



Western Australia

Port Kennedy Development Agreement Act 1992

Compare between:

[15 Sep 2017, 02-c0-00] and [27 Feb 2018, 02-d0-01]

Western Australia

Port Kennedy Development Agreement Act 1992

An Act to ratify an agreement between the State of Western Australia and Fleuris Pty Ltd and to facilitate the development of the area known as Port Kennedy and for related purposes.

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Port Kennedy Development Agreement Act 1992*¹.

2. Commencement

The provisions of this Act shall come into operation on such day as is fixed by proclamation¹.

3. Terms used

- (1) In this Act, unless the contrary intention appears —

Agreement means the Agreement a copy of which is set out in Schedule 1;

Board means the Port Kennedy Management Board established under section 12;

Company has the same meaning as in the Agreement;

Crown Grant has the same meaning as in the *Land Act 1933*²;

development area has the same meaning as in the Agreement;

Environmental Approval has the same meaning as in the Agreement;

member means member of the Board;

Port Kennedy area means the area bordered in blue and shown as the Port Kennedy area on Plan No. 1744;

Registrar of Titles has the meaning given by the *Transfer of Land Act 1893*;

stage 2 area means stage 2 as that term is defined in the Agreement.

- (2) A reference in this Act to a plan by number is a reference to the miscellaneous plan of that number held by the Western Australian Land Information Authority established by the *Land Information Authority Act 2006* section 5.

[Section 3 amended by No. 46 of 2009 s. 13(2) and (3).]

Part 2 — Ratification of Agreement

4. Agreement ratified and implementation authorised

- (1) The Agreement is 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.

Part 3 — Facilitation of development

5. Reserve cancelled, roads closed and land vested in Crown

- (1) On the commencement of this Act —
 - (a) Reserve No. 20716 classified as of Class C, containing 137.405 9 hectares and set apart as “Excepted from sale” is cancelled; and
 - (b) all those portions of road within the Port Kennedy area that are dedicated or reserved for public use under any Act are closed.
- (2) The land contained in Reserve No. 20716 cancelled under subsection (1)(a) and the land contained in the portions of road closed under subsection (1)(b) is, on the commencement of this Act —
 - (a) vested in Her Majesty as of her former estate; and
 - (b) constituted Crown land within the meaning of that expression in the *Land Act 1933*².

6. Area of Port Kennedy Land Conservation District amended

The area of land comprising the Port Kennedy Development Area Land Conservation District under the *Soil and Land Conservation Act 1945* is amended —

- (a) by excising the areas of land referred to in section 8(2)(b), (c), (d) and (e) when they are reserved or dedicated under that section; and
- (b) from time to time by excising such other areas of land which the Minister declares are necessary to be excised to enable development to proceed when construction of the next part of the project which will affect that area is imminent.

7. Removal of unauthorised structures

(1) In this section —

chief executive officer means the chief executive officer of the department principally assisting in the administration of the *Land Administration Act 1997*;

order means an order referred to in subsection (2);

structure includes a structure whether on, over or under any land;

unauthorised structure means a structure the erection of which was not, at the time of its erection, authorised under any Act.

(2) The chief executive officer may by order published —

- (a) in the *Gazette*; and
- (b) in a newspaper circulating in the locality of the Port Kennedy area,

direct the owner or any person occupying any unauthorised structure in the Port Kennedy area to permanently remove the structure, the contents of the structure and any materials or fixtures in the area of the structure from the Port Kennedy area before the day specified in the order, being a day not less than 90 days from the day of publication of the order in the *Gazette*.

(3) An order may be directed —

- (a) to the owners or occupiers of all unauthorised structures in the Port Kennedy area; or
- (b) to the owner or occupier of one or more unauthorised structures in the Port Kennedy area that are specified in the order.

(4) In addition to publishing an order in accordance with subsection (2), the chief executive officer shall, within 14 days of the publication of the order in the *Gazette*, cause a copy of the order to be served upon the owner or occupier of each unauthorised structure to which the order relates.

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- (5) For the purposes of subsection (4), and without limiting the operation of section 76 of the *Interpretation Act 1984*, an order shall be taken to have been duly served upon the owner or occupier of an unauthorised structure if a copy of the order —
- (a) is served upon any person in occupation or apparently in occupation of the unauthorised structure; or
 - (b) is affixed to the unauthorised structure in a conspicuous place.
- (6) Upon application by the owner or occupier of an unauthorised structure to which an order relates, the Minister may extend, by not more than 45 days from the day specified in the order, the day by which the structure, contents of the structure and materials and fixtures in the area of the structure must be removed from the Port Kennedy area.
- (7) An application referred to in subsection (6) shall —
- (a) be made in writing setting out the grounds upon which the extension is sought; and
 - (b) be served upon the Minister not later than 21 days before the day specified in the order.
- (8) The Minister shall not grant an extension of time under subsection (6) unless the Minister is satisfied that the applicant —
- (a) is unable to remove the structure, contents, materials or fixtures from the Port Kennedy area by the day specified in the order; and
 - (b) will remove the structure, contents, materials and fixtures from the Port Kennedy area within the extended period if such an extension is granted.
- (9) Where —
- (a) an order has been published in accordance with subsection (2) and a copy of the order has been served in accordance with subsections (4) and (5); and

- (b) an unauthorised structure to which the order relates or any part of the unauthorised structure or any contents of the unauthorised structure or any materials or fixtures remaining in the area of the structure have not been permanently removed from the Port Kennedy area by the day specified in the order or, if an extension of time has been granted under subsection (6), by the day fixed under that subsection,

the structure, contents, materials and fixtures become the property of the Crown and may be removed, destroyed or disposed of in such manner as the chief executive officer thinks fit.

- (10) No compensation shall be payable to any person in respect of the removal, destruction or disposal of any structure, contents, materials or fixtures under this section.
- (11) For the purposes of clause 16 of the Agreement, action taken under this section shall be regarded as action taken pursuant to the provisions of the *Land Act 1933*² but nothing in this section prevents action being taken under that Act.

[Section 7 amended by No. 46 of 2009 s. 13(4).]

8. Subdivision, dedication and reservation of certain land in the development area

- (1) In this section —
authorised land officer has the same meaning as in the *Land Act 1933*².
- (2) When a survey of the development area has been carried out in accordance with the Agreement and the plan of the survey has been certified correct by an authorised land officer —
- (a) any land delineated and shown on that plan as a lot shall be taken to have been subdivided into that lot;

- (b) any land delineated and shown on that plan as a street shall be taken to have been dedicated as a thoroughfare under the *Local Government Act 1995*;
- (c) any land delineated and shown on that plan as a pedestrian accessway shall be taken to have been reserved and vested in the City of Rockingham under Part III of the *Land Act 1933*² for the purpose of a “pedestrian accessway”, and classified as of Class “C” under that Part;
- (d) any land delineated and shown on that plan as public open space and beach reserve shall be taken to have been reserved and vested in the City of Rockingham under Part III of the *Land Act 1933*² for the purpose of “public recreation”, and classified as of Class “C” under that Part;
- (e) any land delineated and shown on that plan as a nature reserve shall be taken to have been reserved under Part III of the *Land Act 1933*² for the purpose of the conservation of flora and fauna, and classified as of Class “A” under that Part,

with effect from the day on which the certification takes place.

- (3) The City of Rockingham shall have the care, control and management of any land that is, by virtue of subsection (2)(b), dedicated as a thoroughfare under the *Local Government Act 1995*.

[Section 8 amended by No. 14 of 1996 s. 4.]

9. Rezoning of land granted under Agreement

- (1) In this section —
Metropolitan Region Scheme has the same meaning as in the *Planning and Development Act 2005*;
Town Planning Scheme means the City of Rockingham Town Planning Scheme made under the *Town Planning and Development Act 1928*³.

- (2) Where in accordance with the Agreement, a Crown Grant is issued to the Company of any land in the development area, that land shall be taken to have been zoned or rezoned (as the case may be) —
- (a) as “urban” under the Metropolitan Region Scheme; and
 - (b) as a “development zone” under the Town Planning Scheme,

with effect from the day on which the grant is issued.

- (3) Nothing in subsection (2) shall be taken as preventing land referred to in that subsection from being further dealt with under the Metropolitan Region Scheme, the Town Planning Scheme or under the Acts referred to in subsection (1), after the grant is made.

[Section 9 amended by No. 38 of 2005 s. 15.]

10. Note regarding unexploded munitions to be endorsed on register

- (1) Where, in accordance with the Agreement, a Crown Grant is issued to the Company of any land in the development area, the Registrar of Titles shall cause a note to be endorsed in the Register within the meaning of the *Transfer of Land Act 1893* and on the certificate of title for that land and on any future certificate of title issued in respect of that land or any part of that land to the effect that the land was formerly an artillery range and may contain unexploded munitions.
- (2) The Supreme Court may, upon application by a person who is the registered proprietor of an estate in fee simple in land referred to in subsection (1), order that the note referred to in that subsection be removed from the Register and not be endorsed on any future certificate of title issued in respect of that land or any part of that land.

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- (3) The Supreme Court shall only make an order referred to in subsection (2) in respect of any land if the Court is satisfied that there are no longer any unexploded munitions on that land.

[Section 10 amended by No. 81 of 1996 s. 153(1).]

11. Registrar of Titles etc. shall give effect to Act

The Registrar of Titles and any other person authorised by a written law to record and give effect to the registration of transactions affecting any estate or interest in land or other property, shall take cognizance of this Act and shall record and register in the appropriate manner such matters as are necessary to give effect to this Act.

Part 4 — Port Kennedy Management Board

12. Establishment and composition of Port Kennedy Management Board

- (1) There is hereby established a board to be known as the Port Kennedy Management Board.
- (2) The Board shall consist of not less than 8 members and not more than 9 members appointed by the Minister.
- (3) Of the members appointed by the Minister under subsection (2), at least —
 - (a) 2 shall be persons who are nominated by the Company;
 - (b) one shall be nominated by the City of Rockingham;
 - (c) one shall be nominated by the Minister to whom the administration of the *Fish Resources Management Act 1994* is for the time being committed;
 - (d) one shall be nominated by the Minister to whom the administration of the *Conservation and Land Management Act 1984* is for the time being committed;
 - (e) one shall be nominated by the Minister to whom the administration of the *Land Act 1933*² is for the time being committed;
 - (f) one shall be a person who in the opinion of the Minister represents the local community;
 - (g) one shall be a person selected by the Minister from a panel of 3 names submitted to the Minister by the Conservation Council of Western Australia Inc.
- (4) If, within 30 days of being requested in writing by the Minister to do so, any person or body referred to in subsection (3)(a), (b), (c), (d), (e) or (g) has not made any nomination for appointment or submitted any panel of names required to be made or submitted by the person or body under a paragraph of that subsection, the Minister shall make the appointment at his or her discretion but any person so appointed is deemed to have been

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nominated under that paragraph or selected from a panel of names submitted under that paragraph (as the case may be).

[Section 12 amended by No. 53 of 1994 s. 264.]

13. Functions of Board

- (1) The functions of the Board are —
- (a) to consider the proposals submitted to the Minister by the Company under clause 4 of the Agreement and to advise the Minister on the effect of the proposals upon the environment; and
 - (b) to advise the Minister when the Board considers that commencement of construction of the project described in the Agreement is imminent; and
 - (c) to advise the Minister on matters related to the protection of flora and fauna in areas of vacant Crown land in the Port Kennedy area; and
 - (d) to facilitate the further study of the geomorphological features of the Port Kennedy area and to educate the public on the environmental importance of those features; and
 - (e) to advise the Minister on the progress of development of the project described in the Agreement; and
 - (f) to advise the Minister with respect to the issue of Crown Grants to the Company under the Agreement; and
 - (g) to advise the Minister on any requirements for the maintenance of land, buildings or facilities, including marina facilities and breakwaters, in the Port Kennedy area or waters in or abutting that area; and
 - (h) to monitor whether the conditions and procedures attached to the Environmental Approval have been or are being complied with by the Company and to advise the Minister if the Board considers that the Company has failed to comply with any condition or procedure; and

- (i) to monitor the implementation by the Company of the provisions of the Agreement and to advise the Minister if the Board considers that the Company has failed to comply with any provision of the Agreement; and
 - (j) to advise the Minister on the future use and development of the stage 2 area; and
 - (k) subject to section 21(1), to direct and control any future development of the stage 2 area; and
 - (l) to advise the Minister on any future development of the development area; and
 - (m) to inquire into and to advise the Minister on any matter relating to the Port Kennedy area on which the advice of the Board is sought by the Minister.
- (2) The Board shall have and may exercise such powers as are necessary for or incidental to the performance of its functions.
- (3) Where the Board notifies the Minister of its decision on any matter referred to in subsection (1) the Board shall also notify the Minister of any dissenting view expressed by a member or members in relation to that decision and recorded in the minutes of the meeting at which the decision was made.
- (4) In exercising its functions the Board shall, where practicable and in any case where the matter concerns the conservation, preservation or scientific values of the Port Kennedy area, ensure that there is adequate public consultation.

