



Western Australia

## **Pigment Factory (Australind) Agreement Act 1986**

Compare between:

[12 Dec 2005, 01-b0-04] and [09 Apr 2006, 01-c0-05]



## Pigment Factory (Australind) Agreement Act 1986

**An Act to ratify and authorise the implementation of an Agreement between the State of Western Australia and SCM Chemicals Ltd., to repeal the *Laporte Industrial Factory Agreement Act 1961* and for incidental and other purposes.**

**1. Short title**

This Act may be cited as the *Pigment Factory (Australind) Agreement Act 1986*<sup>1</sup>.

**2. Commencement**

This Act shall come into operation on the day on which it receives the Royal Assent<sup>1</sup>.

**3. Interpretation**

In this Act —

**“the Agreement”** means the Agreement a copy of which is set out in Schedule 1 and includes the Agreement as altered from time to time in accordance with its provisions;

**“the Kemerton works site”** means the Kemerton works site as defined by the Variation Agreement;

**“the Variation Agreement”** means the Agreement a copy of which is set out in Schedule 2.

*[Section 3 amended by No. 28 of 1987 s. 4.]*

**4. Agreement ratified and implementation authorised**

- (1) The Agreement is hereby ratified.
- (2) The implementation of the Agreement is authorised.
- (3) Without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Agreement shall operate and take effect notwithstanding any other Act or law.

**4A. Variation Agreement ratified and implementation authorised**

- (1) The Variation Agreement is ratified and its implementation is authorised.
- (2) Without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Variation Agreement shall operate and take effect notwithstanding any other Act or law.

*[Section 4A inserted by No. 28 of 1987 s. 5.]*

**4B. ~~Certain town planning schemes do not apply~~ Planning laws modified**

~~*{(1) repealed}*~~

- ~~(2) Notwithstanding anything in \_\_\_\_\_ Despite the ~~Town Planning and Development Act 1928, town~~2005, planning schemes prepared under ~~as defined in~~ that Act do not apply to or in relation to the Kemerton works site.~~

*[Section 4B inserted by No. ~~28~~38 of ~~1987~~2005 s. 5; amended by No. 14 of 1996 s. 415.]*

**5. Repeal**

The *Laporte Industrial Factory Agreement Act 1961* is repealed.

## Schedule 1

(Section 3)

THIS AGREEMENT is made the 18th day of November 1986 BETWEEN THE HONOURABLE BRIAN THOMAS BURKE, M.L.A., Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time (hereinafter called "the State") of the one part and

SCM CHEMICALS LTD. (formerly called Laporte Australia Limited) a company duly incorporated in the State of Western Australia and having its registered office at Old Coast Road, Australind (hereinafter called "the Company") of the other part.

WHEREAS:

- (a) the State and the Company (pursuant to assignment) are now the parties to the agreement defined in section 2 of the *Laporte Industrial Factory Agreement Act 1961-1982*;
- (b) the Company has agreed to cancel the agreement and to release the State from its obligations for effluent disposal thereunder in consideration of the payment by the State of the amount hereinafter provided; and
- (c) the parties have agreed to provide for the carrying on by the Company of operations on the works site in manner hereinafter contained.

NOW THIS AGREEMENT WITNESSES:

Definitions

1. In this Agreement subject to the context —

"advise", "apply", "approve", "approval", "consent", "certify", "direct", "notify", "request", or "require", means advise, apply, approve, approval, consent, certify, direct, notify, request, or require in writing as the case may be and any inflexion or derivation of any of those words has a corresponding meaning;

"approval date" means the date the detailed proposals to be submitted by the Company under Clause 7 hereof have been approved by the Minister under Clause 8 hereof;

- “approved proposal” means any proposal approved or determined under this Agreement;
- “changeover date” means the 31st day of December 1989;
- “chloride effluent” means liquid effluent from the chloride process;
- “chloride plant” means the plant to be erected and established by the Company on the works site;
- “chloride process” means the process of producing titanium compounds by attacking the raw material with chlorine;
- “Clause” means a clause of this Agreement;
- “commencement date” means the date the Bill referred to in Clause 3 comes into operation as an Act;
- “Commonwealth” means the Commonwealth of Australia and includes the Government for the time being thereof;
- “decommissioning period” mean the period of ninety (90) days after the changeover date;
- “encumbrance” includes any mortgage, pledge, charge, lien, assignment, hypothecation, security interest, title retention, preferential right or trust arrangement and any other security agreement or arrangement of any kind given or created, in each case, by way of security, and the expressions “encumber” and “encumbrancer” shall be construed accordingly;
- “EPA” means the Environmental Protection Authority created by section 9 of the *Environmental Protection Act 1971* or upon proclamation of the *Environmental Protection Act 1986* as continued in existence by section 7 of that Act;
- “EPA Report” means the report which the EPA may prepare and submit to the Minister in respect of the ERMP or upon proclamation of the *Environmental Protection Act 1986* pursuant to section 40(1) of that Act;
- “ERMP” means the environmental review and management program submitted to the EPA in respect of the chloride plant;
- “factory” means the factory which has been erected and established at the works site pursuant to Clause 2 of the 1961 Agreement;

“financial year” means the period from 1 July to 30 June next;

“Minister” means the Minister in the Government of the State for the time being responsible (under whatsoever title) for the administration of the Act to ratify this Agreement and pending the passing of that Act means the Minister for the time being designated in a notice from the State to the company and includes the successors in office of the Minister;

“month” means calendar month;

“notice” means notice in writing;

“person” or “persons” includes bodies corporate;

“said State” means the State of Western Australia;

“State Energy Commission” means The State Energy Commission of Western Australia as described in section 7 of the *State Energy Commission Act 1979*;

“sub-clause” means a sub-clause of the Clause in which the term is used;

