



# Townsville Breakwater Entertainment Centre Act 1991

Current as at 1 July 2010—revised version

## **Reprint note**

Powers under the *Reprints Act 1992* have been used in this reprint to bring the legislation into line with current drafting practice or to make minor editorial changes.

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Queensland

# Townsville Breakwater Entertainment Centre Act 1991

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# Townsville Breakwater Entertainment Centre Act 1991

## An Act to provide for the Townsville Breakwater Entertainment Centre, and related purposes

### Part 1 Preliminary

#### 1 Short title

This Act may be cited as the *Townsville Breakwater Entertainment Centre Act 1991*.

#### 2 Objects of Act

The objects of this Act are—

- (a) to authorise the Council of the City of Thuringowa and the Council of the City of Townsville to participate in a joint venture with ANZ Executors & Trustee Company Limited as trustee of the Breakwater Island Trust for design, development, construction, commissioning, operation and ownership of a convention, exhibition, sports and entertainment centre (the *Townsville Breakwater Entertainment Centre*) for holding conventions, exhibitions, sports and entertainments; and
- (b) to declare the purposes of the joint venture to be functions of local government of the Local Governments; and
- (c) to provide for contribution by the Crown and the Local Governments to the purposes of the joint venture; and
- (d) to provide in relation to the site for the Townsville Breakwater Entertainment Centre; and

- (e) to limit the liability of the Local Governments in relation to the joint venture; and
- (f) to make appropriate provision for audit in relation to the Townsville Breakwater Entertainment Centre; and
- (g) to authorise the Council of the City of Thuringowa and the Council of the City of Townsville to vary the joint venture with the trustee to enable the upgrading of the Townsville Breakwater Entertainment Centre.

### 3 Definitions

In this Act—

***authorised auditor*** means an authorised auditor within the meaning of the *Auditor-General Act 2009*.

***joint venture*** means the association of the joint venturers in the design, development, construction, commissioning, operation and ownership of the Townsville Breakwater Entertainment Centre.

***Joint Venturers*** means the Local Governments and the Trustee, and includes any successor in title to any of them in relation to the site.

***Local Governments*** means the Council of the City of Thuringowa and the Council of the City of Townsville.

***Manager*** means Breakwater Island Limited, a company registered under the Corporations Act.

***site*** means the site of the Townsville Breakwater Entertainment Centre as prescribed by section 15.

***Townsville Breakwater Entertainment Centre*** means the convention, exhibition, sports and entertainment centre to be constructed on the site and includes the centre as upgraded from time to time.

***Trustee*** means ANZ Executors & Trustee Company Limited as trustee of the Breakwater Island Trust, and includes any successors in title to it as trustee of the Breakwater Island Trust.



## **6 Agreements have force of law**

Agreements made by any of the Joint Venturers for the purposes of the joint venture in terms set out in schedule 1, part 1, 2, 3 or 4 have the force of law and may be enforced as if the terms of the agreements were enactments of this Act.

## **7 Objects of agreements functions of local government**

The objects of agreements that may be made under section 4 by either of the Local Governments are functions of local government of the Local Governments.

## **8 Tenders not required for s 4 agreements**

Despite the provisions of any other Act (including the *Local Government Act 2009*), the Local Governments are not required to give notice of intention to invite tenders or to give opportunity for the making of quotations in relation to agreements to be made under section 4.

# **Part 3 Contribution by State and local governments**

## **9 Contribution by State**

- (1) The Treasurer may contribute to the purposes of the joint venture, out of amounts appropriated by Parliament, an amount of not more than \$7 million.
- (2) The Treasurer may contribute to the purposes of the joint venture, out of amounts appropriated by Parliament, a further amount of not more than \$11.5 million for the upgrading of the Townsville Breakwater Entertainment Centre.

## **10 Contribution by Thuringowa Council**

- (1) In performance of agreements made between all of the Joint Venturers, the Council of the City of Thuringowa may



contribute to the purposes of the joint venture an amount of \$2 million and any other amounts referred to in the agreements made by the Joint Venturers in terms set out in Schedule 1.

- (2) A person is not entitled to have recourse, in satisfaction of any liability of the Council in relation to the design, development, construction, commissioning, operation or ownership of the Townsville Breakwater Entertainment Centre, to any assets of the Council other than its interest in the Townsville Breakwater Entertainment Centre.

## **11 Contribution by Townsville Council**

- (1) In performance of agreements made between all of the Joint Venturers, the Council of the City of Townsville may contribute to the purposes of the joint venture an amount of \$5 million and any other amounts referred to the agreements made by the Joint Venturers in terms set out in Schedule 1.
- (2) A person is not entitled to have recourse, in satisfaction of any liability of the Council in relation to the design, development, construction, commissioning, operation or ownership of the Townsville Breakwater Entertainment Centre, to any assets of the Council other than its interest in the Townsville Breakwater Entertainment Centre.

## **Part 4 The site**

### **12 Surrender of land**

- (1) As soon as practicable after the commencement of this Act, the Trustee is to surrender to the Crown, and the Crown is to accept surrender of—
  - (a) the estate in fee simple held by the Trustee in the land described as Lots 641 and 643 Parish of Coonambelah and shown on the plan in Schedule 2; and

[s 13]

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- (b) the leasehold interest held by the Trustee in that part shown on the plan in Schedule 2 of the land currently leased by the Trustee under Special Lease 44/47072.
- (2) Despite the provisions of the *Land Act 1962*, the Trustee is not required to give notice of intention to surrender under subsection (1).
- (3) The Crown incurs no liability because of surrenders under subsection (1).

### **13 Closure of road**

On the surrenders under section 12 taking effect, the area shown hatched on the plan in Schedule 2 as road and marked 'A' is, by this section, permanently closed to public use.

### **14 Grant of land to partners**

- (1) On the surrenders under section 12 taking effect, the amalgamated area of the lands affected by the surrenders, and the area of road permanently closed to public use by section 13, is to be granted in fee simple to the Joint Venturers as tenants in common in shares as follows—
  - (a) Council of the City of Thuringowa—39/200;
  - (b) Council of the City of Townsville—98/200;
  - (c) ANZ Executors & Trustee Company Limited—63/200.
- (2) Despite the *Land Act 1962*, the grant under subsection (1) may be made under that Act in priority to all other persons.

### **14A Adjustment of interests as tenants in common**

- (1) This section applies if, after the commencement of this section, a joint venturer makes a further contribution under the agreement set out in schedule 1, part 1 as varied by the agreement set out in schedule 1, part 4.
- (2) The respective interests of the joint venturers in the site must be adjusted under the agreement as varied.

**15 Location of site**

The site of the Townsville Breakwater Entertainment Centre is the land granted to the Joint Venturers under section 14.

**16 Zoning of site**

Despite the *Local Government (Planning and Environment) Act 1990* or the planning scheme of the City of Townsville, the site is in the Special Facilities (Convention, Exhibition, Sports, Entertainment and Ancillary Facilities) Zone under that planning scheme.

## **Part 5 General provisions**

**17 Access to site**

Until the grant under section 14 takes effect, all agents and contractors of the Joint Venturers, or of any of them, and all agents or sub-contractors of such contractors are, by force of this section, entitled to enter on all parts of the lands affected by the surrenders under section 12, and on the area closed by section 13 as road, for the purposes of the joint venture.

**18 Funds, books of account and records**

- (1) The funds, books of account and records kept by the Trustee or the Manager in relation to the Townsville Breakwater Entertainment Centre must be kept separately from all other funds, books of account and records.
- (2) As soon as practicable after the close of each financial year of the Townsville Breakwater Entertainment Centre, the Auditor-General, or an authorised auditor, must audit the accounts kept by the Trustee or the Manager in relation to the Centre.

## **19 Operational audit**

If at any time it appears to the Auditor-General that an operational audit should be conducted in relation to any matter associated with the management of the Townsville Breakwater Entertainment Centre, the Auditor-General, or an authorised auditor, may conduct such an audit.

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## Schedule 1

sections 5 and 7

### **PART 1—PARTICIPATION AGREEMENT**

**THIS AGREEMENT** is made the \_\_\_\_\_ day of \_\_\_\_\_ 1991

**BETWEEN**

(1) **ANZ EXECUTORS & TRUSTEE COMPANY LIMITED** a company duly incorporated by law in the State of Victoria and having its principal place of business in the State of Queensland at 307 Queen Street, Brisbane in the said State as trustee of the **BREAKWATER ISLAND TRUST** (hereinafter called “the Trustee”)

**AND**

(2) **BREAKWATER ISLAND LIMITED** a company duly incorporated by law in the State of Queensland and having its registered office at Ground Floor, Garden Square, 643 Kessels Road, Upper Mt Gravatt, Brisbane in the said State (hereinafter called “the Manager”)

**AND**

(3) **COUNCIL OF THE CITY OF TOWNSVILLE** a local authority duly constituted under the provisions of the Local Government Act 1936 and having its Public Office at Administration Building, Walker Street, Townsville in the State of Queensland (hereinafter called “Townsville City Council”)

**AND**

(4) **COUNCIL OF THE CITY OF THURINGOWA** a local authority duly constituted under the provisions of the Local Government Act 1936

and having its Public Office at 86 Thuringowa Drive, Thuringowa Central in the State of Queensland (hereinafter called “Thuringowa City Council”)

## **WHEREAS**

A. The Trustee is the trustee and the Manager is the manager of the Breakwater Island Trust established pursuant to a trust deed dated 22nd November 1984.

B. The Trustee is the registered proprietor of an estate in fee simple in the land described in the First Schedule.

C. The land hatched in black and marked “A” on the plan in the Second Schedule is part of the land leased by the Trustee pursuant to Special Lease No 44/47072 under the Land Act 1962.

D. The land hatched in black and marked “B” on the plan in the Second Schedule is part of a road vested in the Crown.

E. The Townsville City Council and the Thuringowa City Council have made a submission to the Government of the State of Queensland for a grant to assist in the development and construction of an entertainment, convention and exhibition centre.

F. Legislation has been enacted by the Parliament of the State of Queensland facilitating the design, development, construction, commission, operation and ownership of a convention exhibition sports and entertainment centre upon the lands described in Recitals B, C and D by the Trustee, the Townsville City Council and the Thuringowa City Council.

**NOW THIS AGREEMENT WITNESSES** that in consideration of the premises the parties hereto do covenant and agree as follows:

### **1. INTERPRETATION**

In this Agreement, unless otherwise provided or unless there is something in the subject matter or context inconsistent herewith, the expressions following (whether appearing with

or without capital letters) shall have the meanings hereinafter in this clause respectively assigned to them.

- 1.01 “this Agreement” means this Agreement and any other agreement expressed to be supplemental to this Agreement and all amendments to any such documents.
- 1.02 “Breakwater Island Trust” means the trust established pursuant to a trust deed dated the 22nd November 1984 and entered into between Breakwater Island Limited as manager and ANZ Executors & Trustee Company Limited as trustee as amended.
- 1.03 “Business Days” means those days on which the banks in Townsville are open for corporate business.
- 1.04 “Committee of Management” means the Committee of Management constituted pursuant to Clause 8.02.
- 1.05 “date of commencement of the Legislation” means the date that the Legislation is assented to by the Governor of the State.
- 1.06 “Development Agreement” means the agreement to be entered into by the Joint Venturers with MULTIPLEX CONSTRUCTIONS PTY LTD in the form of agreement in the Fifth Schedule.
- 1.07 “Entertainment Centre” means the convention exhibition sports and entertainment centre to be constructed upon the Site in accordance with the Development Agreement.
- 1.08 “Joint Venture” means the joint venture formed by the Trustee, the Townsville City Council and the Thuringowa City Council pursuant to this Agreement to implement the purposes referred to in Clause 3.01.
- 1.09 “Joint Venturer” means any one of the Trustee, the Townsville City Council and the Thuringowa City Council.
- 1.10 “Joint Venturers” means the Trustee, the Townsville City Council and the Thuringowa City Council.
- 1.11 “Legislation” means the legislation referred to in Clause 2.

Schedule 1

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- 1.12 “Management Agreement” means the agreement to be entered into by the Joint Venturers with the Trustee and the Manager in the form of agreement in the Sixth Schedule.
- 1.13 “participating interests” and “interests” mean the interests of the Joint Venturers in the Joint Venture set out in Clause 3.05.
- 1.14 “parties” and “party” mean respectively the parties to this Agreement and any one of those parties.
- 1.15 “representative” means one of the representatives referred to in Clause 8.02.
- 1.16 “Site” means all that area of land to be described in the deed of grant referred to in Clause 4.01. The expression extends to and includes any future description consequent upon any resurvey of the Site including pursuant to Clause 4.02.
- 1.17 “State” means the State of Queensland.
- 1.18 “Trustee” means ANZ Executors & Trustee Company Limited as trustee of the Breakwater Island Trust or any other person who for the time being is the trustee of the Breakwater Island Trust.
- 1.19 Words denoting the singular number only shall include the plural number and vice versa and the masculine shall include the feminine and vice versa and words denoting individual persons only shall include corporations.
- 1.20 A reference in this Agreement to any Act of Parliament or any Section thereof shall be read as though the words “or any statutory modification or re-enactment thereof or any statutory provisions substituted therefor” were added to such reference.
- 1.21 The expression “\$” or “Dollars” means Australian Dollars unless otherwise provided or unless inconsistent with the context or subject matter.
- 1.22 The headings in this Agreement are included for convenience only and shall not affect the construction of this Agreement.
- 1.23 References to Clauses and Schedules are references to Clauses and Schedules in this Agreement.



## 2. LEGISLATION

The parties acknowledge that legislation in the form of the legislation in the Seventh Schedule has been enacted by the Parliament of the State of Queensland.

## 3. JOINT VENTURE

- 3.01 The Trustee, the Townsville City Council and the Thuringowa City Council hereby associate themselves in an unincorporated joint venture to be known as the Entertainment Centre Joint Venture for the purpose of carrying into effect all works required to design, develop, construct, commission, operate and own the Entertainment Centre. Unless otherwise agreed in writing between the Joint Venturers, the Joint Venture shall be limited to the purposes and activities specified in this Agreement and nothing herein contained shall by implication or otherwise be deemed to extend the Joint Venture beyond the purposes and activities specified in this Agreement and all other matters necessarily incidental thereto.
- 3.02 The address of the Joint Venture shall prior to the opening of the Entertainment Centre be care of Breakwater Island Limited, Ground Floor, Garden Square, 643 Kessels Road, Upper Mt Gravatt, Brisbane in the State of Queensland and on and from the opening of the Entertainment Centre be at the Entertainment Centre.
- 3.03 The Joint Venture shall be deemed to have commenced and shall take effect from the date hereof and shall continue in force for so long as it is practical to carry out the purposes and activities specified in this Agreement unless terminated pursuant to the provisions of this Agreement PROVIDED HOWEVER that to the extent that the foregoing might but for this provision infringe the rule against perpetuities the Joint Venture shall in any event be terminated within the period of eighty (80) years from the date hereof or such other period as may for the time being be prescribed by law as the maximum permissible period without infringing the said rule.
- 3.04 Except as expressly provided in this Agreement the rights, duties, obligations and liabilities of the Joint Venturers arising

out of this Agreement shall be several in proportion to their respective participating interests and not joint or collective, it being the express purpose and intention of the Joint Venturers that their ownership of their respective interests shall be as tenants-in-common and that nothing in this Agreement contained or implied shall be deemed or construed to constitute the Joint Venture a partnership or any of the Joint Venturers a partner, agent or representative of any other Joint Venturer for any purpose whatsoever and none of the Joint Venturers shall have or be deemed to have the authority express or implied to act for or to incur any obligation, liability, indebtedness or responsibility on behalf of the Joint Venture or any other Joint Venturer except as expressly provided in this Agreement.

- 3.05 The Joint Venturers shall share in the profits or losses of the Joint Venture in the proportions set out hereunder:

Trustee	31.5%
Townsville City Council	49%
Thuringowa City Council	19.5%

- 3.06 Without limiting the generality of Clause 3.05 and subject to the provisions of Clause 3.07, Clause 5.04 and Clause 12, all costs, charges, expenses, fees and outgoings incurred, suffered or sustained in or about or on behalf of the Joint Venture or the Site and each and every part thereof shall (to the extent that the same are either incurred by and with the agreement of the Joint Venturers or are items which would if the Joint Venture was a partnership of which the Joint Venturers were partners and of which the Site was an asset be payable by such partnership in the ordinary course of events) be borne and payable by the Joint Venturers in the proportion of their respective participating interests and shall for accounting purposes be treated and paid as a Joint Venture expense and the audited net amount available before payment of income tax from the Joint Venture shall be taken by and distributed between the Joint Venturers in the proportion of the participating interests of the Joint Venturers at such time as the Committee of Management may determine.

- 3.07 Each Joint Venturer shall (unless otherwise required by law) lodge a separate return and obtain and pay a separate assessment of land tax in respect of its interest in the Site and shall pay any other assessments or outgoings which may be incurred or levied separately on a Joint Venturer in respect of its interest in the Site.

#### **4. SURRENDER OF LANDS**

- 4.01 Immediately following the receipt by the Trustee of consent from the Minister for the time being charged with the administration of the *Casino Control Act 1982* pursuant to Clause 21, the Trustee shall surrender the freehold title to the lands described in the First Schedule and the leasehold title to the land hatched in black and marked "A" on the plan in the Second Schedule and currently being part of the lands leased by the Trustee pursuant to Special Lease 44/47072. Each of the parties will use its best endeavours to secure the issue of a deed of grant in fee simple in the names of the Trustee, the Townsville City Council and the Thuringowa City Council as tenants-in-common in the shares of 63/200, 49/100 and 39/200 respectively over the land described in the First Schedule and the lands hatched in black on the plan in the Second Schedule and marked "A" and "B" respectively and each of the parties will execute all documents and assurances and do all acts whatsoever to secure the issue of such deed of grant.
- 4.02 Following the issue of the deed of grant referred to in Clause 4.01 the Joint Venturers shall cause to be prepared and registered in the Department of Freehold Land Titles a plan of survey in accordance with or substantially in accordance with the plan in the Fourth Schedule.
- 4.03 The value of the lands to be surrendered by the Trustee pursuant to Clause 4.01 shall be deemed to be \$6 500 000.00.

#### **5. CONTRIBUTIONS AND BORROWINGS**

- 5.01 The Trustee shall be deemed to have contributed \$6 500 000.00 by way of capital contribution to the Joint

- Venture in consideration of its surrender of the lands referred to in Clause 4.01 to enable the issue of the deed of grant referred to in Clause 4.01.
- 5.02 The Townsville City Council will contribute the sum of \$10 000 000.00 in cash by way of capital contribution to the Joint Venture and shall be deemed to have contributed \$150,000.00 by way of further capital contribution to the Joint Venture in consideration of its agreement to carry out the works referred to in Clause 5.05.
- 5.03 The Thuringowa City Council will contribute the sum of \$4 000 000.00 in cash by way of capital contribution to the Joint Venture.
- 5.04 The cash capital contributions referred to in Clauses 5.02 and 5.03 shall be made as to the sum of \$6 500 000.00 within seven (7) days from the date of this Agreement and as to the balance of \$7 500 000.00 in sufficient time to enable progress payments up to an amount of \$7 500 000.00 under the Development Agreement to be paid. The sum of \$6 500 000.00 shall be invested by the Committee of Management and used to pay the remaining progress payments in excess of the amount of \$7 500 000.00 under the Development Agreement after the sum of \$7 500 000.00 has been used to pay progress payments under the Development Agreement.
- 5.05 The Townsville City Council shall cause to be constructed at its own cost the works described in the Third Schedule on or before the opening of the Entertainment Centre.
- 5.06 Any further contributions to the capital of the Joint Venture shall be made by the Joint Venturers in the proportion of their respective participating interests.
- 5.07 Subject to Clause 6.03 of this Agreement the Joint Venturers to the exclusion of the Committee of Management shall have the power to borrow any funds required for the purposes of the Joint Venture and to determine that further contributions to the capital of the Joint Venture shall be made by the Joint Venturers in accordance with Clause 5.06 provided that all such decisions in relation to the borrowing of funds and the

further contributions to capital shall require the consent in writing of each of the Joint Venturers.

## **6. DEVELOPMENT AGREEMENT**

- 6.01 Within seven (7) days of the date of this Agreement the Joint Venturers shall enter into a Development Agreement with MULTIPLEX CONSTRUCTIONS PTY LTD in the form of agreement in the Fifth Schedule and participate in the formation of the project control group referred to in the Development Agreement.
- 6.02 Each of the Joint Venturers accepts and approves development of the Entertainment Centre in accordance with the plans and specifications referred to in the Development Agreement and in particular the Townsville City Council agrees that no town planning requirements other than those incorporated in such plans and specifications will be imposed by the Townsville City Council. The Townsville City Council agrees that no further development of any land owned by the Trustee in its capacity as trustee of the Breakwater Island Trust will be in any way affected by the imposition of any carparking requirements relating to the Entertainment Centre.
- 6.03 In the event that MULTIPLEX CONSTRUCTIONS PTY LTD does not fulfil its obligations under the Development Agreement for any reason whatsoever the Joint Venture shall ensure that construction of the Entertainment Centre is completed in accordance with the Development Agreement (notwithstanding that the Development Agreement may not be in full force and effect at that time) as expeditiously as possible and each of the Joint Venturers hereby agrees that notwithstanding Clause 5.07 of this Agreement the Joint Venturers shall contribute in the proportion of their respective participating interests the funds required to complete the construction of the Entertainment Centre in accordance with the provisions of the Development Agreement (notwithstanding that the Development Agreement may not be in full force and effect at the relevant time).

**7. MANAGEMENT AGREEMENT**

- 7.01 Within seven (7) days of the date of this Agreement the Joint Venturers shall enter into a Management Agreement with the Trustee and the Manager in the form of agreement in the Sixth Schedule.

**8. COMMITTEE OF MANAGEMENT**

**8.01 Authority of the Committee of Management**

- 8.01.1 The design, development, construction, commissioning, operation, ownership and maintenance of the Entertainment Centre shall be supervised and managed by the Committee of Management which subject to the provisions of this Agreement and the Management Agreement (if the Management Agreement is in full force and effect) shall have full power and responsibility to make decisions on policy, procedure and objectives with respect to all matters and things affecting the Entertainment Centre including without limitation the provision of all necessary plant and equipment to operate the Entertainment Centre and the appointment of an operator in the event that the Management Agreement is no longer in full force and effect.
- 8.01.2 The Committee of Management may at any time appoint any person or corporation including the parties hereto to act in its stead and delegate to such person or corporation any of the functions or obligations of the Committee of Management.
- 8.01.3 Every decision by the Committee of Management upon any of the matters within its power shall be binding on the Joint Venture and upon the Joint Venturers as if the same had been included in the provisions of this Agreement at the time and execution hereof.

## 8.02 Constitution of Committee of Management

The Committee of Management shall be constituted by eight (8) representatives. Each of the Joint Venturers shall by notice in writing to each of the others forthwith nominate the number of representatives to the Committee of Management set out opposite its name below and an alternate for each such representative who shall be empowered to act as such representative in the absence of the said representative and each of the Joint Venturers may by further notice in writing by one to each of the other from time to time revoke any such nomination and in such event a new nomination shall be made in the stead of the person or persons whose nomination has been revoked:

Townsville City Council	Four (4)
Thuringowa City Council	Two (2)
Trustee	Two (2)

Each such representative shall be deemed to have power to vote on behalf of and to bind the Joint Venturer nominating such representative and each such alternate shall be deemed to have like powers during any absence from a meeting of the person for whom such alternate is the alternate and for the purposes of this Agreement (except where the context does not admit of such interpretation) reference to a representative shall be deemed to include an alternate acting in the absence of the representative.

## 8.03 Meetings of Committee of Management

8.03.1 Unless otherwise mutually agreed, all meetings of the Committee of Management shall be held at Townsville in the State of Queensland and shall be convened upon at least fourteen (14) days notice in writing given by or on behalf of any of the Joint Venturers to each of the others specifying the purpose time and place of the meeting. A meeting may notwithstanding that it is called with a shorter notice period than the aforesaid period be deemed to be duly called if such shorter period of notice is agreed to by all of the Joint Venturers.

- 8.03.2 A quorum for a meeting of the Committee of Management shall be five (5) representatives including at least one (1) representative nominated by each of the Joint Venturers.
- 8.03.3 All decisions of the Committee of Management (other than a decision in relation to the giving of any notice pursuant to Clause 9.04 or Clause 17.02 of the Management Agreement which shall be made by a simple majority) shall require a unanimous decision. At any meeting at which a quorum is present one (1) vote (and no more) may be cast on any question by each representative.
- 8.03.4 At each meeting the Townsville City Council shall nominate one of the representatives present to be the Chairman of the Committee of Management.
- 8.03.5 The Trustee shall provide a secretary to the Committee of Management who shall cause Minutes of each meeting to be kept and distributed to each of the representatives.
- 8.03.6 Any representative may be accompanied at any meeting by up to two (2) assistants or advisors who shall not be entitled to vote.
- 8.03.7 A Minute signed by all of the representatives of the Committee of Management or an exchange of letters signed by all of the representatives of each of the Joint Venturers confirming mutual agreement on any question shall be as effectual and binding on the Joint Venturers as an agreement reached and recorded at a duly convened meeting of the Committee of Management.

**8.04 Expenses of Representatives**

Except as may be otherwise mutually agreed from time to time, each of the Joint Venturers shall be solely responsible for all travelling expenses, accommodation and payments of and to its own representatives and any other servants or agents employed by it in or about the Joint Venture and the affairs thereof from time to time and none of the Joint Venturers shall



be entitled as against the Joint Venture or the affairs thereof to any payment, salary, fees or reimbursement.

#### 8.05 **Insurance**

The Committee of Management shall ensure that all appropriate insurance policies in relation to the Entertainment Centre and the operation thereof, all other property owned by the Joint Venture and the Site are effected and the relevant premiums paid.

### **9. DEALINGS BY JOINT VENTURERS**

9.01 Each of the Joint Venturers shall absolutely own and be entitled to its respective share in the Site and all improvements thereon and such ownership and entitlement shall to the maximum extent applicable to a tenancy in common be several but the Joint Venturers shall each make available to the Joint Venture their respective estates and interests for the time being in the Site for the Entertainment Centre and none of the Joint Venturers shall without the consent in writing of each of the others (and in the case of paragraphs 9.01.1, 9.01.2, 9.01.3 and 9.01.5, the Governor-in-Council) first had and obtained during the continuance of the Joint Venture:

9.01.1 (except for the purposes of the Joint Venture) mortgage, charge or encumber its estate or interest in the Site (including all improvements thereon) or any part or parts thereof; or

9.01.2 (except for the purposes of the Joint Venture) sell, dispose of or assign its estate or interest in the Site (including all improvements thereon) or any part or parts thereof; or

9.01.3 (except for the purposes of the Joint Venture) part with the possession of its estate or interest in the Site; or

9.01.4 (except for the purposes of the Joint Venture) grant any lease or license over or create in favour of a third party any estate or interest in the Site or over its estate or interest in the Site nor suffer any adverse rights to arise in respect thereof unless such rights

- shall arise from circumstances beyond the control of the relevant Joint Venturer; or
- 9.01.5 apply for or seek any partition or the appointment of trustees for sale or partition of the Site or of any estate or interest therein or any part or parts thereof.
- 9.02 Without limiting the generality of any other provisions of this Agreement each Joint Venturer shall:
- 9.02.1 permit all subdivisions of the Site which shall be agreed upon to be made or registered and join in and if necessary execute all documents and do all acts which may be reasonably required to effect any of the foregoing;
- 9.02.2 join in all dedications or transfers of land to any local authority or other governmental or semi-governmental authority which may be required in order to obtain consent to reflect any aforesaid subdivision;
- 9.02.3 at all times take and join in taking all such steps and execute all such documents as may be decided upon in order to carry forward the Entertainment Centre and enter into all contracts, leases, licences, agreements, applications, undertakings or guarantees as are necessary or required during the currency of the Joint Venture for obtaining any approvals by any government or statutory authority or for the design, construction, financing, administration, management or operation of the Entertainment Centre; and
- 9.02.4 take and join in taking all such actions, suits and steps which may reasonably be required by the others of the Joint Venturers to prevent or remove any rights, adverse or prejudicial, to the estate or interest of the Joint Venturers or any of them in the site or the performance of this Agreement as the case may be.
- 9.03 Each Joint Venturer shall at all times during the continuance of the Joint Venture:

- 9.03.1 be just and true to each of the others of them and act bona fide in the best interests of the Joint Venture; and
- 9.03.2 promptly execute all such documents as shall reasonably be required in relation to the Joint Venture.

