

# DEED OF NOVATION

**RIVERS REGIONAL COUNCIL  
(ABN 80 479 097 483)**

- and -

**RIVERS REGIONAL SUBSIDIARY**

- and -

**CITY OF ARMADALE, CITY OF GOSNELLS, CITY OF SOUTH PERTH, CITY OF  
MANDURAH, SHIRE OF MURRAY, SHIRE OF SERPENTINE – JARRAHDALÉ,  
CITY OF CANNING**

- and -

**KWINANA WTE PROJECT CO PTY LTD  
(ACN 165 661 263) in its personal capacity and its capacity as trustee of the  
Kwinana WTE Project Trust  
(ABN 50 113 636 774)**

- and -

**BTA INSTITUTIONAL SERVICES AUSTRALIA LIMITED ( ABN 48 002 916 396) in  
its capacity as security trustee**



Level 8, AMP Building  
140 St Georges Terrace  
Perth WA 6000

GPO Box L890  
Perth WA  
6842

T 08 9321 3755  
F 08 9321 3465  
E [info@kottgunn.com.au](mailto:info@kottgunn.com.au)

[kottgunn.com.au](http://kottgunn.com.au)  
*advoc*



Liability limited by a scheme approved under the Professional Standards Legislation.

THIS DEED is made \_\_\_\_\_ day of \_\_\_\_\_ 2021

B E T W E E N

**RIVERS REGIONAL COUNCIL (ABN 80 479 097 483)** of 13 Third Road, Armadale, Western Australia

and

**RIVERS REGIONAL SUBSIDIARY** of 13 Third Road, Armadale, Western Australia

and

**CITY OF ARMADALE** of 7 Orchard Avenue, Armadale, Western Australia;

and

**CITY OF GOSNELLS** of 2120 Albany Highway, Gosnells, Western Australia;

and

**CITY OF SOUTH PERTH** of Cnr Sandgate Street and South Terrace, South Perth, Western Australia;

and

**CITY OF MANDURAH** of 3 Peel Street, Mandurah, Western Australia;

and

**SHIRE OF MURRAY** of 1915 Pinjarra road, Pinjarra, Western Australia;

and

**SHIRE OF SERPENTINE – JARRAHDAL** of 6 Paterson Street, Mundijong, Western Australia;

and

**CITY OF CANNING** of 1317 Albany Highway, Cannington, Western Australia

and

**KWINANA WTE PROJECT CO PTY LTD (ACN 165 661 263)** in its personal capacity and in its capacity as trustee of the Kwinana WTE Project Trust (ABN 50 113 636 774) of Lot 9501 Leath Road, Kwinana, Western Australia

and

**BTA INSTITUTIONAL SERVICES AUSTRALIA LIMITED (ABN 48 002 916 396)** in its capacity as security trustee of Level 2, 1 Bligh Street Sydney, New South Wales

**RECITALS:**

- A.** The RRC, the Local Governments, Kwinana WTE and BTA are parties to some, or all, of the RRC Waste Agreements.
- B.** The RRC intends to hand over all of its functions to the Subsidiary.
- C.** The Subsidiary is a body that is subject to the Local Government Act 1995 that has been established by the Local Governments under section 3.69 of the *Local Government Act 1995 (WA) (Act)* to take over the functions of the RRC.

- D. To enable the Subsidiary to take over these functions, the RRC will novate and the Subsidiary has agreed to take a novation of the RRC Waste Agreements on and from the Novation Date.
- E. The Local Governments, Kwinana WTE and BTA consent to the novation of the RRC Waste Agreements from the RRC to the Subsidiary.

