

20...

[INSERT NAME OF GUARANTOR]

and

**THE DIRECTOR GENERAL OF THE DEPARTMENT OF BIODIVERSITY,
CONSERVATION AND ATTRACTIONS**

Guarantee and Indemnity

Crown Solicitor's Office
Commercial and Conveyancing
141 St Georges Terrace
PERTH WA 6000
Telephone: (08) 9264 1888
Ref: CSO 03/4236

TABLE OF CONTENTS

1	INTERPRETATION	2
2	CONSIDERATION	5
3	GUARANTEE	5
4	INDEMNITY	5
5	EXTENT OF GUARANTEE AND INDEMNITY	6
6	PRESERVATION OF DBCA'S RIGHTS	6
7	SUSPENSION OF GUARANTOR'S RIGHTS	8
8	PAYMENTS	9
9	OTHER SECURITIES AND OBLIGATIONS OF GUARANTOR.....	9
10	REINSTATEMENT OF DBCA'S RIGHTS	9
11	FURTHER ASSURANCES	9
12	GOVERNING LAW, JURISDICTION AND SERVICE OF PROCESS	10
13	COUNTERPARTS	10
14	COSTS AND STAMP DUTY.....	10
	SCHEDULE 1.....	11

- (a) at any time; and
- (b) for any reason or circumstance in connection with any agreement, transaction, engagement, document, instrument (whether negotiable or not), event, act, omission, matter or thing whatsoever either
- (c) are payable, are owing but not currently payable, are contingently owing, or remain unpaid by the Debtor to DBCA; or
- (d) have been advanced or paid by DBCA or which of DBCA is liable to pay by reason of any act or omission of the Debtor; in connection with the Licence or the Commercial Operations.

Insolvency Event means the happening of any of these events:

- (a) an application is made to a court for an order (and is not stayed, withdrawn or dismissed within 7 days), or an order is made that a body corporate be wound up; or
- (b) an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of a body corporate (and is not stayed, withdrawn or dismissed within 7 days), or one of them is appointed, whether or not under an order; or
- (c) except to reconstruct or amalgamate while solvent on terms approved by DBCA, a body corporate enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them; or
- (d) a body corporate resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent on terms approved by DBCA or is otherwise wound up or dissolved; or
- (e) a body corporate is or states that it is insolvent; or
- (f) as a result of the operation of section 459F(1) of the *Corporations Act 2001 (Cth)*, a body corporate is taken to have failed to comply with a statutory demand; or
- (g) a body corporate is or makes a statement from which it may be reasonably deduced by DBCA that the body corporate is the subject of an event described in section 459C(2) or section 585 of the *Corporations Act 2001 (Cth)*; or

- (h) a body corporate takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to a body corporate; or
- (i) a person becomes insolvent under administration as defined in section 9 of the *Corporations Act 2001 (Cth)* or action is taken which could result in that event; or
- (j) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Licence means any licence or licences granted by DBCA to the Debtor pursuant to the CALM Act or the Regulations as the case may be, from time to time.

Regulations means the *Conservation and Land Management Regulations 2002*.

Security Interest means any bill of sale (as defined in any statute), mortgage, charge, lien, pledge, hypothecation, title retention arrangement, trust or power as or in effect as security for the payment of a monetary obligation or the observance of any other obligation.

Taxes means taxes, levies, imposts, deductions, charges, withholdings and duties imposed by any authority (including, without limitation, stamp and transaction duties) together with any related interest, penalties, fines and expenses in connection with them.

1.2 In this guarantee and indemnity, unless the contrary intention appears:

- (a) a reference to this guarantee and indemnity or another instrument includes any variation or replacement of any of them;
- (b) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (c) the singular includes the plural and vice versa;
- (d) the word "person" includes a firm, a body corporate, an unincorporated association or an authority;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and assigns;
- (f) an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally;

- (g) an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;
- (h) a reference to an accounting term is to be interpreted in accordance with accounting standards under the *Corporations Act 2001 (Cth)* and, if not inconsistent with those accounting standards, generally accepted principles and practices in Australia consistently applied by a body corporate or as between bodies corporate and over time; and
- (i) a reference to any thing (including, without limitation, the Guaranteed Money and any other amount) is a reference to the whole and each part of it and a reference to a group of persons is a reference to all of them collectively, to any two or more of them collectively and to each of them individually.

1.3 Headings are inserted for convenience and do not affect the interpretation of this guarantee and indemnity.

2 Consideration

The Guarantor acknowledges incurring obligations and giving rights under this guarantee and indemnity for valuable consideration received from DBCA.

3 Guarantee

The Guarantor unconditionally and irrevocably guarantees payment to DBCA of the Guaranteed Money. If the Debtor does not pay the Guaranteed Money on time and in accordance with any agreement (including but not limited to any Licence) or law which imposes the obligation to pay it, or otherwise as legally required to do so, then the Guarantor agrees to pay the Guaranteed Money to DBCA on demand from DBCA (whether or not demand has been made by DBCA on the Debtor). A demand may be made at any time and from time to time.

