

Draft guideline



Types of financial assurance

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200 Victoria Street, Carlton, 3053.

Purpose

This document gives an overview of a number of types of financial assurance that Environment Protection Authority Victoria (EPA) may consider and when each type of financial assurance may be applied.

Where appropriate, templates for duty holders to use are included as appendices.

Legal status

This guideline provides duty holders who have to submit a financial assurance with information about the different types of financial assurances that EPA may accept under section 67B(1)(a) of the *Environment Protection Act 1970* (the Act).

EPA is responsible under the Act for determining the type and extent of a financial assurance.

Introduction

EPA requires duty holders operating certain scheduled premises to provide a financial assurance. Under the Act, this requirement can be specified in a works approval, licence or a pollution abatement notice.

The types of scheduled premises that may be required to submit a financial assurance are specified in Schedule 1 of the Environment Protection (Scheduled Premises and Exemptions) Regulations 2007. Financial assurance may be applied to landfills, Prescribed Industrial Waste (PIW) management, PIW composting, container washing, bulk storage facilities, contaminated land - onsite soil containment, and contaminated land - long-term management.

Generally, EPA has required duty holders to provide bank guarantees as financial assurances. While EPA expects that bank guarantees will continue to be the most common form of financial assurance it accepts, other types of financial assurance may occasionally be appropriate. Duty holders are advised to engage with EPA to determine which type of financial assurance will be accepted before proceeding to draft up financial assurance documentation.

This document outlines what each type of financial assurance under the Act means, as well as other types of financial assurance EPA may consider.

Related publications that may assist include:

Publication 1584 - *Financial Assurance Calculation for Landfills, Prescribed Industrial Waste Management, PIW Composting and Container Washing - EPA Victoria Guideline*

Publication 1568: *Draft Position on Financial Assurance in Licences and Works Approvals*

Bank guarantee

A bank guarantee is an unconditional written undertaking issued by a bank in favour of EPA, in which the bank promises to pay a certain amount of the bank customer's money upon demand by EPA.

Bank guarantees are the most common form of financial assurance.

Bank guarantees:

- specify a dollar amount that will be paid upon demand;
- pay unconditionally;
- are perpetual;
- are administratively simple.

How it works

After the duty holder enters into a contract with a bank, the bank guarantee is provided to EPA by the bank. Generally, the contract between the duty holder and the bank involves a security of cash or assets together with payment of regular premiums to the bank, in return for the bank providing the bank guarantee.

Any bank that issues a bank guarantee must:

- be regulated by APRA or be based in a country that APRA has determined has comparable prudential regulation;
- have a credit rating at or above a long-term credit rating of A- (Standard and Poor's) or A3 (Moody's).

EPA retains a right of review if there is a change in ownership or credit standing of the issuing bank or if a concentration risk arises with any one issuing bank.

Appendix A contains the template EPA needs banks to complete for bank guarantees.

When it is used

Bank guarantees are commonly used by EPA for quantifiable costs that could pass to the state if a site is abandoned by its duty holder.

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Guarantee (by Deed Poll)

A Guarantee by Deed Poll is an agreement that binds the entity entering into the deed to ensure that the requirements in an EPA statutory tool are met.

Guarantees by Deed Poll:

- indemnify EPA against the failure of a duty holder to perform the obligations set out in the corresponding statutory document such as a licence or pollution abatement notice;
- have no premiums or payments needed to maintain them.

How it works

A Deed Poll is executed by the duty holder, a related entity (for example, a parent company), or a company Director, and the relevant statutory tool is attached to it. It is a formalised expression of the intention of the party executing the Deed Poll to do what the statutory tool requires.

Appendix B contains a template for a Guarantee by Deed Poll for a parent company. EPA may tailor this template as needed for other situations such as a personal guarantee or duty holder guarantee.

When it is used

EPA may consider accepting a Guarantee by Deed Poll where the responsible entity:

- demonstrates the capacity to self-insure;
- has a credit rating at or above a long-term credit rating of A- (Standard and Poor's) or A3 (Moody's);
- is regulated by APRA or is based in a country that APRA has determined has comparable prudential regulation.

Guarantees by Deed Poll can be useful when a parent company has more resources than a subsidiary that has requirements under a statutory tool, and is therefore better placed to offer assurance.

EPA may consider this type of financial assurance if the entity proposing to provide the Guarantee is able to demonstrate that it can meet the financial commitments under the Guarantee. EPA may periodically require the parent company to provide information about its ability to meet the Guarantee and may, if it considers necessary to do so, require an alternative type of financial assurance.