## **10. BANKING**

- 10.01 The Committee of Management shall open and maintain such banking account or accounts (if any) with the Australia and New Zealand Banking Group Ltd of Sturt Street, Townsville Branch as it may consider necessary.
- 10.02 All monies borrowed by the Joint Venture for the purposes of the Joint Venture and all monetary contributions to the Joint Venture by the Joint Venturers and all monies payable to the Joint Venturers pursuant to the Management Agreement and any other monies accruing to the Joint Venture shall be paid into and deposited to the credit of the bank account or accounts referred to in Clause 10.01 and all payments by or on behalf of the Joint Venture shall be made by cheque drawn on such bank account or accounts. All cheques and other drawings on such bank account or accounts shall be signed by not less than three (3) representatives of the Committee of Management comprising at least one (1) representative from each of the Joint Venturers.

## **11. ACCOUNTS AND AUDITS**

- 11.01 The Joint Venture shall cause to be kept properly posted up books of account in respect of the receipts and expenditure of the Joint Venture and for such purpose shall appoint the Manager to maintain such accounts. On the last day of June in each and every year a full account of the income and expenditure of the Joint Venture for the preceding twelve (12) months (or in the case of the first of such accounts for the period from the date of commencement of the Legislation) and an account of the liabilities undertaken by the Joint Venturer as at such date showing what amount (if any) is due

in respect of such liabilities by each of the Joint Venturers to the other or to or for the account of the Joint Venture shall be prepared on behalf of the Joint Venture.

- 11.02 Each such account shall be audited by the Auditor-General or his nominee and subject to the confirmation of such auditor every such account shall be final and binding on the Joint Venturers unless a manifest error shall be found therein within three (3) months in which case such error shall be rectified PROVIDED HOWEVER that except as may be otherwise required by law none of the Joint Venturers shall be bound in the treatment of any item in such account in its own books of account and returns to the Commissioner of Taxation for Income Tax purposes by the treatment thereof by any other Joint Venturer in the books of account and/or returns to the Commissioner of Taxation for income tax purposes of such other Joint Venturer.
- 11.03 Each of the Joint Venturers shall have the right to examine and inspect any books, records or accounts of the Joint Venture at any reasonable time.
- 11.04
- 11.04.1 The Committee of Management shall establish a reserve fund which shall be recorded on the books of account of the Joint Venture maintained by the Manager as “Reserve for Replacements, Substitutions and Additions to Plant Furniture and Equipment and Non-Structural Improvements”.
- 11.04.2 At the commencement of the operation of the Entertainment Centre the Committee of Management shall estimate an amount required for replacements, substitutions and additions to the plant furniture and equipment and non-structural repairs and improvements (other than those of a minor nature) in the Entertainment Centre for the period until the 30th June next occurring which figure shall be calculated as three and one half per cent (3.5%) of the estimate of the Total Revenue as that term is defined in the Management Agreement (whether or not the Management Agreement is in full force and effect at

the relevant time) to be produced during that period which amount shall be credited to the reserve fund.

- 11.04.3 On 1st July in each year of operation of the Entertainment Centre there shall be credited to the reserve fund an amount equal to three and one half per cent (3.5%) of the Total Revenue as that term is defined in the Management Agreement (whether or not the Management Agreement is in full force and effect at the relevant time) derived in the immediately preceding year.
- 11.04.4 The reserve fund shall be used solely for replacement or substitution of or additions to plant furniture and equipment or non-structural repairs or improvements (other than those of a minor nature) during each year of operation of the Entertainment Centre. All proceeds from the sale of plant furniture and equipment no longer needed for the operation of the Entertainment Centre shall be credited to the reserve fund. All amounts remaining in the reserve fund at the 30th June in each year shall be carried forward and retained until fully used.
- 11.04.5 The Committee of Management shall determine the times at which cash contributions to the reserve fund are to be made by the Joint Venturers PROVIDED THAT cash contributions shall be made to the reserve fund by each of the Joint Venturers in the proportion of their respective participating interests in sufficient time to enable the Joint Venture to comply with its obligations under the Management Agreement.
- 11.04.6 The Joint Venturers acknowledge and agree that while the Management Agreement is in full force and effect the establishment of one reserve fund which enables the Joint Venture to comply with its obligations under the Management Agreement and under this Clause 11.04 shall be sufficient compliance with such obligations.

## **12. INDEMNITIES**

- 12.01 Each of the Joint Venturers shall indemnify and keep indemnified and hold harmless each of the other Joint Venturers and each of its directors, officers, employees and representatives from and against all losses, claims, actions, damages and liabilities arising out of any obligation or liability suffered or incurred by such other Joint Venturer or any of its directors, officers, employees or representatives as a result of any breach of the firstmentioned Joint Venturer of any of its obligations hereunder.
- 12.02 Each of the Joint Venturers shall be liable for and shall promptly pay in the proportion of their respective participating interests all liabilities incurred with the approval of the Committee of Management for the purpose of the Joint Venture or to promote the Entertainment Centre (including but without limiting the generality of the foregoing all money borrowed with such approval for such purposes upon the security of the Site and monies payable pursuant to the Development Agreement, the Management Agreement and any other contracts entered into with such approval for the carrying out of work upon the Site) and each of the Joint Venturers shall indemnify each of the other Joint Venturers against all loss, costs and damage which such other shall incur or sustain as a result of or arising from any failure of the firstmentioned Joint Venturer to comply with the provisions of this Clause 12.02.

## **13. WINDING UP AND SALE**

- 13.01 Notwithstanding any other provision of this Agreement:
- 13.01.1 neither the Entertainment Centre nor the Site shall be sold during the continuance of this Agreement; and
- 13.01.2 the Joint Venture shall not be wound up without the consent in writing of all of the Joint Venturers and the Governor-in-Council.
- 13.02 In the event that all of the Joint Venturers wish to:
- 13.02.1 sell the Entertainment Centre or the Site; or

### 13.02.2 wind up the Joint Venture

the Joint Venture shall subject to obtaining the consent in writing of the Governor-in-Council to such sale or winding up have full power and responsibility to make decisions in relation to any such sale or winding up.

- 13.03 Subject to Clause 17.02, a Joint Venturer may not retire from the Joint Venture without the consent in writing of all of the other Joint Venturers and the Governor-in-Council.

## **14. DEFAULT**

- 14.01 In any of the following circumstances, namely:

14.01.1 if any Joint Venturer fails within fourteen (14) days to pay any monies required to be paid by it pursuant to the provisions of this Agreement;

14.01.2 if any Joint Venturer shall fail to observe, perform or fulfil any of the terms, covenants, conditions and restrictions herein contained on the part of that Joint Venturer (whether positive or negative) and such failure shall continue for a period of one (1) month; or

14.01.3 if a Joint Venturer stops payment generally or ceases or threatens to cease to carry on its business or the major part thereof;

then the Joint Venturer responsible therefor or so affected shall be deemed to have made default.

- 14.02 Upon default by a Joint Venturer a non-defaulting party may give to the defaulting Joint Venturer a notice of default in writing. Upon receipt of such notice the defaulting Joint Venturer shall promptly and with all due diligence cure the default within thirty (30) days from the date of receipt of such notice.

- 14.03 If a default by a Joint Venturer is not cured within six (6) months from the date of receipt of the notice of default referred to in Clause 14.02 the interest of that Joint Venturer in the Joint Venture shall immediately be forfeited to the remaining Joint Venturers or Joint Venturer and the defaulting

Joint Venturer shall forthwith execute all documents and assurances and do all acts whatsoever to transfer its interest in the Joint Venture including its interest in the Site to the remaining Joint Venturers or Joint Venturer.

## **15. NOTICES**

- 15.01 Any notice required or desired to be given by any party to any other party or to the Committee of Management under this Agreement shall be deemed to have been duly given or made if it be in writing and signed by the party giving the same either under its Common Seal or on its behalf by any duly authorised person including its solicitor or solicitors and sent through the post in a prepaid envelope addressed to the party to receive the notice or if delivered left at the address of the party to receive the notice. The address of posting or delivery shall be the address of the respective party advised to the Joint Venture from time to time in writing and in default of any address being advised the address of the party set out in this Agreement. Any such notice sent by post shall be deemed to have been given at the time when by the ordinary course of post it would have been delivered.
- 15.02 Any copy of a document or any notice in writing or other written communication required or desired to be given by one party to any other party or the Committee of Management under or pursuant to this Agreement or concerning the Joint Venture may be given by transmitting a facsimile copy thereof via the telephone network to the address for notices of the other party and shall be deemed to have been given (unless the contrary is shown) upon the date and at the time contained in any transmission confirmation report which contains the identification code of the person to whom it was intended to be transmitted and which indicates that the transmission was received without error. If a document or a copy of a document or a notice in writing or other written communication is given after 5.00 pm on any Business Day and before 9.00 am on the next following Business Day and its receipt is not acknowledged by the other party during that period, it shall be deemed to have been given at 9.00 am on that next following Business Day.



**16. GENERAL**

- 16.01 The parties acknowledge that the terms, conditions and provisions set out in this Agreement contain the entire agreement as concluded between the parties as at the date of execution hereof notwithstanding any negotiations or discussions prior to the execution hereof and each party expressly acknowledges that it has not been induced to enter into this Agreement by any representation, oral or otherwise, made by or on behalf of any other party.
- 16.02 This Agreement shall be construed and take effect in accordance with and the rights and obligations under this Agreement shall be governed by the laws of the State. Each of the parties submits to the jurisdiction of the Courts of the State including all Courts of appeal therefrom.
- 16.03 No delay or omission to exercise any right power or remedy accruing to any party hereunder upon any continuing breach or default under this Agreement shall impair any such right power or remedy of such party nor shall it be construed to be a waiver of any such continuing breach or default or any acquiescence therein or of or in any similar breach or default thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character of any breach or default under this Agreement or any waiver of any provision or condition of this Agreement must be in writing and shall be effective only to the extent in such writings specifically set forth. All remedies either under this Agreement or by law or otherwise afforded to a party shall be cumulative and not in the alternative.

**17. TRUSTEE**

- 17.01 Notwithstanding any other provision of this Agreement, and whether or not any such provision is expressed to be unconditional, the parties acknowledge that the Trustee enters into this Agreement in its capacity as trustee of the Breakwater Island Trust and the liability of the Trustee under this Agreement is limited to such of the Trust Fund as defined

in the trust deed constituting the Breakwater Island Trust as is for the time being held by the Trustee and available for the purpose. No party shall be entitled to have recourse in satisfaction of any liability of the Trustee under this Agreement to any assets held by the Trustee in its personal capacity or in its capacity as trustee of any trust other than the Breakwater Island Trust. Any agreement entered into by the Joint Venturers must be expressly subject to a provision limiting the liability of the Trustee in the manner provided in this Clause 17.

- 17.02 If the Trustee at any time proposes to retire as trustee of the Breakwater Island Trust the other parties to this Agreement will consent to the retirement and replacement of the Trustee in accordance with the provisions of the trust deed constituting the Breakwater Island Trust and will not place any conditions upon that consent other than a condition requiring the replacement trustee to acknowledge that it is bound by all the provisions of this Agreement on the part of the Trustee to be observed performed and fulfilled.

## **18. AMALGAMATION**

In the event that the Townsville City Council and the Thuringowa City Council are amalgamated or there is a boundary adjustment between the areas of the Townsville City Council and the Thuringowa City Council the parties hereby agree to enter into any further agreements that may be necessary to clarify the interests of the Joint Venturers pursuant to this Agreement. Any such amalgamation will not prejudicially affect in any way the interest of any party pursuant to this Agreement.

## **19. NAME**

The name of the Entertainment Centre shall be the “Townsville Breakwater Entertainment Centre” and shall not be changed without the consent in writing of all of the Joint Venturers.

**20. COST**

The parties shall each pay their own costs of and incidental to this Agreement.

**21. CASINO CONTROL**

This Agreement is subject to the Trustee obtaining within three (3) months from the date hereof the consent of the Minister for the time being charged with the administration of the Casino Control Act 1982 to the entry into this Agreement by the Trustee and to the performance of all obligations by the Trustee pursuant to this Agreement failing which this Agreement will cease and determine in which event none of the parties hereto will have any claim against any 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 in anticipation of the coming into force of this Agreement.

**22. ACCESS**

22.01 Notwithstanding any other provision of this Agreement the Joint Venturers agree that:

22.01.1 the Joint Venturers shall grant to the Trustee when requested by the Trustee a right of way easement not more than three (3) metres wide from the Entertainment Centre to the boundary of the Site with Lot 639 on Plant EP2106 in such location as is notified by the Trustee to the Joint Venturers after consultation with the Joint Venturers provided that the location of such easement does not detrimentally interfere with the existing operation of the Entertainment Centre and the Joint Venturers will execute all necessary documents and take all such action as is required to register such easement in the Department of Freehold Land Titles; and

22.01.2 the Trustee shall be entitled at any time to construct at its own cost such improvements as it sees fit on the right of way easement referred to in paragraph

22.01.1 to facilitate the passage of persons and goods between the Entertainment Centre and the Casino-Hotel constructed upon Lot 639 on Plan EP2106; and

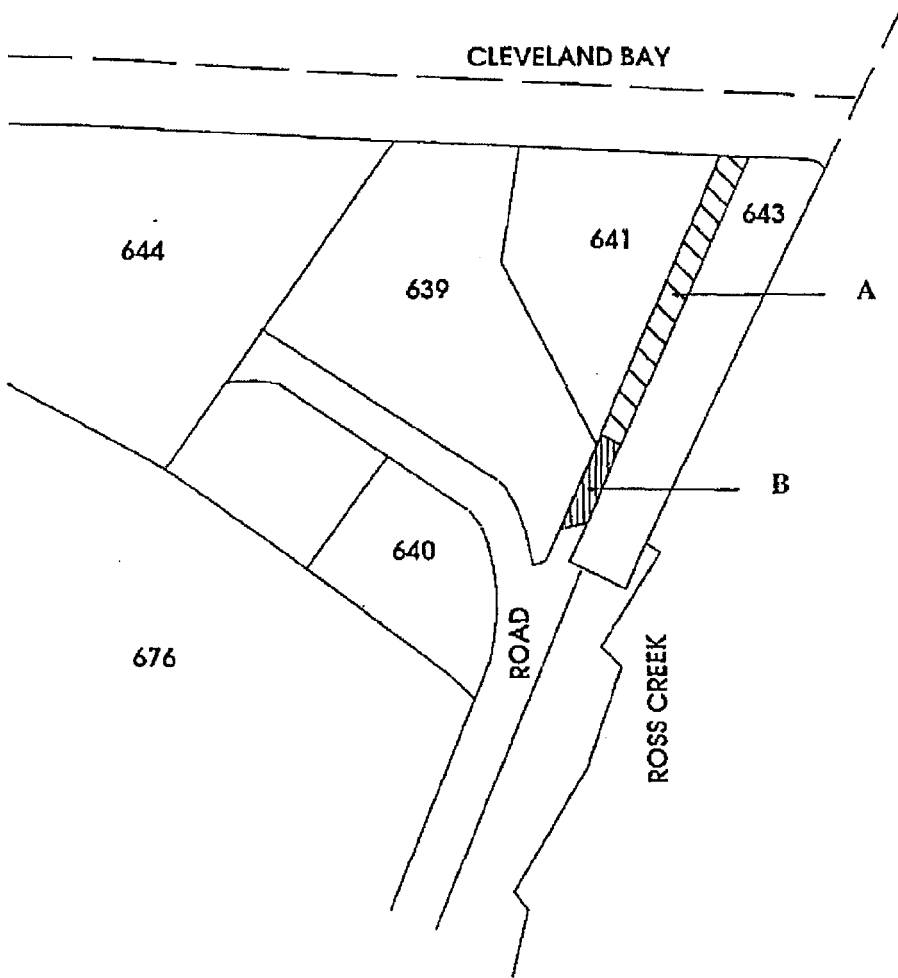
22.01.3 in the event that the Trustee carries out any improvements on Lot 639 on Plan EP2106, the Trustee shall have the right of access for its consultants, agents, servants, licensees, invitees, workmen, contractors and other persons authorised by it over the Site for the purpose of carrying out the improvements on Lot 639 on Plan EP2106 including the right for vehicles, equipment, machinery, tools, materials and goods to pass over the site for all purposes connected with the carrying out of the improvements on Lot 639 on Plan EP2106 provided that in exercise of this right, the Trustee shall ensure that there is no detrimental interference with the existing operation of the Entertainment Centre.

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**FIRST SCHEDULE**

Volume	Folio	County	Parish	Description	Area
Deed of Grant					
N1315	125	Elphinstone	Coonambelah	Lot 641 on Plan EP2106	1.475 hectares
City of Townsville					
Deed of Grant					
N1315	126	Elphinstone	Coonambelah	Lot 643 on Plan EP2106	1.213 hectares
City of Townsville					

**SECOND SCHEDULE**



**FOR SURVEY DETAILS REFER-**

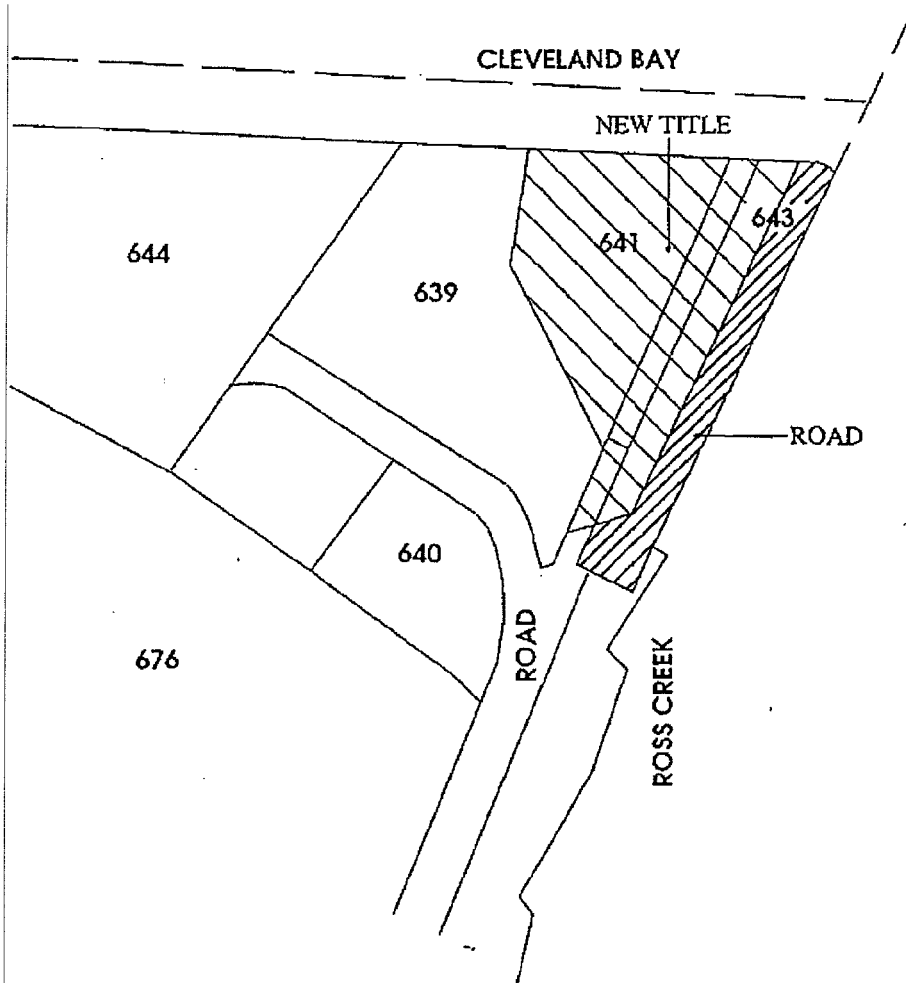
**PLAN No EP2106 Sheets 1 & 2  
PARISH OF COONAMBELAH  
COUNTY ELPHINSTONE  
LAND AGENTS DISTRICT TOWNSVILLE**

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**THIRD SCHEDULE**

1. Carpark—approximate capacity 40 cars located adjacent to the sewerage pumping station to the east of Sir Leslie Thiess Drive and access to the Entertainment Centre	\$60,000.00
2. Intersection improvements at intersection of Sir Leslie Thiess Drive and access to Entertainment Centre	\$49,000.00
3. Intersection improvements Flinders Street East-Wickham Street	\$25,000.00
4. Replace direction signs to include location of the Townsville Breakwater Entertainment Centre	\$3,000.00
5. Modification of linemarking and signs Sir Leslie Thiess Drive, Flinders Street East, Wickham Street and King Street	\$5,000.00
6. Modification of central median, Sir Leslie thiess Drive to improve capacity	\$8,000.00
<b>Total cost to Townsville City Council</b>	<b><u>\$150,000.00</u></b>

**FOURTH SCHEDULE**



**FOR SURVEY DETAILS REFER-**  
PLAN No EP2106 Sheets 1 & 2  
PARISH OF COONAMBELAH  
COUNTY ELPHINSTONE  
LAND AGENTS DISTRICT TOWNVILLE



## **FIFTH SCHEDULE**

### **DEVELOPMENT AGREEMENT**

(Part 3 of Schedule 1 of the *Townsville Breakwater Entertainment Centre Act 1991*)

## **SIXTH SCHEDULE**

### **MANAGEMENT AGREEMENT**

(Part 2 of Schedule 1 of the Townsville *Breakwater Entertainment Centre Act 1991*)

## **SEVENTH SCHEDULE**

*Townsville Breakwater Entertainment Centre Act 1991*  
other than Schedule 1



**SEALED** with the Common Seal of )  
 the **COUNCIL OF THE CITY OF** )  
**TOWNSVILLE** and signed by ) \_\_\_\_\_  
**ANTHONY JOHN MOONEY** the ) Mayor  
 Mayor and countersigned by **KEVIN** )  
**VINNARD WHEBELL** the )  
 Town Clerk on the )  
 day of \_\_\_\_\_ 1991 who certify that )  
 they are the proper officers in that ) Town Clerk  
 behalf, in the presence of: )

A Justice of the Peace

**SEALED** with the Common Seal of )  
 the **COUNCIL OF THE CITY OF** )  
**THURINGOWA** and signed by )  
**LESLIE RONALD TYRELL** the ) \_\_\_\_\_  
 Mayor and countersigned by **ANTHONY** ) Mayor  
**JOSEPH GUNN** the Town Clerk on )  
 the \_\_\_\_\_ day of \_\_\_\_\_ 1991 who certify )  
 that they are the proper officers in that )  
 behalf in the presence of: ) Town Clerk

A Justice of the Peace

## PART 2—MANAGEMENT AGREEMENT

**THIS AGREEMENT** is made the                      day of                      1991

### **BETWEEN**

(1) **ANZ EXECUTORS & TRUSTEE COMPANY LIMITED** a company duly incorporated by law in the State of Victoria and having its principal place of business in the State of Queensland at 307 Queen Street, Brisbane in the said State as trustee of the **BREAKWATER ISLAND TRUST, COUNCIL OF THE CITY OF TOWNSVILLE** a local authority duly constituted under the provisions of the *Local Government Act 1936* and having its Public Office at Administration Building, Walker Street, Townsville in the State of Queensland and **COUNCIL OF THE CITY OF THURINGOWA** a local authority duly constituted under the provisions of the *Local Government Act 1936* and having its Public Office at 86 Thuringowa Drive, Thuringowa Central in the State of Queensland (hereinafter collectively called “the Owner”)

### **AND**

(2) **ANZ EXECUTORS & TRUSTEE COMPANY LIMITED** a company duly incorporated by law in the State of Victoria and having its principal place of business in the State of Queensland at 307 Queen Street, Brisbane in the said State as trustee of the **BREAKWATER ISLAND TRUST** (hereinafter called “the Operator”)

### **AND**

(3) **BREAKWATER ISLAND LIMITED** a company duly incorporated by law in the State of Queensland and having its registered office at Ground Floor, Garden Square, 643 Kessels Road, Upper Mt Gravatt, Brisbane in the said State (hereinafter called “the Manager”)

**WHEREAS**

- A. The Owner is or is entitled to be or will be the registered proprietor of an estate in fee simple in the land described in the First Schedule on which it proposes to construct a convention exhibition sports and entertainment centre.
- B. The Operator is the trustee and the Manager is the manager of the Breakwater Island Trust established pursuant to a trust deed dated the 22nd November 1984.
- C. The Owner wishes the Operator to manage the convention exhibition sports and entertainment centre which the Operator has agreed to do.
- D. The Owner has engaged MULTIPLEX CONSTRUCTIONS PTY LTD to design, construct, furnish and equip the convention exhibition sports and entertainment centre.

**NOW THIS AGREEMENT WITNESSES** that in consideration of the premises the parties hereto do covenant and agree as follows:

**1. INTERPRETATION**

In this Agreement, unless otherwise provided or unless there is something in the subject matter or context inconsistent herewith, the expressions following (whether appearing with or without capital letters) shall have the meanings hereinafter in this clause respectively assigned to them.

- 1.01 “accounting period” means a period of not less than two weeks nor more than two months as determined by the Operator.
- 1.02 “accounting year” means each of the years ending on 30th June during the Operating Term except that the first accounting year shall be that period commencing on the Opening Date and ending on the 30th June next occurring.
- 1.03 “Breakwater Island Trust” means the trust established pursuant to a trust deed dated 22nd November 1984 and entered into between Breakwater Island Limited as manager

and ANZ Executors & Trustee Company Limited as trustee as amended.

- 1.04 “Building and Appurtenances” means the convention exhibition sports and entertainment centre building erected on the Site together with all installations therein including without limitation lighting, sound, seating, sanitary equipment, air-conditioning, refrigeration and built-in kitchen equipment.
- 1.05 “Business Days” means those days on which the banks in Townsville are open for corporate business.
- 1.06 “Defined Costs” means all costs and expenses of maintaining, conducting and supervising the operation of the Entertainment Centre (which do not include (1) depreciation, (2) amounts credited to and expenditure from the Reserve Fund and (3) general rates and land taxes which are to be borne by the Owner) incurred by the Operator directly or at its request pursuant to this Agreement or as otherwise specifically provided herein, which are properly incurred and attributable to the period under consideration under the Operator’s system of accounting including without limitation:
- (1) The cost of all food and beverages sold or consumed;
  - (2) Salaries and wages of Entertainment Centre personnel, including costs of payroll taxes and employee benefits (which benefits may include, without limitation, a pension plan, medical insurance, life insurance, an executive bonus program and home leave transportation expenses) and any amount accrued or paid for severance termination pay (other than with respect to severance or termination pay agreed to in the terms of their engagement unless with the Owner’s consent) long service leave or superannuation payments related to the period of employment at the Entertainment Centre;
  - (3) The cost of all other goods and services obtained by the Operator in connection with its operation of the Entertainment Centre including, without limitation, heat and utilities, office supplies and all services performed by third parties.



