

ORD RIVER HYDRO ENERGY PROJECT AGREEMENT ACT 1994

No. 76 of 1994

AN ACT to ratify, and authorize the implementation of, an agreement between the State and Pacific Hydro Group Two Pty. Ltd., Pacific Hydro Group Three Pty. Ltd. and Pacific Hydro Group Four Pty. Ltd. and Pacific Hydro Limited in relation to the development of a hydro electric power station at Lake Argyle and transmission lines to the Argyle diamond mine and Kununurra.

[Assented to 13 December 1994.]

The Parliament of Western Australia enacts as follows:

Short title

1. This Act may be cited as the *Ord River Hydro Energy Project Agreement Act 1994*.

Commencement

2. This Act comes into operation on the day on which it receives the Royal Assent.

Interpretation

3. In this Act, unless the contrary intention appears —

“**the Agreement**” means the Ord River Hydro Energy Project Agreement, a copy of which is set out in Schedule 1, and includes the Agreement as varied from time to time in accordance with its provisions.

Agreement ratified and implementation authorized

4. (1) The Agreement is ratified.

(2) The implementation of the Agreement is authorized.

(3) Without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Agreement operates and takes effect despite any other Act or law.

SCHEDULE 1

[Section 3]

ORD RIVER HYDRO ENERGY PROJECT AGREEMENT

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THIS AGREEMENT is made the 26th day of October 1994

B E T W E E N:

THE HONOURABLE RICHARD FAIRFAX COURT, B.Com., 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 **PACIFIC HYDRO GROUP TWO PTY. LTD.** ACN 061 436 815 a company incorporated in the State of Victoria, **PACIFIC HYDRO GROUP THREE PTY. LTD.** ACN 064 817 438 a company incorporated in the Australian Capital Territory and **PACIFIC HYDRO GROUP FOUR PTY. LTD.** ACN 064 817 518 a company incorporated in the Australian Capital Territory each of the companies has its principal office at Suite 4, 1st Floor, 651 Canterbury Road, Surrey Hills, Victoria (hereinafter collectively called "the Partnership" in which term shall be included the successors and permitted assigns of the parties comprising the Partnership) of the second part and **PACIFIC HYDRO LIMITED** ACN 057 279 508 a company incorporated in the State of Victoria and having its principal office at Suite 4, 1st Floor, 651 Canterbury Road, Surrey Hills aforesaid (hereinafter called "the Guarantor") of the third part.

W H E R E A S:

- (a) for the purpose of providing electricity to the operations carried on pursuant to the Argyle Diamond Agreement (as hereinafter defined) and the Argyle Tourist Village and facilitating access by the State Energy Commission of Western Australia to electricity the Partnership intends to develop a hydro electric power station of at least 30 megawatts at Lake Argyle, a 132 kilovolt high voltage transmission line from the power station to the Argyle diamond mine and a 132 kilovolt transmission line from the power station to Kununurra;
- (b) the State, for the purpose of promoting employment opportunity and industrial development in Western Australia, has agreed to assist the establishment and operation of the said works upon and subject to the terms of this Agreement.

NOW THIS AGREEMENT WITNESSES:

Definitions

1. In this Agreement subject to the context -

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

"approved proposal" means a proposal approved or deemed to be approved under this Agreement;

"Argyle Diamond Agreement" means the Agreement (as amended from time to time) ratified by the Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981;

"Argyle facilities" means a system for the transmission of electricity from the power station to the Argyle mining area, as defined in the Argyle Diamond Agreement, by way of a 132 kilovolt high voltage transmission line and transformation to mine distribution voltage;

"Clause" means a clause of this Agreement;

"Commonwealth" means the Commonwealth of Australia and includes the Government for the time being thereof;

"Electricity Act" means the Electricity Act 1945;

"EP Act" means the Environmental Protection Act 1986;

"Kununurra facilities" means a system for the transmission of electricity from the power station to Kununurra by way of a 132 kilovolt high voltage transmission line and transformation to State Energy Commission distribution voltage;

"Land Act" means the Land Act 1933;

"laws relating to traditional usage" means laws applicable from time to time in Western Australia in respect of rights or entitlements to or interests in land or waters which rights, entitlements or interests are acknowledged, observed or exercisable by Aboriginal persons (whether communally or individually) in accordance with Aboriginal traditions, observances, customs or beliefs;

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

"Minister" means the Minister in the Government of the State for the time being responsible 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 Partnership and includes the successors in office of the Minister;

"Minister for Lands" means the Minister in the Government of the State for the time being responsible for the administration of the Land Act;

"month" means calendar month;

"notice" means notice in writing;

"Partnership's workforce" means the persons (and the dependents of those persons) engaged whether as employees, agents or contractors in the construction and operation of the power station, the Argyle facilities and the Kununurra facilities;

