

PS Oscar W: Lease, Operation and Maintenance Agreement

Alexandrina Council

The Friends of The Oscar W Incorporated

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PS OSCAR W: OPERATION AND MAINTENANCE AGREEMENT

THIS AGREEMENT is made the 30 day of July 2024

BETWEEN

ALEXANDRINA COUNCIL ABN 20 785 405 351 of 11 Cadell Street Goolwa SA 5214 (the **Council**)
and

THE FRIENDS OF THE OSCAR W INCORPORATED of PO Box 527 Goolwa SA 5214 (**FOW**)

BACKGROUND

- A. The Council is a council constituted under the *Local Government Act 1999*.
- B. The Council is the owner of the paddle steamer named PS Oscar W.
- C. FOW is an incorporated association, with primary aims and objectives to operate, manage and maintain the PS Oscar W.
- D. On 18 July 2019, the Council and FOW entered into a Memorandum of Understanding in connection with the operation of the PS Oscar W (**MOU**), which continues to govern such relationship between the parties.
- E. The parties agree that the MOU no longer meets the needs of the parties and agree to:
 - (a) enter into this Agreement and the Leases; and
 - (b) terminate the operation of the MOU, upon the commencement of this Agreement.
- F. The Council and FOW record the terms of their continuing arrangements as agreed in this Agreement.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement:

Agreement means this Agreement as executed by the parties.

Agreement Term means the Initial Term and, if applicable, the Renewal Term.

AMSA means the Australian Maritime Safety Authority (and includes any replacement regulatory authority from time to time, for the safety and protection of the marine environment and navigations in Australian waters (or similar purpose)).

Annual Operating Budget and Business Plan means the annual budget and business plan prepared in connection with the operation of the PS Oscar W and related operations by FOW.

Approved Subcontractors means the parties approved by the Council to perform certain maintenance works on the PS Oscar W, identified in **Annexure D** to this Agreement (as may be amended or updated in writing from time to time).

Assets means the assets identified in **Annexure G** to this Agreement, or any replacement assets in accordance with clause 5.2.

Authorised Waters means:

- (a) the waters located within the local government area of the Council, being the body of water located to the west of the broken line delineated in purple on the plan annexed to this Agreement as **Annexure A** to this Agreement; and
- (b) the waters of Lake Alexandrina (and located in the local government area of the Coorong District Council as necessary to undertake a Voyage to Milang (and return).

Authority means any authority created by or under any relevant Legislation including, but not limited to, AMSA.

Business Day means a day that is not a Saturday, Sunday or public holiday in Adelaide, South Australia.

CEO means the Chief Executive Officer of the Council at any given time and from time to time, and includes any person acting in that position.

Commencement Date means 1 August 2024.

Conservation Plan means the Conservation Plan for the PS Oscar W prepared for the Council and dated September 2000 (as amended on December 2014) and any replacement or updated plan provided to FOW by the Council from time to time, a copy of which is annexed to this Agreement as **Annexure E**.

Defaulting Party is defined in clause 12.2.1.

Event of Default means those events specified in clause 12.2.

Financial Year means any 12-month accounting period during the Agreement Term, commencing on 1 July and ending on 30 June.

Improvements is defined in clause 6.5.1.

Initial Financial Year means the Financial year commencing 1 July 2024.

Initial Term means the period of five (5) years, commencing on the Commencement Date.

Innocent Party is defined in clause 12.2.1.

Leases means the Riverboat Centre Lease and the Wood Yard Lease and where relevant, means any one of them.

Leases Act means the *Retail and Commercial Leases Act 1995*.

Leases Regulations means the *Retail and Commercial Leases Regulations 2010*.

Legislation means any relevant Statute or Act of Parliament (whether State or Federal) and any regulation or by-law including by-laws issued by any Council or Local Government body or Authority.

LG Act means the *Local Government Act 1999*.

Material Breach is defined in clause 12.4.

Mooring Licence is defined in clause 4.1.

MOU is defined in Background paragraph D.

Permitted Use means the operation and maintenance of the PS Oscar W within only the Authorised Waters (unless otherwise notified or authorised, in advance, by the Council in writing from time to time).

PS Oscar W means the paddle steamer named PS Oscar W, Unique Vessel Identifier UVI 419301 and where applicable, is also a reference to the Tender Boat.

Quarter means each period of three (3) months, ending on 31 March, 30 June, 30 September and 31 December, respectively.

Quarterly Report is defined in clause 6.3.2.

Remediation Plan is defined in clause 12.2.1(c)(i).

Renewal Term means the period of five (5) years.

Reportable Incident means any accident, injury, property or environmental damage or any potential breach of any Legislation that occurs during the existence of or as a result of this Agreement or the Leases.

Riverboat Centre Decking Area is defined in the Mooring Licence.

Riverboat Centre Lease means the lease of a portion of the Goolwa Riverboat Centre to be entered into between the Council and FOW on or about the date of this Agreement.