14. Minister to take into account advice of Board

The Minister in exercising powers under this Act and the Agreement shall take into account any advice of the Board and any dissenting views notified to the Minister under section 13(3).

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15. Chairperson

- (1) The Minister shall appoint from among the members a person to be chairperson of the Board and a person to be deputy chairperson of the Board.
- (2) During any vacancy in the office of chairperson, or while the chairperson is unable to act by reason of sickness, absence or other cause, the deputy chairperson shall perform the functions of the chairperson.

16. Services and facilities

The Minister shall arrange for the Board to be provided with such services, staff and facilities as are necessary to enable the Board to perform its functions.

17. Remuneration

A member, other than a member who is an officer of the Public Service of the State, shall be paid such remuneration and travelling and other allowances as the Minister from time to time determines on the recommendation of the Public Sector Commissioner.

[Section 17 amended by No. 39 of 2010 s. 89.]

18. Protection of Board and members

The Board and a member shall not be liable for any thing done or omitted to be done in good faith for the purposes of this Act by the Board or a member.

19. Constitution and proceedings

Schedule 2 has effect with respect to the constitution and proceedings of the Board.

20. Construction of marina

A marina shall not be constructed in or adjacent to the development area unless —

- (a) a marine ecological survey is carried out in accordance with survey methods and for a period approved by the Environmental Protection Authority; and
- (b) the marine ecological survey finds that the proposed marina development is environmentally acceptable; and
- (c) the marine ecological survey is published and endorsed by the Environmental Protection Authority and the Director of Fisheries.

Part 5 — Miscellaneous

21. Restriction upon development of land in stage 2 area

- (1) Land in the stage 2 area shall not be developed unless not less than 75% of land in the stage 2 area has been reserved under Part III of the *Land Act 1933*² for a purpose related to nature conservation, and is classified as of class “A” under that Part.
- (2) Nothing in subsection (1) limits the operation of sections 5 and 7 or prevents the land conservation district committee established under the *Soil and Land Conservation Act 1945* for the Port Kennedy Land Conservation District from performing its functions under that Act.
- (3) Subject to subsection (1), any development of land in the stage 2 area shall be under the direction and control of the Board.

22. Regulations

The Governor may make regulations, not inconsistent with this Act or the Agreement, prescribing all matters necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, regulations may be made —

- (a) for the protection of flora and fauna in areas of vacant Crown land in the Port Kennedy area;
- (b) for the protection of the geomorphological features of the Port Kennedy area;
- (c) with respect to the development of facilities for the study of the geomorphological features of the Port Kennedy area and for the education of the public on the environmental importance of those features;
- (d) with respect to the development of holiday units additional to those provided for in the Agreement.

23. Review

- (1) The Minister shall cause to be carried out independently of the parties to the Agreement a review of, and a report on, the operation and effectiveness of this Act as soon as practicable after the expiration of 2 years from its commencement, and in the course of that review and report regard shall be had to —
 - (a) the progress of development of the project described in the Agreement taking into account any periods or dates specified in the Agreement during or before which any thing is required to be done under the Agreement;
 - (b) the effectiveness of the operations of the Board under this Act;
 - (c) such other matters as appear to be relevant to the operation and effectiveness of this Act.
- (2) The Minister shall cause a copy of the report referred to in subsection (1) to be laid before each House of Parliament within 10 sitting days of receiving the report and in any case not later than 3 years from commencement of this Act.

Schedule 1 — The Agreement

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[Heading amended by No. 19 of 2010 s. 4.]

PORT KENNEDY DEVELOPMENT PROJECT AGREEMENT

THIS AGREEMENT is made the 10th day of February 1992

B E T W E E N

THE STATE OF WESTERN AUSTRALIA (in this Agreement called “the State”) and **FLEURIS PTY LTD** of Unit 3, 294 Rokeby Road Subiaco Western Australia.

RECITALS

- A. In March 1986 the State through its State Planning Commission called for expressions of interest in the development of certain Crown Land in the City of Rockingham known as Port Kennedy in accordance with guidelines contained in a detailed Development Brief prepared by the State Planning Commission.
- B. The Company carried out extensive investigations into the feasibility of the Project, and submitted a proposal to the State which the State has accepted for the carrying out of the Project, on the terms and conditions contained in this Agreement.
- C. The Company has prepared an ERMP in relation to the Project which has been accepted by the Minister for the Environment, subject to certain conditions, as sufficient to enable the Project to be carried out.
- D. The State and the Company now wish to record the terms upon which they have agreed that the Company is to carry out the Project.

OPERATIVE PART WHEREBY THE PARTIES AGREE as follows —

1. DEFINITIONS

In this Agreement, unless the contrary intention appears —

“advise”, “agree”, “apply”, “approve”, “authorise”, “certify”, “consent”,
“direct”, “nominate”, “notice”, “notify”, “request”, “require”, or

“specify” means advise, agree, apply, approve, authorise, certify, consent, direct, nominate, notice, notify, request, require, or specify in writing as the case may be and any inflexion or derivation of any of those words has a corresponding meaning;

“approved proposal” means a proposal approved or determined under this Agreement;

“Board” means the Port Kennedy Management Board established under the ratifying Act;

“Breakwaters” means the breakwaters shown on the Development Plan to be constructed in accordance with approved proposals, and includes a reference to the breakwaters as finally constructed and surveyed;

“City” means the City of Rockingham, a municipality and body corporate under the *Local Government Act 1960*;

“clause” means a clause of this Agreement;

“Company” means Fleuris Pty Ltd, its successors and permitted assigns;

“Crown” means the Crown in right of the State of Western Australia;

“Crown Grant” means a Crown Grant under the Land Act;

“Crown Lands” has the same meaning as is given to that term by the Land Act;

“Development Area” means the area bordered in purple and shown as “stage 1” on Department of Land Administration⁴ Miscellaneous Plan No. 1743;

“Development Plan” means the plan and the text in **Schedule 2** as amended by agreement from time to time between the Company and the State showing and describing the broad concepts of the elements which constitute the Project;

“Environmental Approval” means the published statement under section 45(5) of the EP Act that the Project may be carried out;

“EP Act” means the *Environmental Protection Act 1986*;

“EPA” means the Environmental Protection Authority continued by the EP Act;

“ERMP” means the Environmental Review and Management Programme with respect to the Project prepared by the Company and submitted to the EPA;

“Harbour” means the harbour shown on the Development Plan to be constructed in accordance with approved proposals and includes a reference to the harbour as finally constructed and surveyed but does not include any jetties to be constructed in the Harbour;

“Jetty Licence” means a jetty licence granted under the *Jetties Act 1926*;

“Land Act” means the *Land Act 1933*;

“Land Tenure Plan” means the plans in **Schedule 3** showing, in general terms, how the land and water the subject of the Project will be held upon the completion of construction of the Project;

“Minister” means the Minister in the Government of the State for the time being responsible (under whatever title) for the administration of the ratifying Act;

“Minister for the Environment” means the Minister in the Government of the State for the time being responsible (under whatever title) for the administration of the EP Act;

“Mooring Licence” means a mooring licence granted under the *Western Australian Marine Act 1982*;

“parties” means the State and the Company, and “party” is a reference to either of them;

“Project” means the project for developing a marina, harbour and tourist development at Port Kennedy generally in accordance with the Development Plan, as from time to time developed in accordance with approved proposals;

“ratifying Act” means the Bill referred to in **clause 3** when that Bill is passed and comes into operation as an Act as contemplated by that clause;

“Site Plan” means the plans referred to in **Schedule 1** showing the Port Kennedy Townsite and adjacent lands and water which are to be developed as part of the Project;

“Stage 1” means the area at Port Kennedy which is the subject of this Agreement and of the ERMP and which is shown bordered in purple as “stage 1” on Department of Land Administration⁴ Miscellaneous Plan No. 1743;

“Stage 2” means the area at Port Kennedy which is shown as “stage 2” on the Site Plan and which may or may not be developed by the Company, but the development of which will in any event be the subject of a further environmental review and management programme;

“State” means the State of Western Australia;

“Statutory Requirements” means all approvals, consents, permits, or licences necessary for the purposes of the Project from the State, any government department, authority, instrumentality or local government authority, and includes, without limiting the generality of the foregoing, all approvals, consents, permits, and licences, for engineering drawings, construction plans, earthworks and structures necessary for the purposes of the Project;

“subclause” means a subclause of the clause in which the term is used;

“subsidiary legislation” includes any proclamation, regulation, rule, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under any Act of the State or of the Commonwealth of Australia or subsidiary legislation for the time being in force and having legislative effect;

“this Agreement” means this Agreement (including its Recitals and Schedules) whether in its original form or as from time to time added to varied or amended;

“written law” has the same meaning as is given to that term in the *Interpretation Act 1984*.

2. **INTERPRETATION**

In this Agreement, unless the contrary intention appears —

- (a) power given under any clause other than **clause 23** to extend any period or date is without prejudice to the power of the Minister under **clause 23**;

- (b) the plural includes the singular and vice versa and any gender includes every other gender;
- (c) clause headings do not affect the interpretation or construction of this Agreement;
- (d) a reference to an Act includes the amendments to that Act for the time being in force and also any Act passed in substitution for it and the subsidiary legislation for the time being in force under it; and
- (e) a reference to a person includes a corporation and a body politic.

3. RATIFICATION AND OPERATION

- (1) 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 30 June 1992 or such later date as the parties may agree.
- (2) The provisions of this Agreement other than this **clause 3** shall not come into operation until the Bill referred to in subclause (1) has been passed by the Parliament of Western Australia and comes into operation as an Act.
- (3) If before 30 June 1992 or such later date as may be agreed pursuant to subclause (1) the Bill referred to in that subclause has not commenced to operate as an Act then unless the parties otherwise agree this Agreement shall then cease and terminate and none of the parties shall have any claim against any of the others of them with respect to any matter or thing antecedent to, or arising out of or done, performed, or omitted to be done or performed, under this Agreement.
- (4) On the Bill referred to in subclause (1) commencing to operate as an Act all of this Agreement shall operate and take effect.

4. SUBMISSION OF PROPOSALS

- (1) The Company shall on or before 30 June 1994 (or by such extended date as the Minister may allow pursuant to **clause 23**) and subject to the EP Act and the Environmental Approval and the provisions of this Agreement submit to the Minister to the fullest

extent reasonably practicable its detailed proposals for the carrying out of the Project, which proposals shall include the location, area, layout, design, materials, time programme for the commencement and completion of construction or the provision (as the case may be) of all things necessary to complete the Project, the order in which the works necessary to complete the Project are to be carried out, and full plans and specifications for all works required to complete the Project.

- (2) The provisions of **clause 22** do not apply to subclause (1).
- (3) The Company may submit separate proposals for each part of the works necessary to complete the Project, and subject to subclause (4) the Company may carry out each part of the works necessary to complete the Project in such order as the Company sees fit.
- (4) At the time when the Company submits the first of its proposals pursuant to subclause (1), it shall also furnish to the Minister evidence demonstrating —
 - (a) the availability of finance necessary for the carrying out and completion of the whole of the Project; and
 - (b) the readiness of the Company to embark upon and proceed to carry out the operations referred to in those proposals.