- (4) Insurance premiums and insurance excesses for property damage insurance on the Entertainment Centre and its contents, public or third party liability insurance, Workers' Compensation Insurance or insurance required by similar employee benefits acts and such business interruption or other insurance as may be provided for protection against claims, liabilities and losses arising from the operation of the Entertainment Centre. Premiums on policies for more than one year will be pro-rated over the period of insurance and premiums under blanket policies will be allocated among properties covered.
- (5) All taxes, assessments and other charges (other than income taxes but including turnover tax) payable by or assessed against the Operator with respect to the operation of the Entertainment Centre, and water and sewer and pedestal rates or charges and licence fees under the Liquor Act. Specifically excluded from Defined Costs are all land taxes levied or imposed against the Site and that part of Council or local government rates, charges, or taxes attributed to the Entertainment Centre or the Site after deducting from such rates, charges and taxes that component which relates specifically to services provided by the Council or local government body.
- (6) Legal fees and disbursements and fees of any Independent Certified Public Accountant for services directly related to the operation of the Entertainment Centre and its facilities and fees for the audit of the accounts relating to the Entertainment Centre.
- (7) The costs and expenses of technical consultants and specialised operational experts for specialised services in connection with non-recurring work on operational, functional, decorating, design or construction problems and activities.
- (8) All expenses of sales promotion and public relations activities and subject to Clause 6.04.2 all expenses for advertising the Entertainment Centre.

- (9) All out-of-pocket expenses and disbursements determined by the Independent Certified Public Accountant to have been reasonably, properly and specifically incurred by the Operator, or the Manager pursuant to, in the course of and directly related to, the management and operation of the Entertainment Centre under this Agreement. Without limiting the generality of the foregoing, such charges may include all reasonable travel, telephone, telegram, facsimile, radiogram, cablegram, air express and other incidental expenses.
- (10) All Pre-Opening Expenses.
- (11) The costs and expenses of repairs and improvements of a minor nature (including those effected pursuant to a maintenance contract) to the Building and Appurtenances which are not of a structural nature and which arise during the day to day normal operation of the Entertainment Centre. Specifically excluded from Defined Costs are the costs and expenses of repairs and improvements effected in accordance with a refurbishment program undertaken by the Operator (with the consent of the Owner if required by this agreement), the costs and expenses of repairs to plant and equipment which has substantially reached the end of its economic life and the costs and expenses of any repairs or improvements which arise as a result of a latent defect in the Building and Appurtenances.
- (12) Any other expenses expressly provided in this Agreement as being Defined Costs.
- 1.07 “Development Agreement” means the agreement entered into or to be entered into by the Owner with MULTIPLEX CONSTRUCTIONS PTY LTD for the design, construction, furnishing and equipping of the Entertainment Centre.
- 1.08 “Entertainment Centre” means the Site the Building and Appurtenances and the Furniture and Equipment.
- 1.09 “Estimated Opening Date” means the 22nd day of February 1993 or such other date as the Owner and Operator agree to as the date they estimate to be the Opening Date.

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- 1.10 “Furniture and Equipment” means all necessary furniture, furnishings, wall and floor coverings and plant and equipment to operate the Entertainment Centre.
- 1.11 “Gross Operating Surplus” means the excess of Total Revenue over Defined Costs.
- 1.12 “Independent Certified Public Accountant” means:
- (a) for the purposes of this Agreement where there is a need for a determination of a dispute by reference to an independent Certified Public Accountant, an accountant or firm of accountants selected by one party from three nominations put forward by the other party where that other party has requested use of another accountant to that nominated in (b) below; and
  - (b) for all other purposes of this Agreement and where no request for use of another accountant has been made as provided in (a) above, the Auditor-General or his nominee.
- 1.13 “Management Fee” means an amount equal to twenty percent (20%) of the Gross Operating Surplus (if any) and referred to in Clause 10.
- 1.14 “Manager” means Breakwater Island Limited.
- 1.15 “Net Operating Surplus” means an amount equal to eighty percent (80%) of the Gross Operating Surplus (if any) and referred to in Clause 10.
- 1.16 “Non-Structural Improvements” means repairs and improvements (other than those of a minor nature included in Defined Costs and referred to in Clause 1.06(11)) to the Building and Appurtenances which are not of a structural nature.
- 1.17 “Opening Date” means the date referred to in Clause 4.
- 1.18 “Operating Term” shall mean the initial operating term referred to in Clause 5 and any extension thereof.
- 1.19 “Operator” means ANZ Executors & Trustee Company Limited in its capacity as trustee of the Breakwater Island Trust or any other person who for the time being is the trustee of the Breakwater Island Trust.

- 1.20 “Owner” means ANZ Executors & Trustee Company Limited in its capacity as trustee of the Breakwater Island Trust, the Council of the City of Townsville and the Council of the City of Thuringowa.
- 1.21 “Participation Agreement” means the agreement dated the \_\_\_\_\_ day of \_\_\_\_\_ 1991 entered into between ANZ Executors & Trustee Company Limited in its capacity as trustee of the Breakwater Island Trust, Breakwater Island Limited, Council of the City of Townsville and Council of the City of Thuringowa.
- 1.22 “parties” and “party” mean respectively the parties to this Agreement and any one of those parties.
- 1.23 “Pre-Opening Expenses” means all expenses incurred by the Operator in performing Pre-Opening Services in connection with the opening of the Entertainment Centre by the Owner including without limitation travel expenses of employees and expenses of business entertainment; the cost of pre-opening advertising, promotion and publicity; and the cost of suitable ceremonies.
- 1.24 “Pre-Opening Services” means those services referred to in Clause 3.
- 1.25 “Reserve Fund” means a fund created for the purpose of making replacements, substitutions and additions to Furniture and Equipment and Non-Structural Improvements pursuant to Clause 11.
- 1.26 “Schematic Design Drawings, Plans and Specifications” means the schematic design drawings, plans and specifications referred to in the Development Agreement.
- 1.27 “Site” means the land described in the First Schedule. The expression extends to and includes any future description consequent upon any resurvey of the Site including pursuant to Clause 4.02 of the Participation Agreement.
- 1.28 “Trust Deed” means the trust deed dated 22nd November 1984 entered into between Breakwater Island Limited as manager and ANZ Executors & Trustee Company Limited as trustee as amended.

- 1.29 “Total Revenue” means all income and proceeds of sales of every kind (whether in cash or on credit) resulting from the operation of the Entertainment Centre and all of the facilities therein which are received or receivable during the period under consideration under the Operator’s system of accounting including, without limitation, all income received from tenants, patrons, lessees, licensees and concessionaires (but not including the gross receipts of such lessees, licensees or concessionaires) and other persons occupying space at the Entertainment Centre and/or rendering services to patrons, all subsidy payments, governmental allowances and awards, the value of any sponsorships, any other form of incentive payments or awards from any source whatsoever which are attributable to the occupation of the Entertainment Centre and the proceeds of use and occupancy insurance actually received by the Operator or the Owner with respect to the operation of the Entertainment Centre (after deduction from said insurance proceeds of all necessary expenses incurred in the adjustment or collection thereof) after deducting any value added tax or betterment levy payable to any Government or statutory authority.
- 1.30 Words denoting the singular number only shall include the plural number and vice versa and the masculine shall include the feminine and vice versa and words denoting individual persons only shall include corporations.
- 1.31 A reference in this Agreement to any Act of Parliament or any Section thereof shall be read as though the words “or any statutory modification or re-enactment thereof or any statutory provisions substituted therefor” were added to such reference.
- 1.32 The expression “\$” or “Dollars” means Australian Dollars unless otherwise provided or unless inconsistent with the context or subject matter.
- 1.33 The headings in this Agreement are included for convenience only and shall not affect the construction of this Agreement.
- 1.34 References to Clauses and Schedules are references to Clauses and Schedules in this Agreement.

**2. CONSTRUCTION OF BREAKWATER ENTERTAINMENT CENTRE AND INSTALLATIONS BY OWNER**

- 2.01 The Owner shall in accordance with the Schematic Design Drawings, Plans and Specifications and in conformity with all applicable laws, ordinances and governmental regulations at its own expense and with all reasonable diligence construct, furnish and equip on the Site the Entertainment Centre. The Operator acknowledges that it has perused and is currently satisfied with the Schematic Design Drawings, Plans and Specifications. The Schematic Design Drawings, Plans and Specifications shall not be changed in any material manner without the consent in writing of the Operator nor shall the Owner make any additions or alterations to the Entertainment Centre during the Operating Term without the prior written approval of the Operator such approval not to be unreasonably withheld to any alteration, addition or improvement necessary in the opinion of the Owner for the safety, security or preservation of the Entertainment Centre or for compliance with any applicable law or regulation. The Operator may require the Owner to cause such changes in the Schematic Design Drawings, Plans and Specifications as are necessary to meet problems that may arise during the period of constructing, furnishing and equipping the Entertainment Centre which could reasonably be expected to materially affect the operation of the Entertainment Centre having regard to comparable entertainment centres. The Operator shall have the right to periodically inspect the construction to determine if such construction is in conformity with the Schematic Design Drawings, Plans and Specifications.
- 2.02 The Owner shall commence design and construction of the Entertainment Centre within seven (7) days from the date of this Agreement and shall complete the construction of the Entertainment Centre and the installation of the Furniture and Equipment within sixteen (16) months thereafter such dates being subject to extension for delays due to causes reasonably beyond the control of the Owner.
- 2.03 The Entertainment Centre shall be a facility designed for entertainment, convention, exhibition and sporting events. It

shall be generally as described in the Development Agreement and be capable of accommodating:

- 2.03.1 Entertainment events such as sporting events, rock concerts, major theatrical performances and other events with a capacity of between 3000 to 6000 people depending on the configuration chosen;
  - 2.03.2 Conferences of varying sizes from small to a maximum of approximately 1800 people in theatre style;
  - 2.03.3 Exhibitions on a total floor display area of approximately 1500 square metres;
  - 2.03.4 Major dinners and presentations for approximately 1000 people;
  - 2.03.5 Small banqueting functions for weddings and commercial purposes.
- 2.04 The design and construction and other matters affecting the operating efficiency of the Entertainment Centre and the selection of all Furniture and Equipment shall be subject to the prior approval of the Operator which may be granted or withheld in its reasonable discretion having regard to comparable entertainment centres provided however that the Operator hereby acknowledges that it is currently satisfied with the Schematic Design Drawings, Plans and Specifications. Prior to the Opening Date the Owner will provide the Operator with a full inventory of all Furniture and Equipment.
- 2.05 In the event that any liquidated damages are payable by MULTIPLEX CONSTRUCTIONS PTY LTD to the Owner pursuant to the Development Agreement, the Owner shall reimburse the Operator to the extent of such liquidated damages any Defined Costs incurred by the Operator.

### **3. PRE-OPENING SERVICES BY OPERATOR**

Prior to the Opening Date of the Entertainment Centre, the Operator, as agent and for the account of the Owner, shall have the exclusive right in relation to the Entertainment

Centre after consultation with the Owner to engage in the following Pre-Opening Services:

- 3.01 Recruit, train, direct and employ an initial staff for the Entertainment Centre.
- 3.02 Initiate and prosecute advertising promotion publicity and other like programs designed to attract patrons to the Entertainment Centre on and after the Opening Date including without limiting the generality of the foregoing, public relations and other marketing activities and contracts for the use of the Entertainment Centre either before or after the Opening Date.
- 3.03 Negotiate leases, licences and concession agreements for stores, office space and lobby space at the Entertainment Centre, subject to the approval of the Owner. All leases, licences or concessions shall be in the name of the Owner and executed by or on behalf of the Owner.
- 3.04 Apply for, process and take all necessary steps to procure (in the name of the Operator or the name of the Owner or both as may be required by the issuing authority) all licences and permits required for the operation of the Entertainment Centre by the Owner, provided that it will be the obligation of the Owner to obtain any liquor licences for the sale of alcoholic beverages at all restaurants and bars in the Entertainment Centre but the Operator agrees to render the Owner all reasonable assistance in connection with its efforts to obtain such liquor licences.
- 3.05 Purchase all initial inventories of paper supplies, cleaning materials and similar consumable items and food and beverages.
- 3.06 Test the operation of the Entertainment Centre in an endeavour to ensure that a satisfactory standard of operation shall be achieved on the Opening Date.
- 3.07 Do all other things necessary for the proper opening of the Entertainment Centre including, but not limited to, arranging for suitable inaugural ceremonies.



#### **4. OPENING DATE**

The Opening Date is the date of the formal opening of the Entertainment Centre. It shall occur on a date to be specified by the Operator after the Operator deems the Entertainment Centre to be completed and the Furniture and Equipment have been installed therein, all in accordance with the provisions of Clause 2, after all licences and permits required for the operation of the Entertainment Centre (including liquor and restaurant licences) have been obtained and the Entertainment Centre has been accepted by the Operator and fully operational. The Operator may (with prior consent of the Owner), without accepting the Entertainment Centre, conduct partial operations of the Entertainment Centre prior to the Opening Date. Notwithstanding the formal opening of the Entertainment Centre, the Owner shall proceed diligently thereafter to fulfil all of its obligations hereunder regarding the construction, furnishing and equipping of the Entertainment Centre and to cure all defects or deficiencies which are required to be cured under the Development Agreement as to which the Operator notifies it.

#### **5. OPERATING TERM OF AGREEMENT**

The initial Operating Term of this Agreement shall be a period commencing on the Opening Date and terminating at midnight on the date twenty-five (25) years following the Opening Date.

#### **6. OPERATION OF THE ENTERTAINMENT CENTRE DURING OPERATING TERM**

- 6.01 The Owner hereby engages the Operator as the exclusive operator of the Entertainment Centre during the Operating Term. The Operator shall operate the Entertainment Centre and all of its facilities and activities in no less than the same manner as is customary and usual with the standard of operation of other comparable entertainment centres.
- 6.02 Except as in this Agreement otherwise provided and subject to all other applicable laws and regulations (including without

limitation such other laws and regulations to which the Owner is subject), the Operator shall have exclusive control and discretion in the operation, direction, management and supervision of the Entertainment Centre. Such control and discretion shall be positively exercised and shall include, without limitation, determination of labour policies (including the hiring and discharge of all employees and entering into a contract or contracts with an applicable union or unions), credit policies (including entering into agreements with credit card organisations), terms of admittance and sponsorship, entertainment and amusement policies, food and beverage policies (including the right to conduct catering operations outside of the Entertainment Centre), hiring policies, leasing, licensing and granting of concessions for commercial space at the Entertainment Centre, traffic management and parking, the institution of such legal proceedings in the name of the Operator as the Operator shall deem appropriate and the defence of legal proceedings in connection with the operation of the Entertainment Centre, and all aspects of administration, promotion, publicity and advertising relating to the Entertainment Centre. In exercising its said control and discretion, the Operator may negotiate such contracts, leases, concession agreements and other undertakings on behalf of the Owner as it shall from time to time consider appropriate, and officers of the Owner will execute any or all of same at the Operator's request.

- 6.03 The Owner shall co-operate with the Operator in the institution of such legal proceedings in the name of the Owner as the Operator shall deem appropriate in connection with the operation of the Entertainment Centre. In the event that the Owner shall refuse or fail to institute such legal proceedings within two (2) months of the Operator on the advice of solicitors acting for the Operator requiring the institution of such proceedings then where the recommended proceedings are for recovery of a debt the amount thereof specified by the Operator in its recommendation to the Owner shall be deemed to be added to Total Revenue. In any other case such amount as may be determined by the Independent Certified Public Accountant (who may make such determination on the advice of Queen's Counsel) shall be deemed to be added to Total

Revenue. Such addition to Total Revenue shall be with effect in the accounting year in which the cause of action arose but shall only be made if it has not already been included in Total Revenue. In any such proceeding the Owner shall be represented by legal advisors of its choice.

6.04 Notwithstanding Clause 6.02:

6.04.1 No Entertainment Centre employee shall receive compensation (including salary and benefits as described in item (2) of Clause 1.06) greater than at the rate of ninety thousand dollars (\$90 000.00) per year without the prior approval of the Owner of the pay rate; provided that the foregoing amount may be redetermined by agreement from time to time to reflect increases in the cost of living, said maximum rate to be determined conclusively by the Independent Certified Public Accountant at the request of either party made at any time in the event the parties fail to agree to any suggested increase; and

6.04.2 Except as herein otherwise provided, no annual expenditure in excess of eighty thousand dollars (\$80 000.00) in the aggregate shall be made by the Operator without the approval of the Owner (unless the Owner dispenses with the necessity for such approval either generally or in a particular case) in relation to advertising provided that the foregoing amount may be redetermined by agreement from time to time to reflect increases in the cost of living, said maximum amount to be determined conclusively by the Independent Certified Public Accountant at the request of either party in the event the parties fail to agree to any suggested increase.

6.05 The Operator will purchase necessary goods, supplies and services for the Entertainment Centre.

6.06 From time to time, at the request of the Owner (and in addition to the Operator's other obligations to report and account hereunder), senior executive staff of the Operator having full knowledge of the operation of the Entertainment

Centre, shall attend a meeting at a time and place reasonably determined by the Owner and shall report to the Owner as to the operation of the Entertainment Centre and shall discuss matters of policy and procedure affecting all phases of the conduct of business at the Entertainment Centre. The parties further acknowledge that the purpose of establishing policies and procedures is to ensure the proper and efficient operation of the Entertainment Centre and to ensure the best possible return on capital investment by the Owner which thereby reflects in the appropriate payment of fees to the Operator. To the extent possible, such consultation and advice shall take place prior to effectuating any major policies and procedures.

- 6.07 Not later than thirty (30) days prior to the commencement of each accounting year the Operator shall submit to the Owner an annual budget for the operation of the Entertainment Centre substantially in accordance with the pro-forma set out in the Second Schedule, and shall, at the Owner's request, consult with the Owner in good faith concerning said budget and will give consideration to suggestions made by the Owner.

## **7. OPERATOR TO ACT SOLELY AS AGENT OF OWNER**

- 7.01 In the performance of its duties as Operator of the Entertainment Centre, the Operator shall act solely as agent of the Owner. Nothing herein shall constitute or be construed to be or create a partnership or joint venture between the Owner and the Operator. Subject to Clause 25 all debts and liabilities to third persons incurred by the Operator as agent for the Owner in the course of its operation and management of the Entertainment Centre shall be the debts and liabilities of the Owner only and the Operator shall not be liable for any such debts and liabilities by reason of its management, supervision, direction and operation of the Entertainment Centre as agent for the Owner. The Operator may so inform third parties with whom it deals on behalf of the Owner and may take any other reasonable steps to carry out the intent of this paragraph.
- 7.02 Each Entertainment Centre employee shall be the employee of the Manager and not of the Operator.

**8. WORKING CAPITAL**

- 8.01 The Operator will provide all necessary working capital for the Entertainment Centre.
- 8.02 All funds received by the Operator in the operation of the Entertainment Centre shall be deposited to a bank account in the name of the Manager and all Defined Costs shall be paid from such account.

**9. BOOKS, RECORDS AND STATEMENTS**

- 9.01 The Operator shall, for the account of the Owner, establish and keep full and adequate books of account and other records reflecting the results of operation of the Entertainment Centre on an accrual basis. Books of account and records relating to or reflecting the operation of the Entertainment Centre shall be kept at the Entertainment Centre or such other place as may be agreed by the Owner and shall be available to the Owner and its representatives at all reasonable times for examination audit inspection and transcription.
- 9.02 The Operator shall deliver to the Owner at or prior to the end of each accounting period a profit and loss statement showing the results of the operation of the Entertainment Centre for the immediate preceding accounting period and for the accounting year to date. Such statement:
- 9.02.1 shall be taken from the books and records maintained by the Operator in the manner hereinabove specified;
  - 9.02.2 shall have attached a computation in adequate detail of the Management Fee for the Entertainment Centre;
  - 9.02.3 shall be accompanied by a narrative report of operations including specific comment on abnormal or over-budget or forecast expenditure; and
  - 9.02.4 show comparative figures for previous equivalent accounting periods and for the previous accounting year to the equivalent date.
- 9.03 Within sixty (60) days after the end of each accounting year, the Operator shall deliver to the Owner a profit and loss

statement, audited by the Independent Certified Public Accountant, showing the results of operations of the Entertainment Centre during such accounting year, and the Gross Operating Surplus, if any, for such accounting year.

- 9.04 If the Profit and Loss Statement delivered by the Operator to the Owner pursuant to Clause 9.03 contains any qualifications by the Independent Certified Public Accountant who audited the statement the Owner may give a notice to the Operator requiring it to explain the qualifications. In the event that the Operator is unable to satisfy the Owner in relation to the matter the subject of the qualification the matter shall be referred to Arbitration in accordance with this Agreement.

## **10. MANAGEMENT FEE AND PAYMENT TO OWNER**

- 10.01 During each accounting year of the Operating Term (and proportionately for a fraction of an accounting year) the Operator shall receive for services rendered under this Agreement the Management Fee being twenty percent (20%) of Gross Operating Surplus (if any) for such accounting year.
- 10.02 Subject to Clause 25.02 within thirty (30) days of the end of each accounting period during the Operating Term, the Operator shall pay to the Owner the Net Operating Surplus for that accounting period being an amount equal to eighty percent (80%) of the Gross Operating Surplus for that accounting period (if any) and shall be entitled to retain the Management Fee for that accounting period.
- 10.03 At the end of each accounting year and following receipt by the Owner of the annual audit, an adjustment will be made based on said audit, if necessary, so that subject to Clause 25.02 the Owner shall have received the Net Operating Surplus for that accounting year. Within thirty (30) days of receipt by the Owner of such audit the Owner shall either (a) pay to the Operator any amounts it may have received as Net Operating Surplus during such accounting year in excess of the Net Operating Surplus for that accounting year, or (b) be paid by the Operator the amount (if any) by which the Net Operating Surplus for that accounting year exceeds the

amounts it shall have received as Net Operating Surplus during that accounting year, whichever the case may be.

- 10.04 The Operator shall receive the Management Fee in respect of the period between the date the Operator commences to conduct partial operations of the Entertainment Centre with the consent of the Owner, as provided in Clause 4, and the Opening Date, as defined in said Clause 4.

**11. RESERVE FOR REPLACEMENTS, SUBSTITUTIONS AND ADDITIONS TO FURNITURE AND EQUIPMENT AND NON-STRUCTURAL IMPROVEMENTS**

- 11.01 The Owner shall establish a reserve fund which shall be recorded on books of account maintained by the Owner as “Reserve for Replacements, Substitutions and Additions to Furniture and Equipment and Non-Structural Improvements”.
- 11.02 At the commencement of the first accounting year of the Operating Term the Operator shall estimate an amount required for replacements, substitutions and additions to the Furniture and Equipment and Non-Structural Improvements in the Entertainment Centre for that accounting year which figure shall be calculated as three and one-half per cent (3.5%) of the estimate of the Total Revenue to be produced in that accounting year which amount shall be notified by the Operator to the Owner in writing and credited to the Reserve Fund.
- 11.03 At the commencement of the second and subsequent accounting years of the Operating Term there shall be credited to the Reserve Fund an amount equal to three and one-half per cent (3.5%) of the Total Revenue derived in the immediately preceding accounting year.
- 11.04 The Reserve Fund shall be used solely for the purposes specified in this Clause 11. Any expenditure for replacement or substitution of or additions to Furniture and Equipment or Non-Structural Improvements during each accounting year may be made by the Operator without the consent of the Owner up to the amount of such Reserve Fund including the unused accumulations thereof from earlier accounting years, and any such expenditures shall be paid by the Owner to the

Operator within seven (7) days of written demand being made therefor by the Operator to the Owner PROVIDED THAT if the amount of any particular expenditure exceeds the sum of five thousand dollars (\$5,000.00) and such expenditure has not been allowed for in the annual budget submitted by the Operator to the Owner pursuant to Clause 6.07 then (except in the case of emergency) the Operator shall give to the Owner notice in writing of its intention to make such expenditure. If the Operator does not receive an objection in writing from the Owner within fourteen (14) days from the giving of the notice by the Operator the Owner shall be deemed to have consented to the expenditure. If the Owner and the Operator are unable to agree as to the need for the expenditure within thirty (30) days from the date of the giving of the notice by the Operator the matter shall be referred to the Independent Certified Public Accountant for determination. All proceeds from the sale of Furniture and Equipment no longer needed for the operation of the Entertainment Centre shall be credited to the Reserve Fund and paid to the Owner. All amounts remaining in the Reserve Fund at the close of each accounting year shall be carried forward and retained until fully used as herein provided. Any expenditure for the purposes specified in this Clause II in excess of the Reserve Fund shall be subject to the approval of the Owner.

## **12. CAPITAL IMPROVEMENTS**

- 12.01 The Owner may from time to time at its sole expense make such alterations, additions, or improvements in or to the Entertainment Centre as the Operator shall recommend or the Owner shall recommend and the Operator shall approve, all of which will be made with as little hindrance to the operation of the Entertainment Centre as possible. No alterations, additions or improvements shall be made without the approval of the Operator such approval not to be withheld to any alteration addition or improvement necessary in the opinion of the Owner for the safety security or preservation of the Entertainment Centre or for compliance with any applicable law or regulation.



- 12.02 If structural repairs or changes in the Entertainment Centre or extraordinary repairs to or replacement of any equipment included in the definition of Building and Appurtenances shall be required at any time during the term of this Agreement to maintain the Entertainment Centre in good operating condition or by reason of any laws, ordinances, rules or regulations now or hereafter in force, or by order of any governmental or municipal power, department, agency, authority or officer, or otherwise, or because the Operator and the Owner jointly agree upon the desirability thereof, then in such event all such repairs, changes or replacements shall be made by the Owner at the sole expense of the Owner, and shall be made with as little hindrance to the operation of the Entertainment Centre as possible. Notwithstanding the foregoing, the Owner shall have the right to contest the need for any such repairs, changes or replacements required by any law, ordinance, regulation or order of governmental authority and may postpone compliance therewith, if so permitted by law, but in each such event the Owner shall protect the Operator from any loss, cost, damage or expense which may result therefrom, such protection to be in a form satisfactory to the Operator.
- 12.03 The provisions of this Clause 12 are without prejudice to any of the rights or remedies of the Operator arising out of any breach by the Owner of its obligations under Clause 2 to construct, furnish and equip the Entertainment Centre.

### **13. INSURANCE**

- 13.01 The Owner shall provide and maintain at all times during the period of construction, furnishing and equipping of the Entertainment Centre, adequate public liability and indemnity and property damage insurance (including, without limitation, boiler and machinery insurance) protecting the Owner and the Operator against loss or damage arising in connection with the construction, furnishing and equipping and preparation for the opening of the Entertainment Centre. Such public liability and indemnity insurance shall specifically include the coverages and limits specified in Clause 13.03.

- 13.02 Throughout the Operating Term the Owner shall insure the Entertainment Centre and each of the component parts and contents against damage from risks of all nature (including without limitation boiler and machinery insurance) for the aggregate amount which shall not be less than ninety percent (90%) of the full replacement costs of the Entertainment Centre and each of its component parts and contents and in no event less than the minimum amount necessary to avoid the effect of co-insurance provisions in such policies and the Owner shall carry such other or additional insurance in such amounts and against such risks as the Operator shall reasonably require with respect to the buildings facilities and contents of the Entertainment Centre.
- 13.03 The Owner shall also throughout the Operating Term provide and maintain:
- 13.03.1 Public liability insurance having a minimum per occurrence limit of twenty-five million dollars (\$25 000,000.00) against all claims which may be brought anywhere in the world for bodily injury, death or damage to property of third parties which insurance shall amongst other risks include coverage against liability arising out of the ownership or operation of motor vehicles as well as coverage in the same amount against all claims brought anywhere in the world arising out of alleged:
- (a) assault and battery;
  - (b) false arrest, detention;
  - (c) libel, slander, defamation or violation of the right of privacy; or
  - (d) wrongful entry or eviction.
- 13.03.2 Business interruption insurance (subject to availability) covering loss of income to both the Owner and the Operator for a minimum period of six months resulting from interruption of business caused by the occurrence of any of the risks insured against under the property damage insurance referred to in Clause 13.02.