“sulphate plant” means that part of the factory which uses the sulphate process;

“sulphate process” means the process of producing titanium pigments by attacking the raw material with sulphuric acid;

“the pipeline” means the pipeline or pipelines presently used to transport the sulphate effluent from the factory into the intermediate pumping reservoir on the Leschenault peninsula which was commissioned in October 1985;

“the 1961 Agreement” means the agreement defined in section 2 of the *Laporte Industrial Factory Agreement Act 1961* as amended;

“the sulphate effluent” means the liquid effluent from the sulphate process which shall not alter substantially in composition from that recorded by the Government Chemical Laboratories over the three years from 30th June 1983 to 30th June 1986;

“this Agreement” “hereof” and “hereunder” refer to this Agreement whether in its original form or as from time to time added to varied or amended;

“Water Authority” means the Water Authority of Western Australia established pursuant to section 7 of the *Water Authority Act 1984*;

“works site” means all that land at Australind and more particularly described as Portion of Leschenault Location 31 and being part of Lot 4 on Diagram 26619 and the whole of the land in Certificate of Title Volume 1637 Folio 689.

#### Interpretation

2. In this Agreement —

- (1) monetary references are references to Australian currency unless otherwise specifically expressed;
- (2) power given under a clause other than Clause 22 to extend any period or date shall be without prejudice to the power of the Minister under Clause 22;
- (3) clause headings do not affect the interpretation or construction; and
- (4) reference to an Act includes the amendments to that Act for the time being in force and also any Act passed in substitution therefor and in lieu thereof and the regulations for the time being in force thereunder.

#### Introduction of Bill

3. The State shall introduce and sponsor a Bill in the State Parliament of Western Australia to ratify this Agreement and endeavour to secure its passage as an Act prior to 31st December, 1986.

#### Ratification and Operation

4. (1) The provisions of this Agreement other than this Clause and Clauses 1, 2 and 3 shall not come into operation until the Bill referred to in Clause 3 has been passed by the Parliament of Western Australia and comes into operation as an Act.

(2) If before 31st December, 1986 the said Bill has not commenced to operate as an Act then unless the parties hereto otherwise agree this Agreement shall then cease and determine and no party hereto shall have any claim against



any other party hereto with respect to any matter or thing arising out of, done, performed, or omitted to be done or performed under this Agreement.

(3) On the said Bill commencing to operate as an Act all the provisions of this Agreement shall operate and take effect notwithstanding the provisions of any Act or law.

#### Termination of 1961 Agreement

5. Upon and subject to the said Bill commencing to operate as an Act the 1961 Agreement is hereby cancelled and the rights and obligations of the parties thereunder are hereby terminated but otherwise the 1961 Agreement shall remain in full force and effect.

#### Production to the Changeover Date

6. (1) The Company may continue to use the sulphate process at the factory until the changeover date;

(2) Until the end of the decommissioning period —

- (a) subject to this Clause the State shall continue to be totally responsible for the disposal of all sulphate effluent;
- (b) unless and until the parties hereto otherwise in writing agree the State shall at the cost of the Company patrol the pipeline and such cost shall include reasonable charges for supervision and administration;
- (c) on behalf of the State the Company shall at its own expense maintain, repair and renew the pipeline and its support structure;
- (d) the Company shall at its own cost collect the sulphate effluent and pump it into the pipeline under pressure and conditions which will efficiently discharge the sulphate effluent completely through the pipeline. The Company shall provide and maintain adequate pumps sumps machinery apparatus and facilities to provide for and maintain such discharge;
- (e) during each financial year the Company shall pay to the State \$100,000 (or a pro rata sum thereof if the end of the decommissioning period shall occur during a financial year)

as contribution towards costs of disposal of the effluent. Payment of the contribution shall be made by the Company to the State on the 31st March of each year, the next payment shall be made on 31st March 1987 and the last payment shall be made on the end of the decommissioning period.

- (3) From and after the changeover date the Company shall: —
- (a) within the decommissioning period discharge all sulphate effluent and residual liquor through the pipeline and shall then flush the pipeline with clean water; and
  - (b) be responsible for and shall pay all costs relating to the treatment and disposal of all effluent and waste products emanating from production at the works site after the changeover date.

#### Company to Submit Proposals

7. (1) The Company shall within sixty (60) days of the Company's acceptance of (which acceptance shall not be unreasonably withheld) any condition which may be recommended in the EPA Report (or thereafter within such extended time as the Minister may allow as hereinafter provided) and subject to the provisions of this Agreement submit to the Minister to the extent reasonably practicable its detailed proposals (having due regard where applicable to the ERMP and the EPA Report) for the construction and the establishment on the works site of a new plant designed to produce and capable of producing not less than 36,000 tonnes of titanium dioxide pigment per annum by use of the chloride process. Except for proprietary confidential information the detailed proposals shall include plans where practicable and specifications, where reasonably required by the Minister, of the location, area, lay-out, design, quantities, materials and a time program for the commencement and completion of construction plant commissioning and the provision (as the case may be) of each of the following matters, namely —

- (a) the chloride plant;
- (b) the production of chlorine;
- (c) air separation plant;
- (d) integration of the chloride plant into the factory;