5. **CONSIDERATION OF PROPOSALS**

- (1) The Minister shall advise the Company within 3 months of receiving the evidence furnished by the Company pursuant to **clause 4(4)** whether or not the Minister is satisfied with that evidence.
- (2) If the Minister advises the Company pursuant to subclause (1) that the Minister is not satisfied with the evidence furnished by the Company pursuant to **clause 4(4)**, then the Company may —
 - (a) within 6 months following the date of that advice furnish to the Minister further or different evidence of —
 - (i) the availability of finance necessary for the carrying out and completion of the whole of the Project; and

- (ii) the readiness of the Company to embark upon and proceed to carry out the operations referred to in the proposals submitted to the Minister under **clause 4(1)**;
or
 - (b) within 2 months following the date of that advice, advise the Minister that it does not wish to furnish any such further or different evidence.
- (3) Within 3 months of receiving the further or different evidence furnished by the Company pursuant to subclause (2) the Minister shall advise the Company whether or not the Minister is satisfied with that further or different evidence.
- (4) If the Minister is not satisfied with the further or different evidence, or if the Company has advised the Minister pursuant to **clause 5(2)(b)** that it does not wish to furnish further or different evidence, within 2 months following —
 - (a) the date of the Minister’s advice to the Company under **clause 5(3)**; or
 - (b) the date of the Company’s advice to the Minister under **clause 5(2)(b)**,

the Company may refer to arbitration under this Agreement the question of the reasonableness of the Minister’s decision on the evidence, or the further and different evidence, as the case may be, and unless so referred to arbitration, this Agreement shall cease and terminate on the expiry of that 2 month period, subject to **clause 25**. If the Minister’s decision is so referred to arbitration, this Agreement shall cease and terminate on the date of the arbitrator’s award, subject to **clause 25**, if the arbitrator upholds the reasonableness of the Minister’s decision, but if the arbitrator does not uphold the reasonableness of the Minister’s decision, the Minister is as and from the date of the arbitrator’s award deemed to be satisfied with the evidence, or the further and different evidence, as the case may be.

- (5) Subject to the EP Act and provided the Minister is satisfied or deemed to be satisfied with the evidence furnished by the Company pursuant to **clause 4(4)**, or is satisfied or deemed to be satisfied with the further or different evidence furnished by the

Company pursuant to subclause (2), in respect of proposals pursuant to **clause 4(1)** the Minister shall —

- (a) approve of those proposals either wholly or in part without qualification or reservation; or
- (b) defer consideration of or decision upon those proposals until such time as the Company submits a further proposal or proposals in respect of some other aspect of the Project not covered by those proposals; or
- (c) require as a condition precedent to the giving of the Minister's approval to those proposals that the Company makes such alteration to them or complies with such conditions in respect of them as the Minister (having regard to the circumstances including the overall development of and use by others as well as the Company of all or any of the facilities proposed to be provided) thinks reasonable and in such a case the Minister shall give reasons for the imposition of such conditions,

provided always that where implementation of any proposals has been approved pursuant to the EP Act subject to conditions or procedures, any approval or decision of the Minister under this **clause 5** shall if the case requires incorporate a requirement that the Company makes such alterations to the proposals as may be necessary to make them accord with those conditions or procedures.

- (6) If the Minister is satisfied or deemed to be satisfied with the evidence furnished by the Company pursuant to **clause 4(4)** or is satisfied or deemed to be satisfied with the further or different evidence furnished by the Company pursuant to subclause (2), the Minister shall within 3 months after receipt of proposals pursuant to **clause 4(1)**, or where those proposals are to be assessed under section 40(1)(b) of the EP Act then within 3 months after service on the Minister of an authority under section 45(7) of the EP Act give notice to the Company of the decision which the Minister has made in respect of those proposals.
- (7) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of subclause (5) the Minister shall afford the

Company full opportunity to consult with the Minister and should the Company so desire, to submit new or revised proposals either generally or in respect of some particular matter.

- (8) If the Company considers that any decision of the Minister under subclause (5) is unreasonable the Company within 2 months after receipt of the notice mentioned in subclause (6) may elect to refer to arbitration under this Agreement the question of the reasonableness of the decision but any requirement of the Minister pursuant to the proviso to subclause (5) shall not be referable to arbitration under this Agreement.
- (9) Subject to and in accordance with —
- (a) the Environmental Approval;
 - (b) the EP Act;
 - (c) any further approvals and licences required under the EP Act;
 - (d) the Statutory Requirements; and
 - (e) all applicable Acts of the Commonwealth of Australia and subsidiary legislation under those Acts, and all applicable written laws,

the Company shall implement proposals approved under this **clause 5** in accordance with their terms and in accordance with any conditions imposed by the Minister in giving approval, and shall implement proposals determined on arbitration pursuant to this Agreement in accordance with the award made on arbitration. If due to the conditions imposed by the Minister in giving approval, or due to the proposal as determined on arbitration differing substantially from the proposal as originally submitted, the finance which was available for the carrying out and completion of the whole of the Project has been withdrawn and is no longer available to the Company, the Company must so advise the Minister immediately upon becoming aware of the withdrawal of that finance. Within 6 months following the Company giving that advice to the Minister the Company may obtain alternative finance and within that period furnish to the Minister evidence demonstrating —

- (f) the availability of finance necessary for the carrying out and completion of the whole of the Project; and
- (g) the readiness of the Company to embark upon and proceed to carry out the operations referred to in the approved proposals.

The Minister shall advise the Company within 1 month of receiving that evidence whether or not the Minister is satisfied with that evidence. If the Company does not furnish any evidence to the Minister under this subclause, this Agreement shall cease and terminate, subject to clause 25, upon the expiry of the period of 6 months referred to in this subclause. If the Company does furnish evidence to the Minister under this subclause, but the evidence does not satisfy the Minister, this Agreement shall cease and terminate, subject to clause 25, upon the Minister advising the Company that the Minister is not satisfied with that evidence. The decision of the Minister as to whether or not the Minister is satisfied with evidence furnished under this subclause is not subject to arbitration under clause 29.

- (10) Notwithstanding that under subclause (5) 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 30 June 1996 or by such extended date if any as the Company is granted pursuant to the provisions of this Agreement then the Minister may give to the Company 3 months notice of intention to terminate this Agreement and unless before the expiration of that 3 months period all the detailed proposals and matters are so approved or determined this Agreement shall cease and terminate subject however to the provisions of **clause 25**.

6. **ADDITIONAL PROPOSALS**

If the Company at any time during the continuance of this Agreement desires to modify expand or otherwise vary its activities carried on pursuant to this Agreement beyond those specified in any approved proposal, it shall give notice of such desire to the Minister and within 2 months after giving such notice shall submit to the Minister detailed proposals in respect of such modifications expansions or variations and

such other matters as the Minister may require. The provisions of **clause 4 and 5** (including (for the avoidance of doubt) clause 5(9)) shall apply, the necessary changes being made, to proposals submitted pursuant to this clause.

7. **TERM**

Subject to **clause 23**, this Agreement will automatically cease and terminate (subject however to the provisions of **clause 25**) without the need for either party to give the other any notice whatever, on that date which is 2 years after the date upon which the last of the detailed proposals of the Company are approved by the Minister or determined by arbitration award.

8. **LICENCE TO ENTER**

- (1) The State hereby grants to the Company an exclusive licence for the Company and its agents contractors and employees to enter, with all necessary vehicles plant and equipment, upon the lands and waters shown in the Site Plan which are to be developed as part of the Project.
 - (2) The licence granted by subclause (1) shall automatically terminate, without the necessity for any notice or any other action by either of the parties —
 - (a) upon termination of this Agreement;
 - (b) as to any particular area subject of the licence, upon that area being —
 - (i) leased to the Company pursuant to **clause 9**;
 - (ii) granted to the Company in fee simple pursuant to **clause 10**;
 - (iii) vested in, or placed under the care control or management of, the City or any other authority or instrumentality of the State; or
 - (iv) made the subject of an easement or licence granted to the Company under **clause 11**;
- or
- (c) the completion of all works necessary to implement the Project, whichever occurs soonest.

- (3) The Company shall permit the State by its officers, employees, agents, and nominees to enter upon the lands and waters the subject of the exclusive licence granted by subclause (1) during the period of that licence to inspect the progress of the Project, and the Company shall afford those officers, employees, agents and nominees such assistance and facilities as they may reasonably require.

9. **CROWN LEASE**

Upon the Company completing all works necessary to implement the Project, or at such earlier time or times as the Minister following advice from the Board considers appropriate, the State shall grant or cause to be granted to the Company a lease of those areas of land shown marked A, B, C, D, E, F, and G and bordered in green on Department of Land Administration⁴ Miscellaneous Plan No. 1745, or a separate lease for each of those areas, as then surveyed in accordance with approved proposals, under section 117 of the Land Act and except as otherwise provided in this Agreement subject to the Land Act but in the form set out in **Schedule 4**, with such variations as circumstances may render necessary in any particular case and as are agreed to by the parties.

10. **CROWN GRANTS**

- (1) Subject to the Company undertaking the Project in accordance with this Agreement, the State shall cause to be issued at no cost to the Company, to and in the name of the Company Crown Grants of those lots shown on the Land Tenure Plan as freehold land, subject to those lots being surveyed pursuant to approved proposals and not exceeding 25 hectares in area in the aggregate, and subject to the exceptions reservations and conditions usual in Crown Grants but otherwise free from encumbrances.
- (2) The State shall cause the Crown Grants referred to in subclause (1) to be issued at such time or times as the Minister in the absolute discretion of the Minister thinks fit, but following advice on the matter from the Board, it being the intention of the parties that the Crown Grants be issued to the Company progressively during the carrying out of the Project.
- (3) Notwithstanding anything in subclause (1) or (2) the State shall not cause Crown Grants to be issued to the Company such that, prior to

the issue to the Company of the last of the Crown Grants to be issued to it under this Agreement,

$$\frac{VG}{VTBG} > \frac{\$E}{\$TBE}$$
$$\frac{VG}{VTBG} > \frac{\$E}{\$TBE}$$

where —

- VG = the value of the land for which a Crown Grant or Crown Grants have been issued to the Company in accordance with this Agreement;
- VTBG = the total value of the land for which Crown Grants are to be issued to the Company in accordance with this Agreement;
- \$E = the amount paid by the Company in implementing the Project following the date the ratifying Act came into operation as an Act;
- \$TBE = the total amount which the Minister reasonably estimates the Company will have to pay to fully implement the Project,

and references to value of the land are references to the Valuer General's estimates from time to time of the value of the land in question calculated as though the Project had been fully implemented at the time the calculation is made.

11. EASEMENTS, LICENCES ETC.

- (1) The State shall in accordance with approved proposals grant to the Company or cause the appropriate authority or instrumentality of the State to grant, for such period and on such reasonable terms and conditions (including licence fees and renewal rights) as the person, authority or instrumentality who or which makes the grant requires —
- (a) Mooring Licences over the water areas of the Harbour;

- (b) Jetty Licences for the construction maintenance and use of jetties within the Harbour; and
 - (c) such easements (if any) over any part of the land within the Development Area which the Minister considers reasonable and appropriate.
- (2) The Board shall give the Minister advice in relation to the matters the subject to subclause (1).
- (3) The terms and conditions upon which licences are granted under paragraphs (a) and (b) of subclause (1) must include terms and conditions making the Company responsible for complying with the Environmental Approval, and making the Company responsible for the management of the depth of the Harbour (i.e. requiring the Company to dredge the Harbour), the quality of the water in the Harbour, sand by passing across the Harbour entrance, and the maintenance and repair of the Breakwaters and all revetments constructed as part of the Project, during the term and any renewed term of the lease granted to the Company pursuant to **clause 9**.

12. **MODIFICATION OF LAND ACT**

For the purposes of this Agreement the Land Act is deemed to be modified —

- (a) in respect of the Development Area by the inclusion of a power to grant the licence to enter granted by **clause 8**; and
- (b) the inclusion of a power for the Minister for Lands to grant a lease under section 117 of the Land Act in the form set out in **Schedule 4**; and
- (c) the inclusion of a power for the Governor to issue to the Company the Crown Grants referred to in **clause 10**.

13. **NAVIGATIONAL AIDS**

The Company shall install in such location or locations within the Development Area such navigational aids approved of by the Minister for Transport as to design, specification and location, as may be reasonably required by the Minister for Transport for safe navigation into and from the Harbour, and shall transfer to and vest in the Minister for Transport all such navigational aids and, where such navigational aids are land

based, the land upon which they stand if it is owned by the Company, and provide a right of way over such portions of land owned or leased by the Company abutting in the vicinity of that area or those areas as is necessary to allow the Minister for Transport access to any such land based navigational aid, and shall allow any leasehold land upon which such land based navigational aids are based to be excised from any lease held by the Company as lessee, at no cost to the State or any instrumentality or authority of the State.

