

**CEMENT WORKS (COCKBURN CEMENT LIMITED) AGREEMENT  
AMENDMENT BILL 2010**

**EXPLANATORY MEMORANDUM**

**Section 1**

Contains the short title of the Act.

**Section 2(a)**

Provides for sections 1 and 2 of the Act to come into operation on the day it receives the Royal Assent.

**Section 2(b)**

Provides for the remainder of the Act to come into operation on the day after sections 1 and 2 receive the Royal Assent.

**Section 3**

Specifies that the Act amends the *Cement Works (Cockburn Cement Limited) Agreement Act 1971* (**Principal Act**).

**Section 4**

Provides that section 2 (Interpretation) of the Principal Act is amended by inserting the new definition of “the Third Variation Agreement” which means the agreement a copy of which is set out in the Fifth Schedule of the Principal Act.

**Section 5**

Inserts a new section 6 into the Principal Act which:

- (1) ratifies the Third Variation Agreement;
- (2) authorises the implementation of the Third Variation Agreement; and
- (3) provides for the Third Variation Agreement to operate despite any other act or law, without limiting or affecting the application of the *Government Agreements Act 1979*.

**Section 6**

Inserts as the Fifth Schedule to the Principal Act a copy of the Third Variation Agreement.

## THIRD VARIATION AGREEMENT

### PARTIES

The Honourable Colin James Barnett, Premier of the State of Western Australia acting for and on behalf of the Government of the said State and its instrumentalities (**State**), The Honourable Simon McDonnell O'Brien, Minister for Transport (**Port Authorities Minister**), Fremantle Port Authority (**Authority**) and Cockburn Cement Limited (**Company**).

### RECITALS

- A. Provides details of the State Agreement as originally ratified and of past variations made to it. The State Agreement as so varied is called the Principal Agreement.
- B. Advises that the parties wish to add to and vary the Principal Agreement on the terms and conditions set out in the Variation Agreement.

### OPERATIVE CLAUSES

#### Clause 1

Provides subject to the context for words and expressions used in the Variation Agreement to have the same meanings respectively as they have in and for the purpose of the Principal Agreement.

#### Clause 2

The State commits to introduce and sponsor a Bill into State Parliament to ratify the Variation Agreement and endeavour to secure its passage as an Act by 30 September 2010 or such later date as the parties may agree.

#### Clause 3(a)

Provides that clause 4 (which sets out the proposed variations to the Principal Agreement) shall not come into operation unless or until an Act passed in accordance with clause 2 ratifies the Variation Agreement.

#### Clause 3(b)

Provides, unless the parties otherwise agree, for the cessation and determination of the Variation Agreement (and without any party having a claim against any other) if by 10 December 2010 or such later date as may be agreed pursuant to clause 2, clause 4 has not come into operation.

**Clause 4**

Sets out the proposed variations to the Principal Agreement.

**Clause 4(1)(a)**

Inserts in clause 1(2) of the Principal Agreement the following new definitions:

"Area A" – defined as the area marked "Area A" outlined in red on the Plan (as also defined), excluding that part shaded grey on the Plan. Area A is the current State Agreement area (excluding the area of the current development at Coogee) extended to accommodate the Company's proposed long term Stage 2 dredging operations under Ministerial Statement 599.

"Area B" – defined as the area marked "Area B" outlined in orange on the Plan and which is overlapped by the Exploration Licences (as also defined) and which may contain strategic shell sand resources which would allow the Company in time to relocate its dredging operations out of Area A.

"Environmental Approvals" – defined as Ministerial Statements 494 and 599 (as amended from time to time under the *Environmental Protection Act 1986 (EP Act)*) and which approvals relate to the Company's current medium term and long term dredging operations respectively within Area A.

"Exploration Licences" – defined as exploration licence numbers 70/1247, 70/1136, 70/1298 and 70/1300 (and any titles issued in substitution for them). They (apart from part of exploration licence 70/1247 within Area A) will comprise Area B. They are to be retained under the Principal Agreement in accordance with the provisions of proposed clause 6F of the Principal Agreement. That part of exploration licence 70/1247 covering Area A (after the variations take effect) will be surrendered pursuant to proposed clause 6D to allow the grant of the mining lease pursuant to that clause.