"person" or "persons" includes bodies corporate;

"power station" means a hydro electric power station with a nominal total installed capacity of at least 30 megawatts;

"power station site" means the land for the site for the power station agreed between the Minister and the Partnership pursuant to Clause 6;

"private roads" means the roads referred to in subclause (1) of Clause 15 and any other roads constructed by the Partnership in accordance with an approved proposal or agreed by the parties to be a private road for the purposes of this Agreement;

"project" means the power station, the Argyle facilities and the Kununurra facilities;

"public road" means a road as defined by the Road Traffic Act 1974;

"Rights in Water and Irrigation Act" means the Rights in Water and Irrigation Act 1914;

"Public Works Act" means the Public Works Act 1902;

"said State" means the State of Western Australia;

"State Energy Commission" means The State Energy Commission of Western Australia as described in section 7 of the State Energy Commission Act 1979 and includes any successor of the State Energy Commission engaged in the supply of electrical power;

"State Energy Commission Act" means 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;

"Water Authority" means the Water Authority of Western Australia established pursuant to section 4 of the Water Authority Act;

"Water Authority Act" means the Water Authority Act 1984;

"Water Supply Agreement" means an agreement between the Water Authority and the Partnership for the provision of water to the power station which is approved by the Minister for the purpose of Clause 31.

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 27 to extend any period or date shall be without prejudice to the power of the Minister under Clause 27;
- (c) clause headings do not affect the interpretation or construction;
- (d) words in the singular shall include the plural and words in the plural shall include the singular according to the requirements of the context;
- (e) one gender includes the other genders; and
- (f) 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.

Initial obligation of the State

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 31 December 1994 or such later date as may be agreed between the parties hereto.

Ratification and operation

4. (1) The provisions of this Agreement other than this Clause and Clauses 1, 2 and 3 shall not come into operation unless and until the Bill referred to in Clause 3 has been passed as an Act before 31 December 1994 or such later date (if any) as the parties hereto agree upon.
- (2) If before 31 December 1994 or such later agreed date 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 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.

Initial obligations of the Partnership

5. (1) The Partnership shall continue its field and office engineering, environmental, market and finance studies and other matters necessary for the purposes of Clause 6 and to enable it to finalise and to submit to the Minister the detailed proposals referred to in Clause 7.
- (2) The Partnership shall keep the State fully informed in writing quarterly as to the progress and results of its activities under subclause (1).
- (3) The Partnership shall co-operate with the State and consult with the representatives or officers of the State regarding matters referred to in subclauses (1) and (2) and any other relevant studies in relation to those subclauses that the Minister may wish to undertake.
- (4) The State shall subject to the adequate protection of the environment (including flora and fauna) and the land affected (including improvements thereon) and laws relating to traditional usage allow the Partnership to enter upon Crown lands (including land the subject of a pastoral lease) to the extent reasonably necessary for the purpose of undertaking its obligations under this Clause.

Lands for works

6. (1) As soon as practicable during its studies under Clause 5, and from time to time during those studies as required by either of the Partnership or the Minister, the Partnership shall meet with the Minister to seek agreement on the power station site and on routes for the Argyle facilities and the Kununurra facilities and the lands required for those facilities. In seeking such agreement, regard shall be had to achieving a balance between engineering matters including the costs of the works, the nature and use of any lands concerned and interests therein and the cost to both the Partnership and the State of acquiring the land.
- (2) Where the Minister and the Partnership propose to reach agreement on any such lands (which may include alternative lands), the Minister shall refer the lands proposed to the Minister for Lands and the Minister for Lands shall act in relation to any such reference in accordance with Part IA of the Land Act, and the provisions

of that Part shall apply to the reference, as if the reference were a proposal that the land be disposed of under that Act.

- (3) Forthwith after sections 27A to 27G of the Land Act have been complied with, the Minister for Lands shall advise the Minister whether he would or would not be prepared to dispose under the Land Act of the land the subject of the reference for the purposes of the power station site, the Argyle facilities or the Kununurra facilities as the case may be.
- (4) If the advice of the Minister for Lands pursuant to subclause (3) is that he would not be prepared to dispose of any land the subject of a reference under subclause (2) then the Partnership and the Minister shall seek to agree on other land for the purposes of this Agreement. The provisions of subclauses (1), (2), and (3) and this subclause shall apply to any such other land proposed to be agreed between the Partnership and the Minister.
- (5) Where pursuant to subclause (3) or (4) the Minister for Lands has advised that he would be prepared to dispose of land under the Land Act in respect of a proposed route, the power station site, the Argyle facilities or the Kununurra facilities, section 7A of that Act shall not apply to any application by the Partnership pursuant to Clause 11 for that land and section 33E of the Public Works Act shall not apply to a subsequent setting apart or taking pursuant to the Public Works Act or this Agreement of that land.
- (6) Notwithstanding anything herein contained if the power station site and the routes for the Argyle facilities and the Kununurra facilities and the lands required for those facilities have not been agreed between the Minister and the Partnership by 31 March 1995 then unless the Minister and the Partnership otherwise agree this Agreement shall on that date cease and determine and no party hereto shall have any claim against any other party with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under this Agreement.