- (e) the concurrent operation of the sulphate plant and the chloride plant;
  - (f) the expected solid and liquid discharges and gaseous emissions and the method and location of disposal;
  - (g) water supply;
  - (h) access roads;
  - (i) use of local labour professional services manufacturers suppliers contractors and materials and measures to be taken with respect to the engagement and training of employees by the Company, its agents and contractors;
  - (j) chemicals and other supplies for the ongoing process;
  - (k) an environmental management programme as to measures to be taken, in respect of the Company's activities under this Agreement, for the protection and management of the environment; and
  - (l) the security of confidential proprietary information provided to or obtained by the State or any authority of the State to satisfy the provisions of any written law.
- (2) With the approval of the Minister or if so required by him the proposals pursuant to sub-clause (1) may be submitted separately and in any order as to the matters mentioned in paragraphs (a) to (l) of sub-clause (1).
- (3) With the approval of the Minister and that of any third parties concerned the proposals pursuant to sub-clause (1) may provide for the use by the Company of any existing facilities belonging to the Company or upon reasonable terms and conditions of any other existing facilities belonging to a third party instead of the construction of new facilities of such kind.
- (4) When the Company submits the proposals pursuant to sub-clause (1) it shall furnish to the State's satisfaction evidence of —
- (a) the anticipated amount and value of the works to be carried out hereunder;
  - (b) the availability of finance necessary to carry out the operations to which the said proposals refer; and

- (c) the readiness of the Company to commence and proceed to carry out the operations referred to in the said proposals.

#### Consideration of Proposals

8. (1) On receipt of the proposals pursuant to sub-clause (1) of Clause 7 the Minister shall —

- (a) approve of the said proposals either wholly or in part without qualification or reservation; or
- (b) defer consideration of or decision upon the same until such time as the Company submits a further proposal or proposals in respect of some other of the matters mentioned in sub-clause (1) of Clause 7 which are not covered by the said proposals; or
- (c) require as a condition precedent to the giving of his approval to the said proposals that the Company make such alterations thereto or comply with such conditions in respect thereto as he thinks reasonable and in such a case the Minister shall disclose his reasons for such conditions.

#### Advice of Minister's Decision

(2) The Minister shall within two months after receipt of each of the said proposals pursuant to sub-clause (1) give notice to the Company of his decision in respect to the same.

(3) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of sub-clause (1) the Minister shall afford the Company full opportunity to consult with him and should it so desire to submit new or revised proposals either generally or in respect to some particular matter.

#### Minister's Decision Subject to Arbitration

(4) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of sub-clause (1) and the Company considers that the decision is unreasonable the Company within two months after receipt of the notice mentioned in sub-clause (2) may elect to refer to arbitration in the manner hereinafter provided the question of the reasonableness of the decision.

#### Arbitration Award

(5) An award made on an arbitration pursuant to sub-clause (4) shall have force and effect as follows:

- (a) if by the award the dispute is decided against the Company and the Company within 3 months after delivery of the award has not given notice to the Minister of its acceptance of the award then except for the provisions of Clause 6 hereof which shall remain in full force and effect, this Agreement shall cease and determine on the expiration of that period of 3 months; or
- (b) if by the award the dispute is decided in favour of the Company the decision shall take effect as a notice by the Minister that he is so satisfied with and approves the matter or matters the subject of the arbitration.

#### Effect of Non Approval of Proposals

(6) Notwithstanding that under this Clause any detailed proposals of the Company are approved by the Minister or determined by arbitration award, unless each and every such proposal and matter is so approved or determined by 31st August 1987 or by such extended date or period (if any) as the Minister may grant hereunder then the Minister may give to the Company 12 months notice of intention to determine this Agreement except for the provisions of Clause 6 which shall remain in full force and effect and unless before the expiration of the said 12 months period all the detailed proposals and matters are so approved or determined this Agreement shall thereupon cease and determine except for the provisions of Clause 6 which shall remain in full force and effect.

#### Implementation of Proposals

(7) The Company shall implement the approved proposals in accordance with the terms thereof so that the chloride plant is constructed and fully commissioned not later than the changeover date.

#### Extension of Time

(8) If for any reason not attributable to any default or unreasonable delay by the Company the approval date shall be later than 30 June 1987 then,

notwithstanding any other provision, the dates referred to in the definition of “changeover date” appearing in Clause 1 hereof and in sub-clause (6) shall be extended by the number of days which shall have elapsed from the 30th June 1987 until the approval date.

#### Additional Proposals

9. (1) If the Company at any time during the continuance of this Agreement desires to significantly modify expand or otherwise vary its activities carried on pursuant to this Agreement beyond those specified in any approved proposals or desires to carry out any operations on the works site in addition to the production of pigment by the chloride process it shall give notice of such desire to the Minister and if required by the Minister within 2 months of the giving of such notice shall submit to the Minister within such period as the Minister shall reasonably allow detailed proposals in respect of all matters covered by such notice and as the Minister may require. The provisions of Clause 7 and Clause 8 (other than sub-clauses (5)(a) and (6)) shall mutatis mutandis apply to detailed proposals submitted pursuant to this sub-clause. The Company shall implement the approved proposals in accordance with the terms thereof.

(2) If the Minister does not require the Company to submit proposals under subclause (1) the Company may, subject to compliance with all applicable laws, proceed with the modification, expansion or variation of its activities carried on pursuant to this Agreement.

#### Protection and Management of the Environment

10. The Company shall keep the Minister fully informed in respect of, and when and in such form as reasonably required by the Minister from time to time shall report to the Minister on the measures it has taken, is taking or proposes to take for the monitoring, protection and management of the environment in respect of its operations including (without limiting the generality of the foregoing provisions) the following matters —

- (a) effluent disposal (solid and liquids);
- (b) gaseous emissions and discharges into the air from the works site;
- (c) emissions, discharges and disposals of matter on or from the works site onto or into land;
- (d) noise and radiation from the works site;

- (e) rehabilitation of contaminated ground water emanating from under the works site; and
- (f) ongoing risk and hazard auditing as a consequence of the acceptance of the EPA Report by the Company,

and as and when reasonably required by the Minister the Company shall liaise and cooperate with the Minister on measures it is taking and take additional reasonable measures with respect to the monitoring, protection and management of the environment arising from its operations.

