

~~CITY OF CANNING~~  
and  
~~CITY OF COCKBURN~~  
and

TOWN OF EAST FREMANTLE  
and  
CITY OF FREMANTLE  
and  
~~TOWN OF KWINANA~~  
and  
CITY OF MELVILLE

and  
~~CITY OF ROCKINGHAM~~

ESTABLISHMENT AGREEMENT OF THE  
~~SOUTHERN METROPOLITAN REGIONAL COUNCIL~~ RESOURCE RECOVERY GROUP

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## AGREEMENT

THIS ESTABLISHMENT AGREEMENT dated

~~BETWEEN CITY CANNING of 1317 Albany Highway, Cannington, Western Australia~~

~~AND CITY OF COCKBURN of 9 Coleville Crescent, Spearwood, Western Australia~~

~~AND~~ BETWEEN TOWN OF EAST FREMANTLE of 135 Canning Highway, East Fremantle,  
Western Australia

AND CITY OF FREMANTLE of William Street, Fremantle, Western Australia

~~AND TOWN OF KWINANA of Gilmore Avenue, Kwinana, Western Australia~~

AND CITY OF MELVILLE of 10 Almondbury Road, ~~Address~~ Booragoon, Western Australia

~~AND CITY OF ROCKINGHAM of Civic Boulevard, Rockingham, Western Australia~~

~~(the Participants)~~

## RECITALS

~~A The districts of the Participants were constituted as a regional district by virtue of an Order of the Governor made under the Former Act and published in the Government Gazette on 13 December 1991.~~

~~B Pursuant to the Former Act and by virtue of the Order of the Governor, a regional council was then constituted.~~

~~C Under the Former Constitution Agreement dated 30 October 1991 made between the Participants the regional council so constituted was named the South West Metropolitan Regional Waste Management Council.~~

~~D 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.~~

A On 22 January 1998, the City of Canning, City of Cockburn, Town of East Fremantle, City of Fremantle, Town of Kwinana, City of Melville, and City of Rockingham entered into the "Establishment Agreement of the Southern Metropolitan Regional Council" (Original Establishment Agreement).

B ~~E~~ The Participants have agreed to amend the Former Constitution Agreement by revoking it and substituting it with this On 30 October 1998 the Original Parties entered into the "Deed of Variation of the Establishment Agreement of the Southern Metropolitan Regional Council", which varied the Original Establishment Agreement.

C ~~F~~ Under the Establishment Agreement City of Canning, City of Cockburn, Town of Kwinana and City of Rockingham have subsequently withdrawn from the Regional Local Government is to be renamed the Southern Metropolitan Regional Council and this Agreement.

G ~~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. FORMER CONSTITUTION AGREEMENT~~

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

### ~~2. NAME~~

- ~~D The name of the regional local government is~~ On 16 February 2022, the Southern Metropolitan Regional Council ~~was formerly renamed Resource Recovery Group.~~

## OPERATIVE PART

### 1. DEFINITIONS AND INTERPRETATION

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 3.66, 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.~~

### 3. REGION

~~The Regional Local Government is established for the Region.~~

### 4. REGIONAL PURPOSES

~~The regional purposes for which the Regional Local Government is established are:~~

- (a) ~~to plan, coordinate and implement the removal, processing, treatment and disposal of waste for the benefit of the communities of the Participants;~~
- (b) ~~to influence local, State and Federal Governments in the development of regional waste management policies and legislation.~~

### 5. OBJECTIVES

~~The objectives of the Regional Local Government shall be:~~

- (a) ~~without loss being incurred by the Regional Local Government, to carry out the Regional Purposes so that services and facilities are provided to the consumer at a reasonable cost and with due regard for community needs;~~
- (b) ~~to reduce the quantity of waste disposed of at landfill sites in accordance with targets set by the Regional Local Government.~~

### 6. DEFINITIONS

~~In this Establishment~~ In this Agreement unless the context requires otherwise:

**'Act'** means the Local Government Act 1995;

~~'Council'~~ **'Chairperson'** means the Council Member elected to that office pursuant to clause 5.3;

**'CEO'** means the Chief Executive Officer of the Regional Local Government;

**'Council'** means the Council of the Regional Local Government as required by the Act;

**'Council Member'** means a member of the council of the Participant appointed pursuant to clause 5.1;

**'Deputy Chairperson'** means the Council Member elected to that office pursuant to clause 5.3;

**'Dispute'** means any dispute, question or difference arising between the Participants or between any of the Participants and the Regional Local Government at any time in connection with this Agreement or a Proposal or Project;

**'Dispute Notice'** means a written notice given by a party pursuant to clause 16.2;

**'Existing Undertaking'** means an undertaking of the Regional Local Government which is being carried out ~~immediately before the Operative Date~~ at when this Agreement becomes operative including, without limitation;

- (a) research and education with respect to the removal, processing, treatment and disposal of waste; and
- (b) the administrative functions of the Regional Local Government related to any purpose other than a Project;

