

BROWSE (LAND) AGREEMENT BILL 2012

EXPLANATORY MEMORANDUM

Section 1 – Short Title

This clause cites the short title of the Act as the *Browse (Land) Agreement Act 2012*.

Section 2– Commencement

Provides that the Act comes into operation on the day after the day it receives the Royal Assent.

Section 3 – Terms Used

Defines the terms "scheduled agreement" (the agreement a copy of which is set out in Schedule 1 to the Act) and "Agreement" (the scheduled agreement or, if it is varied in accordance with its terms, that agreement as varied from time to time) used in the Act.

Section 4 – Ratification and authorisation

Provides that the scheduled agreement is ratified and the implementation of the Agreement is authorised.

Section 5 – Effect of Agreement on other laws

Subsection (1) provides that each provision of the Agreement operates and takes effect according to its terms notwithstanding any other Act or law.

Subsection (2) provides that if a provision of the scheduled agreement purports to modify any other Act or law, such modification operates and takes effect for the purposes of the scheduled agreement according to its terms notwithstanding any other Act or law.

Section 6 – *Government Agreements Act 1979* not to apply

Subsection (1) provides that the *Government Agreements Act 1979 (GA Act)* does not apply in relation to the Agreement regardless of whether the Governor places the administration of the *Browse (Land) Agreement Act* under the control of the Minister administering the GA Act.

Subsection (2) provides that an agreement scheduled to, incorporated in, or appearing in the *Browse (Land) Agreement Act 2012* cannot be declared under the GA Act to be a Government Agreement for the purposes of that Act.

SCHEDULE 1

Browse (Land) Agreement

Parties

The Honourable Brendon John Grylls MLA, Minister for Lands acting for and on behalf of the State of Western Australia, the Native Title Party for and on behalf of the Native Title Claim Group in relation to the Native Title Claim, as each is defined in the Agreement, and the Kimberley Land Council Aboriginal Corporation (**KLC**).

Recitals

Advises that:

- A. The Native Title Party are the registered native title claimants in relation to the land and waters the subject of the Native Title Claim.
- B. The State intends establishing an LNG Precinct in the vicinity of James Price Point and that the proposed LNG Precinct development is within the area the subject of the Native Title Claim.
- C. The State considers the LNG Precinct is a unique and important project for the State of Western Australia and that the particular circumstances justify the State's entry into the Agreement.
- D. The State has committed to entering into the Agreement in relation to:
 - limiting the use of the LNG Precinct;
 - limiting further LNG development on the Kimberley Coastline; and
 - at the End of the Precinct Life
 - the remediation and rehabilitation of the land within the LNG Precinct; and
 - the Grant of title within the LNG Precinct to the Native Title Party, subject to the terms of the Agreement.
- E. Advises that the KLC is authorised to execute the Agreement on behalf of the Native Title Party.

Clause 1 – Definitions and Interpretations

Subclause 1.1

Defines the terms used in the Agreement.

Subclause 1.2

Sets out principles for interpreting the Agreement.

Provides that nothing in the Agreement shall be construed to exempt parties from compliance with:

- any Law relating to native title.
- the provisions of the *Environmental Protection Act 1986* (WA), the *Contaminated Sites Act 2003* (WA), or the Act that ratifies the Agreement.

Clause 2 – Ratification and Operation

Paragraph (a) commits the State to introduce and sponsor a Bill into State Parliament prior to 30 June 2012 or such later date agreed by the parties to ratify the Agreement, and is to endeavour to secure the timely passage of the Bill.

Paragraph (b) provides that the provisions of the Agreement, other than clauses 1 and 2, will not come into operation until the Bill has been passed by State Parliament and comes into operation as an Act.

Paragraph (c) provides that if by 30 June 2014, or such later date agreed between the parties, the Bill has not commenced to operate as an Act then, unless the parties otherwise agree, the Agreement will cease. In that event no party will have any claim against any other party with respect to the Agreement.

Paragraph (d) provides that all provisions of the Agreement will operate and take effect on the date the Bill commences to operate as an Act.

Clause 3 – Permitted use of the LNG Precinct

Paragraph (a) contains the State's agreement that subject to clause 5.1 and the balance of clause 3, the LNG Precinct will only be used for a **Permitted Precinct Use** as set out in paragraph (a)(i).

The State is not to use or permit any other person to use the LNG Precinct otherwise than for a Permitted Precinct Use.

Further, the State will ensure that neither LandCorp nor the Broome Port Authority will use or permit any other person to use the LNG Precinct otherwise than for a Permitted Precinct Use.

