in writing a person who submitted an application under subregulation (2), that the application has been approved, the application is deemed to have been refused.

(8) Where prescribed industrial waste is transported in accordance with this regulation, a prescribed industrial waste producer is exempt from the provisions of section 53D of the Act in relation to that transport.

(9) Despite anything to the contrary in these Regulations, this regulation applies—

(a) to any transport of prescribed industrial waste whether or not a person requires a permit to transport the prescribed industrial waste; and

(b) whether or not a person holds a permit to transport the prescribed industrial waste.

**27 Waste container**

(1) A prescribed industrial waste producer who supplies or provides a container for the purposes of the transport of prescribed industrial waste produced by that waste producer must supply or provide a container that will not allow the contents to escape, spill or leak.

Penalty: 20 penalty units.

(2) This regulation does not apply to a vessel used to contain prescribed industrial waste that is a fixture of a transport vehicle.