



Western Australia

Silicon (Kemerton) Agreement Act 1987

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Defined terms

Silicon (Kemerton) Agreement Act 1987

An Act to ratify an agreement between the State of Western Australia and Barrack Silicon Pty. Ltd. and Barrack Mines Limited relating to the establishment of a plant for the manufacture of silicon, and for purposes incidental thereto or connected therewith.

1. Short title

This Act may be cited as the *Silicon (Kemerton) Agreement Act 1987*¹.

[Section 1 amended: No. 3 of 1988 s. 4; correction to reprint in Gazette 21 Jul 2006 p. 2652.]

2. Commencement

This Act shall come into operation on the day on which it receives the Royal Assent¹.

3. Interpretation

In this Act, unless the contrary intention appears —

silicon plant site means the silicon plant site as defined by the Agreement as varied by the Variation Agreement;

the Agreement means the agreement a copy of which is set out in Schedule 1 and includes that agreement as varied from time to time in accordance with its provisions;

the Variation Agreement means the agreement a copy of which is set out in Schedule 2.

[Section 3 amended: No. 3 of 1988 s. 5.]

4. Agreement ratified and implementation authorised

- (1) The Agreement is ratified.

s. 4A

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

4A. Variation Agreement ratified and implementation authorised

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

[Section 4A inserted: No. 3 of 1988 s. 6.]

4B. Planning laws modified

Despite anything in the *Planning and Development Act 2005*, planning schemes prepared under that Act do not apply to or in relation to the silicon plant site.

[Section 4B inserted: No. 38 of 2005 s. 15.]

Schedule 1 — Silicon (Kemerton) Agreement

[s. 3]

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

THIS AGREEMENT is made the 12th day of November 1987 BETWEEN THE HONOURABLE BRIAN THOMAS BURKE, M.L.A., Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time (hereinafter called the State) of the first part BARRACK SILICON PTY. LTD. a company incorporated in the State of Western Australia and having its registered office at 614 Newcastle Street, Leederville (hereinafter called the Company which term shall include its successors and permitted assigns) of the second part and BARRACK MINES LIMITED a company incorporated in the State of Western Australia and having its registered office at 614 Newcastle Street, Leederville (hereinafter called “the Guarantor”) of the third part.

WHEREAS:

- (a) the company is desirous of establishing and operating a silicon plant for the manufacture of silicon at Picton in the said State and intends to provide such facilities and services as may be necessary for its proposed manufacturing operation under this agreement; and
- (b) the State, for the purpose of promoting employment opportunity and industrial development in Western Australia, desires to assist the establishment of the proposed silicon plant upon and subject to the terms of this Agreement.

NOW THIS AGREEMENT WITNESSES as follows:

Definitions

1. In this Agreement subject to the context:

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

“approved proposal” means any proposal approved under this Agreement;

“CALM” means the Department of Conservation and Land Management established pursuant to the *Conservation and Land Management Act 1984*;

“Clause” means a clause of this Agreement;

“commencement date” means the date the Bill referred to in Clause 3 comes into operation as an Act;

“Commonwealth” means the Commonwealth of Australia and includes the Government for the time being thereof

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

“local authority” means the council of a municipality that is a city, town or shire constituted under the *Local Government Act 1960*;

“Mining Act” means the *Mining Act 1978*;

“Mining Lease” means Mining Lease No. 70/191 and any mining lease or mining leases that be granted in respect of lands the subject of the Prospecting Licences pursuant to application by the Company under section 49 of the Mining Act and includes any extension or variation of such lease or leases from time to time and any replacements thereof;

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

“month” means calendar month;

“notice” means notice in writing;

“person” or “persons” includes bodies corporate;

“project” means the mining of silica, the production of charcoal or other reductant and the manufacture of silicon at the silicon plant together with all associated facilities to be developed and operated by the Company under this Agreement;

“Prospecting Licences” means prospecting licences numbered 70/258 and 70/260;

“public road” means a road as defined by the *Road Traffic Act 1974*;

“silicon plant” means the charcoal production facilities the submerged arc electric furnaces and associated ancillary plant and buildings to be established at Picton for the conversion of silica or other silicon bearing material to chemical and/or metallurgical grade silicon with a production capacity of not less than 20,000 tonnes of silicon per annum and includes any expansion thereof or addition thereto in accordance with this Agreement;

“silicon plant site” means the site for the silicon plant at Picton being the land hatched on the plan marked A initialled by or on behalf of the parties hereto for the purpose of identification;

“said State” means the State of Western Australia;

“silica” means chert quartz quartzite silica sand or other materials containing a high percentage of silicon dioxide used as a source of silicon;

“silicon” means the elemental product of the high temperature smelting of a blended mixture of chert, quartzite or other form of high purity silica with charcoal, coke, coal or other suitable reductants in a submerged arc electric furnace;

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

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

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

Interpretation

2. In this Agreement:

- (a) monetary references are references to Australian currency unless otherwise specifically expressed;
- (b) power given under any clause other than Clause 21 to extend any period or date shall be without prejudice to the power of the Minister under Clause 21;
- (c) clause headings do not affect the interpretation or construction; and

- (d) reference to an Act includes the amendments to that Act for the time being in force and also any Act passed in substitution therefor or in lieu thereof and the regulations for the time being in force thereunder.

Ratification of Agreement

3. The State shall introduce and sponsor a Bill in the Parliament of Western Australia to ratify this Agreement and endeavour to secure its passage as an Act prior to 31st December 1987.