Special Voyage means a voyage permitted under clause 3.5.

Statutory Requirements means all relevant and applicable Legislation and all lawful conditions, requirements, notices and directives issued or applicable under any such Legislation.

Tenancy Conditions is defined in clause 2.1.2.

Tender Boat means the non-survey tender vessel for the PS Oscar W, Unique Vessel Identifier 427547.

Vessel Lease is defined in clause 3.1.

Vessel Management Plan means the Vessel Management Plan for the PS Oscar W prepared for the Council and dated 17 August 2023 and any replacement or updated plan provided to FOW by the Council from time to time, a copy of which is annexed to this Agreement as **Annexure F**.

Vessel Rent means \$1 excluding GST, if demanded.

VIS means the Visitor Information Services Department of the Council.

Voyage means a scheduled (whether or not passengers are onboard) or chartered voyage of the PS Oscar W within the Authorised Waters, and from time to time includes a Special Voyage.

Wilful Misconduct means an intentional disregard of good and prudent standards of performance or of any of the terms of this Agreement, as applicable.

Wood Yard Lease means the lease of a portion of the Goolwa Community Precinct to be entered into between the Council and FOW on or about the date of this Agreement.

1.2 Interpretation

In this Agreement unless the context otherwise requires:

- 1.2.1 a term which is defined in the Background or in clause 1.1 has the meaning therein defined;
- 1.2.2 headings do not affect interpretation;
- 1.2.3 the term "person" includes a corporate body, partnership, association, government body or other entity;
- 1.2.4 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 1.2.5 singular includes plural and plural includes singular;
- 1.2.6 where two or more persons are bound by this Agreement to observe or perform any obligation or agreement whether express or implied then they shall be bound jointly and also severally;
- 1.2.7 unless otherwise provided, a reference in this Agreement to the Council's approval or consent, is to the Council's prior written approval or consent which may be granted or withheld in the absolute discretion of the Council;
- 1.2.8 "including" and similar expressions are not and must not be treated as words of limitation; and
- 1.2.9 a reference to any statute or subordinate legislation includes all statutes and subordinate legislation amending, consolidating or replacing the statute or subordinate legislation referred to.

1.3 Acknowledgement of Background

The parties acknowledge that the matters set out in the Background to this Agreement are true and accurate and agree that they form part of the terms of this Agreement.

2. INTEROPERABILITY & COMMENCEMENT

2.1 Leases

- 2.1.1 The parties acknowledge and agree that it is the intention of the parties that the Council grant each of:
 - (a) the Riverboat Centre Lease;

(b) the Wood Yard Lease; and

(c) the Mooring Licence,

to the FOW for the purposes of this Agreement and the intended operation of the PS Oscar W.

2.1.2 Notwithstanding the intention of the parties as set out in clause 2.1.1, the parties acknowledge and agree that the Riverboat Centre Lease and the Mooring Licence are subject to the satisfaction or waiver of the following conditions:

(a) the Council obtaining the consent of the Minister for Climate, Environment and Water to grant the Riverboat Centre Lease in accordance with the *Crown Lands Management Act 2009* (if applicable); and

(b) the Council obtaining the consent of the Minister for Transport and Infrastructure to grant the Riverboat Centre Lease in accordance with the *Crown Land Management Act 2009* (if applicable),

(together, the **Tenancy Conditions**).

2.1.3 Each party agrees to provide all reasonable assistance to the other party to achieve each of the Tenancy Conditions.

2.1.4 Either party may terminate this Agreement if all of the Tenancy Conditions are not satisfied (or waived by the Council) on or by 1 August 2024 (or such other date as the parties may agree in writing).

2.1.5 The Council will promptly notify FOW in writing upon the satisfaction (or waiver) of all of the Tenancy Conditions, upon which the parties agree to execute and do all things necessary to give effect to each of the Riverboat Centre Lease and the Wood Yard Lease.

2.2 Agreement Term and Leases

2.2.1 To avoid doubt, the lease granted under clause 3 commences on the Commencement Date.

2.2.2 The Mooring Licence and Leases commence on the date on which the Tenancy Conditions are all satisfied or waived for the balance of the Initial Term, unless terminated earlier in accordance with this Agreement.

2.3 Renewal of Agreement

2.3.1 If FOW wishes to renew this Agreement for the Renewal Term, FOW must serve a written notice on the Council not less than three (3) months and not more than six (6) months prior to the expiry of the Initial Term stating its desire to renew this Agreement for the Renewal Term.

2.3.2 If notice is given under clause 2.3.1, then:

(a) the Council will be obliged to renew this Agreement for the Renewal Term on the same terms and conditions as are contained in this Agreement except for the exclusion of this clause 2.3.1, clause 4, and **Annexure B**; and

- (b) the Renewal Term commences immediately after the expiration of the Initial Term; and
- (c) unless expressly provided to the contrary, notice given under clause 2.3.1 is deemed to be notice given under clause 12.1 of the Wood Yard Lease; and
- (d) to avoid doubt, the renewal of this Agreement for the Renewal Term does not include the renewal of the Mooring Licence.