Partnership to submit proposals

7. (1) Subject to and in accordance with the EP Act, the laws relating to traditional usage and the provisions of this Agreement the Partnership shall within 6 months of the date of agreement on the lands for the project pursuant to Clause 6 submit to the Minister to the fullest extent reasonably practicable its detailed proposals (including plans where practicable and specifications where reasonably required by the Minister and any other details normally required by the local authority in which area any of the

works are to be situated and by the State Energy Commission in relation to electricity generating or transmission works) with respect to the establishment and operation of the project and shall include the location in accordance with Clause 6, area, lay-out, design, quantities, materials and 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 power station site and routes for the electricity transmission lines and any leases, licences or easements of land required from the State;
- (b) the power station and ancillary works and facilities;
- (c) the spillway weir;
- (d) the stilling pond;
- (e) the switching station;
- (f) the Argyle facilities;
- (g) the Kununurra facilities;
- (h) the provision of electricity to the Argyle Tourist Village;
- (i) interconnection facilities;
- (j) roads serving the power station, the Argyle facilities and the Kununurra facilities;
- (k) accommodation and ancillary facilities for the Partnership's workforce on or in the vicinity of the power station site and housing or other appropriate accommodation and facilities generally for the Partnership's workforce;
- (l) water supply;
- (m) any other works, services or facilities desired by the Partnership;
- (n) use of local labour professional services manufacturers suppliers contractors and materials; and
- (o) an environmental management programme as to measures to be taken in respect of the Partnership's activities under this Agreement for rehabilitation and the protection and management of the environment.

Order of proposals

- (2) Each of 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 (c) of subclause (1).

Use of existing infrastructure

- (3) The proposals relating to any of the matters mentioned in subclause (1) of this Clause 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 other than the power station, the Argyle facilities and the Kununurra facilities provide for the use by the Partnership upon reasonable terms and conditions of any existing facilities of such kind.

Additional submissions

- (4) At the time when the Partnership submits the said proposals it shall submit to the Minister details of any services (including any elements of the project investigations design and management) and any works materials plant equipment and supplies that it proposes to consider obtaining from or having carried out or permitting to be obtained from or carried out outside Australia together with its reasons therefor and shall, if required by the Minister, consult with the Minister with respect thereto.

Consideration of proposals

8. (1) Subject to the EP Act and laws relating to traditional usage, in respect of each proposal pursuant to subclause (1) of Clause 7 the Minister shall -
- (a) approve of the proposal without qualification or reservation; or
 - (b) defer consideration of or decision upon the same until such time as the Partnership submits a further proposal or proposals in respect of some other of the matters mentioned in subclause (1) of Clause 7 not covered by the said proposal; or
 - (c) require as a condition precedent to the giving of his approval to the said proposal that the Partnership

makes such alteration thereto or comply 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 Partnership 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 alterations or conditions,

PROVIDED ALWAYS that where implementation of any proposals hereunder have been approved pursuant to the EP Act subject to conditions or procedures, any approval or decision of the Minister under this Clause shall if the case so requires incorporate a requirement that the Partnership make such alterations to the proposals as may be necessary to make them accord with those conditions or procedures.

Advice of Minister's decision

- (2) The Minister shall within two months after receipt of proposals pursuant to subclause (1) of Clause 7 or where the proposals are to be assessed under section 40(1)(b) of the EP Act or where laws relating to traditional usage apply then within two months after service on him of an authority under section 45(7) of the EP Act or satisfaction of the requirements under laws relating to traditional usage (as the case may be) give notice to the Partnership of his decision in respect to the proposals.

Consultation with Minister

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

Minister's decision subject to arbitration

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

- (5) An award made on an arbitration pursuant to subclause (4) shall have force and effect as follows -
- (a) if by the award the dispute is decided against the Partnership then unless the Partnership within 3 months after delivery of the award gives notice to the Minister of its acceptance of the award this Agreement shall on the expiration of that period of 3 months cease and determine and neither the State nor the Partnership shall have any claim against the other of them with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under this Agreement; or
 - (b) if by the award the dispute is decided in favour of the Partnership the decision shall take effect as (and be deemed to be) a notice by the Minister that he is so satisfied with and approves the matter or matters the subject of the arbitration.