Paragraph (b) provides that nothing in clause 3:

- displaces the Broome Port Authority's obligations under international custom or convention or under common law relating to seas and ports;
- limits the Broome Port Authority's ability to conduct exercises by itself or with others for the purpose of emergency and safety drills;
- limits the Broome Port Authority from refuelling, supplying or providing assistance to any Commonwealth vessel; or
- limits the Broome Port Authority from providing assistance to vessels or third parties in an actual or perceived emergency.

Clause 4 – Precinct Closure

Subclause 4.1 Closure Decision

Paragraph (a)(i) enables the State, subject to paragraph (b), to make a decision at any time after the Commencement Date to close the LNG Precinct.

Paragraph (a)(ii) requires the State to consider whether it should close the LNG Precinct after 50 years following the Commencement Date, and to notify the Native Title Party of that decision.

Paragraph (a)(iii) requires the State to close the LNG Precinct on or prior to the date 100 years from the Commencement Date, unless the parties to the Agreement otherwise agree.

Paragraph (b) precludes the State from making a decision to close the LNG Precinct under paragraphs (a)(i) or (a)(ii) during the establishment and operation of a Proponent Project.

Subclause 4.2 Notification of Closure Decision

Requires the State, if it makes a decision to close the LNG Precinct, to promptly notify the Native Title Party of its decision and the End of Precinct Life will take effect on the date set out in the notice.

Subclause 4.3 Closure of Precinct where no Proponent

Paragraph (a) provides for a set of circumstances occurring after the registration of Taking Orders under the *Land Administration Act 1997 (WA)* for the establishment of the LNG Precinct, where the Native Title Party may give notice to the State to either:

- make a decision to close the LNG Precinct; or
- make a decision that in the State's opinion a legally enforceable right between the State and a potential Proponent for the Grant of an interest within the LNG Precinct to that Proponent for the purpose of conducting a Proponent Project is likely to be entered into in the foreseeable future (**Extension Decision**).

The circumstances are where:

- for a continuous period of 10 years, there is no interest within the LNG Precinct held by a Proponent;
- there has been no exercise of rights under any interest in land within the LNG Precinct held by a Proponent within 10 years of the creation of that interest;
- for a continuous period of 10 years, there is no legally enforceable right between the State and a potential Proponent for the Grant of an interest within the LNG Precinct for the purpose of conducting a Proponent Project; or
- there has been no exercise of a legally enforceable right between the State and a potential Proponent for the Grant of an interest within the LNG Precinct to the Proponent for the purpose of conducting a Proponent Project within 5 years of

the creation of that right. In this case at least 10 years must have elapsed since the registration of the Taking Orders.

The State must notify the Native Title Party of its decision to either close the LNG Precinct or of its Extension Decision as soon as practicable after it is made.

Paragraph (b) provides that if the State gives notice of an Extension Decision and a legally enforceable right is not entered into within 2 years of the notice of the Extension Decision, the Native Title Party may again give notice requiring the State to:

- make a decision to close the LNG Precinct ; or
- make a further Extension Decision.

Paragraph (c) provides that if the State makes 3 consecutive Extension Decisions under paragraphs (a) and (b) and the Native Title Party again gives notice to the State, then the State must make a Closure Decision under Clause 4.1(a)(i).

Clause 5 – Port at End of Precinct Life

Subclause 5.1 Port to continue at discretion of the State

Paragraph (a) provides for the State to make a decision, following consultation with the Native Title Party, to determine that the Port will continue to operate after the End of Precinct Life as a port under, and for any purpose permitted under, the *Port Authorities Act 1999 (WA)*.

Paragraph (b) requires the State as soon as practicable after making a Closure Decision to notify the Native Title Party whether the Port will continue to operate beyond the End of Precinct Life and the manner of operation, including capacity, permitted use and purpose of the Port.

Paragraph (c) provides that the Native Title Party or any member of the Native Title Claim Group may make any representation in relation to any approval for the continued operation, including capacity, permitted use and purpose of the Port.

Subclause 5.2 Remediation and Grant if Port operation continues

Paragraph (a) provides that the State is not obliged to carry out Remediation and Rehabilitation Works for the Port Land pursuant to clause 6 if it gives notice under clause 5.1(b) that the Port will operate beyond the End of Precinct Life.

In this situation, there is no limit on the State as to how long it may wish Port operations to continue and the provision of Remediation and Rehabilitation Works do not arise until such time as the State notifies the Native Title Party that the Port will cease operation.

Paragraph (b) provides that, subject to paragraph (d), the State will Grant the Port Land to the Native Title Party in accordance with clause 7 at the same time as the

Grant of Precinct Land occurs, although the Port land will not have been subject to Remediation or Rehabilitation Works.

