

CB11-04/12 Mindarie Regional Council - New Establishment Agreement

File Ref: 4603 – 12/29623
Responsible Officer: Director, City Businesses
Disclosure of Interest: Nil
Attachments: 2

Issue

To seek endorsement of a new Establishment Agreement for the Mindarie Regional Council (MRC) and note the current status of negotiations underway in regard to the withdrawal of the City of Stirling.

Background

Following the application by the City of Stirling for an Interlocutory Injunction in the Supreme Court of Western Australia in June 2010, a mediated Heads of Agreement was reached and was considered by the Council at a Special Council Meeting on 10 August 2010 (CR01-08/10).

Since this Heads of Agreement was signed and adopted by all MRC Member Councils, all parties have acted in good faith and considerable effort has been invested in progressing the withdrawal of the City of Stirling from the Mindarie Regional Council. This has included the two major components of:

- The drafting of an Establishment Agreement to set the governing parameters for the future Membership of the MRC, led by the MRC Strategic Projects Committee (MRC SPC) Chaired by the City's Director City Businesses; and
- Undertaking the valuation process of the MRC to adjust the assets and liabilities of the MRC.

At present the process of withdrawal is nearing conclusion with the current Ministerial deadline being 31 March 2012. It is noted that a one month extension has been raised by the MRC Chief Executive Officer (MRC CEO) with both the City of Stirling's Chief Executive Office Stuart Jardine and the Minister on this issue, who have both agreed that the extension is warranted. Correspondence has been sent by the MRC CEO to the Minister formally requesting the extension.

The final draft Establishment Agreement for Council consideration is as **Attachment 1**.

Detail

The Establishment Agreement is proposed to be presented to the Minister in place of the current Constitution Agreement to address one of the requirements of section 699 (3)(b)(i) and (ii) of the *Local Government Act 1960* to facilitate the withdrawal of the City of Stirling from the MRC. The other requirement is the adjustment of assets and liabilities of the MRC, which will be considered by the MRC Council at a special meeting to be held on Wednesday 28 March 2012.

The Establishment Agreement as attached, has been drafted by Woodhouse Legal for the MRC, and has been developed, refined and finalised by Administration representatives from all Councils via the MRC Strategic Projects Committee. It is noted that a new Establishment Agreement for the MRC has been in development since 2002, however consensus has not been achieved previously for it to have been finalised for consideration and adoption.

Since the withdrawal of the City of Stirling has been initiated, the importance of a more contemporary and detailed governance framework within the Agreement has been highlighted as necessary. Many months of detailed discussions and workshopping of the draft Agreement has occurred, in particular in relation to the following matters:

- Clause 9: Dealing with a Deficit or Surplus;
- Clause 11: Winding Up;
- Clause 12: Withdrawal of a Participant; and
- Clause 14: Participant's Obligation to Deliver Waste to the MRC, including a procedure for Exemptions.

The Agreement from a City of Wanneroo Administration perspective has provisions made for many elements that are supportive of a new business direction for the regional council such as:

- Delivering or facilitating a wide range of services on regional basis (see Clause 5: Regional Purposes and Clause 6: Objectives);
- Elected Member tenure is aligned to biennial ordinary elections (see Clause 8: The Council), and allows for the appointment of Deputy members;
- Dealing with a surplus or deficit is aligned annually to the Audited Financial Reports, with a process for distribution and/or collection of funds being outlined (see Clause 9); and
- Matters such as seeking an exemption, or seeking a withdrawal or winding up of the MRC are now no longer silent, with specific processes outlined based primarily on the business impact of the action against individual members and on the MRC.

In relation to the second component of the withdrawal process, that of the valuation of assets and liabilities of the MRC to inform the negotiation of a settlement, a Special Council Meeting of MRC was held on Wednesday 28 March 2012. At this meeting a resolution (unconfirmed) was adopted as per the following:

1. *The PricewaterhouseCoopers Stage 2 (Report in relation to the City of Stirling's withdrawal from the MRC) dated 3 August 2011 be received.*
2. *The City of Stirling be advised that with respect to the resolution of its Council of 13 December 2011:*
 - a. *the offer to withdraw its requirement that any agreement must be accompanied by the City of Stirling ceasing to be a guarantor under the Deed of Guarantee with BioVision made on 21 November 2007" is acknowledged; .*
 - b. *the offer to accept a payout based on a discount of 25% on the PWC averaged valuation is not accepted.*
3. *The City of Stirling be advised that the MRC is prepared to negotiate an agreement for its withdrawal pursuant to section 699 of the Local Government Act 1960 on the basis that the City of Stirling:*
 - a. *be paid no more than its:*
 - (i) *paid-in capital contributions (\$840,000); and*
 - (ii) *share of the Members Revenue Equalisation Reserve i.e. unders/overs account (\$670,000);*
from current accumulated Mindarie Regional Council funds;
 - b. *not be released from its liabilities under the Resource Recovery Facility guarantee to BioVision;*