14. PAYMENT BY COMPANY

- (1) In and as consideration for the State entering into this Agreement with the Company and for the grant of the Crown lease referred to in **clause 9** and the issue of the Crown Grants referred to in **clause 10**, not later than 31 January in each year the Company shall pay to the State a sum equal to 0.5% of the total amount paid by the Company in implementing the Project (other than such of the Project as is on reserved land as referred to in clause 5 of Schedule 2) in the 12 months ended on 31 December immediately preceding that 31 January, until the Company has paid to the State under this provision 0.5% of the total cost of the Project (other than such of the Project as is on reserved land as referred to in clause 5 of Schedule 2).
- (2) The Company shall keep proper records of and relating to all payments made by the Company concerning the implementation of the Project, and shall keep those records available to the State for at least 2 years following the year to which those records relate.
- (3) The State by the Minister and officers and employees of the State shall have the right at any reasonable time to examine the records referred to in subclause (2) and to take copies of them to satisfy the State as to the correctness of any payment made to the State under subclause (1).
- (4) The Minister may cause at any reasonable time or times an audit to be made of the records referred to in subclause (2). If the audit discloses that any payment made to the State under subclause (1) was less than it should have been, the Company shall immediately pay the State the amount of the deficiency together with the cost of the audit.

(5) In and as further consideration for the State entering into this Agreement with the Company, within 30 business days following the Minister being satisfied or being deemed to be satisfied with the evidence furnished by the Company pursuant to **clause 4(4)** or with further or different evidence furnished by the Company pursuant to **clause 5(2)**, as the case may be, the Company shall pay the State \$500,000. In this subclause “business days” means days upon which the head office of the Commonwealth Trading Bank in Perth is open for business.

15. **SURVEYS**

Any surveys of land and bathymetric surveys required for the purposes of this Agreement within the Development Area shall be carried out at the expense of the Company.

16. **UNAUTHORIZED STRUCTURES**

Within 2 months following the ratifying Act commencing to operate as an Act the State acting through the Department of Land Administration and pursuant to the provisions of the Land Act shall commence the procedures to procure the removal of structures that are on the Development Area without lawful authority, and shall thereafter diligently proceed to have those structures removed. The Company shall not be responsible for any costs incurred pursuant to this provision.

17. **UNEXPLODED ORDNANCE**

The Company shall procure the scanning of each part of the land in the Development Area which is to be excavated for services, roads, or footpaths, or which will be the site of earthworks, or which will become playing fields or recreation areas as part of the Project, for any unexploded ordnance, (such scanning to be carried out to the satisfaction of the Western Australian State Emergency Service, Warnbro UXO project) prior to carrying out any other work on that part of the land.

18. **STAGE TWO**

The State shall not sell or grant any lease or licence over the Stage 2 area before the date or extended date by which proposals must be approved or determined under **clause 5(10)** so that the Stage 2 area or part of it is available for the expansion of the Project upon such terms and conditions

(if any) as may be agreed upon by the parties prior to that date or extended date.

19. **USE OF LOCAL LABOUR PROFESSIONAL SERVICES AND MATERIALS**

- (1) The Company shall, for the purposes of this Agreement —
- (a) use labour available within Western Australia or if such labour is not available then use labour otherwise available within Australia, except in those cases where the Company can demonstrate that it is impracticable to do so;
 - (b) as far as it is reasonable and economically practicable to do so use the services of engineers surveyors architects and other professional consultants, project managers, manufacturers, suppliers and contractors resident and available within Western Australia or if such services are not available within Western Australia then, as far as it is reasonable and economically practicable to do so, use the services of such persons otherwise available within Australia;
 - (c) during design and when preparing specifications calling for tenders and letting contracts for works materials plant equipment and supplies (which shall at all times, except where it is impracticable to do so, use or be based upon Australian Standards and Codes) ensure that suitably qualified Western Australian and Australian suppliers manufacturers and contractors are given fair and reasonable opportunity to tender or quote;
 - (d) give proper consideration and where possible preference to Western Australian suppliers manufacturers and contractors when letting contracts or placing orders for works, materials, plant, equipment and supplies where price quality delivery and service are equal to or better than that obtainable elsewhere or, subject to the foregoing, give that consideration and where possible preference to other Australian suppliers manufacturers and contractors;
- and

- (e) if notwithstanding the foregoing provisions of this subclause a contract is to be let or an order is to be placed with other than a Western Australian or Australian supplier, manufacturer or contractor, give proper consideration and where possible preference to tenders arrangements or proposals that include Australian participation.
- (2) Except as otherwise agreed by the Minister the Company shall 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, require as a condition of such contract that such third party shall undertake the same obligations as are referred to in subclause (1) 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 3 monthly intervals or such longer period as the Minister determines commencing from the date of this Agreement concerning the Company's implementation of the provisions of this clause together with a copy of any report received by the Company pursuant to subclause (2) during that 3 month or longer period as the case may be, but the Minister may agree that any such reports need not be provided in respect of contracts of such kind or value as the Minister may from time to time determine.
- (4) The Company shall keep the Minister informed on a regular basis as determined by the Minister from time to time or otherwise as required by the Minister during the currency of this Agreement of any services (including any elements of the project investigations design and management) and any works materials plant equipment and supplies that it may be proposing to obtain from or have carried out or permit to be obtained from or carried out outside Australia together with its reasons therefor and shall as and when required by the Minister consult with the Minister with respect thereto.

20. **ASSIGNMENT**

- (1) Subject to the provisions of this clause the Company may with the consent of the Minister assign mortgage charge sub-let or dispose of the whole or any part of the rights of the Company under this Agreement and of the obligations of the Company under this Agreement subject however in the case of an assignment

sub-letting or disposition to the assignee sub-lessee or disponee (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 and observe and perform the provisions of this Agreement 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 or disposition.

- (2) Notwithstanding anything contained in or anything done under or pursuant to subclause (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 in this Agreement but the Minister may agree to release the Company from such liability where the Minister considers such release will not be contrary to the interests of the State.
- (3) For the purposes of subclause (1) any change at any time or times after the date of this Agreement (whether by transfer, allotment, or otherwise and whether as the result of one or more transactions) in the beneficial ownership of 5% or more of the issued shares from time to time of the Company, or if the Company is the trustee of a unit trust any change at any time or times after the date of this Agreement (whether by transfer, allotment, or otherwise and whether as the result of one or more transactions) in the beneficial ownership of 5% or more of the issued units from time to time in that unit trust, other than for the purpose of a reconstruction which the Minister has approved, shall be deemed to be an assignment of the Company's interest in this Agreement, and the parties now record for the purposes of this clause that at the date of execution of this Agreement the beneficial owners of all of the issued shares in the Company are —
- | | | |
|-----|---------------------------|-----------------|
| (a) | Indo West Finance Pty Ltd | 117,070 shares; |
| (b) | Agenda Holdings Pty Ltd | 37,779 shares; |
| (c) | Richard Anthony Lukin | 2,078 shares; |
| (d) | Gary Kevin Sheehan | 2,078 shares; |
| (e) | Eric Phillip Synnerdahl | 74 shares; |
| (f) | Viewhurst Pty Ltd | 10,000 shares; |

(g) Caspian Holdings Pty	18,786 shares;
	<hr/> 187,865 shares

21. **VARIATION**

- (1) The parties 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 under or pursuant to this Agreement 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 subclause (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.

22. **FORCE MAJEURE**

- (1) In this Agreement force majeure means events or occurrences and the effects of them beyond the reasonable control of the party claiming force majeure which affects the ability of that party to observe and perform its obligations under this Agreement, and includes war, invasion, riot, civil or military disturbances, sabotage, strikes, picketing or other labour disputes or disturbances, expropriation, lightning, fire, flood or threats of floods, earthquake, storm, cyclone, explosion, governmental restrictions or other governmental actions or inactions (unless such restrictions, actions, or inactions arise out of the failure of the party affected to comply with any governmental requirement), and orders or temporary or permanent injunctions of any duly constituted court of competent jurisdiction or any duly authorised

administrative agency or officer (unless any such order or injunction was imposed by reason of the failure of the party affected to observe and obey any legal requirement or obligation under this Agreement), but does not include inability to obtain finance on acceptable terms.

- (2) If any party is unable, wholly or in part, by reason of force majeure to carry out any obligation on it, and notifies the other party that it wishes to claim that it is affected by force majeure, the obligation shall be suspended so far as it is affected by the force majeure during the period from the giving of the notice that force majeure is claimed until the force majeure and the effects of the force majeure cease. The notice claiming force majeure shall contain the particulars of the force majeure, and so far as is known, the extent to which the party claiming force majeure considers that it will be unable to perform or be delayed in performing its obligations.
- (3) A party affected by force majeure shall take all reasonable steps to remedy or remove the force majeure and the effect of it as quickly as possible.
- (4) Where a party gives a notice pursuant to this clause it shall thereafter during the continuance of the force majeure at least every five days give notice to the other party of the then probable extent to which it will be unable to perform or be delayed in performing its obligations and of any significant changes relative to the force majeure since it gave its last notice to the other party.

23. POWER TO EXTEND PERIODS

Notwithstanding any provision of this Agreement, the Minister on advice from the Board 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 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.

24. TERMINATION OF THIS AGREEMENT

- (1) 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 of the Company contained in this Agreement or in any lease licence easement grant or other title or document granted or assigned under this Agreement 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 repudiation or abandonment is not remedied or such operations resumed within a period of 90 days after notice is given by the State as provided in subclause (2) or, if the default or abandonment is referred to arbitration, then within the period fixed by the arbitrator mentioned in subclause (3);

- (b) the Company whilst entitled to the benefit of this Agreement goes into liquidation (other than a voluntary liquidation for the purpose of reconstruction to which the Minister has given prior written consent) and unless within 3 months from the date of such liquidation the interest of the Company in this Agreement and in every lease and licence granted or assigned under this Agreement (to the benefit of which the Company is entitled at the date of such liquidation) is assigned to an assignee or assignees approved by the Minister under **clause 20** and in the case of any leases or licences, approved by the person who by the terms of any such lease or licence must approve of any assignment of it,

the State may by notice to the Company terminate this Agreement.

- (2) The State in a notice given by it under subclause (1) shall specify the nature of the default or other grounds so entitling the State to exercise its right of termination and where appropriate and known to the State the party or parties responsible therefor and the State shall give the notice to the Company and all such assignees mortgagees chargees and disponees for the time being of the Company's rights to or in favour of whom or by whom an assignment mortgage charge or disposition has been effected in terms of **clause 20** whose name and address for service of notices

has previously been notified to the State by the Company or by any such assignee, mortgagee, chargee or disponee.

- (3) If the Company contests the alleged default, abandonment or repudiation referred to in paragraph (a) of subclause (1) the Company shall within 60 days after notice is given by the State as provided in subclause (2) refer the matter in dispute to arbitration, and if the matter in dispute is decided against the Company, the Company shall comply with the arbitration award within a reasonable time to be fixed by that award but 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.
- (4) If the default referred to in paragraph (a) of subclause (1) is not remedied after receipt of the notice referred to in subclause (1) or within the time fixed by the arbitration award as provided in subclause (3), the State instead of terminating this Agreement because of the default may itself remedy the default or cause it to be remedied (for which purpose the State by its agents, employees or otherwise shall have full power to enter upon and to make use of all plant machinery and installations upon land owned or occupied by the Company) and the actual costs and expenses incurred by the State in remedying or causing the default to be remedied shall be payable by the Company to the State on demand.

25. **EFFECT OF TERMINATION**

- (1) On the cessation or termination of this Agreement —
 - (a) except as otherwise agreed by the Minister —
 - (i) the rights of the Company in or under this Agreement;
and
 - (ii) where this Agreement has been terminated because of a matter mentioned in **clause 24(1)**, the rights of the Company or of any assignee, mortgagee, chargee, or disponee to any lease, licence, easement, grant or other title or right granted under or pursuant to this Agreement,

shall thereupon cease and terminate but without prejudice to the liability of either of the parties in respect of any antecedent breach or default under this Agreement or under any such lease, licence, grant, or other title or right or in respect of any indemnity given under this Agreement;

- (b) the Company shall forthwith pay to the State all moneys which may then have become payable or accrued due; and
 - (c) except as specified in paragraphs (a) and (b) of this subclause and as otherwise provided in this Agreement, neither of the parties shall have claim against the other in respect of any matter or thing in or arising out of this Agreement.
- (2) Nothing in subclause (1) shall affect any Crown Grant issued under this Agreement prior to the cessation or termination of this Agreement.