~~**'Former Act'** means the Local Government Act 1960;~~

~~**'Former Constitution Agreement'** means the Former Constitution Agreement made between the Participants under the Local Government Act 1960 and dated 30 October 1991;~~

**'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;

~~**'Operative Date'** means the date upon which the Minister approves this~~ **Original Establishment Agreement;** as the meaning given to it in the Recitals;

**'Participants'** means the Town of East Fremantle, the City of Fremantle and the City of Melville;

**'Population'** means the population of a Region as calculation in accordance with clause 14;

~~**'Population'** means at any relevant time in relation to a Participant, the estimated resident population of that Participant as set out in Table 1 (Estimated Resident Population In Statistical Local Areas) of the statistics last published by the Australian Bureau of Statistics titled 'Estimated Resident Population by Age and Sex in Statistical Local Areas' or any substitute therefor accepted by the Government of the Commonwealth of Australia from time to time as a measure of resident population provided that if at any time the statistics are discontinued or suspended or if in the opinion of the Regional Local Government the method of computation thereof is substantially altered there shall be substituted therefor such alternative method of establishing resident populations of the Participant as the Regional Local Government may resolve;~~

**'Project'** means a project or undertaking defined in a business plan referred to in clause ~~8.36.3~~;

**'Project Participant'** in relation to a Project, means a Participant which is participating in that Project under clause ~~86~~;

**'Proposal'** means a proposal to undertake a ~~Regional Purpose~~ Project;

**'Region'** means the districts of the Participants declared under the Act;

**'Regional Local Government'** means the ~~body corporate originally established by the Former Constitution Agreement which continues now as a~~ regional local government ~~by virtue of the Act~~ known as the Resource Recovery Group;

**'Regional Purpose'** means any regional purpose referred to in clause 4.

## **1.2 Interpretation**

In this Agreement unless the context requires otherwise:



- (a) clause headings, subclause headings and footnotes are for convenience only and are not to be used in the interpretation or construction of this Agreement;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing any gender include [all genders](#);
- (d) references to persons include corporations and bodies politic;
- (e) references to a person include the legal personal representatives, successors and assigns of that person;
- (f) a reference to a statute or statutory provision includes:
  - (i) a statutory provision which supplements, amends, extends, consolidates or replaces it; and
  - (ii) any applicable orders, regulations, instruments or other delegated legislation;
- (g) references to this or any other document include the document as varied or replaced, and notwithstanding any change in the identity of the parties;
- (h) references to a right or obligation of any two or more persons confers that right, or imposes that obligation, jointly and severally;
- (i) references to a person 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, [must](#) be taken to refer to the person or body established or constituted in its place or by which its functions have become exercisable;
- (j) 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 [must](#) end on the last day of the next succeeding calendar month;
- (k) references to this Agreement include its schedules;
- (l) references to time are to local time in Perth, Western Australia; [and](#)
- (m) where time is to be reckoned from a day or event, such day or the day of such event [must](#) be excluded.

## 2. NAME

The name of the Regional Local Government is the Resource Recovery Group.

## 3. REGION

The Regional Local Government is established for the Region.

## 4. REGIONAL PURPOSES

The purposes for which the Regional Local Government is established are:

- (a) to actively plan, coordinate and implement the removal, processing, treatment and disposal of waste, with the intention of implementing and advocating for the adoption of best practice processes and activities;
- (b) to lead and influence local, State and Federal Governments in the development of regional waste management policies and legislation;
- (c) to educate by providing tools to recycle right, reduce waste and live more sustainably; and

- (d) 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 clause 4(a) or 4(b).

## **5. ~~7.~~THE COUNCIL**

### **5.1 ~~7.1~~Appointment of Members**

~~A~~ Each Participant ~~is to~~ must appoint ~~one~~ two members s of the council of the Participant ~~to be a member of the~~ as a Council ~~of the Regional Local Government~~ Member.

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.

### **5.2 ~~7.2~~Tenure of Council Members~~of the Council~~**

~~A member of the~~ Council ~~shall~~ Members hold office until ~~the member ceases to be a member of the Council of the Participant or until the member is removed by the Participant.~~

- (a) the member ceases to be a member of the council of the Participant;
- (b) the member is removed by the Participant by written notice to the CEO; or
- (c) the member resigns or retires.

### **5.3 ~~7.3~~Election of ~~Chairman and Deputy Chairman~~ Chairperson and Deputy Chairperson**

- (a) The election of the chairperson and a deputy chairperson is to be conducted by the CEO in accordance with the procedure prescribed under the Act for the election of a mayor and a deputy mayor, respectively, by a council.
- (b) The Council Members must elect a chairperson and a deputy chairperson at the first meeting of the Council following:
  - (i) an ordinary election held under the Act;
  - (ii) the resignation or retirement of the Chairperson or the Deputy Chairperson; or
  - (iii) a vacancy in the office of the Chairperson or the Deputy Chairperson caused by the operation of clause 5.4(c)(i) or 5.4(c)(ii).