- c. *retain its post closure liabilities for the Tamala Park landfill, including but not limited to remediation and rehabilitation on the landfill site and other lands potentially affected, in proportion to the tonnes tipped to the total of members tonnes over the life of the landfill;*
 - d. *retain its ownership share in the land at the Tamala Park landfill site;*
 - e. *should the value of the land assets exceed liabilities post the closure of the Tamala Park land-fill site, then ten City of Stirling shall receive a portion of that net asset value proportional to their period as members of the Mindarie Regional Council; and*
 - f. *the outcome of the negotiations be the subject of a separate report to Council.*
4. *Council's resolution is significantly different from that recommended by officers for the following reasons :*
- a. *The MRC has not raised its fees to the levels used in the PricewaterhouseCoopers (PWC) computations, so the values assumed in those computations will not be achieved.*
 - b. *The City of Stirling's interest in MRC is an unmarketable minority interest in a regional council that has little or no commercial value insofar as the interest is incapable of being sold or sold for the PWC value to a purchaser.*
 - c. *The City of Stirling's withdrawal will create diseconomies of scale for the remaining members: the fixed costs of the operations, which are a high proportion of the total costs, will be spread across fewer local governments and, consequently, the remaining local governments will pay higher tipping fees.*
 - d. *The City of Stirling's withdrawal will result in the substantial operating costs of the Resource Recovery Facility being spread across fewer councils, which will suffer an increased financial burden for the life of the contract.*
 - e. *The City of Stirling has not offered any compensation to the remaining members for the increased tipping fees and RRF costs.*
 - f. *A proposal that the remaining members of MRC intend to enter into a new Establishment Agreement under which a departing member will be paid only:*
 - (i) its capital contributions; and*
 - (ii) its share of the Members Revenue Equalisation Reserve (ie unders/overs account)*

suggests that it is fair and equitable that City of Stirling should withdraw on a similar basis."

Consultation

Significant consultation has occurred between the Administrations of the six Member Councils excluding the City of Stirling, inclusive of financial and legal Officers, over nearly an 18 month timeframe.

Comment

As the new Establishment Agreement sets out the governance and the roles of the member Councils it will require consideration and adoption by each of the member councils of MRC.

During recent discussions surrounding the withdrawal process, the notion of a "Cooperative Model" was introduced by the Town of Cambridge as an alternative option in relation to the adjustment of assets and liabilities of the City of Stirling's interest in MRC.

Following in-house legal investigation it is considered that the MRC is not, and could not be considered a 'Co-op' as it fails to meet the basic legal standards required for a Co-op under the *Co-operatives Act 2009* (Co-op Act). An alternative Clause 12 (See **Attachment 2**) to the Agreement was drafted by the MRC to accommodate the adjustment of MRC's assets and liabilities based on this methodology as presented by the Town of Cambridge, however the MRC SPC did not support this alternative clause, and as such it is not reflected or included within the current Agreement presented for consideration.

However given the resolution passed at the Special MRC Meeting on Wednesday 28 March 2012 supporting a consistent withdrawal methodology for all members, it is recommended that the alternative clause be included in the agreement. The specific recommendation part indicated:

"A proposal that the remaining members of MRC intend to enter into a new Establishment Agreement under which a departing member will be paid only:
(i) its capital contributions; and
(ii) its share of the Members Revenue Equalisation Reserve (ie unders/overs account)
suggests that it is fair and equitable that City of Stirling should withdraw on a similar basis."

Administration is thus supportive of the adoption of the attached Establishment Agreement, with the alternative Clause 12 inserted, having been involved intimately with its development and refinement to this final version. If Council are not supportive of this new Agreement, then an alternative recommendation is required to be adopted whereby seeking approval for a Deed of Variation of the current Constitution Agreement to be created, addressing the requirements of the sections of the *Local Government Act 1960* to enable the withdrawal of the City of Stirling.

Statutory Compliance

The Establishment Agreement is to address one of the requirements of section 699 (3)(b)(i) and (ii) of the *Local Government Act 1960* in relation to the withdrawal of the City of Stirling, and as per the Heads of Agreement reached as a mediated outcome of Interlocutory Injunction in the Supreme Court of Western Australia in June 2010.

Strategic Implications

The proposal accords with the following Outcome Objective of the City's Strategic Plan 2006 – 2021:

- "4 Governance*
 - 4.3 Deliver excellence in business performance and service provision"*

Policy Implications

Nil

Financial Implications

Nil

Voting Requirements

Simple Majority

Recommendation**That Council:-**

1. **SUPPORTS** in principle an Establishment Agreement in the same or similar terms to that dated March 2012 as in Attachment 1 with the inclusion of the alternative Clause 12 as in Attachment 2:
2. **AUTHORISES** the Mayor and the Chief Executive Officer to sign the Establishment Agreement under the Common Seal, in the event that the withdrawal and the terms of the withdrawal of the City of Stirling are agreed and finalised;
3. In addition to 1. and 2. above **APPROVES** that a Deed of Variation of the Constitution Agreement be created by the Mindarie Regional Council, addressing the sections of the *Local Government Act 1960* required in order to enable the withdrawal of the City of Stirling in the event that one of the five remaining constituent municipalities does not resolve to approve the Establishment Agreement detailed in 1. above:
4. **NOTES** and **SUPPORTS** the recommendation (unconfirmed) of the Mindarie Regional Council endorsed on Wednesday 28 March 2012, that:

"1. The PricewaterhouseCoopers Stage 2 (Report in relation to the City of Stirling's withdrawal from the MRC) dated 3 August 2011 be received.

2. The City of Stirling be advised that with respect to the resolution of its Council of 13 December 2011:

- a. the offer to withdraw its requirement that any agreement must be accompanied by the City of Stirling ceasing to be a guarantor under the Deed of Guarantee with BioVision made on 21 November 2007" is acknowledged;*
- b. the offer to accept a payout based on a discount of 25% on the PWC averaged valuation is not accepted.*

3. The City of Stirling be advised that the MRC is prepared to negotiate an agreement for its withdrawal pursuant to section 699 of the Local Government Act 1960 on the basis that the City of Stirling:

- a. be paid no more than its:*
 - (i) paid-in capital contributions (\$840,000); and*
 - (ii) share of the Members Revenue Equalisation Reserve i.e. unders/overs account (\$670,000);*

from current accumulated Mindarie Regional Council funds;

b. not be released from its liabilities under the Resource Recovery Facility guarantee to BioVision;

c. retain its post closure liabilities for the Tamala Park landfill, including but not limited to remediation and rehabilitation on the landfill site and other lands potentially affected, in proportion to the tonnes tipped to the total of members tonnes over the life of the landfill;

d. retain its ownership share in the land at the Tamala Park landfill site;

e. should the value of the land assets exceed liabilities post the closure of the Tamala Park land-fill site, then ten City of Stirling shall receive a portion of that net asset value proportional to their period as members of the Mindarie Regional Council; and

f. the outcome of the negotiations be the subject of a separate report to Council.

