

IN THE SUPREME COURT OF WESTERN AUSTRALIA
CIVIL MANAGED CAUSES LIST

CIV 2812 of 2011

B E T W E E N :

JAMES POINT PTY LTD

Plaintiff

and

THE MINISTER FOR TRANSPORT

First Defendant

and

THE MINISTER FOR LANDS

Second Defendant

and

THE STATE OF WESTERN AUSTRALIA

Third Defendant

**SUBSTITUTED STATEMENT OF CLAIM
BY ORDER MADE ON 23 NOVEMBER 2011**

Date of Document: 23 December 2011

Filed on behalf of: The Plaintiff

Date of Filing: 22 December 2011

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1. The Plaintiff is and was at all material times a company duly incorporated under the laws of the State of Western Australia.
2. The First Defendant is, and was at all material times, pursuant to the provisions of the Marine and Harbours Act 1981 (“**the Harbours Act**”):
 - (a) a body corporate, with perpetual succession, under the name of the Minister for Transport, who may sue or be sued;
 - (b) a Minister for the Crown in right of the State;
 - (c) the Minister with administrative responsibility, to ensure, inter alia, the proper exercise of powers and performance of duties by the Department of Transport (“**the Department**”) in relation to Marine and Port affairs and navigation in respect of the State;
 - (d) the Minister with administrative power and responsibility under the Port Authorities Act 1999 including the power to give directions to the Fremantle Port Authority under S72 of that Act as to the performance of its functions under that Act.
3. The Second Defendant is and was at all material times, pursuant to the provisions of the Land Administration Act 1997 (“**the Land Act**”):
 - (a) a body corporate with perpetual succession, who may sue or be sued;
 - (b) a Minister for the Crown in right of the State; and
 - (c) the Minister with administrative power and responsibility under the Land Act to exercise powers and perform duties in relation to places in the State.
4. The Third Defendant is, and was at all material times, the State authority for Western Australia, as defined in the Constitution Act 1889.
5. On 20 December 2000, the Plaintiff agreed with the Defendants (“**the Agreement**”) to construct, own and operate a port, and to provide port services at the port, at James Point, near Kwinana in the State of Western Australia (“**the Port**”).

Particulars of the agreement

The Agreement was in writing, executed by the parties on 20 December 2000.

6. The Agreement contained in substance the following material express terms:

- (a) the First Defendant appointed the Plaintiff to construct the Port and act as agent of the Department to operate the Port and provide the Port Services (as defined), with effect from the Commercial Operations Date (clause 2);
- (b) the Plaintiff would design the Port to be developed in Stages as set out in the Concept Design, which could be varied from time to time (clauses 4.2 and 4.3);
- (c) the Plaintiff was required to obtain the written approval of the Department to the design of each Stage or part thereof before commencement of each Stage or part of the Stage, which approval could not be unreasonably withheld (clause 4.7);
- (d) the Plaintiff was required to give the First Defendant not less than 45 days notice of the date that it proposed construction of Stage 1 (a proposed Bulk Facility), at which time it was also required to give the First Defendant details of its nominees as Harbour Master of the Port and Pilot of the Port (clause 5);
- (e) the Plaintiff would use its best endeavours to ensure that Stage 1 of the Port became operational within two years from the Commencement Date, or such later date as may be agreed pursuant to clause 4.3.2(b) of the Agreement (clause 5.7) (“the Commercial Operation Date”);
- (f) if Stage 1 of the Port was not operational within five years from the Commencement Date (unless extended pursuant to clause 4.3.2(b)), then the Agreement would terminate on that date (clause 5.8);
- (g) if the Plaintiff applied to vary a completion date in respect of a Stage, the Department could not unreasonably withhold its consent to an extension of a completion date of any Stage if it was satisfied that the extension was required (relevantly) to enable a statutory approval process to be concluded (clause 4.3.2);
- (h) the Plaintiff was required to promptly and diligently proceed to obtain all required approvals of Government Agencies for the construction and operation of the Port and the provision of Port Services, and to promptly and diligently proceed to apply for and obtain all necessary environmental approvals as may be required by the Department of Environmental

Protection and / or the Environmental Protection Authority for the construction and operation of the Port (clauses 5.14 and 5.15);

- (i) if the Plaintiff did give notice of its intention to commence construction of Stage 1 under clause 5.3 of the Agreement to the First Defendant, the First Defendant was required to immediately send a copy of that notice to the Second Defendant and to promptly arrange for the excision of the Port Area under the Agreement, promptly arrange for the withdrawal of the Port Area from the Fremantle Port Authority for revestment in the Third Defendant under Section 26(1) of the Port Authorities Act 1999(WA), and either declare the Port Area a Port under Section 10 under the Shipping and Pilotage Act 1967(WA) or cause the Port Area to be so designated, completing those acts within a reasonable period of a notice being received (clause 7.1);
- (j) the Third Defendant was required to provide road and rail improvements required for Stage 1 as described in Annexure A to the Agreement or as may otherwise be agreed between the parties (clause 7.4);
- (k) the Third Defendant was required to facilitate the obtaining of all required approvals pleaded in sub-paragraph (h) above, but so as not to prejudice the powers and obligations of the relevant Government Agencies (thereby preserving their proper exercise of discretion in determining any applications for relevant approvals) (clause 7.5);
- (l) the Department was required to use its best endeavours to make available to the Plaintiff any existing technical, environmental or other studies or information required to be conducted as part of a planning or approval process, as held by the Third Defendant (clause 7.6);
- (m) upon receipt of any notice pleaded in sub-paragraph (d) above, the Second Defendant was required to complete all outstanding particulars for a lease over the Port Area, and execute the Lease on behalf of the State, for a term of 50 years commencing on the date by which the matters required to be undertaken under clause 7.1 of the Agreement had been completed by the Defendants (clause 8);

- (n) if the Department considered that the Port was not satisfying a specific market demand for a service or facility at the Port, it could seek competitive proposals from the market place for the provision of any such service or facility, after first having afforded the Plaintiff an opportunity to determine whether the provision of any such service or facility was feasible (clause 9);
- (o) each party must do anything another party reasonably requires in writing to give full effect to the Agreement and transactions it contemplates (clause 28); and
- (p) each of the First Defendant and the Second Defendant acted at all material times in respect of matters arising in connection with the Agreement in their statutory corporate capacities and for and on behalf of the Third Defendant.

The Plaintiff will rely on all the terms of the Agreement for their full force and effect.

- 7. It is a material implied term of the Agreement that each party would mutually cooperate to afford the other party the benefits that the Agreement was intended to confer upon each such party.

Particulars of implied term

The term is to be implied in law as an incident of the Agreement.

- 8. The implied term pleaded in paragraph 7, or the obligation to facilitate under clause 7.5 of the Agreement, relevantly required:
 - (a) each of the Defendants to respond promptly and substantively to any correspondence from the Plaintiff which reasonably sought information or assistance on any issue regarding the proper planning, construction and operation of the Port;
 - (b) each of the Defendants to cause any servant of any State Government Department or instrumentality in respect of which either the First or Second Defendant, or any other Minister with administrative responsibility in matters relating to the Port, to provide the Plaintiff with prompt and substantive responses to any request by the Plaintiff for information or assistance on any issue reasonably required for the proper planning, construction and operation of the Port;

- (c) if any document was required to be signed by either the First Defendant or the Second Defendant, or by any person acting in their capacity as a servant of any State Government Department or instrumentality over which the First Defendant or Second Defendant or any other Minister had administrative responsibility, in matters relating to the Port, in order to enable the Plaintiff to reasonably and properly plan for the proper and timely construction and operation of the Port, the First Defendant or Second Defendant would in each case:
 - (i) cause such document to be signed promptly; and
 - (ii) cause the signed document to be provided to the Plaintiff as soon as practicable upon receipt of a request from the Plaintiff for the document to be signed and returned; and
 - (d) if any power under any State Act was required to be exercised by the First Defendant or Second Defendant in order for the proper planning of the Port to proceed in a timely manner, such power would be exercised promptly and reasonably in order for the Plaintiff to complete its planning of the Port, and for each and every Stage of the Port, in a timely way, so as to facilitate the Plaintiff meeting the timeframes specified in the Agreement; and
 - (e) the Defendants not to prevent, hinder or delay the reasonable, timely and proper determination of any statutory approval process required to enable the Port to be constructed and operated under the Agreement for any Stage of the Port, including the Container Facility.
9. On or about 25 January 2001, the Plaintiff had satisfied all of the Conditions Precedent to the Agreement, such that the Commencement Date for the purposes of the Agreement was 26 January 2001.
10. By reason of the matters pleaded in paragraphs 6(f), 6(g) and 7 to 9, the Agreement would terminate or be terminable on 26 January 2006, unless the period by which the Port was required to be operational was, or ought to be, extended pursuant to clause 4.3.2(b) of the Agreement.
11. On its proper construction, the Stages of the Port after Stage 1 included, if considered feasible by the Plaintiff, the right to construct, own and operate facilities

required to import and export containers in and out of the Port (“**the Container Facility**”).

Particulars of Proper Construction

- (a) Recital A of the Agreement refers to an expression of interest and a request for a proposal process in which the Plaintiff participated, and following which the Agreement was drafted.
- (b) Recital C of the Agreement provides that the Port would be “a multi-function port” providing for the import and export of “all commodities that the Port is capable of handling”.
- (c) Recital A of the Agreement is a reference to the First Defendant’s Request for Proposal to Build, Own, and Operate a Multi Trade Port dated July 1998 (“**RFP**”), and the proposal dated 1 October 1998 submitted by the Plaintiff (“**the Proposal**”), which materially provided that:
 - (i) the proposed Port would be a staged development, with the first stage being suitable for general and bulk cargos;
 - (ii) future stages would include a container shipping service such as to justify the establishment of a container terminal;
 - (iv) the Business Strategy in the Proposal provided that the Plaintiff would optimise “the operation of the Stage 1 port facility while pursuing approvals and business commitment for the Stage 2 development”;
 - (v) attachment two of the Proposal provided that as many as six different stages might be constructed which (after Stage 1) would “depend on the forecast traffic demand”, and that Stage 2 would be “probably carried out in phases”, the design for which would include “adequate space for container handling facilities”;
 - (vi) attachment one of the Proposal, entitled “Strategic and Business Plan”, included a provision under the title

“Container Cargo” that “the provision of container facilities within Kwinana Port will be triggered either in the long term when either Inner Harbour facilities reach capacity or are restricted by conflicting land use and congested access, or in the short (sic) when a major user of shipping services is prepared to commit to Kwinana”;

- (vii) under Section D, entitled “Specific Trade Targets”, a Section headed “Container Trade” stated, relevantly: “the proposed Kwinana Port will offer a significant opportunity for future Container Trade” and that the Port will “promote” various aspects of the Container Terminal Port including seeking “a user with sufficient business to warrant investment in the terminal”; and
 - (viii) the timing of various stages of the development “will be driven by business demands and business opportunity”. Stage Four was described as the “Container Terminal Facility”, with relatively sheltered water, efficient land backing and convenient rail access, the extent and speed of development of which would be “determined by customer requirements”.
- (d) The State Cabinet had resolved by resolution dated 18 March 1996 to endorse Naval Base Kwinana “as the future site for the development of additional port facilities to handle container and general cargo trade expansion beyond the capacity of the existing Fremantle Inner Harbour”.
 - (e) In respect of the new port, by resolution dated 27 April 1999, State Cabinet resolved to endorse “conferring a preferred tenderer status on [the Plaintiff]” and authorised “negotiations to proceed with JPPL to determine the terms and conditions acceptable to the State”;
 - (f) The terms of the RFP and the Proposal were therefore consistent with the State Cabinet resolutions pleaded in sub-paragraphs (d)

and (e), insofar as they all particularly referred to a Container Terminal or container facilities being part of the Port business;

- (g) In a Memorandum of Understanding executed by the parties on 9 November 1999 (“MOU”), provision was made by Item 2.4 of the MOU to the Port being designed in six stages, with the initial stage relating to the bulk cargo business and subsequent stages being developed “based on business opportunity, demand and commercial viability”;
- (h) In a document entitled “Naval Base Kwinana Private Multi-Function Port: Questions and Answers”, prepared by the Department for the purposes of public consultation, it provided:
 - (i) in answer to the question “what is the difference between James Point’s Proposals and FPA’s proposed expansion?”, that “James Point’s Proposal is . . . container berths as demand arises” whereas FPA proposed a multi-terminal container facility to supplement Inner Harbour when it would reach capacity in ten to fifteen years’ time;
 - (ii) in answer to the question “should FPA continue to plan for an expansion from the Inner Harbour to the Kwinana Area?”, that “effective competition by James Point in containers may defer long term need for FPA to expand beyond the Inner Harbour”;
 - (iii) in answer to the question “what commodities will the new Port handle?”, that among the potential cargos are containers (carried on general cargo ships); and “a dedicated container facility could be developed if a shipping line is prepared to commit to Kwinana”.
- (i) Clause 9 of the Agreement reflected the process identified in the MOU for determining whether the market would feasibly justify the provision of a Port Service directed to such things as the import or export of containers, having regard to the above matters;