EPA may also seek a personal guarantee from the company Director.

Mutual fund

A mutual fund is a fund created by or on behalf of multiple entities that provides cover to pay out in the event of specific, named events.

Mutual funds:

- are established by agreement between parties;

- allow the costs of addressing risk to be shared;
- may accumulate to allow increased coverage of a cleanup event compared to single financial assurances from individual duty holders.

How it works

The combined capital of the mutual fund is usually invested by a professional fund manager, with funds used to meet claims by the members of the fund. The fund manager will need to be approved by EPA.

EPA may consider entering into a separate agreement with the overall manager of the fund or, in some instances, it may become a party to the fund deed.

The amount of the fund is approved by EPA following its consideration of the risk profiles of the entities, the potential size of any claims, whether insurance is held, and the duration of the fund. The fund manager will have to notify EPA of any material issues arising that relate to the fund.

The documents that are executed to establish the mutual fund arrangement are:

- **Fund deed:** The mutual fund is established using a fund deed that sets out who has overall management of the fund, how contributions are to be made to the fund and how claims on the fund are determined.
- **Investment agreement:** An agreement about investment of the funds is also established between the overall manager of the fund and a professional funds manager.
- **Shareholder's agreement:** Where the member entities form a company or trust to have overall responsibility for the fund, a shareholder's agreement or trust deed is also established.
- **Insurance contract:** Insurance protects the fund from large unexpected claims or an unexpected aggregation of claims.

When it is used

A mutual fund is appropriate where the member entities have similar obligations and the costs that the fund addresses are contingent in nature rather than known, required expenditure.

Duty holders will need to seek legal and tax advice on the structure and establishment of a mutual fund. The establishment of a mutual fund may give rise to further responsibilities under other legislation, for example, the *Corporations Act 2001* (Cwlth), *Insurance Contracts Act 1984* (Cwlth), *Insurance Act 1973* (Cwlth) and the *Financial Sector (Collection of Data) Act 2001* (Cwlth). It may be that the cost of meeting these regulatory requirements outweighs the benefits of using this type of financial assurance.

EPA will require evidence of processes to ensure that obligations under all relevant state and Commonwealth legislation are complied with.

EPA is most likely to accept mutual funds as a form of financial assurance when proposed by an industry association.

Financial assurance calculation

Accumulating trust fund

An accumulating trust fund is a fund created by a single duty holder.

In an accumulating trust fund:

- the trustee is permitted to accumulate income from funds invested in the trust;
- the accumulated income may be added to the capital.

How it works

An accumulating trust fund is established to hold cash or other assets on behalf of the duty holder.

The powers of the trustee and the rights of beneficiaries are set out in the trust agreement. EPA would be a beneficiary of the trust.

The trust can be designed to accumulate a balance over time, or to maintain a constant balance.

The balance of the fund must be regularly reported to EPA by the trustee.

When it is used

An accumulating trust fund is appropriate for financial assurances needed for long-term operations.

Similar to mutual funds, the establishment of an accumulating trust fund may give rise to further responsibilities under other legislation. Duty holders will need to seek legal and tax advice on the structure and establishment of an accumulating trust fund. It may be that the cost of meeting these regulatory requirements outweighs the benefits of using this type of financial assurance.

EPA will require evidence of processes to ensure that obligations under all relevant state and Commonwealth legislation are complied with.

Controlled bank account

A controlled bank account is an account held in the name of the duty holder, with restricted drawdown from the account.

In controlled bank accounts:

- interest accumulates in the fund for the benefit of the duty holder;
- administrative and compliance fees can be minimised;
- funds are available to perform required works.

How it works

An agreement sets out the establishment of the bank account and restrictions on the drawdown of funds. The bank and EPA are parties to the agreement.

EPA authorises drawdown from the account as reimbursement to the duty holder for expenditure on works done under associated statutory tools and guidelines.

EPA may register a security interest in the fund under the *Personal Property Securities Act 2009* (Cwlth).

When it is used

A controlled bank account is appropriate for addressing known, anticipated costs. It is appropriate for financial assurances needed for long-term operations.

Duty holders will need to seek tax advice on this type of arrangement.

EPA may require duty holders to regularly report on the balance of the fund and may require an alternative type of financial assurance if it considers there are insufficient funds.

Letter of credit

A letter of credit is an undertaking issued by a bank authorising the payment of money up to a maximum amount according to conditions expressed in the letter of credit to a named person, when that person presents those complying documents to the bank.

In a letter of credit:

- a maximum amount for payment is specified;
- the terms under which the letter of credit is claimed are clearly specified.