4 Indemnity

4.1 The Guarantor unconditionally and irrevocably indemnifies DBCA against any loss DBCA suffers because:

- (a) the liability to pay the Guaranteed Money is unenforceable in whole or in part as a result of lack of capacity, power or authority or improper exercise of power or authority; or
- (b) an Insolvency Event occurs in respect of the Debtor (including, without limitation, loss suffered by DBCA because interest is payable by DBCA to a liquidator or trustee in bankruptcy of the Debtor as a result of a claim referred to in clause 10 being made); or

- (c) the Guaranteed Money is not or has never been recoverable from the Guarantor under clause 3, or from the Debtor because of any other circumstance whatsoever including, without limitation, any transaction relating to the Guaranteed Money being void, voidable or unenforceable and whether or not DBCA knew or should have known anything about that transaction.

4.2 The Guarantor as principal debtor agrees to pay to DBCA on demand a sum equal to the amount of any loss described in clause 4.1.

5 Extent of guarantee and indemnity

This guarantee and indemnity is a continuing security and extends to all of the Guaranteed Money and other money payable under this guarantee and indemnity. The Guarantor waives any right it has of first requiring DBCA to commence proceedings or enforce any other right against the Debtor or any other person before claiming from the Guarantor under this guarantee and indemnity.

6 Preservation of DBCA's rights

6.1 The liabilities under this guarantee and indemnity of the Guarantor as a guarantor, principal debtor or indemnifier and the rights of DBCA under this guarantee and indemnity are not affected by anything which might otherwise affect them at law or in equity including, without limitation, one or more of the following (whether occurring with or without the consent of a person):

- (a) DBCA or another person granting time or other indulgence (with or without the imposition of an additional burden) to, compounding or compromising with or wholly or partially releasing the Debtor or another person in any way;
- (b) laches, acquiescence, delay, acts, omissions or mistakes on the part of DBCA or another person or both DBCA and another person;
- (c) any variation or novation of a right of DBCA or another person, or material alteration of a document, in respect of the Debtor, the Guarantor or another person including, without limitation, an increase in the limit of or other variation in connection with advances or accommodation;
- (d) the transaction of business, expressly or impliedly, with, for or at the request of the Debtor, the Guarantor or another person;
- (e) changes which from time to time may take place in the membership, name or business of a firm, partnership, committee or association whether by death, retirement, admission or otherwise whether or not the Guarantor or another person was a member;

- (f) the death of any person or an Insolvency Event occurring in respect of any person;
- (g) a change in the legal capacity, rights or obligations of a person;
- (h) the fact that a person is a trustee, nominee, joint owner, joint venturer or a member of a partnership, firm or association;
- (i) a judgment against the Debtor or another person;
- (j) the receipt of a dividend after an Insolvency Event or the payment of a sum or sums into the account of the Debtor or another person at any time (whether received or paid jointly, jointly and severally or otherwise);
- (k) any part of the Guaranteed Money being irrecoverable;
- (l) an assignment of rights in connection with the Guaranteed Money;
- (m) the acceptance of repudiation or other termination in connection with the Guaranteed Money;
- (n) the invalidity or unenforceability of an obligation or liability of a person other than the Guarantor;
- (o) invalidity or irregularity in the execution of this guarantee and indemnity by the Guarantor or any deficiency in or irregularity in the exercise of the powers of the Guarantor to enter into or observe its obligations under this guarantee and indemnity;
- (p) the opening of a new account by the Debtor with DBCA or another person or the operation of a new account; or
- (q) any obligation of the Debtor being discharged by operation of law or otherwise.

6.2 The liability of the Guarantor under this guarantee and indemnity is not affected:

- (a) because the Guarantor ceases to be a director of the Debtor; or
- (b) because any other person who was intended to enter into this guarantee and indemnity, or otherwise become a co-surety or co-indemnifier for payment of the Guaranteed Money or other money payable under this guarantee and indemnity has not done so or has not done so effectively; or
- (c) because a person who is a co-surety or co-indemnifier for payment of the Guaranteed Money or other money payable under this guarantee and

indemnity is discharged under an agreement or under statute or a principle of law or equity.

7 Suspension of Guarantor's rights

7.1 As long as the Guaranteed Money or other money payable under this guarantee and indemnity remains unpaid, the Guarantor may not without the consent of DBCA:

- (a) in reduction of its liability under this guarantee and indemnity, raise a defence, set-off or counterclaim available to itself, the Debtor or a co-surety or co-indemnifier against DBCA or claim a set-off or make a counterclaim against DBCA; or
- (b) make a claim or enforce a right (including, without limitation, an Encumbrance) against the Debtor or against the Debtor's estate or property; or
- (c) prove in competition with DBCA if an Insolvency Event occurs in respect of the Debtor whether in respect of an amount paid by the Guarantor under this guarantee and indemnity, in respect of any other amount applied by DBCA in reduction of the Guarantor's liability under this guarantee and indemnity, or otherwise.