Commencement and Operation of Agreement

4. (1) The provisions of this Agreement other than this Clause and Clauses 1, 2 and 3 shall not come into operation until the Bill referred to in Clause 3 has been passed by the Parliament of Western Australia and comes into operation as an Act.
- (2) If before 31st December 1987 the said Bill has not commenced to operate as an Act then unless the parties hereto otherwise agree this Agreement shall then cease and determine and no party hereto shall have any claim against any other party hereto with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under this Agreement.
- (3) On the said Bill commencing to operate as an Act all the provisions of this Agreement shall operate and take effect notwithstanding the provisions of any Act or law.

Company to Submit Proposals for the Project

5. (1) The Company shall on or before 31st January 1988 (or thereafter within such extended time as the Minister may allow as hereinafter provided), and subject to the provisions of this Agreement, submit to the Minister to the fullest extent reasonably practicable its detailed proposals for the project which proposals shall include plans where appropriate and specifications where reasonably required by the Minister and shall make provision for the necessary workforce required to enable the Company to implement the project and shall include the location, area, lay-out, design, quantities, materials and a time programme for the commencement and completion of construction or the provision (as the case may be) of each of the following matters, namely:

- (a) the mining of silica;
- (b) the silicon plant;
- (c) manning requirements and manning recruitment policies;
- (d) transport;
- (e) power supply;
- (f) water supply;
- (g) use of local labour professional services manufacturers suppliers contractors and materials and measures to be taken with respect to the engagement and training of employees by the Company, its agents and contractors;
- (h) an environmental management programme as to measures to be taken, in respect of the Company's activities under this Agreement, for the protection and management of the environment; and
- (i) elements of the project which the Company proposes to be sourced from outside Australia and the reason therefor.

Order of Proposals

- (2) The proposals pursuant to subclause (1) may with the approval of the Minister or if so required by him be submitted separately and in any order as to the matter or matters mentioned in one or more of paragraphs (a) to (i) of subclause (1).

Use of Existing Infrastructure

- (3) The proposals pursuant to subclause (1) may with the approval of the Minister and that of any third parties concerned instead of providing for the construction of new facilities of the kind therein mentioned provide for the use by the Company of any existing facilities of such kind belonging to the Company or upon reasonable terms and conditions of any other existing facilities of such kind.

Marketing and Financial Arrangements

- (4) At the time when the Company submits the said proposals it shall furnish to the State's reasonable satisfaction evidence of:

- (a) marketing arrangements demonstrating the Company's ability to profitably sell or use silicon manufactured pursuant to this Agreement;
- (b) the availability of finance necessary for the fulfilment of the operations to which the said proposals refer; and
- (c) the readiness of the Company to embark upon and proceed to carry out the operations referred to in the said proposals.

Consideration of Proposals

6. (1) In respect of the said proposals pursuant to subclause (1) of Clause 5 the Minister shall:
- (a) approve of the said proposals either wholly or in part without qualification or reservation; or
 - (b) defer consideration of or decision upon the same until such time as the Company submits a further proposal or proposals in respect of some other of the matters mentioned in subclause (1) of Clause 5 not covered by the said proposals; or
 - (c) require as a condition precedent to the giving of his approval to the said proposals that the Company makes such alteration thereto or complies with such conditions in respect thereto as he (having regard to the circumstances including the overall development of and the 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 disclose his reasons for such conditions

PROVIDED ALWAYS that any approval or decision of the Minister under this clause shall be in accordance with the conditions and procedures, if any, to which implementation of the project is made subject pursuant to the EP Act and such approval or decision shall if the case so requires incorporate a requirement that the Company make such alterations to the said proposals as may be necessary to make them accord with those conditions or procedures.

Advice of Minister's Decision

- (2) The Minister shall, within whichever is the later of two months after receipt of the said proposals or seven days after service on him of an

authority under section 45(7) of the EP Act, give notice to the Company of his decision in respect to the same.

Termination

- (3) Notwithstanding subclauses (1) and (2) in the event that:
- (a) it is determined under the EP Act that the project contemplated by this Agreement may not be implemented; or
 - (b) it is determined under that Act that the said project may be implemented but such implementation is made subject to conditions and procedures and the Company does not notify the Minister of its acceptance thereof within six months of the determination of those conditions and procedures, or if the Company lodges an appeal in respect thereof within six months of the decision on the appeal,

the parties shall consult together with respect to any modifications that may be proposed by the Company or the State to enable the project to be implemented and subject thereto the Company may by notice to the State determine this Agreement or if the Company has not given a notice under this subclause determining this Agreement by 31st January 1989 or by such extended date if any as the Company shall be granted pursuant to the provisions of this Agreement then the Minister may give to the Company 12 months notice of intention to determine this Agreement and unless before the expiration of the said 12 months each and every proposal pursuant to subclause (1) of Clause 5 is so approved or determined this Agreement shall cease and determine. The provisions of Clause 23 shall apply to any termination of this Agreement pursuant to this subclause.

Consultation with Minister

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

Minister's Decision Subject to Arbitration

- (5) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of subclause (1) and the Company considers that

the decision is unreasonable the Company within two months after receipt of the notice mentioned in subclause (2) may elect to refer to arbitration in the manner hereinafter provided the question of the reasonableness of the decision PROVIDED THAT any requirement of the Minister pursuant to the proviso to subclause (1) shall not be referable to arbitration hereunder.

Arbitration Award

- (6) An award made on an arbitration pursuant to subclause (5) shall have force and effect as follows:
- (a) if by the award the dispute is decided against the Company then unless the Company within three months after delivery of the award give notice to the Minister of its acceptance of the award this Agreement shall on the expiration of that period of three months cease and determine; or
 - (b) if by the award the dispute is decided in favour of the Company the decision shall take effect as a notice by the Minister that he is so satisfied with and approves the matter or matters the subject of the arbitration.