How it works

The letter of credit is established in a similar manner to a bank guarantee.

In order to claim against the letter of credit, EPA presents the bank with documentation showing a default on behalf of the duty holder.

When it is used

Letters of credit are similar to bank guarantees and are appropriate for quantifiable costs that could pass to the state if a site is abandoned by its duty holder.

As letters of credit require EPA to demonstrate the duty holder's default to the bank, letters of credit will only be considered where the risk of the duty holder defaulting on their obligations can be demonstrated to be very low.

Letters of credit can also be used as assurance against default on another type of financial assurance such as payment into a controlled bank account or accumulating trust fund.

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Certificate of title

A certificate of title involves EPA securing an interest in a property held by the duty holder.

Under certificates of title:

- duty holders who are asset-rich but cash-poor can satisfy financial assurance requirements;
- the title may be to a different property to the premises that is required to submit the financial assurance.

How it works

After quantifying the potential liability required as the financial assurance, a certification of the value of the land is obtained through the Victorian Government Land Monitor.

EPA then registers its interest on the title to the property. The certificate of Title may be retained by EPA as a mortgagee.

When it is used

A certificate of title may be considered by EPA as an acceptable type of financial assurance, where the value of the land for which the title is given exceeds the amount of financial assurance required to be submitted.

Bond

A bond is an instrument containing an undertaking by the issuer, who is generally the duty holder or a related entity.

Bonds are flexible instruments that can take a number of forms. They are generally similar to a Guarantee by Deed Poll.

How it works

The bond is executed under seal and contains an undertaking such as a deed.

When it is used

Bonds are used when the duty holder is known to be reputable and financially stable.

Bonds will only be considered by EPA where the risk of the duty holder defaulting on their obligations can be demonstrated to be very low.

Insurance

Insurance is an indemnity between an insurer and the insured in exchange for premium payments.

Under insurance:

- the insurer has a vested interest in ensuring that the duty holder minimises the risk of a claim;
- a wide range of events can be covered, such as third-party damages.

How it works

An insurance contract is agreed between the parties which sets out the event or events that trigger a pay-out up to a nominated sum to the insured or a nominated party. The contract or policy wording sets out the conditions for payment.

A certificate of currency is issued by the insurer upon acceptance of coverage.

The risks associated with the named events are transferred to the insurer.

EPA may be named as a party with an insurable interest and can then recover cleanup costs directly from the insurer.

When it is used

Holding insurance for sudden and accidental events and gradual pollution is prudent for any duty holder; this applies to a range of duty holders beyond those that are required to provide financial assurance.

Appendix A - Bank guarantee template

[Letterhead of Bank]

Bank Guarantee

providing financial assurance under section 67B of the *Environment Protection Act 1970* (Vic) (the Act)

Guarantee to: Environment Protection Authority (EPA)

Person required to provide financial assurance: *[insert legal name and business name if applicable]*

[insert registered business address]

[insert ONLY one of the following]

- *The person has applied for a works approval under the Act.*
- *The person has applied for a licence under the Act.*
- *The person has applied for a permit under the Act.*
- *The person has a works approval, licence or permit under the Act.*
- *The person occupies premises subject to a pollution abatement notice under the Act.*

[insert premises address]

At the request of the person required to provide financial assurance under section 67B, the Bank undertakes unconditionally to pay EPA on written demand any sum or sums up to a maximum of \$*[insert amount in figures]*. The Bank agrees to make the payment without reference to the person and notwithstanding any notice from the person not to pay EPA any money under this guarantee.

The liability of the Bank under this guarantee will not be discharged or affected because:

- a. any of the person's obligations are varied, or
- b. any breach (wilful or otherwise) of its obligations are committed by or on behalf of the person (with or without the knowledge or consent of EPA), or
- c. EPA grants any time, credit or concession to the person or others who have contracted with the person.

This guarantee continues in force until:

- a. the Bank pays EPA the full amount payable under this guarantee, or
- b. EPA notifies the Bank in writing that this guarantee is no longer required.

At its option, the Bank may pay the maximum amount payable to EPA (less any amounts already paid) and the Bank's liability under this guarantee immediately then ceases.

This guarantee is governed by the law of Victoria.

The benefit of this guarantee is not assignable.