26. **ENVIRONMENTAL PROTECTION**

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 under this Agreement that may be made by the State or by any State department, authority or instrumentality or any local or other authority or statutory body of the State pursuant to any Act from time to time in force. The Company shall comply with the conditions attached to the Environmental Approval as though those conditions were expressly set out in this Agreement as obligations of the Company.

27. **APPLICATION OF STATUTE LAW**

Except as expressly set out in this Agreement, nothing in this Agreement exempts the Company from the provisions of any applicable Act of the Commonwealth of Australia or any subsidiary legislation under any such Act, or from the provisions of any applicable written law.

28. **INDEMNITY**

The Company indemnifies and will keep indemnified the State and its employees, agents and contractors in respect of all actions, claims, demands, or costs of third parties, arising out of or in connection with any

works carried out by or on behalf of the Company pursuant to this Agreement or relating to its operations under this Agreement or arising out of or in connection with the construction or use by the Company or its employees, agents, contractors, or assignees of the Company's works or services the subject of this Agreement or the plant apparatus or equipment installed in connection therewith.

29. **ARBITRATION**

- (1) Subject to subclause (4) 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 of the parties under this Agreement or as to any matter to be agreed upon between the parties or under this Agreement, or as to the reasonableness of any terms and conditions required by the person, authority or instrumentality which is to grant any Mooring Licence, Jetty Licence, or easement pursuant to **clause 11(1)**, shall, in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary, be referred of a single arbitrator to be appointed (if the parties to the arbitration do not agree upon an arbitrator) by the President for the time being of the Law Society of W.A. (Inc.) at the request of either party. Any such arbitration shall be conducted in accordance with the provisions of the *Commercial Arbitration Act 1985* and notwithstanding section 20(1) of that Act each party may be represented at the arbitration by a duly qualified legal practitioner or other representative.
- (2) Except where otherwise provided in this Agreement, the provisions of this clause do not apply to any case where the State, the Minister or any other Minister in the Government of the State is by this Agreement given either expressly or impliedly a discretionary power.
- (3) The arbitrator of any submission to arbitration under this Agreement is 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 in this Agreement 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.

- (4) Where in respect of any matter that might otherwise be referred to arbitration under this clause the Company has a right of appeal under the *Town Planning and Development Act 1928*, the matter shall be determined in accordance with that Act and the provisions of subclause (1) do not apply.

30. **NOTICES**

- (1) Any notice to be given under this Agreement shall be hand delivered or sent by facsimile transmission or telex or by prepaid post addressed as follows —

The State

The Minister for State Development
Capita Centre
197 St George's Terrace
PERTH WA 6000

The Company

Fleuris Pty Ltd
3/294 Rokeby Road
Subiaco WA
Attention: The Chairman

- (2) Any notice so delivered or mailed or sent by facsimile transmission or telex shall be deemed to be duly given and received at the actual time of delivery, or in the case of a facsimile transmission or telex on the day after they are respectively despatched.
- (3) Any party may change its address for receipt of notices at any time by giving notice to the other party in the manner provided in this clause.
- (4) Any notice may be signed on behalf of the party giving it by any duly authorised representative, including its solicitors, or in the case of the State, if signed by the Minister or by a senior officer in the Public Service of the State acting at the direction of or under any delegation from the Minister.

31. **PROPER LAW AND FORUM**

This Agreement shall be interpreted according to the law for the time being in force in Western Australia and the parties hereby irrevocably submit to the exclusive jurisdiction of the courts of Western Australia and courts hearing appeals from those courts.

SCHEDULE 1

SITE PLAN

1. DEPARTMENT OF LAND ADMINISTRATION⁴ MISCELLANEOUS
PLAN NO. 1743
2. DEPARTMENT OF LAND ADMINISTRATION⁴ MISCELLANEOUS
PLAN NO. 1744



SCHEDULE 2

DEVELOPMENT PLAN TEXT

1. DEVELOPMENT STANDARDS
2. SERVICING AND INFRASTRUCTURE
3. PORT KENNEDY MARINA
4. DEVELOPMENT ON LEASEHOLD LAND
5. DEVELOPMENT ON RESERVED LAND
6. DEVELOPMENT ON FREEHOLD LAND

1. DEVELOPMENT STANDARDS

1.1 Generally

All development, including buildings, services, excavation, and site works, roads and pedestrian paths and landscaping must be designed and constructed in compliance with appropriate Australian standards, the *Building Regulations 1989* and other requirements of the West Australian Government and the City applying the following criteria —

- (a) breakwaters must be designed for 0-5% damage from the 1 in 20 year significant wave. That part of the breakwater which is to be used for the mooring of vessels must not be overtopped by the maximum single wave from this design wave;
- (b) wind loading design for building and other structures must be on the basis of a 50 year return period with a basic velocity of 40 metres/sec, with appropriate terrain category factors being used for individual structures; and
- (c) stormwater drainage must be in accordance with the Institution of Engineers, Australia “Australian Rainfall and runoff” standards.

1.2 Building Design

All buildings must be of masonry construction with appearance and layout appropriate to this seaside location and its climate. Different buildings and groups of buildings must harmonise aesthetically with each other and with other structures and shelters.

1.3 Site Layout

The Development Area must be laid out to effectively use existing landscape features rather than remould these or change them. Pedestrian/cycle accessways must be clearly signposted, and be differentiated from vehicle paths by using textured or coloured paving material.

All signs must use an appropriate common lettering style and colour. Street lighting and furniture must be designed to suit the building design theme.

1.4 **Completion of Works**

Buildings will be considered complete on the issue of the City's Certificate of Occupancy. Other structures will be considered complete on the issue of the Company's engineers notification of the completion of construction, and by the City's certification.

2. **SERVICING AND INFRASTRUCTURE**

2.1 **Electrical Services**

The Company must construct and reticulate electrical requirements for all amenities and facilities.

The Company must construct sub-station and distribution boards necessary to reticulate power to all Company owned or leased facilities which provide amenities to the public. The electrical installation must be to the design and installation standards of the State Energy Commission of Western Australia. All electrical reticulation must be placed underground.

2.2 **Water Services**

The Company must progressively provide reticulated water facilities within the Development Area and connection to the existing water reticulation system as may be required by the Water Authority of Western Australia. The Company must provide, or pay the Water Authority of Western Australia for the provision of (at the Water Authority of Western Australia's option), all reticulation mains. Distribution mains connecting to the Water Authority of Western Australia's existing system must be provided in accordance with the Water Authority of Western Australia's policy and standards.

2.3 **Sewerage**

The Company must progressively provide sewerage facilities within the Development Area and connection to temporary treatment facilities as may be required by the Water Authority of

Western Australia. Such temporary treatment facilities will be operated by the Water Authority of Western Australia. The Company must provide, or pay the Water Authority of Western Australia for the provision of (at the Water Authority of Western Australia's option) all reticulation sewers. Other facilities must be provided in accordance with the Water Authority of Western Australia's policy and standards.

2.4 Headworks Contributions

The Company must progressively, at the time of building plan approvals by the City, make headworks contributions with respect to water supply and sewerage services, in accordance with the policy of the Water Authority of Western Australia.

2.5 Telephone

The Company must ensure that adequate telephone services are connected, in accordance with approved proposals.

2.6 Footpath and Cycle Track

Pathways with all weather surfaces are to be provided to permit pedestrian and cycle access from the Town Centre to the northern boundary of the Port Kennedy townsite, the public golf course, and the car parking area, all as shown on the Development Plan.

2.7 Access Roads

The Company is to construct a public access road from Ennis Avenue to the Town Centre together with all other roads shown on the Land Tenure Plan. All roads are to be paved and drained to the satisfaction of the City.

3. PORT KENNEDY MARINA

3.1 Marina

The marina is to comprise all navigable waters, breakwaters, revetments, and that land necessary to gain access to those waters. The Company must prepare a plan, to the approval of the Department of Marine and Harbours showing the marina to be constructed by the Company. The marina must be designed to optimise wave exclusion, water circulation and exchange, and the

bypassing of longshore littoral drift sand, and must comply with the recommendations of Australian Standard 3962, "Guidelines for the Design of Marinas". On completion of construction of the marina the Company must prepare and lodge with the Department of Marine and Harbours an "as constructed" plan of the marina, to the approval of the Department of Marine and Harbours.

3.2 Marina Facilities

The marina facilities are to comprise all pens, moorings, (including at least 100 moorings which will be available to the general public) service facilities and landings within the harbour. The pens and moorings must be capable of catering for craft at least up to 15 metres length, with the main berth being capable of handling vessels to 25 metres length. The Company must prepare a Marina Management Programme containing such provisions as the Department of Marine and Harbours considers appropriate, and the Company must comply with that Marina Management Programme.

3.3 Service Facilities

The Company must construct a boatyard with vehicle access and a slipway (or equivalent), fuel and water supply, sewered sullage pumpout facilities, and ablutions, to the satisfaction of the Department of Marine and Harbours. The management of these facilities must be provided for in the Marina Management Programme.

4. DEVELOPMENT ON LEASEHOLD LAND

The following must be constructed in the locations shown on the Development Plan on leasehold land.

4.1 Harbour Rental Units 1

60 holiday units located on the western breakwater with an average floor area of at least 125 m² each. These will be self contained family units.

4.2 Beach Rental Units 1

80 holiday units located to the south south west of the harbour rental units 1, with an average floor area of at least 100m² each. These will be self contained family units.

4.3 **Beach Rental Units 2**

100 holiday units located to the west of the Town Centre, with an average floor area of at least 100 m² each. These will be self contained family units.

4.4 **Town Centre**

The Town Centre is to contain buildings for residential, commercial, administrative and community uses.

(a) **Residential Accommodation**

Residential accommodation in the Town Centre is to consist of 25 residential units of mixed size and quality for essential staff as well as contingency accommodation associated with the operation and functioning of the Port Kennedy development. The Town Centre residential accommodation is to be located at first and second floor levels.

(b) **Commercial**

The minimum commercial area in the Town Centre is to be 2 000m² Gross Leaseable Area (measured in accordance with the BOMA method of measurement). The Town Centre is to accommodate the following uses —

Tavern, Restaurant, Food outlets, Newsagency, Pharmacy, Delicatessen, Liquor Store, Boat Brokerage, Bank, Leisurewear Boutiques, Gift/Duty Free Shop, Sporting Goods.

(c) **Administration Offices**

Not less than 200m² of office space is to be provided to accommodate the Board, the Port Controller, Rescue and Emergency Services, and staff from the Fisheries Department, Department of Marine and Harbours, the Education Department and the Department of Conservation and Land Management. The Company is to provide, rent free, one office of at least 30m² to be shared by these 4 Departments, which will be responsible for their own furnishing, and for power, telephone, water and cleaning costs.

(d) Multi-Purpose Hall

A hall and associated rooms and facilities for multi-purpose uses such as meetings, public entertainment, and receptions are to be provided.

(e) Public Club Facilities

A building of not less than 500m² floor area for a combined surf lifesaving, sailing club, and first aid station is to be provided.

(f) Child Minding Facilities

A fully equipped child minding facility is to be constructed in the Town Centre.

(g) Toilets and Change Rooms

Public toilets are to be provided within the Town Centre.

4.5 **Golf Courses**

Two eighteen hole golf courses are to be designed and developed. One is to be a public course, the other for use by Hotel guests.

- (a) The courses are to be of Competition Standard.
- (b) The design and development of both courses is to be to a similar quality.
- (c) The course layouts are to be sympathetic to the existing land forms and be designed to retain natural features such as wetlands and ridges.
- (d) Landscaping between fairways is to be similar to the natural vegetation of the area.
- (e) Temporary planting of fast growing natural vegetation is to be used to protect the establishment of the long term planting.
- (f) Earthworks are to be carried out in accordance with the City's guidelines and are to be stabilised and sealed immediately after formation.

4.6 **Public Course Clubhouse**

The public golf course clubhouse is to include —
changerooms, showers, and toilets, professional shop, restaurant,
and outdoor terraces, and is to accommodate a sprig bar and a
lounge bar.

4.7 **Public Car Parking Area**

A landscaped public car parking area for 950 cars paved with
unsealed laterite is to be constructed on the land shown as leased
lot E on the Land Tenure Plan.

5. **DEVELOPMENT ON RESERVED LAND**

5.1 **Generally**

Reserved land consists of that land shown on the Land Tenure Plan
as —

- (a) Public Open Space and Beach Reserves; and
- (b) Conservation Zones.