4. Council's resolution is significantly different from that recommended by officers for the following reasons :

- a. The MRC has not raised its fees to the levels used in the*

PricewaterhouseCoopers (PWC) computations, so the values assumed in those computations will not be achieved.

b. The City of Stirling's interest in MRC is an unmarketable minority interest in a regional council that has little or no commercial value insofar as the interest is incapable of being sold or sold for the PWC value to a purchaser.

c. The City of Stirling's withdrawal will create diseconomies of scale for the remaining members: the fixed costs of the operations, which are a high proportion of the total costs, will be spread across fewer local governments and, consequently, the remaining local governments will pay higher tipping fees.

d. The City of Stirling's withdrawal will result in the substantial operating costs of the Resource Recovery Facility being spread across fewer councils, which will suffer an increased financial burden for the life of the contract.

e. The City of Stirling has not offered any compensation to the remaining members for the increased tipping fees and RRF costs.

f. A proposal that the remaining members of MRC intend to enter into a new Establishment Agreement under which a departing member will be paid only:

(i) its capital contributions; and

(ii) its share of the Members Revenue Equalisation Reserve (ie unders/overs account)

suggests that it is fair and equitable that City of Stirling should withdraw on a similar basis." ; and

- 5. NOTES that any variations to these base principles of negotiation by the Mindarie Regional Council will be subject to a further report to Council.**

Attachments:

1. *Draft Establishment Agreement* 12/30381 *Minuted*
2. *Replacement Clause* 12/30536

Dated ____ March 2012

**TOWN OF CAMBRIDGE
and
CITY OF JOONDALUP
and
CITY OF PERTH
and
TOWN OF VICTORIA PARK
and
CITY OF VINCENT
and
CITY OF WANNEROO
ESTABLISHMENT AGREEMENT
OF THE
MINDARIE REGIONAL COUNCIL**

Woodhouse Legal
Solicitors & Legal Consultants
323 Rokeby Road
Subiaco WA 6008
Telephone (08) 9382 2202
Fax (08) 9382 3011
JMW:2060429

2060429 - Draft Estb Agmt clean 140312

TABLE OF CONTENTS

RECITALS.....1

OPERATIVE PART2

1. CONDITIONS.....2

2. FORMER CONSTITUTION AGREEMENT2

3. NAME.....2

4. REGION2

5. REGIONAL PURPOSES2

6. OBJECTIVES3

7. DEFINITIONS.....3

8. THE COUNCIL.....5

8.1 Appointment of members.....5

8.2 Tenure of members of the MRC Council.....6

8.3 Election of chairman and deputy chairman.....6

8.4 Term of office of chairman and deputy chairman.....7

8.5 Role of chairman.....7

8.6 Role of deputy chairman.....7

8.7 Role of members of MRC Council.....7

8.8 Deputy members.....8

9. DEALING WITH A DEFICIT OR SURPLUS8

9.1 Application of clause.....8

9.2 Where a Deficit occurs.....8

9.3 Time for payment.....8

9.4 Late payment.....9

9.5 Determination of Fees Proportions.....9

9.6 Where a Surplus occurs.....9

9.7 Dealing with a Surplus which is paid.....9

10. CONTRIBUTIONS TO THE ACQUISITION OF LAND9

10.1 Proportions for contributions.....9

10.2 Capital contributions.....9

11. WINDING UP9

11.1 Winding up by agreement.....9

11.2 Direction to be given to the MRC.....10

11.3 Regional Purposes limited to winding up.....10

11.4 Division of assets.....10

11.5 Division of liabilities.....10

12. WITHDRAWAL OF A PARTICIPANT.....10

12.1 Definitions.....10

12.2 Notice by a Participant wishing to withdraw.....11

12.3 Procedure to be followed by the CEOs.....11

12.4 Withdrawal only by written agreement.....11

12.5 Requirements of agreement.....11

12.6 Restriction on giving another notice.....12

12.7 Clause 15 not to apply.....12

13. BORROWINGS.....12

14. PARTICIPANTS' OBLIGATION TO DELIVER WASTE TO THE MRC.....12

14.1 Delivery of Participant's waste.....12

14.2 MRC may give exemption.....12

14.3 Procedure for exemptions.....12

14.4 Exemptions under the Former Constitution Agreement.....13

15. DISPUTE RESOLUTION.....13

2060429 - Draft Esrh Agmt clean 140312

15.1	No proceedings.....	13
15.2	Notification of Dispute.....	14
15.3	Reasonable efforts to resolve Dispute.....	14
15.4	Dispute resolution process.....	14
15.5	Arbitration.....	14
15.6	Legal representation.....	14
16.	INTERPRETATION.....	14
16.1	Interpretation.....	14
16.2	Headings and footnotes.....	15
16.3	Time.....	16
	SCHEDULE 1.....	17
	SCHEDULE 2.....	18
	SCHEDULE 3.....	19
	EXECUTED by the parties.....	20

DRAFT

AGREEMENT

THIS ESTABLISHMENT AGREEMENT dated 2012

BETWEEN **TOWN OF CAMBRIDGE** of 1 Bold Park Drive, Floreat, Western Australia

AND **CITY OF JOONDALUP** of Boas Avenue, Joondalup, Western Australia

AND **CITY OF PERTH** of Council House, 27 St George's Terrace, Perth, Western Australia

AND **TOWN OF VICTORIA PARK** of 99 Shepperton Road, Victoria Park, Western Australia