- (j) by reason of the various matters pleaded in sub-paragraphs (a) to (i) hereof the parties intended that the Plaintiff's right under the Agreement to construct, own and operate the Port included Container Facilities, if the Plaintiff thought market demand made it feasible.
12. By letter dated 27 May 2011 from the Plaintiff to the First Defendant, the Plaintiff gave the First Defendant notice pursuant to clause 5.3 of the Agreement that it intended to commence construction of Stage 1 under the Agreement on 2 January 2013 ("**the Notice**"), and informed the First Defendant that it required the excision of the Port Area pursuant to clause 7.1 of the Agreement in order to provide the Plaintiff with sufficient security of tenure to justify the expenditure of about \$15,000,000 required for further pre-planning and detailed design work prior to commencement of construction.
13. In breach of the Agreement, the First Defendant:
- (a) failed to immediately refer the Notice to the Second Defendant; and
 - (b) failed to promptly undertake any steps to excise the Port Area as required under the Agreement.
14. By letter dated 18 July 2011 from the State Solicitor's Office on behalf of the First Defendant to Hotchkin Hanly on behalf of the Plaintiff, the First Defendant noted that the Plaintiff had not sought, nor had there been any consent to, an extension of the date for commencement of construction of Stage 1 from 30 June 2011.
15. By letter dated 18 July 2011 from Hotchkin Hanly on behalf of the Plaintiff to the State Solicitor's Office on behalf of the Department and the First Defendant and from the Plaintiff to the Department of the same date, the Plaintiff sought approval from the Department pursuant to clause 4.3.2(b) of the Agreement to an extension of the date for completion of Stage 1 from 30 June 2011, as the statutory approval process had not been concluded.

Particulars of statutory approvals processes

- (a) By Ministerial Statement 669 issued in November 2004, the Minister for the Environment granted environmental approval for Stage 1 of the Port, the operation of which was extended by consent of Minister Marmion to 17 November 2014 which includes, among other conditions, the following conditions requiring further approvals by Government Agencies yet to be procured:
- (i) conditions 11-14, 14-2, 14-13: Department of Health;
 - (ii) conditions 13-1 and 14-2: Fisheries Department;
 - (iii) conditions 14-3: Water Corporation;
 - (iv) conditions: 14-3 and 15-4: Western Power;
 - (v) conditions: 14-3: Fremantle Port Authority;
 - (vi) numerous conditions requiring approval of the Department of Planning and Infrastructure;
 - (vii) numerous provisions requiring further approvals of the Department of Environment and the Environmental Protection Authority;
 - (viii) numerous conditions requiring further cooperation from Government Agencies represented in the Stakeholder Reference Group;
- (b) The planning approval issued by the WAPC on or about 20 May 2011, by way of reconsideration of its refusal dated 25 January 2011, pursuant to section 31 of the State Administrative Tribunal Act 2004, by which planning approval:
- (i) Condition 1 required approval by the WAPC of a traffic and access management plan;
 - (ii) the level of fill for the Reclamation Works, the subject of the planning application was required to be to the WAPC's satisfaction, as determined by the Department of Transport;
- (c) Further planning approval for Stage 1 will be required for the development of the rest of Stage 1, in relation to the construction of

the port structure itself, which approval will most likely be conditioned by further approvals from Government Agencies.

16. By letter dated 2 September 2011 from the State Solicitor's Office on behalf of the Department and the First Defendant to Hotchkin Hanly on behalf of the Plaintiff, the Department and the First Defendant informed the Plaintiff that the Department and the First Defendant did not consent to the extension of the date for completion of Stage 1 from 30 June 2011 ("**the Refusal**").

17. The Refusal was unreasonable, in that:

- (a) the Plaintiff had used its best endeavours to complete Stage 1 before 30 June 2011;
- (b) the further time for completion of Stage 1 was (and remains) required in order to conclude statutory approval processes, namely:
 - (i) the satisfaction of conditions imposed on a planning approval for commencement of the Reclamation Works of Stage 1, issued by the WAPC on or about 20 May 2011; and
 - (ii) the environmental approval extended by the Minister for the Environment to 17 November 2014; and
 - (iii) further planning approvals required for the balance of construction works in Stage 1; and
- (c) if, on a proper construction of the Agreement, any further grounds of unreasonable withholding of consent are required to be established by the Plaintiff, from early 2001, all material and significant delays in the statutory approval processes were caused by or on behalf of each of the Defendants, particulars whereof are set out in the following paragraphs.

18. In order for the Plaintiff to lawfully commence development of Stage 1 of the Port, it required at least the following relevant approvals:

- (a) approval by the Minister for Planning and Infrastructure, and by the State Government, to an amendment to the Metropolitan Region Scheme to re-zone the area of a waterways reservation required for the Port as an "industrial" zone, whereby a reclaimed land-backed cargo port would be consistent with the zoned use ("**the MRS Amendment**");

- (b) environmental approval of Stage 1 by the Minister for the Environment;
- (c) planning approval for Stage 1 by the Western Australian Planning Commission;
- (d) such further or other approvals by Government Agencies to comply with any conditions of the environmental and planning approvals; and
- (e) approval by the Second Defendant to:
 - (i) sell the Landcorp Land (as defined in paragraph 89 hereof) to the Plaintiff; or
 - (ii) at least to grant access to and over the Landcorp Land and the area in the waterways reservation, to undertake such studies as were necessary to facilitate a final detailed design of Stage 1 of the Port.

MRS AMENDMENT

19. The Minister for Planning and Infrastructure did not cause the MRS Amendment to be gazetted into law as part of the Metropolitan Region Scheme until 21 August 2009, when, acting diligently and co-operatively with the Plaintiff, such an amendment to the MRS would be reasonably expected to have become effective by the end of 2002, a delay of about seven years. The Plaintiff relies particularly upon the steps taken by the Plaintiff and the Defendant's failure to co-operate, or to facilitate relevant approvals under clause 7.5 of the Agreements, as pleaded below.
20. Between 1999 and in or about June 2000:
- (a) officers of the First Defendant (Mike Williams and Patrick Dick) advised the Plaintiff to request the MRS Amendment; and
 - (b) the Plaintiff requested the Western Australian Planning Commission ("**the WAPC**") initiate the MRS Amendment.
21. By May 2001, the MRS Amendment Report had still not been advertised.
22. By letter dated 25 March 2002, the Plaintiff asked Mr Joyce on behalf of the First Defendant whether the First Defendant would agree to the sale of the Landcorp Land to the Plaintiff and to allow the MRS Amendment Report to be advertised to permit Stage 1 of the Port to progress.
23. By letter dated 29 July 2002 from the Plaintiff to Mike Williams, the Principal Policy Officer of the Department on behalf of the First Defendant, the Plaintiff:

- (a) advised that it was still awaiting responses from the Second Defendant to its offer to purchase the Landcorp Land;
 - (b) noted the request for the MRS Amendment had been initiated on 21 June 2000, but the Perth Regional Planning Committee had only just resolved to initiate the MRS Amendment on or about 24 May 2001, after a lapse of about 11 months, and the Minister for Planning and Infrastructure had still not given approval for the proposed MRS Amendment to proceed as at the date of the letter, despite two previous letters from the Plaintiff to the Minister for Planning and Infrastructure dated 17 January 2002 and 25 March 2002, requesting meetings to progress those matters;
 - (c) requested an extension of time for completion of Stage 1 due to the Department of Environmental Protection's delays in progressing the Plaintiff's application for Environmental Approval and the Minister for Planning and Infrastructure's delays in progressing the MRS Amendment; and
 - (d) requested that those matters be addressed "as a matter of urgency".
24. The Plaintiff received no reply to that letter other than a confirmation in August 2002 that the request had been referred to the Minister for Planning and Infrastructure.
25. By letter dated 26 August 2002 from Corrs Chambers Westgarth, solicitors for the Plaintiff, to the Minister for Planning and Infrastructure, the Plaintiff requested, pursuant to clause 28 of the Agreement, that the Minister consent to the advertising of the MRS Amendment.
26. By letter dated 29 August 2002 from the Minister for Planning and Infrastructure to Corrs Chambers Westgarth, the Minister informed the Plaintiff that the MRS Amendment process was "a complex issue", and that she expected to be in a position to respond by the end of the following week. No such response was received.
27. Between 10 September 2002 and 18 September 2002, Corrs Chambers Westgarth left three separate telephone messages with an officer of the Minister of Planning and Infrastructure, none of which were returned.

28. By letter dated 18 September 2002, Corrs Chambers Westgarth informed the Minister that, in light of the lack of a response, proceedings would be issued to force the Minister to advertise the proposed MRS Amendment.
29. By letter dated 19 June 2002, the Department for Planning and Infrastructure sought advice from expert consultant, Dr Michael Paul, as to his view on the potential impacts and issues of concern arising out of a revised concept plan for Stage 1 submitted by the Plaintiff. Dr Paul's report was provided to the Department for Planning and Infrastructure on 19 August 2002, but was not provided to the Plaintiff until 1 October 2002.
30. By letter dated 7 April 2003 from the Plaintiff to the First Defendant:
- (a) the Plaintiff outlined delays it had experienced;
 - (b) requested an extension of the date for commencing operations of the Port to 25 January 2007; and
 - (c) informed the First Defendant that detailed modelling, investigation and design work would commence once the Plaintiff was "reasonably assured that the planning approval process is moving forward".
31. By letter dated 12 June 2003, two months later, the Plaintiff asked the First Defendant for a response to its request.
32. By letter dated 3 July 2003, the Plaintiff;
- (a) informed the Department that 31 appeals had been lodged against the Bulletin which remained outstanding, and that it understood that the Minister for Planning and Infrastructure had determined to progress the MRS Amendment only when the environmental issues had been resolved; and
 - (b) requested regular meetings to facilitate progressing the development.
33. By letter dated 5 August 2003, over a month later, the Department informed the Plaintiff that they would make provision for monthly meetings to address "technical issues" and were "still waiting for advice" regarding a response to the Plaintiff's request for an extension of time, in respect of which four months lapsed without any substantive response.
34. At a steering committee meeting of the Board of the Plaintiff on 17 September 2003, the Plaintiff noted that:

- (a) there was still no response from the State Government to its request for an extension of time for completion of Stage 1;
 - (b) the environmental approval process had still not been completed due to the appeals; and
 - (c) the Minister for Planning and Infrastructure had refused to process the MRS Amendment until environmental approval had been finalised,
- yet the Plaintiff resolved to incur some further expenditure in anticipation that those issues would be resolved, in an effort to avoid further delays.

35. By letter dated 2 February 2004, the Plaintiff notified the Department that:

- (a) it had experienced further delays in obtaining statutory approvals for the development;
- (b) if the approval processes could be concluded “without undue delay”, its best estimate was that Stage 1 could be operational by 31 March 2008; and
- (c) the date for the extension which it had previously sought by letter dated 7 April 2003, and to which it had still not received a response, was revised to 31 March 2008.

36. By letter to the Plaintiff dated 9 February 2004, the Department advised the Plaintiff that it would respond once it had “received legal advice” on the request.

37. By letter dated 25 February 2004 to the Plaintiff, the First Defendant requested a timetable for the approval processes in which the Plaintiff was currently involved (although one had already been provided by the Plaintiff) “and other necessary activities required to establish an operational port at James Point” in order to assist consideration of its request for a further extension of time.

38. By letter dated 30 April 2004 from Hotchkin Hanly on behalf of the Plaintiff to the Department, the Plaintiff threatened legal proceedings unless consent under Clause 4.3.2 of the Agreement was given.

39. By letter dated 26 May 2004, approximately 13 months after the Plaintiff first made its request for an extension of the time for completing Stage 1, and despite referring to the amended date requested in the Plaintiff’s letter dated 2 February 2004, the First Defendant granted an extension of time only to 25 January 2007.