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- 13.04 The Owner may, and the Operator may reasonably require the Owner to increase the above limits of insurance coverage and may reasonably require the Owner to carry other or additional insurance, provided cover is available.
- 13.05 The costs of all premiums and excesses on the insurances required under this Clause 13 shall be Defined Costs.
- 13.06 All insurance shall be in such form and for such amounts and with such companies as approved by the Operator such approval not to be unreasonably withheld. Such property damage policies shall provide that the loss, if any, payable thereunder shall be adjusted with and payable to the Owner. All other insurance shall be in the name of the Owner and the Operator as the insured.
- 13.07 Certificates of all policies shall be delivered to the Operator:
- 13.07.1 within thirty (30) days after the Opening Date in the case of all insurance required to be maintained during the Operating Term; and
- 13.07.2 not less than thirty (30) days prior to the expiration date of all policies of insurance that must be maintained subsequent to such expiration dates under the terms of this Agreement.
- All such certificates shall specify that the policies to which they relate cannot be cancelled on less than thirty (30) days prior written notice to the Operator. Should the Owner fail to supply the Operator with such certificates within the foregoing time limits, the Operator may provide any such insurance as to which such certificates are not supplied and the expenses of such provision of insurance or the losses shall be treated hereunder as Defined Costs.
- 13.08 The Operator shall throughout the Operating Term provide and maintain workers' compensation insurance under the laws of the State of Queensland for the time making provision for the same. The Operator shall prepare and lodge all wages and other returns and proposals as may be required from time to time to effect and maintain such insurance.

#### **14. OWNER TO PAY LAND TAXES AND RATES**

- 14.01 The Owner shall pay, no later than the final dates on which the same may be payable without the assessment of interest or penalties, with the right to pay the same in instalments to the extent permitted by law, all land taxes levied or imposed against the Site and that part of Council or local government rates or taxes attributed to the Entertainment Centre or the Site after deducting from such rates and taxes that component which relates specifically to services provided by the Council or local government body. The Owner shall furnish the Operator, on or before the foregoing deadlines, proof of payment thereof in form satisfactory to the Operator, in default whereof, the Operator may pay any such taxes or rates on behalf of the Owner; and shall be reimbursed forthwith by the Owner for all sums so expended.

#### **15. DAMAGE OR DESTRUCTION**

- 15.01 If the Entertainment Centre or any portion thereof shall be damaged or destroyed at any time or times during the Operating Term by fire, casualty or any other cause, the Owner will, at its own cost and expense and with due diligence, repair, rebuild or replace the same so that after such repairing, rebuilding or replacing the Entertainment Centre shall be substantially the same as prior to such damage or destruction. If the Owner fails to commence such work within ninety (90) days after it receives payment of its insurance claim in respect of the fire or other casualty, or shall fail to complete the same diligently, the Operator may, at its option, either:
- (a) terminate this Agreement by written notice to the Owner, effective as of the date sent; or
  - (b) commence or complete such work for the account of the Owner, in which event the Operator shall be entitled to be repaid therefor as provided in Clause 16.03 and the proceeds of insurance shall be made available to the Operator.

The Operator shall further have the right to require that any proceeds from insurance be applied to such repairing,

rebuilding or replacing. Notwithstanding the foregoing, if the Entertainment Centre is damaged or destroyed to such an extent that the cost of repairs or restoration as reasonably estimated by the Operator exceeds one-third of the replacement cost of the Entertainment Centre, the Operator may terminate this Agreement by written notice to the Owner or the Owner may if it determines not to repair or rebuild or replace the Entertainment Centre as aforesaid terminate this Agreement by such notice to the Operator. If thereafter at any time during the Operating Term hereof but within three (3) years of such damage or destruction the Owner commences to repair, rebuild or replace the Entertainment Centre it shall give written notice thereof to the Operator and the Operator may within sixty (60) days of written notice from the Owner of its intention to repair, rebuild or replace the Entertainment Centre reinstate this Agreement by written notice to the Owner.

## **16. TITLE TO ENTERTAINMENT CENTRE**

- 16.01 The Owner covenants and agrees that:
- 16.01.1 it will on the issue of a deed of grant in fee simple in respect of the Site maintain full ownership thereof free and clear of all liens and encumbrances save those referred to in the First Schedule;
  - 16.01.2 it will maintain full ownership of the Building and Appurtenances free and clear of all liens and encumbrances; and
  - 16.01.3 it will maintain full ownership or the right to use of the Furniture and Equipment free and clear of all liens and encumbrances.
- 16.02 The Owner covenants subject to all applicable laws and regulations and any agreements approved by the Operator that the Operator, upon fulfilling its obligations hereunder, shall have undisturbed occupation, management and operation of the Entertainment Centre during the Operating Term, and the Owner will at its own expense undertake and prosecute any appropriate action, judicial or otherwise, to assure such peaceful and quiet possession by the Operator.

- 16.03 Should the Owner default in the performance of any of the foregoing obligations, the Operator may, on behalf of the Owner, fulfil said obligations using its own funds and shall be reimbursed forthwith by the Owner for all sums so expended out of their own funds with interest calculated at the rate of interest which is Australia and New Zealand Banking Group Limited prime rate on overdrafts exceeding \$100 000.00 from time to time in the State of Queensland.

## **17. TERMINATION**

- 17.01 The following shall constitute events of default:
- 17.01.1 The failure of the Operator to pay any amount to the Owner provided for herein when the same is payable, or the failure of the Owner to pay or furnish to the Operator any amount the Owner is required to pay or furnish to the Operator in accordance with the terms hereof when the same is payable or required to be furnished.
- 17.01.2 The execution upon a judgment for an amount in excess of FIFTY THOUSAND DOLLARS (\$50 000.00) upon any property of the Owner or the Operator which is not stayed or satisfied within sixty (60) days.
- 17.01.3 The failure of the Owner to maintain at all times throughout the Operating Term hereof all of the insurance required to be maintained by the Owner under this Agreement.
- 17.01.4 The failure of either the Owner or the Operator to perform, keep or fulfil any of the other covenants, undertakings, obligations or conditions set forth in this Agreement where such failure has a material adverse effect on the other party.
- 17.02 In any of such events of default, the non-defaulting party may give to the defaulting party notice of its intention to terminate this Agreement after the expiration of a period of fifteen (15) days from the date such notice is served and, upon the expiration of such period, this Agreement shall be terminated.

If, however, with respect to the events of default referred to in Clauses 17.01.1, 17.01.3 and 17.01.4 above and unless a specific right of termination is specified elsewhere in this Agreement for the breach in question, upon receipt of such notice the defaulting party shall promptly and with all due diligence cure the default within the said fifteen (15) day period or, in the case of defaults referred to in Clause 17.01.4, if such default is not susceptible of being cured within the said fifteen (15) day period, take and continue action to cure such default with all due diligence until the same is cured, but for not more than ninety (90) days from such notice, then such notice shall be of no force and effect.

- 17.03 Notwithstanding the foregoing, neither the Owner nor the Operator shall be deemed to be in default under this Agreement if a *bona fide* dispute with respect to any of the foregoing events of default has arisen between them and such dispute has been or is submitted to arbitration prior to the expiration of the foregoing fifteen (15) day notice period for the termination of this Agreement, provided that the provisions of this Clause 17.03 will not apply to any dispute over a determination by the Independent Certified Public Accountant on any matter to be determined by him under the provisions of this Agreement.
- 17.04 The rights granted in Clause 17.03 shall not be in substitution for, but shall be, except as otherwise provided in this Agreement, in addition to any and all rights and remedies for breach of contract (other than the right to terminate this Agreement) granted by applicable provisions of law.
- 17.05 Nothing in this Clause 17 shall prevent the termination of this Agreement pursuant to any other right or provision to such effect contained elsewhere in this Agreement.

## 18. EXTENSION

The Operator shall have the right to extend the Operating Term for two successive periods of ten (10) years each (each extension to be otherwise on the same terms and conditions except the last extension which shall exclude this Clause), provided that:

- 18.01 the Owner at such time is not entitled to terminate this Agreement pursuant to Clause 17 by reason of the Operator's default;
- 18.02 the Operating Term shall have been extended for all prior periods; and
- 18.03 the Operator shall have given notice to the Owner of its election to extend the Operating Term on or before one month prior to the expiration of the original term, or any extension thereof then in force.

## **19. SET-OFF AND LIEN**

The Operator shall have the right to set-off against any payments to be made to the Owner by the Operator under any provisions of this Agreement, any and all liabilities of the Owner due to the Operator and the Owner hereby pledges to the Operator and the Operator shall have a lien on and security interest in all funds from time to time held by the Operator to secure the payment of all of the foregoing liabilities.

## **20. NOTICES**

- 20.01 Any notice, statement or demand required or desired to be given under this Agreement shall be deemed to have been duly given or made if it be in writing and signed on behalf of the party giving the same by any duly authorised person including its solicitor or solicitors and sent through the post in a prepaid envelope addressed to the party to receive the notice or if delivered, left at the address of the party to receive the notice. The address of posting or delivery shall be the address of the respective party advised to the other parties from time to time in writing and in default of any address being advised the address of the party set out below:
- 20.02 Any copy of a document or any notice in writing or other written communication required or desired to be given under this Agreement may be given by transmitting a facsimile copy thereof via the telephone network to the address for notices of the other party and shall be deemed to have been given (unless the contrary is shown) upon the date and at the time contained



in any transmission confirmation report which contains the identification code of the person to whom it was intended to be transmitted and which indicates that the transmission was received without error. If a document or a copy of a document or a notice in writing or other written communication is given after 5.00 pm on any Business Day and before 9.00 am on the next following Business Day and its receipt is not acknowledged by the other party during that period, it shall be deemed to have been given at 9.00 am on that next following Business Day.

## **21. ARBITRATION AND GOVERNING LAW**

Unless the parties can agree upon some other course of action all disputes arising in connection with this Agreement shall be first referred to arbitration in accordance with the provisions of the Commercial Arbitration Act 1990. The place of arbitration shall be agreed between the parties and in the absence of agreement shall be Townsville, Queensland. The Arbitrator shall have the right to award costs as between the parties.

## **22. CONSENT**

Except as herein otherwise provided, whenever in this Agreement the consent or approval of the Operator or the Owner is required, such consent or approval shall not be unreasonably withheld. Such consent shall also be in writing only and shall be duly executed by an authorised officer or agent of the party granting such consent or approval.

## **23. RIGHT OF SALE OF OWNER**

During the Operating Term of this Agreement, the Owner shall not sell or otherwise dispose of the Entertainment Centre or lease any part or the whole of the Entertainment Centre or the Site to any other person, firm or corporation without the consent in writing of the Operator which consent may be granted or withheld in the absolute discretion of the Operator.

## **24. ASSIGNMENT**

- 24.01 Subject to Clause 26.02, neither the Owner nor the Operator shall assign its interest under this Agreement without first having obtained the written consent of the other of them to such assignment, which consent may be granted or withheld in the absolute discretion of such party.
- 24.02 Upon any assignment permitted by this Clause and upon assumption of this Agreement by the assignee by the execution of a deed in form satisfactory to the Owner the assignor shall be relieved of any obligation or liability under this Agreement.

## **25. LIABILITY OF OWNER AND OPERATOR**

- 25.01 Notwithstanding any other provisions of this Agreement, the Operator shall not, whilst acting as the agent of the Owner in the performance of this Agreement, be liable to the Owner for any damages, loss, cost or expense except as set out in Clause 25.02 and shall be entitled to be indemnified by the Owner with respect to all liability, loss, damage, cost and expense to any other person whatsoever except as set out in Clause 25.03 hereof resulting from acts or omissions, negligent tortious or otherwise of the Owner or any agent or employee thereof in carrying out its obligations hereunder. Moreover, the Owner will at the request of the Operator assume the defence of any proceeding brought by any third party to establish any such liability, the costs of any such defence being a Defined Cost.
- 25.02 The Operator agrees that to the extent specified in this Clause 25.02 the Operator will indemnify and save harmless the Owner in respect of the amount, if any, by which Defined Costs exceed Total Revenue during an accounting year. Where the Operator makes any payment under this indemnity it is entitled to be reimbursed from Net Operating Surplus from time to time payable to the Owner and may deduct the amounts so paid from the Net Operating Surplus from time to time payable to the Owner until the whole of the amount or amounts paid by the Operator pursuant to this Clause 25.02 has been reimbursed to it in full.

25.03 The Operator shall be liable for claims of third parties for any damages, loss, cost or expense not covered by the insurance required under Clause 13 which result from the negligence of the Operator.

25.04

25.04.1 The Owner shall not assert any claims against the Operator or the Manager and they shall not be liable to the Owner for any losses, damages, liabilities or expenses (including legal fees) incurred or sustained by the Owner to the extent that the same are covered by insurance on account of damage or injury to person or property arising out of the ownership, operation or maintenance of the Entertainment Centre and the applicable insurer pays such amounts.

25.04.2 The Operator shall not assert any claims against the Owner, and the Owner shall not be liable to the Operator for any losses, damages, liabilities or expenses (including legal fees) incurred or sustained by the Operator to the extent that the same are covered by the said insurance on account of damage or injury to person or property arising out of the ownership, operation or maintenance of the Entertainment Centre and the applicable insurer pays such amounts.

## **26. OPERATOR AND MANAGER**

26.01 Notwithstanding any other provision of this Agreement, and whether or not any such provision is expressed to be unconditional, the parties acknowledge that the Operator enters into this Agreement in its capacity as trustee of the Breakwater Island Trust and the liability of the Operator under this Agreement is limited to such of the Trust Fund as defined in the Trust Deed as is for the time being held by the Operator and available for the purpose. No party shall be entitled to have recourse in satisfaction of any liability of the Operator under this Agreement to any assets held by the Operator in its personal capacity or in its capacity as trustee of any trust other than the Breakwater Island Trust.

26.02 Notwithstanding anything hereinbefore contained:

26.02.1 If the Operator at any time proposes to retire as trustee of the Breakwater Island Trust the other parties to this Agreement will consent to the retirement and replacement of the Operator in accordance with the provisions of the trust deed constituting the Breakwater Island Trust and will not place any conditions upon that consent other than a condition requiring the replacement trustee to acknowledge that it is bound by all the provisions of this Agreement on the part of the Operator to be observed, performed and fulfilled.

26.02.2 Nothing contained in this Agreement shall prevent Breakwater Island Limited from retiring or otherwise ceasing to be manager of the Breakwater Island Trust and a new manager being appointed in such place.

**27. MISCELLANEOUS**

27.01 If during the term of this Agreement the Auditor-General designated as an Independent Certified Public Accountant in Clause 1.12 shall no longer be in existence and has no successor, or if the Operator shall desire to substitute another firm of independent certified public accountants, the name of any reputable firm of independent certified public accountants having appropriate experience, selected by the Operator and approved by the Owner, shall be deemed substituted in its place.

27.02 The Owner and the Operator shall execute and deliver all other appropriate supplemental agreements and other instruments, and take any other action necessary to make this Agreement fully legally effective, binding and enforceable as between them and as against third parties.

27.03 No delay or omission to exercise any right, power or remedy accruing to any party hereunder upon any continuing breach or default under this Agreement shall impair any such right power or remedy of such party nor shall it be construed to be a waiver of any such continuing breach or default or any acquiescence therein or of, or in any similar breach or default

thereafter occurring; nor shall any waiver of any single breach or default be deemed a waiver of any other breach or default theretofore or thereafter occurring. Any waiver, permit, consent or approval of any kind or character of any breach or default under this Agreement or any waiver of any provision or condition of this Agreement must be in writing and shall be effective only to the extent in such writings specifically set forth. All remedies either under this Agreement or by law or otherwise afforded to a party shall be cumulative and not in the alternative.

- 27.04 This Agreement shall be binding upon and inure to the benefit of the Owner, its successors and permitted assigns, and shall be binding upon and inure to the benefit of the Operator its successors and permitted assigns.
- 27.05 This Agreement shall be construed and take effect in accordance with and the rights and obligations under this Agreement shall be governed by the laws of the State of Queensland. Each of the parties submits to the jurisdiction of the Courts of the said State including all Courts of appeal therefrom.

## **28. ENTIRE AGREEMENT**

- 28.01 This Agreement constitutes the entire Agreement between the parties relating to the subject matter hereof, superseding all prior agreements or undertakings, oral or written. The Owner hereby represents that in entering into this Agreement the Owner has not relied on any projection of earnings, statements as to the possibility of future success or other similar matter which may have been prepared by the Operator or the Manager and understands that no guarantee is made or implied by the Operator or the Manager as to the cost or the future financial success of the Entertainment Centre.
- 28.02 The Operator hereby represents that in entering into this Agreement the Operator has not relied on any projection of earnings, statements as to the possibility of future success or other similar matter which may have been prepared by the Owner and understands that no guarantee is made or implied

by the Owner as to the cost or the future financial success of the Entertainment Centre.

## **29. AUTHORITIES**

- 29.01 The Owner acknowledges and accepts that the Manager is the manager of the Breakwater Island Trust.
- 29.02 The Operator hereby directs the Owner and the Owner is authorised by the Operator and agrees to account to and deal with and accept notices, statements, directions, approvals and consents from the Manager on behalf of the Operator in respect of all matters relating to this Agreement until such time as the Operator shall otherwise notify the Owner in writing and the Operator hereby indemnifies the Owner from and against all actions, suits, claims, losses, demands, damages, costs and expenses suffered or incurred by the Owner in respect of or arising from the Owner so accounting to dealing with or accepting notices, statements or directions or relying upon or acting upon any such approvals or consents from the Manager pursuant to this Clause 29.

## **30. NAME**

The name of the Entertainment Centre shall be the “Townsville Breakwater Entertainment Centre” and shall not be changed without the consent in writing of the Operator.

## **31. CASINO CONTROL**

This Agreement is subject to the Operator obtaining within three (3) months from the date hereof the consent of the Minister for the time being charged with the administration of the *Casino Control Act 1982* to the entry into this Agreement by the Operator and to the performance of all obligations by the Operator pursuant to this Agreement failing which this Agreement will cease and determine in which event none of the parties hereto will have any claim against any 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 in anticipation of the coming into force of this Agreement.

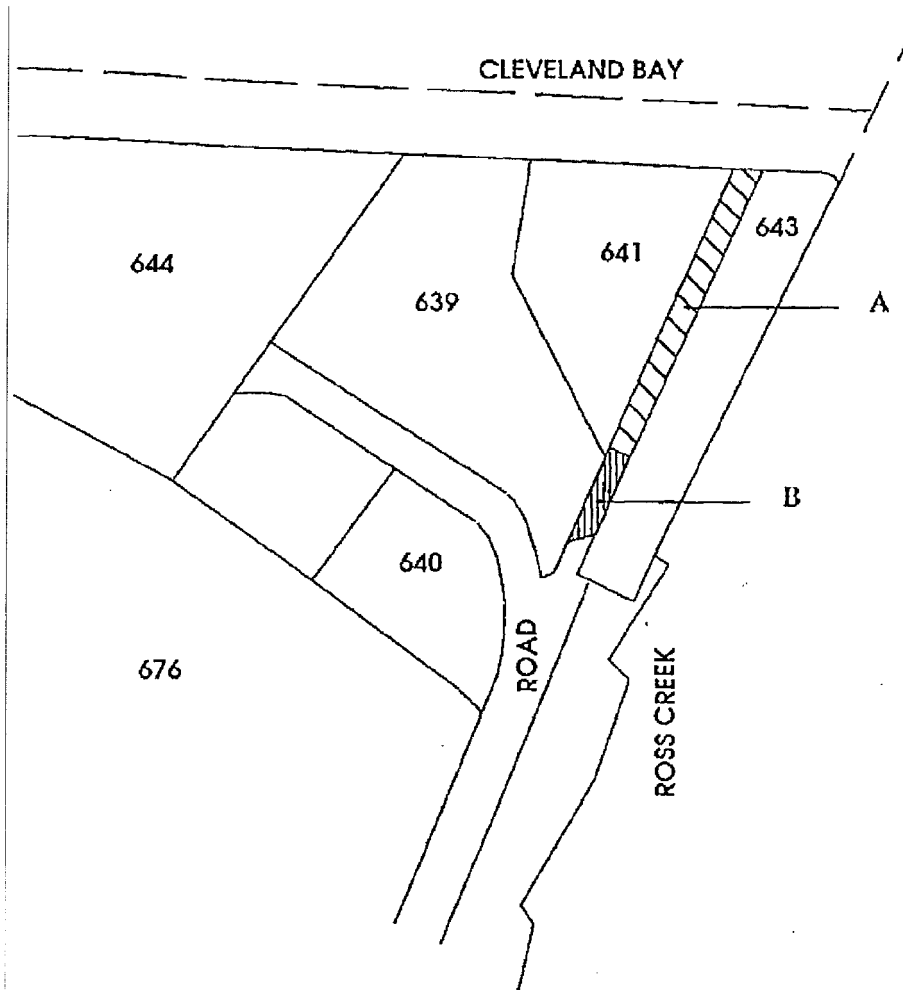
## FIRST SCHEDULE

Volume	Folio	County	Parish	Description	Area
Deed of Grant					
N1315	125	Elphinstone	Coonambelah	Lot 641 on Plan EP2106	1.475 hectares
City of Townsville					
Deed of Grant					
N1315	126	Elphinstone	Coonambelah	Lot 643 on Plan EP2106	1.213 hectares
City of Townsville					

The land hatched in black and marked "A" on the plan attached hereto

The land hatched in black and marked "B" on the plan attached hereto





FOR SURVEY DETAILS REFER-  
PLAN No EP2106 Sheets 1 & 2  
PARISH OF COONAMBELAH  
COUNTY ELPHINSTONE  
LAND AGENTS DISTRICT TOWNVILLE

## SECOND SCHEDULE

### TOWNSVILLE BREAKWATER ENTERTAINMENT CENTRE

#### BUDGETED PROFIT & LOSS ACCOUNT 199X/199X

	Months of Financial Year Dissected July to June (12 columns)	Total	Actual Previous Year
<u>INCOME</u>			
<u>Entertainment</u>			
Income			
Rental			
Service Charges			
Merchandising Comm.			
Labour Charges Rec'd			
<u>Less Expenses</u>			
Labour Costs			
Services Provided			
<u>Gross Profit Entertainment</u>			
<u>Exhibitions</u>			
Rental			
Service Charges			
Merchandising Comm.			
Labour Charges Rec'd			
<u>Less Expenses</u>			
Labour Costs			
Services Provided			
Gross Profit Exhibitions			
<u>Sport</u>			
Rental			
Service Charges			

Season Ticket Commission  
Labour Charges Rec'd

Less Expenses  
Labour Costs  
Services Provided

Gross Profit Sport

Conventions  
Rental  
Service Charges  
Merchandising Comm.  
Labour Charges Rec'd

Less Expenses  
Labour Costs  
Services Provided

Gross Profit Conventions

Catering  
Commission Received  
Power Charges  
Gas Charges  
Cleaning

Total Gross Profit House

Trading Account—Kiosks  
Sales

Less cost of Goods Sold  
Opening Stock  
Add Purchases

Less Closing Stock  
Cost of Goods Sold  
Gross Profit Kiosks

Less Expenses:  
Wages

Contribution Kiosks

Trading Account—Bar  
Sales

Less Costs of Goods Sold  
Opening Stock  
Add Purchases

Schedule 1

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Less Closing Stock  
Costs of Goods Sold

Gross Profit—Bar

Less Expenses

Wages  
Licences & Registrations

Contribution Bar

Contribution Concessions

Box Office Operation

Booking Fees Received

Less Expenses

Box Office Staff  
Tickets

Gross Profit Box Office

Other Income

Interest  
Sundry

TOTAL INCOME

LESS OVERHEAD EXPENSES

Accounting & Secretarial  
Advertising & Promotions  
Audit Fees  
Bank Charges  
Board Fees  
Cleaning (Contract)  
Consumables  
Electricity  
Entertainment  
Freight & Cartage  
Garbage Disposal  
Hire of Plant  
Insurance  
Interest on Overdraft  
Legal Fees  
Licences & Registrations  
Motor Vehicle Expenses  
Postage  
Printing & Stationery  
Provision for Annual Leave  
Rates & Taxes  
Repairs & Maintenance  
Salaries  
Security

Staff Amenities  
Staff Development & Train  
Subscriptions & Members  
Sundry Expenses  
Superannuation  
Telephone & Fax  
Travelling Expenses  
Uniform Clean & Maint

Total Overhead Expenses

Depreciation

Profit / Loss

Profit / Loss Before Depn

**IN WITNESS WHEREOF** this Agreement has been executed by the parties hereto on the dates hereinafter set forth.

**GIVEN** under the Official Seal of )  
**ANZ EXECUTORS & TRUSTEE** )  
**COMPANY LIMITED** for use in )  
Queensland by authority of the Board of )  
Directors under the hand of )  
)  
a Director and )  
who hereby certify that the Official Seal was ) ANZ Executors & Trustee  
affixed in Brisbane on the ) Company Limited  
day of 1991 in the presence of: )

A Justice of the Peace

**SEALED** with the Common Seal of )  
the **COUNCIL OF THE CITY OF** )  
**TOWNSVILLE** and signed by )  
**ANTHONY JOHN MOONEY** the ) Mayor  
Mayor and countersigned by **KEVIN** )  
**JVINNARD WHEBELL** the )  
Town Clerk on the )  
day of 1991 who certify that )  
they are the proper Officers in that ) Town Clerk  
behalf, in the presence of: )

A Justice of the Peace



## **PART 3—DEVELOPMENT AGREEMENT**

**THIS DEED OF AGREEMENT** is made the            day of            1991

**BETWEEN** the joint venture of

**ANZ EXECUTORS & TRUSTEE COMPANY LIMITED**  
as trustee of the Breakwater Island Trust,

**COUNCIL OF THE CITY OF TOWNSVILLE** and  
**COUNCIL OF THE CITY OF THURINGOWA**

whose address is care of Breakwater Island Limited, Ground Floor, Garden Square, 643 Kessels Road, Upper Mount Gravatt, Brisbane in the State of Queensland (hereinafter with its successors and permitted assigns called “the Joint Venture”) of the one part

**AND** **MULTIPLEX CONSTRUCTIONS PTY LTD** of Level 1, 349 Coronation Drive, Auchenflower, Brisbane in the State of Queensland (hereinafter with its permitted successors and assigns called “the Contractor”) of the other part

### **WHEREAS**

A. The Joint Venture is desirous of having building works designed constructed and fitted out by the Contractor; such design, building works, fit out works and other works being all those works known as the Townsville Breakwater Entertainment Centre described in the drawings and specifications and other documents and information described in or in Schedules A, B, C, D and E which are appended to this Deed of Agreement together with any variations in accordance with such Deed of Agreement.

B. The parties wish to enter into this Deed of Agreement to accurately record the terms of their agreement.

**NOW THIS DEED WITNESSES** that, in the pursuance of the services to be provided by the Contractor and in consideration of the payments to be made by the Joint Venture to the Contractor under and by virtue of this



Deed of Agreement, the Contractor hereby agrees with the Joint Venture that the Contractor will perform the work required to complete the Townsville Breakwater Entertainment Centre in accordance with the following terms and conditions for a Guaranteed Contract Sum of THIRTEEN MILLION SIX HUNDRED AND TWENTY-TWO THOUSAND DOLLARS (\$13,622,000.00):

## 1. INTERPRETATION

In the Agreement, unless the context otherwise requires:

“Actual Contract Cost” has the meaning attributed to it in Clause 19.4 of the Agreement.