### **5.4 Term of Chairperson and Deputy Chairperson**

The term of the Chairperson and Deputy Chairperson is not to exceed two (2) years and ends:

- (a) ~~The members of the Council shall elect a chairman and a deputy chairman at~~ at the start of the first meeting of the Council following the ~~first Saturday in May after the Operative Date and in May every 2 years thereafter.~~ next ordinary election held under the Act;
- (b) if the Chairperson or Deputy Chairperson resigns or retires by giving written notice to the CEO; or
- (c) if all Council Members unanimously agree that:
  - (i) the Chairperson is unable to fulfil the role of the Chairperson; or
  - (ii) the Deputy Chairperson is unable to fulfil the role of the Deputy Chairperson.

### **5.5 ~~7.4~~Role of Chair~~ma~~person**

The ~~e~~ CChair~~ma~~person:

- (a) presides at meetings of the Council;
- (b) carries out civic and ceremonial duties on behalf of the Regional Local Government;
- (c) speaks on behalf of the Regional Local Government;

- (d) performs such other functions as are given to the ~~chairman~~ Chairperson by the Act, any other written law or this Agreement; and
- (e) liaises with the CEO on the Regional Local Government's affairs and the performance of its functions.

Footnotes:

- 1. ~~\_\_\_\_\_ The role of the Council is set out in section 2.7 of the Act.~~
- 2. ~~\_\_\_\_\_ The functions of the CEO are set out in section 5.4.1 of the Act.~~

## 5.6 ~~7.5~~ Role of Deputy Chairmaperson

~~(1) The d~~ Deputy ~~chairman~~ Chairperson performs the functions of the ~~chairman when authorised to do so under this clause.~~ Chairperson if:

~~(2) \_\_\_\_\_ If:~~

- (a) the office of ~~chairman~~ Chairperson is vacant; or
- (b) the ~~chairman~~ Chairperson is not available, or ~~is~~ unable or unwilling to perform the functions of ~~chairman,~~ the Chairperson.

~~then the deputy chairman may perform the functions of chairman.~~

## 5.7 ~~7.6~~ Role of ~~Members of Council~~ Member

~~A member of the A~~ Council Member:

- (a) represents the interests of the ratepayers and residents of the Region;
- (b) facilitates communication between the community of the Region and the Council;
- (c) participates in the Regional Local Government's decision-making processes at meetings of the Council and its committees; and
- (d) performs such other functions as are given to the member by the Act or any other written law.

## 6. ~~8.~~ PROPOSALS ~~AND PROJECTS~~

### 6.1 ~~8.1~~ Requirements

The Regional Local Government ~~shall~~ must only adopt a Proposal and undertake a Project in accordance with the requirements of this clause.

### 6.2 ~~8.2~~ Absolute Majority to Adopt Proposal

The Regional Local Government ~~shall~~ must only adopt a Proposal when authorised to do so by an absolute majority of the Council.

### 6.3 ~~8.3~~ Business Plan for each Project

- (a) ~~(1)~~ Where the Regional Local Government has adopted a Proposal it ~~shall~~ must:
  - (i) ~~(a)~~ prepare and adopt a business plan; and
  - (ii) ~~(b)~~ provide a copy of the business plan to each of the Participants.
- (b) ~~(2)~~ The contents of the business plan ~~shall~~ must meet the requirements of the Act and the business plan ~~shall~~ must clearly define the Project.

#### 6.4 ~~8.4~~ Decision to Participate in Project

Each Participant ~~shall~~must, within a reasonable period determined by the Council after the adoption of the business plan, decide whether to participate in the Project by giving notice of its decision to the Regional Local Government.

#### 6.5 ~~8.5~~ Meeting of Project Participants

As soon as practicable after the period referred to in clause ~~8.4~~6.4, the Regional Local Government ~~is to~~must convene a meeting of all the Project Participants.

#### 6.6 ~~8.6~~ Unanimous Agreement to Terms of Project

Before the Regional Local Government undertakes the Project, the Project Participants ~~shall~~must, by unanimous resolution of the ~~members of the~~ Council Members who are appointed by those Project Participants, agree upon:

- (a) the proportion (and the basis of its calculation) in which the Project Participants will make contributions towards:
  - (i) the acquisition of any asset of a capital nature required for the Project;
  - (ii) the operating expenditure, including administrative expenses, relating to the Project;
- (b) the manner of payment of the contributions referred to in ~~paragraph (a)~~ clause 6.6(a);
- (c) the proportional entitlement or liability, as the case may be (and the basis of its calculation), of a Project Participant when the withdrawal of that Project Participant from the Project takes effect; and
- (d) the manner of payment of the entitlement or liability referred to in ~~paragraph (c)~~ clause 6.6(c).