Effect of Non-Approval of Proposals

- (7) Notwithstanding that under subclause (1) detailed proposals of the Company are approved by the Minister or determined by arbitration award unless each and every such proposal is approved or determined by 31st January 1989 or by such extended date if any as the Company shall be granted pursuant to the provisions of this Agreement then the Minister may give to the Company 12 months notice of intention to determine this Agreement and unless before the expiration of the said 12 months period all the detailed proposals and matters are so approved or determined this Agreement shall cease and determine subject however to the provisions of Clause 23.

Implementation of Proposals

- (8) The Company shall implement the approved proposals in accordance with the terms thereof.

Transfer of Silicon Plant Site

- (9) (a) As soon as practicable after the final approval of all the detailed proposals required pursuant to subclause (1) of Clause 5 the State shall cause to be transferred and vacant possession to be given of the silicon plant site free from encumbrances to the Company on such terms as agreed between the parties.
- (b) The State shall to the extent reasonably necessary for the purposes of this Agreement allow the Company to have access to the silicon plant site prior to the transfer thereof to the Company for the purpose of carrying out surveys and preparatory building works necessary to enable it to finalise the detailed proposals referred to in Clause 5 and otherwise as agreed by the Minister.

Operation of Silicon Plant

7. The Company shall during the continuance of this Agreement use its best endeavours to operate the silicon plant so as to produce in each year silicon of a quantity at least equal to or above 80% of installed capacity.

Additional Proposals

8. If the Company at any time during the continuance of this Agreement desires to significantly modify expand or otherwise vary its activities carried on pursuant to this Agreement beyond those specified in the approved proposals or to mine minerals from the Mining Lease or the Prospecting Licences in addition to silica or to mine silica for the project from other than the Mining Lease or Prospecting Licences it shall give notice of such desire to the Minister and if required by the Minister within two months of the giving of such notice shall submit to the Minister within such period as the Minister shall reasonably allow detailed proposals in respect of all matters covered by such notice and such of the other matters mentioned in paragraphs (a) to (i) of subclause (1) of Clause 5 and where minerals other than silica are the subject of the proposals specifying those other minerals and the proposed mining methods and other relevant information as the Minister may require. The provisions of Clause 5 and Clause 6 (other than subclauses (6)(a) and (7) of Clause 6) shall *mutatis mutandis* apply to detailed proposals submitted pursuant to this subclause. The Company shall implement the approved proposals in accordance with the terms hereof.

Protection and Management of the Environment

9. (1) The Company shall in respect of the matters referred to in paragraph (h) of subclause (1) of Clause 5 and which are the subject of approved proposals under this Agreement, carry out a continuous programme of investigation and research including monitoring and the study of sample areas to ascertain the effectiveness of the measures it is taking pursuant to such approved proposals for rehabilitation and the protection and management of the environment.
- (2) The Company shall during the currency of this Agreement at yearly intervals commencing from the date when the Company's proposals are approved submit an interim report to the Minister concerning investigations and research carried out pursuant to subclause (1) and at 3 yearly intervals commencing from such date submit a detailed report to the Minister on the result of the investigations and research during the previous 3 years.
- (3) Whenever as a result of its investigations and research under subclause (1) or otherwise information becomes available to the Company which may necessitate or could require any changes or additions to any approved proposals or which concerns matters not addressed in approved proposals the Company shall forthwith notify the Minister thereof and with such notification shall submit a detailed report thereon.
- (4) The Minister may within two months of the receipt of any interim or detailed report pursuant to subclauses (2) or (3) notify the Company that he requires additional detailed proposals to be submitted in respect of all or any of the matters the subject of the report and such other matters as the Minister may require.
- (5) The Company shall within two months of the receipt of a notice given pursuant to subclause (4) submit to the Minister additional detailed proposals as required and the provisions of Clause 5 and Clause 6 (other than subclauses (6) and (7)) where applicable shall *mutatis mutandis* apply in respect of such proposals.
- (6) The Company shall implement the decision of the Minister or an award made on arbitration as the case may be in accordance with the terms thereof.

Use of Local Labour Services and Materials

10. (1) The Company shall, for the purposes of this Agreement:
- (a) except in those cases where the Company can demonstrate it is impracticable so to do, use labour available within the said State;
 - (b) as far as it is reasonable and economically practicable so to do, use the services of engineers surveyors architects and other professional consultants, project managers manufacturers suppliers and contractors resident and available within the said State;
 - (c) 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 so to do, use or be based upon Australian Standards and Codes) ensure that Western Australian suppliers manufacturers and contractors are given fair and reasonable opportunity to tender or quote; and
 - (d) give proper consideration and where possible preference to Western Australian suppliers manufacturers and contractors when letting contracts or placing orders for works material plant equipment and supplies where price quality delivery and service are equal to or better than that obtainable elsewhere.
- (2) The Company shall require in every contract entered into with a third party for the supply of services labour works materials plant equipment and supplies for the purposes of this Agreement as a condition thereof that such third party shall undertake the same obligations as are referred to in 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 monthly intervals (or such longer period as the Minister determines) commencing from the date of this Agreement concerning its implementation of the provisions of this Clause together with a copy of any report received by the Company pursuant to subclause (2) during that month.

Mining Lease

11. Subject to due performance of the terms and conditions thereof by the holder from time to time and except as otherwise provided in this Agreement, during the term of this Agreement and any extension thereof, the Mining Lease shall continue to be held pursuant to the Mining Act.