#### Use of Local Labour and Professional Services

11. (1) The Company shall, for the purpose of this Agreement —
- (a) so far as it is reasonable and economically practicable so to do, use labour available within the said State;
  - (b) so far as it is reasonable and economically practicable so to do, use the services of engineers, surveyors, architects and other professional consultants resident and available within the said State;
  - (c) when preparing specifications, calling for tenders and letting contracts for works, materials, plant, equipment and supplies, ensure that Western Australian suppliers manufacturers and contractors are given fair and reasonable opportunity to tender or quote; and
  - (d) give proper consideration and where possible preference to Western Australian suppliers manufacturers and contractors when letting contracts or placing orders for works, material, plant, equipment and supplies where price quality delivery and service are equal to or better than that obtainable elsewhere.

(2) The Company shall require in every contract entered into with a third party for the supply of services labour works materials plant equipment and supplies for the purposes of this Agreement as a condition thereof that such third party shall undertake the same obligations as are referred to in sub-clause (1) of this Clause and shall report to the Company concerning such third party's implementation of that condition.

(3) The Company shall submit a report to the Minister at monthly intervals or such longer period as the Minister determines commencing from the date of this Agreement concerning their implementation of the provisions of this Clause together with a copy of any report received by the Company pursuant to sub-clause (2) during that month.

Consideration for Termination of the 1961 Agreement

12. (1) Subject to sub-clause (2) and in consideration of the Company agreeing to cancel the 1961 Agreement and to release the State from its obligations for effluent disposal thereunder the State shall pay to the Company the sum of EIGHT MILLION FIVE HUNDRED THOUSAND DOLLARS (\$8,500,000) as follows:

- (a) as to TWO MILLION DOLLARS (\$2,000,000) six (6) months after the approval date;
- (b) as to TWO MILLION DOLLARS (\$2,000,000) nine (9) months after the approval date;
- (c) as to TWO MILLION DOLLARS (\$2,000,000) twelve (12) months after the approval date; and
- (d) as to the balance on the changeover date together with interest on such balance at the rate hereinafter mentioned for the period from the date twelve (12) months prior to the changeover date to the changeover date. The interest rate shall be the rate equal to the yield on 5 year Commonwealth Treasury Bonds as at the date being twelve (12) months prior to the changeover date which was published in the latest Reserve Bank bulletin issued prior to that date.

(2) The obligation of the State to pay each instalment under sub-clause (1) shall be subject to:

- (a) the Company not being in default hereunder being a default in respect of which notice has been given to the Company pursuant to Clause 23 and which, if capable of remedy, shall have remained unremedied after the period for remedy provided for or otherwise allowed pursuant to this Agreement; and



- (b) the Minister being reasonably satisfied as to the progress of the construction of the chloride plant and associated works.

#### Disposal of Works Site

13. Upon the Company disposing of any part or parts of the works site all the provisions of this Agreement shall cease to apply to the same which shall thereupon cease to have the benefit of the rights and privileges conferred by this Agreement.

#### Water

14. (1) The State and the Company shall agree upon the reasonable amounts and qualities thereof of the Company's annual and maximum daily water requirements for its purposes hereunder at the works site.

(2) The water requirements referred to in sub-clause (1) shall be obtained in accordance with the provisions of the *Water Authority Act 1984* or other relevant Act.

#### Electricity

15. (1) The Company shall confer with the State Energy Commission with respect to the Company's power requirements at the works site during the currency of the Agreement.

(2) The Company and the State Energy Commission shall enter into arrangements for the provision of power to the works site during the currency of this Agreement on terms and conditions to be negotiated between them.

(3) Subject to its compliance with the provisions of the *State Energy Commission Act 1979* the Company may supply electric power generated by any electric power plant erected on the works site to any third party performing work on the works site.

#### Conversion of Sulphate Plant

16. (1) During the continuance of this Agreement the Company shall investigate the technical economic and environmental feasibility of converting the sulphate plant to the processing of raw materials and shall endeavour to promote the establishment and operation of facilities to achieve processing of raw materials in the said State, whether by itself or in association with others.

(2) The Company shall when required by the Minister, but not more frequently than once in every 3 years, submit to the Minister detailed reports of its investigations and endeavours to promote processing carried out pursuant to sub-clause (1).

#### Road Haulage

17. (1) The State shall endeavour to ensure that subject to the payment by the Company of appropriate fees, the Minister for Transport under the *Transport Co-ordination Act 1966* will not refuse to grant and issue to the Company (or suppliers to or contractors with the Company and sub-contractors) a licence to transport by road —

- (a) minerals (including coal) for use in the factory anywhere within an area having a radius of 80 kilometres of the factory; and
- (b) any goods for use in the factory or manufactured or produced in the factory within an area having a radius of 40 kilometres of the factory.

And will ensure that the appropriate fees charged to the Company for licences under the *Transport Co-ordination Act 1966* will not be such as to discriminate against the Company its suppliers contractors and sub-contractors.

(2) The Company, so long as it complies and continues to comply with its obligations hereunder —

- (a) may use roads providing access from the boundary of the works site to and on any jetty or wharf where ships are berthed;
- (b) shall not have imposed on it any discriminatory charge in respect of the use by it of any jetty or wharf referred to in paragraph (a) of this sub-clause.

#### Zoning

18. During the currency of this Agreement the State shall ensure after consultation with the relevant local authority that:

- (a) the works site; and

- (b) the area of land surrounding the works site as delineated and bordered as on the plan annexed hereto and marked with the letter "A"

shall be and remain zoned for use or otherwise protected so that the operations of the Company hereunder may be undertaken and carried out on the works site without any interference or interruption by the State or by any State agency or instrumentality or by any local or other authority of the State on the ground that such operations are contrary to any zoning by-law regulation or order.