“Actual Cost of Construction” has the meaning attributed to it in Clause 19.3 of the Agreement.

“Adjusted Guaranteed Contract Sum” has the meaning attributed to it in Clause 19.5 of the Agreement.

“Agreement” means this Deed of Agreement and the Schedules hereto and any other agreement between the parties hereto expressed to be supplemental hereto and all amendments to any such documents.

“commissioning” means all tasks reasonably required to be performed by the Contractor up to the issue of the Final Certificate to assist in understanding or improving the performance of the Works and ensuring the satisfactory operation of all building components, equipment and contents but excluding the actual rectification of defects.

“Constructional Plant” means all plant, appliances and other things used in the construction of the Works but not forming part of the Works.

“Contractor” means the party which is bound to execute the work under the Agreement.

“date for Practical Completion” means the date fifty-nine (59) weeks from the Date of Acceptance.

“Date of Acceptance” means the date seven (7) days from the date hereof.

“day” means calendar day.

“Defects Liability Period” means the period referred to in Clause 31.2 of the Agreement.

“Final Certificate” means the certificate referred to in Clause 30 of the Agreement.

“Final Completion” means that stage when:

- (i) all work under the Agreement has been finally and satisfactorily executed;
- (ii) the Contractor has fulfilled all its obligations under the Agreement; and
- (iii) the Defects Liability Period has expired.

“Guaranteed Contract Sum” has the meaning attributed to it in Clause 19.2 of the Agreement.

“Joint Venture” means the unincorporated joint venture between ANZ Executors & Trustee Company Limited as trustee of the Breakwater Island Trust, Council of the City of Townsville and Council of the City of Thuringowa.

“Joint Venture’s Supervisor” means the person appointed pursuant to Clause 15(a) of the Agreement.

“month” means calendar month.

“Participation Agreement” means the agreement dated the day of 199 entered into between ANZ Executors & Trustee Company Limited, Breakwater Island Limited, Council of the City of Townsville and Council of the City of Thuringowa with respect to the Townsville Breakwater Entertainment Centre.

“person” means an individual, a firm or a body corporate or unincorporate.

“Practical Completion” means that stage of the work under the Agreement when:

- (i) the Works are capable of being properly used for their intended purpose;
- (ii) those tests required under the Agreement to be performed prior to Practical Completion have been carried out and passed;

- (iii) all relevant statutory requirements have been complied with and certificates therefor have been obtained by the Contractor; and
- (iv) warranties, certificates, operating and maintenance manuals and other documents or information required under the Agreement have been provided to the Joint Venture.

“proposed Fixed Lump Sum for Contractor’s design documentation and commissioning fees” means the sum of nil.

“proposed Fixed Lump Sum for off-site overheads and profit” means subject to Clause 24 the sum of TWO HUNDRED AND SEVENTY-FIVE THOUSAND DOLLARS (\$275,000.00).

“proposed Fixed Lump Sum for on-site overheads” means the sum of NINE HUNDRED AND TEN THOUSAND THREE HUNDRED AND NINETY-EIGHT DOLLARS (\$910,398.00).

“proposed Fixed Lump Sum for project consultants’ fees” means the sum of ONE MILLION ONE HUNDRED AND TWENTY-TWO THOUSAND DOLLARS (\$1,122,000.00).

“Site” means the land hatched on the plan in Schedule E hereto made or to be made available to the Contractor by the Joint Venture for the purpose of carrying out the work under the Agreement.

“Temporary Works” means work required for the construction of the Works but not forming part of the Works.

“Works” means the whole of the work to be constructed in accordance with the Agreement and handed over to the Joint Venture.

“work under the Agreement” means the whole of the work to be executed under the Agreement including design development, documentation, construction, fit out and commissioning and all incidental work.

The Agreement shall be governed by and construed with reference to the laws for the time being in force in the State of Queensland.

Clause headings shall not be used in the interpretation of the Agreement.

Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.

Words importing a gender include every gender.

References to Clauses and Schedules are references to Clauses and Schedules in the Agreement.

Where specific obligations and responsibilities are included, the Agreement shall not be construed so as to limit the generality of the Contractor's obligations.

## **2. NATURE OF AGREEMENT**

The Agreement between the Joint Venture and the Contractor is that the Contractor takes total responsibility for the work under the Agreement.

The Contractor shall be paid the Actual Contract Cost up to the Adjusted Guaranteed Contract Sum.

## **3. AGREEMENT DOCUMENTS**

The Agreement documents are all the documents which constitute or evidence the final or concluded agreement between the Joint Venture and the Contractor concerning the execution of the work under the Agreement and include:

- (i) the drawings and specifications and other documents described in Schedule A hereto and initialled by the parties for the purposes of identification;
- (ii) the list of project consultants in Schedule B hereto;
- (iii) the preliminary budget estimate in Schedule C hereto;

- (iv) the construction program described in Schedule D hereto and initialled by the parties for the purposes of identification; and
- (v) all documents issued during the currency of the Agreement and approved by the Project Control Group referred to in Clause 13 of the Agreement;

without limiting its obligations under the Agreement, the Contractor shall carry out the work under the Agreement in strict compliance with each of the aforementioned Agreement documents.

#### **4. CONTRACTOR'S OBLIGATIONS**

The Contractor's obligations shall include but not be limited to:

##### **4.1 Design and Documentation**

The Contractor shall:

- (i) be accountable to the Joint Venture for ensuring that the design development and documentation of the Works are carried out in accordance with the provisions of the preliminary design described by the drawings and specifications and other documents described in Schedule A hereto, other provisions of the Agreement and all relevant statutory requirements and the Contractor warrants that the design will be fit for its intended purpose. The Contractor acknowledges that it has examined the drawings, specifications, documents and information described in the Schedules hereto and has satisfied itself as to the appropriateness and adequacy of same;
- (ii) be solely responsible for the co-ordination of the project consultants engaged in the design development and documentation of the Works and shall provide adequate and competent management thereof;
- (iii) be solely responsible for ensuring that materials and standards of workmanship prescribed in drawings, trade specifications and other documents are fit for the

purpose, consistent with the nature and character of the Works and in accordance with the Agreement. Local preferences and trade practices shall be considered in the selection of materials, systems and services;

- (iv) be accountable to the Joint Venture for ensuring that no change affecting the function, scope or quality of the Works is made without the prior consent of the Joint Venture; and
- (v) arrange and chair weekly design review meetings in Townsville attended by the project consultants engaged in the design development and documentation of the Works for the purpose of monitoring and reviewing the design development and documentation of the Works, reasonable notice of which meetings shall be given to the Joint Venturer's Supervisor who shall be at liberty to attend such meetings but without being under any obligation to do so.

#### 4.2 **Construction**

The Contractor shall:

- (i) be accountable to the Joint Venture for ensuring that the Works are constructed in accordance with the Agreement and all relevant statutory requirements and in a proper and workmanlike manner using new materials and warrants that the Works will be fit for the purpose for which they are constructed;
- (ii) provide by way of subcontracts or on its own account (where approved or required by the Agreement) everything that is indispensably and contingently necessary for the completion of the Works; and
- (iii) be solely responsible for the co-ordination of subcontractors engaged in the construction of the Works and shall provide adequate and competent supervision thereof.

#### 4.3 **Fit Out**

The Contractor shall be responsible to the Joint Venture for the fit out of the Works.

#### 4.4 **Commissioning**

The Contractor shall be responsible to the Joint Venture for the commissioning of the Works.

### 5. **ASSIGNMENT**

The Contractor shall not, without the prior written approval of the Joint Venture and except on such terms and conditions as are determined in writing by the Joint Venture, assign, mortgage, charge or encumber the Agreement or any part thereof or any benefit or monies or interest hereunder.

### 6. **SUBCONTRACTS**

- (a) The Contractor shall invite public or selected subcontract tenders, as approved by the Joint Venture, for each trade package required for the construction of the Works.
- (b) The Contractor shall not tender for the construction of any part of the Works unless the Joint Venture determines that no subcontract tender shall be accepted or no tender is received in respect thereof or for such other reasons as the Joint Venture may determine.

Where the Joint Venture approves that the Contractor submit a tender for the construction of part of the Works and subsequently accepts that tender, the Contractor shall carry out that work as a subcontractor and all provisions of the Agreement in respect of subcontracts shall apply thereto.

- (c) The Contractor shall submit the names of proposed selected subcontract tenderers to the Joint Venture for its approval a minimum of seven (7) days before tenders are invited.
- (d) Subcontract tender documents shall be submitted to the Joint Venture for review a minimum of seven (7) days before tenders are invited.
- (e) Conditions of tendering as approved by the Joint Venture shall apply to all subcontract packages including the supply of materials.

- (f) Subcontracts shall be based on conditions compatible with the requirements and provisions of the Agreement and with the nature, complexity and extent of the individual trade packages. Such conditions shall be the subject of prior approval by the Joint Venture and shall include appropriate clauses regarding:
- (i) errors in Bills of Quantities and compensation therefor similar to that contained in the National Public Works Conference General Conditions of Contract; and
  - (ii) the requirement that all costs payable for the employment of labour shall relate to Award rates, allowances and conditions as prescribed by the Industrial Conciliation and Arbitration Commission, except that no payments shall be made by the Joint Venture in respect of a site allowance or site agreement, adjustments to the Award to compensate for over-award payments or actual or proposed improvements in productivity or efficiency or any allowance in respect of redundancy or any Building Union Superannuation Scheme.
- (g) The Contractor shall issue the subcontract tender documents including professionally prepared Bills of Quantities as described in Clause 11(viii) to subcontract tenderers, who shall be required to submit fully priced and correctly extended copies of the Bills of Quantities with their tenders. The rates contained within the successful tenderer's agreed priced Bill of Quantities shall be used for the purposes of payments and the valuation of variations pursuant to Clause 34.
- (h) The Contractor shall use its best endeavours to obtain at least three (3) conforming competitive tenders for each subcontract, and shall submit its recommendation regarding acceptance of a tender accompanied by all tenders, information supplied by tenderers and project consultants' recommendations to the Joint Venture for its approval before acceptance thereof by the Contractor. The Contractor shall not accept any tender to which the Joint Venture raises a reasonable objection.



- (i) The Contractor shall enter into a contract with each subcontractor approved by the Joint Venture and shall be responsible for the proper administration of those contracts including:
  - (i) the identification and notification to subcontractors of any variations and adjustments to the work under the subcontract and of any defects in workmanship or materials in and omissions from that work; and
  - (ii) ensuring that such defects and omissions are rectified and that such work is completed in accordance with the requirements of the subcontract.
- (j) If a subcontractor defaults in the performance or observance of any covenant, condition or stipulation in the subcontract, the Contractor shall exercise every right available to him under the subcontract or at law to rectify the default and recover any consequent costs. The Contractor shall not waive, discharge, release or vary any condition of the subcontract without the prior approval of the Joint Venture.
- (k) Nothing in the Agreement shall constitute the Contractor as agent for the Joint Venture and any implication of agency is hereby expressly negated and in particular but without limiting the generality of the foregoing the Contractor shall remain responsible to the Joint Venture for the performance of the work under the Agreement strictly in accordance with the terms and conditions of the Agreement notwithstanding any default or omission of any subcontractor engaged by the Contractor with the approval of the Joint Venture. Any approval given by the Joint Venture is for the purpose of ensuring compliance by the Contractor with the requirements of the Joint Venture under the Agreement and no such approval is or shall be construed as an assumption of risk or liability by the Joint Venture.

## **7. COMPLIANCE WITH LAWS**

- (a) The Contractor shall comply with all statutes, regulations and by-laws applicable to the design, construction, fit out and commissioning of the Works.

- (b) In order to comply with By-Laws 8.1(2) of the Building Act 1975, the Contractor shall supply a certificate in which the authorship of all documentation is acknowledged by all design disciplines. The certificate shall be signed by a person nominated in that By-Law as having a co-ordinating role with respect to documentation including the integration of other consultants' work, and shall be in a form approved by the Joint Venture.
  - (c) The Contractor shall not carry out or cause to be carried out any building work in respect of which the Standard Building By-Laws under the Building Act require the prior approval of the Local Authority unless such approval has been obtained.
  - (d) The Joint Venture as or on behalf of the owner under the Workplace Health and Safety Act 1989 does hereby appoint the Contractor as principal contractor under that Act, such appointment to apply immediately upon the Date of Acceptance.
  - (e) The Contractor shall perform all the duties of the principal contractor as prescribed by the Workplace Health and Safety Act including, but not limited to:
    - (i) Giving notice in the prescribed form to the Director of Accident Prevention of intention to commence a notifiable project at least twenty-four (24) hours before commencing any work on site; and
    - (ii) Payment of the prescribed fee, such payment to accompany the aforementioned notice.
- Should the Contractor as principal contractor under the Act fail to perform any such duty, the Contractor shall indemnify the Joint Venture from any liability including any penalty which may be imposed under the Act and any amounts so incurred shall be a debt due from the Contractor to the Joint Venture pursuant to Clause 23.
- (f) The Contractor shall liaise with the Joint Venture's Supervisor in order to ascertain requirements with respect to Building Act inspections.
  - (g) The Contractor shall refer to the Queensland Government Administration Services Department's Building Surveyor in

order to ascertain the authority having jurisdiction over the plumbing and sanitary drainage installation and the number of copies of drawings required to be provided to that authority by the Contractor. During construction, plumbing and sanitary drainage installations shall be inspected by, and shall comply with the requirements of, the applicable authority's plumbing and drainage Inspectors. Fees for inspections shall be paid by the Contractor.

- (h) Without limiting the generality of paragraph (a) of this Clause 7, the Contractor shall deliver to the Joint Venture prior to the date of Practical Completion the following:
- (i) a Certificate of Classification under the Standard Building By-Laws under the Building Act 1975 permitting the Works to be occupied or used for the purposes for which they are intended to be occupied or used;
  - (ii) a Certificate of Approval under the Fire Safety Act 1974 permitting the Works to be occupied or used for the purposes for which they are intended to be occupied or used; and
  - (iii) a certificate from a licensed surveyor certifying that the Works are correctly located on the Site in accordance with the drawings and specifications and other documents described in Schedule A hereto and the requirements of the Townsville City Council.
- (i) Approvals and certificates other than those referred to in paragraph (h) of this Clause 7 issued by the relevant authorities shall be surrendered to the Joint Venture following Practical Completion of the Works.

## **8. DOCUMENTS**

### **8.1 Supply by Contractor**

- (a) The Contractor shall supply copies of documents as follows:
- (i) Four (4) copies of preliminary working drawings and subcontract tender documents for Building Act approval in accordance with Clause 7(c);

- (ii) Six (6) copies of preliminary working drawings to the Joint Venture;
  - (iii) Six (6) copies of drawings and other documents issued for construction; and
  - (iv) Six (6) copies of subcontract tender documents including working drawings and trade specifications to the Joint Venture pursuant to Clause 6(d).
- (b) If within seven (7) days of receipt of the subcontract tender documents the Joint Venture advises the Contractor that the work described therein does not meet the requirements of the Agreement, the Contractor shall submit new or amended documents for review as described in the preceding paragraph.
- (c) The review of preliminary working drawings and subcontract tender documents by the Joint Venture or its employees, consultants or agents shall not relieve the Contractor of responsibility for errors, omissions or any of its other obligations and responsibilities under the Agreement.
- (d) The cost of reproducing preliminary working drawings and subcontract tender documents including all copies required by the Joint Venture, its employees, consultants and agents and for Building Act review, inclusive of all plan printing and document production, shall be deemed to be included in the proposed Fixed Lump Sum for the Contractor's design, documentation and commissioning fees except to the extent normally provided by project consultants, the cost of which shall be included in the Fixed Lump Sum for project consultants' fees.
- (e) Prior to the date of Practical Completion, the Contractor shall provide to the Joint Venture two (2) copies of interim operating manuals and maintenance manuals for all services, plant and equipment forming part of the Works and all warranties, guarantees, certificates and records relating to any materials, services, plant or equipment forming part of or incorporated into the Works.
- (f) Within one (1) month after the date of Practical Completion, the Contractor shall provide to the Joint Venture;

- (i) two (2) complete sets of architectural and engineering drawings;
- (ii) the negatives of architectural and engineering drawings;
- (iii) two (2) copies of trade specifications and other data;
- (iv) two (2) copies of complete schedule of all plant and equipment setting out all acquisition costs; and
- (v) two (2) copies of operating manuals and maintenance manuals for all services, plant and equipment forming part of the Works;

for the Works as constructed.

## 8.2 Use and Publicity

- (a) During the course of construction, the Contractor shall retain on site one copy of all preliminary working drawings, subcontract tender documents including any variations thereto, workshop drawings, programs and the Agreement documents as described in Clause 3 which shall be available for reference by the Joint Venture and its employees, consultants and agents.
- (b) The Contractor shall not issue any information, document or article in respect of the work under the Agreement for publication in any media nor nominate the project for any award without the prior written approval of the Joint Venture, shall give due recognition to the Joint Venture should any such issue or nomination be approved and shall refer enquiries from any media concerning the work under the Agreement to the Joint Venture.
- (c) The Joint Venture may use or copy any drawings, trade specifications and other data provided by the Contractor.

## 8.3 Ownership and Copyright

The Contractor shall ensure that ownership and copy right in all drawings, trade specifications and other documents are vested exclusively in the Joint Venture pursuant to Clause 16(d).

#### **8.4 Discrepancies**

- (a) The discovery by either party of any discrepancy shall immediately be notified in writing to the other party.
- (b) Where the discrepancy is contained in the information provided by the Contractor, the Joint Venture shall, subject to compliance with statutory requirements, determine which of the discrepant items or descriptions shall prevail and shall advise the Contractor accordingly.
- (c) There shall be no adjustment to the Guaranteed Contract Sum on account of the determination of discrepancies.

#### **9. NOTICES**

- (a) Any written notice, demand, request or document given or required to be given under the Agreement shall be deemed to have been duly given when it is received by the party to which it is addressed (including by way of facsimile transmission) or is delivered to the address stated in the Agreement or such change of address as notified.
- (b) Any change of address by either party to the Agreement shall be immediately notified in writing to the other party.

#### **10. WARRANTIES**

Prior to the date of Practical Completion, the Contractor shall provide to the Joint Venture all warranties required to be provided under the Agreement and shall ensure that the Joint Venture shall have the benefit therefrom.

#### **11. CONTRACTOR'S RESPONSIBILITIES**

The Contractor shall control, co-ordinate, supervise and direct all activities necessary in respect of the work under the Agreement, and shall not delegate any responsibilities under the Agreement to other persons. In addition to the Contractor's other responsibilities under the Agreement, the Contractor shall:

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- (i) Design and document the Works and complete such design including the provision of preliminary working drawings and subcontract tender documents in accordance with the Agreement;
  - (ii) Advise the Joint Venture on all matters relating to the work under the Agreement;
  - (iii) Prepare a comprehensive management plan incorporating time programs and cost plans and maintain current for the duration of the Works;
  - (iv) Establish administrative procedures, including convening meetings, taking minutes and reporting to and consulting with the Joint Venture and its employees, consultants and agents;
  - (v) Co-ordinate and monitor the work of the project consultants;
  - (vi) Provide precise cash flow planning to ensure that budget limits and planned expenditure in any fiscal period are achieved;
  - (vii) Instigate appropriate program control over and for the duration of the work under the Agreement based on the construction program for the Works described in Schedule D hereto and monitor, review and update the program;
  - (viii) Prepare Bills of Quantities for subcontracts as required—such Bill of Quantities shall be prepared by the quantity surveyor engaged by the Contractor in accordance with the requirements of the current edition of the Australian Standard Method of Measurement of Building Works. Bills of provisional quantities shall be issued to subcontract tenderers where necessary;
  - (ix) Call and evaluate competitive tenders for subcontracts and make recommendations on the acceptance thereof;
  - (x) Engage, manage, co-ordinate and be responsible for the activities of all subcontractors and provide all necessary supervision (including persons experienced in the supervision of specialist service subcontracts),

- attendance, Constructional Plant and Temporary Works necessary for the construction of the Works;
- (xi) Provide adequate storage and protection of all materials;
  - (xii) Submit payment claims and requests for variations, and for extensions of time;
  - (xiii) Obtain all necessary approvals and certificates in accordance with Clause 7;
  - (xiv) Ensure that the work under the Agreement is completed within the time and cost limitations provided for by the Agreement;
  - (xv) Ensure that all the requirements and objectives of the Joint Venture are achieved to the Joint Venture's reasonable satisfaction;
  - (xvi) Provide reasonable assistance with the initial occupation of the Works including all necessary access for any relocation required to be effected by the Joint Venture prior to the date of Practical Completion;
  - (xvii) Prepare and submit architectural and engineering drawings and trade specifications for the Works as constructed and operating manuals and maintenance manuals for all services, plant and equipment forming part of the Works within the times as stipulated in Clause 8.1;
  - (xviii) Provide assistance to the Joint Venture by making all accounts and book-keeping available for scrutiny at all times in order to enable the Joint Venture or its employees, consultants or agents to check and certify the Actual Cost of Construction and the Actual Contract Cost;
  - (xix) Ensure the identification and rectification of defects in any part of the Works pursuant to Clauses 6(i) and 31;
  - (xx) Keep on-site until the Works have been commissioned to the Joint Venture's satisfaction an experienced and competent Contractor's Representative; and



- (xxi) Procure after obtaining the prior approval of the Joint Venture the plant and equipment necessary for the proper functioning of the Works.

## **12. CONTRACTOR'S REPORTS**

The Contractor shall submit to the Joint Venture within seven (7) days of the end of each month and at Practical and Final Completion eight (8) copies of a consolidated report in a form approved by the Joint Venture including:

- (i) a comparison of the projected Actual Contract Cost and the Adjusted Guaranteed Contract Sum including the implications thereof;
- (ii) a comparison of the original cash flow forecast, the revised cash flow forecast and the actual cash flow including comments on compliance with budgetary limitations and planned expenditure in any fiscal period;
- (iii) details of and recommendations on variations pursuant to Clause 34.1;
- (iv) details of variations pursuant to Clause 34.2;
- (v) details of all other contractual matters including payments, extension of time claims and other claims;
- (vi) details of design development and documentation progress including compliance with statutory requirements;
- (vii) details of construction progress and subcontracts including compliance with statutory requirements;
- (viii) details of all urgent approvals, acceptances, directions and other decisions given by the Joint Venture's Supervisor pursuant to Clause 15(a);
- (ix) all reports prepared by the project consultants pursuant to Clause 16; and
- (x) other comments and recommendations of the Contractor.

### **13. PROJECT CONTROL GROUP**

- (a) Within fourteen (14) days after the Date of Acceptance, a Project Control Group shall be established comprising representatives from each of ANZ Executors & Trustee Company Limited, Council of the City of Townsville, Council of the City of Thuringowa, the Queensland Government Department of Administrative Services, the Contractor, Peter Hunt Architect and Rider Hunt North Queensland Pty Ltd. Each such organisation shall nominate its representative and an alternate for such representative who shall be empowered to act as such representative in the absence of the said representative and each such organisation may from time to time revoke any such nomination and make a new nomination. Any representative may be accompanied at any meeting by up to two (2) assistants or advisers who shall not be entitled to vote.
- (b) Meetings of the Project Control Group shall be convened, chaired and minuted by the Contractor and shall be held at least once during each month, provided that a special meeting shall be convened at the request of any member.
- (c) The Project Control Group shall, subject to Clause 46.2(a), receive and consider, for and on behalf of the Joint Venture, all reports, information and particulars which are required under the Agreement, and make, give or endorse, for and on behalf of the Joint Venture, approvals, acceptances, directions and other decisions which the Joint Venture is required or entitled to make or give under the Agreement, except that:
  - (i) the Joint Venture's Supervisor shall have the authority to give urgent approvals, acceptances, directions and decisions pursuant to Clause 15(a); and
  - (ii) where the Agreement requires consideration by and approval, acceptance, direction or other decision by the Joint Venture then it shall be given by it and not by the Project Control Group.

All decisions of the Project Control Group shall be deemed to be those of the Joint Venture under the Agreement.

- (d) Matters arising at a meeting of the Project Control Group shall be determined by the unanimous agreement of the members present. If any member present refuses or fails to signify its agreement the matter shall be referred to the Joint Venture for its determination and decision, which shall be given as soon as practicable.
- (e) The Project Control Group may call upon any person considered necessary for a report or other advice to assist it in its deliberations.
- (f) The Project Control Group shall be dissolved upon completion of the construction of the Works on a date which shall be agreed by the Group.

#### **14. CONTRACTOR'S REPRESENTATIVE**

- (a) The Contractor shall nominate to the Joint Venture and subsequently appoint by notice in writing to the Joint Venture an experienced and competent person acceptable to the Joint Venture to act as the Contractor's Representative for the duration of all activities in relation to the work under the Agreement.
- (b) The full-time on-site presence of the Contractor's Representative shall be required from the date of commencement of work on the Site until the Works have been commissioned to the Joint Venture's satisfaction.
- (c) Any direction given to the Contractor's Representative shall be deemed to be a direction given to the Contractor, and any decision or action of the Contractor's Representative shall be deemed to be a decision or action of the Contractor.

#### **15. JOINT VENTURE'S SUPERVISOR AND CLERK OF WORKS**

- (a) (i) The Joint Venture shall nominate to the Contractor and subsequently appoint by notice in writing to the Contractor a person to act as the Joint Venture's Supervisor for the duration of all activities in relation to the work under the Agreement.

- (ii) The Joint Venture's Supervisor shall have the authority to issue instructions in accordance with Clause 15(b) and to exercise such of the functions, powers and duties of the Project Control Group as are delegated to it in writing by that Group.
  - (iii) The Joint Venture's Supervisor shall also have the authority to make and give for and on behalf of the Joint Venture those approvals, acceptances, directions and other decisions required to be given urgently by the Joint Venture to the Contractor.
- (b) The Contractor shall comply with written instructions from the Joint Venture's Supervisor related to the quality of the Works. Such instructions may include any or all of but are not limited to:
  - (i) removal of material from the Site;
  - (ii) demolition of parts of the Works;
  - (iii) reconstruction, replacement or correction of materials or work; and
  - (iv) matters related to Building Act compliance.
- (c) The Joint Venture may appoint a Clerk of Works at its own expense and such person shall report directly to the Joint Venture's Supervisor. The Contractor shall ensure that adequate on-site furnished accommodation including a telephone is provided for the Clerk of Works—all associated costs shall be paid by the Contractor and shall be deemed to be included in the proposed Fixed Lump Sum for on-site overheads.
- (d) The Joint Venture's Supervisor and the Clerk of Works and employees, consultants and agents of the Joint Venture nominated by the Joint Venture's Supervisor shall be permitted access to all parts of the Works and to all places where goods and/or materials are being stored, fabricated or manufactured for incorporation in the Works.
- (e) Neither the Joint Venture's Supervisor nor the Clerk of Works shall issue instructions to any subcontractor or workman but shall at all times deal with and through the Contractor or the Contractor's Representative.

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- (f) The Contractor's Representative, Joint Venture's Supervisor and Clerk of Works shall meet regularly to inspect the quality and progress of the Works.
- (g) The Contractor shall give a minimum of seven (7) days notice to the Joint Venture's Supervisor of inspections pursuant to Clauses 16(e) and (f).
- (h) The Joint Venture's Supervisor may delegate such of its functions, powers and duties as it sees fit.