40. The First Defendant and Fremantle Port Authority (“FPA”) in 2004 published an information brochure for the purposes of public consultation in the review (“the Outer Harbour Review”), which provided among other things that:
- (a) a steering committee had been set up to undertake the Outer Harbour Review;
 - (b) representatives of the FPA, but not the Plaintiff, were represented on the steering committee;
 - (c) the committee would focus on (relevantly) priorities and oversighting of an approval process of the Outer Harbour container port and associated infrastructure; and
 - (d) of the four design options to be considered by the steering committee for advice to the State Government on future planning for the area, two of the four options (Options Two and Four) directly conflicted with the Plaintiff’s approved Concept Design for Stage 1.
41. The Plaintiff objected to the Defendant’s further consideration of Options Two and Four by letter to the steering committee of the Outer Harbour Review dated 6 December 2004, on the ground that it directly conflicted with the Plaintiff’s right to develop, own and operate a Port under the Agreement, but the Plaintiff received no reply.
42. By letter dated 28 January 2003 to Corrs Chambers Westgarth, the Minister for Planning and Infrastructure informed the Plaintiff that she would not advertise the MRS Amendment proposal until after the Environmental Impact Assessment Process had been finalised.
43. By letter dated 7 February 2003, Corrs Chambers Westgarth on behalf of the Plaintiff submitted to the Minister for Planning and Infrastructure that the reasons for doing so were not soundly based.
44. The Minister did not respond to that letter until by letter dated 13 June 2003, three months later, addressed to Corrs Chambers Westgarth on behalf of the Plaintiff, repeating her response pleaded at paragraph 42.
45. The Plaintiff received a formal response from the Minister for the Environment on 27 November 2003 to the Plaintiff’s appeal lodged on 9 December 2002, to the

effect that it wanted the Plaintiff to undertake further steps in the environmental assessment.

46. The Plaintiff sought and obtained a meeting attended by Michael Hotchkin, Hans Moonen, John Neylon and Graham Kierath on behalf of the Plaintiff and Rob Mitchell, Darren Walsh and Mike Williams on behalf of the Defendants on 5 December 2003 to discuss the matters raised by the Minister for the Environment.
47. By letter from Hotchkin Hanly to the Minister for Planning and Infrastructure on 8 December 2003, the Plaintiff outlined the matters raised at the meeting held on 5 December 2003, and submitted, in light of those matters, that there could be no material impact by advertising the MRS Amendment Report prior to finalisation of the EIA process, and requested the advertising of the MRS Amendment Report in order to “avoid further unnecessary delays”.
48. The Plaintiff received no material response to that letter from the Minister for Planning and Infrastructure or the Defendants.
49. At a meeting held on or about 15 April 2004 between Len Buckeridge on behalf of the Plaintiff and Ms MacTiernan on behalf of the Defendants, the Plaintiff was informed that the MRS Amendment process would be deferred until completion of the Outer Harbour Review.
50. Notwithstanding that advice, the Plaintiff continued to take steps directed to persuading the Minister for Planning and Infrastructure to agree to advertise the MRS Amendment proposal prior to completion of the Outer Harbour Review.

Particulars of Steps Taken

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|-----|------------|---|
| (a) | May 2001 | MRS rezoning report prepared internally by DPI. Not advertised / progressed.
N.B. slightly larger area than final MRS Amendment. |
| (b) | 13/06/2003 | WAPC (Paul Frewer – Executive Director) writes to JPPL advising MRS Amendment “awaiting final approval”, but a number of “outstanding issues”. |
| (c) | 07/07/2003 | JPPL meets P Frewer to discuss outstanding issues. P Frewer advises JPPL Minister McTiernan now resolved MRS process (advertising) must await EPA resolution. |

Frewer also advises if EPA process reduces MRS amendment area (reclamation) then MRS process must be resubmitted (existing cannot be amended).

- (d) 19/08/2003 JPPL replies addressing 13/06/03 issues.
- (e) 19/08/2003 JPPL confirmed to (then) DPI that JPPL and DPI had assumed EPA and MRS processes would proceed concurrently.
- (f) 20/11/2003 JPPL writes to DPI (P Frewer) confirming MRS meeting scheduled for 25/11/03.
- (g) 05/12/2003 DPI sends Greg Rowe and Associates (“**GRA**”) copy of “earlier” MRS Amendment report as rejected by Minister.
- (h) 17/12/2003 GRA writes to JPPL outlining consultants needed for new MRS Amendment report.
- (i) December 2003 (No Date) Greg Rowe and Associates meets DPI officers to discuss MRS Amendment report content.
- (j) 12/01/2004 GRA appoints DAL Environmental to provide summary of EPA processes to date (as requested by DPI).
- (k) 12/01/2004 GRA writes to DPI seeking clarification on traffic component of MRS Amendment Report.
- (l) 14/01/2004 GRA provides DPI draft contents of MRS Amendment Report requesting ratification.
- (m) 19/01/2004 DPI advises GRA due to “sensitive” nature of GRA queries on transport component of MRS Amendment Report, DPI reply must await “Kevin Smith” return.
- (n) 21/01/2004 GRA provides to JPPL copy of September 2001 MRS Amendment report (prepared by DPI) as rejected by Minister in 2001.
- (o) 30/01/2004 JPPL meets GRA and instructs MRS Amendment report must be lodged by March 2004.
- (p) 11/02/2004 GRA advises JPPL still awaiting DPI confirmation of MRS Amendment Report

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- (q) 18/02/2004 GRA advises JPPL still awaiting DPI confirmation of MRS Amendment Report Table of Contents.
- (r) 24/02/2004 GRA writes to DPI querying confirmation of Table of Contents and meeting dates for WAPC (reminder).
- (s) 04/03/2004 GRA advises JPPL still awaiting DPI confirmation of MRS Amendment Report Table of Contents.
- (t) 04/03/2004 GRA again writes to DPI querying confirmation of Table of Contents and meeting dates for WAPC (reminder).
- (u) 15/03/2004 GRA forwards draft MRS to JPPL for review.
- (v) 26/03/2004 JPPL authorises GRA to lodge MRS Amendment Report to WAPC.
- (w) 14/04/2004 GRA and JPPL meet DPI (Paul Frewer) to lodge MRS Amendment and “discuss timing of process”. MRS Amendment Report lodged.
- (x) 29/04/2004 DPI advises GRA that MRS Amendment Report should go to WAPC Meeting (SWDPC) of 24/06/2004. Requests consent to release GRA report to FPA prior to public advertising.
- (y) 11/05/2004 MRS Amendment Report scheduled to be assessed by DPI internal Technical Officer’s Meeting, then to SWDPC (24/06/04), then PRPC (13/7/04) or 10/08/04).
- (z) 14/05/2004 GRA writes to DPI querying progress.
- (aa) 01/06/2004 DPI advises will release report to FPA and seek FPA comment prior to WAPC assessment. DPI advises receipt of advice from EPA requesting further information from JPPL. DPI “interprets” this to mean cannot advertise MRS Amendment Amendment.
- (bb) 23/06/2004 GRA advice DPI that JPPL withdraws objection to referral to FPA.

- (cc) 24/06/2004 DPI advises MRS Amendment report “on agenda” for 25/06/04 SWDPC Meeting and that FPA has 21 days to comment.
- (dd) 31/08/2004 GRA advises JPPL, SWDPC considered MRS Amendment Report “at its meeting last week“.
- DPI advises Cities of Melville and Fremantle support MRS Amendment. Town of Kwinana (“**TOK**”) opposes.
- (ee) 15/12/2004 DPI advises GRA that MRPC has adopted MRS report for purposes of advertising. Must go to Minister for Planning and Infrastructure for ratification (expect 3-4 weeks) then to Gov. Gazette to commence advertising.
- (ff) 28/01/2005 DPI advises GRA Amendment still with DPI - awaiting Chairman’s endorsement.
- (gg) 14/02/2005 GRA queries (in writing) progress of referral to Minister
- (hh) 15/02/2005 DPI confirms documents with Minister and Ministerial briefing scheduled for evening of 15/02/2005.
DPI advises that during “caretaker period” of Govt. no MRS decisions will be made.
- (ii) 08/03/2005 DPI advises Minister has signed documents for advertising.
- (jj) 29/03/2005 MRS advertising formally commences – for period to 01/07/2005.
- (kk) 09/06/2005 GRA requests TOK consent to present MRS proposal to Councillor workshop.
- (ll) 15/06/2005 GRA attends TOK Councillor workshop.
- (mm) 22/06/2005 TOK Council formally “considers MRS Amendment.
- (nn) 29/06/2005 GRA makes formal submission on behalf of JPPL (to WAPC).
- (oo) 06/07/2005 DPI acknowledges receipt of GRA submission.

- (pp) 13/07/2005 TOK requests JPPL agreement to extension of advertising period to (circa) September 2005.
- (qq) 01/08/2005 JPPL offers to fund assessment of MRS submissions to expedite.
- (rr) 18/08/2005 TOK resolved to advise WAPC of various matters relating to JPPL port.
- (ss) 29/08/2005 JPPL requests WAPC initiate further MRS amendment for cargo and container facilities port (Stage 2)
- (tt) 05/10/2005 JPPL writes to Chairman of WAPC requesting MRS Amendment be initiated for all stages of JPPL port.
- (uu) 18/10/2005 GRA writes to TOK requesting reply to GRA letter of 11/05/05.
- (vv) 15/11/2005 GRA advises JPPL Hearing date for MRS Amendment is 01/12/2005.
- (ww) November 2005 (no date) WAPC advises JPPL finalisation of MRS Amendment must await “access study”.
- (xx) 01/12/2005 GRA and JPPL attend Hearing and make oral submission to the effect that the Amendment should be recommended without further delay.
- (yy) 05/12/2005 JPPL makes further written submission to WAPC addressing queries raised in Hearing.
- (zz) 08/08/2006 JPPL writes to WAPC querying progress of MRS Amendment.
- (aaa) 11/10/2006 WAPC replies to 08/08/06 letter (apology for delay) advising a detailed reply will come from SSO. Not forthcoming.
- (bbb) 16/01/2007 JPPL writes to WAPC querying progress. No Reply.
- (ccc) 06/03/2007 HH writes to Premier A. Carpenter expressing concern at delay in progress.
- (ddd) 08/03/2007 DPI advises GRA Stage 1 Amendment submitted to Cabinet (in mid January 2007) with recommendation for approval.

- (eee) 15/03/2007 DPI writes to JPPL advising “no reason for further delays” to finalising MRS Amendment but waiting Minister’s agreement to endorse documents.
- (fff) 30/03/2007 HH writes to Premier Carpenter requesting meeting for JPPL to discuss delays.
- (ggg) 13/06/2007 GRA queries finalisation of Amendment with DPI. DPI advises Cabinet endorsement being held pending Outer Harbour proposal being endorsed by Cabinet.
- (hhh) 27/07/2007 DPI advises GRA awaiting SSO advice on how to progress JPPL MRS Amendment.
- (iii) 21/08/2007 JPPL writes to D.G. (DPI) querying timing of MRS Amendment and its final approval.
- (jjj) 12/12/2008 GRA/JPPL meets Premier to discuss JPPL port and delays in process.
- (kkk) 09/12/2008 Minister Day receives WAPC recommendation for Cabinet to endorse MRS Amendment. Minister Day defers - requesting changes.
- (lll) 12/12/2008 Changes submitted to Minister Day.
- (mmm) 21/01/2009 Chairman JPPL advises JPPL Directors that Eacham Curry (Chief of Staff to Minister for Transport) has left message that MRS Amendment for JPPL Stage 1 should be tabled in Parliament “mid year”.
- (nnn) 27/01/2009 JPPL and GRA meet Minister Grylls and Steve Imms (Chief of Staff) re, inter alia , need to finalise MRS Amendments.
- (ooo) January 2009 (no date) DPI advises GRA, MRS Amendment with Minister Day for tabling in Cabinet.
- (ppp) 16/02/2009 Minister Day’s office advises GRA, Amendment goes to Cabinet but deferred – “questions by Premier”. No date set for further Cabinet assessment.
- (qqq) 21/05/2009 MRS Amendment introduced to Parliament. Expected to pass through Parliament (if not

disallowed) 13 August 2009.