AND **CITY OF VINCENT** of 244 Vincent Street, Leederville, Western Australia

AND **CITY OF WANNEROO** of 23 Dundobar Road, Wanneroo, Western Australia

RECITALS

- A. The districts of City of Perth, City of Stirling and City of Wanneroo were constituted as a regional district by virtue of an Order of the Governor made under the Former Act on 22 December 1987 and published in the Government Gazette on 31 December 1987.
- B. Pursuant to the Former Act and by virtue of the Order of the Governor, a regional council was then constituted.
- C. Under a Constitution Agreement undated but stamped 21 December 1988 made between City of Perth, City of Stirling and City of Wanneroo, the Regional Council so constituted was named the Mindarie Regional Council.
- D. By an undated Deed of Variation made between, City of Perth, City of Stirling and City of Wanneroo, the Constitution Agreement was amended in the manner set out in the Deed of Variation.
- E. By a Deed of Variation dated 25 November 1996 made between City of Wanneroo, City of Stirling, City of Perth, Town of Vincent, Town of Cambridge and Town of Victoria Park, the Constitution Agreement was amended in the manner set out in that Deed. The amendments included the admission of the Town of Cambridge, Town of Victoria Park and Town of Vincent as constituent municipalities of the Regional Council. The Deed was approved by the Minister on 25 November 1996.
- F. By a Deed of Amendment dated 20 October 1999, made between the City of Perth, City of Stirling, Town of Cambridge, Town of Vincent, Town of Victoria Park, City of Joondalup and City of Wanneroo, the Constitution Agreement was amended to include the City of Joondalup and City of Wanneroo as constituent municipalities.

- G. By virtue of transitional provisions of the Act, the regional council continues as a regional local government as if it had been constituted as a regional local government under the Act.
- H. The Participants have agreed to amend the Former Constitution Agreement by revoking it and substituting it with this Establishment Agreement.
- I. The Participants have resolved on the dates referred to in Schedule 1 to enter into this Establishment Agreement and to submit it to the Minister for approval.

OPERATIVE PART

1. CONDITIONS

This Establishment Agreement is subject to and conditional upon:

- (a) the approval of the Minister to this Establishment Agreement under section 699(3)(b) of the Local Government Act 1960 (repealed) and section 3.65 of the Local Government Act 1995; and
- (b) an Order to the Governor under section 699(1) of the Local Government Act 1960 (repealed) removing the district of the City of Stirling from the regional district of the MRC.

2. FORMER CONSTITUTION AGREEMENT

The Former Constitution Agreement is revoked and substituted with this Establishment Agreement commencing on the Operative Date.

3. NAME

The name of the regional local government continues to be the Mindarie Regional Council.

Footnote:

- 1. Section 3.62(1) of the Act provides that a regional local government is a body corporate with perpetual succession and a common seal.
- 2. A regional local government has the same general function of a local government including its legislative and executive functions. See Part 3 and section 3.66 of the Act.
- 3. Except as stated in section 3.65, the Local Government Act 1995 applies to a regional local government as if:
 - (a) the participants' districts together made up a single district; and
 - (b) the regional local government were the local government established for that district.

4. REGION

The MRC is established for the Region.

5. REGIONAL PURPOSES

The regional purposes for which the MRC is established are:

- (a) to undertake the processing, recycling, treatment, sale and disposal of waste for the benefit of the communities of the Participants;

- (b) to investigate and assess the possibilities of, and the methodologies for, carrying out a range of services on a regional basis; and
- (c) to carry out and do all other acts and things which are reasonably necessary for the bringing into effect of the purposes referred to in paragraph (a) or (b) of this clause.

Footnote:

In certain circumstances, a proposal to undertake a Regional Purpose may require the preparation of a business plan under the Act – see section 3.59.

6. OBJECTIVES

- (1) The objectives of the MRC are:
 - (a) to provide effective and cost efficient waste disposal, consistent with safeguarding all environmental elements, for the benefit of the Participants and the residents of the Region;
 - (b) to operate programmes to dispose of waste accepted by the MRC via landfill, recycling and reuse in accordance with best practice;
 - (c) to implement one or more preferred waste treatment methods, including landfill, and waste-to-energy either separately, or with others, for treatment of at least that waste generated within the Region;
 - (d) to support initiatives to minimise waste-at-source generation through interaction with government, industry groups and the community;
 - (e) to establish business systems necessary for the ongoing management of the MRC's business;
 - (f) to obtain the appropriate level of resources, financial and physical, for the operation of the MRC's business activities; and
 - (g) to use best endeavours to operate effectively and efficiently, to be self-funding and to be responsible for the raising of any necessary capital or loans to meet its needs independent of the Participants.
- (2) No failure or alleged failure of the MRC to meet any of the objectives set out in subclause (1) is to preclude any of the Participants from meeting its obligations under this Agreement or otherwise give rise to any claim or entitlement on its part.

7. DEFINITIONS

In this Establishment Agreement, unless the contrary intention appears:

“Act” means the Local Government Act 1995;

“annual financial report” means the annual financial report which is audited and submitted to the Departmental CEO;

“CEO” means chief executive officer;

“Deficit”, for a financial year, means the amount, if any:

(a) by which the expenses of the MRC exceeds the revenues and other income of the MRC; and

(b) which is shown as such in the annual financial report of the MRC, for that year;

“Departmental CEO” means the chief executive officer of the department assisting the Minister to administer the Act;

“Fees Proportion”, in relation to a Participant and for any financial year, is the proportion which the amount of the fees and charges paid by that Participant to the MRC for acceptance by the MRC of the Participant’s waste, in that year, bears to the amount of the fees and charges paid by all of the Participants to the MRC for acceptance by the MRC of the Participants’ waste, in that year;