#### Assignment

19. (1) Subject to the provisions of this Clause the Company may at any time assign mortgage charge sub-let or dispose of with the consent of the Minister the whole or any part of the rights of the Company hereunder and of the obligations of the Company hereunder subject however in the case of an assignment sub-letting disposition or appointment to the assignee sub-lessee donee or the appointee (as the case may be) executing in favour of the State (unless the Minister otherwise determines) a deed of covenant in a form to be approved by the Minister to comply with observe and perform the provisions hereof on the part of the Company to be complied with observed or performed in regard to the matter or matters the subject of such assignment sub-letting disposition or appointment.

(2) Notwithstanding anything contained in or anything done under or pursuant to sub-clause (1) the Company shall at all times during the currency of this Agreement be and remain liable for the due and punctual performance and observance of all the covenants and agreements on its part contained herein PROVIDED THAT the Minister may agree to release the Company from such liability where he considers such release will not be contrary to the interests of the State.

#### Variation

20. (1) The parties hereto may from time to time by agreement in writing add to substitute for cancel or vary all or any of the provisions of this Agreement or of any lease licence easement grant or other title granted hereunder or pursuant hereto for the purpose of more efficiently or satisfactorily implementing or facilitating any of the objects of this Agreement.

(2) The Minister shall cause any agreement made pursuant to sub-clause (1) in respect of any addition substitution cancellation or variation of

the provisions of this Agreement to be laid on the Table of each House of Parliament within 12 sitting days next following its execution.

(3) Either House may, within 12 sitting days of that House after the agreement has been laid before it pass a resolution disallowing the agreement, but if after the last day on which the agreement might have been disallowed neither House has passed such a resolution the agreement shall have effect from and after that last day.

#### Force majeure

21. This Agreement shall be deemed to be made subject to any delays in the performance of the obligations hereunder and to the temporary suspension of continuing obligations hereunder (other than obligations to pay money) that may be caused by or arise from circumstances beyond the power and control of the party responsible for the performance of those obligations including without limiting the generality of the foregoing delays or any such temporary suspension as aforesaid caused by or arising from act of God force majeure earthquakes floods storms tempest washaways fire (unless caused by the actual fault or privity of the party responsible for such performance) act of war act of public enemies riots civil commotions strikes lockouts stoppages restraint of labour or other similar acts (whether partial or general) acts or omissions of the Commonwealth shortages of labour or essential materials reasonable failure to secure contractors delays of contractors or factors due to overall world economic conditions or factors due to action taken by or on behalf of any government or governmental authority (other than the State or any authority of the State pursuant to this Agreement) or factors that could not reasonably have been foreseen PROVIDED ALWAYS that the party whose performance of obligations is affected by any of the said causes shall promptly give notice to the other party of the event or events and shall use its best endeavours to minimise the effects of such causes as soon as possible after the occurrence.

#### Power to Extend Periods

22. Notwithstanding any provision of this Agreement the Minister may at the request of the Company from time to time extend or further extend any period or vary or further vary any date referred to in this Agreement or in any approved proposal hereunder for such period or to such later date as the Minister thinks fit whether or not the period to be extended has expired or the date to be varied has passed.

Determination of Agreement

23. (1) In any of the following events namely if —

- (a) (i) the Company makes default which the State considers material in the due performance or observance of any of the covenants or obligations to the State herein on its part to be performed or observed; or
- (ii) the Company abandons or repudiates this Agreement or its operations under this Agreement

and such default is not remedied or such operations resumed within a period of 180 days after notice is given by the State as provided in sub-clause (2) or, if the default or abandonment is referred to arbitration, then within the period mentioned in sub-clause (3); or

- (b) the Company goes into liquidation (other than a voluntary liquidation for the purpose of reconstruction) and unless within 3 months from the date of such liquidation the interest of the Company is assigned to another company or to an assignee approved by the Minister under Clause 19

the State (except for the provisions of Clauses 6 and 24 which shall remain in full force and effect) may by notice to the Company determine this Agreement.

(2) The notice to be given by the State in terms of sub-clause (1) of this Clause shall specify the nature of the default or other ground so entitling the State to exercise such right of determination and where appropriate and known to the State the party or parties responsible therefor and shall be given to the Company and all such assignees mortgagees chargees and disponees for the time being of the Company's said rights to or in favour of whom or by whom an assignment mortgage charge or disposition has been effected in terms of Clause 19 whose name and address for service of notice has previously been notified to the State by the Company or any such assignee mortgagee chargee or disponent.

- (3) (a) If the Company contests the alleged default abandonment or repudiation referred to in paragraphs (a) and (b) of sub-clause (1) the Company shall within 60 days after notice given by the State as provided in sub-clause (2) refer the matter in dispute to arbitration.

- (b) If the question is decided against the Company, the Company shall comply with the arbitration award within a reasonable time to be fixed by that award PROVIDED THAT if the arbitrator finds that there was a bona fide dispute and that the Company was not dilatory in pursuing the arbitration, the time for compliance with the arbitration award shall not be less than 90 days from the date of such award.

#### Effect of Cessation or Determination of Agreement

24. On the cessation or determination of this Agreement —

(1) Except as otherwise agreed by the Minister the rights of the Company to in or under this Agreement and the rights of the Company or of any of its assignees shall thereupon cease and determine but without prejudice to the liability of either of the parties hereto in respect of any antecedent breach or default under this Agreement or in respect of any indemnity given hereunder or in respect of the provisions of Clause 6 and this Clause.

(2) The Company shall forthwith pay to the State all moneys which may then have become payable or accrued due.

(3) Save as aforesaid and as otherwise provided in this Agreement neither of the parties hereto shall have any claim against the other of them with respect to any matter or thing in or arising out of this Agreement.