- | | | |
|-------|------------|--|
| (rrr) | 04/08/2009 | DOP advises GRA no motions to disallow received. Three (3) more sitting days required. |
| (sss) | 21/08/2009 | DPI advises GRA, MRS Amendment “effective”. |
| (ttt) | 09/10/2009 | G. Gazette confirms finalisation of MRS Amendment – recognizing effective date as 21/8/2009. |

51. The Minister for Planning and Infrastructure approved the MRS Amendment Report for advertising on or about 8 March 2005:

- (a) almost five years after the Plaintiff had requested that the MRS Amendment be initiated;
- (b) almost four years after the WAPC had initiated the MRS Amendment; and
- (c) over three years since the Plaintiff had first requested that the Minister advertise the MRS Amendment Report, which period included numerous further requests and demands as pleaded herein.

52. The advertising period for the MRS Amendment did not close until September 2005, thereby affording the public approximately 6 months to make submissions.

53. A hearing before the WAPC to consider those submissions did not take place until 1 December 2005, at which representatives of the Plaintiff attended and submitted to the WAPC that there was no reasonable basis for deferring either a recommendation to the Minister for Planning and Infrastructure to approve the MRS Amendment, or the Minister for Planning and Infrastructure herself deferring approval of the MRS Amendment.

54. The Plaintiff submitted further written submissions to the WAPC on 5 December 2005.

55. No decision was made or communicated by the WAPC or the Minister for Planning and Infrastructure to the Plaintiff as a consequence of the hearing held on 1 December 2005, until 11 October 2006, which date was:

- (a) more than ten months later, and

- (b) more than two months after the Plaintiff had written to the WAPC querying progress of the MRS Amendment.
56. The reply by the WAPC dated 11 October 2006 advised that a detailed reply would come from the State Solicitor's Office.
57. No such reply was received by the Plaintiff.
58. The Plaintiff wrote again to the WAPC on 16 January 2007 requesting a report on progress, and received no reply.
59. By letter dated 6 March 2007 from Hotchkin Hanly to the Premier, the Plaintiff expressed its concern at further delays in progress of the matter.
60. By letter dated 30 March 2007, Hotchkin Hanly on behalf of the Plaintiff asked the Premier on behalf of the Defendants for a meeting to discuss ways in which further delays could be avoided.
61. On 13 June 2007, the Minister for Planning and Infrastructure advised the Plaintiff that Cabinet endorsement of the MRS Amendment was being withheld until the Cabinet had determined which of the four Outer Harbour Review options should be endorsed by Cabinet. The Plaintiff received no other response to its request for avoidance of further delays.
62. By letter dated 21 August 2006 from the Plaintiff to the Department, the Plaintiff informed the Defendants that the following matters required attention:
- (a) although environmental approval had finally been granted in November 2004, it was itself limited for five years, and the delays experienced by the Plaintiff to that point in time caused it to be concerned that further approvals required to commence and complete Stage 1 would not be received within that time frame of a further 5 years (to November 2009);
 - (b) the Plaintiff had requested confirmation from the WAPC that the MRS Amendment would proceed without further delay by the Defendants: and
 - (c) the Plaintiff understood that the town boundaries for the Town of Kwinana had to be amended to include the area of the proposed reclamation for Stage 1, and that this also required an amendment to the Town's town planning scheme.
63. The Plaintiff received no response to that letter.

64. In August 2008, the State Government called a new election, and in September 2008, a new government was formed.
65. Dr Chris Whitaker on behalf of the Plaintiff met with the new Minister of Transport's (the Honourable Simon O'Brien MLC) Chief of Staff and Transport Policy advisor on Friday 17 October 2008, and was informed at that meeting that the new government would no longer delay or obfuscate the development of the Port.
66. At a further meeting with the new Minister for Transport, the Honourable Simon O'Brien MLC, in November 2008:
- (a) the First Defendant was informed by the Plaintiff that until the new Government publicly committed to the Port, it was unable to persuade key stake-holders in the public and private sector that there should be any engagement with the Plaintiff, because there was a concern that they would be wasting their time and money;
 - (b) the Plaintiff informed the First Defendant that it wanted the Second Defendant to agree to sell the Landcorp Land to the Plaintiff for the purposes of the Port, finalise the MRS Amendment, and assist the Plaintiff in planning with appropriate road and rail infrastructure for Stage 1; and
 - (c) the First Defendant expressed his support for the Plaintiff's development of the Port, advised that it would "take some time to study" and plan a broader strategy involving planning for the Inner Harbour, as well as the Outer Harbour, and stated that he was not in a position to publicly support the Plaintiff until further consideration by the Cabinet.
67. The First Defendant advised the Plaintiff to brief each of the new Minister Grylls (the Second Defendant), Buswell (Treasurer) and Day (the Planning Minister), as well as the new Premier, which it did at various meetings between 1 November 2008 and 31 March 2009.
68. Between May 2009 and August 2009, the Third Defendant caused the MRS Amendment to be:
- (a) introduced in May 2009 to Parliament for its consideration; and

- (b) advertised in the Government Gazette on 21 August 2009, as notice of the MRS Amendment taking legal effect.

ENVIRONMENTAL APPROVAL

69. The Minister for the Environment did not issue environmental approval for Stage 1 of the Port until November 2004, when the Minister should, acting diligently and co-operatively with the Plaintiff, have issued the environmental approval before the end of 2002 - a delay of almost 2 years. The Plaintiff relies particularly upon the steps taken by the Plaintiff and the Defendants' failure to cooperate, or to facilitate the approval process under clause 7.5 of the Agreement, as pleaded below.
70. From 14 December 1999, the Plaintiff took steps to procure environmental approval for Stage 1, submitting its draft PER document to the Department of Environmental Project ("**DEP**") on 23 January 2001.

Particulars of steps taken

- | | | |
|-----|------------------|---|
| (a) | 14 December 1999 | JPPL refers Stage 1, to DEP for determining the level of assessment |
| (b) | 7 January 2000 | DEP advise that the level of assessment is PER |
| (c) | 10 January 2000 | JPPL commissions DAL to prepare the PER |
| (d) | 2 February 2000 | Advice from DAL that DEP guidelines will be issued "Monday" |
| (e) | 7 February 2000 | DEP forward guidelines |
| (f) | 15 August 2000 | Revision of Stage 1 – DAL advise DEP |
| (g) | 21 August 2000 | DEP advise level of assessment for revised project at PER |
| (h) | 23 January 2001 | Draft copies of the PER submitted to DEP |
| (i) | 13 February 2001 | DEP responds with proposed changes to PER |
| (j) | 12 April 2001 | DEP agrees to release of PER |
| (k) | 19 April 2001 | JPPL advises DEP that advertisement will be lodged on 28 April 2001 – seeking comment |
| (l) | 24 April 2001 | DEP agrees to advertising on 28 April 2001 and confirms public comment period |

Monday, 30 April to Monday 25 June

- (m) 16 August 2001 DEP provides summary of public submissions
- (n) December 2001 JPPL submits response to public submissions
- (o) 26 March 2002 JPPL submits further response to DEP queries
- (p) 18 July 2002 DEP submits advice/briefing note to EPA for consideration at the meeting on 18 July 2002
- (q) 15 August 2002 EPA considered matter on the 1 August and 15 August
- (r) 25 November 2002 EPA issued Bulletin 1076 advertises for public comment closing 9 December 2002
- (s) 18 December 2002 Appeals convenor provided JPPL with copies of Appeal matters
- (t) 31 March 2003 Appeal Convenor provided JPPL with copy of DEP/EPA responses to appeals
- (u) 9 April 2003 JPPL meets with Appeal Convenor

71. At a meeting between representatives of the Plaintiff and Mr Paul Joyce on behalf of the First Defendant on 21 January 2002 and in a letter from the Plaintiff to Mr Joyce dated 29 January 2002, the Plaintiff:

- (a) listed various issues upon which it required a response from the First Defendant in order to facilitate the environmental approval process instituted by the Plaintiff; and
- (b) required changes in the Concept Design for the proper development of the Port.

72. No response was provided to the Plaintiff for more than six weeks, prompting the Plaintiff to send a follow up letter on 27 February 2002, requesting a response.

73. Mr Joyce responded by email dated 18 March 2002, almost two months after a meeting in which the Plaintiff had been advised that the information would be forthcoming in a couple of days, advising by the email that he would “undertake to provide a response ASAP”.

74. On 23 April 2002, Hans Moonen and John Peraldini met officers from the DEP to discuss the Plaintiff’s application for environmental approval and:

- (a) were informed that the DEP intended to provide advice for consideration of the Environmental Projection Authority at a formal meeting in early June 2002; but
 - (b) the meeting did not take place.
75. On 25 November 2002, the Environmental Protection Authority issued Bulletin 1076, constituting public notice of the Environmental Protection Authority's advice to the Minister for Heritage and the Environment that the proposal should be approved subject to conditions.
76. The Plaintiff by letter dated 3 December 2002 requested the Minister for Planning and Infrastructure to progress the "planning process" now that the Bulletin had been published. It received no reply from the Minister for Planning and Infrastructure.
77. The Minister for the Environment did not issue conditional environmental approval for Stage 1 of the Port until November 2004, about 2 years after the commencement of the appeal period for the Bulletin published in November 2002.

PLANNING APPROVAL

78. As an alternative to the MRS Amendment process pleaded herein, and in an attempt to avoid further delays, the Plaintiff by its town planners, Greg Rowe and Associates ("GRA"), on 13 April 2004 submitted development application forms for reclamation works in the area of the Waterways reservation to both Landcorp and the FPA, both of which had to sign the applications for reclamation works to take place on the Landcorp Land and in the waterways reserve where the reclamation works were to be undertaken, respectively.
79. By letter dated 28 April 2004, the FPA refused to sign the development application.
80. GRA on behalf of the Plaintiff by letter dated 10 May 2004 requested the FPA reconsider its decision and sign the application form. It repeated its request again on 18 May 2004.
81. The FPA again refused to sign the development application by letter dated 19 May 2004.
82. Landcorp refused to sign the form by letter dated 14 May 2004.
83. Len Buckeridge on behalf of the Plaintiff, by letter dated 20 May 2004, asked Neil Hamilton on behalf of Landcorp to cause the FPA to sign the forms.

84. Derwent Southern of Landcorp informed GRA on 25 May 2004 that the State Solicitors' Office advised Landcorp not to sign the development application form.
85. Hotchkin Hanly on behalf of the Plaintiff by letter dated 9 June 2004 requested the First and Second Defendants respectively to direct both Landcorp and the FPA to sign the development application forms, but received no reply.
86. The Plaintiff caused Murray Criddle, a former Minister of the Crown, to write to the First and Second Defendants on behalf of the Plaintiffs to request that the development application forms be signed, which he did by letter dated 3 December 2004, but he also received no reply.
87. By letter dated 31 May 2005, Len Buckeridge on behalf of the Plaintiff wrote to the First and Second Defendants, requesting that she (acting in both capacities) arrange the signing of the development application forms, but he received no reply.
88. Between 1 February 2004 and 20 May 2011, the Plaintiff took other steps to procure planning approval, including an application to the State Administrative Tribunal for review of a deemed refusal by the WAPC of its application for planning approval.

Particulars of steps taken

- | | | |
|-----|------------|---|
| (a) | 11/02/2004 | JPPL, instructs GRA to lodge Development Application (DA). |
| (b) | 13/04/2004 | GRA writes to WA Land Authority (Landcorp) requesting DA form be signed. |
| (c) | 13/04/2004 | GRA writes to FPA requesting DA form be signed. |
| (d) | 28/04/2004 | FPA writes to GRA – declines to sign DA (Form 1). |
| (e) | 10/05/2004 | GRA writes again to FPA (Kerry Sanderson) requesting reconsideration and sign Form 1. |
| (f) | 14/05/2004 | Landcorp declines to sign Form 1. |
| (g) | 18/05/2004 | GRA again requests FPA sign DA (Form 1). |
| (h) | 19/05/2004 | FPA again declines to sign DA. |

- (i) 20/05/2004 Len Buckeridge (“**LWB**”) writes to Neil Hamilton requesting, inter alia, signing by FPA of DA forms.
- (j) 25/05/2004 GRA advised by Mr Derwent Southern at Landcorp that SSO has advised Landcorp not to sign Form 1 (DA).
- (k) 09/06/2004 Hotchkin Hanly (“**HH**”) writes to Minister McTiernan requesting she direct Landcorp and FPA sign DA’s. No reply.
- (l) 03/12/2004 Hon. Murray Criddle writes to Minister McTiernan on behalf of JPPL requesting DA forms be signed. No reply.
- (m) 31/05/2005 LWB writes to Min McTiernan requesting, inter alia, endorsement of DA forms. No reply to the request.
- (n) 07/10/2008 GRA writes to Min Grylls (after meeting with Grylls and Buswell on 03/10/08). Grylls had requested DA form sent to him for Landcorp and he would arrange signature.
- (o) 28/10/2008 GRA writes to Eacham Curry at Minister Transport’s Office re Ministerial endorsement of DA.
- (p) 02/02/2009 GRA writes to Minister Grylls after meeting with Minister (27/01/2009) requesting endorsement of DA. Minister Grylls had requested DA to be sent to him. Minister said he would support signing DA.
- (q) 12/03/2009 Min Grylls writes to GRA advising application should be forwarded to Landcorp.
- (r) 26/03/2009 GRA writes to Landcorp requesting DA form be signed. No reply.
- (s) 01/04/2009 GRA again writes to Mr Eacham Curry in Office of Min for Transport requesting DA form to be signed.