## **16. PROJECT CONSULTANTS**

- (a) The Contractor shall engage the project consultants listed in Schedule B hereto or as approved by the Project Control Group to undertake the minimum services described hereunder and any additional services included in the drawings and specifications and other documents described in Schedule A hereto:
- (i) Architectural
- Design development;
  - Preparation of preliminary architectural working drawings of the Works;
  - Preparation of architectural subcontract documentation pursuant to Clause 8.1 including co-ordination and integration of other consultants' works;
  - Preparation of furniture layouts;
  - Review of and comment on relevant subcontract tenders;
  - Quality and progress inspections of the Works during construction and at Practical and Final Completion and preparation of monthly reports pursuant to Clauses 16(e) and (f); and
  - Provision of architectural "as constructed" drawings and specifications pursuant to Clauses 8.1(f) and 11(xvii).

(ii) Civil/Structural Engineering

- Design development;
- Preparation of preliminary civil engineering drawings of the Works;
- Preparation of civil/structural subcontract documentation pursuant to Clause 8.1;
- Review of and comment on relevant subcontract tenders;
- Quality and progress inspections of civil/structural work during construction and at Practical and Final Completion and preparation of monthly reports pursuant to Clauses 16(e) and (f); and
- Provision of civil/structural “as constructed” drawings and specifications pursuant to Clause 8.1(f) and 11(xvii).

(iii) Mechanical/Electrical Engineering

- Design development;
- Preparation of preliminary mechanical/electrical engineering drawings of the Works;
- Preparation of mechanical/electrical subcontract documentation consistent with partition and furniture layouts pursuant to Clause 8.1;
- Review of and comment on relevant subcontract tenders;
- Quality and progress inspections of mechanical/electrical work during construction and at Practical and Final Completion and preparation of monthly reports pursuant to Clauses 16(e) and (f);
- Provision of mechanical/electrical “as constructed” drawings and specifications pursuant to Clauses 8.1(f) and 11(xvii); and
- Assistance to Contractor in the commissioning of mechanical/electrical services.

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- (iv) Quantity Surveying
- Preparation of Bills of Quantities as required for subcontracts pursuant to Clause 11(viii); and
  - Review of and recommendations on subcontract tenders.
- (b) The Contractor shall enter into a written agreement with each project consultant and shall be responsible for payment of all relevant fees. A copy of all consultancy agreements shall be forwarded to the Joint Venture by the Contractor within fourteen (14) days of the Date of Acceptance.
- (c) Project consultants shall be accountable to the Contractor on all matters pertaining to their appointment and the Contractor shall be responsible to the Joint Venture for any acts, defaults and neglects of the project consultants.
- (d) Consultancy agreements shall include a requirement that the consultant execute a Deed of Assignment for ownership and copy right in all drawings, trade specifications and other documents produced by the consultant pursuant to the work under the Agreement to be vested exclusively in the Joint Venture.
- (e) The project consultants shall make regular site inspections during construction to assess the quality and conformity of the Works with the Agreement provisions, to witness tests and to inspect work to be subsequently concealed.
- (f) Monthly during construction and at Practical Completion and Final Completion the project consultants shall make joint site inspections with the Contractor's Representative and the Joint Venture's Supervisor to assess the progress of the Works and shall report to the Contractor with a copy to the Joint Venture on:
- (i) compliance with all relevant statutory requirements;
  - (ii) compliance with the Agreement;
  - (iii) compliance with subcontract tender documents prepared pursuant to Clause 8.1;
  - (iv) quality of workmanship and materials incorporated in the Works with all defects identified; and

- (v) progress of the construction of the Works.
- (g) The Contractor shall not terminate the services of any project consultant without the prior written approval of the Joint Venture.

## **17. JOINT VENTURE'S CONSULTANTS**

- (a) The Joint Venture may, at its own cost, appoint its own consultants, to provide advice upon any matters relating to the work under the Agreement. Such matters may include but shall not be limited to:
  - (i) Monitoring design development;
  - (ii) Reviewing and advising on revisions to subcontract budgets, Bills of Quantities in subcontract tender documents, subcontract estimates, tenders and priced Bill of Quantities, construction progress, cash flow and financial aspects;
  - (iii) Checking, negotiating and advising on valuations of variations, delay claims and other claims;
  - (iv) Checking, negotiating and certifying claims for payment;
  - (v) Checking, negotiating and certifying actual costs, guarantee adjustments, bonus calculations and the final account;
  - (vi) Advising on program matters including extensions of time and adjustments/entitlements arising therefrom;
  - (vii) Ensuring that all other contractual requirements are met; and
  - (viii) Carrying out inspections and witnessing tests.
- (b) The Contractor shall provide all information and assistance necessary to enable the Joint Venture's consultants to provide advice.
- (c) The Contractor shall remain responsible to the Joint Venture for the performance of the work under the Agreement strictly in accordance with the terms and conditions of the Agreement



notwithstanding the appointment of consultants by the Joint Venture pursuant to this Clause 17 and notwithstanding any act or omission by any such consultants.

## **18. SITE**

### **18.1 (a) Site Conditions**

The Contractor shall be deemed:

- (i) to have visited the Site prior to execution of the Agreement and to have made itself fully aware of all matters including but not limited to site and local conditions affecting the Works;
- (ii) to have undertaken all necessary soil investigations;
- (iii) to have checked access to the Site and to have made allowance for all matters pertaining thereto;
- (iv) to have ascertained the extent and nature of all services including but not limited to temporary services necessary to ensure the continuing operation of any existing facility; and
- (v) to have ascertained and to have ensured compliance with the requirements of authorities having jurisdiction over the Works.

The Contractor shall not be entitled to any compensation for any additional costs which the Contractor may suffer in carrying out the work under the Agreement due to any conditions which may be found to differ from the conditions properly ascertainable by complying with the requirements of the foregoing.

- (b) The Contractor acknowledges that it is aware that the Site has been reclaimed from the sea or filled and that if at any time there shall be any damage done to any materials or works placed or constructed on the Site whether such damage be caused through subsidence or by any other cause whatsoever arising out of the reclamation or filling of such area then and in any such case the Contractor will not hold the Joint Venture liable to make good any such damage and the Joint Venture

shall be free from any liability therefor whether in tort or contract or otherwise.

**18.2 Possession of Site**

The Contractor shall be given possession of the Site in accordance with Clause 25.1. Possession of the Site shall confer on the Contractor a right to only such use and control as is necessary to enable the Contract or to execute the work under the Agreement. Until the Contractor is given possession of the Site, it shall not deliver materials to or perform work on the Site unless written approval is obtained from the Joint Venture.

**18.3 Access for Joint Venture and Others**

- (a) The Joint Venture and its employees, consultants and agents shall at any time after reasonable notice to the Contractor have access to any part of the Site and to any place where the work under the Agreement is being carried out or materials are being stored, fabricated or manufactured.
- (b) The Contractor shall permit the execution of work on the Site by persons engaged by the Joint Venture and shall provide reasonable access for and co-operate with such persons in the execution of that work.
- (c) The Contractor shall remain responsible to the Joint Venture for the performance of the work under the Agreement strictly in accordance with the terms and conditions of the Agreement notwithstanding that the Joint Venture exercises any of its rights under this Clause 18.3 and any exercise of such rights by the Joint Venture shall not be or be deemed to be an acceptance by the Joint Venture of any of the work under the Agreement.

**18.4 Cleaning Up of Site**

The Contractor shall keep the Site clean and tidy at all times, shall regularly remove debris and rubbish from the Site during the progress of the Works and shall remove all debris and rubbish from the Works and the Site on completion.

## **19. COST DEFINITIONS**

### **19.1 Proposed Construction Sum**

“Proposed Construction Sum” means the total of:

- (i) the estimated cost of construction elements as proposed in the Preliminary Budget Estimate in Schedule C hereto for all work to be carried out by subcontractors or the Contractor (where so approved) in respect of the construction of the Works. This amount is inclusive of all allowances for Cost Adjustment (Rise and Fall) and escalation and excludes all costs pursuant to Clauses 19.1(ii) and (iii);
- (ii) the proposed Fixed Lump Sum for on-site overheads, including but not limited to:
  - site management and programming, inclusive of salaries, wages, allowances, on-costs, benefits, bonuses, lodgings, travelling expenses, vehicles and any other associated expenses of the Contractor’s full-time on-site administrative and supervisory personnel;
  - the supply or hire and maintenance of an adequate site shed for the Joint Venture’s Supervisor and the Clerk of the Works including provision of a telephone, facsimile machine, desks, chairs, plan storage and air conditioning;
  - the supply or hire and maintenance of site establishment items such as sheds, hoardings and signs including a project sign board incorporating the project name and the names of all parties involved including all consultants. All other establishment and administrative costs and expenses of any nature whatsoever including the cost of photocopying, stationery and other administrative expenses shall be deemed to be included under Clause 19.1(iii);
  - the provision of Temporary Works and services such as site access roads and hard standings, lighting, power (including for the commissioning

of services), water, telephones, safety protection, night patrol and the like, including the cost of rental, removal, maintenance and making good on completion;

- the provision, operating and maintenance of Constructional Plant, equipment, materials, and similar items including cranes, hoisting and scaffolding required for construction but not incorporated in the Works and where required for use by more than one subcontractor;
  - setting out of the Works including fees to and permits from surveyors and relevant authorities, the cost of stamp and other duties and taxes legally payable, the cost of insurance policies, the cost of the Workplace Health and Safety Act Fee, and Building Act Approval Fees pursuant to Clause 7;
  - the provision and maintenance of tools, ropes, brushware, protective clothing and similar items required to be provided by the Contractor;
  - cleaning up the Site and removal of debris and rubbish during the progress of the work and the removal of all debris and rubbish from and undertaking pest eradication of the Works and the Site on completion including the provision of all associated equipment;
  - all attendant labour including attendance on subcontractors;
  - the Contractor's work and obligations during the Defects Liability Period; and
  - all allowances for profit, Cost Adjustment (Rise and Fall) and escalation on each of the foregoing; and
- (iii) the proposed Fixed Lump Sum for off-site overheads and profit inclusive of all allowances for Cost Adjustment (Rise and Fall) and escalation—this shall be deemed to include all administrative expenses and

services of any nature whatsoever except those referred to in any other item of Clause 19.1.

### 19.2 **Guaranteed Contract Sum**

“Guaranteed Contract Sum” means subject to Clause 24 the sum of THIRTEEN MILLION SIX HUNDRED AND TWENTY THOUSAND DOLLARS (\$13,622,000.00) and is the total of:

- (i) the proposed Construction Sum;
- (ii) the proposed Fixed Lump Sum for the Contractor’s design, documentation and commissioning fees; and
- (iii) the proposed Fixed Lump Sum for project consultants’ fees;

each of the above being inclusive of all allowances for Cost Adjustment (Rise and Fall) and escalation.

### 19.3 **Actual Cost of Construction**

“Actual Cost of Construction” means the total of:

- (i) the cost of subcontracts pursuant to Clause 6(i) together with approved adjustments thereto including variations pursuant to Clause 34.2 for all work carried out by subcontractors or the Contractor (where so approved) in respect of the construction of the Works but excluding:
  - all costs pursuant to Clauses 19.3(ii);
  - the cost of rectifying non-complying and defective work pursuant to Clause 31; and
  - any other costs not properly incurred in respect of the construction of the Works; and
- (ii) the proposed Fixed Lump Sums in respect of Clauses 19.1(ii) and (iii).

### 19.4 **Actual Contract Cost**

“Actual Contract Cost” means the total of:

- (i) the Actual Cost of Construction;
- (ii) the proposed Fixed Lump Sum for the Contractor’s design, documentation and commissioning fees;

- (iii) the proposed Fixed Lump Sum for project consultants' fees; and
- (iv) any valid claim by the Contractor due to an act or omission on the part of the Joint Venture or its employees, consultants or agents and agreed to by the Joint Venture.

#### **19.5 Adjusted Guaranteed Contract Sum**

“Adjusted Guaranteed Contract Sum” means the Guaranteed Contract Sum adjusted as a result of:

- (i) adjustments consequent upon approved variations pursuant to Clause 34.1;
- (ii) valid claims pursuant to Clause 19.4(iv); and
- (iii) the costs of rectifying non-complying and defective work pursuant to Clause 31.

### **20. GUARANTEE-BONUS CONDITIONS**

The following guarantee-bonus conditions shall apply;

#### **20.1 Guarantee**

The Contractor shall guarantee that the Joint Venture shall not pay any greater sum than the Adjusted Guaranteed Contract Sum, and that the Contractor shall be liable to meet, pay and discharge to the satisfaction of the Joint Venture all monies, payments, obligations and liabilities whatsoever over and above the Adjusted Guaranteed Contract Sum. Any such excess and the payment thereof and therefor shall at all times be and remain the sole and absolute liability of the Contractor, and the Contractor shall be required to indemnify and to keep indemnified the Joint Venture from and against all actions, proceedings, claims and demands whatsoever which may be made on or against the Joint Venture in this respect whereby the Joint Venture is required or obliged to pay any greater sum than the Adjusted Guaranteed Contract Sum.

## 20.2 **Bonus**

Where the Actual Contract Cost is less than the Adjusted Guaranteed Contract Sum, the Contractor will be paid a bonus equal to thirty per centum (30%) of the value of the difference.

## 21. **PAYMENTS**

### 21.1 **Payment Claims, Certificates and Conditions**

- (a) At monthly intervals up to the date of Practical Completion and within twenty-eight (28) days after the issue of a certificate of Practical Completion and within the time prescribed by Clause 30 and at other times agreed by the Joint Venture, the Contractor shall submit to the Joint Venture claims for payment, supported by sufficiently detailed evidence of the amount payable by the Joint Venture in default whereof the Joint Venture may disregard the amount claimed.
- (b) The Joint Venture may require the Contractor to provide true copies of claims from subcontractors and project consultants.
- (c) Within fourteen (14) days after receipt of a payment claim by the Joint Venture, a joint inspection of the work completed shall be undertaken by persons acting on behalf of the Contractor and the Joint Venture to assess the claim. If, in the opinion of the person inspecting the work on behalf of the Joint Venture, the claim or any part thereof is not valid, the Joint Venture shall determine the amount payable.
- (d) Within twenty-one (21) days after the joint inspection, the Joint Venture shall pay the Contractor the amount due to the Contractor and shall provide with the payment a certificate stating the amount payable by the Joint Venture.
- (e) If the Contractor fails to submit a claim for payment, the Joint Venture may nevertheless issue a payment certificate and make a payment to the Contractor.

- (f) The payment of monies by the Joint Venture shall not be evidence of the value of work completed or an admission of liability on the part of the Joint Venture or that work has been executed satisfactorily but shall be a payment on account only.
- (g) The conditions with respect to the final payment claim as outlined in Clause 30 are additional to the above conditions and shall apply to that payment.

## 21.2 Calculation of Payment

The amount due to the Contractor in respect of a claim for payment shall represent:

- (i) The value of the work carried out on the Site by subcontractors (or the Contractor where so approved) in accordance with the Agreement pursuant to Clause 19.3(i) (subject to Clause 21.4) but excluding values in respect of Clauses 21.2(ii) to (iv) inclusive, as substantiated by evidence satisfactory to the Joint Venture and provided always that the progressive total of those costs shall not exceed the total cost of subcontract tenders approved by the Joint Venture pursuant to Clause 6(i) together with approved adjustments thereto including variations to subcontracts pursuant to Clause 34.2;
- (ii) The value of the work carried out on the Site by the Contractor in accordance with the Agreement in respect of on-site overheads pursuant to Clause 19.1(ii), provided always that the progressive total of that value shall not exceed the relevant proportion of the proposed Fixed Lump Sum therefor;
- (iii) The amount calculated by applying the ratio that the proposed Fixed Lump Sum for off-site overheads and profit bears to the Guaranteed Contract Sum to the total amount in respect of Clause 21.2(i), provided always that the total amount payable for off-site overheads and profit following Final Completion shall be the proposed Fixed Lump Sum therefor;



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- (iv) The amount calculated by applying the ratio that the value of Clause 21.2(v) bears to the proposed Fixed Lump Sum for project consultants' fees as at the date of inspection to the proposed Fixed Lump Sum for the Contractor's design, documentation and commissioning fees;
  - (v) The value of work carried out by project consultants in accordance with the Agreement, as substantiated by evidence satisfactory to the Joint Venture and provided always that the progressive total of those costs does not exceed the relevant proportion of the proposed Fixed Lump Sum therefor;
  - (vi) The amount of any valid claims due to an act or omission on the part of the Joint Venture pursuant to Clauses 19.4(iv) and 32;
  - (vii) Any payments due pursuant to Clauses 21.4 and 21.5; but there shall be deducted from such payments:
  - (viii) Amounts already paid in respect of Clauses 21.2(i) to (vii) inclusive;
  - (ix) Retention monies up to the limit of the percentages stated in Clause 22; and
  - (x) Other amounts which the Joint Venture is entitled to deduct or retain under the Agreement including any monies due from the Contractor to the Joint Venture; provided always that:
    - (xi) No costs of rectifying design faults or defective or damaged work shall be payable by the Joint Venture;
    - (xii) The Joint Venture shall not be obliged to make a payment until the Contractor produces evidence to the satisfaction of the Joint Venture that all monies due to subcontractors and project consultants included in previous payments by the Joint Venture have been paid by the Contractor and all relevant approvals have been obtained and the work carried out in accordance with Clause 7; and

(xiii) The total payment for the work under the Agreement shall not exceed the Adjusted Guaranteed Contract Sum.

**21.3 Defective Work**

The Contractor shall ensure that no amount shall be included in any payment claim in respect of defective work or materials.

**21.4 Unfixed Plant or Materials**

The Joint Venture shall not be obliged to make payment for plant or materials intended for incorporation in the Works but not yet incorporated, but the Joint Venture may make payment for such unfixed plant or materials in exceptional circumstances and provided that:

- (i) At the time of recommending acceptance of the relevant subcontract tender pursuant to Clause 6(h), the Contractor submits a request for payment for certain unfixed plant or materials accompanied by details of the circumstances necessitating such payment;
- (ii) The Joint Venture approves the request in respect of that plant or materials;
- (iii) That plant or materials are held in secure storage to the satisfaction of the Joint Venture and are clearly branded as being the property of the Joint Venture; and
- (iv) The Contractor provides security additional to and in one of the forms described in Clause 22.3 in an amount equal to the amount which the Joint Venture agrees to pay for that plant or materials.

The amount of any payment for unfixed plant or materials shall be the net value of same and shall not include any amounts in respect of Clauses 21.2(ii) and (iii).

**21.5 Payment of Bonus**

The payment of any bonus pursuant to Clause 20.2 shall be made by the Joint Venture within twenty-eight (28) days of the determination of the Actual Contract Cost and the Adjusted Guaranteed Contract Sum.

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## **22. SECURITY, RETENTION MONIES AND PERFORMANCE UNDERTAKINGS**

### **22.1 Purpose**

Security, retention monies and performance undertakings are for the purpose of ensuring the due and proper performance of the Contractor under the Agreement.

### **22.2 Provision of Security**

The Contractor shall provide security in the form of a lump sum amount calculated as one and one quarter percent (1-1/4%) of the Guaranteed Contract Sum.

### **22.3 Form of Security**

The security shall be in the form of cash, bonds or inscribed stock issued by the Australian Government or the Queensland Government, or an unconditional undertaking or certificate in a form approved in writing by the Joint Venture and given by a financial institution approved by the Joint Venture.

If the security is not transferable by delivery it shall be accompanied by an executed transfer thereof to the Joint Venture and the costs and expenses (including all stamp or other duties) of and incidental to the transfer and any retransfer to the Contractor shall be borne by the Contractor.

### **22.4 Time for Lodgment of Security**

The security shall be lodged by the Contractor with the Joint Venture within fourteen (14) days of the Date of Acceptance or within such further time as is approved in writing by the Joint Venture. Failure on the part of the Contractor to lodge the security within this time shall constitute a breach of the Agreement and the Joint Venture may elect to give to the Contractor a notice in writing that the Joint Venture is discharged from all further obligations under the Agreement and may:

- (i) institute proceedings in any court of competent jurisdiction to recover any damages which the Joint Venture may have sustained by reason of the breach; and/or

- (ii) exercise all or any other rights or remedies conferred on the Joint Venture whether under the Agreement or at common law.

**22.5 Release of Security**

The Joint Venture shall release the security to the Contractor with a payment in respect of a claim submitted by the Contractor after the issue of the Certificate of Practical Completion.

**22.6 Release of Additional Security**

If the Contractor has provided additional security pursuant to Clause 21.4, the Joint Venture shall release that additional security upon incorporation into the Works of the unfixed plant or materials in respect of which the additional security was furnished.

**22.7 Provision and Form of Retention**

The Contractor shall provide retention by way of two (2) unconditional undertakings or certificates in the form described in Clause 22.3. Each undertaking or certificate shall be for the amount of two and one half percent (2-1/2%) of the Guaranteed Contract Sum.

**22.8 Time for Lodgement of Retention**

The retention shall be lodged by the Contractor with the Joint Venture within fourteen (14) days of the Date of Acceptance. Failure on the part of the Contractor to lodge such undertakings or certificates within this time shall entitle the Joint Venture to retain from monies due to the Contractor under payments pursuant to Clause 21 the amount of ten percent (10%) of the total gross value shown in the payment certificate or five percent (5%) of the Adjusted Guaranteed Contract Sum, whichever is the lesser.

**22.9 Reduction of Retention**

One undertaking or certificate or, in the event that monies are retained by the Joint Venture, such monies less 2.1/2% of the Guaranteed Contract Sum, shall be released to the Contractor and shall accompany a payment in respect of a claim

submitted by the Contractor after the issue of the certificate of Practical Completion.

Within twenty-eight (28) days after the issue of the Final Certificate the other undertaking or certificate shall be released to the Contractor or, in the event that monies are retained by the Joint Venture, such monies shall be released to the Contractor.

**22.10 Interest on Security and Retention Monies**

Any interest earned on the security or retention monies shall be retained by the Joint Venture.

**22.11 Deed of Guarantee, Undertaking and Substitution**

The Contractor shall, if so requested in writing by the Joint Venture, lodge with the Joint Venture, at the time of execution of the Agreement a Deed of Guarantee, Undertaking and Substitution for the performance of the obligations and the discharge of the liabilities of the Contractor under the Agreement in a form approved in writing by the Joint Venture.

**23. RIGHT OF JOINT VENTURE TO RECOVER MONIES**

The Joint Venture may deduct from monies otherwise due to the Contractor any money due from the Contractor to the Joint Venture whether under the Agreement or otherwise, and if those monies are insufficient the Joint Venture shall have recourse to any retention monies, and if they are insufficient, to any security under the Agreement. Nothing in this clause shall affect the right of the Joint Venture to recover from the Contractor the whole of the debt or any balance that remains owing.

**24. SALES TAX**

Goods supplied under the Agreement and incorporated in the Works are not exempt from sales tax and the Contractor agrees that it has allowed for all such sales tax in the Guaranteed Contract Sum. The Joint Venture shall be entitled to any rebate refund or exemption received obtained or granted as the case may be in respect to sales tax on any goods

necessary for the Works and in the event that the whole of the work under the Agreement is subject to a full sales tax exemption the following adjustments shall be made:

- (a) The Guaranteed Contract Sum shall be reduced by an amount of THREE HUNDRED AND TWENTY-ONE THOUSAND DOLLARS (\$321,000.00);
- (b) The proposed Construction Sum shall be reduced by an amount of THREE HUNDRED AND TWENTY-ONE THOUSAND DOLLARS (\$321,000.00);
- (c) The estimated cost of construction elements as proposed in the Preliminary Budget Estimate in Schedule C hereto for all work to be carried out by subcontractors or the Contractor (where so approved) in respect of the construction of the Works referred to in Clause 19.1(i) shall be reduced by an amount of THREE HUNDRED AND SEVENTY-ONE THOUSAND DOLLARS (\$371,000.00); and
- (d) The proposed Fixed Lump Sum for off-site overheads and profit shall be increased by an amount of FIFTY THOUSAND DOLLARS (\$50,000.00).

## **25. TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION**

### **25.1 Time for Commencement of Work on the Site**

The Contractor shall be given possession of the Site on the Date of Acceptance or such later date as agreed in writing with the Joint Venture.

The Contractor shall give the Joint Venture seven (7) days notice of intention to commence work on the Site.

### **25.2 Time for Practical Completion**

Subject to the Joint Venture granting extensions of time pursuant to Clause 27, the Contractor shall guarantee that the Works shall reach Practical Completion within fifty-nine (59) weeks from the Date of Acceptance.

## 26. PRACTICAL COMPLETION

The Contractor shall give the Joint Venture twenty eight (28) days notice of the date upon which the Contractor anticipates that Practical Completion will be reached. When of the opinion that Practical Completion has been achieved, the Contractor shall request in writing that the Joint Venture issue the certificate of Practical Completion. Within fourteen (14) days of the receipt of such request, the Joint Venture shall issue to the Contractor the certificate of Practical Completion stating the date on which Practical Completion was achieved, or shall advise the Contractor in writing of the reasons for not issuing such certificate.

The Joint Venture may issue the certificate of Practical Completion notwithstanding that the Contractor has not requested that such certificate be issued.

Upon issue of the certificate of Practical Completion, the Contractor shall give the Joint Venture possession of the Works.

Within three (3) months of the issue of such certificate, the Contractor shall submit to the Joint Venture a detailed statement showing the comparative values of the Actual Contract Cost and the Adjusted Guaranteed Contract Sum.

## 27. EXTENSIONS OF TIME FOR PRACTICAL COMPLETION

- (a) If it becomes evident to the Contractor that execution of the work under the Agreement has been or will be delayed in reaching Practical Completion by any cause provided for in Clause 27(e) of the Agreement, the Contractor shall be entitled to claim an extension of time for Practical Completion provided that the Contractor:
- (i) gives the Joint Venture written notice of intention to claim together with a statement of the facts on which the claim is based within twenty-eight (28) days after the delay commences;
  - (ii) submits with the notice or as soon as practicable thereafter a detailed written claim setting out the

- number of days extension claimed supported by details substantiating that additional time; and
- (iii) takes all reasonable steps to prevent and to minimise delays.
- (b) If the Joint Venture determines that the Contractor is entitled to an extension of time for Practical Completion, the Joint Venture shall, as soon as practicable after making that determination, grant the Contractor such extension of time as is considered reasonable and shall notify the Contractor in writing accordingly and, should that time be less than the extension of time claimed, advise the reason therefor.
- (c) If the Joint Venture determines that the Contractor is not entitled to an extension of time for Practical Completion, the Joint Venture shall, as soon as possible after making that determination, notify the Contractor in writing of rejection of the claim and the reason therefor.
- (d) In assessing the extent of any delay and its effect on the due date for Practical Completion, regard shall not be had to any days not planned to be worked by the Contractor or its employees, consultants, agents or subcontractors.
- (e) The occurrence of the following causes of delay shall be grounds for a claim by the Contractor for an extension of time but no other causes:
- (i) Variations to the work pursuant to Clause 34.1;
  - (ii) The Contractor not having received from the Joint Venture within reasonable time any necessary instructions or information specifically applied for in writing;
  - (iii) The Excepted Risks referred to in Clause 38.3;
  - (iv) The Contractor not being given possession of the Site pursuant to Clause 25.1;
  - (v) Suspension of the work under the Agreement pursuant to Clause 32 and provided that such suspension was not caused by default or omission on the part of the Contractor or its employees, consultants, agents or subcontractors;



- (vi) Inclement weather if the total rainfall for the area of which the Site forms part during the period of fifty-nine (59) weeks from the Date of Acceptance exceeds the average rainfall of such area for such period of time by more than thirty percent (30%).
- (f) Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time for Practical Completion, the Joint Venture may at any time before the issue of the Final Certificate, by notice in writing to the Contractor, extend the time for Practical Completion.
- (g) A delay in reaching Practical Completion caused by the Joint Venture or its employees, consultants, or agents, or the failure of the Joint Venture to grant a reasonable extension of time, shall not cause the date for Practical Completion to be set at large.
- (h) Notwithstanding the granting of an extension of time to the Contractor by the Joint Venture under the Agreement, the Contractor shall not be entitled to any additional costs or expenses suffered or incurred by it by reason of the extension of time nor shall the Contractor be entitled to any amount by way of damages for any loss.