Supply of timber

12. (1) The State shall ensure that CALM through its Executive Director shall supply up to 150,000 tonnes of dry jarrah (*Eucalyptus Marginata*) of firewood quality suitable for the production of charcoal (or an equivalent amount of green jarrah and dry jarrah both of firewood quality) per annum from the jarrah forest upon reasonable and commercial terms and conditions to be negotiated and agreed between CALM and the Company for a term of fifteen years with the right to an extension of the said term for a further term of five years. If the Company desires an expansion of the capacity of the silicon plant the State shall investigate its capacity to supply further quantities of dry jarrah of firewood quality within the limits of good forest management as it is at that time able to supply from the jarrah forest or, if the State determines that the requisite supplies are not available from that source then such other forest under its control, if any, as may be a practicable and commercial source of supply for the Company having regard for the place or places of its operation. For the purposes of this Clause, dry jarrah means dead jarrah from which the bark has been shed, green jarrah means dead jarrah from which the bark has not been shed.
- (2) The State shall ensure that CALM shall not contract to supply jarrah of firewood quality suitable for the production of charcoal to a third party for use in the production of silicon on terms more favourable on the whole to the third party than those under which the Company is being supplied jarrah pursuant to subclause (1) without similar terms being made available to the Company.

Private Roads

13. (1) The Company shall:
- (a) be responsible for the provision of finance for and the construction and maintenance of all private roads which shall be used in its operations hereunder;

- (b) at its cost make such provision as shall ensure that all persons and vehicles (other than those engaged upon the Company's operations and its invitees and licencees) are excluded from use of any such private roads; and
- (c) at any place where such private roads are constructed by the Company so as to cross any public roads or railways provide adequate grade separation or such other reasonable protection as may be required by the Commissioner of Main Roads or the Railway Commission as the case may be.

Public Roads — Maintenance

- (2) The State shall maintain or cause to be maintained those public roads under the control of the Commissioner of Main Roads or a local authority which may be used by the Company to a standard similar to comparable public roads maintained by the Commissioner of Main Roads or a local authority as the case may be.

Upgrading of Public Roads

- (3) In the event that for or in connection with the Company's operations hereunder (including the construction of the silicon plant) the Company or any person engaged by the Company uses or wishes to use a public road which is inadequate for the purpose or in the event that any use by the Company or any person engaged by the Company of any public road results in excessive damage thereto or deterioration thereof (other than fair wear and tear) the Company shall pay to the State the whole or an equitable part of the total cost of any upgrading required or of making good the damage or deterioration as may be reasonably required by the Commissioner of Main Roads having regard to the use of any such public road by others.

Transport Licences

- 14. The State shall ensure that:
 - (a) subject to the payment by the Company of appropriate fees, the Minister for Transport under the *Transport Co-ordination Act 1966* will not refuse to grant and issue to the Company (or suppliers to or contractors with the Company and subcontractors of such contractors reasonably approved by the State) a licence to transport by road:

- (i) from the silicon plant to Fremantle silicon and other products (including waste products) manufactured by the Company at the silicon plant; and
 - (ii) logs and timber to the silicon plant for use in the production of silicon; and
- (b) the appropriate fees charged to the Company for licences under the *Transport Co-ordination Act 1966* will not be such as to discriminate against the Company its suppliers contractors and subcontractors.

Power

15. (1) The Company shall confer with the State Energy Commission with respect to the Company's power requirements for the project during the constructional phase and the operational phase.
- (2) The Company and the State Energy Commission shall enter into arrangements for the provision of power, to the mining areas if required and the silicon plant during the currency of this Agreement on the terms and conditions to be negotiated between them.

Water

16. (1) The State and the Company shall agree upon the reasonable amounts and qualities thereof of the Company's annual and maximum daily water requirements for its purposes hereunder at the silicon plant.
- (2) The water requirements referred to in subclause (1) shall be obtained in accordance with the provisions of the *Water Authority Act 1984* or other relevant Act.

Zoning

17. (1) The State shall ensure after consultation with the relevant local authority that the Mining Lease the Prospecting Licences and the silicon plant site shall be and remain zoned for use or otherwise protected during the currency of this Agreement so that the operations of the company hereunder may be undertaken and carried out thereon without any interference or interruption by the State or by any State agency or instrumentality or by any local or other authority of the State on the ground that such operations are contrary to any zoning by-law regulation or order.

- (2) The State shall ensure that the land outside the silicon plant site and within a radius of one kilometre from a point determined by the Minister after consultation with the Company as the centre of the silicon plant site shall not be zoned during the currency of this Agreement for residential purposes.

Assignment

18. (1) Subject to the provisions of this Clause the Company may at any time with the consent of the Minister assign mortgage charge sublet or dispose of to any company or person the whole or any part of the rights and obligations of the company hereunder subject however in the case of an assignment subletting or disposition to the assignee sublessee or disponent (as the case may be) executing in favour of the State (unless the Minister otherwise determines) a deed of covenant in a form to be approved by the Minister to comply with observe and perform the provisions hereof on the part of the Company to be complied with observed or performed in regard to the matter or matters the subject of such assignment subletting 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 herein the subject of an assignment mortgage subletting or disposition under subclause (1) PROVIDED THAT the Minister may agree to release the Company from such liability where he considers such release will not be contrary to the interests of the State.

Variation

19. (1) The parties hereto may from time to time by agreement in writing add to substitute for cancel or vary all or any of the provisions of this Agreement 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.