Effect of non-approval of proposals

- (6) Notwithstanding that under subclause (1) any proposals of the Partnership are approved by the Minister or deemed to be approved as a consequence of an arbitration award, unless each and every such proposal and matter is so approved or deemed to be approved within 12 months of the date for submission of proposals pursuant to subclause (1) of Clause 7 or by such extended date or period if any as the Partnership shall be granted or be entitled to pursuant to the provisions of this Agreement then the Minister may give to the Partnership 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 deemed to be approved this Agreement shall cease and determine subject however to the provisions of Clause 29.

Implementation of proposals

- (7) Subject to and in accordance with the EP Act and any approvals and licences required under that Act and laws relating to traditional usage the Partnership shall implement the approved proposals in accordance with the terms thereof so that each of the power station, the Argyle facilities and the Kununurra facilities is constructed within 2 years of the final approval of the proposals. For the purpose of this subclause, the power station, the Argyle facilities and the Kununurra facilities shall be deemed to be constructed when they are able to be used for the purposes for which they were built.

Extension or termination of Agreement

9. (1) The periods set forth in subclause (1) of Clause 7 and subclauses (6) and (7) of Clause 8 will be extended (in addition to any extension granted pursuant to Clause 26 or 27) upon request of either the Partnership or the State for such reasonable period or periods as may be necessary from time to time to enable either of the parties hereto to comply with laws relating to traditional usage.
- (2) If either the Partnership or the State considers the development of the project should not proceed having regard to matters arising out of laws relating to traditional usage or by reason of claims or objections lodged under laws relating to traditional usage, that party shall consult with the other in regard thereto. Subject to such consultation, either party may at any time before the approval or determination of the proposals required pursuant to subclause (1) of Clause 7 determine this Agreement by notice to the other whereupon this Agreement shall cease and determine and no party hereto shall have any claim against any other party with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under this Agreement.

Additional proposals

10. (1) If the Partnership at any time during the continuance of this Agreement desires to significantly modify expand or otherwise vary its activities carried on pursuant to any approved proposals it shall give notice of such desire to the Minister and within 2 months thereafter shall submit to the Minister detailed proposals in respect of all matters covered by such notice and such of the other matters mentioned in paragraphs (a) to (o) of subclause (1) of Clause 7 as the Minister may require.
- (2) The provisions of Clause 7 and Clause 8 (other than subclauses (5), (6) and (7) of Clause 8) shall mutatis mutandis apply to detailed proposals submitted pursuant to this Clause with the proviso that the Partnership may withdraw such proposals 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 same. Subject to and in accordance with the EP Act and any approvals and licences required under that Act and laws relating to traditional usage the Partnership shall implement approved proposals pursuant to this Clause in accordance with the terms thereof.

Land tenures

11. (1) On application made by the Partnership, not later than 3 months after all its proposals submitted pursuant to subclause (1) of Clause 7 have been approved or deemed to have been approved and the Partnership has complied with the provisions of subclause (4) of Clause 7, the State shall in accordance with the approved proposals grant to the Partnership, or arrange to have the appropriate authority or other interested instrumentality of the State grant, at reasonable rentals or fees or for other reasonable consideration and for such periods (not exceeding 27 years with one automatic extension for a period of 15 years at the option of the Partnership) and on such terms and conditions as shall be reasonable having regard to the requirements of the Partnership -
- (a) a lease of the power station site;
 - (b) leases or easements for access roads to the Partnership's works under this Agreement; and
 - (c) other leases licences or easements as appropriate in respect of the project

under and, except as otherwise provided in this Agreement, subject to the Land Act (as modified by this Agreement) and any such lease, licence or easement may be granted notwithstanding that the survey in respect thereof has not been completed but subject to such corrections to accord with the survey when completed at the Partnership's expense.

Modification of Land Act

- (2) For the purpose of this Agreement in respect of any land to which subclause (1) applies the Land Act shall be deemed to be modified by -
- (a) the substitution for subsection (2) of section 45A of the following subsection-
 - "(2) Upon the Minister signifying approval pursuant to subsection (1) of this section in respect of any such land the same may subject to this section be leased.";
 - (b) the deletion of the proviso to section 116;
 - (c) the deletion of section 135;

- (d) the deletion of section 143;
- (e) the inclusion of a power to grant occupancy rights over land on such terms and conditions as the Minister for Lands may determine;
- (f) the inclusion of a power to grant leases or licences for terms or periods and on such terms and conditions (including renewal rights) and in forms consistent with the provisions of this Agreement in lieu of the terms or periods, the terms and conditions and the forms referred to in the Land Act.

The provisions of this subclause shall not operate so as to prejudice the rights of the State to determine any lease licence or other right or title in accordance with the other provisions of this Agreement.