"lapse" – definition inserted for the purposes of proposed clause 6(7) of the Principal Agreement.

"mining lease" – defines the *Mining Act 1978 (Mining Act)* mining lease to be granted pursuant to proposed clause 6D of the Principal Agreement over that part of Area A outside the western boundary of the Port.

"Minister for Mines" – defined as the State Government Minister for the time being responsible for the administration of the Mining Act. This

definition replaces the existing definition of "Minister for Minerals and Energy" which will be deleted.

"Plan" – defines the plan (to be marked "C") and on which Area A and Area B are shown.

"Port" – defined as the Port of Fremantle and for which the Authority is established under the Port Authorities Act (as also defined).

"Port Authorities Act" – defined as the *Port Authorities Act 1999*.

"Port Authorities Minister" – defined as the State Government Minister for the time being responsible for the administration of the Port Authorities Act.

"port facilities", "port services", "port works" and "vessels" – have the meanings given in the Port Authorities Act and are inserted for the purposes of the provisions of clause 6 of the Principal Agreement.

"Shipping Channels" – means the areas delineated as "Existing Shipping Channel" and "Proposed Second Shipping Channel" respectively on the Plan (as also defined) and is inserted for the purpose of clauses 6 and 13(2) of the Principal Agreement.

**Clause 4(1)(b)**

Deletes the existing definitions of "Fremantle Port Authority Act", "Minister for Minerals and Energy", "Minister for Works" and "shell sand" from clause 1(2) of the Principal Agreement.

**Clause 4(1)(c)**

Updates the definition of "Land Act" in clause 1(2) of the Principal Agreement to refer to the *Land Administration Act 1997* which Act replaced the *Land Act 1933*.

**Clause 4(2)(a)**

Deletes the existing reference to "Minister for Works" in clause 4(1) of the Principal Agreement and substitutes "Port Authorities Minister".

**Clause 4(2)(b)**

Inserts a clause 4(3) in the Principal Agreement to permit the Company to, in accordance with that subclause, dredge its approach channel to its Woodman Point jetty.

**Clause 4(3)**

Deletes clause 5 (Removal of Coal Ash)

**Clause 4(4)**

Deletes the existing heading "Right to Dredge Shell Sand" and substitutes the new heading "Right to Dredge Shell Sand in Area A".

**Clause 4(5)(a)**

Deletes the existing clause 6(1) of the Principal Agreement and inserts a new subclause setting out the Company's rights to dredge shell sand within the Port area of Area A (being the extended Agreement area to be shown on the Plan). In summary:

- the State and the Authority will permit the Company to dredge in accordance with the State Agreement the medium and long term areas of the Port (within Area A) that are approved for dredging by or pursuant to the Environmental Approvals (as also defined); and
- the State and the Authority will permit the Company to dredge in accordance with the State Agreement those areas, approved by the Authority, of the Port (within Area A) that are approved for dredging by or pursuant to other EP Act approvals granted to the Company.

**Clause 4(5)(b)**

Deletes the existing clause 6(1a) dealing with the payment of royalties (which is addressed in proposed clause 6E) and inserts new subclauses (1a) and (1b) whose subject matter (relating to Port operations) were previously dealt with in the last sentence of the existing clause 6(1) of the Principal Agreement.

**Clause 4(5)(c)**

Varies clause 6(2) of the Principal Agreement to reflect the proposed new provisions of clause 6(1).

**Clause 4(5)(d)**

Amends clause 6(3) of the Principal Agreement by deleting the existing reference to "port installations" and substituting reference "port works".

**Clause 4(5)(e)**

Amends clause 6(4) of the Principal Agreement to reflect the new definitions of "port works", "Port" and "Port Authorities Minister" to be inserted in the Principal Agreement and to specifically refer to the Shipping Channels.