#### Environmental Protection

25. Nothing in this Agreement shall be construed to exempt the Company from compliance with any requirement in connection with the protection of the environment arising out of or incidental to its activities hereunder that may be made by the State or by any State agency or instrumentality or any local or other authority or statutory body of the State pursuant to any Act from time to time in force.

#### Commonwealth Licences and Consents

26. (1) The Company shall from time to time make application to the Commonwealth or to the Commonwealth constituted agency, authority or instrumentality concerned for the grant to them of any licence or consent under

the laws of the Commonwealth necessary to enable or permit the Company to enter into this Agreement and to perform any of its obligations hereunder.

(2) On request by the Company the State shall make representations to the Commonwealth or to the Commonwealth constituted agency authority or instrumentality concerned for the grant to the Company of any licence or consent mentioned in sub-clause (1).

#### Sub-contracting

27. The State shall ensure that without affecting the liabilities of the parties under this Agreement either party shall have the right from time to time to entrust to third parties the carrying out of any portions of the operations which it is authorised or obliged to carry out hereunder.

#### Arbitration

28. (1) Any dispute or difference between the parties arising out of or in connection with this Agreement the construction of this Agreement or as to the rights, duties or liabilities of either party hereunder or as to any matter to be agreed upon between the parties under this Agreement shall in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary be referred to the arbitration of two arbitrators one to be appointed by each party the arbitrators to appoint their umpire before proceeding in the reference every such arbitration shall be conducted in accordance with the provisions of the *Commercial Arbitration Act 1985* and notwithstanding Section 20 sub-section 1 of that Act each party may be represented before the arbitrators by a duly qualified legal practitioner or other representative.

(2) Except where otherwise provided in this Agreement, the provisions of this clause shall not apply to any case where the State the Minister or any other Minister in the Government of the said State is by this Agreement given an unfettered discretion.

(3) The arbitrators or umpire (as the case may be) of any submission to arbitration hereunder are hereby empowered upon the application of either of the parties to grant in the name of the Minister any interim extension of any period or variation of any date referred to herein which having regard to the circumstances may reasonably be required in order to preserve the rights of that party or of the parties hereunder and an award may in the name of the Minister grant any further extension or variation for that purpose.

#### Consultation

29. (1) The Company shall during the currency of this Agreement consult with and keep the State informed on a confidential basis concerning progress towards reaching the changeover date.

(2) Following the changeover date the Company will use its best business judgement to operate the chloride plant at a capacity appropriate to the demand for titanium dioxide.

(3) Following the changeover date and prior to the Company making a decision to cease production of titanium dioxide at the factory the Company will advise the Minister of its intentions and will enter into bona fide discussions with the Minister to discuss any viable possibility to avoid the same.

#### Notices

30. Any notice, consent or other writing authorised or required by this Agreement to be given or sent shall be deemed to have been duly given or sent by the State if signed by the Minister or by any senior officer of the Civil Service of the said State acting by the direction of the Minister and forwarded by pre-paid post or handed to the Company at its registered office for the time being in the said State and by the Company if signed on its behalf by any person or persons authorised by the Company or by its solicitors as notified to the State from time to time and forwarded by pre-paid post or handed to the Minister and except in the case of personal service any such notice, consent or writing shall be deemed to have been duly given or sent on the day on which it would be delivered in the ordinary course of post.

#### Term of Agreement

31. Subject to the provisions of Clause 23 this Agreement shall expire on 31 December, 2011.

#### Applicable Law

32. This Agreement shall be interpreted according to the law for the time being in force in the State of Western Australia.



IN WITNESS WHEREOF this Agreement has been executed by or on behalf of the parties hereto the day and year first hereinbefore mentioned.

SIGNED by the said THE HONOURABLE  
BRIAN THOMAS BURKE M.L.A.

in the presence of:

BRIAN BURKE

D. PARKER  
MINISTER FOR MINERALS AND ENERGY

THE COMMON SEAL OF SCM CHEMICALS LTD.  
was hereunto affixed by authority of the Board of  
Directors in the presence of:

[C.S.]

Director: J. LEACH

Secretary: H. MACIEJEWSKI

*[Schedule 1 amended by No. 27 of 1987 s. 6.]*

## **Schedule 2**

(Section 3)

THIS AGREEMENT is made the 17 day of June 1987 BETWEEN THE HONOURABLE BRIAN THOMAS BURKE, M.L.A., Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time (hereinafter called "the State") of the one part and

SCM CHEMICALS LTD. a company duly incorporated in the State of Western Australia and having its registered office at Old Coast Road, Australind (hereinafter called "the Company") of the other part.

WHEREAS:

- (a) the State and the Company are the parties to the agreement defined in section 3 of the *Pigment Factory (Australind) Agreement Act 1986* (which agreement is hereinafter referred to as the "Principal Agreement");
- (b) the parties desire to vary the Principal Agreement as hereinafter provided.

NOW THIS AGREEMENT WITNESSES:

1. Subject to the context, the words and expressions used in this Agreement have the same meanings respectively as they have in and for the purpose of the Principal Agreement.
2. The State shall introduce and sponsor a Bill in the Parliament of Western Australia to ratify this Agreement and endeavour to secure its passage as an Act prior to 31st July 1987.
3. The provisions of this Agreement other than this Clause 3 and Clause 2 shall not come into operation until:
  - (1) the Bill referred to in Clause 2 has been passed by the Parliament of Western Australia and comes into operation as an Act;
  - (2) the Company has given notice to the State of its acceptance of the conditions and procedures which may be recommended in the EPA Report as defined in Clause 4(1)(c) of this Agreement and adopted by the Minister for the time being responsible for the administration of the *Environmental Protection Act 1986* (which acceptance may only be withheld where the Company considers

that compliance with any individual or combination of conditions or requirements will so adversely affect the economic viability of the proposed Kemerton factory that it would be unreasonable for the Company to proceed) provided that if by the 14th day of August 1987 (or such later date as the Minister may reasonably require) the Company has not given notice of acceptance then by the 31st day of August 1987 (or such later date as the State and the Company may agree) the State and the Company will endeavour to mutually agree a satisfactory arrangement which will permit the Company to give the notice of acceptance; and

- (3) the State and the Company have executed the agreements for the sale and lease of the works site as contemplated by Clause 13A of the Principal Agreement as amended by this Agreement.