Stone sand clay and gravel

- (3) The State shall in accordance with approved proposals grant to the Partnership a mining lease or mining leases for the obtaining of stone sand clay and gravel for the construction of the project such mining lease or mining leases to be granted under and, except as otherwise provided herein, subject to the Mining Act 1978 but limited in term to a reasonable period required for construction of the project and rehabilitation in accordance with the approved proposals of the leased areas. No royalty shall be payable under the Mining Act 1978 in respect of stone sand clay and gravel obtained from any such mining lease.

Use of local labour professional services and materials

12. (1) The Partnership shall, for the purposes of this Agreement -
- (a) except in those cases where the Partnership can demonstrate it is impracticable so to do, use labour available within Western Australia or if such labour is not available then, except as aforesaid, use labour otherwise available within Australia;
 - (b) as far as it is reasonable and economically practicable so to do, use the services of engineers surveyors architects and other professional consultants experts and specialists, 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 practicable as aforesaid, 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 so to do, 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 Partnership shall in every contract entered into with a third party for the supply of services labour works materials plant equipment or supplies for the purposes of this Agreement require 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 Partnership concerning such third party's implementation of that condition.
 - (3) The Partnership 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 Partnership pursuant to subclause (2) during that month or longer period as the case may be PROVIDED THAT 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 Partnership 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.

Protection and management of the environment

13. (1) The Partnership shall in respect of the matters referred to in paragraph (o) of subclause (1) of Clause 7 and which are the subject of approved proposals, carry out a continuous programme including monitoring 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 and shall as and when reasonably required by the Minister from time to time submit to the Minister a detailed report thereon.
- (2) Whenever as a result of its activities pursuant to subclause (1) or otherwise information becomes available to the Partnership which in order to more effectively rehabilitate, protect or manage the environment may necessitate or could require any changes or additions to any approved proposals or require matters not addressed in any such proposals to be addressed the Partnership shall forthwith notify the Minister thereof and with such notification shall submit a detailed report thereon.
- (3) The Minister may within 2 months of the receipt of a detailed report pursuant to subclauses (1) or (2) notify the Partnership 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 reasonable matters as the Minister may require in connection therewith.
- (4) The Partnership shall within 2 months of receipt of a notice given pursuant to subclause (3) submit to the Minister additional detailed proposals as required and the provisions of subclauses (1), (2), (3) and (4) of Clause 8 shall mutatis mutandis apply.
- (5) Subject to and in accordance with the EP Act and any approvals and licences required under that Act the Partnership shall implement the decision of the Minister or any award on arbitration as the case may be in accordance with the terms thereof.

Electricity Act

14. For the purpose of this Agreement in respect of the construction and operation of the power station, the Argyle facilities and the

Kununurra facilities the Electricity Act shall be deemed to be modified by -

- (a) the deletion of sections 7, 8, 12, 13(4), (5) and (6), 17, 32(1) (a), (d) and (l) and 43;
- (b) the deletion of "Commission" wherever it occurs in sections 13(1), (2) and (3), 14, 16 and 20 and the substitution in each case of the following -

"Minister";

- (c) in section 28 -

- (i) by inserting after "this Act" in paragraph (a) the following -

"as modified by the Agreement (as amended from time to time) ratified by the Ord River Hydro Energy Project Agreement Act 1994"; and

- (ii) by inserting after "the Act" the following -

"as modified as aforesaid"; and

- (d) the addition at the end of section 33(1) of the following proviso -

"PROVIDED THAT to the extent of any inconsistency between approved proposals under the agreement (as amended from time to time) ratified by the Ord River Hydro Energy Project Agreement Act 1994 and any by-laws made pursuant to this subsection, the approved proposals will prevail."

Roads - Private roads

- 15. (1) The Partnership shall -

- (a) be responsible for the cost of the construction and maintenance of all private roads which shall be used in its activities hereunder;
- (b) at its own cost erect signposts and take other steps that may be reasonable in the circumstances to prevent any persons and vehicles other than those engaged upon the Partnership's activities and its invitees and licensees from using the private roads; and
- (c) at any place where any private roads are constructed by the Partnership so as to cross any railways or public roads provide at its cost such reasonable

protection and signposting as may be required by the Commissioner of Main Roads or the Railways Commission as the case may be.

Maintenance of public roads

- (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 Partnership for the purposes of this Agreement 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 Partnership's activities hereunder the Partnership or any person engaged by the Partnership uses or wishes to use a public road (whether referred to in subclause (2) or otherwise) which is inadequate for the purpose, or any use by the Partnership or any person engaged by the Partnership of any public road results in excessive damage to or deterioration thereof (other than fair wear and tear) the Partnership shall pay to the State or the local authority as the case may require 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 such public road by others.

Acquisition of private roads

- (4) Where a road constructed by the Partnership for its own use is subsequently required for public use, the State may, after consultation with the Partnership and so long as resumption thereof shall not unduly prejudice or interfere with the activities of the Partnership under this Agreement, resume and dedicate such road as a public road. Upon any such resumption the State shall pay to the Partnership such amount as is reasonable.