Force Majeure

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

Power to Extend Periods

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

Determination of Agreement

22. (1) In any of the following events namely if:

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

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

- (b) the Company goes into liquidation (other than a voluntary liquidation for the purpose of reconstruction) and unless within 3 months from the date of such liquidation the interest of the Company is assigned to an assignee approved by the Minister under Clause 18,

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

- (2) The notice to be given by the State in terms of subclause (1) shall specify the nature of the default or other ground so entitling the State to exercise such right of determination and where appropriate and known to the State the party or parties responsible therefor and shall be given to the Company and all such assignees mortgagees chargees and disponees for the time being of the Company's said rights to or in favour of whom or by whom an assignment mortgage charge or disposition has been effected in terms of Clause 18 whose name and address for service of notice has previously been notified to the State by the Company or any such assignee mortgagee chargee or donee.
- (3) (a) 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 given by the State as provided in subclause (2) refer the matter in dispute to arbitration.
- (b) If the question is decided against the Company, the Company shall comply with the arbitration award within a reasonable time to be fixed by that award PROVIDED THAT if the arbitrator finds that there was a bona fide dispute and that the Company was not dilatory in pursuing the arbitration, the time for

compliance with the arbitration award shall not be less than 90 days from the date of such award.

- (4) If the default referred to in sublease (1) shall not have been remedied after receipt of the notice referred to in subclause (1) or within the time fixed by the arbitration award as aforesaid the State instead of determining this Agreement as aforesaid because of such default may itself remedy such default or cause the same to be remedied (for which purpose the State by agents workmen or otherwise shall have full power to enter upon lands occupied by the Company and to make use of all plant machinery equipment and installations thereon) and the actual costs and expenses incurred by the State in remedying or causing to be remedied such default shall be a debt payable by the Company to the State on demand.

Effect of Cessation or Determination of Agreement

23. On the cessation or determination of this Agreement:

- (a) except as otherwise agreed by the Minister the rights of the Company to in or under this Agreement shall thereupon cease and determine but without prejudice to the liability of either of the parties hereto in respect of any antecedent breach or default under this Agreement or in respect of any indemnity given hereunder;
- (b) the Company shall forthwith pay to the State all moneys which may then have become payable or accrued due;
- (c) save as aforesaid and as otherwise provided in this Agreement neither of the parties hereto shall have any claim against the other of them with respect to any matter or thing in or arising out of this Agreement

PROVIDED ALWAYS that such cessation or determination shall in no way affect the Mining Lease and the Prospecting Licences or such of them then in force which, for their remaining unexpired terms and any extensions shall continue in accordance with the Mining Act.

Environmental Protection

24. Nothing in this Agreement shall be construed to exempt the Company from compliance with any requirement in connection with the protection of the environment arising out of or incidental to its activities hereunder that may be made by the State or by any State agency or instrumentality or any local

or other authority or statutory body of the State pursuant to any Act from time to time in force.

Indemnity

25. The Company shall indemnify and keep indemnified the State and its servants agents and contractors in respect of all actions suits claims demands or costs of third parties arising out of or in connection with any work carried out by or on behalf of the Company pursuant to this Agreement or relating to its operations hereunder or arising out of or in connection with the construction maintenance or use by the Company or its servants 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 PROVIDED THAT subject to the provisions of any other relevant Act such indemnity shall not apply in circumstances where the State, its servants, agents or contractors are negligent in carrying out work for the Company pursuant to this Agreement.

Commonwealth Licences and Consents

26. (1) The Company shall from time to time make application to the Commonwealth or to the Commonwealth constituted agency authority or instrumentality concerned for the grant to it of any licence or consent under the laws of the Commonwealth necessary to enable or permit the Company to enter into this Agreement and to perform any of its obligations hereunder.
- (2) On request by the Company the State shall make representations to the Commonwealth or to the Commonwealth constituted agency authority or instrumentality concerned for the grant to the Company of any licence or consent mentioned in subclause (1).

Subcontracting

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

Stamp Duty Exemption

28. (1) The State shall exempt from any stamp duty which but for the operation of this Clause would or might be assessed and chargeable on:
- (a) this Agreement;
 - (b) the Agreement for sale and purchase dated 16th October 1987 between Agnew Clough Limited as Vendor and the Company as purchaser, whereby the Company acquired the whole of the right title and interest of Agnew Clough Limited in the project, including all assets and other property belonging thereto and mentioned in that Agreement;
 - (c) the transfer of the silicon plant site to the Company pursuant to subclause (9) of Clause 6; and
 - (d) any assignment sublease or disposition (other than by way of mortgage or charge) made in conformity with the provisions of Clause 18

PROVIDED THAT this subclause shall not apply to any instrument or other document executed or made more than three years from the date hereof.

- (2) If prior to the date on which the Bill referred to in Clause 3 to ratify this Agreement is passed as an Act stamp duty has been assessed and paid on any instrument or other document referred to in subclause (1) the State when such a Bill is passed as an Act shall on demand refund the amount of any stamp duty paid on any such instrument or other document to the person who paid the same.

Arbitration

29. (1) Any dispute or difference between the parties arising out of or in connection with this Agreement the construction of this Agreement or as to the rights, duties or liabilities of either party hereunder or as to any matter to be agreed upon between the parties under this Agreement shall in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary be referred to and settled by arbitration in accordance with the provisions of the *Commercial Arbitration Act 1985* and notwithstanding section 20 subsection (1) of that Act each party may be represented before the

arbitrators by a duly qualified legal practitioner or other representative.