## THE PARTIES COVENANT AND AGREE:

### 1. DEFINITIONS

---

Unless otherwise required by the context or subject matter:

“BTA” means BTA Institutional Services Australia Limited (ABN 48 002 916 396) in its capacity as security trustee;

“Deed” means this deed as varied, modified or supplemented from time to time;

“Deed of Asset Transfer” means a deed of that name between the RRC, the Subsidiary and the Local Governments;

“Kwinana WTE” means Kwinana WTE Project Co Pty Ltd (ACN 165 661 263) in its personal capacity and its capacity as trustee of the Kwinana WTE Project Trust (ABN 50 113 636 774);

“Local Governments” means the City of Armadale, City of Gosnells, City of Mandurah, City of South Perth and City of Canning, the Shire of Murray and the Shire of Serpentine-Jarrahdale;

“Minister” means the Minister for the time being responsible for the administration of the Act;

“Novation Date” means 28 Days after the Minister has approved the formation of the Subsidiary;

“Parties” means the parties to this Deed and “Party” means any one or more of them according to context;

“RRC” means the Rivers Regional Council;

“RRC's Covenants” means the covenants, agreements, warranties and obligations contained or implied in the RRC Waste Agreements or imposed by law in each case to be observed and performed (or warranted) as the case may be by the RRC;

“RRC Rights” means the estate, rights and interests of the RRC set out in the RRC Waste Agreements;

“RRC Waste Agreements” means those agreements and documents referred to in Schedule 1;

“Schedule” means a schedule to this Deed; “Specified Encumbrances” means the encumbrances listed in Schedule 2; and

“Subsidiary” means the Rivers Regional Subsidiary, a body corporate that has been established by the Local Governments under section 3.69 of the Act to take over the functions of the RRC.

## 2. OPERATIVE PART

---

- (a) Subject to clause 2(b), in consideration of the Subsidiary agreeing to observe, perform and be bound by the RRC's Covenants on and from the Novation Date, the RRC as beneficial owner novates to the Subsidiary absolutely all of the RRC's rights, title and interest in the RRC Waste Agreements on and from the Novation Date and on the terms and conditions of this Deed.
- (b) This Deed does not commence until:
  - (i) each Party to this Deed has duly executed this Deed;
  - (ii) each party to the Deed of Asset Transfer has duly executed the Deed of Asset Transfer;
  - (iii) the Minister has consented to the establishment of the Subsidiary for the purposes set out in the Charter of the Subsidiary in accordance with the Act, including regulations 4 and 5 of the *Local Government (Regional Subsidiaries) Regulations 2017 (WA)*, and evidence of such consent in form and substance satisfactory to Kwinana WTE and BTA (each acting reasonably) has been provided to Kwinana WTE and BTA; and
  - (iv) each of the Local Governments has duly passed resolutions to enter into this Deed and the Deed of Asset Transfer and certified copies of those resolutions have been provided to Kwinana WTE and BTA.

## 3. RRC'S COVENANTS WITH THE SUBSIDIARY

---

RRC covenants with the Subsidiary that:

- (a) the RRC Waste Agreements are valid and subsisting and enforceable in accordance with their terms, and set out all of the RRC's Rights in relation to the subject matter of the RRC Waste Agreements;
- (b) the RRC's Rights do not infringe the rights of any third party;
- (c) the RRC has full power to novate its right, title and interest in the RRC Waste Agreements to the Subsidiary subject to the Specified Encumbrances;
- (d) the novation contemplated by this Deed shall be taken by the Subsidiary free and clear of any mortgage, pledges, liens, charges or other encumbrances or claims or interests of any other person;
- (e) the RRC shall, on the Novation Date or as soon as practicable thereafter, deliver to the Subsidiary copies of all contracts, invoices and other records, papers, books and documents of the RRC relating to the RRC Waste Agreements; and
- (f) the RRC shall do all acts and things as may be reasonably required by the Subsidiary to give effect to the novation contemplated by this Deed.