Date

Signed for and on behalf of

[insert name of Bank]

by:

in the presence of:

.....
NAME: *[please print]*

POSITION:

.....
NAME: *[please print]*

Appendix B - Guarantee (by deed poll) template

Parent Company Guarantee

Deed Poll

in favour of:

Environment Protection Authority

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Date **2015**

By

[*Insert Name*] (ABN #) of [*Insert Address*]

(Guarantor)

In favour of

Environment Protection Authority (ABN 85 899 617 894) of 200 Victoria Street, Carlton, Victoria 3053

(EPA)

Background

- A. This Deed Poll is provided under section 67B of the *Environmental Protection Act 1970 (Act)* and as [a condition of a works approval or licence under section 21(1)(ba) of the Act/a requirement of a pollution abatement notice under section 31A(2A) of the Act/a condition of the issue, renewal or transfer of a transport permit under section 53F(5) of the Act]. [**Note: Select appropriate provision and delete others.**]
- B. The Guarantor agrees to provide the guarantees and indemnities detailed in this Deed Poll.

Agreed terms

It is agreed as follows:

1. Definitions and Interpretation

1.1 Definitions

In this Deed Poll, unless the context otherwise requires:

Instrument means the [approval/licence/pollution abatement notice/permit] dated [on or about the date of this agreement/*insert date*] [and set out in Attachment 1] as varied from time to time. [**Note: Select appropriate description and delete others.**]

Instrument Holder means the person [in whose favour the Instrument is issued/who is required to comply with the Instrument]. [**Note: The first option is relevant to approvals or licences under s 21(1)(ba) or transport permits under s 53F(5). The second option should be used for pollution abatement notices under s 31A(2A).**]

Obligation means every legal, equitable, contractual, statutory or other duty, undertaking, warranty, guarantee, indemnity, covenant, agreement or other obligation on the part of the Instrument Holder, which at any time arises under or in connection with the Instrument including:

- (a) any Obligation on the part of the Instrument Holder to pay EPA any costs, expenses, damages or other liabilities, whether present, future, actual or contingent, liquidated or unliquidated;
- (b) any Obligation arising from any variation to the Instrument:
 - (i) agreed between the Instrument Holder and EPA; or
 - (ii) made in accordance with the Act or the Instrument;
 at any time, whether or not the Guarantor is aware of or consents to the variation; and
- (c) any Obligation on the part of the Instrument Holder which was void from the beginning, or has been subsequently avoided or is otherwise unenforceable by EPA as a result of:
 - (i) any legal limitation, disability or incapacity relating to the Instrument Holder;
 - (ii) the Instrument Holder's failure to comply with any law; or
 - (iii) any winding up, liquidation, bankruptcy, insolvency, external administration, composition of debts, scheme of reconstruction, official management receivership, assignment of property, scheme of arrangement or other incapacity, insolvency or demise on the part of or entered into by the Instrument Holder.

1.2 Interpretation

In this Deed Poll, unless the context otherwise requires:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined, its other grammatical forms have corresponding meanings;
- (c) 'includes' means includes without limitation; and
- (d) a reference to:
 - (i) a person includes a natural person, partnership, body corporate, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) a document includes all amendments or supplements to, or replacements or novations of, that document;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation; and
 - (v) a party or parties is a reference to EPA and the Guarantor (as the case requires).

2. Guarantee

2.1 Undertaking

The Guarantor unconditionally and irrevocably guarantees to EPA the due and punctual performance by the Instrument Holder of all its Obligations under the Instrument.

2.2 Principal Obligation

- (a) This Deed Poll:
 - (i) is not to be treated as ancillary or collateral to any right or obligation; and
 - (ii) is a continuing guarantee and remains in full force and effect for so long as the Instrument Holder has any liability or obligation to EPA and until all of those liabilities or obligations have been fully discharged.
- (b) The Guarantor waives any right it has of first requiring EPA to commence proceedings or enforce any other right against the Instrument Holder or any other person before claiming from the Guarantor under this Deed Poll.

2.3 Liability

The liability of the Guarantor under this Deed Poll is not affected by any of the following, whether with or without the consent of the Guarantor:

- (a) EPA exercising or refraining from exercising its rights under any other security provided in relation to the Instrument.
- (b) Any delay by the Instrument Holder or EPA to notify the Guarantor of any default by the Instrument Holder under the Instrument.
- (c) The invalidity or unenforceability of an obligation or liability of a person other than the Guarantor.
- (d) Invalidity or irregularity in the execution of this Deed Poll by the Guarantor or any deficiency in or irregularity in the exercise of the powers of the Guarantor to enter into or observe its obligations under this Deed Poll.
- (e) Any other circumstances which might otherwise constitute a defence available to, or a discharge of, the Instrument Holder in respect of its obligations under the Instrument or the Guarantor in respect of this Deed Poll.