Paragraph (c) provides that unless the State and the Native Title Party agree, the State will retain liability for Remediation and Rehabilitation of the Port Land as contemplated by the Agreement.

Paragraph (d) provides that if the State gives notice under clause 5.1 (b) that the Port will continue to operate as a port following the End of Precinct Life, the obligation on the State in relation to the Grant of Port Land will be conditional upon the Native Title Party and the State entering into an agreement to lease the Port Land to the State (or any other entity nominated by the State) (the **Lessee**) to allow for the continued operation of the Port (**Lease**). The terms of the Lease will be agreed between the State, the Lessee and the Native Title Party, on the following conditions:

- the duration of the Lease, and the inclusion of any options to extend, will be fixed at the State's sole discretion;
- the Lessee will have exclusive possession of the Port Land (subject to any ongoing access rights that the Broome Port Authority may have Granted to the Native Title Party);
- the form of title created for the Port Land must be consistent with the purpose of operating the Port;
- the rental will be on commercial terms;
- a requirement that the State will carry out Remediation and Rehabilitation Works for the Port Land in a manner consistent with clause 6 once the Lease expires; and
- policies and procedures to achieve increased and incremental Native Title Party involvement in the management and operation of the Port.

Subclause 5.3 Dispute in relation to terms of Port Lease

Provides for a dispute resolution mechanism when parties fail to agree on the terms of the Lease.

Disputes or differences regarding to the duration of the Lease or any Lease terms specifying capacity, permitted use or purpose of the Port are not disputes for the purpose of this provision.

Subclause 5.4 Remediation and Grant if Port ceases operation

Provides that if the State gives notice under clause 5.1(b) that the Port will not operate beyond the End of Precinct Life or if the State gives notice under clause 5.2(a) that the Port will cease operation, the State must carry out Remediation and Rehabilitation Works for the Port Land in accordance with its obligations under clause 6 and Grant the Port Land to the Native Title Party in accordance with clause 7.

Clause 6 - Remediation of Precinct Land and Facilities

Subclause 6.1 State to remediate Precinct Land and Facilities following End of Precinct Life

Paragraph (a) provides that subject to clauses 5 and 6 and any agreement between the parties to transfer Facilities to the Native Title Party, the State will cause Remediation and Rehabilitation Works to be carried out as soon as reasonably practicable following End of Precinct Life.

Paragraph (b) provides that the Native Title Party will have no liability under the Agreement for Remediation and Rehabilitation Works, unless the State and the Native Title Party otherwise agree.

Subclause 6.2 LNG Precinct Baseline Report

Paragraph (a) requires the State to prepare a report by no later than 6 months of the Commencement Date, which identifies current uses, any existing Facilities, the environmental condition and the presence of any known or suspected Contamination on the LNG Precinct (**LNG Precinct Baseline Report**).

Paragraph (b) requires the aspects of the LNG Precinct Baseline Report relating to known or suspected Contamination to be reviewed by a contaminated sites auditor accredited under the *Contaminated Sites Act 2003*.

Paragraph (c) provides that the LNG Precinct Baseline Report will be used to inform Remediation and Rehabilitation Works required at the End of Precinct Life.

Paragraph (d) requires the State, as soon as practicable after preparing the LNG Baseline Report to provide a copy to the Native Title Party. The Native Title Party may provide comments on the LNG Precinct Baseline Report within 3 months.

Paragraph (e) then requires the State, in consultation with the Native Title Party, to prepare and publish a final LNG Precinct Baseline Report which takes into account and, where appropriate, incorporates the Native Title Party's comments, within 3 months of receiving comments from the Native Title Party.

Subclause 6.3 Remediation and Rehabilitation Works management plan

Provides that parties will establish a Remediation and Rehabilitation Works management plan, consistent with the principles outlined in clause 6, as soon as practicable following the making of a Closure Decision.

Subclause 6.4 Carrying out of Remediation and Rehabilitation Works

Paragraph (a) requires the State to cause the Remediation and Rehabilitation Works to be carried out in accordance with the management plan developed pursuant to clause 6.3 and with clause 6.4(b)-(g).

Paragraph (b) requires the Remediation and Rehabilitation Works to be designed to remediate and rehabilitate the LNG Precinct to a condition:

- consistent with applicable legislation, policy and standards (including those relating to Contamination and environmental rehabilitation) at the time the works are to be carried out;
- having regard to the condition of the LNG Precinct as determined in the LNG Precinct Baseline Report; and
- having regard to the use made by the LNG Precinct prior to commencement of Remediation and Rehabilitation Works.