- (t) 01/04/2009 Landcorp writes to GRA declining to sign form.
- (u) 02/10/2009 GRA writes to Minister Grylls querying DA forms be signed.
- (v) 16/10/2009 GRA writes to Min O'Brien querying DA form be signed.
- (w) 12/11/2009 GRA writes to Office of Minister O'Brien querying progress of DA signing.
- (x) 12/11/2009 GRA writes to Office of Minister Grylls querying progress of DA signing.
- (y) 16/11/2009 JPPL meets Minister Grylls and Minister O'Brien re progress of project. Ministers request GRA lodge DA forms for signature.
- (z) 20/11/2009 FPA Board advised FPA has received request to sign DA Form.
- (aa) 22/01/2010 Minister for Transport advises Greg Rowe and Associates that, notwithstanding his advice, unable to sign application form and has referred form to Fremantle Port Authority with a request for the FPA Board to consider the application form.
- (bb) 02/02/2010 JPPL writes to FPA requesting signing of DA form.
- (cc) 18/02/2010 FPA Board advised FPA has received request to sign DA form.
- (dd) 22/02/2010 JPPL writes to Minister for Transport requesting DA form be signed.
- (ee) 24/02/2010 GRA and JPPL meet FPA (CEO) requesting DA form be signed. CEO advises has never received DA papers from Minister O'Brien.
- (ff) 09/03/2010 GRA writes to FPA (Chris Leatt-Hayter) modifying original DA request – now limited to Stage 1- Reclamation Works. Enclosing new

Form 1 and request for signature.

- (gg) 19/03/2010 Greg Rowe and Associates request for application form endorsement presented to FPA Board.
- (hh) 19/03/2010 FPA Board advised FPA has received request to sign DA form.
- (ii) 23/03/2010 Chris Leatt-Hayter, Fremantle Port Authority advises Greg Rowe and Associates (Mr Greg Rowe) that FPA Board has deferred consideration of application form endorsement request. Chris Leatt-Hayter advises that next consideration by Board not yet determined, i.e. no date set.
- (jj) 20/04/2010 Response from Chris Leatt-Hayter requesting that JPPL agree to ten conditions before Fremantle Ports would sign the Form 1 Development Application.
- (kk) 02/05/2010 Letter sent in response by Chairman requesting amendments to Chris Leatt-Hayter.
- (ll) 14/05/2010 Email from Chairman to Chris Leatt-Hayter as a follow-up.
- (mm) 14/05/2010 Email to Chairman from Chris Leatt-Hayter saying he would call “early next week” to discuss.
- (nn) 21/05/2010 Letter from Chris Leatt-Hayter with revised ten conditions (revisions as requested by Chairman JPPL) and advice that FPA will only endorse Form 1 on basis of various undertakings.
- (oo) 25/05/2010 JPPL agrees and endorses undertakings.
- (pp) 25/05/2010 Letter from Chairman to Chris Leatt-Hayter countersigning the revised ten conditions and seeking urgent provision of the “indemnity” agreement;

- (qq) 09/06/2010 Phone call to JPPL Chairman from Christ Leatt-Hayter promising a response “within a day or so”.
- (rr) 18/06/2010 Proposed Indemnity Agreement emailed to Chairman JPPL.
- (ss) 13/07/2010 JPPL returned signed Deed of Indemnity to FPA.
- (tt) 16/07/2010 FPA endorses Form 1
- (uu) 20/08/2010 GRA lodges Development Application with WAPC
- (vv) 10/09/2010 WAPC requests further information, but advises application will be referred to other agencies and not held pending information.
- (ww) 29/9/2010 WAPC advised application will be referred to other Government Agencies
- (xx) 12/10/2010 GRA meets WAPC officers. Further information requested. No response by any referral agencies at this time. Meeting convened to discuss 10/9/2010 request for further information
- (yy) 22/10/2010 GRA lodges further information addressing queries of 10/9/010 and 12/10/2010.
- (zz) 26/10/2010 “Deemed Refusal” Right of Appeal available by efflux of 60 days and WAPC failure to determine application.
- (aaa) 01/11/2010 GRA lodges Application for Review (Appeal) with SAT.
- (bbb) 08/11/2010 WAPC advised GRA no responses received from Government Agencies on first or second referrals.
- (ccc) 09/11/2010 GRA requests WAPC and JPPL agree to avoid Directions Hearing and proceed direct to Mediation. No reply from WAPC/SSO.

- (ddd) 19/11/2010 GRA/WAPC (SSO) attend SAT Directions Hearing. SAT directs WAPC to consider this matter at WAPC meeting of 25/1/2011. SSO advised SAT WAPC could not meet any earlier date. New Directions Hearing date set for 04/02/2011.
- (eee) 16/12/2010 Town of Kwinana requests additional information.
- (fff) 20/12/2010 JPPL replies with information to TOK
- (ggg) 01/02/2011 WAPC advises SAT Commission refuses application:
 - (a) A decision is premature.....insufficient information for WAPC/relevant State agencies to assess.....
 - (b) The application does not demonstrate.....the development complies.....with requirements.....of Government agencies.
- (hhh) 04/02/2011 HH attend SAT Directions. SAT orders WAPC to provide list of all information it requires by 18/02/2011. Mediation conference ordered for 02/03/11.
- (iii) 18/02/2011 WAPC (SSO) provides schedule of required information (nine [9] items).
- (jjj) 25/02/2011 JPPL (GRA) responds to SSO with responses to 18/2/11 schedule (nine [9] items).
- (kkk) 02/03/2011 Mediation Conference. Three [3] items immediately confirmed satisfied. Discussion confirmed 5 further items resolved. One [1] item (finished fill level) remains for further advices. Mediation adjourned to further Mediation on 29 March 2011.
- (lll) 09/03/2011 JPPL provides WAPC (SSO) with advice on nominated fill level.
- (mmm) 18/03/2011 WAPC (SSO) provides draft

- conditions of approval – 3 conditions :
- (c) Traffic and access plan prior to commencement.
 - (d) Stabilisation of fill.
 - (e) Level of fill to the satisfaction of WAPC on advice from DOT.
- (nnn) 25/03/2011 JPPL (GRA) responds to draft conditions – agreeing and proposing conditions be ratified by WAPC.
- (ooo) 29/03/2011 Mediation Conference. SSO advises JPPL, WAPC cannot consider conditions for 8 weeks. JPPL objects. SAT directs WAPC to consider at its meeting of 10/5/11. SAT adjourned to Directions Hearing 12/5/11.
- (ppp) 11/05/2011 WAPC advises JPPL (GRA) it has approved application with three [3] conditions. Conditions (a) and (b) as above. Condition (c) varies and requires fill to be to satisfaction of DOT.
- (qqq) 12/05/2011 SAT Mediation adjourned to 20/5/2011.
- (rrr) 13/05/2011 HH writes to SSO objecting to wording of Condition 3.
- (sss) 17/05/2011 SSO advises, WAPC is prepared to enter into a Consent Order varying Condition 3, to be to satisfaction of WAPC, on advice from DOT.
- (sss) 20/05/2011 SAT agrees to Minute of Consent. Appeal at an end. DA in place.

LANDCORP LAND APPROVAL

89. Landcorp is and was at all material times the registered proprietor of Kwinana Lots 54, 55 and part Cockburn Sound Location 1864 (“**the Landcorp Land**”), situated at James Point.

90. The Plaintiff required the Landcorp Land to be:

- (a) made available to it (by sale, or lease for the duration of the Port Lease) for use in the Port; and
 - (b) made available to it in the design process, to undertake geotechnical investigations.
91. The Second Defendant initially approved on 20 December 2000 the sale of the Landcorp Land to the Plaintiff for the purpose of facilitating the development of the Port.
92. The Second Defendant subsequently failed or refused to progress any further negotiations for sale or lease to the Plaintiff of the Landcorp Land, despite discussions between Bryn Martin and John Peraldini on behalf of the Plaintiff and Peter Crook of Landcorp on behalf of the Second Defendant on various occasions during 2001, in which the Plaintiff repeatedly requested a response from the Second Defendant to its offer to acquire the Landcorp Land.
93. The Plaintiff did not receive any substantive response from the Second Defendant until, by letter dated 24 September 2003, Landcorp on behalf of the Second Defendant informed the Plaintiff that the Second Defendant had resolved not to approve the sale of the Landcorp Land to the Plaintiff for the purposes of the Port.
94. Mike Williams of the Department advised the Plaintiff on 4 September and 22 September 2003 to undertake geotechnical investigation work in both the Landcorp Land and the waterways reservation. Unless access was afforded to the Plaintiff for both areas, the site investigation could not properly be completed.
95. The Plaintiff by letters dated 1 October 2003 to the FPA and to Landcorp provided a proposed work program and requested access to areas over which they had control for the purpose of carrying out geotechnical investigation work.
96. By letter dated 6 October 2003, Landcorp refused permission for the Plaintiff to undertake geotechnical investigations over the Landcorp Land, because the Second Defendant had refused to permit the sale of the Landcorp Land by Landcorp to the Plaintiff.
97. By letter dated 28 October 2003, the FPA requested a plan showing proposed drilling barge locations and the planned drilling program and requested confirmation that the works had been approved by the Department of Environment.

98. The information was provided by the Plaintiff in or about November 2003, but the FPA's conditional approval in or about December 2003 was rendered futile by the refusal of Landcorp pleaded in paragraph 96 above,
99. By letter from Hotchkin Hanly on behalf of the Plaintiff to the First Defendant and the Department, dated 6 November 2003, the Plaintiff:
- (a) informed the First Defendant of the response from Landcorp refusing access;
 - (b) advised that the purpose of ascertaining site conditions was for the proper design of the Port to avoid the risk of premature failure if the design was inadequate to provide a safe and secure structure in light of the site conditions in the area; and
 - (c) referred to clause 28 of the Agreement and sought the consent of the First Defendant (or Second Defendant, as the Minister acted in both capacities) for approval to access the site to undertake geotechnical investigations.
100. The First Defendant and Second Defendant responded by letter dated 23 December 2003, confirming the refusal of access to the Landcorp Land.
101. The Plaintiff instituted proceedings against the Defendants in the Supreme Court of Western Australia by CIV 2529 of 2003 seeking orders for the sale of the Landcorp Land and for access to it, which proceedings remain pending.

OTHER DELAY MATTERS

102. Although the Plaintiff had satisfied the Conditions Precedent to the Agreement by 25 January 2001, the First Defendant failed or refused to provide the Plaintiff with notice of the Commencement Date as required by clause 3.1 of the Agreement until after the Plaintiff demanded the First Defendant issue it by letter from the Plaintiff's solicitors, Corrs Chambers Westgarth, dated 1 June 2001.
103. Despite repeated attempts by Bryn Martin on behalf of the Plaintiff to speak to officers of the Department to arrange meetings to discuss a cooperative approach to planning and developing the Port from January 2001, the only response from officers of the Department, including the Director of Maritime, Patrick Dick, was that the Government was "examining the terms and

conditions” of the Agreement, such that by letter dated 17 May 2001, the Plaintiff expressed its concern to the Department at the lack of cooperation.