#### 6.7 ~~8.7~~ Basis on which contributions are Calculated

- (a) ~~(1)~~ Where the contributions referred to in clause ~~8.6(a)~~6.6(a) are calculated on the basis of a unit of measurement (for example):
  - (i) ~~(a)~~ number of tonnes of waste processed;
  - (ii) ~~(b)~~ number of bins of waste collected;
  - (iii) ~~(c)~~ numbers of hours of advice given),then that basis ~~shall~~must be applied equally to all Project Participants.
- (b) ~~(2)~~ This clause ~~must~~shall not apply where, by unanimous resolution, the Project Participants decide otherwise with respect to a particular Project.

#### 6.8 Project Participants Not to Provide Same Services by Agreement

- (a) Where the Regional Local Government undertakes a Project in accordance with this clause 6, the Project Participants may agree that, for an agreed term, none of them will provide any service or facility of the same kind as those the subject of the Project.
- (b) No Project Participants must provide any service or facility contrary to an agreement of the Project Participants made under clause 6.8(a).

Footnote:

The Participants envisage that in no circumstances, will any agreement reached pursuant to this clause 6.8 have an anti-competitive effect or otherwise contravene the Trade Practices Act 1974.

## **7. PROJECT PARTICIPANT PAYMENTS**

### **7.1 ~~8.8~~ Manner of Payment of Operating Expenditure Contributions**

Unless otherwise agreed, the contributions referred to in clause ~~8.6~~6.6 towards operating expenditure ~~shall~~must be paid by each Project Participant to the Regional Local Government by equal and successive quarterly instalments:

- (a) the first of which ~~shall~~must be made within 42 days (or such greater period as may be determined by the Regional Local Government) of service of a copy of the annual budget of the Regional Local Government on that Project Participant; and
- (b) the subsequent instalments ~~shall~~must be made in advance at the commencement of each quarter of the financial year.

### **7.2 ~~8.9~~ Late Payment**

Unless otherwise agreed, if a Project Participant fails to pay to the Regional Local Government a sum of money owing under this clause 6 on or before the due date for payment, that Project Participant must, in addition to the sum of money due and payable, pay to the Regional Local Government interest at the overdraft rate charged by the Regional Local Government's bank on amounts of the same size as the unpaid sum, calculated from and including the due date of payment to but excluding the actual date for payment.

### **~~8.10~~ ~~Withdrawal from Project~~**

## **8. WITHDRAWAL FROM A PROJECT**

### **8.1 Right to Withdraw**

A Project Participant may at any time give notice of its intention to withdraw from a Project.

### **8.2 ~~8.11~~ When Withdrawal to Take Effect**

The withdrawal of a Project Participant ~~shall~~must take effect:

- (a) from the end of the financial year after the financial year in which notice under ~~clause 8.10~~ this clause 8 has been given by the Project Participant to the Regional Local Government; or
- (b) on any earlier date agreed by the Project Participants.

## **9. JOINING A PROJECT**

### **9.1 ~~8.12~~ Participant Wishing to Join Existing Project**

A Participant which is not a Project Participant may at any time after a Project is undertaken, give notice of its wish to participate in the Project.

### **9.2 ~~8.13~~ Preparation of Amended Business Plan**

- (a) ~~(1)~~As soon as practicable after receipt of a notice under ~~clause 8.12~~ this clause 9, the Regional Local Government ~~shall~~must:
  - (i) ~~(a)~~prepare an amended business plan for the Project in respect of the current financial year having regard to the effect of the participation of the Participant giving the notice; and
  - (ii) ~~(b)~~provide a copy of the amended business plan to the Participant and the Project Participants.

- (b) ~~(2)~~ The amended business plan ~~shall~~ must include details of any additional capital expenditure necessitated by the participation of the Participant giving the notice under ~~clause 8.12~~ this clause 9 and an estimate of that additional capital expenditure.
- (c) ~~(3)~~ The Participant giving the notice under ~~clause 8.12~~ shall clause 9 must meet the cost of preparation of the amended business plan.

### 9.3 ~~8.14~~ **Determination of Participation Date**

- (a) ~~(1)~~ As soon as practicable after preparation and adoption of the amended business plan under clause ~~89.213~~:
  - (i) ~~(a)~~ the Participating Local Governments acting reasonably, ~~shall~~ must determine the date upon which any decision by the Participant to participate in the Project is to become effective;
  - (ii) ~~(b)~~ the Regional Local Government ~~shall~~ must advise the Participant of that date.
- (b) ~~(2)~~ The date determined under ~~sub-clause (1)~~ shall clause 9.3(a) must not be earlier than:
  - (i) ~~(a)~~ the commencement of the financial year after the financial year in which the notice was given by the Participating Local Government to the Regional Local Government;
  - (ii) ~~(b)~~ unless otherwise agreed by the Project Participants and the Participant.

### 9.4 ~~8.15~~ **Participant to Decide**

Within 35 days after receipt of the advice referred to in clause ~~89.314~~, the Participant may give to the Regional Local Government notice of its decision to participate in the Project.