“Former Constitution Agreement” means the constitution agreement undated but stamped 21 December 1988 as amended by the subsequent deeds referred to in Recitals D, E and F;

“Minister” means the Minister of the Crown to whom the administration of the Act is for the time being committed by the Governor and includes a Minister of the Crown for the time being acting for or on behalf of the Minister;

“MRC” means the Mindarie Regional Council;

“MRC Council” means the council of the MRC;

“Operative Date” means the date upon which the Governor, by Order, removes the district of the City of Stirling from the regional district of the Mindarie Regional Council;

“Participants’ Surplus Reserve Account” means any reserve account established and maintained by the MRC for an express purpose which permits the use of the money in the reserve account to meet the amount of any Deficit or any part of a Deficit;

“Participant’s waste” means waste which is:

- (a) collected or received by a Participant from the Region; or
- (b) generated by the operations of a Participant,

but excludes:

- (i) waste which is solely or predominantly comprised of liquid;
- (ii) sewage; or

(iii) waste which is:

- (A) placed, for collection by the Participant, in a receptacle intended for the deposit of glass, plastics, metals, paper or cardboard, separate from other waste; and
- (B) collected or received by a Participant from the Region; or

- (iv) waste which is;
 - (A)(1) placed, for collection by the Participant, in a receptacle intended for the deposit for vegetative waste from gardens, trees or lawns, separate from other waste; and
 - (2) collected or received by the Participant from the Region; or
 - (B) vegetative waste from gardens, trees or lawns collected separately by the Participant from other waste;
- (v) waste which is produced by the processing or recycling of any waste referred to in paragraphs (i), (ii), (iii) and (iv) including any residual waste remaining after that processing or recycling;

“Participants” means Town of Cambridge, City of Joondalup, City of Perth, Town of Victoria Park, City of Vincent, and City of Wanneroo and “Participant” is a reference to any one of them;

“Region” means the districts of the Participants;

“Regional Purpose” means any regional purpose referred to in clause 5;

“Surplus”, for a financial year, means the amount, if any:

- (a) by which the revenues and other income of the MRC exceeds the expenses of the MRC; and
- (b) which is shown as such in the annual financial report of the MRC, for that year;

“waste” means matter which is:

- (a) discarded, rejected, abandoned, unwanted or surplus, whether or not intended for sale or for recycling, reprocessing, recovery or purification by a separate operation from that which produced the matter; or
- (b) prescribed under the Waste Avoidance and Resource Recovery Act 2007 to be waste.

8. THE COUNCIL

8.1 Appointment of members

- (1) Each Participant is to appoint a member or members of the council of the Participant to be a member of the MRC Council, in the numbers set out in Schedule 2.
- (2) The members of the MRC Council appointed immediately prior to the Operative Date are to remain in office after the Operative Date.
- (3) A Participant may terminate an appointment made under subclause (1) at any time.

Footnote:

Section 3.62(b) of the Act provides that a regional local government is to have, as its governing body, a council established under the Establishment Agreement and consisting of members of the councils of the participants.

8.2 Tenure of members of the MRC Council

A member of the MRC Council is to hold office until:

- (a) the appointment of the member is terminated by the Participant;
- (b) the member ceases to be a member of the council of the Participant;
- (c) the commencement of the first meeting of the MRC Council following the day on which the biennial ordinary election to elect councillors of the Participant which appointed that member, is held; or
- (d) the 35th day after the day on which the next biennial ordinary election to elect councillors of the Participant which appointed that member, is held under the Act,

whichever is the earlier.

Footnote:

Sections 2.32 and 2.33 of the Act set out circumstances in which the office of a member of a council becomes vacant.

8.3 Election of chairman and deputy chairman

- (1) The members of the MRC Council are to elect a member to fill the offices of chairman and deputy chairman:
 - (a) at the first meeting of the MRC Council following the day on which biennial ordinary elections to elect councillors to the Participants are held; or
 - (b) if those biennial ordinary elections are held on more than one day then at the first meeting of the MRC Council following the latest of those days;
- (2) If the office of chairman or deputy chairman becomes vacant then the members of the MRC Council are to elect a new chairman or deputy chairman, as the case requires.
- (3) The election referred to in subclause (2) is to take place at a meeting held at least 4 weeks after the date on which the office became vacant.
- (4) The election of the chairman is to be conducted by the CEO and the election of the deputy chairman is to be conducted by the chairman, in accordance with the procedure prescribed under the Act for the election of a mayor or deputy mayor, respectively, by a council.
- (5) The chairman and deputy chairman appointed immediately prior to the Operative Date are to remain in office after the Operative Date.

8.4 Term of office of chairman and deputy chairman

The term of a person holding the office of chairman or deputy chairman begins when the person is elected to the office and ends when the chairman or deputy chairman, as the case may be is next elected under clause 8.3.

8.5 Role of chairman

The chairman:

- (a) presides at meetings of the MRC Council;
- (b) carries out civic and ceremonial duties on behalf of the MRC;
- (c) speaks on behalf of the MRC;
- (d) performs such other functions as are given to the chairman by the Act, any other written law or this Agreement; and
- (e) liaises with the CEO on the MRC's affairs and the performance of its functions.

Footnotes:

- 1. The role of the MRC Council is set out in section 2.7 of the Act.
- 2. The functions of the CEO are set out in section 5.41 of the Act.
- 3. The chairman may agree to the CEO speaking on behalf of the MRC - see section 5.41(f) of the Act.

8.6 Role of deputy chairman

- (1) The deputy chairman performs the functions of the chairman when authorised to do so under this clause.
- (2) If:
 - (a) the office of chairman is vacant; or
 - (b) the chairman is not available or is unable or unwilling to perform the functions of chairman,then the deputy chairman may perform the functions of chairman.