4. The Principal Agreement is hereby varied as follows: —

(1) Clause 1 —

- (a) in the definition of “changeover date” by deleting “31st day of December 1989” and substituting the following —  
“30th day of June 1990”;
- (b) in the definition of “chloride plant” by deleting “works site” and substituting the following —  
“Kemerton works site”;
- (c) by deleting the definition “EPA Report” and substituting the following definition —  
“ “EPA Report” means the report (Bulletin 275 May 1987) submitted by the EPA to the Minister in respect of the ERMP to the extent that the same remains relevant and any subsequent report the EPA may submit to the Minister in respect of the NOI;”;
- (d) by deleting the definition “ERMP” and substituting the following definition —  
“ “ERMP” means the environmental review and management program (dated November 1986) which was submitted by the Company to the EPA;”;

- (e) by inserting, in their appropriate alphabetical positions, the following definitions —

“ “Kemerton factory” means the factory to be erected and established by the Company pursuant to an approved proposal;

“Kemerton works site” means all that land at Kemerton referred to in paragraph (1) of Clause 6A;

“Finishing Plant” means the plant at the works site which will be upgraded to convert the raw titanium dioxide slurry to produce the finished product;

“NOI” means the notice of intent to be submitted by the Company to the Minister in respect of the chloride plant and the continuing operations on the works site or the more detailed requirements of the EPA pursuant to the *Environmental Protection Act 1986*.”

- (2) By inserting after Clause 6 the following clause —

“6A. (1) The Company desires as its site for the Kemerton works site certain land comprising 55 hectares or thereabouts and being that portion of the land shown hatched subject to survey on the plan marked “X” and initialled by or on behalf of the parties hereto for the purposes of identification.

(2) Subject to Clause 7 the State shall as soon as practicable after the execution hereof transfer and give vacant possession of the Kemerton works site free from encumbrances to the Company upon payment by the Company of one dollar and all costs associated with the survey and transfer of the land.

(3) The State shall to the extent reasonably necessary for the purposes of this Agreement allow the Company to have access to the Kemerton works site prior to the transfer thereof to the Company for the purpose of carrying out surveys and preparatory building works necessary to enable it to finalise the detailed proposals referred to in Clause 7.”.

(3) Clause 7 —

- (a) by deleting subclause (1) and substituting the following subclause —

“(1) The Company shall within sixty (60) days of the Company’s acceptance of (which acceptance shall not be unreasonably withheld) any condition and procedure which may be recommended in the EPA Report and adopted by the Minister for the time being responsible for the administration of the *Environmental Protection Act 1986* (or thereafter within such extended time as the Minister may allow as hereinafter provided) and subject to the provisions of this Agreement submit to the Minister to the extent reasonably practicable its detailed proposals (having due regard where applicable to the ERMP, NOI, the EPA Report and those conditions and procedures) for —

- (a) the construction and the establishment on the Kemerton works site of a new plant designed to produce and capable of producing not less than 70,000 tonnes of titanium dioxide pigment per annum by use of the chloride process and the Finishing Plant on the works site, and
- (b) the continuing operations on the works site.

Except for proprietary confidential information the detailed proposals shall include plans where practicable and specifications, where reasonably required by the Minister, of the location, area, lay-out, design, quantities, materials and a time programme for the commencement and completion of construction plant commissioning and the provision (as the case may be) of each of the following matters, namely —

- (c) the chloride plant;
- (d) the production of chlorine at the Kemerton works site;

- (e) air separation plant;
- (f) the continuing operations on the works site;
- (g) the concurrent operation of the sulphate plant and the chloride plant;
- (h) the expected solid and liquid discharges and gaseous emissions and the method and location of disposal;
- (i) water supply;
- (j) access roads;
- (k) use of local labour professional services manufacturers suppliers contractors and materials and measures to be taken with respect to the engagement and training of employees by the Company, its agents and contractors;
- (l) chemicals and other supplies for the ongoing process;
- (m) an environmental management programme as to measures to be taken, in respect of the Company's activities under this Agreement, for the protection and management of the environment; and
- (n) the security of confidential proprietary information provided to or obtained by the State or any authority of the State to satisfy the provisions of any written law."

(4) Clause 9 subclause (1) —

By inserting after "works site" the following —

"or Kemerton works site (as the case may be)".

(5) Clause 10 —

In paragraphs (b), (c) and (d) by inserting after “works site” wherever it occurs the following —

“or Kemerton works site (as the case may be)”.

(6) Clause 12 subclause (2) —

By inserting after “subclause (1)” wherever it occurs the following —

“and Clause 12A (as the case may be)”.

(7) By inserting after Clause 12 the following clause —

“12A. Subject to subclause (2) of Clause 12 and in consideration of the Company agreeing to relocate the chloride plant from the works site to the Kemerton works site the State agrees to pay to the Company (or a related company which is acceptable to the State) the sum of SIX MILLION THREE HUNDRED AND FIFTY THOUSAND DOLLARS (\$6,350,000.00) upon and subject to the terms and conditions of this Agreement and such other terms and conditions as the parties may mutually agree and the Minister considers may be beneficial to the State. The payment will be made progressively as follows —

- (a) as to ONE MILLION FIVE HUNDRED AND EIGHTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$1,587,500.00) on 31st July 1988;
- (b) as to ONE MILLION FIVE HUNDRED AND EIGHTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$1,587,500.00) on 31st October 1988;
- (c) as to ONE MILLION FIVE HUNDRED AND EIGHTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$1,587,500.00) on 31st January 1989;  
and
- (d) as to ONE MILLION FIVE HUNDRED AND EIGHTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$1,587,500.00) on 31st July 1990.