Paragraph (c) empowers the State to subcontract or delegate to a Proponent or to third parties to carry out any of the Remediation and Rehabilitation Works.

Paragraph (d) provides that for avoidance of doubt, such subcontracting or delegation by the State does not relieve the State from its obligation to the Native Title Party to carry out Remediation or Rehabilitation Works.

Paragraph (e) requires the State, once it considers the Remediation and Rehabilitation Works are complete, to procure the preparation of a report setting out whether Remediation and Rehabilitation Works have been carried out and the objectives of paragraph 6.4(b) have been met (**Environmental Status Report**). This report must be prepared by a suitably qualified expert.

Paragraph (f) requires a copy of the Environmental Status Report to be given to the Native Title Party as soon as practicable after it is completed. The Native Title Party may provide comments on the Environmental Status Report within 6 months of receiving the report. The State in its discretion will include the Native Title Party's comments in the Environmental Status Report prior to its submission to any regulatory body.

Paragraph (g) requires the State to consider the Native Title Party's comments on the Environmental Status Report, and:

- take such action as it considers appropriate to address the matters raised in the comments; and
- give the Native Title Party a revised copy of the Environmental Status Report that sets out the State's response to the Native Title Party's comments and any action taken (if any).

Subclause 6.5 Completion of Remediation and Rehabilitation Works

Provides that the Remediation and Rehabilitation Works will be deemed completed when one of the following takes place:

- the State has provided an Environmental Status Report to the Native Title Party and the Native Title Party has either not given comments under clause 6.4(f) within the required period (6 months) or has notified the State that it agrees that the Remediation and Rehabilitation Works have been completed; or
- an Expert appointed under clause 16.2 so determines.

Subclause 6.6 Dispute in relation to Remediation and Rehabilitation Works

Establishes a dispute resolution mechanism with respect to whether or not the Remediation and Rehabilitation Works have been completed.

Clause 7 - Grant of Precinct Land

Subclause 7.1 Grant of land following closure of the LNG Precinct

Paragraph (a) provides that the obligations on the State in paragraphs (b) and (c) are conditional upon, and will not take effect until each of the Taking Orders has been registered under the *Land Administration Act 1997* (WA).

Paragraph (b) requires the State, subject to paragraph (a), to Grant to the Native Title Party the land required for the Industrial Precinct, Third Party Contractors' Site, and Workers' Accommodation Site (**Precinct Land**) following the End of Precinct Life in accordance with procedure set out in clause 7.

Paragraph (c) requires the State, subject to paragraph (a) and clauses 5 and 6, to Grant to the Native Title Party the Port Land following the End of Precinct Life and in accordance with procedure set out in clause 7.

Subclause 7.2 State and Native Title Party to determine form of title

Paragraph (a) requires the State, as soon as practicable following the End of Precinct Life, to consult the Native Title Party as to the Native Title Party's desired use of the Precinct Land and Port Land and the appropriate title or interest in the Precinct Land and Port Land to be Granted.

Paragraph (b) provides that if by 12 months after Completion of Remediation, the State and the Native Title Party have not agreed on the appropriate form of title of interest in the Precinct Land or Port Land, the State will as soon as practicable Grant unconditional freehold title to the Precinct Land and the Port Land.

Subclause 7.3 Administrative Body to hold Grant Land

Provides that unless the Native Title Party nominates an alternative body and the State agrees to that nomination, the Precinct Land and the Port Land must be registered in the name of the Administrative Body who will hold the land on trust for the Native Title Party.

Subclause 7.4 State not liable

Provides that the State is not liable for any Loss arising out of or connected with the Grant of any interest in the Precinct Land and Port Land to any person on the direction or advice of the Native Title Party.

Subclause 7.5 Costs arising in relation to Grant

Paragraph (a) provides that the State will pay for the following establishment costs arising out of the Grant of Precinct Land and Port Land:

- creation of title to the Precinct Land and Port Land and the transfer of title to the Administrative Body; and
- Landgate registration fees.

Paragraph (b) provides that the State is not liable to pay for:

- establishment costs not referred to above, including the provision of services to the Precinct Land and Port Land (including any which are a usual precondition to the creation of title) such as road upgrades, service connections and headworks charges, unless the State agrees to pay for these costs; and
- all holding costs including local government rates and other taxes that are normally borne by the land owner.

Paragraph (c) provides that the Native Title Party agrees that the State will not pay for the following costs arising out of the Grant of Precinct Land and Port Land:

- all costs referred to in paragraph (b); and
- all costs incurred by the Native Title Party under clause 7.1 or 7.2 other than those costs identified in paragraph (a).