- (2) Except where otherwise provided in this Agreement, the provisions of this Clause shall not apply to any case where the State the Minister or any other Minister in the Government of the said State is by this Agreement given either expressly or impliedly a discretionary power.
- (3) The arbitrators of any submission to arbitration hereunder are hereby empowered upon the application of either of the parties to grant in the name of the Minister any interim extension of any period or variation of any date referred to herein which having regard to the circumstances may reasonably be required in order to preserve the rights of that party or of the parties hereunder and an award may in the name of the Minister grant any further extension or variation for that purpose.

Consultation

30. The Company shall during the currency of this Agreement consult with and keep the State fully informed on a confidential basis concerning any action that the Company proposes to take with any third party (including the Commonwealth or any Commonwealth constituted agency authority instrumentality or other body) which might significantly affect the overall interest of the State under this Agreement.

Notices

31. Any notice consent or other writing authorised or required by this Agreement to be given or sent shall be deemed to have been duly given or sent by the State if signed by the Minister or by any senior officer of the Public Service of the said State acting by the direction of the Minister and forwarded by prepaid post or handed to the Company at its respective address in the said State hereinbefore set forth or other address in the said State nominated by the Company to the Minister from time to time and by the Company if signed on its behalf by any person or persons authorised by the Company or by its solicitors as notified to the State from time to time and forwarded by prepaid post or handed to the Minister and except in the case of personal service any such notice consent or writing shall be deemed to have been served on the day on which it would be delivered in the ordinary course of post.

Term

32. (1) Subject to the provisions of Clause 6(3) Clause 22 and this Clause, this Agreement shall expire on 31st December 2010.
- (2) The Company may, provided that it is not in default of its obligations under this Agreement, give notice to the Minister not later than 30th September 2010 of:
- (a) its desire to have the provisions of this Agreement extended for such period not exceeding 21 years as the Company may nominate in such notice; and
 - (b) its arrangements for the production of silicon metal and the marketing thereof during such period.
- (3) The Minister may, if he agrees with the Company's arrangements under paragraph (b) of subclause (2), extend the term of this Agreement accordingly.

Applicable Law

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

Guarantee

34. Notwithstanding any addition to or deletion or variation of the provisions of this Agreement or any time or other indulgence granted by the State to the Company whether or not notice thereof is given to the Guarantor by the State, the Guarantor hereby guarantees to the State the due performance by Barrack Silicon Pty. Ltd. of all its obligations to be performed hereunder PROVIDED THAT after the Company has completed construction of the silicon plant and commenced to produce silicon in commercial quantities the Minister may release the Guarantor from this guarantee where he considers such release will not be contrary to the interests of the State.

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

Schedule 2 — Variation Agreement

[s. 3]

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

THIS AGREEMENT is made this sixth day of June 1988 BETWEEN THE HONOURABLE PETER McCALLUM DOWDING, LL.B., M.L.A., Premier of the State of Western Australia, acting for and on behalf of the said State and its instrumentalities from time to time (hereinafter called “the State”) of the first part BARRACK SILICON PTY. LTD. a company incorporated in the State of Western Australia and having its registered office at 614 Newcastle Street, Leederville (hereinafter called “the Company” which term shall include its successors and permitted assigns) of the second part and BARRACK MINES LIMITED a company incorporated in the State of Western Australia and having its registered office at 614 Newcastle Street, Leederville (hereinafter called “the Guarantor”) of the third part.

WHEREAS:

- (a) on the 12th day of November 1987 the parties hereto entered into an agreement relating to the establishment of a plant for the manufacture of silicon which agreement was ratified by the *Silicon (Picton) Agreement Act 1987* and is hereinafter referred to as “the principal Agreement”;
- (b) the parties have agreed that the said plant shall be established at Kemerton in the said State in lieu of Picton as provided in the principal Agreement and desire to vary the principal Agreement for such purpose.

NOW THIS AGREEMENT WITNESSETH:

1. Subject to the context the words and expressions used in this Agreement have the same meanings respectively as they have in and for the purpose of the principal Agreement.
2. The provisions of this Agreement shall not come into operation until a Bill to approve and ratify this Agreement is passed by the Legislature of the said State and comes into operation as an Act.
3. The principal Agreement is hereby varied as follows —
 - (1) Clause 1 —
 - (a) by inserting, in the appropriate alphabetical positions, the following definitions —

- “approved project” means the project as described in the bound volume entitled ‘Project Description’ initialled by or on behalf of the Minister and the Company for the purpose of identification;
- “commissioning” means the earlier of —
- (a) 30 days after the second furnace assembly and its auxiliaries have been erected and are ready for operation; or
 - (b) completion of 2 consecutive days of operation of the second furnace at the following figures —
 - (i) Power consumption: Electric power consumption shall not be greater than 12,000 kWh/tonne of silicon metal tapped;
 - (ii) Production rate: The rate of silicon metal production shall not be less than an average of 1.5 tonnes/hour; and
 - (iii) Active power of furnace: The active power of the furnace shall not be less than 18MW; ”;
- (b) in the definition of “silicon plant”, by deleting “Picton” and substituting the following —
- “ Kemerton ”;
- (c) by substituting for the plan marked “A” referred to in the principal Agreement the plan marked “B” initialled by or on behalf of the parties hereto for the purpose of identification;
- (d) in the definition of “silicon plant site”, by deleting “Picton being the land hatched on the plan marked “A” ” and substituting the following —
- “ Kemerton being the land shown shaded on the plan marked “B” ”.

(2) Clause 5 —

by deleting Clause 5 and the clause heading thereto and substituting the following clause —

“ Implementation of approved project

5. The Company shall subject to and in accordance with the EP Act and any approvals and licences required under that Act implement the approved project in accordance with the terms thereof. ”.