8.7 Role of members of MRC Council

A member of the MRC Council:

- (a) represents the interests of the ratepayers and residents of the Region;
- (b) facilitates communication between the community of the Region and the MRC Council;
- (c) participates in the MRC's decision-making processes at meetings of the MRC Council and its committees; and

- (d) performs such other functions as are given to the member by the Act or any other written law.

8.8 Deputy members

- (1) A Participant may:
 - (a) appoint a member of the council of the Participant to be a deputy of a member of the MRC Council; and
 - (b) terminate the appointment at any time.
- (2) A deputy of a member of the MRC Council may attend a meeting of the MRC Council when the member is unable to do so by reason of illness, absence or other cause.
- (3) A deputy of a member, when attending as a member under subclause (2), has the functions of, and all the protections given to, a member.
- (4) A person must not concurrently hold office as a deputy of more than one member of the MRC Council.

9. DEALING WITH A DEFICIT OR SURPLUS

9.1 Application of clause

This clause 9 applies only to the financial year which ends after the Operative Date.

9.2 Where a Deficit occurs

If a Deficit occurs then the Participants must pay to the MRC, in their respective Fees Proportions:

- (a) the amount of the Deficit; less
- (b) any amount in the Participants' Surplus Reserve Account as shown in the annual financial report of the MRC for the financial year to which the Deficit relates,

and, for the purpose of clause 11.4(1)(a), the capital contribution of each Participant is taken to be reduced by the Participant's Fees Proportion of the amount referred to in paragraph(b).

9.3 Time for payment

Each Participant must pay to the MRC the amount payable by that Participant under clause 9.2:

- (a) within 3 months after the date on which the annual financial report is submitted to the Departmental CEO; or
- (b) at any earlier time agreed by the Participants; or

(c) at any later time decided by the MRC and notice of which is given to the Participants.

9.4 Late payment

If a Participant fails to pay the amount referred to in clause 9.2 on or before the due date for payment then, in addition to the amount, the Participant must pay to the MRC interest on the amount at the overdraft rate charged by the MRC's bank on sums of the same size as the unpaid amount calculated from and including the due date to but excluding the actual date of payment.

9.5 Determination of Fees Proportions

For the purpose for determining the Fees Proportion, in relation to a Participant for any financial year, the amount of fees and charges paid by each of the Participants to the MRC for the acceptance by the MRC of a Participant's waste, is to be as shown in the annual financial report of the MRC or, if not shown in that report, then as advised by the MRC.

9.6 Where a Surplus occurs

If a Surplus occurs then, for the purpose of clause 11.4(1)(a), the capital contribution of each Participant is taken to be increased by the Participant's Fees Proportion of that amount.

9.7 Dealing with a Surplus which is paid

If, following any financial year, a Surplus for that year or any part of that Surplus is paid by the MRC to the Participants, then it is to be distributed to the Participants in the proportions set out in Schedule 3 and, for the purpose of clause 11.4(1)(a), the capital contribution of a Participant is taken to be reduced by the amount distributed to that Participant.

10. CONTRIBUTIONS TO THE ACQUISITION OF LAND

10.1 Proportions for contributions

Where the MRC Council determines that the Participants are to make contributions towards the acquisition of land then the Participants must make those contributions in the proportions set out in Schedule 3.

10.2 Capital contributions

For the avoidance of doubt, contributions paid under clause 10.1 are to be taken to be capital contributions for the purpose of clause 11.4(1)(a).

11. WINDING UP

11.1 Winding up by agreement

The Participants may agree in writing that MRC is to be wound up.

11.2 Direction to be given to the MRC

Where an agreement is made under clause 11.1, the Participants are to give to the MRC a written direction that the MRC is to commence to wind up its affairs and undertaking.

11.3 Regional Purposes limited to winding up

Commencing on the date on which a direction referred to in clause 11.2 is given to the MRC, the MRC continues to be established for the Regional Purposes but only so far as is necessary to enable the MRC to wind up its affairs and undertaking.

11.4 Division of assets

- (1) If the MRC is to be wound up and there remains, after satisfaction of all of its debts and liabilities, any property and assets of the MRC then the property and assets are to be realised and:
 - (a) the proceeds, along with any surplus funds are to be used to repay to the Participants their respective capital contribution as shown in the accounting records of the MRC; and
 - (b) the balance, if any, is to be divided among the Participants in the proportions set out in Schedule 3.
- (2) For the avoidance of doubt, for the purposes of subclause (1), the capital contributions of the Participants do not accrue interest.

11.5 Division of liabilities

If the MRC is to be wound up and there remains any liability or debt in excess of the realised property and assets of the MRC then the liability or debt is to be met by each of the Participants in the proportions set out in Schedule 3.

12. WITHDRAWAL OF A PARTICIPANT**12.1 Definitions**

In this clause 12:

“CEOs” means the chief executive officers of the Participants;

“Initial Period”, in relation to a Participant which gives notice under clause 12.2, means a period of one month commencing on the date on which Participant gives the notice;

“Second Period”, in relation to a Participant which gives notice under clause 12.2, means a period of 2 months commencing on the day following the expiry of the Initial Period;

“Withdrawal Period”, in relation to a Participant which gives notice under clause 12.2, means a period of 15 months commencing on the date on which the Participant gives the notice.

12.2 Notice by a Participant wishing to withdraw

A Participant wishing to withdraw from the MRC must give to each of the other Participants and to the MRC, notice in writing of its wish to do so.