Clause 8 - Limitation of further LNG Development on the Kimberley Coastline

Paragraph (a) contains the State's agreement not to:

- operate, authorise or permit the operation of; or
- Grant any right, title interest, approval or permission which would have the effect of authorising,

a further Gas Processing Facility located on the Kimberley Coastline but outside the LNG Precinct.

Paragraph (b) defines **Gas Processing Facility** for the purpose of paragraph (a).

Clause 9 - Assignment

Paragraph (a) precludes the Native Title Party from assigning its rights and obligations under the Agreement unless the assignment is to a **Permitted Assignee**:

- as provided under paragraph (b); or
- where the Native Title Party has obtained the consent of the State to the assignment, which consent shall not be unreasonably withheld.

Paragraph (b) requires the Native Title Party to assign its rights and obligations under the Agreement to the prescribed body corporate within 2 months of the determination by the Federal Court of the Native Title Claim and the incorporation of that prescribed body corporate.

Paragraph (c) requires the Native Title Party to procure the Permitted Assignee to execute a deed by which the Native Title Party assigns and the Permitted Assignee

assumes all of the Native Title Party's rights and obligations under the Agreement and by which the parties agree to vary this Agreement.

Paragraph (d) provides that the Native Title Party is released from further performance of the Agreement from the date of execution of the above deed, but remains liable for obligations accrued prior to the date of its execution.

Paragraph (e) requires the Minister to table the executed deed in both Houses of Parliament.

Clause 10 - Variation

Subclause 10.1 Parties may vary Agreement

Permits the Agreement and any lease, licence, easement or other title granted under or pursuant to the Agreement to be varied from time to time by the parties for the purpose of more efficiently and satisfactorily implementing or facilitating any of the objects of the Agreement.

Subclause 10.2 Minister to table variations in Parliament

Paragraph (a) requires any variation to the Agreement to be tabled in both Houses of State Parliament.

Paragraph (b) details how the variation agreement may come into operation.

Clause 11 - Term

Provides that the Agreement terminates on the date:

- when the last of the State's obligations under clause 5 (Port at End of Precinct Life), clause 6 (Remediation of Precinct Land and Facilities) and clause 7 (Grant of Precinct Land) have been fulfilled; and
- either the State or the Native title Party serves notice to that effect.

Clause 12 - Power to extend periods

Allows the Minister, at the request of the Native Title Party, to extend periods or vary dates referred to in the Agreement, whether or not the period to be extended has expired or the date to be varied has passed.

Clause 13 - Duties

Paragraph (a) requires the State to pay all duties on and in relation to:

- the Agreement;
- any instrument, document or transaction to which the State is a party required by the Agreement; and

- any instrument or document required under any relevant Law in connection with any transaction to which the State is a party required by the Agreement.

Paragraph (b) provides that the State is not required to pay duties on and in relation to any dutiable transaction:

- to which it is not a party; and
- which does not arise out of an obligation of the State contemplated by the Agreement.

Clause 14 – Notices

Specifies how notices are to be given under the Agreement.

Clause 15 – Applicable law

Provides that the Agreement is subject to the laws of Western Australia.

Clause 16 – Dispute Resolution

Subclause 16.1 General dispute resolution

Establishes the general dispute resolution process (by arbitration) applicable under the Agreement.

Paragraph (b) provides that arbitration will not (otherwise than as provided in the Agreement) apply where the State, the Minister or any other Minister in the Government of the State has under the provisions of this Agreement an express or implied discretionary power.

Paragraph (c) empowers the arbitrator to grant an interim extension to any date or period to preserve rights while a matter is before arbitration on application made by the State or the Native Title Party.

Subclause 16.2 Dispute as to terms of Port Lease or Remediation and Rehabilitation Works

Establishes a process for the resolution of disputes between the State and the Native Title Party, as contemplated under clause 5.3 (Dispute in relation to terms of Port Lease) or clause 6.6 (Dispute in relation to Remediation and Rehabilitation Works).

The process provides for the parties to meet and attempt to resolve the relevant Dispute in good faith. If it is not resolved within 28 days, it is to be referred for expert determination by the Australian Commercial Disputes Centre Ltd.

Clause 17 – Warranty

Provides that the KLC on its own behalf and for and on behalf of the Native Title Party represents and warrants that it has been validly and lawfully instructed by the Native Title Party to enter into the Agreement and all necessary authorisations have been obtained to enable the Native Title Party to enter into the Agreement and to enable the KLC to enter into the Agreement.