## **28. LIQUIDATED DAMAGES FOR DELAY IN REACHING PRACTICAL COMPLETION**

If the Works fail to reach Practical Completion by the date for sixty-three (63) weeks from the Date of Acceptance, the Contractor shall be indebted to the Joint Venture for liquidated damages at the rate of \$1,500.00 for each day thereafter up to and including the date of Practical Completion or until the Joint Venture exercises its rights under Clause 46, whichever occurs first.

Liquidated damages may be deducted from any monies that may then be or thereafter become payable to the Contractor by the Joint Venture, and if such monies are insufficient for this purpose then from the Contractor's security or retention monies pursuant to Clauses 22 and 23.

If the date for Practical Completion is subsequently extended pursuant to Clause 27, the Joint Venture shall forthwith repay to the Contractor any liquidated damages deducted in respect of the period up to and including the date four (4) weeks from the revised date for Practical Completion.

## **29. USE OF PARTLY COMPLETED WORKS**

The Joint Venture and the Contractor may agree that any part of the Works shall be a separable portion, and the Joint Venture has the right to use or occupy that part of the Works once Practical Completion of same has been reached notwithstanding that other parts of the Works are not complete. The Contractor shall provide all necessary access for such use or occupation required to be effected by the Joint Venture.

Upon Practical Completion of a separable portion of the Works, the Joint Venture and the Contractor shall jointly inspect that separable portion and the Joint Venture shall list in writing any items required to be completed or rectified and provide same to the Contractor. Thereupon, subject to Clause 31, the Contractor shall be required to complete or rectify the items so listed.

The use or occupation by the Joint Venture of a separable portion of the Works shall not limit or affect the Contractor's rights and obligations under the Agreement.

## **30. FINAL COMPLETION**

Within twenty eight (28) days after Final Completion, the Contractor shall lodge with the Joint Venture a final payment claim endorsed accordingly and including all monies which the Contractor considers to be due from the Joint Venture under or arising out of the Agreement including any alleged breach thereof, and after the expiration of this period any additional claim by the Contractor against the Joint Venture shall be barred.

Within twenty-eight (28) days after receipt of the final payment claim from the Contractor or within twenty-eight

(28) days after the expiration of the period for lodging the final payment claim, whichever is the earlier, the Joint Venture shall issue to the Contractor the Final Certificate stating the amount which the Joint Venture considers to be due to or owing by the Contractor under or arising out of the Agreement including any alleged breach thereof.

Within twenty-eight (28) days after the issue of the Final Certificate the Joint Venture shall pay to the Contractor any amount payable and shall, subject to Clause 23, release to the Contractor any retention held by the Joint Venture.

The issue of the Final Certificate shall constitute conclusive evidence that all work under the Agreement has been finally and satisfactorily executed by the Contractor except insofar that it is proved in any proceedings in a court of competent jurisdiction or in an arbitration hearing that such certificate is erroneous by reason of:

- (i) fraud, dishonesty or deliberate concealment on the part of the Contractor or its employees, consultants, agents or subcontractors or their employees or agents; or
- (ii) any defect including any omission on the work under the Agreement which reasonable inspection at the time of issue of the Final Certificate would not have disclosed; or
- (iii) any accidental or erroneous inclusion or exclusion of any work, materials or goods or of any figure in any computation, or any arithmetical error in any computation.

## **31. NON-COMPLYING AND DEFECTIVE WORK AND ASSIGNMENT OF WARRANTIES**

### **31.1 Materials or Work not Complying with the Agreement**

The Joint Venture may, at any time prior to the issue of the Final Certificate pursuant to Clause 30, reject any materials or work which is not in accordance with the Agreement and may direct its replacement, correction or removal whether it has been the subject of payment or not, and the Contractor shall ensure that any such replacement or correction is commenced

or such removal is completed within seven (7) days of receipt of that direction. All such replacements, corrections and removals shall be at no additional cost to the Joint Venture.

If the Contractor fails to comply with such a direction, the Joint Venture may have the work of replacement, correction or removal carried out by other persons and the cost thereof shall be a debt due from the Contractor to the Joint Venture which the Joint Venture may recover by deduction from payments due to the Contractor pursuant to Clause 21.2, by deduction from retention monies held or by receiving payment under the undertakings referred to in Clause 22 or from the Contractor as a debt due pursuant to Clause 23.

The Guaranteed Contract Sum shall be reduced by an amount equal to the cost of rectifying non-complying and defective works pursuant to this Clause 31.

### **31.2 Rectification of Defects**

The Defects Liability Period shall be twelve (12) months and shall commence on the date of Practical Completion. As soon as possible after Practical Completion, the Contractor shall ensure the rectification of any defects or omissions in the Works or other work not in accordance with the Agreement existing at the date of Practical Completion.

At any time prior to the fifteenth day after the expiry of the Defects Liability Period, the Joint Venture may direct the Contractor in writing to secure the rectification of any defect or omission in the Works. The direction shall identify the defect or omission and shall state a reasonable date by which the Contractor shall secure the rectification. A separate Defects Liability Period of twelve (12) months shall apply in respect of the work of the rectification unless a shorter period is approved by the Joint Venture. Any separate Defects Liability Period shall commence on the date on which rectification work is completed.

If the Contractor fails to secure the rectification of the defect or omission within the time stated in the direction, the Joint Venture may rectify or employ others to rectify the defect or omission at the Contractor's expense, but without prejudice to any other rights of the Joint Venture with respect to that defect

or omission the Joint Venture may recover any costs thereby incurred by deduction from retention monies held or by receiving payment under the undertakings referred to in Clause 22 or from the Contractor as a debt due pursuant to Clause 23.

The Contractor shall ensure that rectification work is carried out in a manner which causes minimal inconvenience to the occupants of the Works.

### 31.3 **Assignment of Warranties**

The Contractor shall at the expiration of twelve (12) calendar months from the date of Practical Completion assign to the Joint Venture so far as they are capable of assignment the benefit of any warranties or guarantees which have not then expired given by the manufacturers or suppliers of any services, materials, plant or equipment forming part of or incorporated into the Works.

## 32. **SUSPENSION OF THE WORK UNDER THE AGREEMENT**

The Joint Venture may, by notice in writing to the Contractor, direct the Contractor to suspend the progress of the whole or any part of the work under the Agreement, stating the reason and the expected duration of the suspension.

The extra cost, if any, incurred by the Contractor in completing the work under the Agreement by reason of any suspension shall be borne and paid for by the Contractor, provided however that if the suspension is due to an act or omission on the part of the Joint Venture or its employees, consultants or agents, the Contractor shall be entitled to payment of the amount of any extra cost of completing the work under the Agreement that is attributable to such act or omission.

When the reason for the suspension no longer exists, the Joint Venture shall direct the Contractor in writing to recommence work and the Contractor shall comply with that direction as soon as is practicable.

### **33. PROGRESS AND PROGRAMMING OF THE WORK UNDER THE AGREEMENT**

#### **33.1 Progress**

The Contractor shall proceed with the work under the Agreement with due expedition and without delay, and shall not suspend the progress of the whole or any part of the work under the Agreement unless so directed by the Joint Venture pursuant to Clause 32.

The Contractor shall give the Joint Venture reasonable advance notice of any information, documents or instructions required from the Joint Venture by the Contractor.

#### **33.2 Programming**

The Contractor shall instigate appropriate program control over and for the duration of the work under the Agreement based on the construction program described in Schedule D hereto and shall monitor, review and update the program in order to ensure that the work under the Agreement is completed within the time specified in the Agreement. Six (6) copies of updated programs shall be issued by the Contractor to the Joint Venture whenever the progress of work under the Agreement falls in excess of ten (10) days behind the due date for Practical Completion.

### **34. VARIATIONS**

#### **34.1 Variations to Scope and Quality**

(a) The following provisions shall apply in relation to variations to the scope and quality of the work to be constructed by the Contractor in accordance with the Agreement:

- (i) The Joint Venture may direct the Contractor to submit a proposal to vary the work in which case the Contractor shall submit a detailed written valuation of the resultant increase or decrease in the Guaranteed Contract Sum and the anticipated effect on the date for Practical Completion within fourteen (14) days of such direction; or

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- (ii) The Contractor may, with the prior approval of the Joint Venture, submit a proposal to vary the work together with a detailed written valuation of the resultant increase or decrease in the Guaranteed Contract Sum and the anticipated effect on the date for Practical Completion.
  - (b) Should the Joint Venture approve that a variation in respect of (a) proceed, the Contractor shall be so advised in writing. The Contractor shall not proceed with a proposed variation without the written approval of the Joint Venture.
  - (c) The Joint Venture may direct the Contractor in writing to vary the work, in which case the Contractor shall submit to the Joint Venture a detailed written valuation of the resultant increase or decrease in the Guaranteed Contract Sum and the anticipated effect on the date for Practical Completion within fourteen (14) days of such direction.
  - (d) Should the Joint Venture approve or direct in writing that a variation proceed, then the resultant adjustment to the Guaranteed Contract Sum shall be determined by the Joint Venture by:
    - (i) measuring the extent of the variation and applying the rates contained in the relevant agreed subcontract priced Bill(s) of Quantities or, where no such rates are applicable, applying rates appropriate to the work; and
    - (ii) adding any relevant allowance for Cost Adjustment (Rise and Fall).
  - (e) The Contractor shall be deemed to have allowed in the Guaranteed Contract sum for all costs that it may incur in measuring, pricing and negotiating the value of variations and in administering the processing and implementation of variations.
  - (f) In valuing a variation pursuant to paragraph (d) of this Clause 34.1 there shall not be included any costs

associated with any delay to the work under the Agreement.

- (g) The provisions of this Clause 34 shall not apply to a direction by the Joint Venture pursuant to Clause 31.

#### **34.2 Variations of Subcontracts**

The following provisions shall apply in respect of variations to subcontracts:

- (a) The Contractor shall submit to the Joint Venture for its approval information substantiating variations to subcontracts entered into by the Contractor pursuant to Clause 6(i), accompanied by a detailed written valuation of any resultant increase or decrease in the Actual Cost of Construction.
- (b) The Contractor shall advise the Joint Venture of all variations to subcontracts arising out of or caused by a wrongful or negligent act, error or omission on the part of the Contractor or its employees, consultants, agents or subcontractors including those involving demolition and/or rectification of any part of the Works but there shall be no adjustment to the Actual Cost of Construction consequent upon such variations.
- (c) The Guaranteed Contract Sum shall not be adjusted on account of subcontract variations unless approved in writing by the Joint Venture pursuant to Clause 34.1.
- (d) The Contractor shall not proceed with a variation to a subcontract without the written approval of the Joint Venture.

### **35. LIMITATION ON CLAIMS**

Any claim for damages or delay in respect of which the Contractor does not give written notice to the Joint Venture of intention to make the claim and the causes thereof within twenty-eight (28) days after the cause of the claim arose shall be barred.



The Contractor shall provide a detailed statement of the damages or delay with the claim or as soon as practicable thereafter.

The Joint Venture shall not be liable upon any such claim by the Contractor unless the claim, together with the full particulars thereof, is lodged in writing with the Joint Venture no later than the submission of the final payment claim pursuant to Clause 30.

### **36. PATENT AND PROPERTY RIGHTS**

The Contractor shall indemnify the Joint Venture against any loss or damage arising out of any design, materials, documents or methods of working provided by the Contractor which infringe any patent, registered design, trademark or name, copyright or other protected right.

### **37. PROTECTION OF PERSONS AND PROPERTY**

The Contractor shall:

- (i) provide all things and take all measures necessary to protect persons and property;
- (ii) avoid unnecessary interference with the passage of persons and vehicles; and
- (iii) prevent nuisance and unreasonable noise and disturbance.

The Contractor's obligations shall include but not be limited to the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, the removal of obstructions and the protection of services.

If the Contractor or its employees, consultants, agents or subcontractors damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

If the Contractor fails to comply with an obligation under this clause, the Joint Venture may, in addition to any other remedy, fulfil the obligation on the Contractor's behalf and the cost incurred by the Joint Venture shall be a debt due from the Contractor to the Joint Venture.

### **38. CARE OF THE WORKS AND MAKING GOOD**

#### **38.1 Care of Works**

From the date on which the Contractor is given possession of the Site pursuant to Clause 25.1 to 4 p.m. on the date of Practical Completion, the Contractor shall be responsible for the care of the Works.

The Contractor's responsibilities shall include but not be limited to the care, storage and protection of unfixed items the value of which has been included in a payment certificate under Clause 21.4, property entrusted to the Contractor by the Joint Venture for the purpose of constructing the Works, property brought on the Site by subcontractors for that purpose, the Works, the Temporary Works and Constructional Plant.

After 4 p.m. on the date of Practical Completion, the Contractor shall remain responsible for the care of outstanding work and items to be removed from the Site by the Contractor and shall be liable for damage occasioned by the Contractor or his employees, consultants, agents or subcontractors in the course of completing outstanding work or complying with his obligations under Clause 31.

#### **38.2 Making Good**

Loss or damage occurring to anything while the Contractor is responsible for its care shall be promptly made good by the Contractor without adjustment to the Guaranteed Contract Sum.

Provided that there is no fault or omission on the part of the Contractor, this clause shall not apply to loss or damage occurring as a direct result of the Excepted Risks as defined in Clause 38.3.

### 38.3 **Excepted Risks**

The Excepted Risks are:

- (i) Any negligent act or omission of the Joint Venture or its employees, consultants or agents;
- (ii) War, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;
- (iii) Ionising radiations or contamination by radioactivity from any nuclear waste from the combustion of nuclear fuel not caused by the Contractor or his employees, consultants, agents or subcontractors; and
- (iv) Use or occupation of any part of the Works or the Temporary Works by the Joint Venture or its employees, consultants or agents or other persons engaged by the Joint Venture.

### 39. **URGENT PROTECTION**

If urgent action is necessary to ensure the care of the Works pursuant to Clause 38.1 or protection of persons and property pursuant to Clause 37 and the Contractor does not take the necessary action then the Joint Venture may do so and the cost incurred by the Joint Venture shall be a debt due from the Contractor to the Joint Venture if taking the action was the Contractor's responsibility.

If time permits, the Joint Venture shall give the Contractor prior written notice of intention to take action under this Clause 39.

### 40. **DAMAGE TO PERSONS AND PROPERTY**

The Contractor shall indemnify the Joint Venture against:

- (i) claims by any person against the Joint Venture or its employees, consultants or agents in respect of personal

loss, damage injury or death and loss of or damage to any property; and

- (ii) claims in respect of loss of or damage to the property of the Joint Venture, including existing property in or upon which the work under the Agreement is being carried out

arising out of or as a consequence of the carrying out by the Contractor of the work under the Agreement, but the Contractor's liability may be reduced to the extent that an act or omission of the Joint Venture or its employees, consultants or agents contributes to the loss, damage, death or injury.

This Clause 40 shall not exclude any other right of the Joint Venture to be indemnified by the Contractor.

## **41. INSURANCE OF THE WORKS**

### **41.1 Insurance Cover**

From the date on which the Contractor is given possession of the Site, the Contractor shall provide insurance covering the liabilities and responsibilities referred to in Clause 38 against loss or damage resulting from any cause whatsoever until the Contractor ceases to be responsible for their care.

### **41.2 Exclusions**

The insurance cover may exclude:

- (i) the cost of making good fair wear and tear or gradual deterioration, but shall not exclude the loss or damage resulting therefrom;
- (ii) consequential loss of any kind, but shall not exclude loss of or damage to the Works;
- (iii) damages for delay in completing or for the failure to complete work;
- (iv) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause; and

- (v) loss or damage resulting from Excepted Risk (ii) in Clause 38.3.

#### 41.3 **Amount of Insurance**

The insurance cover shall be for an amount not less than the sum of:

- (i) the Guaranteed Contract Sum;
- (ii) five (5) percent of the Proposed Construction Sum to provide for costs of demolition and the removal of debris incurred in the reinstatement of loss or damage to the Works; and
- (iii) five (5) percent of the total amount in respect of Clause 41.3(i) and (ii) to provide for increases in costs.

The insurance policy shall be in the joint names of the Joint Venture and the Contractor, and shall cover all subcontractors employed from time to time in relation to the work under the agreement for their respective rights, interests and liabilities and shall be effected with an insurer and in terms both approved by the Joint Venture. The policy shall be maintained until the Contractor ceases to be responsible under Clause 38.1.

#### 42. **PUBLIC LIABILITY INSURANCE**

From the Date of Acceptance, the Contractor shall provide public liability insurance in the joint names of the Joint Venture and the Contractor which shall cover the Joint Venture and its representatives and all subcontractors employed from time to time in relation to the work under the Agreement for their respective rights and interests to cover their liabilities to third parties. The insurance shall also cover the Contractor's liability to the Joint Venture and the Joint Venture's liability to the Contractor for loss of or damage to property (other than property required to be insured by Clause 41) and the death of or injury to any person (other than liability which is required to be insured under Clause 43).

The insurance policy shall include a cross-liability clause in which the insurer agrees to waive all rights of subrogation or

action against any of the persons comprising the insured and for the purpose of which the insurer accepts the term “insured” as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

The insurance cover in respect of any one occurrence shall be for an amount not less than \$10,000,000.00 (Ten Million Dollars). The policy shall be maintained until the Final Certificate is issued pursuant to Clause 30.

#### **43. INSURANCE OF EMPLOYEES**

From the Date of Acceptance, the Contractor shall insure against liability for death of or injury to persons employed by the Contractor including liability by statute and at common law. The insurance cover shall be unlimited in amount and shall be maintained until all work under the Agreement including rectification work is completed.

The insurance shall be extended to indemnify the Joint Venture for the Joint Venture’s statutory liability to persons employed by the Contractor.

The Contractor shall ensure that every subcontractor is similarly insured.

#### **44. PROFESSIONAL INDEMNITY INSURANCE**

The Contractor shall take out and maintain professional indemnity insurance in an amount of not less than TEN MILLION DOLLARS (\$10,000,000.00) from the date hereof until the date six (6) years after the date the Final Certificate is issued pursuant to Clause 30.

#### **45. INSPECTION AND PROVISION OF INSURANCE POLICIES**

Prior to the Contractor being given possession of the Site and whenever requested in writing by the Joint Venture, the

Contractor shall produce satisfactory evidence to the Joint Venture that all insurances are effected and maintained. If the Contractor fails to produce evidence of compliance with insurance obligations under Clause 41, 42, 43 or 44 then the Joint Venture may effect and maintain the insurance and pay the premiums. The amount paid shall be a debt due from the Contractor to the Joint Venture.

The effecting of insurance shall not limit the liabilities or obligations of the Contractor under other provisions of the Agreement.

The Joint Venture's rights given by this clause are in addition to any other rights under the Agreement.

#### **46. DEFAULT BY OR INSOLVENCY OF CONTRACTOR**

##### **46.1 Procedure on Default by Contractor**

- (a) If the Contractor:
- (i) suspends work, in breach of Clause 33.1; or
  - (ii) fails to proceed with the work under the Agreement with due expedition and without delay, in breach of Clause 33.1; or
  - (iii) fails to use the materials or standards of workmanship required by the Agreement, in breach of Clause 4; or
  - (iv) fails to comply with a direction of the Joint Venture; or
  - (v) fails to provide evidence of insurance, in breach of Clause 45; or
  - (vi) fails to lodge security, in breach of Clause 22.4; or
  - (vii) fails to complete the Works within the time specified in the Agreement as adjusted in accordance with the Agreement, in breach of Clause 25.2; or

(viii) defaults in the performance of any other obligations under the Agreement or in the observance of any of the provisions thereof;

then the Joint Venture may, in addition to any other rights under the Agreement, give the Contractor written notice to remedy such default and may suspend payments to the Contractor under the Agreement until such time as the default has been remedied or the Joint Venture exercises the right under Clause 46.1(c).

- (b) The written notice referred to in Clause 46.1(a) shall:
- (i) state that it is a notice under this clause;
  - (ii) specify the default;
  - (iii) specify the period within which the default is required to be remedied; and
  - (iv) require the Contractor, within the specified period, to remedy the default or to show cause in writing why the Joint Venture should not exercise the right pursuant to Clause 46.1(c) should the default not be remedied.
- (c) If the Contractor fails within the period specified in the written notice to remedy the default or to show reasonable cause why the Joint Venture should not exercise the right under this clause, the Joint Venture may, without prejudice to any other right, power, remedy or claim of the Joint Venture under the Agreement, take the work under the Agreement remaining to be completed wholly or partly out of the hands of the Contractor.

#### **46.2 Procedure When the Joint Venture Takes Over Work**

- (a) If the Joint Venture elects to take work under the Agreement out of the hands of the Contractor pursuant to Clauses 46.1(c) or 46.3(a), the Project Control Group shall cease to function and the Joint Venture may:
- (i) complete the whole or any part of that work or have other persons complete the whole or any part of the work; and



(ii) take possession of and permit other persons to use all materials, Constructional Plant and other goods on or in the vicinity of the Site as are owned by the Contractor and are required by the Joint Venture to facilitate completion of the Work;

and the Contractor shall have no right to any compensation or allowance for any such action by the Joint Venture.

- (b) The Joint Venture shall maintain such Constructional Plant and, subject to Clause 46.2(c), shall return same to the Contractor on completion of the work.
- (c) On completion of the work, the Joint Venture shall ascertain the cost incurred in completing the work and shall issue a certificate to the Contractor certifying that cost.

If the cost incurred by the Joint Venture is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Joint Venture. If the Contractor is indebted to the Joint Venture, the Joint Venture may, in addition to any other remedy under the Agreement or at common law, retain Constructional Plant and other goods taken under this clause until the debt is met. If after reasonable notice the Contractor fails to pay the debt, the Joint Venture may sell the Constructional Plant or other goods and apply the proceeds of such sale towards satisfaction of the debt. Any excess resulting therefrom shall be paid to the Contractor.

### 46.3 Insolvency of Contractor

- (a) If:
- (i) the Contractor informs the Joint Venture in writing or creditors generally that the Contractor is insolvent; or
- (ii) the Contractor commits an act of bankruptcy, receives a bankruptcy petition or is made bankrupt; or

- (iii) the Contractor enters into a scheme of arrangement or composition with creditors; or
- (iv) the Contractor is placed under official management or a resolution is passed at a meeting of creditors to place the Contractor under official management; or
- (v) a receiver of the property or part of the property of the Contractor is appointed; or
- (vi) an application is made to a court for the winding up of the Contractor or a winding up order is made in respect of the Contractor; or
- (vii) execution is levied against the Contractor by creditors, debenture holders or trustees or under a floating charge; or
- (viii) a mortgagee takes possession of the business affairs of the Contractor; or
- (ix) the Contractor, due to insolvency, gives written notice to the Joint Venture that he is unable or unwilling to complete the work under the Agreement;

then the Joint Venture may, without giving a notice to show cause pursuant to Clauses 46.1(a) and (b), suspend payments to the Contractor under the Agreement and exercise the right under Clause 46.1(c) and the provisions of Clause 46.2 shall apply.

- (b) The rights given by this Clause 46 are in addition to any other rights of the Joint Venture and may be exercised notwithstanding that there has been no breach of the Agreement, and are subject to any limitations under the Bankruptcy Act or any other relevant Act.

#### **47. DISPUTES**

- (a) If a dispute or difference between the Joint Venture and the Contractor arises out of or in connection with the Agreement, either party may forward written notice of such dispute or difference to the other party accompanied by detailed particulars of the matter at issue.

- (b) Notwithstanding the existence of a dispute or difference the Contractor shall continue to execute the work under the Agreement.
- (c) At the expiration of 14 days of the issue of the notice of dispute, unless it shall be otherwise settled, the parties shall endeavour to solve the dispute by a conciliation process mediated by a mutually agreed person under the auspices of the Australian Commercial Disputes Centre Limited in Brisbane or by an alternate mediator agreed between parties. If the dispute is not settled within 28 days of the issue of the notice of dispute, or some extended period agreed by the parties then either party may give notice of its intention to submit the dispute to arbitration.
- (d) Arbitration shall be carried out by a mutually agreed single Arbitrator or, failing such an agreement by a person appointed by the chairperson of the Queensland chapter of the Institute of Arbitrators, Australia. Any request to appoint an Arbitrator shall indicate the appointee shall not be an employee of the Contractor or Joint Venture, or any person who has been involved in the project, or a person in respect of whom there has been a failure to agree by the Contractor and Joint Venture.
- (e) Arbitrator may award whatever interest the Arbitrator considers reasonable.
- (f) If one party has overpaid the other then the Arbitrator may order repayment together with interest.
- (g) The award made by the Arbitrator shall be final and binding on both Contractor and Joint Venture and neither party shall be entitled to commence or maintain any action upon any such dispute until such matter shall have been referred or determined as hereinbefore provided, and then only for the amount of relief to which the Arbitrator by his award finds either party is entitled, and the costs of the submission, reference and award shall be at the discretion of the said Arbitrator.

**48. LIABILITY OF ANZ EXECUTORS & TRUSTEE COMPANY LIMITED**

- 48.1 Notwithstanding any other provision of the Agreement, and whether or not any such provision is expressed to be unconditional, the parties acknowledge that ANZ Executors & Trustee Company Limited enters into the Agreement in its capacity as trustee of the Breakwater Island Trust and the liability of ANZ Executors & Trustee Company Limited under the Agreement is limited to such of the Trust Fund as defined in the trust deed constituting the Breakwater Island Trust as is for the time being held by ANZ Executors & Trustee Company Limited and available for the purpose. No party shall be entitled to have recourse in satisfaction of any liability of ANZ Executors & Trustee Company Limited under the Agreement to any assets held by ANZ Executors & Trustee Company Limited in its personal capacity or in its capacity as trustee of any trust other than the Breakwater Island Trust.
- 48.2 If ANZ Executors & Trustee Company Limited at any time proposes to retire as trustee of the Breakwater Island Trust the other parties to the Agreement will consent to the retirement and replacement of ANZ Executors & Trustee Company Limited in accordance with the provisions of the trust deed constituting the Breakwater Island Trust and will not place any conditions upon that consent other than a condition requiring the replacement trustee to acknowledge that it is bound by all the provisions of the Agreement on the part of ANZ Executors & Trustee Company Limited to be observed performed and fulfilled.

**49. DEFAULT BY THE JOINT VENTURE**

- 49.1 If the Joint Venture commits a substantial breach of contract and the Contractor considers that damages may not be adequate remedy, the Contractor may give the Joint Venture a written notice to show cause.

Substantial breaches include but are not limited to:

- (a) failing to make a payment, in breach of Clause 21.1;

- (b) failure by the Joint Venture to issue a Certificate of Practical Completion, in breach of Clause 26;
  - (c) failing to give the Contractor possession of the Site, in breach of Clause 25.1, but only if the failure continues for longer than ninety (90) days.
- 49.2 A notice under Clause 49.1 shall
- (a) state that it is a notice under Clause 49.1;
  - (b) specify the alleged substantial breach;
  - (c) require the Joint Venture to show cause in writing why the Contractor should not exercise a right referred to in Clause 49.3;
  - (d) specify the time and date by which the Joint Venture must show cause (which shall not be less than seven (7) clear days after the notice is given to the Joint Venture);
  - (e) specify the place at which cause must be shown.