### 9.5 ~~8.16~~ **When Decision to Take Effect**

A Participant which gives notice under clause ~~89.415~~ is to become a Project Participant in that Project with effect on the date referred to in clause ~~89.314~~.

### 9.6 ~~8.17~~ **Calculation of New Member's Contributions**

- (a) ~~(1)~~ As soon as practicable after a Participant becomes a Project Participant in a Project under clause ~~89.516~~ ("**the New Member**"), the Regional Local Government ~~shall~~ must:
  - (i) ~~(a)~~ calculate the amount of the contribution of that New Member towards:
    - (I) ~~(i)~~ the value of any existing assets of a capital nature acquired for the Project; and
    - (II) ~~(ii)~~ the operating expenditure for the current financial year in respect of the Project; and
  - (ii) ~~(b)~~ ascertain the amount of the additional capital expenditure referred to in the amended business plan prepared under clause ~~89.213~~; and
  - (iii) ~~(c)~~ give notice to the Project Participant and the New Member of the calculation referred to in ~~paragraph (a)~~ clause 9.6(a)(i) and the amount referred to in ~~paragraph (b)~~ 9.6(a)(ii).
- (b) ~~(2)~~ In calculating the amounts of the contributions under clause ~~89.6(a)(i)~~ 171a, the Regional Local Government ~~shall~~ must use the proportions referred to in clause ~~8.6(a)~~ 6.6(a) which have been agreed for the Project.
- (c) ~~(3)~~ Unless the Project Participants agree upon another method of payment, the New Member ~~shall~~ must pay the amounts:
  - (i) ~~(a)~~ in the case of the contribution towards capital assets ~~—~~ — immediately after receipt of the notice of the calculation referred to in clause ~~89.6(a)(iii)~~ 171c;

- (ii) ~~(b)~~ in the case of the contribution towards operating expenses ~~—~~ in the same manner as has been agreed in respect of the Project pursuant to clause ~~8.6(a)6.6(a)~~ or as specified in clause ~~8.87~~ (whichever is applicable); and
- (iii) ~~(c)~~ in the case of the amount for additional capital expenditure immediately after receipt of the notice of the amount referred to in clause ~~89.6(a)(iii)171e~~.

## 9.7 ~~8.18~~ Adjustment of Equities

As soon as practicable after payment of the contribution referred to in clause ~~89.6(a)(i)171a~~, the Regional Local Government will pay to the Project Participants other than the New Member any amount due in respect of their equities in the capital assets which results from the participation of the New Member in the Project.

## ~~8.19~~ Project Participants Not to Provide Same Services by Agreement

- ~~(1) Where the Regional Local Government undertakes a Project in accordance with this clause 8, the Project Participants may agree that, for an agreed term, none of them should provide any service or facility of the same kind as those the subject of the Project.~~
- ~~(2) No Project Participants shall provide any service or facility contrary to an agreement of the Project Participants made under clause 8.19(1).~~

### Footnote:

The Participants envisage that in no circumstances, will any agreement reached pursuant to this ~~clause 8.19~~ have an anti-competitive effect or otherwise contravene the *Trade Practices Act 1974*.

## 10. WINDING UP OF A PROJECT

### 10.1 ~~8.20~~ Winding up of Project by Resolution

The ~~members of the~~ Council Members appointed by the Project Participants of a Project may resolve, by absolute majority, to wind up the Project.

### 10.2 ~~8.24~~ Division of Assets

If a Project is to be wound up and their remains, after satisfaction of all its debts and liabilities, any property and assets of the Project then the property and assets ~~shall~~ must be realised and the proceeds along with any surplus funds ~~shall~~ must be divided among the Project Participants in the agreed proportions referred to in clause ~~8.6(a)6.6(a)~~.

### 10.3 ~~8.22~~ Division of Liabilities

If a Project is to be wound up and there remains any liability or debt in excess of the realised property and assets of the Project then the liability or debt is to met by the Project Participants in the agreed proportions referred to in clause ~~8.6(a)6.6(a)~~.

### 10.4 ~~8.23~~ Indemnification by Project Participants of the Regional Local Government

If a Project is wound up pursuant to ~~clause 8.20~~ this clause 10, the Project Participants ~~shall~~ must indemnify the Regional Local Government (in the agreed proportions referred to in clause ~~8.6(a)6.6(a)~~) with respect to that liability or debt.

## 11. ~~9.~~ EXISTING UNDERTAKINGS



## 11.1 9.1 Application of Clause

This ~~clause shall only apply~~ clause only applies to an Existing Undertaking.

## 9.2 Preparation of Financial Statements

~~As soon as practicable after the Operative Date, the Regional Local Government shall prepare and give to each Participant financial statements for each Existing Undertaking including details of all assets and liabilities and the respective equities of the Participants in those assets.~~

## 11.2 9.3 Contribution to Operating Expenditure

The annual contribution of each Participant towards the operating expenditure, including administrative expenses, relating to an Existing Undertaking as disclosed in the municipal fund budget of the Regional Local Government for that financial year ~~shall~~ must be an amount which bears the same proportion to that operating expenditure as the Population of that Participant bears to the total of the Populations of all Participants.