## 4. THE SUBSIDIARY'S COVENANTS WITH THE RRC

---

The Subsidiary covenants with the RRC and as a separate covenant with the Local Governments, Kwinana WTE and BTA:

- (a) to pay all money payable by the Subsidiary under this Deed (if any);

- (b) to observe, perform and be bound by the RRC's Covenants on and from the Novation Date;
- (c) to assume all liability for any costs, claims and expenses, debts or liabilities incurred or accrued by the RRC (whether actual or contingent) arising out of or in connection with the performance and execution of the RRC Waste Agreements up to and including the Novation Date, including any costs, claims and expenses, debts or liabilities owed or accruing to any of the Local Governments and / or Kwinana WTE and / or BTA; and
- (d) to indemnify and keep indemnified the RRC against all proceedings, costs, claims and expenses resulting from any failure to observe, perform and be bound by the RRC's Covenants occurring on or after the Novation Date, or arising from the RRC's failure to promptly pay, discharge or satisfy the expenses, debts or liabilities referred to in paragraph (c) of this clause.

## **5. CONSENT TO NOVATION**

---

The Local Governments, Kwinana WTE and BTA hereby consent to the novation of each of the RRC Waste Agreements to which they are a party as contemplated by this Deed. BTA consents to novation of each RRC Waste Agreement as described in this Deed (for the purposes of clause 9.1 of the "Financier Direct Deed" between the RRC, the Local Governments, Kwinana WTE and BTA dated 16 October 2018 (**FDD**)).

## **6. MUTUAL RELEASE**

---

6.1 The RRC covenants and agrees that, on and from the Novation Date, the RRC:

- (a) releases and discharges the Local Governments, Kwinana WTE and BTA from and against all liability whatsoever now existing or which might but for this Deed arise, relating to, arising out of, in connection with or incidental to the matters the subject of the RRC Waste Agreements; and
- (b) will not at any time commence or continue any action, suit or proceeding, or make any claim or demand of any nature against the Local Governments, Kwinana WTE or BTA relating to, arising out of, in connection with or incidental to the matters the subject of the RRC Waste Agreements,

and the RRC covenants and agrees that this Deed may be pleaded in bar to any action, suit or proceeding mentioned in paragraph (b) of this sub-clause.

6.2 The Local Governments, Kwinana WTE and BTA covenant and agree that on and from the Novation Date, they will:

- (a) release and discharge the RRC from and against all liability whatsoever now existing or which might but for this Deed arise, relating to, arising out of, in connection with or incidental to the matters the subject of the RRC Waste Agreements; and
- (b) will not at any time commence or continue any action, suit or proceeding, or make any claim or demand of any nature against the RRC relating to, arising out of, in connection with or incidental to the matters the subject of the RRC Waste Agreements,

and the Local Governments, Kwinana WTE and BTA covenant and agree that this Deed may be pleaded in bar to any action, suit or proceeding mentioned in paragraph (b) of this sub-clause.

## **7. COSTS AND EXPENSES**

---

The Parties excluding BTA shall each pay their own costs and expenses in relation to the instructions for, preparation and execution of this Deed, except that the Subsidiary agrees to pay any duty assessed on this Deed (if any). BTA's costs and expenses in relation to the instructions for, preparation and execution of this Deed shall be paid by *Kwinana WTE*.

## **8. PROPER LAW**

---

This Deed is governed by, and to be interpreted in accordance with, the laws of Western Australia and where applicable the laws of the Commonwealth of Australia.

## **9. SEVERANCE**

---

If any part of this Deed is, or becomes void or unenforceable, that part is or will be, severed from this Deed to the intent that all parts that are not, or do not become, void or unenforceable remain in full force and effect and are unaffected by that severance.

## **10. FURTHER ASSURANCES**

---

Each Party must execute and do all acts and things necessary or desirable to implement and give full effect to the provisions and purpose of this Deed.

## **11. MISCELLANEOUS**

---

In this Deed:

- (a) a reference to a person includes that person's executors, administrators, successors and assigns;
- (b) a covenant, agreement, representation or warranty in favour of 2 or more persons is for the benefit of them jointly and severally;
- (c) an agreement, representation or warranty given or made by 2 or more persons shall bind them jointly and severally.

## **12. BTA LIMITATION OF LIABILITY**

---

Clause 1.6 of the FDD is incorporated into this Deed (*mutatis mutandis*) as if set out in full.