2.4 Indemnity

The Guarantor indemnifies EPA and agrees to keep EPA indemnified from and against all damages, costs, losses, expenses and liabilities which EPA may suffer or incur consequent upon or arising out of the Instrument Holder's breach of its Obligations. The Guarantor agrees that the indemnity given by the Guarantor under this clause:

- (a) is a separate and additional Obligation of the Guarantor under this Deed Poll;

- (b) is given by the Guarantor as a principal indemnifier and not as a surety;
and
- (c) is given on the terms of this Deed Poll insofar those other terms can apply.

2.5 Limitation

The obligations of the Guarantor under this Deed Poll will not exceed the Obligations of the Instrument Holder under the Instrument.

2.6 Payment

Any payment required to be made by the Guarantor to EPA under this Deed Poll must be made in Australian dollars within 14 days of receipt of a notice from EPA setting out the amount payable and describing in reasonable detail the Instrument Holder's default.

2.7 GST

- (a) Terms used in this clause have the same meanings given to them in *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth).
- (b) With any payment of amounts payable under or in connection with this Deed Poll including by way of indemnity, reimbursement or otherwise, the party paying the amount must also pay any GST in respect of the taxable supply to which the amount relates.
- (c) The party receiving the payment will provide a tax invoice.
- (d) The payment of any amount referred to in paragraph (b) which is a reimbursement or indemnification of a cost, expense, loss or liability will exclude any part of the amount for which the other party can claim an input tax credit.

3. Notices

- (a) A notice or other communication given to or served on the Guarantor under this Deed Poll is deemed to have been duly given or served if it is in writing, signed on behalf of EPA and is either delivered by hand, posted or a copy transmitted electronically to the Guarantor or its agent at any registered office of the Guarantor or posted to the Guarantor's address set out above or such other address as is notified in writing to EPA from time to time.
- (b) A notice or other communication given to or served on EPA under this Deed Poll is deemed to have been duly given or served if it is in writing, signed by or on behalf of the Guarantor and is either delivered by hand, posted or a copy transmitted electronically to EPA at the address set out above or such other address as is notified in writing to the Guarantor from time to time.
- (c) A notice sent by post is deemed to have been given at the time when, in due course of transmission, it would have been delivered at the address to which it is sent.

- (d) A notice sent by facsimile transmission or transmitted electronically will be deemed to have been given when the machine on which the notice is sent reports that the notice has been transmitted satisfactorily.

4. General

4.1 Variations

This Deed Poll may be amended or replaced only in writing and with the written consent of EPA.

4.2 Assignment

The Guarantor may only assign this Deed Poll or a right under this Deed Poll with the prior written consent of EPA.

4.3 Stamp duty

Any stamp duty or other taxes of a similar nature (including fines, penalties and interest payable) in connection with this Deed Poll or any transaction contemplated by this Deed Poll must be borne by the Guarantor.

4.4 Rights cumulative

Except as expressly stated otherwise in this Deed Poll, the rights of a party under this Deed Poll are cumulative and in addition to any other rights of that party.

4.5 No merger

The rights and obligations of the parties under this Deed Poll do not merge on completion of any transaction contemplated by this Deed Poll.

4.6 Entire agreement

This Deed Poll contains the entire agreement between the parties in connection with its subject matter. It supersedes all previous agreements or understandings between the parties in connection with its subject matter.

4.7 Further assurances

The Guarantor must, at its own expense, do everything reasonably necessary (including executing and delivering documents) to give full effect to this Deed Poll and the transactions contemplated by it.

4.8 Severability

Any provision of this Deed Poll which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable. If the provision cannot be read down, it will be ineffective to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

4.9 Waiver

EPA does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right,

power or remedy. A waiver of a right, power or remedy must be in writing and signed by EPA.

4.10 Governing law and jurisdiction

This Deed Poll is governed by the law of Victoria. The Guarantor irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts that may hear appeals from those courts in respect of any proceedings in connection with this Deed Poll.

Signing page

Executed as a Deed Poll in favour of EPA this day of 2015

[Note: The execution clause may need amendment, depending on the identity of the Guarantor. If the Guarantor is not incorporated in Australia, it is good practice to seek a legal opinion from local counsel to confirm the method of execution by the overseas company.]

<p>Executed by [<i>insert Guarantor</i>] ACN [XX] in accordance with s 127(2) of the <i>Corporations Act 2001</i>(Cwlth) in the presence of:</p>	
<p>Signature of director</p>	<p>Signature of director/company secretary (Please delete as applicable)</p>
<p>Name of director (print)</p>	<p>Name of director/Company secretary (print)</p>

Attachment 1

[Insert copy of Instrument]