## 11.3 9.4 Contributions to Capital Assets

The contribution of each Participant towards the acquisition of any asset of a capital nature required for and Existing Undertaking ~~shall~~ must be an amount which bears the same proportion to the cost of the acquisition disclosed in the municipal fund budget of the Regional Local Government for that financial year as the Population of that Participant bears to the total of the Populations of all Participants.

## 9.5 Limit on Contributions

- ~~(1) This clause applies with respect to the 4 financial years commencing 1 July 1997.~~
- ~~(2) In this clause '1997 Plan' means the plan with respect to principal activities prepared under section 5.56 of the Act and accepted by the Regional Local Government for the 4 financial years commencing 1 July 1997.~~
- ~~(3) Notwithstanding clauses 9.3 and 9.4, but subject to subclause (4), the total of the annual contributions of all of the Participants (whether towards operating expenditure or towards acquisition of capital assets) for each financial year relating to Existing Undertakings shall not exceed the amount of those contributions as shown in the 1997 Plan.~~
- ~~(4) With the agreement of all of the Participants, the Regional Local Government may impose contributions which exceed the amount shown in the 1997 Plan.~~

## 11.4 9.6 Manner of Payment of Contributions

Unless otherwise agreed, contributions referred to in clauses ~~9.1.23~~ and ~~9.4 shall~~ 11.3 must be paid by each Participant to the Regional Local Government by equal and successive quarterly instalments:

- (a) the first of which ~~shall~~ must be made within 42 days (or such greater period as may be determined by the Regional Local Government) of service of a copy of the annual budget of the Regional Local Government on that Participant; and
- (b) the subsequent instalments ~~shall~~ must be made in advance at the commencement of each quarter of the financial year.

## 11.5 9.7 Late Payment

If a Participant fails to pay to the Regional Local Government a sum of money owing under this clause on or before the due date for payment, that Participant must, in addition to the sum of money due and payable, pay to the Regional Local Government interest at the overdraft rate charged by the Regional Local Government's bank on amounts of the same size as the unpaid



sum, calculated from and including the due date for payment to but excluding the actual date for payment.

## **11.6 ~~9.8~~ Winding up of Existing Undertakings**

The Council may resolve, by absolute majority, to wind up an Existing Undertaking.

## **11.7 ~~9.9~~ Division of Assets**

If an Existing Undertaking is to be wound up and there remains, after satisfaction of all its debts and liabilities, any property and assets of the Existing Undertaking then the property and assets ~~shall~~ must be realised and the proceeds along with any surplus funds, ~~shall~~ must be divided among each of the Participants in the same proportion as the contributions of a particular Participant to the assets of that Existing Undertaking bear to the total of the contributions of all Participants.

## **11.8 ~~9.10~~ Division of Liabilities**

If an Existing Undertaking is to be wound up and there remains any liability or debt in excess of the realised property and assets of the Existing Undertaking then the liability or debt is to be met by each of the Participants in the same proportion as the contributions of a particular Participant to the assets of that Existing Undertaking bear to the total of the contributions of all Participants.

## **12. ~~10.~~ WINDING UP OF THE REGIONAL LOCAL GOVERNMENT**

### **12.1 ~~10.1~~ Winding Up by Council Resolution**

The Council may resolve, by absolute majority, to wind up the Regional Local Government.

### **12.2 ~~10.2~~ Procedure on Winding up**

If the Council resolves to wind up the Regional Local Government then:

- (a) each Project is to be wound up separately;
- (b) each Existing Undertaking is to be wound up separately;
- (c) the provisions of clauses ~~8.21~~ 10.2, ~~8.22~~ 10.3 and ~~8.23 shall~~ 10.4 must apply to the winding up of each Project; and
- (d) the provisions of clauses ~~9~~ 11.7 and ~~9.10 shall~~ 11.8 must apply to the winding up of each Existing Undertaking.

## **13. ~~11.~~ WITHDRAWAL OF A PARTICIPANT FROM THE REGIONAL LOCAL GOVERNMENT**

### **13.1 ~~11.1~~ Withdrawal**

A Participant may, at any time, give notice of its intention to withdraw from the Regional Local Government.

### **13.2 ~~11.2~~ When Withdrawal to Take Effect**

The withdrawal of a Participant ~~shall~~ must take effect from the end of the financial year after the financial year in which notice of the withdrawal has been given by the Participant to the Regional Local Government.

### 13.3 ~~11.3~~ Entitlement or Liability of Withdrawing Participant

As soon as practicable after the withdrawal of a Participant takes effect, the Regional Local Government ~~shall~~ must:

- (a) distribute to the Participant an amount equal to the proceeds and any surplus funds which would have been payable if the Regional Local Government was wound up; or
- (b) be entitled to recover from the Participant an amount equal to the liability or debt which would be payable by the Participant if the Regional Local Government was wound up,

as the case may be.