12.3 Procedure to be followed by the CEOs

- (1) As soon as practicable after a Participant has given notice under clause 12.2, the Participants are to cause a meeting to be held between the CEOs at which the CEOs are to endeavour to reach agreement on a timetable for:
 - (a) the preparation of:
 - (i) a valuation of the assets and liabilities of the MRC; and
 - (ii) a business impact statement with respect to the impact of a withdrawal of the Participant on the business and affairs of the MRC; and
 - (b) further meetings of the CEOs.
- (2)(a) If the CEOs agree in writing on a timetable referred to in subclause (1), then the CEOs are to implement the agreed timetable with a view to each of them preparing a recommendation to their respective councils concerning the proposed withdrawal and the terms on which a withdrawal might be agreed.
- (b) The Participant which has given notice under clause 12.2 must meet the cost of the preparation of the valuation referred to in subclause (1).
- (3) If the CEOs do not agree in writing on a timetable within the Initial Period, then the dispute is to be submitted to mediation during the Second Period in accordance with, and subject to, The Institute of Arbitrators & Mediators Australia Mediation and Conciliation Rules.
- (4) If the CEOs fail to agree on a timetable referred to in subclause (1) by the end of the Second Period then the Participants have no further obligations to one another under this clause 12.3.

12.4 Withdrawal only by written agreement

A Participant may only withdraw from the MRC in accordance with an agreement in writing between the Participants which agreement specifies the matters referred to in clause 12.5 and which takes effect under clause 12.5.

12.5 Requirements of agreement

An agreement under clause 12.4:

- (a) is to specify the agreed date on which the withdrawal of the Participant is to take effect;
- (b) is to specify the agreed amount to be paid to or by the withdrawing Participant; and

- (c) does not take effect unless the other Participants have agreed in writing to vary the establishment agreement so as to provide for the determination of the contributions to be made by those Participants to the funds of the MRC and for either:
 - (i) the alteration of the number of members of the MRC Council; or
 - (ii) the alteration of the number of members of the MRC Council to be appointed by one of more of those Participants.

12.6 Restriction on giving another notice

A Participant which has given notice under clause 12.2 is not entitled to give another notice under that clause until the Withdrawal Period has elapsed.

12.7 Clause 15 not to apply

Any failure by the Participants to reach agreement under this clause is not to be treated as a dispute for the purpose of clause 15.

Footnote:

Disputes between local governments may be referred to the Minister for resolution under section 9.63 of the Act.

13. BORROWINGS

Part 6, Division 5, Subdivision 3 of the Act is to apply.

Footnote:

1. Section 3.66(4) of the Act provides that Part 6, Division 5, Subdivision 3 does not apply in relation to a regional local government unless the Establishment Agreement provides that it does.
2. Part 6, Division 5, Subdivision 3 of the Act deals with borrowings and includes the power to borrow and restrictions on borrowings.

14. PARTICIPANTS' OBLIGATION TO DELIVER WASTE TO THE MRC

14.1 Delivery of Participant's waste

A Participant must deliver the Participant's waste to the MRC and to any person with whom the MRC has entered into a contract for the receipt of the Participant's waste, at any location notice of which is given to the Participant by the MRC.

14.2 MRC may give exemption

The Participants agree to abide by any decision made by the MRC Council pursuant to clause 14.3 to grant to a Participant an exemption from the Participants' obligation under clause 14.1.

14.3 Procedure for exemptions

- (1) A Participant which wishes to be exempted from an obligation under clause 14.1, must give to the other Participants and to the MRC, a notice in writing which meets the requirements of subclause (2).
- (2) A notice given under subclause (1) must:

- (a) set out a description of those portions of the Participant's waste for which the exemption is requested;
 - (b) state the requested exemption period;
 - (c) specify the reasons for the request; and
 - (d) request the MRC to prepare, and give to all of the Participants, a business impact statement with respect to the requested exemption including its expected financial impact on the business and affairs of the MRC.
- (3) Within 2 months after receiving the business impact statement from the MRC referred to in subclause (2)(d), any of the other Participants are entitled to give to the MRC, the other Participants and the Participant which requested the exemption, a response to the requested exemption.
- (4) After the 2 month period referred to in subclause (3) has ended, the MRC Council may:
- (a) grant an exemption in accordance with subclause (5); or
 - (b) refuse the request.
- (5) A decision by the MRC Council to grant an exemption must set out:
- (a) the period of the exemption;
 - (b) a description of the exempted portion of the Participant's waste; and
 - (c) any conditions imposed on the exemption.

14.4 Exemptions under the Former Constitution Agreement

Notwithstanding the revocation of the Former Constitution Agreement under clause 2, an exemption which is:

- (a) granted under the Former Constitution Agreement; and
- (b) in effect immediately before the Operative Date,

continues in effect, according to its terms, as if it were an exemption granted under clause 14.2.

15. DISPUTE RESOLUTION

15.1 No proceedings

A party must not start arbitration proceedings in respect of a dispute arising out of this Agreement ("**Dispute**") unless it has complied with this clause.

15.2 Notification of Dispute

A party claiming that a Dispute has arisen must notify the other parties to the Dispute giving details of the Dispute.

15.3 Reasonable efforts to resolve Dispute

- (1) During the 14 day period after a notice is given under clause 15.2 (or longer period agreed in writing by the parties) ("**Negotiation Period**"), the parties must use their reasonable efforts to resolve the Dispute.
- (2) Within the first 7 days of the Negotiation Period, if the Dispute continues, the CEOs of the parties and the CEO of the MRC, must meet, and use their reasonable endeavours to resolve the Dispute.

15.4 Dispute resolution process

If the Dispute is not resolved within the Negotiation Period, the parties must meet and endeavour to agree on:

- (a) a process for resolving the Dispute other than by litigation or arbitration (such as by further negotiations, mediation, conciliation or expert determination);
- (b) the procedure and timetable for any exchange of documents and other information relating to the Dispute;
- (c) the procedural rules and timetable for the conduct of the selected mode of proceeding;
- (d) a procedure for the selection and compensation of any independent persons engaged by the parties to assist in resolution of the Dispute; and
- (e) whether or not the parties are to seek the assistance of a dispute resolution organisation.