5.2 **Boundaries, Fences, Paths and Protective Boundaries**

Conservation zones are to be defined and protected with fences and
protective barriers. The conservation zones are also to be protected
by fire breaks. Where possible access paths are to follow existing
tracks unless the existing routes damage significant or identified
features. Fences, paths and protective barriers are to be designed to
be unobtrusive elements in the landscape to standards acceptable to
the Department of Conservation and Land Management.

5.3 **Picnic Areas**

Four areas of approximately 100m² each are to be provided with
shelter, paving, tables and seats, landscaping and potable water, in
the locations shown on the Development Plan.

5.4 **Barbecues**

A coin operated gas barbecue is to be located at each picnic area.

5.5 **Conservation Interpretation Areas**

Two interpretation areas with walkways, and protective barriers are to be provided in the conservation zone adjacent to the Town Centre, in the locations shown on the Development Plan.

5.6 **Public Toilets**

Public toilets are to be provided —

- (a) in the West beach area;
- (b) in the East beach area; and
- (c) in the Public Open Space adjacent to the car parking area, as shown on the Development Plan.

6. **FREEHOLD LAND**

6.1 **Island Rental Accommodation**

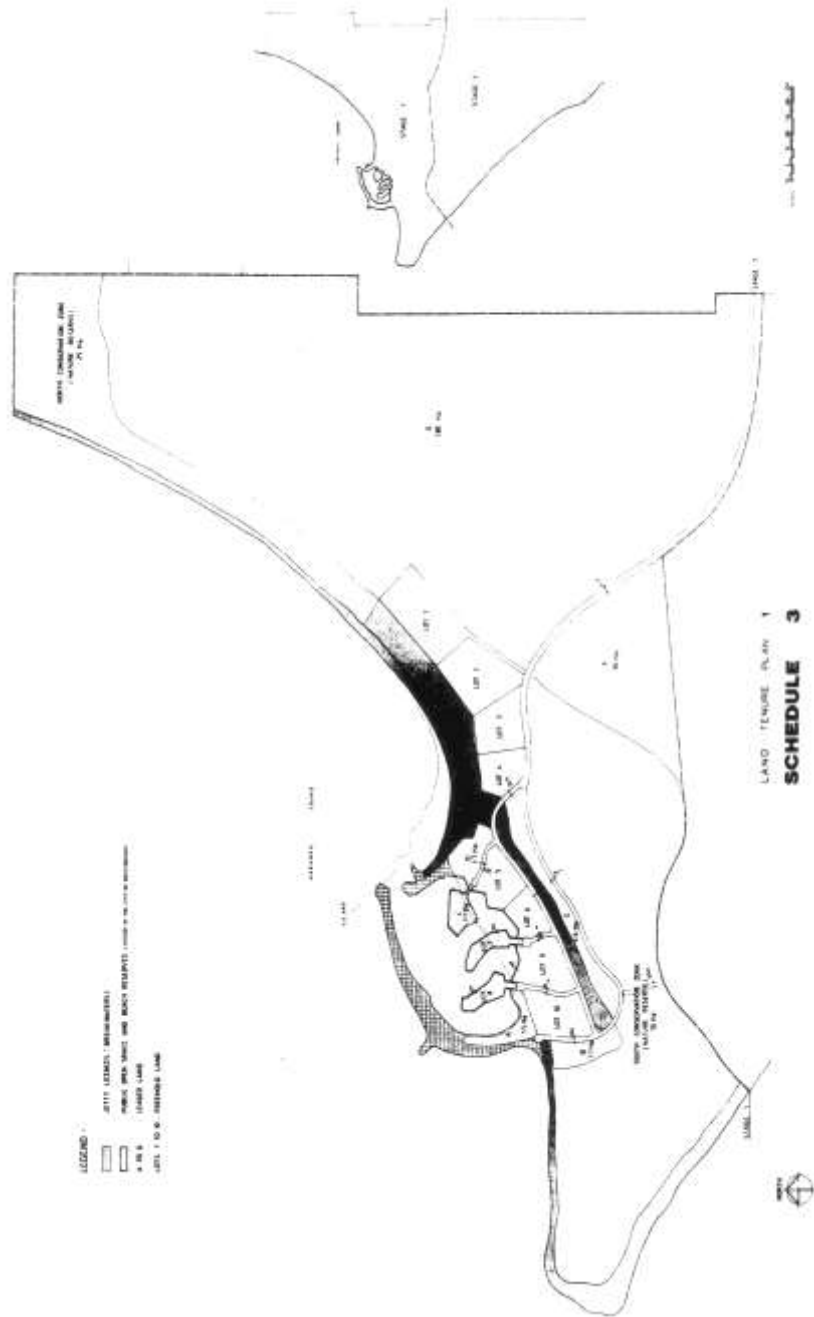
The Company is to construct serviced holiday units, complete with vehicle access, on the land shown as lots 7 and 8 on the Land Tenure Plan.

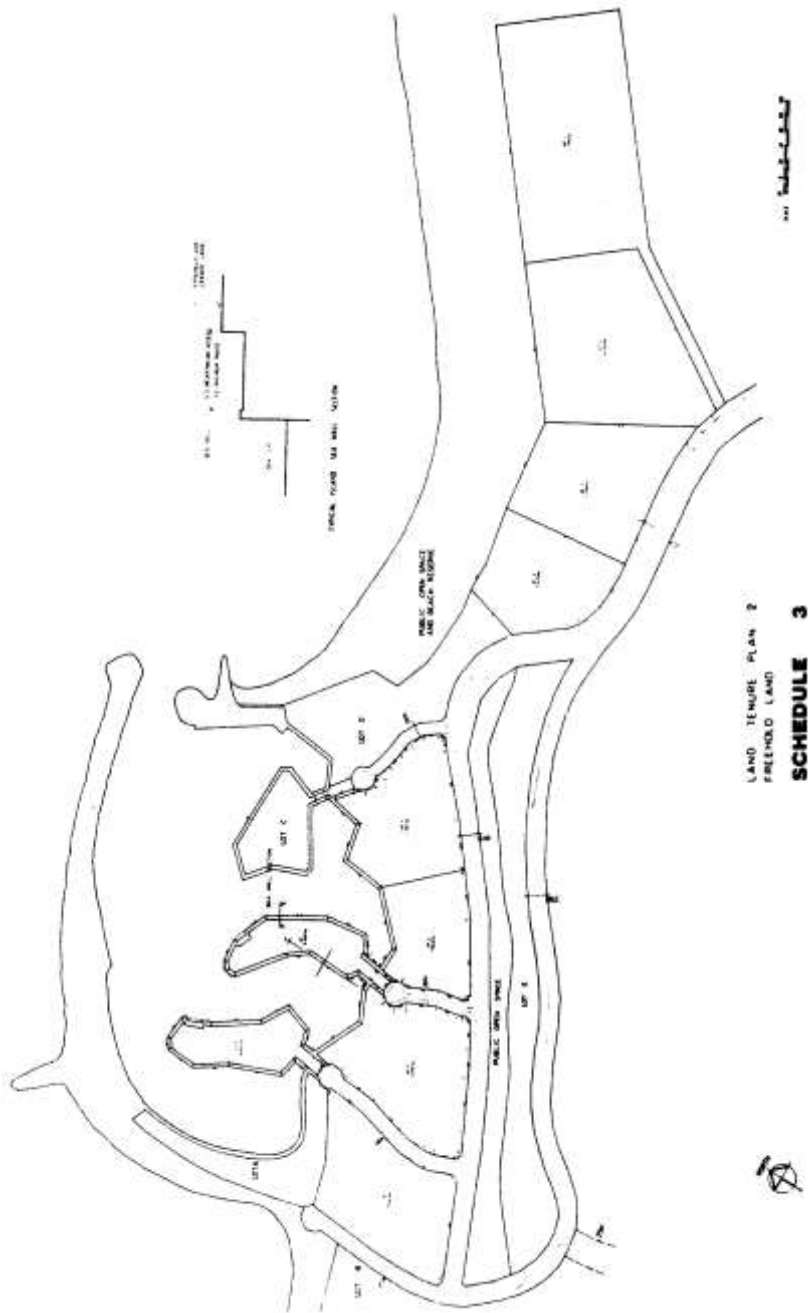
6.2 **Hotel**

The Company is to construct a five star hotel with exclusive access to its own golf course on the land shown as lot 1 on the Land Tenure Plan. The hotel is to consist of 225 guest rooms with the associated lounges, bars and facilities commensurate with a five star hotel.

The hotel is also to include the facilities for a private golf club.

A Sports Centre consisting of tennis court, squash court, gymnasium, spa, sauna and swimming pools, is also to be provided in the hotel.





SCHEDULE 4

LAND ACT 1933

SECTION 117 LEASE

PORT KENNEDY DEVELOPMENT AGREEMENT ACT 1991

Lease No.

Elizabeth the Second, by the Grace of God, Queen of Australia and Her other Realms and Territories, Head of the Commonwealth. To all to whom these presents shall come, GREETING: Know ye that:

WHEREAS:

- A. By Section 117 of the *Land Act 1933* power is given to the Minister for Lands to lease any town, suburban or village lands on such terms as he may think fit.
- B. By clause 9 of the Agreement, the State of Western Australia agreed to grant this lease, or cause this lease to be granted to Fleuris Pty Ltd of Unit 3, 294 Rokeby Road Subiaco Western Australia.

NOW, THEREFORE, We of our especial Grace, and in consideration of the premises, and also in consideration of the rents hereinafter reserved and on the part of Fleuris Pty Ltd of Unit 3, 294 Rokeby Road Subiaco Western Australia its successors and permitted assigns (hereinafter called "the Lessee") to be paid, and in exercise of the powers given by the Act, do by these presents demise and lease to the Lessee the natural surface and so much of the land as is below the natural surface to a depth of 12.19 metres ALL THAT piece or parcel or ALL THOSE pieces or parcels of land marked _____ and containing in the aggregate approximately _____ hectares with the appurtenances ("the leased premises") TO HAVE AND TO HOLD the leased premises subject to the powers, reservations, and conditions herein, and in the Schedule below, and in the Act, contained, and with all the rights, powers, and privileges conferred by the Act as are applicable hereto, unto the Lessee, for the term of 50 years, to be computed from the _____ day of _____ 19____ ("the Term"), YIELDING AND PAYING therefor during the term unto Us, our Heirs and Successors, the yearly rent of one peppercorn payable if and when demanded, and also during each of the years of the Term commencing on the 24th and each subsequent anniversary of the date of commencement of the

Term such yearly rent as is equal to the market rental of the leased premises at the commencement of that year of the Term, less the market rental of the leased premises at the commencement of that year of the Term calculated on the basis that the leased premises were in the same state of development at the commencement of that year of the Term as at the commencement of the Term (so that, for example, if no further development had been carried out on the leased premises after the commencement of the Term, no further rent would be payable for that year pursuant to this provision) payable to Our Minister for Lands monthly in arrears without demand the first such payment being due one month following the date of commencement of the Term Provided, nevertheless, that it shall at all times be lawful for Us, Our Heirs and Successors all for any person or persons acting in that behalf by Our or Their authority, to resume and enter upon possession of any part of the leased premises which it may at any time by Us, Our Heirs and Successors, be deemed necessary to resume for roads, tramways, railways, railway stations, bridges, canals, towing paths, harbour or river improvement works, drainage or irrigation works, quarries, and generally for any other works or purposes of public use, utility, or convenience, and for the purpose of exercising the power to search for minerals and gems hereinafter reserved, and such land so resumed to hold to Us, Our Heirs and Successors, as of Our or Their former estate, without making to the Lessee, or any person claiming under the Lessee, any compensation in respect thereof; so, nevertheless that the lands so to be resumed shall not exceed one twentieth part in the whole of the leased premises, and that no such resumption be made of any part of the leased premises upon which any buildings may have been erected, or which may have been enclosed and in use as gardens, or otherwise for the more convenient occupation of any such buildings or on which any other improvements as defined by the Act have been made without compensation: Provided also, that it shall be lawful at all times for Us, Our Heirs and Successors, or for any person or persons acting in that behalf by Our or Their authority, to cut and take away any such indigenous timber, and to search and dig for and carry away any stones or other materials which may be required for making or keeping in repair any roads, tramways, railways, railway stations, bridges, canals, towing paths, harbour works, breakwaters, river improvements, drainage or irrigation works, and generally for any other works or purposes of public use, utility or convenience, without making to the Lessee, or any person claiming under the Lessee any compensation in respect thereof; and We do hereby save and reserve to Us, Our Heirs and Successors, all mines of gold, silver, copper, tin or other metals, ore, and mineral, or other substances containing metals and all gems and precious stones, and coal or mineral oil, and all phosphatic substances in and under the leased premises, with full liberty at

all times to search and dig for and carry away the same; and for that purpose enter upon the leased premises or any part thereof; and We do hereby save and reserve to Us, Our Heirs and Successors, all petroleum (as defined in the *Petroleum Act 1967*) on or below the surface of the leased premises with the right reserved to Us, Our Heirs and Successors and persons authorised by Us, Our Heirs and Successors to have access to the leased premises for the purposes of searching for and for the operations of obtaining petroleum in any part of the leased premises subject to and in accordance with the *Petroleum Act 1967* or any Act repealing and enacted in substitution of that Act: Provided also that if the Lessee shall, during the Term, at any time make default in payment of the rent hereby reserved, or shall fail or cease to use, hold, and enjoy the leased premises for the purposes set out in this lease, or shall fail or neglect to comply with, perform or fulfil all or any of the provisions of this lease or the conditions or provisions of the Act, it shall thereupon be lawful for Us, Our Heirs and Successors into and upon the leased premises, or any part thereof in the name of the whole to re-enter, and the same to have again, repossess and enjoy as if this deed had never been executed, without making any compensation to the Lessee.