104. The apparent reason for the Government “examining the terms and conditions” of the Agreement and thereby delaying the progress of planning for the Port, was that the Government changed at state elections in early 2001, and the new Minister for Transport, Ms Alannah MacTiernan, wished to find “a way out” of the Agreement on the part of the Government at the time, which purpose was communicated to the Mayor of Kwinana by an advisor of the First Defendant (Mr Harris).
105. By the letter of 17 May 2001, the Plaintiff raised its concern with the Department on behalf of the First Defendant that Bryn Martin had been unsuccessful in three previous attempts to arrange an appointment to discuss the project, and received no response at all from the Government to a request for a meeting.
106. The First Defendant did not provide notice to the Plaintiff pursuant to clause 3.1 of the Agreement until 26 September 2001, eight months after it had been informed that the Conditions Precedent had been satisfied by the Plaintiff, and almost three months after the Plaintiff’s lawyers had demanded such a notice, that the Commencement Date for the Agreement was 26 January 2001.
107. The First Defendant did not respond to the letter of the Plaintiff dated 17 May 2001, expressing concern about the lack of a response from the Government in progressing the development of the Port until a letter from David Hatt, Chief of Staff of the First Defendant, dated 9 October 2001, almost five months later, in which the First Defendant apologised for the delay, expressed “serious concerns” about the Agreement but accepted that the First Defendant was “obliged to let the contract operate”.
108. By letters dated 11 October 2001 addressed to Mr M Harris of the Department for Planning and Infrastructure and 16 October 2001 to the First Defendant, the Plaintiff requested advice as to who was the proper point of contact within the Department of Planning and Infrastructure in order to address issues raised during the environmental approval process, which letter received no reply.

109. On 27 October 2001, Bryn Martin on behalf of the Plaintiff was informed by Mr D Brewsher on behalf of the First Defendant that he “would look into the matter” and call Mr Martin back, which did not occur.
110. Mr Martin rang the office of the First Defendant on 17 December 2001, and was informed that a draft response was “ready to go”.
111. When the response had still not been received by the Plaintiff by 31 December 2001, the Plaintiff expressed its concern to the First Defendant at the delay in identifying a liaison officer to assist the Plaintiff in planning and developing the Port, by letter to the First Defendant dated 3 January 2002, and requested an urgent reply to the letters sent in October 2001.
112. By letter dated 9 January 2002, the First Defendant:
- (a) informed the Plaintiff that the liaison officer was Mr Paul Joyce; and
 - (b) apologised for the delay in the response.
113. The Plaintiff sought information from the First Defendant on what it considered to be “acceptable road and rail improvements” in order for it to be delivered in a timely manner for the operation of the Port, by letter dated 10 March 2005, at a meeting with Paul Frewer of the WAPC (also co-chair of the Outer Harbour Review steering committee) on 13 June 2005, and by letter dated 25 June 2005.
114. The only response from the Defendant was a letter from the Director General of the Department dated 27 July 2005:
- (a) apologising for the delay in responding;
 - (b) confirming that the State Government acknowledged its obligations as to road and rail improvements for Stage 1; and
 - (c) advising that no decision would be made regarding that until completion of the Outer Harbour Review.
115. After further correspondence between the parties as to road and rail improvements, the Plaintiff by letter dated 2 February 2006 to the Department:
- (a) queried whether the original road and rail arrangements specified in the Agreement needed revision in light of the delays experienced in procuring the necessary approvals; and

- (b) sought a meeting to discuss those issues, and to resolve them as part of the planning process.
116. The meeting did not take place and the issues were not resolved.
117. The Plaintiff submitted plans to the Department under cover of a letter dated 5 September 2005, seeking consent to a variation of the stages shown in the Concept Design, according to clause 4.3 of the Agreement.
118. The Department did not respond to that request until by letter dated 10 February 2006, some five months later, raising a “preliminary issue” as to the difference in the footprint comprised in the new plans from the original Concept Design.
119. By letter dated 15 February 2006 from the Plaintiff to the Department, the Plaintiff:
- (a) expressed its “dismay” at the lack of attention accorded the project by the Defendants;
 - (b) requested the Defendants assist the Plaintiff in having the Container Facilities as part of the Stage 2 port development delivered at the earliest possible date; and
 - (c) accepted that there was a design variation requiring approval, but emphasised that the change was a realignment of reclamation boundaries to better utilise the site, provide improved segregation from other neighbouring activities and address environmental outcomes.
120. The Department did not respond to that correspondence until 18 July 2006, some four months later, setting out a formal process for the Plaintiff to pursue.
121. By letter dated 21 August 2006 from the Plaintiff to the Department, the Plaintiff informed the Defendants that the question of “acceptable road and rail improvements”:
- (a) had never received proper attention from the Defendants;
 - (b) was likely to require resumption of privately owned land;
 - (c) was a fundamental requirement for the commencement of construction and the ultimate operation of the Port; and

- (d) required the Defendant's attention.
122. The Plaintiff received no response to that letter.
123. The Defendants have still failed or refused to identify adequately or at all what road and rail access arrangements would now be appropriate for the Defendants to provide, whether in light of the outcome of the Outer Harbour Review or the Fremantle Ports Optimum Planning Group report ("**FPOPG report**"), or at all.
124. By letters from Hotchkin Hanly on behalf of the Plaintiff to the Premier dated 6 March 2007 (which received no reply) and 30 March 2007, the Plaintiff:
- (a) expressed its concern at the history of unco-operative treatment it had received at the hands of the Defendants for the previous seven years, as pleaded above; and
 - (b) requested the Defendants act more cooperatively under the Agreement to facilitate development of the Port.
125. The Premier replied by letter dated 9 July 2007, approximately four months after the first letter, apologising for the delay in his reply and declining the requested meeting to discuss the Plaintiff's concerns.
126. By letter dated 18 December 2006 from the Plaintiff to the Department, and by further letter dated 1 May 2007 from the Plaintiff to the Department, the Plaintiff sought an extension of time for completion of Stage 1 to 31 December 2009.
127. The Department, by letter dated 7 November 2007, over ten months after the first request, consented to the request for an extension of time (notwithstanding that the date by which Stage 1 was meant to be completed had already expired).
128. In the same letter, the Department advised that:
- (a) the road extension for Stage 1 would only be provided within a reasonable period after all statutory approvals for Stage 1 had been obtained, unless the parties agreed to some other option;
 - (b) the outcome of the Outer Harbour Review would impact on possible arrangements for road and rail access to the Port; and
 - (c) further discussions about road and rail access should only take place after the Outer Harbour Review had been determined.

129. By letters dated 20 December 2007, 23 January 2008 and 1 February 2008, BGC as the major shareholder in the Plaintiff wrote to the Premier:
- (a) expressing its concerns at the unco-operative approach of the Defendants;
 - (b) requesting a meeting to discuss BGC's concerns on behalf of the Plaintiff; and
 - (c) attempted to persuade the Government to adopt a more co-operative approach.
130. By letter dated 4 February 2008 to BGC, the Premier apologised for the delay in responding and advised that the Premier would reply "as soon as possible". No further reply was received.
131. By reason of the delays experienced by the Plaintiff as pleaded above, the Plaintiff:
- (a) resolved to initiate its own strategic review internally of the feasibility of the Port and whether any changes could be effected to procure more co-operation from the Defendants;
 - (b) appointed Dr Chris Whitaker, a former Director General of the Department of Transport in Western Australia and former Managing Director of the Melbourne Port Corporation as Chairman of the Board of the Plaintiff; and
 - (c) appointed Ian Hutton, Former Chief Executive Officer of the Port of Port Hedland, Chief Executive Officer of the Plaintiff.
132. Messrs Whitaker and Hutton met with the Treasurer of the State, Mr Eric Ripper, on 28 May 2008, for the purpose of persuading him on behalf of the Third Defendant that there was significant merit, in the public interest, in facilitating the Plaintiff's development of both Stage 1 and Stage 2 of the Port.
133. The Plaintiff resolved at a meeting on 17 June 2008 of the Board of Directors to proceed with an Environmental Scoping Document for Stage 2 (to begin planning for the Container Facilities) and apply to the Department and the First Defendant for an extension of the date by which Stage 1 should be completed.
134. The Plaintiff:

- (a) commissioned further studies including wave climate modelling;
 - (b) made a submission to the Council of Australian Government's review of Western Australian Ports of 5 August 2008;
 - (c) commissioned a report from ACIL Tasman on the comparative economic benefit of the Port over any Outer Harbour Review option still under consideration by the Government, some four years after commencing the Outer Harbour Review.
135. In July 2009, the Plaintiff retained a financial consultant, Next Level Corporate Pty Ltd, to advise and procure investors and operators for the Port, but after preparing an Information Memorandum for expressions of interest, the Plaintiff was unable to proceed further from mid-2010 because of the financial and operational uncertainty caused by the conduct of the Defendants pleaded herein.

THE CONTAINER FACILITY DELAY

136. At a meeting held between the Honourable Colin Barnett, the Premier of the Third Defendant, and Ms Deidre Willmott on behalf of the Defendants and Len Buckeridge and Michael Hotchkin (solicitor for the Plaintiff) on behalf of the Plaintiff, at the home of Len Buckeridge, the Premier on behalf of the Third Defendant informed Messrs Buckeridge and Hotchkin on behalf of the Plaintiff that:
- (a) he did not regard the Agreement as providing for any Stages at all;
 - (b) he regarded the Container Facility as a completely different project, not contemplated by the Agreement; and
 - (c) the Government (the Defendants) would only agree to the development of a bulk port by the Plaintiff;
137. At the meeting referred to in paragraph 136 above, Michael Hotchkin on behalf of the Plaintiff informed the Premier on behalf of the Defendants that:
- (a) the Agreement had contemplated a Container Facility;
 - (b) the Plaintiff's shareholders considered that the bulk port as a stand-alone project was not commercially feasible;

- (c) the Container Facility was required to enable the entire Port to be commercially feasible over time; and
 - (d) that if the Agreement was to be re-negotiated to sever the Container Facility contractual right from the Agreement, then the Government would need to agree to commercial conditions which would enable the bulk port to be sufficiently profitable to be feasible as a stand-alone project.
138. The Premier orally agreed with the Plaintiff that further negotiations to vary the Agreement should be conducted with that in mind.
139. At the same meeting, in answer to a query from Michael Hotchkin on behalf of the Plaintiff as to whether any such commercial conditions would include the sale of the Landcorp Land to the Plaintiff and whether any Government Policy precluded the sale of such land, in order to make any such bulk port facility as a stand-alone project bankable as a feasible project, the Premier informed Messrs Buckeridge and Hotchkin that his Government did not have any policy which precluded the sale of the Landcorp Land to the Plaintiff.
140. On or about October 2010, the Premier on behalf of the Defendants stated to a journalist employed at the Australian Financial Review, Peter Kerr, which statement was published in the Australian Financial Review on 12 October 2010 that: “There are two proposed projects that Mr Buckeridge has. One is for a bulk project port and I am strongly supportive of that. His other project is a container port, and what I have said to Len Buckeridge is that the Government will treat those two proposals as separate and distinct proposals – he cannot link one to the other” and: “A commitment or an agreement about the bulk cargo port does not imply to me any commitment for rights to have the container trade of Fremantle and therefore of the State. I am very clear on this. I am not about to get the State in a compromised position. That Agreement such as it was, was a long time ago. What has happened for the last ten years? Nothing much”.
141. At a meeting on 16 November 2009 in Dumas House, West Perth, between Len Buckeridge, Greg Rowe and Michael Hotchkin on behalf of the Plaintiff with the First and Second Defendants and their respective Chiefs of Staff, neither the First nor Second Defendants, nor their Chiefs of Staff stated, in answer to a

question put to them on behalf of the Plaintiff, that the government accepted the Plaintiff's right to develop a Container Facility under the Agreement contrary to the view expressed by the Premier pleaded above.