7.2 The Guarantor irrevocably appoints DBCA its attorney for the purposes of doing anything which the Guarantor must do under the terms of this Guarantee and for the purposes of doing anything which DBCA considers to be necessary for the purposes of giving effect to any of DBCA's rights or powers under this Guarantee.

7.3 DBCA may:

- (a) in the name of the Guarantor or DBCA do anything which the Guarantor may lawfully do to exercise a right of proof of the Guarantor following an Insolvency Event occurring in respect of the Debtor (including, without limitation, executing deeds and instituting, conducting and defending legal proceedings and receiving any dividend arising out of that right); and
- (b) delegate its powers (including, without limitation, this power of delegation) to any person for any period and may revoke a delegation; and
- (c) exercise or concur in exercising its powers even if DBCA has a conflict of duty in exercising its powers or has a direct or personal interest in the means or result of that exercise of powers.

7.4 The Guarantor agrees to ratify anything done by DBCA or its delegate in accordance with clause 7.3.

7.5 The Guarantor may not exercise the right of proof referred to in clause 7.3 independently of DBCA.

7.6 DBCA need not account to the Guarantor for any dividend received on the exercise of that right of proof until DBCA has received all of the Guaranteed Money and all of the other money payable under this guarantee and indemnity.

8 Payments

8.1 The Guarantor agrees to make all payments to DBCA under this guarantee and indemnity in immediately available funds to the account and in the manner notified by DBCA to the Guarantor.

8.2 The Guarantor agrees to make payments without set-off or counterclaim and free and clear of any withholding or deduction for Taxes unless prohibited by law.

9 Other securities and obligations of Guarantor

DBCA's rights under this guarantee and indemnity are additional to and do not merge with or affect and are not affected by any other obligation of the Guarantor to DBCA (including any mortgage, charge or other encumbrance now or subsequently held by DBCA from the Debtor, the Guarantor or any other person) notwithstanding any rule of law or equity or any statutory provision to the contrary.

10 Reinstatement of DBCA's rights

If a claim is made that all or part of a payment, obligation, settlement, transaction, conveyance or transfer in connection with the Guaranteed Money or other money payable under this guarantee and indemnity is void or voidable under any law relating to Insolvency Events or the protection of creditors or for any other reason and the claim is upheld, conceded or compromised, then:

- (a) DBCA is entitled immediately as against the Guarantor to the rights in respect of the Guaranteed Money or other money payable under this guarantee and indemnity to which it would have been entitled if all or that part of that payment, obligation, settlement, transaction, conveyance or transfer had not taken place; and
- (b) promptly on request from DBCA, the Guarantor agrees to do any act and sign any document to restore to DBCA any Security Interest or guarantee held by it from the Guarantor immediately prior to that payment, obligation, settlement, transaction, conveyance or transfer.

11 Further assurances

At DBCA's request the Guarantor must, at its own expense:

- (a) execute and cause its successors to execute documents and do everything else necessary or appropriate to bind the Guarantor and its successors under this guarantee and indemnity; and
- (b) use its best endeavours to cause relevant third parties to do likewise to bind every person intended to be bound under this guarantee and indemnity.

12 Governing law, jurisdiction and service of process

- 12.1 This guarantee and indemnity is governed by the law in force in Western Australia.
- 12.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia and courts of appeal from them. Each party waives any right it has to object to an action being brought in those courts including, without limitation, by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.
- 12.3 Without preventing any other mode of service, any document in an action (including, without limitation, any writ of summons or other originating process or any third or other party notice) may be served on any party by being delivered to or left for that party at its address for service in accordance with Item 3 of the Schedule.

13 Counterparts

This guarantee and indemnity may consist of a number of counterparts and the counterparts taken together constitute one and the same instrument.

14 Costs And Stamp Duty

Each party agrees to bear its own legal and other costs and expenses in connection with the preparation, execution and completion of this guarantee and indemnity and of other related documentation. The Guarantor shall pay all stamp duty, including any fines and penalties, and all registration fees payable in connection with this guarantee and indemnity.

SCHEDULE 1

Particulars

1. Guarantor

[insert name and address of Guarantor]

2. Debtor

[insert name of company liable for payment of fees and charges]

3. Address for Service

DBCA

[insert address for notices]

Guarantor

[insert address for service of notices]

Signed by *[insert name of Guarantor]*
in the presence of:

Signature of Guarantor

Signature of witness

Full name of witness

Address of witness

Occupation of witness