SCHEDULE OF CONDITIONS

The Lessee hereby covenants and agrees with Us, Our Heirs and Successors and with the Minister for Lands as follows —

1. DEFINITIONS AND INTERPRETATION

(1) Definitions

In this lease, unless the contrary intention appears —

“Agreement” means the agreement between the State and the Lessee ratified by the *Port Kennedy Development Agreement Act 1991*;

“City” means the City of Rockingham, a municipality and body corporate under the *Local Government Act 1960*;

“Crown” means the Crown in right of the State of Western Australia;

“Project” means the project referred to in the Agreement;

“State” means the State of Western Australia;

“this lease” refers to this lease (including its recitals, schedules and annexures), whether its original form or as from time to time added to varied or amended.

(2) Interpretation

In this lease, unless the contrary intention appears —

- (a) words importing one gender include all other genders;
- (b) words in the singular number include the plural and vice versa;
- (c) monetary references are references to Australian currency;
- (d) clause and subclause headings are inserted for ease of reference only and shall be disregarded in the interpretation or construction of this lease;
- (e) any agreement or obligation entered into or undertaken by more than one person shall bind those persons jointly and each of them separately; and

- (f) reference to —
 - (i) an Act by name is a reference to an Act of the Parliament of Western Australia;
 - (ii) an Act whether by name or otherwise includes the amendments to the Act for the time being in force and also any Act passed in substitution for it and all subsidiary legislation for the time being in force under it; and
 - (iii) a person includes a corporation.

2. COVENANTS BY LESSEE

The Lessee covenants and agrees with Us, Our Heirs and Successors and with the Minister for Lands as follows —

- (a) to pay the rent reserved by this lease in the manner specified in this lease without deduction or abatement;
- (b) to duly and punctually pay all present and future rates taxes charges assessments impositions and outgoings which are now or during the Term are payable in respect of or charged upon the leased premises or imposed upon the owner occupier or tenant of the leased premises;
- (c) to keep and maintain the leased premises and all buildings structures erections fixtures plant equipment and all improvements whatsoever now or at any time during the Term on the leased premises in good repair and proper working order fair wear and tear excepted and to yield up the same in such state of repair and condition to the Minister for Lands at the expiration or soon termination of this lease and the Lessee agrees that on the expiration of the Term or the sooner termination of the Term all buildings structures or improvements whatsoever then erected on or affixed to the leased premises shall become and remain the absolute property of the Minister for Lands without compensation to the Lessee and the Lessee shall not have any tenant's rights to those buildings structures or improvements;
- (d) to duly and punctually perform observe comply with carry out and conform with the provisions of all statutes for the time being in

force and of all rules regulations and by-laws made thereunder and for the time being in force relating to the leased premises;

- (e) not to do or leave undone or cause or permit or suffer to be done or left undone in or upon the leased premises or any part of the leased premises any act or thing which may be or become a nuisance damage annoyance or inconvenience to the Minister for Lands or to the occupiers of any of the adjoining or neighbouring land;
- (f) to perform discharge and execute all requisitions and works and do and perform all such acts and things upon to in respect of or affecting the leased premises or any part of the leased premises or the operations carried out on the leased premises as are or may be required or directed to be executed or done (whether by the Minister for Lands or tenant owner or occupier) by the City and by any other local or public authority or by order or in pursuance of any statute (State or Federal) now or hereafter in force or by order or in pursuant of any by-law or regulation under any such statute;
- (g) not to do or leave undone or suffer to be done or left unpaid any act matter or thing whereby a nuisance or anything in the nature of or which may be deemed to be a nuisance by the City or any local or public authority body or person or within the meaning of any statute (State or Federal) now or hereafter in force or any regulations or by-laws made thereunder may exist arise or continue upon or in connection with the leased premises or any business carried on upon the leased premises or the use or occupancy of the leased premises AND to forthwith abate any such nuisance or alleged nuisance and carry out and comply with all the provisions of every such statute or by-law and of every requisition and order of any local or other public authority in reference to such nuisance or alleged nuisance;
- (h) to pay to the Minister for Lands or as directed by it on demand all sums of money which that Minister may at any time and from time to time hereafter pay or expend or be called upon to repay in or about or in connection with performing discharging or executing any requisitions or works or abating any nuisance or alleged nuisance referred to in the immediately proceeding paragraphs (f) and (g) and which contrary to the agreements therein contained the Lessee neglects or fails to perform discharge or execute;

- (i) to permit any Minister of the Crown by agents servants and workmen with or without appliances and equipment at all times to enter into and upon the leased premises to inspect the leased premises for the purpose of ensuring that the Lessee is observing performing and complying with the covenants conditions and obligations of this lease and the Lessee shall forthwith execute all the works (including maintenance and the removal of any obstructions) required to be done by written notice by any such Minister PROVIDED THAT if the Lessee does not within one month after service of such notice commence and diligently proceed with the execution of those works mentioned in such notice (including where necessary and with the prior consent of any such Minister the undertaking by and at the expense in all things of the Lessee of any preliminary research investigations and studies relating to such works) it shall be lawful for that Minister by its contractors servants workmen and agents to enter upon the leased premises and execute such works and the cost thereof shall be a debt due from the Lessee and be forthwith recoverable by action;
- (j) to comply forthwith with any requirement in connection with the protection of the environment arising out of or incidental to the operations of the Lessee hereunder that may be made by or under any Act from time to time in force;
- (k) to indemnify and keep indemnified all Ministers of the Crown and the Crown and all instrumentalities of the Crown and all officers servants workmen agents and contractors of such Ministers of the Crown and its instrumentalities and the employees of such agents and contractors from and against all actions claims costs proceedings suits and demands whatsoever (whether arising founded on or based in contract tort or statute or otherwise howsoever or any combination of them) which may at any time be brought maintained or made against all or anyone or more of them —
 - (i) in respect of any loss (including loss of use) injury or damage of or to any nature or kind of property; and
 - (ii) in respect of any death or injury sustained by any person including without limiting the generality of the foregoing an

officer servant workman agent or contractor of any Minister of the Crown or an employee of such agent or contractor, directly or indirectly during the Term or any extension of the Term caused by arising out of or in connection with —

- (iii) the use or occupation of the leased premises by the Lessee; or
- (iv) any work carried out by or on behalf of the Lessee pursuant to this lease; or
- (v) the Lessee's activities and operations business or otherwise whatsoever under this lease; or
- (vi) the construction maintenance or use by the lessee or its servants agents or contractors of the works facilities or services the subject of this lease or the plant apparatus or equipment installed in connection therewith; or
- (vii) the pollution by oil or any other liquid garbage material refuse substance waste matter or thing of any class kind or description whatsoever of the waters adjacent to the leased premises and of the air generally above those waters; or
- (viii) any default by the Lessee in the due and punctual performance, observance and compliance with any of its covenants agreements conditions or obligations contained in this lease,

PROVIDED ALWAYS that this indemnity shall not apply if and to the extent that any such matter event or thing has been caused or contributed to by any Minister of the Crown, the Crown or any instrumentality of the Crown or any officer servant workman agent or contractor of such Minister of the Crown, the Crown or its instrumentalities or the employees of any such agents or contractors;

- (l) to yield up the leased premises at the expiration or sooner termination of this lease in such state of repair and condition as is consistent with the proper performance by the Lessee of the covenants contained in this lease;
- (m) not without the prior written consent of the Minister for Lands to build on affix to or instal on or permit or suffer to be built on

affixed to or installed on the leased premises any building structure erection fixture plant equipment or improvement whatever and with each application for the consent of the Minister for Lands to submit to that Minister plans and specifications of the proposed works buildings structure erection fixture plant equipment or improvement and to make complete and carry out the same strictly in accordance with plans and specifications approved by the Minister for Lands and (if appropriate) the City;

- (n) to pay all reasonable fees and charges payable to any architect surveyor engineer expert or consultant employed or retained by or on behalf of any Minister of the Crown in respect of services performed or work done relating to the approval of plans or drawings or otherwise in connection with the carrying out of the obligations of the Lessee under this lease;
- (o) to insure and keep insured the erections buildings and other improvements on the leased premises at any time against loss or damage by fire earthquake storm and tempest and such other risks as the Minister for Lands may from time to time reasonably require including but not limited to damage to or destruction of the plate glass in the windows screens mirrors doors advertisements and other parts of such erections and buildings to their full reinstatement and replacement (new for old) value with a reputable and substantial insurance office approved of by the Minister for Lands (which approval shall not be unreasonably withheld) and to pay the premiums necessary for the above purposes on or before the days on which the same shall respectively become due and whenever so requested produce to the Minister for Lands or its agents or employees the policy or several policies of such insurance and the receipts for the current year's premiums and cause all moneys received by virtue of such insurance to be forthwith laid out in repair in rebuilding or reinstating the leased premises so damaged or destroyed and to make up any deficiency out of the Lessee's own money provided always that if the Lessee fails to effect and maintain any such insurance the Minister for Lands may from time to time at its discretion effect and keep on foot such insurance and the Lessee shall on demand repay to the Minister for Lands all sums of money expended by it for that purpose;

- (p) not to do or permit or suffer to be done in about or upon the leased premises any Act or thing whereby any policy of insurance against loss or damage to the leased premises or any part of the leased premises may become void or voidable;
- (q) to effect and keep effected in respect of the leased premises adequate public risk insurance in an amount of not less than \$5 000 000 in respect of any one claim or such greater amount as the Minister for Lands at any time and from time to time after notice to the Lessee may reasonably require within an insurance company approved of by the Minister for Lands (which approval shall not be unreasonably withheld) and to notify the Minister for Lands of the details of the public risk insurance and to ensure that such insurance conforms with the reasonable requirements from time to time of the Minister for Lands of which the Lessee is given notice and —
 - (i) if required by the Minister for Lands to produce the policy of insurance to the Minister for Lands;
 - (ii) to deliver to the Minister for Lands on or before the expiration of each year of the Term and at any other time upon the request of the Minister for Lands a valid certificate of currency in respect of such insurance policy issued by the insurance company with which the policy has been effected; and
 - (iii) not to alter the terms or conditions of that policy without the prior written approval of the Minister for Lands and to forthwith deliver to the Minister for Lands particulars of any change or variation of the terms and conditions or any other matter in respect of any insurance policy effected by the Lessee pursuant to this provision;
- (r) not to assign, sub-let, mortgage, charge or otherwise encumber or part with the possession of or dispose of the leased premises or any part of the leased premises or the benefit at law or in equity of this lease without the prior written consent of the Minister for Lands which it may (but is not obliged to) give —
 - (i) in respect of a sublease of the leased premises or any part of the leased premises to a respectable responsible and solvent person;