142. Between the date of the meeting held on 4 April 2009 and the meeting held on 16 November 2009, the Defendants failed or refused to inform the Plaintiff as to whether the Defendants resiled from the statements made by the Premier to the Plaintiff on 4 April 2009.
143. In the Legislative Assembly of the State Parliament on 18 November 2009, the Premier stated to Parliament that "there was no Stage 1 and Stage 2", in answer to a statement from the Honourable Alannah MacTiernan MLA, to the effect that the Defendants were encouraging Mr Buckeridge's "interests" to proceed with plans for development of a "container facility in Kwinana".
144. In the Legislative Assembly of the State Parliament on 19 November 2009, the Premier referred to meeting with "representatives of James Point", a reference to the meeting pleaded in paragraph 136 above, and stated: "I have made it quite clear that we will deal with the proposal for a bulk products/bulk cargo jetty and we will treat that as a discrete stand-alone project. If it proceeds, it implies no commitment of the State towards a container port", and: "The approach of this Government in dealing with this project is that we will deal on a discrete basis with its proposal for a bulk products jetty and facility to James Point. That is all we are dealing with. Therefore to this Government and to the proponents, there is no Stage 1 and no Stage 2. There is one discrete project: a bulk products port".
145. By letter from Hotchkin Hanly on behalf of the Plaintiff to the First Defendant dated 3 December 2009, the Plaintiff expressed its concern at the lack of any further response from the Minister, as he had promised at the meeting on 16 November 2009, and sought an explanation as to why the Defendants regarded the Stage 2 development (the Container Facility) as something the Government would not commit to.
146. At no time between that date and the date of the issue of this Writ has the Government responded to that query by providing any such explanation.
147. By letter dated 20 January 2010, addressed to the Premier, the Plaintiff;

- (a) referred to the statements made by the Premier in Parliament as described in paragraphs 143 and 144 above;
 - (b) asserted that the Agreement did not exclude the Container Facility as contended for by the Premier; and
 - (c) sought his assurance that the Government would not maintain that view, or it would be regarded as a breach of the Agreement.
148. The Plaintiff never received any such assurance from the Premier, nor any substantive response to that request from any of the Defendants.
149. The Defendants' express refusal to acknowledge, or their rejection of, the Plaintiff's contractual right to develop a Container Facility under the Agreement, hindered or caused delays to the Plaintiff's ability to commence operations, in that:
- (a) until that issue was resolved, the commercial viability of the Port was unclear and hence the Plaintiff's dealings with third parties such as prospective customers, investors or operators, required for Port operations to commence, could not be advanced; and
 - (b) the Plaintiff could not reasonably allocate a substantial investment to the cost of a detailed design and construction of Stage 1 under the Agreement until that issue (the Container Facilities issue) had been resolved, which issue remains unresolved by reason of the Defendant's refusal since at least 4 April 2009 to acknowledge the Plaintiff's contractual right to operate Container Facilities at the Port, and to properly ensure the Plaintiff, in the face of such statements, would be free to develop the Port to meet whatever market demand there was for "all commodities" as a "multi-function Port", as contemplated by the Recitals to the Agreement.
150. By reason of the matters pleaded in paragraphs 19 to 149 hereof:
- (a) the Plaintiff used its best endeavours to complete Stage 1 of the Port in the time required by the Agreement;
 - (b) an extension of the date for completion of Stage 1 of the Port under the Agreement was required in order to enable the statutory approval

processes (namely, planning and environmental approvals for Stage 1 of the Port) to conclude; and

- (c) it would be, and is, unreasonable for the First Defendant to withhold his consent to an extension of time for such period as should reasonably enable the Plaintiff to complete Stage 1 of the Port.

151. On a proper construction of the Agreement:

- (a) neither party is entitled to take advantage of its own wrong, including relying on clause 5.8 of the Agreement, in circumstances where that party has committed breaches of contract which have caused delay in the performance of the Agreement; and
- (b) clause 5.8 of the Agreement cannot be relied on by a party whose default has caused the event referred to in that clause to occur (namely, the failure to complete Stage 1 of the Port within 5 years of the Commencement Date, or such further date as may have been extended by the consent of the Department and the First Defendant) under clause 4.3.2(b) of the Agreement.

152. The conduct of the Defendants and various Government Agencies, as pleaded in paragraphs 19 to 148 hereof, has delayed the Plaintiff in its performance of the Agreement, such that the Defendants cannot validly assert that the Agreement is terminable by reason of the fact that Stage 1 of the Port had not been completed by 30 June 2011.

153. The conduct of the Defendants pleaded in paragraphs 19 to 148 hereof caused the future of the Port, both as to its operability and feasibility, to be of such uncertainty as to:

- (a) preclude the prudent investment of funds by the Plaintiff as were required to meet all of the conditions of the environmental approval, and to undertake final design work, requiring detailed further studies and plans, in the order of approximately \$15,000,000; and
- (b) preclude the ability of the Plaintiff to make any representations to prospective customers of the Port or investors in the Port as to timing or costs of commencement of operations,

in order to be developed and operational at all prior to 30 June 2011, thereby hindering and delaying the completion of Stage 1 of the Port.

154. The on-going conduct of the Defendants pleaded herein continues to preclude the Plaintiff from being reasonably able to make any representations to any prospective customer of, or investor in, the Port until the Plaintiff's rights under the Agreement are declared as sought in these proceedings and the Defendants properly co-operate with the Plaintiff as required under the Agreement, thereby further hindering and delaying completion of Stage 1.
155. By reason of the matters in pleaded in paragraphs 19 to 154 hereof, and by virtue of the principle of law that no contracting party can take advantage of their own wrong, the conduct of the Defendants and other Government Agencies pleaded herein is responsible for the Plaintiff's inability to complete Stage 1 by 30 June 2011, and unless the Defendants properly perform their obligations under the Agreement, such delays will continue to be incurred, despite the Plaintiff's best endeavours, for an indefinite period.
156. Further, the conduct of the Defendants pleaded in paragraphs 19 to 148 hereof constitutes a breach or breaches of the Agreement, in:
- (a) failing to cooperate with the Plaintiff by variously failing to respond promptly or at all to the Plaintiff's requests for information or assistance regarding issues arising in respect of the reasonable and proper planning of the Port; and
 - (b) failing to facilitate Government Agencies granting approvals, by obstructing or hindering statutory approval processes, in:
 - (i) failing to cause its Ministers or servants to act or to otherwise respond to the Plaintiff's correspondence, in a timely manner on matters relevant to the statutory approval processes as pleaded herein; and
 - (ii) deferring relevant statutory approvals processes until completion of the Outer Harbour Review, and further deferring statutory approval processes until after receipt of the FPOPG Report.

157. Further, by reason of:

- (a) the matters pleaded in paragraphs 136 to 149 hereof; and
- (b) further or alternatively, the First Defendant's wrongful refusal to consent to an extension of the date for completion of Stage 1 pleaded herein,

the Defendants have expressed their intention of not performing their obligations under the Agreement, thereby repudiating the Agreement.

- 158. The repudiatory breaches of the Defendants pleaded herein have caused the Plaintiff to suffer loss, in that they have prevented the Plaintiff from being able to progress the planning and completion of Stage 1 of the Port, for the reasons pleaded in paragraphs 149 and 153 hereof, depriving the Plaintiff of profiting during that period.
- 159. The Plaintiff has not accepted the Defendants' repudiatory breaches of the Agreement.

REPRESENTATIONS

- 160. At a meeting between representatives of the Plaintiff and Minister Simon O'Brien (as he then was) in November 2008 the First Defendant on behalf of the Third Defendant was advised by the Plaintiff that the Port could be operational two years after the MRS Amendment had been passed, assuming that the Government acted expeditiously on all required approval processes.
- 161. The MRS Amendment was not effective until 21 August 2009, which meant that, if the Government acted expeditiously on all approvals, the Port could become operative by about 21 August 2011, almost two months after the extended date of 30 June 2011. The Minister expressed no concern to the Plaintiff at the time-table of two years after the MRS Amendment.
- 162. The same estimate as that pleaded in paragraph 160 was given by the Plaintiff to the Premier at a meeting with him in 2008, and no objection was then raised by the Premier.
- 163. The same estimate as that pleaded in paragraph 160 was given to Ministers Grylls, Day and Buswell on behalf of the Third Defendant in briefing packages sent to them in January 2009, with no objection raised by any of them.

164. In 2009, the then Minister for the Environment, Minister Faragher, extended the period of the validity of the Port's environmental approval from 17 November 2009 until 17 November 2012, which extension would not have been granted if the Defendants expected or required Stage 1 to be completed by no later than 30 June 2011.
165. In a meeting with Minister O'Brien (the Minister for Transport) in March 2009, he was shown a Gantt chart by the Plaintiff, providing for operations to commence in late 2011 (on the expressed assumption that the Government acted with more expedition than it had to that point in time). The Minister on behalf of the Third Defendant informed the Plaintiff's representatives at the meeting that he was "looking forward to the berthing of the first ship in late 2011".
166. In February 2009, Mike Williams of the Department contacted Ian Hutton on behalf of the Plaintiff to advise that the previously extended date to 30 June 2009 was shortly due to expire, and suggested to Ian Hutton on behalf of the Plaintiff that the Plaintiff submit a request for an extension of time for about a further two years, during which period the effective date of the MRS Amendment would become clear and, so it was then expected, the parties would be in a better position to estimate a more realistic Commercial Operations Date for Stage 1. The Plaintiff therefore submitted a formal request by letter dated 9 February 2009 for an extension of time of two years to 30 June 2011, which was granted by the Department by letter dated 16 February 2009.
167. In a letter to the Premier dated July 2009, the Plaintiff expressed its desire to proceed expeditiously, and to work collaboratively with the Government, referring to the need to spend approximately \$10,000,000 on a pre-construction work program, once the uncertainty over the Government's position had been clarified.
168. Officers of the Department on behalf of the Third Defendant informed Ian Hutton on behalf of the Plaintiff in or about July 2009 that the Defendants did not wish to respond substantively to the "without prejudice" letter from Hotchkin Hanly dated 10 June 2009 regarding potential changes to the Agreement until they had received a report from the FPOPG report, which report was not received by the State Government until late 2009, and which

delay deferred the Plaintiff's ability to reasonably expend substantial sums on further design work until at least after that date. The Third Defendant ought reasonably to have known by the end of 2009 that, with such uncertainty, there was no reasonable prospect of the Plaintiff being able to commence operations by 30 June 2011.

169. By letter dated 24 March 2010 from the Premier on behalf of the Third Defendant to Len Buckeridge on behalf of the Plaintiff, the Third Defendant advised the Plaintiff that any further decision on the Port would be made by reference to the recommendations of the FPOPG, which "the Government will soon be in a position to assess", thereby implying that the Third Defendant had still not formed any view as to either negotiations for varying the Agreement or reversing its previously stated position that it would not permit the Plaintiff to develop and operate a Container Facility.
170. It could not reasonably be supposed that, given the communications pleaded in paragraphs 153 to 169 herein, the Third Defendant would have expected that the Plaintiff would be in a position to commence operations within just 15 months, without any development approval then in place, and when the FPOPG report had not even been assessed by any of the Defendants.
171. In a meeting in March 2010 between Eacham Curry, the Chief of Staff of the First Defendant, and representatives of the Plaintiff, the First Defendant was advised by the Plaintiff that if the Defendants acted more expeditiously in addressing the uncertainty created by the Defendants' position on the Container Facility and in processing required approvals, the Port could be operational in December 2012. Neither Mr Curry nor the First Defendant on behalf of the Third Defendant informed the Plaintiff that such a date would be unacceptable, given the then existing completion date of 30 June 2011.
172. In the Legislative Assembly of the State Parliament on 22 June 2010, Murray Cowper, the then Parliamentary Secretary representing the First Defendant, informed Parliament that the Plaintiff expected Stage 1 to be operational by the end of 2012, and stated other expectations as to how the Port would operate, without any objection or qualification expressed about that estimate, thereby implying that the commencement of operations by that date, some 18 months after 30 June 2011, was not unacceptable to the Defendants.

173. By letter dated 21 September 2010 from the Plaintiff to the First Defendant, the Defendants were advised that, due to the need for further programming and planning, construction of the Port would commence 12 months after the outstanding disputed issue over the Container Facility with the Defendants would be resolved. As construction of Stage 1 would take more than 12 months, the Commercial Operations of the Port could not commence until late 2012 at the earliest, yet the Third Defendant made no objection.
174. In a telephone call between Dr Christopher Whitaker on behalf of the Plaintiff and Minister O'Brien on behalf of the Third Defendant on 29 September 2010, the Plaintiff informed the Third Defendant that, due to the delays experienced at the hands of the Defendants by the Plaintiff, the first ship would not arrive until 2013, more than 18 months after the current extended date. The Minister raised no objection to that estimated date by which the operation of the Port would commence and did not identify any delay caused by the Plaintiff.
175. In an article appearing in a publication entitled "Farm Weekly", published on 17 September 2010, the Honourable Simon O'Brien in his capacity as the First Defendant on behalf of the Third Defendant was reported as informing attendees at the previous Saturday's Livestock and Rural Transport Association of WA conference that the Plaintiff was responsible for delays in developing the Port, and that, contrary to the letter from the Premier dated 24 March 2010, pleaded in paragraph 169 above, the FPOPG report had no bearing on the Plaintiff's capacity to progress development of the Port.
176. By letter dated 21 September 2010 from the Plaintiff to the First Defendant, the Plaintiff:
- (a) expressed its "astonishment" and "dismay" at the Minister's public comments at the conference;
 - (b) itemised a series of meetings held in the previous months to that publication where the Plaintiff had been unable to progress any discussions directed to obtaining certainty about the commercial viability of the Port;

- (c) specified the instances in which representatives of the Third Defendant had made it clear to the Plaintiff that the future of the Port depended upon the Defendants' assessment of the FPOPG report;
- (d) reiterated that it was "keen to advance" the matter;
- (e) asked the Government to "accelerate the resolution of a range of matters" identified in its letter to the Premier dated 31 March 2009; and
- (f) the Plaintiff repeated its advice that it was poised to spend "\$15,000,000 on final studies and remaining approvals over a 12 month period, following which construction could commence".