(3) Clause 6 —

by deleting Clause 6 and the clause heading thereto and substituting the following clause —

“ Silicon plant site

6. (1) The State shall cause the silicon plant site to be granted free from encumbrances and vacant possession thereof to be given to the Company at such time and on such terms as agreed between the parties.
- (2) The State shall to the extent reasonably necessary for the purposes of this Agreement allow the Company to have access to the silicon plant site prior to the grant thereof to the Company for the purpose of carrying out surveys and preparatory building works and otherwise as agreed by the Minister.
- (3) If the Company has not proceeded with the implementation of the approved project in accordance with the terms thereof by 31 March 1990, or if this Agreement ceases or determines pursuant to Clause 22 on or before that date as a consequence of a matter mentioned in paragraph (a)(ii) or paragraph (b) of Clause 22(1) without the Company having completed the construction of the silicon plant or as a consequence of a failure by the Company to proceed with the implementation of the approved project in accordance with the terms thereof the Company shall —
 - (a) pay to the State on demand by the State an amount equal to the value of the silicon plant site

(but not including the value of any buildings or other improvements erected thereon); or

- (b) alternatively if the Company so desires and the State agrees, transfer the silicon plant site and all buildings and other improvements erected thereon to the State free from encumbrances and free of cost to the State. ”.

(4) By inserting after Clause 6 the following clauses —

- “ 6A. The State in recognition of the decentralised location of the project and the change in the silicon plant site from Picton to Kemerton has advanced to the Company by way of loan the sum of \$8,000,000 which amount (without interest) shall be repaid by the Company to the State upon demand by the State if the Company has not proceeded to implement the approved project in accordance with the terms thereof by 30 September 1989 (or such later date as may be agreed) or if this Agreement ceases or determines as a consequence of a matter mentioned in paragraph (a)(ii) or paragraph (b) of Clause 22(1) on or before 30 September 1989 but otherwise the said loan shall be repaid by the Company to the State by instalments of \$400,000 free of all deductions for every fiscal year in which in excess of 20,000 tonnes of silicon metal is manufactured by the Company at the silicon plant after 30 June 1990 until the said loan is repaid in full. After each fiscal year in which the said minimum quantity of silicon metal has been manufactured as aforesaid, the Company shall forthwith give to the State notice of that fact and the Company shall within 30 days after the date of that notice pay to the State the said instalment in reduction of the said loan.
- 6B. In the event that commissioning of the silicon plant’s electric furnaces does not occur by 30 June 1989 or such later date as may be agreed, the State, except where or to the extent to which it can reasonably demonstrate that the delay in commissioning the said furnaces by that date or any delay in commissioning the said furnaces thereafter was due to lack of diligence on the part of the Company or arose otherwise than as a specific result of the transfer of the project from

Picton to Kemerton or of a matter associated with the silicon plant site at Kemerton but which would not have been associated with the proposed site at Picton, shall pay to the Company the sum of \$1,100,000 per month (or pro rata for any part of a month) in respect of the period from 1 July 1989 or such later date as may be agreed to whichever shall first occur of the commissioning of the said furnaces or 31 December 1989. Payment of a monthly amount or a pro rated monthly amount under this Clause shall be made at the end of the month in respect of which it is payable and without any deduction or set off whatsoever. ”.

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

“ 7A. The State in recognition of the expected economic benefits to the State resulting from maximum utilisation of the installed capacity of the silicon plant, shall pay to the Company a production grant by way of incentive of \$400,000 for every fiscal year in which in excess of 20,000 tonnes of silicon metal is manufactured by the Company at the silicon plant after 30 June 1990 providing that the grant shall only be paid in respect of a maximum of 20 such fiscal years. The said grant shall be paid by the State to the Company free from all deductions within 30 days of the receipt by the State of the notice from the Company under Clause 6A. The State may elect by notice to the Company within 14 days of receipt of the said notice to apply the said grant by way of offset against the outstanding balance of the loan under Clause 6A and the Company shall thereupon be relieved from its obligation to pay the instalment then payable in reduction of the said loan. ”.

(6) Clause 8 —

by deleting Clause 8 and substituting the following clause —

“ 8. (1) If the Company at any time during the continuance of this Agreement desires to significantly modify expand or otherwise vary its activities carried on pursuant to this Agreement beyond those specified in the approved project or in any approved proposals or to mine minerals from the Mining Lease or the Prospecting

Licences in addition to silica or to mine silica for the project from other than the Mining Lease or Prospecting Licences it shall give notice of such desire to the Minister and if required by the Minister within 2 months of the giving of such notice shall submit to the Minister within such period as the Minister may reasonably allow detailed proposals in respect of all matters covered by such notice and such other matters, including matters relating to any of the following, namely —

- (a) the mining of silica;
- (b) the silicon plant;
- (c) manning requirements and manning recruitment policies;
- (d) transport;
- (e) power supply;
- (f) water supply;
- (g) use of local labour professional services manufacturers suppliers contractors and materials and measures to be taken with respect to the engagement and training of employees by the Company, its agents and contractors;
- (h) an environmental management programme as to measures to be taken, in respect of the Company's activities under this Agreement, for the protection and management of the environment;
- (i) elements of the project which the Company proposes to be sourced from outside Australia and the reason therefor; and
- (j) where minerals other than silica are the subject of the proposals, specifying those other minerals and the proposed mining methods,

and other relevant information as the Minister may require.