## 14. POPULATION

The Population of a Participant means the estimated resident population of that Participant as set out in Table 5 (Estimated Resident Population, Local Government Areas, Western Australia) of the statistics last published by the Australian Bureau of Statistics titled "Regional Population" or any substitute therefor accepted by the Government of the Commonwealth of Australia from time to time as a measure of resident population provided that if at any time the statistics are discontinued or suspended or if in the opinion of the Regional Local Government the method of computation thereof is substantially altered there must be substituted therefor such alternative method of establishing resident populations of the Participant as the Regional Local Government may resolve.

## 15. ~~12.~~ 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~~ this 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.

## 16. ~~13.~~ DISPUTE RESOLUTION

### 16.1 ~~13.1~~ Dispute

~~In the event of any dispute or difference ('dispute') arising between the Participants and the Regional Local Government or any of them at any time as to the interpretation of this Establishment Agreement or as to any other matter or thing of whatsoever nature arising under or in connection with this Establishment Agreement, a Participant or the Regional Local Government or the Participants (as the case may be) may give to the other Participants and the Regional Local Government (as the case may be) notice in writing ('dispute notice') adequately identifying the matters the subject of the dispute and the giving of the dispute notice shall be a condition precedent to the commencement by any Participant or the Regional Local Government of proceedings (whether by way of litigation or arbitration) which regard to the dispute as identified in the dispute notice.~~

- (a) The parties agree that any Dispute will be resolved in accordance with this clause 16.
- (b) It is a condition precedent to the commencement of proceedings for the resolution of a Dispute under clause 16.5 that the parties have first complied with clauses 16.2 and 16.3.
- (c) Nothing in this clause 16 prevents the parties from agreeing to implement an alternative dispute resolution procedure, such as mediation, in addition to the requirement of this clause 16.

## **16.2 Notice of Dispute**

If any Dispute arises then the party raising the Dispute must deliver by hand or send by certified mail to the other parties a written Dispute Notice which:

- (a) adequately identifies and provides details of the Dispute; and
- (b) states that the notice is a Dispute Notice given under this clause.

## **16.3 Conferences**

- (a) If the Dispute is not resolved within 10 business days after a Dispute Notice is given to the other parties, each party must nominate one representative from its management to confer to resolve the Dispute.
- (b) If the Dispute is not resolved within 15 business days after a Dispute Notice is given to the other parties, each party must nominate one representative from its senior management to confer to resolve the Dispute.
- (c) If the Dispute is not resolved within 20 business days of the conference held in accordance with clause 16.3(b):
  - (i) if this Agreement requires it, or the parties otherwise agree, a party may refer the Dispute to expert determination in accordance with clause 16.4; or
  - (ii) a party may refer the Dispute to arbitration in accordance with clause 16.5.

## **16.4 Expert Determination**

- (a) An **Expert** is a person, having the qualification set out in clause 16.4(b):
  - (i) selected by the parties within 10 Business Days after the Expert Determination Notice is given by the party wishing to progress the relevant Dispute to the other party; or
  - (ii) if the parties fail to agree as to the Expert, a person nominated by the President at the time of the Resolution Institute (WA Chapter) who must choose the expert on the basis of the type of Dispute and the nature of the expertise necessary to consider the relevant issues.
- (b) An Expert must:
  - (i) have suitable and reasonable qualifications as well as commercial and practical experience in the area of the Dispute;
  - (ii) be independent of each party and not be, or have been, an employee, agent, contractor, advisor or consultant of either party; and
  - (iii) have no interest or duty which conflicts or may conflict with the Expert's function as an expert.
- (c) If an Expert Determination Notice is given:
  - (i) the parties must, within 5 Business Days after an Expert is selected or nominated, arrange for the Expert to be appointed; and
  - (ii) each party must use its reasonable efforts to provide the Expert with any information reasonably required by the Expert (within the time period identified by the Expert) and in any event each party must provide the Expert with its preferred position in relation to the Dispute based on its understanding of the relevant facts.
- (d) The Expert acts as an expert and not as an arbitrator.
- (e) The Expert will have no power to apply or to have regard to the provisions of any proportionate liability Legislative Requirements which might, in the absence of this clause 16.4(e), have applied to any Dispute referred to the Expert under this clause 16.4

- (f) The parties agree that:
  - (i) the Dispute is to be resolved according to the rules of the Resolution Institute (WA Chapter), current as at the date the Expert Determination Notice is given (**Expert Determination Rules**); and
  - (ii) they must abide by the Expert Determination Rules and must procure the Expert's agreement to resolve the Dispute according to those rules.
- (g) The parties must use their best efforts to enable the Expert to give the parties a written decision within 30 Business Days after the Dispute is referred to the Expert.
- (h) The Expert's decision is final and binding except where:
  - (i) the monetary value of the claim or the monetary value of the determination is greater than \$5 (five) hundred thousand and neither party has issued a notice under clause 16.2; or
  - (ii) there has been manifest error.
- (i) Each party must pay an equal proportion of the Expert's costs and the costs of the Expert's advisers unless the Expert, in its absolute discretion, decides otherwise.