**Clause 4(5)(f)**

Deletes the existing clause 6(5) of the Principal Agreement and substitutes a new subclause providing that the Company shall not be entitled during the currency of the Principal Agreement to dredge shell sand from within Area A otherwise than in accordance with the Principal Agreement including, without limitation, the dredging and management plan as approved from time to time under clauses 6A-6C to be implemented by the Company.

**Clause 4(5)(g)**

Provides that clause 6(6) of the Principal Agreement shall cease to apply after 18 February 2021 being the latest date for continuance of the State Agreement under the existing clauses 6(1) and 6(5). It also amends clause 6(6) to reflect that the Company's rights to dredge shell sand within Area A will derive from the clause 6D mining lease as well as from clause 6.

**Clause 4(5)(h)**

Varies clause 6(7) of the Principal Agreement to reflect that the relevant provisions to which that subclause refers will in the future be contained in the proposed clause 6(1b).

**Clause 4(5)(i)**

Inserts in clause 6 of the Principal Agreement a new subclause (8) which obliges the Company to provide the State Agreement Minister with a copy of all reports, plans and other documentation required to be prepared by the Company in compliance with approvals given under the EP Act (including Ministerial Statements 494 and 599) to operations of the Company within Area A.

**Clause 4(6)(a)**

Amends clause 6A(1) to provide for the Company to, commencing in 2010, submit a dredging and management programme (**DMP**) each year (rather than each 2 years as currently required) and to reflect the proposed changes, pursuant to proposed clauses 6(1) and 6D, to the scope of the Company's shell sand dredging operations under the Principal Agreement.

**Clause 4(6)(b)**

Amends clause 6A(2)(d) to reflect the proposed changes to clause 6A(1) (i.e. the yearly submission of a DMP commencing in 2010).

**Clause 4(7)(a)**

Amends clause 6B(1) of the Principal Agreement to reflect that the State Agreement Minister's consideration and approval of a DMP submitted by the Company under clause 6A is subject to the EP Act and to enable the State Agreement Minister to require changes to the submitted programme to accord with the relevant environmental approval.

**Clause 4(7)(b)**

Amends clause 6B(2) of the Principal Agreement to reflect the paramount application of the EP Act in the context of a decision by the State Agreement Minister on a DMP submitted by the Company under clause 6A.

**Clause 4(7)(c)**

Inserts in clause 6B of the Principal Agreement a new subclause (6) which provides that pending the State Agreement Minister approving the DMP to be submitted by the Company under varied clause 6A(1) of the Principal Agreement, the DMP for the period 2009-2018 marked "A" initialled by or on behalf of the Company and the State Agreement Minister for the purpose of identification will be the current approved DMP to be implemented by the Company under the Principal Agreement.

**Clause 4(8)(a)**

Deletes clause 6C(2) of the Principal Agreement and inserts a new subclause reflecting that Area A will now extend beyond the western boundary of the Port (i.e. it will now include the clause 6D mining lease area) and that in respect of that area any variations of a DMP are to be agreed by the Company with the State Agreement Minister rather than with the Authority. In respect of areas of the Port within Area A, any variations of a DMP are to be agreed by the Company and the Authority.

**Clause 4(8)(b)**

Varies clause 6C(3) to restrict its application to disputes between the Company and the Authority.

**Clause 4(9)(a)**

Redesignates the existing clause 6D of the Principal Agreement as clause 6G and inserts new clauses 6D, 6E and 6F in the Principal Agreement.

Clause 6D(1) provides for the grant to the Company of a mining lease under the Mining Act but pursuant to the Principal Agreement (and in the form of proposed Schedule 2 to the Principal Agreement) over that part of Area A outside the western boundary of the Port and shown cross hatched on the Plan.

Clause 6D(2) sets out certain conditions of the mining lease including that it will entitle the Company to only mine shell sand in accordance with the Principal Agreement and that the Company will not be entitled to renew the original term of grant.

Clause 6D(3) provides that the term of the mining lease is to commence on the date of its grant and to end on 18 February 2031 (being the date to which the term of the Principal Agreement is proposed to be extended).

Clause 6D(4) modifies certain specific provisions of the Mining Act for the purposes of the grant of the mining lease. These include the right of third parties to object to the grant of the mining lease and to empower the Minister for Mines to grant the mining lease on the application of the Company.