15.5 Arbitration

If the Parties are unable to agree on a process for resolving the Dispute in accordance with clause 15.4 within 21 days after the Negotiation Period then any party may notify the others in writing ("**arbitration notice**") that it requires the Dispute to be referred to arbitration and, upon receipt of the arbitration notice by the recipients the Dispute is to be referred to arbitration under and in accordance with the provisions of the Commercial Arbitration Act 1985.

15.6 Legal representation

For the purposes of the Commercial Arbitration Act 1985, the Participants consent to each other and to the MRC being legally represented at any such arbitration.

16. INTERPRETATION**16.1 Interpretation**

In this Establishment Agreement, unless the contrary intention appears:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing any gender include the other genders;
- (c) references to persons include corporations and bodies politic;
- (d) references to a person include the legal personal representatives, successors and assigns of that person;
- (e) a reference to a statute, planning scheme, or other law includes regulations and other statutory instruments under it and consolidations, amendments, re-enactments or replacements of any of them (whether of the same or any other legislative authority having jurisdiction);
- (f) references to this or any other document include the document as varied or replaced, and notwithstanding any change in the identity of the parties;
- (g) references to writing include any mode of representing or reproducing words in tangible and permanently visible form;
- (h) an obligation of two or more parties binds them jointly and severally;
- (i) if a word or phrase is defined other parts of speech and grammatical forms of that word or phrase have corresponding definitions;
- (j) references to a person or body which has ceased to exist or has been reconstituted, amalgamated, reconstructed or merged, or the functions of which have become exercisable by any other person or body in its place, are to be taken to refer to the person or body established or constituted in its place or by which its functions have become exercisable;
- (k) an obligation incurred in favour of two or more parties is enforceable by them jointly and severally;
- (l) reference to any thing (including any amount) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (m) reference to a month and cognate terms means a period commencing on any day of a calendar month and ending on the corresponding day in the next succeeding calendar month but if a corresponding day does not occur in the next succeeding calendar month the period ends on the last day of the next succeeding calendar month;
- (n) includes means includes without limitation; and
- (o) references to this Establishment Agreement include its schedules.

16.2 Headings and footnotes

Headings and footnotes are to be ignored in construing this Establishment Agreement.

16.3 Time

- (1) References to time are to local time in Perth, Western Australia.
- (2) Where time is to be reckoned from a day or event, that day or the day of that event is to be excluded.

Footnotes:

Amendment of Establishment Agreement

1. The Participants may amend this Establishment Agreement by agreement made with the Minister's approval - see section 3.65(1) of the Act.

Admission of other local governments

2. This Establishment Agreement can be amended to include another local government as a party to the amending agreement - see section 3.65(2) of the Act.

SCHEDULE 1

Participant	Date of resolution to enter into this establishment agreement
Town of Cambridge	
City of Joondalup	
City of Perth	
Town of Victoria Park	
City of Vincent	
City of Wanneroo	

DRAFT

SCHEDULE 2

Participant	Number of Councillors
Town of Cambridge	1
City of Joondalup	2
City of Perth	1
Town of Victoria Park	1
City of Vincent	1
City of Wanneroo	2

DRAFT

SCHEDULE 3

Participant	Proportion
Town of Cambridge	$\frac{1}{8}$ th
City of Joondalup	$\frac{1}{4}$ th
City of Perth	$\frac{1}{8}$ th
Town of Victoria Park	$\frac{1}{8}$ th
City of Vincent	$\frac{1}{8}$ th
City of Wanneroo	$\frac{1}{4}$ th

EXECUTED by the parties

THE COMMON SEAL of TOWN OF)
CAMBRIDGE was hereunto affixed in the presence of:)
)

Mayor

Chief Executive Officer

THE COMMON SEAL of CITY OF JOONDALUP)
was hereunto affixed in the presence of:)
)

Mayor

Chief Executive Officer

THE COMMON SEAL of CITY OF PERTH was)
hereunto affixed in the presence of:)
)

Lord Mayor

Chief Executive Officer

THE COMMON SEAL of TOWN OF VICTORIA)
PARK was hereunto affixed in the presence of:)
)

Mayor

Chief Executive Officer

THE COMMON SEAL of CITY OF VINCENT was)
hereunto affixed in the presence of:)
)

Mayor

Chief Executive Officer

THE COMMON SEAL of CITY OF WANNEROO)
was hereunto affixed in the presence of:)
)

Mayor

Chief Executive Officer

DRAFT

12. WITHDRAWAL OF A PARTICIPANT

12.1 Notice by a Participant wishing to withdraw

- (1) A Participant which wishes to withdraw from the MRC must give to each of the other Participants and to the MRC, notice in writing of its wish to do so.
- (2) Notice under subclause (1) can only be given between 1 July and 31 December in any year.

12.2 When withdrawal to take effect

The withdrawal of a Participant is to take effect on the commencement of the financial year after the financial year in which notice of withdrawal under clause 12.1 is given.

12.3 Entitlement of withdrawing Participant

A Participant which has withdrawn from the MRC is entitled to payment of the total of the following amounts:

- (a) the capital contribution of that Participant as shown in the accounting records of the MRC; and
- (b) the Participant's proportion, as set out in Schedule 3, of the Participants' Surplus Reserve Account.

12.4 Time for payment

The total amount referred to in clause 12.3 is to be paid within 3 months after the withdrawal takes effect.

12.5 Participants may be required to make payment

If the MRC fails to pay the total amount referred to in clause 12.3 within 2 months after the withdrawal takes effect, then each Participant (other than the Participant which has withdrawn) is to pay a proportion of the total amount which proportion is to be determined in accordance with the following formula:

Participant's proportion = A divided B

Where:

A is the Participant's proportion as set out in Schedule 3;

B is the total of the proportions of the Participants (other than the Participant which has withdrawn) as set out in Schedule 3.