**SCHEDULE 1**  
**RRC Waste Agreements**

Doc	Description	Date
1	Participant's Agreement between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, Shire of Serpentine Jarrahdale and City of Canning	Date 15 October 2015
2	Agreement for the Receipt and Processing of Waste for Resource Recovery between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, Shire of Serpentine Jarrahdale, City of Canning and Kwinana WTE	Dated 4 Nov 2015
3	Deed of Variation to Waste Supply Agreement between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, Shire of Serpentine Jarrahdale, City of Canning and Kwinana WTE	Dated 7 June 2017
4	Supplemental Deed between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, City of Canning and Kwinana WTE	Dated 16 July 2018
5	Exercise of Rights Letter by the RRC	Dated 23 April 2018
6	Exercise of Rights Letter by the RRC	Dated 21 September 2018
7	Exercise of Rights Letter by the RRC	Dated 15 October 2018
8	Financier Direct Deed between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, Shire of Serpentine Jarrahdale, City of Canning, Kwinana WTE and BTA	Dated 16 October 2018
9	Participants Agreement Deed of Variation between the RRC, City of Armadale, City of Gosnells, City of Mandurah, City of South Perth, Shire of Murray, Shire of Serpentine Jarrahdale, City of Canning, Kwinana WTE Project Co Pty Ltd	Dated 14 September 2018

**SCHEDULE 2****Specified Encumbrances**

<b>Doc</b>	<b>Description</b>
<b>1</b>	<b>Charge in favour of BTA over the waste supply agreement referred to in doc 2 and 3 of Schedule 1</b>



EXECUTED BY THE PARTIES AS A DEED

**THE COMMON SEAL of RIVERS** )  
**REGIONAL COUNCIL** )  
**(ABN 80 479 097 483)** was affixed )  
in the presence of: )

\_\_\_\_\_  
Chairperson

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

**THE COMMON SEAL of RIVERS** )  
**REGIONAL SUBSIDIARY** )  
was affixed in the presence of: )

\_\_\_\_\_  
Chairperson

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

**THE COMMON SEAL of the CITY OF** )  
**ARMADALE** was affixed pursuant to )  
a resolution of the Council in the )  
presence of: )

\_\_\_\_\_  
Mayor

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

**THE COMMON SEAL of the CITY OF** )  
**GOSNELLS** was affixed pursuant to )  
a resolution of the Council in the )  
presence of: )

\_\_\_\_\_  
Mayor

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

**THE COMMON SEAL** of the **CITY OF SOUTH PERTH** was affixed pursuant to a resolution of the Council in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Mayor

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

**THE COMMON SEAL** of the **CITY OF MANDURAH** was affixed pursuant to a resolution of the Council in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Mayor

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

**THE COMMON SEAL** of the **SHIRE OF MURRAY** was affixed pursuant to a resolution of the Council in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Shire President

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

**THE COMMON SEAL** of the **SHIRE OF SERPENTINE-JARRAHDALE** was affixed pursuant to a resolution of the Council in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Shire President

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

**THE COMMON SEAL** of the **CITY OF** )  
**CANNING** was affixed pursuant to )  
a resolution of the Council in the )  
presence of: )

\_\_\_\_\_  
Mayor

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

Executed by  
**KWINANA** )  
**WTE PROJECT CO PTY LTD** )  
**(ACN 165 661 263)**  
in accordance with **Section 127**  
of the **Corporations Act 2001 (Cth)** in the presence of: )

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director/Secretary

\_\_\_\_\_  
Full Name

\_\_\_\_\_  
Full Name

Executed by  
**BTA** )  
**INSTITUTIONAL SERVICES** )  
**AUSTRALIA LIMITED (ABN 48 002 916 396)** in its capacity as security trustee and  
acting by its duly authorised signatory  
: )

\_\_\_\_\_  
Authorised Signatory

\_\_\_\_\_

\_\_\_\_\_  
Full Name

\_\_\_\_\_