Clause 6D(5) obliges the State to ensure that during the currency of the Principal Agreement the Company is not required to comply with Mining Act expenditure requirements in regard to the mining lease.

Clause 6D(6) obliges the Company to at all times permit the State and third parties to have access to and to pass over the mining lease so long as (except in the case of access or passage by naval ships or civilian ships supporting military functions) that access and passage does not unduly prejudice or interfere with the activities of the Company under the Principal Agreement.

Clause 6D(7) allows the Company to surrender to the State, with the approval of the State Agreement Minister, all or any portion of the mining lease.

Clause 6D(8) provides that the Company's exploration licence 70/1247 does not entitle it to be granted a mining lease over the cross hachured area otherwise than in accordance with clause 6D.

Clause 6D(9) provides that if the Company does not apply for a mining lease within time as contemplated by clause 6D then its exploration licence 70/1247 (if still current) will be deemed surrendered.

Clause 6E replaces the royalty provisions in the existing clause 6(1a) of the Principal Agreement. The rate of royalty payable remains unchanged and is in accordance with the Mining Act provisions.

Clause 6F provides for the Exploration Licences (as defined and essentially comprising Area B) to continue be held under the provisions of the Mining Act or other Act under which they may from time to time be held (modified as set out in this clause, including to provide for automatic 2 yearly extensions of their term and exemptions from surrender and expenditure requirements) until 11 December 2025 or with the State Agreement Minister's approval until the end of the current term of the State Agreement in 2031.

**Clause 4(10)**

Inserts the heading "Surrender of lease from the Commonwealth" as the new heading to the redesignated clause 6G.

**Clause 4(11)**

Varies clause 6G to provide (consistent with the proposed extension of the term of the Principal Agreement) for an extension of the term of the lease and licence referred to in clause 6G(1) over the Company's washing plant site at Woodman Point granted to it in 1988. It also foreshadows a possible surrender of land from the lease and licence in exchange for the Company being granted a pipeline easement.



**Clause 4(12)(a)**

Deletes existing clause 7(1) of the Principal Agreement which obliged the State to make supplies of electricity and water available to the Company.

**Clauses 4(12)(b-e)**

Repeat the provisions of the existing clauses 7(2) and (2a) as clauses 7(2), (2a) and (2b) but updates them to reflect the proposed new provisions of clause 6(1).

**Clauses 4(12)(f & h)**

Delete the existing heading to clauses 7(3) and 7(4).

**Clause 4(12)(g)**

Varies clause 7(3) to exclude from its application the clause 6D mining lease and all other mining tenements held by the Company pursuant to the Principal Agreement in respect of Area A or Area B. In relation to the mining lease clause 6D(5) is the relevant provision, and in relation to the Exploration Licences clause 6F(e) is the relevant provision, regarding exemptions from expenditure obligations.

**Clause 4(13)**

Inserts the heading "Disposal of part of the works site" to clause 7A.

**Clause 4(14)(a)**

Inserts the heading "Reporting on environmental measures" to clause 10A.

**Clause 4(14)(b)**

Inserts "and" after the semi-colon in paragraph (d).

**Clause 4(14)(c)**

Varies clause 10A(e) to refer to the clause 6D mining lease to reflect that the Company's proposed future operations will not be solely under clause 6 of the Principal Agreement.

**Clause 4(14)(d)**

Varies the existing proviso to clause 10A to remove the need for information provided to the State Agreement Minister under clause 6(8) of the Principal Agreement to be again provided under clause 10A.

**Clause 4(15)(a)**

Inserts the heading "Modification, expansion or variation of operations" to clause 10B.

**Clauses 4(15)(b-e)**

Insert variations reflecting the paramountcy of the operation of the EP Act.

**Clause 4(16)**

Inserts the heading "Compliance with the EP Act" to clause 10C.

**Clause 4(17)**

Inserts new clauses 12A, 12B and 12C in the Principal Agreement.