- (8) Clause 13 —
- (a) by deleting the heading “Disposal of Works Site” and substituting the following heading —  
“Disposal of Kemerton Works Site”;
  - (b) by deleting “works site” and substituting the following —  
“Kemerton works site”.
- (9) By inserting after Clause 13 the following clause —
- “13A. The Company agrees to sell to the State the works site at an agreed price and on condition that upon completion of such sale the State will lease to the Company the portion of the works site as the Company may require and otherwise the sale and lease shall be on such terms and conditions as the parties may mutually agree.”.
- (10) Clause 14 subclause (1) —
- by inserting after “works site” the following —
- “or Kemerton works site (as the case may be)”.
- (11) Clause 15 —
- (a) by deleting the heading “Electricity” appearing immediately above Clause 15 and substituting the following heading —  
“Energy”;
  - (b) in subclauses (1) and (2) by deleting “power” wherever it occurs and substituting in each place the following —  
“energy”;
  - (c) by inserting after “works site” wherever it occurs the following —  
“or Kemerton works site (as the case may be)”.
- (12) Clause 17 —
- (a) in paragraphs (a) and (b) of subclause (1) by inserting after “factory” wherever it occurs the following —



- “or the Kemerton factory (as the case may be)”;
- (b) in paragraph (a) of subclause (2) by inserting after “works site” the following —
- “or Kemerton works site (as the case may be)”.
- (13) Clause 18 —
- (a) by inserting after “works site” wherever it occurs the following —
- “or the Kemerton works site (as the case may be)”;
- (b) by deleting paragraph (b) and substituting the following paragraph —
- “(b) the area of land within a radius of two kilometres of the chloride plant”;
- (c) by adding after “operations of the Company hereunder” the following —
- “including (without limitation) the erection and use of the Kemerton factory in accordance with approved proposals”;
- (d) by deleting “zoning” in the last line and substituting the following —
- “town planning scheme”.
- (14) By inserting after Clause 18 the following clause —
- “18A. (1) Subject to subclause (2) the design, construction, commissioning and operation of the Kemerton factory shall comply with the lawful requirements of and all regulations and bylaws of all relevant local and other authorities of the State and the Commonwealth and all Acts of the State and Commonwealth applicable thereto.
- (2) Notwithstanding the provisions of any Act, regulation, bylaw, interim development order or town planning scheme the Company shall not be required to obtain any approval or consent required by or under a law of

the State to the development of the Kemerton works site or the construction of the Kemerton factory in accordance with the provisions of this Agreement.”.

IN WITNESS WHEREOF this Agreement has been executed by or on behalf of the parties hereto the day and year first hereinbefore mentioned.

SIGNED by the said THE  
HONOURABLE BRIAN THOMAS  
BURKE M.L.A. in the presence of:

}  
-  
}  
\_

BRIAN BURKE

D. PARKER  
MINISTER FOR MINERALS AND ENERGY

THE COMMON SEAL of SCM  
CHEMICALS LTD. was hereunto affixed  
by authority of the Board of directors in the  
presence of:

}  
-  
}  
\_

[C.S.]

Director: J. LEACH

Secretary: H. MACIEJEWSKI

### Notes

<sup>1</sup> This is a compilation of the *Pigment Factory (Australind) Agreement Act 1986* and includes the amendments made by the other written laws referred to in the following table-<sup>1a</sup>.

#### Compilation table

Short title	Number and year	Assent	Commencement
<i>Pigment Factory (Australind) Agreement Act 1986</i>	92 of 1986	10 Dec 1986	10 Dec 1986 (see s. 2)
<i>Pigment Factory (Australind) Agreement Amendment Act 1987</i>	28 of 1987	29 Jun 1987	29 Jun 1987 (see s. 2)
<i>Local Government (Consequential Amendments) Act 1996 s. 4</i>	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)

**Reprint of the *Pigment Factory (Australind) Agreement Act 1986* as at 9 Aug 2002**  
(includes amendments listed above)

~~<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.~~

#### **Provisions that have not come into operation**

Short title	Number and year	Assent	Commencement
<i>Planning and Development (Consequential and Transitional Provisions) Act 2005 s. 15</i> <sup>2</sup>		38 of 2005	12 Dec 2005
			<del>To be proclaimed</del> <a href="#">9 Apr 2006</a> (see s. 2 <a href="#">and Gazette</a> <a href="#">21 Mar 2006 p. 1078</a> )

~~<sup>2</sup> On the date as at which this compilation was prepared, the *Planning and Development (Consequential and Transitional Provisions) Act 2005 s. 15*, which gives effect to Sch. 2, had not come into operation. It reads as follows:~~

~~“~~

~~**15. Acts in Schedule 2 amended**~~

~~— The Acts mentioned in Schedule 2 are amended as set out in that Schedule.~~

”

~~Schedule 2, cl. 48 reads as follows:~~

“

**Schedule 2** ~~Consequential amendments~~

[s. 15]

~~48. Pigment Factory (Australind) Agreement Act 1986~~

~~Section 4B is repealed and the following section is inserted instead~~

“

~~4B. Planning laws modified~~

~~Despite the *Planning and Development Act 2005*, planning schemes as defined in that Act do not apply to or in relation to the Kemerton works site.~~

”

”

***Pigment Factory (Australind) Agreement Act 1986***

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