Water

16. The water requirements of the Partnership for its operations under this Agreement shall be obtained in accordance with the provisions of the Water Authority Act 1984 or other relevant Act.

Sales to State Energy Commission

17. The Partnership is empowered to enter into any arrangements for the sale of electrical power to the State Energy Commission as

may be agreed between the Partnership and the State Energy Commission.

Training levy exemption

18. The provisions of the Building and Construction Industry Training Levy Act 1990 and the Building and Construction Industry Training Fund and Levy Collection Act 1990 shall have no application to the Partnership when acting pursuant to and in accordance with the provisions of this Agreement.

Zoning

19. The State shall ensure after consultation with the relevant local authority that the power station site and any other lands the subject of any lease, licence or easement granted to the Partnership under this Agreement shall be and remain zoned for use or otherwise protected during the currency of this Agreement so that the activities of the Partnership 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 activities are contrary to any zoning by-law regulation or order.

Rating

20. (1) The State shall ensure that notwithstanding the provisions of any Act or anything done or purported to be done under any Act the valuation of the lands the subject of any lease licence or easement granted pursuant to this Agreement (except any parts of such lands on which accommodation units or housing for the Partnership's workforce is erected or which is occupied in connection with such accommodation units or housing and except as to any part upon which there stands any improvements that are used in connection with a commercial undertaking not directly related to the activities carried out by the Partnership pursuant to approved proposals) shall for rating purposes under the Local Government Act 1960, be deemed to be on the unimproved value thereof and no such lands shall be subject to any discriminatory rate.
- (2) It is hereby declared and agreed that the provisions of section 533B of the Local Government Act 1960 shall not apply to any lands the subject of this Agreement.

No discriminatory rates

21. Except as provided in this Agreement the State shall not impose, nor shall it permit or authorise any of its agencies or instrumentalities or any local or other authority of the State to impose discriminatory taxes rates or charges of any nature

whatsoever on or in respect of the titles property or other assets products materials or services used or produced by or through the activities of the Partnership in the conduct of its business hereunder nor will the State take or permit to be taken by any such State authority any other discriminatory action which would deprive the Partnership of full enjoyment of the rights granted and intended to be granted under this Agreement.

No resumption

22. Subject to the performance by the Partnership of its obligations under this Agreement the State shall not during the currency of this Agreement without the consent of the Partnership resume nor suffer nor permit to be resumed by any State instrumentality or by any local or other authority of the State any of the works installations plant equipment or other property for the time being belonging to the Partnership and the subject of or used for the purpose of this Agreement AND without the consent of the Partnership (which shall not be unreasonably withheld) the State shall not create or grant or permit or suffer to be created or granted by any instrumentality or authority of the State as aforesaid any road right-of-way water right or easement of any nature or kind whatsoever over or in respect of the power station site and ancillary works and facilities which may unduly prejudice or interfere with the Partnership's activities under this Agreement.

Resumption for the purposes of this Agreement

23. (1) The State may as and for a public work under the Public Works Act, resume any land required for the power station site, the Argyle facilities and the Kununurra facilities in accordance with approved proposals and notwithstanding any other provisions of that Act may grant leases licenses or easements of that land to the Partnership and the provisions of subsections (2) to (7) inclusive of section 17 and section 17A of that Act shall not apply to or in respect of that land or the resumption thereof. The Partnership shall pay to the State on demand the costs of and incidental to any land resumed at the request of and on behalf of the Partnership except that the State shall pay any compensation payable pursuant to, and the costs incurred by it in connection with, the Land (Titles and Traditional Usage) Act 1993.
- (2) For the purposes of this Agreement, and in the Public Works Act, when construed for the purposes of this Agreement, a reference to "land" shall be read as extending to any land, or to any portion of any land, or to the subsoil, surface or airspace relating thereto and to any estate, right, title, easement, lease, licence, privilege, or other interest, in, over, under, affecting, or in connection with that land or any portion, stratum or other specified sector of that land.

Assignment

24. (1) Subject to the provisions of this Clause the Partnership may at any time with the consent of the Minister assign mortgage charge sublet or dispose of to any other company or person the whole or any part of the rights of the Partnership hereunder (including its rights to or as the holders of any lease licence or easement) and of the obligations of the Partnership hereunder subject however in the case of an assignment subletting or disposition to the assignee sublessee 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 observe and perform the provisions hereof on the part of the Partnership 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 Partnership 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 and in any lease licence or easement the subject of an assignment mortgage subletting or disposition under subclause (1) PROVIDED THAT the Minister may agree to release the Partnership from such liability where the Minister considers such release will not be contrary to the interests of the State.
- (3) Notwithstanding the provisions of the Land Act and the Transfer of Land Act 1893, insofar as the same or any of them may apply -
- (a) no assignment mortgage charge sublease or disposition made or given pursuant to this Clause during the currency of this Agreement of or over any lease licence or easement granted under or pursuant to this Agreement by the Partnership or any assignee sublessee or disponee who has executed and is for the time being bound by deed of covenant made pursuant to this Clause; and
- (b) no transfer assignment mortgage or sublease made or given during the currency of the Agreement in exercise of any power contained in any such mortgage or charge
- shall require any approval or consent other than such consent as may be necessary under this Clause.