- (2) If the Minister does not require the Company to submit proposals under subclause (1) the Company may, subject to compliance with all applicable laws, proceed with the modification, expansion or variation of its activities carried on pursuant to this Agreement.
- (3) Subject to the EP Act, in respect of proposals pursuant to subclause (1) the Minister shall —
 - (a) approve of the said proposals either wholly or in part without qualification or reservation; or
 - (b) defer consideration of or decision upon the same until such time as the Company submits a further proposal or proposals in respect of some other of the matters mentioned in subclause (1) not covered by the said proposals; or
 - (c) require as a condition precedent to the giving of his approval of the said proposals that the Company makes such alteration thereto or complies with such conditions in respect thereto as he (having regard to the circumstances including the overall development of and the 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 disclose his reasons for such conditions,

PROVIDED ALWAYS that any approval or decision of the Minister under this clause shall be in accordance with the conditions and procedures, if any, to which implementation of the project is made subject pursuant to the EP Act and such approval or decision shall if the case so requires incorporate a requirement that the Company make such alterations to the said proposals as may be necessary to make them accord with those conditions or procedures.

- (4) The Minister shall within two months after service on him of an authority under section 45(7) of the EP Act if applicable and otherwise within two months after receipt of the said proposals pursuant to subclause (1)

give notice to the Company of his decision in respect to the said proposals.

- (5) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of subclause (3) the Minister shall afford the Company full opportunity to consult with him and should it so desire to submit new or revised proposals either generally or in respect to some particular matter.
- (6) If the decision of the Minister is as mentioned in either of paragraphs (b) or (c) of subclause (3) and the Company considers that the decision is unreasonable the Company within two months after receipt of the notice mentioned in subclause (4) may elect to refer to arbitration in the manner hereinafter provided the question of the reasonableness of the decision PROVIDED THAT any requirement of the Minister pursuant to the proviso to subclause (3) shall not be referable to arbitration hereunder.
- (7) The Company may withdraw its proposals submitted pursuant to subclause (1) at any time before approval thereof or, where any decision of the Minister in respect thereof is referred to arbitration, within 3 months after the award by notice to the Minister that it shall not be proceeding with the proposed modification expansion or variation of its activities as so proposed in those proposals.
- (8) Subject to and in accordance with the EP Act and any approvals and licences required under that Act the Company shall implement the decision of the Minister or an award made on arbitration (where the proposals are not withdrawn) as the case may be in accordance with the terms thereof. ”.

(7) Clause 9 —

(a) subclause (1) —

- (i) by deleting “matters referred to in paragraph (h) of subclause (1) of Clause 5 and which are” and substituting the following —

“ matters relating to the environment which are referred to in the approved project or which are ”;

- (ii) by deleting “such approved proposals” and substituting the following —

“ the approved project or such approved proposals as the case may be ”;

(b) subclause (2) —

by deleting “the date when the Company’s proposals are approved” and substituting the following —

“ 1 July 1988 ”;

(c) subclause (3) —

- (i) by inserting after “additions to” the following —

“ the approved project or ”;

- (ii) by inserting after “addressed in” the following —

“ the approved project or ”;

(d) subclause (5) —

by deleting “Clause 5 and Clause 6 (other than subclauses (6) and (7))” and substituting the following —

“ subclauses (3), (4), (5) and (6) of Clause 8 ”.

(8) By inserting after Clause 17 the following clause —

“ 17A. (1) Subject to subclause (2) the design, construction, commissioning and operation of the silicon plant shall comply with the lawful requirements of and all regulations and bylaws of all relevant local and other

authorities of the State and the Commonwealth and all Acts of the State and Commonwealth applicable thereto.

- (2) Notwithstanding the provisions of any Act, regulation, bylaw, interim development order or town planning scheme the Company may proceed with the development of the silicon plant site and the construction and commissioning of the silicon plant in accordance with the approved project. ”.

(9) Clause 22 —

by inserting after subclause (4) the following subclause —

- “ (5) Without prejudice to the rights of the State under the preceding subclauses the State may upon any failure by the Company to make payment to the State under Clause 6(3) or under Clause 6A give notice to the Company specifying the failure and if such failure is not remedied by the Company within 14 days after the giving of such notice the State may by further notice to the Company determine this Agreement. ”.

(10) Clause 23 —

by deleting “all moneys” and substituting the following —

- “ any moneys due or falling due pursuant to Clause 6(3) or Clause 6A and all other monies ”.

(11) Clause 28 —

subclause (1) paragraph (c) —

- (a) by deleting “transfer” and substituting the following —

“ grant ”;

- (b) by deleting “subclause (9) of”.

(12) Clause 32 subclause (1) —

by deleting “Clause 6(3).”.

4. The Guarantor hereby consents to this Agreement.

Notes

- ¹ This is a compilation of the *Silicon (Kemerton) Agreement Act 1987* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Silicon (Picton) Agreement Act 1987</i> ²	93 of 1987	16 Dec 1987	16 Dec 1987 (see s. 2)
<i>Silicon (Picton) Agreement Amendment Act 1988</i>	3 of 1988	30 Jun 1988	30 Jun 1988 (see s. 2)
<i>Local Government (Consequential Amendments) Act 1996</i> s. 4	14 of 1996	28 Jun 1996	1 Jul 1996 (see s. 2)
Reprint 1: The Silicon (Kemerton) Agreement Act 1987 as at 24 Apr 2003 (includes amendments listed above) (correction in <i>Gazette</i> 21 Jul 2006 p. 2652)			
<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>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)

- ² Short title changed to the *Silicon (Kemerton) Agreement Act 1987* (see note under s. 1).

Defined terms

[This is a list of terms defined and the provisions where they are defined.

The list is not part of the law.]

Defined term	Provision(s)
silicon plant site	3
the Agreement	3
the Variation Agreement	3