177. As at the date of that letter, therefore, the earliest projections, assuming the Defendants "accelerated" resolution of outstanding issues, was for completion of Stage 1 at the end of September 2012, at the earliest.

178. Minister O'Brien on behalf of the Third Defendant telephoned Dr Chris Whitaker on behalf of the Plaintiff on 29 September 2010, during which telephone conversation he informed the Plaintiff that he wanted to resolve all outstanding issues before Christmas 2010, so that "first ships" could enter the Port in 2012.

179. Dr Whitaker on behalf of the Plaintiff informed the Minister on behalf of the Third Defendant that:

- (a) there were a number of environmental conditions which needed to be satisfied before construction could commence, and that construction would take about 15 months thereafter before the Port could be operational, so that, even if agreement on the outstanding issues could be resolved by Christmas, the first ships would not arrive until 2013; and
- (b) nothing substantive could proceed until agreement had been reached with the Defendants on key issues such as the road and rail linkages, the Landcorp Land and the question of the Container Facilities.

180. The Minister on behalf of the Third Defendant informed Dr Whitaker on behalf of the Plaintiff that the parties must meet in October 2010, to try and reach

agreement on outstanding issues in order for the project to proceed as advised by Dr Whitaker.

181. By email dated 1 October 2010 from Carmel Critchley (the Executive Officer of the Director General of Transport) (the Department), the First Defendant on behalf of the Third Defendant requested a meeting with the Board of the Plaintiff on 1 November 2010, and by email from Dr Whitaker to Carmel Critchley of the same date, the Plaintiff informed the Third Defendant that the Plaintiff was hoping that such a meeting would be held before the middle of October 2010, rather than the start of November 2010, as the outstanding issues were unlikely to be resolved by Christmas if a meeting would not take place until November.
182. The meeting was then convened at an earlier time, as requested by the Plaintiff, on 18 October 2010, at which meeting Directors of the board of the Plaintiff raised a number of outstanding issues with the First Defendant, and the First Defendant on behalf of the Third Defendant undertook to respond to those issues substantively before 1 November 2010. The stated issues were:
- (a) the status of any changes to the Agreement, which remained unclear;
 - (b) whether the Defendants resiled from their refusal to agree to the Plaintiff developing a Container Facility; and
 - (c) whether the Defendants agreed to sell the Landcorp Land to the Plaintiff for the purpose of developing the Port.
183. Notwithstanding the promise made by the First Defendant at the meeting held on 18 October 2010, the Plaintiff received no substantive response from the First Defendant by 1 November 2010.
184. By reason of the matters pleaded in paragraph 178 to 183 hereof, the Third Defendant knew or ought to have known that the Plaintiff could not reasonably proceed with development of the Port by investing approximately \$15,000,000 in satisfying environmental conditions, and undertaking final design work, required for completion of Stage 1, until outstanding issues had been resolved, and that if operations were to commence in 2013, those issues had to be resolved by Christmas 2010.

185. The failure or refusal of the First Defendant on behalf of the Third Defendant to substantively respond to the matters raised at the meeting on 18 October 2010 by 1 November 2010, as had been promised, meant that there was no prospect of Stage 1 being completed by 30 June 2011, yet the First Defendant did not state at this meeting on 18 October 2010 with the board of the Plaintiff that he would regard the Agreement as terminated by 30 June 2011 if operations had not commenced, nor did he identify any conduct on the part of the Plaintiff which caused any delay in the completing Stage 1.
186. At a meeting in February 2011 with Rachel Turnseck, Chief of Staff to Minister Buswell, the new Minister for Transport, Chris Whitaker on behalf of the Plaintiff informed the Defendants that:
- (a) the previously intended Operations Date of December 2012 had been deferred because of the Defendants' failure to resolve the Plaintiff's investment uncertainty in light of the Defendants' view that the Plaintiff had no right under the Agreement to construct and operate a Container Facility;
 - (b) the Plaintiff would spend about \$15,000,000 over a 12 month period to finalise technical studies and obtain various final approvals; and
 - (c) the period of 12 months ("**the Estimate**") depended entirely upon the Government acting more expeditiously than it had to date in processing various approvals.
187. The estimate was repeated by Dr Chris Whitaker in a meeting with the First Defendant on behalf of the Third Defendant on 23 February 2011 and a further meeting on 23 May 2011, which would reasonably put the Defendants on notice that the Plaintiff required a further two and half years at least from 30 June 2011 by which to commence operations.
188. The First Defendant on behalf of the Third Defendant raised no objection at the estimate, or otherwise informed the Plaintiff that it was considered to be responsible for any delays.
189. By letter dated 27 May 2011, the Plaintiff gave the First Defendant on behalf of the Third Defendant formal Notice of Commencement of Construction as 2 January 2013, on the basis that its investment of approximately \$15,000,000 in

further studies would be made upon excision of the Port Area, so that the Plaintiff would be satisfied that further expenditure would not be wasted.

190. The First Defendant on behalf of the Third Defendant did not raise any objection to the estimate, nor did it inform the Plaintiff at any time until 2 September 2011, that it would not agree to an extension of the date for completing Stage 1 beyond 30 June 2011.
191. Since 30 June 2011, the Third Defendant has engaged in conduct affirming the continuation of the Agreement, in that:
- (a) on 12 July 2011, the Minister for the Environment, Minister Marmion, extended Environmental Approval for substantial commencement of the construction of the Port to 17 November 2014;
 - (b) on 14 July 2011, the Acting Director General of the Department sent the Plaintiff a letter seeking consultation regarding the development of a Regional Strategy from the perspective of the Plaintiff, which letter could only have been justified on the basis that the Plaintiff had a legitimate commercial interest in such a consultation by the continued operation of the Agreement;
 - (c) on 14 July 2011, representatives of the Plaintiff engaged in consultation with senior officers of the Department, at the request of the Department, regarding the proposed Regional Transport Strategy and its interface with the Metropolitan Transport Strategy; and
 - (d) on 22 July 2011, a senior officer of the Department sought CAD data on the Port from the Plaintiff, which request would not have been relevant but for the Agreement remaining on foot, and operations of the Port likely to commence under the terms of the Agreement.
192. By the statements and conduct (including by omission) pleaded from paragraphs 158 to 191 hereof, the Third Defendant, by its Ministers and officers, expressly or impliedly, represented to the Plaintiff that:
- (a) the Defendants did not consider that the conduct of the Plaintiff was the material cause of any delay in concluding the necessary statutory approvals processes to enable completion of Stage 1;

- (b) the Defendants did not have any intention at any material time up to 30 June 2011 of terminating the Agreement by reason of the fact that Stage 1 had not been completed by that date, or would not be completed by that date; and
- (c) if any circumstance arose by which that intention might change, such as the need to seek an extension of time for completion of Stage 1 under clause 4.3.2(b) of the Agreement, it would provide the Plaintiff with an opportunity, in good faith, to make a formal request before 30 June 2011 for an extension of time to a date by when completion of Stage 1 might reasonably be expected, and with sufficient time before that date to enable the First Defendant to afford the Plaintiff an opportunity to be heard on any question of delay which the First Defendant might regard as a basis for withholding its consent to any such extension of time:

(“**collectively, the Representations**”).

193. By reason of the Representations, the Plaintiff:

- (a) assumed that the First Defendant on behalf of the Third Defendant consented to, or would consent to, the extension of the date for completion of Stage 1 to a later date likely to be determined once the parties had resolved the apparent dispute over whether the Plaintiff did have a contractual right to construct, own and operate a Container Facility under the Agreement (collectively, “**the Assumptions**”);
- (b) assumed that if the Defendants had any genuine concern that the Plaintiff had in any respect been responsible for delays, the Plaintiff would have been properly informed about why it should be held responsible for such delays, and given an opportunity well before 30 June 2011 to address those concerns on the part of the Defendants; and
- (c) assumed that if the Defendants required a formal application for the extension of the completion date before 30 June 2011, it would have told the Plaintiff so, as it had in February 2009, when it agreed to an extension of the date to 30 June 2011;

194. In reliance upon the Assumptions and induced by the Representations, the Plaintiff acted to its detriment by not formally seeking in 2010 an extension of time of the date to complete Stage 1 beyond 30 June 2011, and the Defendants are thereby estopped from contending that the Agreement either terminated as at 30 June 2011, or is terminable at the option of the First Defendant by reason thereof.
195. By reason of matters pleaded herein, the Plaintiff is entitled to a declaration that:
- (a) the Plaintiff has not been responsible for any significant delays in commencing operations of the Port at any time since the date of the Agreement;
 - (b) the Plaintiff has used its best endeavours to complete Stage 1 in accordance with the Agreement;
 - (c) an extension of the date for completing Stage 1 is required to conclude statutory approval processes for completion of Stage 1;
 - (d) despite its best endeavours, the Plaintiff has been delayed in its ability to complete Stage 1 to date by the conduct of the Defendants and Government Agencies;
 - (e) the Plaintiff has a right under the Agreement to require the Defendants to facilitate approvals for the design, construction and operation of a Container Facility;
 - (f) the Defendants have engaged in repudiatory conduct to the extent that the Premier and other representatives of the Third Defendant have contended that the Plaintiff has no such contractual right;
 - (g) the Defendants cannot rely on paragraph 5.8 of the Agreement to assert that the Agreement has been terminated, or is terminable at the election of the Defendants; and
 - (h) the Defendants must consent to a further extension of the date to complete Stage 1 of the Port.
196. If the Defendants had performed their obligations under the Agreement to facilitate all required approvals and to co-operate with the Plaintiff to enable it

to commence operations within five years of the Commencement Date of the Agreement, the Plaintiff would have been able to:

- (a) complete Stage 1 of the Port by no later than early January 2006;
- (b) derive profits from those operations in the years following, particulars of which will be provided prior to trial;
- (c) commence and advance planning of Stage 2 of the Port, including the provision of Container Facilities, to commence operations of Stage 2 of the Port by the end of 2013, being a period by which it reasonably considered market demand would justify the provision of Container Facilities; and
- (d) be able to enjoy profit from the operations of Stage 2 of the Port, particulars of which would be provided prior to trial.

197. In the premises, the breaches of the Agreement by the Defendants particularised herein have caused the Plaintiff to suffer loss, being the loss of profits it would have enjoyed from January 2006, and the loss of use of money from that time until it commences operations of the Port, particulars whereof will be provided prior to trial.

AND THE PLAINTIFF CLAIMS:

1. A declaration that the Plaintiff has not been responsible for any significant delays in commencing operations of the Port at any time since the date of the Agreement.
2. The Plaintiff has used its best endeavours to complete Stage 1 in accordance with the Agreement;
3. An extension of the date for completing Stage 1 is required to conclude statutory approval processes for completion of Stage 1.
4. A declaration that the Plaintiff has been delayed in its ability to complete Stage 1 of the Port to date, by the conduct of the Defendants and several Government Agencies (as that term is defined in the Agreement).
5. A declaration that the Plaintiff has a right under the Agreement to require the Defendants to facilitate approvals for the design, construction and operation of a Container Facility as part of the Port.

6. A declaration that the Defendants have engaged in repudiatory conduct by the Premier and other representatives of the Third Defendant contending that the Plaintiff has no contractual right to require the Defendants to facilitate approvals for the design, construction operation of a Container Facility as part of the Port.
7. A declaration that the Agreement is not terminated or terminable at the election of the Defendants.
8. An order requiring the First Defendant on behalf of the Third Defendant to consent to an extension of the period within which the Plaintiff is to complete Stage 1 of the Port to 30 June 2015, or such later date as the Court thinks fit.
9. An order requiring the Defendants to promptly take steps pursuant to clause 7.1 of the Agreement to excise the Port Area, and grant a lease to the Plaintiff in the form annexed to the Agreement.
10. Such further or other orders as the Court shall consider fit for the proper disposition of the disputed issues in this matter.
11. Damages for breach of the Agreement.
12. Interest on such damages as may be awarded, at the rate of 6% per annum from the date of issue of the Writ to Judgment.
13. Costs.

M C HOTCHKIN