Variation

25. (1) The Partnership and the State 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.

Force majeure

26. This Agreement shall be deemed to be made subject to any delays in the performance of the obligations under this Agreement and to the temporary suspension of continuing obligations under this Agreement that may be caused by or arise from circumstances beyond the power and control of the party responsible for the performance of those obligations including without limiting the generality of the foregoing delays or any such temporary suspension as aforesaid caused by or arising from act of God force majeure earthquakes floods storms tempest washaways fire (unless caused by the actual fault or privity of the party responsible for such performance) act of war act of public enemies riots civil commotions strikes lockouts stoppages restraint of labour or other similar acts (whether partial or general) acts or omissions of the Commonwealth shortages of labour or essential materials reasonable failure to secure contractors delays of contractors and factors due to overall world economic conditions or factors due to action taken by or on behalf of any government or governmental authority (other than the State or any authority of the State) 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

27. Notwithstanding any provision of this Agreement the Minister may at the request of the Partnership 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.

Determination of Agreement

28. (1) In any of the following events namely if -
- (a) (i) the Partnership makes default which the State considers material in the due performance or observance of any of the covenants or obligations of the Partnership in this Agreement or in any lease licence or easement granted or assigned under this Agreement on its part to be performed or observed; or
 - (ii) the Partnership abandons or repudiates this Agreement or its activities under this Agreement

and such default is not remedied or such activities resumed within a period of 180 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 mentioned in subclause (3); or

- (b) any of the parties comprising the Partnership 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 that party is assigned to an assignee approved by the Minister under Clause 24

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

- (2) The notice to be given by the State in terms of paragraph (a) 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 Partnership and all such assignees mortgagees chargees and disponees for the time being of the Partnership'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 24 whose name and address for service of notice has previously been notified to

the State by the Partnership or any such assignee mortgagee chargee or disponee.

- (3) (a) If the Partnership contests the alleged default abandonment or repudiation referred to in paragraph (a) of subclause (1) the Partnership 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 Partnership, the Partnership 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 Partnership 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) shall not have been remedied after receipt of the notice referred to in that subclause 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 Partnership 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 Partnership to the State on demand.

Effect of cessation or determination of Agreement

29. (1) On the cessation or determination of this Agreement pursuant to subclause (6) of Clause 8, Clause 28 or Clause 39 -
 - (a) except as otherwise agreed by the Minister the rights of the Partnership to in or under this Agreement and the rights of the Partnership or of any assignee of the Partnership or any mortgagee to in or under any lease licence or easement or right granted hereunder or pursuant hereto shall thereupon cease and determine but without prejudice to the liability of any of the parties hereto in respect of any antecedent breach or default under this Agreement or in respect of any indemnity given under this Agreement;
 - (b) the Partnership 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 no party hereto shall have any claim against the other of them with respect to any matter or thing in or arising out of this Agreement.
- (2) Subject to the provisions of subclause (3) upon the cessation or determination of this Agreement except as otherwise determined by the Minister all buildings erections and other improvements (including all electricity transmission works constructed pursuant to this Agreement) erected on any land then occupied by the Partnership under any other lease licence easement or other title made under or pursuant to this Agreement shall become and remain the absolute property of the State without the payment of any compensation or consideration to the Partnership or any other party and freed and discharged from all mortgages and other encumbrances and the Partnership shall do and execute all such deeds documents and other acts matters and things (including surrenders) as the State may reasonably require to give effect to the provisions of this subclause.
- (3) In the event of the Partnership immediately prior to the cessation or determination of this Agreement or within three months after such cessation or determination desiring to remove any of its fixed or movable plant and equipment or any part thereof from any part of the land occupied by it at the date of such cessation or determination it shall give to the State notice of such desire and thereby shall grant to the State the right or option exercisable within 3 months thereafter to purchase in situ such fixed or moveable plant and equipment at a fair valuation to be agreed between the Partnership and the State or failing agreement determined by arbitration under this Agreement.

Environmental protection

30. Nothing in this Agreement shall be construed to exempt the Partnership 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 pursuant to the EP Act.