Clause 12A (No resumption) provides assurance to the Company, subject to the performance by it of its obligations under the Principal Agreement, against resumption of its works, installations, plant, equipment or other property the subject of or used for the purposes of the Principal Agreement and leases and licences granted to it pursuant to the Principal Agreement.

Clause 12B (Non-Interference with the Company's rights) provides assurance to the Company, subject to the performance of its obligations under the Principal Agreement, against third parties obtaining, in respect of Area A as set out in that clause, rights under the Mining Act to shell sand or, unless the State Agreement reasonably determines there will be no undue prejudice or interference with the Company's operations assuming the taking by the Company of all reasonable steps to avoid the interference, rights to other minerals.

Clause 12C (No discriminatory charges) obliges the State, except as otherwise provided in the Principal Agreement, to ensure that the titles, property or other assets, products, materials or services used or produced by the Company by or through its activities under the Agreement are not subjected to discriminatory rates, taxes or charges by the State or any of its agencies or instrumentalities or any local or other authority of the State. The conferral of rights upon parties to other Government agreements (as defined in the *Government Agreements Act 1979*) is to be disregarded in applying this clause.

**Clause 4(18)(a)**

Expands the existing indemnity to include the Minister for Mines and the State Agreement Minister as well as changing the reference to the Minister for Works to the Port Authorities Minister.

**Clause 4(18)(b)**

Provides for the State and the Authority to be indemnified from and against all liability (if any) to pay compensation to native title holders for, or in respect of, the grant to, or exercise by, the Company of rights, as referred to in clause 6(1), to dredge shell sand in Area A.

**Clause 4(18)(c)**

Inserts a new indemnity in favour of the Authority.

**Clause 4(19)**

Inserts new subclauses (2) and (3) in clause 14 of the Principal Agreement to provide for the tabling in, and possible disallowance, by State Parliament of variations to the Principal Agreement. These new provisions reflect the standard variation provisions of recent State Agreements entered into by the State.

**Clause 4(20)**

Inserts new assignment provision in the Principal Agreement to cover an assignment of the clause 6D mining lease and the Exploration Licences as well as to provide in respect of them that no further consent to assignment will be required under the Mining Act.

**Clause 4(21)**

Varies clause 16 of the Principal Agreement to provide for the Minister rather than the State to extend dates and periods. Also removes reference to extension of clause 6 periods and dates as these refer to the existing provisions of clause 6 (relating to the current term of the Principal Agreement) which are to be deleted.

**Clause 4(22)**

Expands the application of clause 18 to include the Minister for Mines and the State Agreement Minister as well as changing the reference to the Minister for Works to the Port Authorities Minister.

**Clause 4(23)**

Updates the notice provision of clause 20 and to cover notices from the Minister as well as from the State.

**Clause 4(24)**

Inserts new clauses 21-24 in the Principal Agreement.

Clause 21 (Determination of Agreement) specifies the events that can result in the State determining the Principal Agreement before its expiration date. It enables the Company to contest a notice of default and allows the matter to be decided by arbitration. It also enables the State to remedy a default and recover costs of doing so from the Company.

Clause 22 (Effect of determination or cessation of Agreement) details the effects of determination of the Principal Agreement, requires payment of money payable or accrued due and provides that, other than as provided in the Principal Agreement, no party has any claim against the others in respect of anything arising out of the Principal Agreement. Also contains provisions regarding whether improvements to the land are to become the property of the State or are to be removed by the Company.

Clause 23 (Term of this Agreement) provides that unless determined earlier, the Principal Agreement will expire on 18 February 2031. It also sets out a process for the State and the Company to confer in the future with respect to agreeing to commence negotiations for an extension of the term of the Principal Agreement beyond 2031.

Clause 24 (Applicable law) provides that the Principal Agreement is subject to the laws of Western Australia.

**Clause 4(25)**

Inserts in the Principal Agreement as Schedule 2 the form of the mining lease to be granted pursuant to proposed clause 6D of the Principal Agreement.

**Clause 5**

Provides for the automatic surrender (upon the abovementioned clause 4 variations becoming effective) of that part of exploration licences 70/1247 (except the cross hatched area shown on the Plan) and 70/1136 (Section 2) currently overlapping Area A.