## 16.5 ~~13.2~~ Arbitration

- (a) If:
  - (i) a dispute is not able to be resolved under 16.3(b); or
  - (ii) a matter is referred to an Expert under clause 16.4 and:
    - (A) the monetary value of a claim or the monetary value of a determination is greater than \$5 (five) hundred thousand; and
    - (B) within 20 Business Days of the Expert making its determination a party notifies the other party that it does not accept the Expert's determination,
- either party may commence arbitration proceedings.
- (b) ~~At the expiration of 35 days from the date of receipt of the dispute notice by the persons to whom it was sent, the person giving the dispute notice may notify the others in writing ('arbitration notice') that it requires the dispute to be referred to arbitration and the dispute (unless meanwhile settled) shall upon receipt of the arbitration notice by the recipients then be and is hereby referred to arbitration under and~~ The arbitration will be conducted in accordance with the provisions of the *Commercial Arbitration Act 1985* ~~2012~~ (WA) and the ACICA Rules and will be final and binding.
- (c) The arbitral tribunal will (unless otherwise agreed) consist of a single arbitrator appointed in accordance with the ACICA Rules.
- (d) The place of arbitration is Perth, Western Australia.
- (e) The arbitration will be conducted in English.

## 16.6 ~~13.3~~ Legal Representations Representatives

~~For the purposes of the Commercial Arbitration Act 1985, the~~ The Participants consent to each other and to the Regional Local Government being legally represented at any ~~such~~ arbitration.

## 14. ~~INTERPRETATION~~

### 14.1 ~~Interpretation~~

~~In this Establishment Agreement unless the context requires otherwise:~~

- ~~(a) — words importing the singular include the plural and vice versa;~~

- (b) ~~words importing any gender include the other genders; references to persons include corporations and bodies politic;~~
- (c) ~~references to a person include the legal personal representatives, successors and assigns of that person;~~
- (d) ~~a reference to a statute, ordinance, code 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);~~
- (e) ~~references to this or any other document include the document as varied or replaced, and notwithstanding any change in the identity of the parties;~~
- (f) ~~references to writing include any mode of representing or reproducing words in tangible and permanently visible form, and includes telex and facsimile transmission;~~
- (g) ~~an obligation of two or more parties shall bind them jointly and severally;~~
- (h) ~~if a word or phrase is defined cognate words and phrases have corresponding definitions;~~
- (i) ~~references to a person 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, shall be taken to refer to the person or body established or constituted in its place or by which its functions have become exercisable;~~
- (j) ~~an obligation incurred in favour of two or more parties shall be enforceable by them jointly and severally;~~
- (k) ~~reference to any thing (including, without limitation, 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;~~
- (l) ~~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 shall end on the last day of the next succeeding calendar month;~~
- (m) ~~references to this Establishment Agreement include its schedules.~~

## 14.2—Headings and Footnotes

~~Headings and footnotes shall be ignored in construing this Establishment Agreement.~~

## 14.3—Time

- (a) ~~References to time are to local time in Perth, Western Australia;~~
- (b) ~~where time is to be reckoned from a day or event, such day or the day of such event shall be excluded.~~

Footnotes:

Amendment ~~or Establishment of~~ 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
City of Canning	
City of Cockburn	
Town of East Fremantle	
City of Fremantle	
Town of Kwinana	
City of Melville	
City of Rockingham	

EXECUTED by the ~~Parties~~ [Participants](#)

~~THE COMMON SEAL of CITY OF CANNING~~ was  
hereunto affixed by authority of a resolution of the  
Council in the presence of

Mayor

Chief Executive Officer

~~THE COMMON SEAL of CITY OF COCKBURN~~  
was hereunto affixed by authority of a resolution of  
the Council in the presence of

Mayor

Chief Executive Officer

**THE COMMON SEAL of TOWN OF EAST  
FREMANTLE** was hereunto affixed by authority of  
a resolution of the Council in the presence of

Mayor

Chief Executive Officer

**THE COMMON SEAL of CITY OF FREMANTLE**  
was hereunto affixed by authority of a resolution of  
the Council in the presence of

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Chief Executive Officer

~~**THE COMMON SEAL of TOWN OF KWINANA**~~  
~~was hereunto affixed by authority of a resolution of~~  
~~the Council in the presence of~~

\_\_\_\_\_  
~~Mayor~~

\_\_\_\_\_  
~~Chief Executive Officer~~

**THE COMMON SEAL of CITY OF MELVILLE** was  
hereunto affixed by authority of a resolution of the  
Council in the presence of

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
Chief Executive Officer

**THE COMMON SEAL of CITY OF ROCKINGHAM**  
was hereunto affixed by authority of a resolution of  
the Council in the presence of

\_\_\_\_\_

Mayor

\_\_\_\_\_

Chief Executive Officer