Water Supply Agreement

31. For the purposes of the Water Supply Agreement -

- (a) the State shall ensure that no request is made to the Governor in relation to the making or alteration or repeal of Orders in Council pursuant to section 44 of the Rights in Water and Irrigation Act which may affect the supply of water by the Water Authority to the Partnership without

- prior consultation in regard thereto between the Minister and the Partnership;
- (b) the Rights in Water and Irrigation Act shall be deemed modified by the deletion of section 45;
 - (c) the Country Areas Water Supply Act 1947 shall be deemed modified by the deletion of section 39;
 - (d) section 63(1) of the Water Authority Act shall be read and construed so that the section does not apply to any person in the Water Supply Agreement for payment by the Water Authority to the Partnership of liquidated damages as a result of failure by the Water Authority to release water to the Partnership; and
 - (e) the State shall ensure that any use by the State Energy Commission of its powers under section 42 of the State Energy Commission Act in relation to the Ord River Main Dam shall not have a material adverse effect on the operations of the power station.

Indemnity

32. The Partnership 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 Partnership pursuant to this Agreement or relating to its activities hereunder or arising out of or in connection with the construction maintenance or use by the Partnership or its servants agents contractors or assignees of the Partnership's works or services the subject of this Agreement or the plant apparatus or equipment installed in connection therewith PROVIDED THAT, without in any way affecting the Partnership's obligations to the State under Clause 23, the foregoing provisions of this Clause shall not apply to any resumption by the State pursuant to Clause 23.

Commonwealth licences and covenants

33. (1) The Partnership 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 Partnership to enter into this Agreement and to perform any of its obligations hereunder.
- (2) On request by the Partnership the State shall make representations to the Commonwealth or to the Commonwealth constituted agency authority or

instrumentality concerned for the grant to the Partnership of any licence or consent mentioned in subclause (1).

Subcontracting

34. 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 activities which it is authorised or obliged to carry out hereunder.

Stamp duty exemption

35. (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) any instrument executed by the State pursuant to this Agreement granting to or in favour of the Partnership or any permitted assignee any lease licence or easement; and
- (c) any assignment, sublease or disposition (other than by way of mortgage or charge) made in conformity with the provisions of subclause (1) of Clause 24

PROVIDED THAT this subclause shall not apply to any instrument or other document executed or made more than 1 year 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 or transaction referred to in subclause (1) the State when such Bill is passed as an Act shall on demand refund any stamp duty so paid to the person who paid it.

Arbitration

36. (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 under this Agreement or as to any matter to be agreed upon between the Partnership and the State or the Minister as the case may be under this Agreement shall in default of agreement between them and in the absence of any provision in this Agreement to the contrary be referred to and settled by arbitration under the provisions of the Commercial Arbitration Act 1985 and notwithstanding section 20(1) of that Act either party may be represented

before the arbitrator 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 arbitrator of any submission to arbitration under this Agreement is hereby empowered upon the application of either of the parties to the arbitration 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 under this Agreement and an award may in the name of the Minister grant any further extension or variation for that purpose.

Consultation

37. The Partnership shall during the currency of this Agreement consult with and keep the State fully informed on a confidential basis concerning any action that the Partnership 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

38. 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 Partnership at Suite 4, 1st Floor, 651 Canterbury Road, Surrey Hills, Victoria or other address in Western Australia nominated as its address for service by the Partnership to the Minister from time to time and by the Partnership if signed on its behalf by any person or persons authorised by its 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 duly given or sent on the day on which it would be delivered in the ordinary course of post.

Term of Agreement

39. Subject to the provisions of subclause (6) of Clause 8 and Clauses 28 and 29 this Agreement shall expire on the expiration or sooner determination or surrender of the lease granted pursuant to Clause 11 of the power station site.

Joint and several

40. The obligations of each of the parties comprising the Partnership shall be joint and several under this Agreement.

Guarantee

41. Notwithstanding any addition to or deletion or variation of the provisions of this Agreement or of any lease licence easement grant or other title granted under or pursuant to this Agreement or any time or other indulgence granted by the State or the Minister to the Partnership whether or not notice thereof is given to the Guarantor, the Guarantor hereby guarantees to the State the due performance by the Partnership of all its obligations to be performed hereunder during the period from the date of this Agreement until the power station the Argyle facilities and the Kununurra facilities are deemed to be constructed in accordance with subclause (7) of Clause 8.

Applicable law

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

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

SIGNED by the said)
THE HONOURABLE RICHARD)
FAIRFAX COURT in the) **Richard F. Court**
presence of:)

MINISTER FOR RESOURCES DEVELOPMENT **Colin Barnett**

SIGNED, SEALED AND DELIVERED)
by **ROBERT ALEXANDER STEELE**) R. A. Steele
as the Attorney and in the)
name of **PACIFIC HYDRO GROUP**)
TWO PTY. LTD. under Power of)
Attorney dated 29th August) G. C. Bertuch
1994 in the presence of:)

SIGNED, SEALED AND DELIVERED)
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