- (ii) if the Lessee wishes to assign the whole of the leased premises and the benefit of this lease, if —
 - (A) the proposed assignee is a respectable, responsible and solvent person;
 - (B) the Lessee procures the execution by the proposed assignee of a deed of assignment of this lease to which the Minister for Lands is a party in a form approved by the Minister for Lands' solicitors at the cost of the Lessee or the assignee in all respects;
 - (C) all rent then due and payable has been paid and there is not any existing unremedied breach of any covenant to be performed by the Lessee under this lease;
 - (D) the assignment contains a covenant by the proposed assignee with the Minister for Lands that the proposed assignee shall at all times during the continuance of the Term duly perform and observe all the covenants in this lease on the part of the Lessee to be performed and observed; and
 - (E) the Lessee first pays to the Minister for Lands all proper and reasonable costs, charges and expenses incurred by the Minister for Lands of and incidental to any enquiries which may be made by or on behalf of the Minister for Lands as to the respectability, responsibility and solvency of any proposed assignee;
- (iii) if the proposed assignee is a company not listed on any Australian stock exchange or if the sublessee is a proprietary company, if the directors of that company guarantee to the Minister for Lands —
 - (A) in the case of an assignment the observance and performance by the proposed assignee of the covenants in this lease to be observed and performed by the Lessee and the payment of any moneys by the Lessee arising from this lease; or
 - (B) in the case of a sublease (the form of which shall be subject to the approval of the Minister for Lands) the

observance and performance by the sublessee of the covenants in this lease to be performed and observed by the Lessee other than the covenant by the Lessee under this lease to pay the rent reserved by this lease; and

- (iv) the Lessee agrees that the covenants and agreements on the part of any proposed assignee or sublessee shall be deemed to be supplementary to the covenants of the Lessee under this lease and shall not in any way relieve or be deemed to relieve the Lessee from any of those covenants,

PROVIDED THAT if the Lessee is a company any change at any time or times during the Term (whether by transfer, allotment, or otherwise and whether as the result of one or more transactions) in the beneficial ownership of 20% or more of the issued shares from time to time of the Lessee, or if the Lessee is the trustee of the unit trust any change at any time or times during the Term (whether by transfer, allotment, or otherwise and whether as the result of one or more transactions) in the beneficial ownership of 20% or more of the issued units from time to time in that unit trust, other than for the purpose of reconstruction shall be deemed to be an assignment of the Lessee's interest in this lease for the purposes of this provision and it is hereby expressly agreed and declared that the provisions of sections 80 and 82 of the *Property Law Act 1969* are excluded from and do not apply to this lease;

- (s) at all times during the Term to ensure that the "harbour rental units 1" and "beach rental units 1" and "beach rental units 2" constructed as part of the Project are available for leasing or licensing to the general public as short term (no longer than 3 consecutive months) holiday accommodation upon reasonable terms and conditions and at reasonable rents or licence fees;
- (t) to use its best endeavours to ensure that the buildings constructed as part of the Project in the town centre as referred to in the Agreement are available for, and are used for, the purposes for which they were constructed in accordance with the Agreement;
- (u) throughout the Term to allow the Departments of Fisheries, Marine and Harbours, Education, and Conservation and Land Management

to share one office of at least 30 square metres floor area in the administration offices constructed as part of the Project in the town centre, free of any rent or licence fee, with those Departments (and their successors however named from time to time) being responsible for their own furnishing and for power, telephone, water, and cleaning costs, and if required by the Minister for Lands to grant a sublease to such person or persons as required by the Minister for Lands to give further effect to this provision;

- (v) to use its best endeavours to ensure that the public golf course and public golf course club house constructed as part of the Project are used for the purposes for which they were constructed in accordance with the Agreement;
- (w) to ensure that all toilets on the leased premises constructed as part of the Project as public toilets are fully maintained cleaned and equipped (including the provision of toilet paper, soap, hand towels, etc.) by the Lessee at its cost at all times;
- (x) to ensure that the public car parking area on the leased premises is kept continuously available to the public free of cost for the parking of vehicles, other than during periods when with the prior written approval of the Minister for Lands that car parking area or part of it may be closed for repairs or other reasonable purposes;
- (y) at all times during the Term to ensure that free public pedestrian access is permitted to all parts of the leased premises as are not from time to time the subject of any sublease or licence.

3. **IT IS HEREBY AGREED AND DECLARED** by and between Us, Our Heirs and Successors and the Minister for Lands, and the Lessee —

- (a) notwithstanding clause 2(r) the Lessee shall not require the consent of the Minister for Lands on each occasion to any sublease or licence of any part of the leased premises which consists of holiday accommodation for periods less than 3 months on standard terms and conditions to which the Minister for Lands has consented in writing;
- (b) all rights other than those expressly or impliedly granted under this lease are reserved to Us, Our Heirs and Successors and the Minister for Lands (as the case requires);

- (c) if —
- (i) the rent hereby reserved is unpaid for 28 days after becoming payable (whether formally demanded or not) and such default continues for a period of a further 28 days after notice by the Minister for Lands to the Lessee specifying the non-payment complained of; or
 - (ii) a petition is lodged or a resolution is passed for the winding up or dissolution of the Lessee, or a receiver or a receiver and manager of the affairs and undertaking of the Lessee or any part of the affairs and undertaking of the Lessee is appointed; or
 - (iii) any process of execution is levied on any property of the Lessee; or
 - (iv) the Lessee defaults in the due and punctual performance or observance of any covenant on its part contained or implied in this lease and fails to remedy that default within a reasonable time after the service on the Lessee of a notice specifying such default,

then and in any of those cases it shall be lawful for Us, Our Heirs and Successors and the Minister for Lands (as the case requires) to re-enter into and upon the leased premises or any part of the leased premises in the name of the whole to have again repossess and enjoy the leased premises as if this lease had never been executed without making any compensation to the Lessee but without prejudice to any right of action of both or either of Us, Our Heirs and Successors and the Minister for Lands in respect of any breach of the Lessee's covenants contained in this lease;

- (d) any notice consent request approval or other writing authorised or required by this lease to be given or sent shall be deemed to have been duly given or sent by the Minister for Lands if signed by that Minister or by a senior officer of the Western Australian Public Service acting by the direction or with authority of that Minister and forwarded by prepaid certified mail to the Lessee at its registered office for the time being and by the Lessee if signed on its behalf by a person authorised to do so and forwarded by prepaid certified mail to the Minister for Lands at its office in Perth AND

WITNESS

197 St. Georges Tce

ADDRESS

Public Servant

OCCUPATION

The Common Seal of FLEURIS PTY)
LTD was affixed to this Agreement by)
authority of the Directors in the presence)
of:)

Gary Sheehan

DIRECTOR

Richard Lukin

DIRECTOR/SECRETARY

Schedule 2 — Constitution and proceedings of Board

[s. 19]

[Heading amended by No. 19 of 2010 s. 4.]

1. Term of office of members

Except as provided in clause 2, a member shall hold office for such term, not being more than 3 years, as is specified in the member's instrument of appointment, but may from time to time be reappointed.

2. Vacation of office by member

- (1) A member may resign from office by notice in writing delivered to the Minister.
- (2) A member may be removed from office by the Minister —
 - (a) for mental or physical disability, incompetence, neglect of duty or misconduct that impairs the performance of his or her duties; or
 - (b) if the member is an insolvent under administration, as that term is defined in the *Corporations Act 2001* of the Commonwealth; or
 - (c) if the member is absent without leave of the Board from 3 consecutive meetings of the Board of which the member has had notice; or
 - (d) if the member ceases to hold the position or qualification by virtue of which he or she was nominated for appointment; or
 - (e) for any other act or omission that in the opinion of the Minister may cause prejudice or injury to the Board.

3. Proceedings of Board

- (1) The procedure for convening meetings of the Board and the conduct of business at those meetings shall, subject to this Act, be as determined by the Board.
- (2) A quorum for a meeting of the Board is 4 members.
- (3) The first meeting of the Board shall be convened by the chairperson.

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4. Chairperson

At a meeting of the Board —

- (a) the chairperson, or in his or her absence the deputy chairperson, shall preside; or
- (b) in the absence of both of those members, a member elected by the members present shall preside.

5. Delegation by Board

- (1) The Board may, by resolution, delegate any function specified in the resolution, other than this power of delegation, to a member or any committee consisting of 2 or more members.
- (2) The performance of a function by a delegate under this clause is deemed to be the performance of the function by the Board.

6. Voting

- (1) A decision of the majority of members at a meeting of the Board at which a quorum is present is the decision of the Board.
- (2) If the votes of members present at a meeting and voting are equally divided the presiding member shall have a casting vote in addition to a deliberative vote.

7. Minutes

- (1) The Board shall cause accurate minutes of its meetings to be recorded and preserved.
- (2) The minutes shall in addition to any other matters properly contained in the minutes record any minority or dissenting view expressed by a member if the member so requests.

[Schedule 2 amended by No. 10 of 2001 s. 220.]

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Notes

¹ This is a compilation of the *Port Kennedy Development Agreement Act 1992* and includes the amendments made by the other written laws referred to in the following table^{1*}. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Port Kennedy Development Agreement Act 1992</i>	45 of 1992	8 Dec 1992	s. 1 and 2: 8 Dec 1992; Act other than s. 1 and 2: 24 Dec 1992 (see s. 2 and <i>Gazette</i> 24 Dec 1992 p. 6307)
<i>Fish Resources Management Act 1994</i> s. 264	53 of 1994	2 Nov 1994	1 Oct 1995 (see s. 2 and <i>Gazette</i> 29 Sep 1995 p. 4649)
<i>Local Government (Consequential Amendments) Act 1996</i> s. 4	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
<i>Transfer of Land Amendment Act 1996</i> s. 153(1)	81 of 1996	14 Nov 1996	14 Nov 1996 (see s. 2(1))
<i>Corporations (Consequential Amendments) Act 2001</i> s. 220	10 of 2001	28 Jun 2001	15 Jul 2001 (see s. 2 and <i>Gazette</i> 29 Jun 2001 p. 3257 and Cwlth <i>Gazette</i> 13 Jul 2001 No. S285)
Reprint of the <i>Port Kennedy Development Agreement Act 1992</i> as at 25 Oct 2002 (includes amendments listed above)			
<i>Planning and Development (Consequential and Transitional Provisions) Act 2005</i> s. 15	38 of 2005	12 Dec 2005	9 Apr 2006 (see s. 2 and <i>Gazette</i> 21 Mar 2006 p. 1078)
<i>Statutes (Repeals and Minor Amendments) Act 2009</i> s. 13	46 of 2009	3 Dec 2009	4 Dec 2009 (see s. 2(b))
<i>Standardisation of Formatting Act 2010</i> s. 4	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and <i>Gazette</i> 10 Sep 2010 p. 4341)
<i>Public Sector Reform Act 2010</i> s. 89	39 of 2010	1 Oct 2010	1 Dec 2010 (see s. 2(b) and <i>Gazette</i> 5 Nov 2010 p. 5563)

Short title	Number and year	Assent	Commencement
Reprint 2: The Port Kennedy Development Agreement Act 1992 as at 23 May 2014 (includes amendments listed above)			

~~^{4a} 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>Aquatic Resources Management Act 2016 s. 377</i>⁵	53 of 2016	28 of 2016	28 of 2016
<u>This Act was repealed by the <i>Port Kennedy Development Act 2017 s. 7</i>⁶ (No. 8 of 2017) as at 27 Feb 2018 (see s. 2(b) and <i>Gazette</i> 27 Feb 2018 p. 531)</u>	8 of 2017	15 Sep 2017	15 Sep 2017

² Repealed by the *Land Administration Act 1997*.

³ Repealed by the *Planning and Development (Consequential and Transitional Provisions) Act 2005* s. 4.

⁴ Department of Land Administration plans are now being held by the Western Australian Land Information Authority (see the *Land Information Authority Act 2006* s. 100).

~~⁵ On the date as at which this compilation was prepared, the *Aquatic Resources Management Act 2016* s. 377 had not come into operation. It reads as follows:~~

~~**377. Various references to *Fish Resources Management Act 1994* amended**~~

~~—(1) This section amends the Acts listed in the Table.~~

~~—(2) In the provisions listed in the Table delete “*Fish Resources Management Act 1994*” and insert:~~

~~— *Aquatic Resources Management Act 2016*~~

Table

<i>Port Kennedy Development Agreement Act 1992</i>	s.12(3)(c)
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⁶ ~~On the date as at which this compilation was prepared, the *Port Kennedy Development Act 2017* s. 7 had not come into operation. It reads as follows:~~

~~7. ***Port Kennedy Development Agreement Act 1992 repealed***
The *Port Kennedy Development Agreement Act 1992* is repealed.~~