- 49.3 If by the time specified in a notice under Clause 49.1 the Joint Venture fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 49.3, the Contractor may by notice in writing to the Joint Venture suspend the whole or any part of the work under Agreement.

The Contractor shall lift the suspension if the Joint Venture remedies the breach but if within twenty eight (28) days after the date of suspension under Clause 49.3 the Joint Venture fails to remedy the breach or, if the breach is not capable of remedy, fails to make other arrangement to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Joint Venture terminate the Contract.

The Contractor shall be entitled to recover from the Joint Venture any damages flowing from the suspension.

## **50. TERMINATION FOR JOINT VENTURE'S CONVENIENCE**

- (a) In addition to the rights of the Joint Venture pursuant to Clause 46 of the Agreement, the Joint Venture may at any time determine the Agreement for its convenience upon

giving fourteen (14) days prior written notice thereof to the Contractor. Following the receipt of such written notice the Contractor shall cease to carry out the work under the Agreement or such part of the work under the Agreement as may be specified in the notice for such cessation and shall vacate the Site together with its Constructional Plant and employees.

- (b) The Contractor shall be paid the following amounts by the Joint Venture:
  - (i) payment for all of the work under the Agreement carried out by the Contractor in accordance with the Agreement up to the date of termination; and
  - (ii) all actual and reasonable costs incurred by the Contractor as a necessary consequence of the termination of the Agreement provided that the Contractor shall not be entitled to claim or be paid for any amount by way of loss of profits, lost bonus or other loss or damage in respect of either the uncompleted parts of the work under the Agreement or because the Works do not reach a stage of Practical Completion.
- (c) The Contractor shall ensure that a provision to like effect is included in any contract or agreement which the Contractor enters into with respect to the work under the Agreement.

## **51. CASINO CONTROL**

The Agreement is subject to ANZ Executors & Trustee Company Limited obtaining within three (3) months from the date hereof the consent of the Minister for the time being charged with the administration of the Casino Control Act 1982 to the entry into the Agreement by ANZ Executors & Trustee Company Limited and to the performance of all obligations by ANZ Executors & Trustee Company Limited pursuant to the Agreement failing which the Agreement will cease and determine in which event none of the parties hereto will have any claim against any other of them with respect to any matter or thing arising out of, done, performed or omitted to be done or performed under the Agreement or in anticipation of the coming into force of the Agreement.

**52. DISCLAIMER**

- 52.1 The Contractor acknowledges that it did not in any way rely upon any information, representation, statement or documentation not forming part of the Agreement made by or provided to the Contractor by the Joint Venture, or its officers, employees, agents or advisers or any other person acting on its behalf for the purposes of entering into the Agreement. In this regard the Contractor warrants that it enters into the Agreement based on its own investigations, interpretations, deductions, information and determinations and the Contractor acknowledges that it is aware that the Joint Venture has entered into the Agreement relying upon this warrant.
- 52.2 Subject to any law to the contrary, and to the maximum extent permitted by law, the Joint Venture and its officers, employees, agents and advisers and any other person acting on its behalf disclaim all liability for any loss or damage (whether foreseeable or not) suffered by any person acting on any information, representation, statement or document not forming part of the Agreement made by or provided to the Contractor by the Joint Venture or any of its representatives whether the loss or damage arises in connection with any negligence, default or lack of care on the part of the Joint Venture or any of its representatives, any misrepresentation or any other cause.
- 52.3 For the purposes of this Clause 52, the Joint Venture is to be deemed to be contracting on behalf of itself as well as acting as agent for all persons who are its officers, employees, agents or advisers or any other person acting on its behalf from time to time and whose persons are to be deemed parties to this Agreement.

## **SCHEDULE A**

### **TOWNSVILLE BREAKWATER ENTERTAINMENT CENTRE**

#### **ARCHITECTURAL DRAWINGS**

- One (1) Set of Architectural Drawings (DD1 to DD5, A2/OA) dated 15th October 1991, prepared by Peter Hunt Architect
- One (1) Set of A3 Sketch Details (2B, 3B, 4A, 5A, 6, 7A, 9, 10, 11, 12, Figure 1) dated 15th October 1991
- One (1) Mechanical Services Performing Specification and Drawings (No 91049) prepared by Steens Gray and Kelly Pty Ltd
- One (1) Electrical Services Preliminary Specification and Drawings, prepared by Wright Mackay and Associates
- One (1) Outline Specification and Scope of Works dated 15th October 1991, prepared by Peter Hunt Architect
- One (1) Addendum to the Outline Specification dated 16th October 1991, prepared by Peter Hunt Architect
- One (1) Schedule of Accommodation, Finishes, Fittings and Services dated 15th October 1991, prepared by Peter Hunt Architect
- One (1) Furniture, Fittings and Equipment budget Schedule dated 26th September 1991, (totalling \$1.6 million) Pages 1 to 6
- One (1) Set of Structural Drawings (issued previously).

Details as follows:

- Roof framing Plan SK1C
- Typical Sections SK2C
- Preliminary Piling Layout SK3B
- Seating Beams and Plant Room Slab SK4C



**SCHEDULE B****TOWNSVILLE BREAKWATER ENTERTAINMENT  
CENTRE****PROJECT CONSULTANTS**

		\$
1.	<u>ARCHITECT</u> Peter Hunt Architect	611,000.00
2.	<u>CIVIL ENGINEER</u> McIntyre Associates	24,000.00
3.	<u>STRUCTURAL ENGINEER</u> Barwood Parker and McIntyre & Associates	152,000.00
4.	<u>MECHANICAL ENGINEER</u> Steens Gray & Kelly/Meinhardt Axon	96,000.00
5.	<u>ELECTRICAL ENGINEER</u> Wright Mackay/Meinhardt Axon	79,000.00
6.	<u>HYDRAULIC AND FIRE SERVICES</u> Parker Paul & Partners	18,000.00
7.	<u>ENVIRONMENTAL</u> N Gabriels	10,000.00
8.	<u>QUANTITY SURVEYOR</u> W T Partnership	92,000.00
9.	<u>DISBURSEMENT COSTS</u> Printing, Couriers etc Allowance	20,000.00
10.	<u>FEE CONTINGENCY</u> Allowance	20,000.00
		<u>\$1,122,000.00</u>

NOTE:

1. Disbursements and Fee contingency are maximum allowances
2. The above fees include all travel costs

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**SCHEDULE C**
**TOWNSVILLE BREAKWATER ENTERTAINMENT  
CENTRE**
**PRELIMINARY BUDGET ESTIMATE**

	\$
<b>SUBSTRUCTURE</b>	<b>\$1,040,350.00</b>
<b>SUPERSTRUCTURE</b>	
Columns	207,245.00
Upper floors	744,655.00
Staircases	83,120.00
Roof	1,358,130.00
External Walls	599,590.00
Windows	30,000.00
External Doors	73,180.00
Internal Walls	394,585.00
Internal Screens	132,260.00
Internal Doors	147,690.00
<b>FINISHES</b>	
Wall Finishes	24,390.00
Floor Finishes	96,726.00
Ceiling Finishes	138,115.00
<b>FITTINGS</b>	
Fitments	161,596.00
FF & E	1,600,000.00
<b>SERVICES</b>	
Sanitary Plumbing, etc.	500,000.00

## Schedule 1

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Mechanical Installation	1,738,000.00
Fire Protection	—
Electric Light and Power	1,125,000.00
Special Services	65,000.00

**SITE WORKS**

Site Preparation (not applicable)	—
Roads, Footpaths and Paved Areas	673,680.00
Boundary Walls, Fencing and Gates	16,150.00
Outbuildings and Covered Ways	10,000.00
Landscaping and Improvements	123,340.00

Carried Forward	<u>\$11,082,802.00</u>
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\$

Brought Forward	\$11,082,802.00
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**EXTERNAL SERVICES**

External Stormwater Drainage	111,800.00
External Sewer Drainage	—
—Included in Sanitary Plumbing	
External Water Supply	—
—Included in Sanitary Plumbing	
External Electric Light and Power	
—Included in electrical works	
(NORQEB contributions only)	20,000.00
Trade Contingency	100,000.00

Estimated Cost of Construction Elements	<u>11,314,602.00</u>
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Fixed Lump Sum for Contractor's design, documentation and commissioning fees	nil
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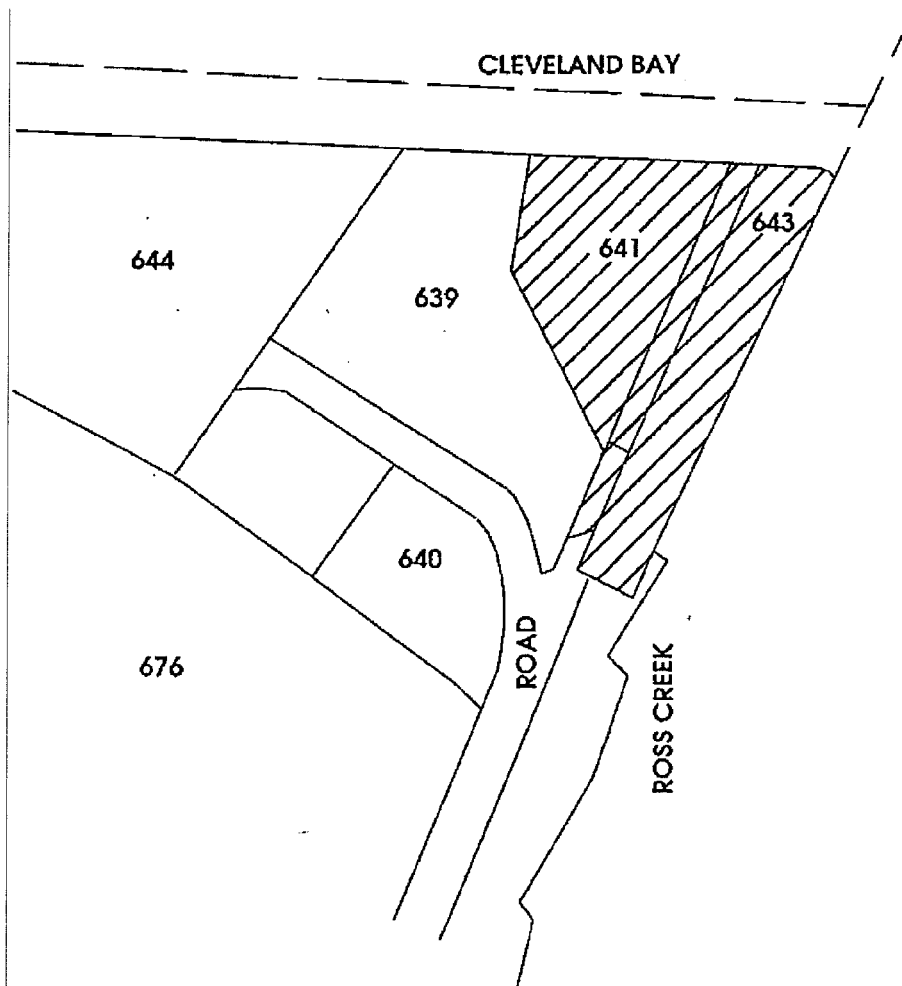
Fixed Lump Sum for Off-Site Overheads and Profit	275,000.00
Fixed Lump Sum for On-Site Overheads	910,398.00
Fixed Lump Sum for Project Consultant's fees	1,122,000.00
	<hr/>
<b>TOTAL</b>	<b>\$13,622,000.00</b>
	<hr/>

## **SCHEDULE D**

### **TOWNSVILLE BREAKWATER ENTERTAINMENT CENTRE**

Construction Program Date: 2/10/91 DWG No 1798-1-2

**SCHEDULE E**



**FOR SURVEY DETAILS REFER-**  
PLAN No EP2106 Sheets 1 & 2  
PARISH OF COONAMBELAH  
COUNTY ELPHINSTONE  
LAND AGENTS DISTRICT TOWNVILLE

**IN WITNESS WHEREOF** this Agreement has been executed as a deed by the parties hereto on the dates hereinafter set forth.

**GIVEN** under the Official Seal of )  
**ANZ EXECUTORS & TRUSTEE** )  
**COMPANY LIMITED** for use in )  
Queensland by authority of the Board of )  
Directors under the hand of )  
)  
a Director and )  
who hereby certify that the Official ) ANZ Executors & Trustee  
Seal was affixed in Brisbane on the ) Company Limited  
day of 1991 in the presence of: )

A Justice of the Peace

**SEALED** with the Common Seal of )  
the **COUNCIL OF THE CITY OF** )  
**TOWNSVILLE** and signed by )  
**ANTHONY JOHN MOONEY** the ) Mayor  
Mayor and countersigned by **KEVIN** )  
**VINNARD WHEBELL** the )  
Town Clerk on the )  
day of 199 who certify that )  
they are the proper officers in that ) Town Clerk  
behalf, in the presence of: )

A Justice of the Peace



**SEALED** with the Common Seal of )  
 the **COUNCIL OF THE CITY OF** )  
**THURINGOWA** and signed by )  
**LESLIE RONALD TYRELL** the ) \_\_\_\_\_  
 Mayor and countersigned by **ANTHONY** ) **Mayor**  
**JOSEPH GUNN** the Town Clerk on )  
 the        day of        199 who certify )  
 that they are the proper officers in that ) \_\_\_\_\_  
 behalf in the presence of: ) **Town Clerk**

A Justice of the Peace

**GIVEN** under the Common Seal of )  
**MULTIPLEX CONSTRUCTIONS** )  
**PTY LTD** this        day of        199 by )  
 authority of a resolution of the Board of )  
 Directors in the presence of )  
 a Director thereof and )  
 the Secretary thereof and in the )  
 presence of: )

A Justice of the Peace

## **PART 4—FIRST AMENDMENT AGREEMENT**

**THIS AGREEMENT** is made the                      day of                      1997

### **BETWEEN**

(1) **PERPETUAL TRUSTEES QUEENSLAND LIMITED** (ACN 009 656 811) a company duly incorporated and having its registered office at 10th Floor, Riverside Centre, 123 Eagle Street, Brisbane, in the State of Queensland as trustee of the Breakwater Island Trust (hereinafter called “the Trustee”)

AND

(2) **BREAKWATER ISLAND LIMITED** (ACN 010 271 691) a company duly incorporated and having its registered office at Ground Floor, Garden Square, 643 Kessels Road, Upper Mount Gravatt, in the State of Queensland (hereinafter called “the Manager”)

AND

(3) **COUNCIL OF THE CITY OF TOWNSVILLE** a local government duly constituted under the provisions of the Local Government Act 1993 and having its Public Office at Administration Building, Walker Street, Townsville in the State of Queensland (hereinafter called “the Townsville City Council”)

AND

(4) **COUNCIL OF THE CITY OF THURINGOWA** a local government duly constituted under the provisions of the Local Government Act 1993 and having its Public Office at 86 Thuringowa Drive, Thuringowa

Central in the State of Queensland (hereinafter called “the Thuringowa City Council”)

## **WHEREAS**

- A. The Trustee, the Manager, the Townsville City Council and the Thuringowa City Council are parties to an agreement dated the 13th day of December 1991 (hereinafter called “the Participation Agreement”) in relation to the Townsville Breakwater Entertainment Centre.
- B. The Government of the State of Queensland has agreed to make a grant to the Townsville City Council and the Thuringowa City Council to enable the upgrading of the Townsville Breakwater Entertainment Centre.
- C. Legislation has been enacted by the Parliament of the State of Queensland facilitating the upgrading of the Townsville Breakwater Entertainment Centre.
- D. The parties have agreed to enter into this Agreement to vary the Participation Agreement.

**NOW THIS AGREEMENT WITNESSES** that in consideration of the premises the parties hereto do covenant and agree as follows:

### **1. LEGISLATION**

The parties acknowledge the Townsville Breakwater Entertainment Centre Amendment Act 1997 has been enacted by the Parliament of Queensland to facilitate this Agreement.

## **2. VARIATION OF PROVISIONS OF PARTICIPATION AGREEMENT**

The Participation Agreement is hereby varied as follows:

- 2.01 the following words are inserted in Clause 1.07 after the word “Agreement”:  
“and as upgraded in accordance with the update Plans and Specifications”;
- 2.02 the following words are inserted in Clause 1.13 in lieu of the words “set out in”:  
“determined by”;
- 2.03 Clauses 1.19 to 1.23 inclusive are renumbered 1.20 to 1.24 respectively;
- 2.04 a new Clause 1.19 is inserted as follows:  
“1.19 “update Plans and Specifications” means the plans and specifications dated 23 April 1997, signed by the Joint Venturers, and entitled the Townsville Breakwater Entertainment Centre Update Plans and Specifications.”;
- 2.05 the following words are inserted at the end of Clause 3.05:  
“PROVIDED THAT in the event that any further contributions to the capital of the Joint Venture are made by the Joint Venturers other than in the proportion of their respective participating interests the proportions in which the Joint Venturers shall thereafter share in the profits or losses of the Joint Venture shall be adjusted accordingly to reflect each Joint Venturer’s overall contribution to the capital of the Joint Venture as a percentage of the total capital contributions to the Joint Venture.”;

2.06 a new Clause 4.04 is inserted as follows:

“4.04 In the event that the participating interest of any of the Joint Venturers is adjusted by 0.5% or more in accordance with Clause 3.05 the shares of the Joint Venturers shown on the deed of grant referred to in Clause 4.01 shall be adjusted to reflect the participating interests of the Joint Venturers.”;

2.07 Clause 5.06 is deleted;

2.08 Clause 5.07 is renumbered Clause 5.06 and the words “in accordance with Clause 5.06” are deleted therefrom;

2.09 a new Clause 23 is inserted as follows:

**“23. FURTHER CONTRIBUTIONS**

23.01 The parties acknowledge that the Government of the State of Queensland has agreed to make a grant to the Townsville City Council and the Thuringowa City Council being an amount of not more than \$11.5 million to enable the upgrading of the Townsville Breakwater Entertainment Centre.

23.02 The Townsville City Council will contribute an amount being  $\frac{5}{7}$  (five-sevenths) of the total amount granted by the Government of the State of Queensland to the Townsville City Council and the Thuringowa City Council in cash by way of further capital contribution to the Joint Venture.

23.03 The Thuringowa City Council will contribute an amount being  $\frac{2}{7}$  (two-sevenths) of the total amount granted by the Government of the State of Queensland to the Townsville City Council and the Thuringowa City Council in cash by way of further capital contribution to the Joint Venture.

23.04 The cash capital contributions referred to in Clauses 23.02 and 23.03 shall be made by the Councils as to the sum of \$3.5 million within seven (7) days from the date of this Agreement being an amount of \$2.5 million from the Townsville City Council and an amount of \$1 million from the Thuringowa City Council,

and as to the balance of \$8 million in sufficient time to enable payment of the amount referred to in Clause 24.05 and progress payments up to an amount of \$8 million for the upgrading of the Entertainment Centre in accordance with the update Plans and Specifications. The sum of \$3.5 million shall be invested by the Committee of Management and used to pay the remaining progress payments in excess of the amount of \$8 million after the sum of \$8 million has been used to pay progress payments.”;

2.10 a new Clause 24 is inserted as follows:

**“24. UPGRADING OF ENTERTAINMENT CENTRE**

24.01 The Joint Venturers shall cause the Entertainment Centre to be upgraded in accordance with the update Plans and Specifications.

24.02 Each of the Joint Venturers accepts and approves the upgrading of the Entertainment Centre in accordance with the update Plans and Specifications and in particular the Townsville City Council agrees that no town planning requirements other than those incorporated in the update Plans and Specifications will be imposed by the Townsville City Council. The Townsville City Council agrees that no further development of any land owned by the Trustee in its capacity as trustee of Breakwater Island Trust will be in any way affected by the imposition of any carparking requirements relating to the Entertainment Centre.

24.03 The Joint Venturers shall ensure that an appropriate system of contract administration is instituted and maintained in respect of the upgrading of the Entertainment Centre incorporating the requirements if any of the Government of the State of Queensland and shall ensure that all progress claims are certified by a quantity surveyor approved by the Joint Venturers prior to payment.

24.04 In the event that the further capital contributions to be contributed by the Townsville City Council and the Thuringowa City Council are insufficient to enable the upgrading of the Entertainment Centre in accordance with the update Plans and Specifications each of the Joint Venturers hereby agrees that if the Joint Venturers are unable to agree how such shortfall in funds is to

be met then notwithstanding Clause 5.06 of this Agreement the Joint Venturers shall contribute in the proportion of their respective participating interests the funds required for the upgrading of the Entertainment Centre in accordance with the update Plans and Specifications.

24.05 The Joint Venture shall from the cash capital contributions referred to in Clauses 23.02 and 23.03 pay to the Trustee as operator of the Entertainment Centre an amount of \$150,000 in relation to the decommissioning and recommissioning of the Entertainment Centre necessary to allow the Entertainment Centre to be upgraded in accordance with the update Plans and Specifications.”

### **3. BREAKWATER ISLAND TRUST**

- 3.1 The Trustee enters into this Agreement only in its capacity as trustee of the Trust and in no other capacity. A liability arising under or in connection with this Agreement can be enforced against the Trustee only to the extent to which it can be satisfied out of property of the Trust out of which the Trustee is actually indemnified for the liability. This limitation of the Trustee’s liability applies despite any other provision of this Agreement and extends to all liabilities and obligations of the Trustee in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Agreement.
- 3.2 The parties other than the Trustee may not sue the Trustee in any capacity other than as trustee of the Trust, including seek the appointment of a receiver (except in relation to property of the Trust), a liquidator, an administrator or any similar person to the Trustee or prove in any liquidation, administration or arrangement of or affecting the Trustee (except in relation to property of the Trust).
- 3.3 The provisions of this Clause 3 shall not apply to any obligation or liability of the Trustee to the extent that it is not satisfied because under the trust deed establishing the Trust or by operation of law

there is a reduction in the extent of the Trustee's indemnification out of the assets of the Trust, as a result of the Trustee's fraud, negligence or breach of trust.

- 3.4 It is acknowledged that the manager of the Trust is responsible under the trust deed establishing the Trust for performing a variety of obligations relating to the Trust, including under this Agreement. No act or omission of the Trustee (including any related failure to satisfy its obligations under this Agreement) will be considered fraud, negligence or breach of trust of the Trustee for the purpose of paragraph 3.3 of this Clause 3 to the extent to which the act or omission was caused or contributed to by any failure by the manager or any other person to fulfil its obligations relating to the Trust or by any other act or omission of the manager or any other person.
- 3.5 No attorney, agent, receiver or receiver and manager appointed in accordance with this Agreement has authority to act on behalf of the Trustee in a way which exposes the Trustee to any personal liability and no act or omission of any such person will be considered fraud, negligence or breach of trust of the Trustee for the purpose of paragraph 3.3 of this Clause 3.
- 3.6 The Trustee is not obliged to do or refrain from doing anything under this Agreement (including incur any liability) unless the Trustee's liability is limited in the same manner as set out in paragraphs 3.1 to 3.2 of this Clause 3.

#### **4. CASINO CONTROL ACT**

This Agreement is subject to the Trustee obtaining within three (3) months from the date hereof the consent of the Minister for the time being charged with the administration of the Casino Control Act 1982 to the entry into this Agreement by the Trustee and to the performance of all obligations by the Trustee pursuant to this Agreement failing which this Agreement will cease and determine in which event none of the parties hereto will have any



claim against any 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 in anticipation of the coming into force of this Agreement.

## **5. COST**

The parties shall each pay their own costs of and incidental to this Agreement.

## **6. GENERAL**

Except as herein expressly varied or as otherwise absolutely required by strict and necessary implication by reason of this Agreement the terms and conditions of the Participation Agreement shall in all respects remain in full force and effect and without limiting the generality of the foregoing the provisions of Clause 8 of the Participation Agreement apply in respect of the upgrading of the Entertainment Centre in accordance with the update Plans and Specifications. Any words and phrases not defined herein which are defined in the Participation Agreement shall have the same meaning herein as such words and phrases bear in the Participation Agreement.

**IN WITNESS WHEREOF** this Agreement has been executed by the parties hereto on the dates hereinafter set forth.

**THE COMMON SEAL of PERPETUAL )**  
**TRUSTEES QUEENSLAND LIMITED )**  
is affixed in accordance with its articles of )  
association on the day of 1997 )  
in the presence of: )

A Justice of the Peace

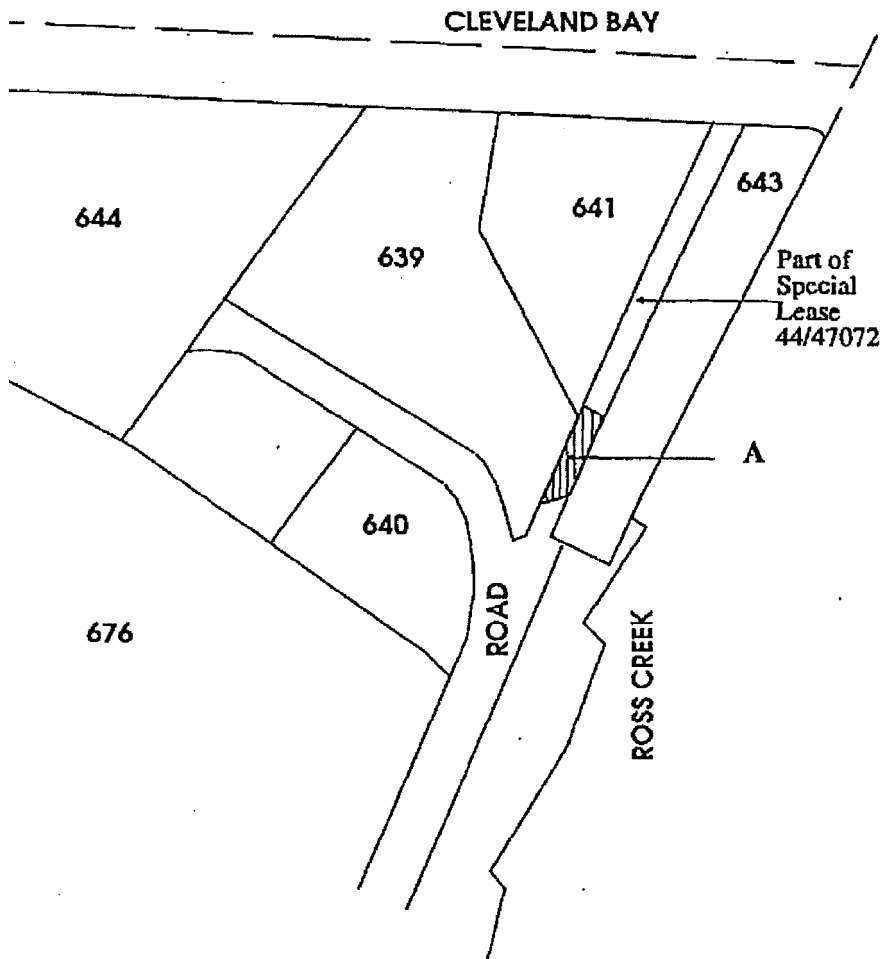
**GIVEN** under the Common Seal of )  
**BREAKWATER ISLAND LIMITED )**  
this day of 1997 by )  
authority of the Board of Directors in the )  
presence of )  
a Director thereof and )  
the Secretary thereof and in the presence of: )

A Justice of the Peace



## Schedule 2 Site plan

sections 12 and 13



**FOR SURVEY DETAILS REFER-**

PLAN No EP2106 Sheets 1 & 2

PARISH OF COONAMBELAH

COUNTY ELPHINSTONE

LAND AGENTS DISTRICT TOWNSVILLE