2.3.3 FOW will not be entitled to a right of renewal for the Renewal Term if:

- (a) FOW is in breach of a term of this Agreement or any of the Leases before or at the time of giving notice of FOW's desire to exercise the right of renewal; or
- (b) FOW is in breach or commits any breach of a term of this Lease after the Lessee giving notice under paragraph (a) but before commencement of the Renewal Term.

2.4 Future tenure for Riverboat Centre and Mooring Licence

2.4.1 FOW acknowledges that the Council's right to grant a further term for either or both of the Riverboat Centre Lease or the Mooring Licence following the Initial Term of this Agreement is subject to and conditional upon the Council:

- (a) procuring any necessary consent or approval and otherwise complying with any relevant public consultation process pursuant to the LG Act and any relevant Council policy; and
- (b) passing any necessary resolution or making any necessary determination required pursuant to the LG Act,

(the **Renewal Conditions**).

2.4.2 On the written request of FOW, made not less than 1 year nor more than 4 years before the expiry of the Initial Term and provided that there is not, or has not been, at the time of such request or after such request, but prior to the commencement of the further term, been any unremedied breach or non-observance by FOW of any of this Agreement, the Leases or the Mooring Licence (prior written notice of which has been given to the Lessee), the Lessor will:

- (a) use reasonable endeavours to obtain and grant the Renewal Conditions; and
- (b) if the Renewal Conditions are met, the parties agree to amend each of this Agreement, the Riverboat Centre Lease, and the Mooring Licence (as applicable) to include a renewal term for a further term of five (5) years (**Further Term**), subject to and on the same terms and conditions as are contained in the relevant lease or licence, except for the exclusion of any further right of renewal.

3. PS OSCAR W

3.1 Grant of lease

The Council grants and FOW accepts, a lease of the PS Oscar W to undertake the Permitted Use for the Agreement Term (the **Vessel Lease**).

3.2 Vessel Rent

FOW must pay the Vessel Rent for the Vessel Lease to the Council annually in advance in the manner directed by the Council.

3.3 Permitted Use

3.3.1 FOW must use the PS Oscar W only for the Permitted Use and must not use or allow the PS Oscar W to be used for any other purpose.

3.3.2 FOW will be responsible for repairing or correcting any damage or malfunction of the PS Oscar W which results from any misuse or abuse of the PS Oscar W by FOW.

3.4 Operation of PS Oscar W

3.4.1 FOW must only use the PS Oscar W in accordance with generally accepted best practice for the Permitted Use.

3.4.2 FOW must conduct its operations and the Permitted Use in a good, lawful and orderly manner and to a high standard.

3.5 Authorised Waters

3.5.1 The parties agree that FOW may make an application in writing to the Council from time to time requesting FOW undertake a Voyage outside Authorised Waters (**Special Voyage**). Subject to FOW complying with clause 3.5.2, the Council agrees to grant any reasonable request by FOW to undertake a Special Voyage.

3.5.2 The Council agrees that it will not unreasonably withhold or delay any request under this clause 3.5 to undertake a Special Voyage, if any request made by FOW:

- (a) is made in accordance with the *Council's Authorised Waters – Exemption Request Form* (a copy of which is annexed to this Agreement as **Annexure I**), including to provide the following information:
 - (i) details of the itinerary for the Special Voyage, including dates and times of departure and arrival and any locations for the purposes of mooring;
 - (ii) details of contingencies (including if crew become unavailable, whether before or during the Special Voyage);
 - (iii) a budget for the special Voyage (including any revenue FOW anticipates receiving from the Special Voyage);
 - (iv) a detailed risk management plan, to the reasonable satisfaction of

the Council;

- (v) adequacy of the insurances held by FOW to undertake the Special Voyage and, if not adequate, that FOW promptly update its insurances in order to comply with this Agreement; and
 - (vi) confirmation of any necessary Statutory Requirement to complete the Special Voyage;
- (b) is made not less than twenty (20) Business Days prior to the proposed departure date for the Special Voyage;
- (c) FOW is able to demonstrate to the reasonable satisfaction of the Council, an economic or historic benefit to any of the Council, to FOW, or to any other local government area, within which the Special Voyage will be undertaken.

3.5.3 Notwithstanding clause 3.5.2, FOW agrees to promptly respond to any queries raised by the Council in writing in reviewing any request made under this clause 3.5.

3.6 Statutory Requirements

- 3.6.1 FOW must, at all times during the Agreement Term, keep current a Certificate of Operation and Certificate of Survey (or any similar Statutory Requirement) for the PS Oscar W. Notwithstanding FOW's obligation under this clause 3.6.1, the Council will provide any assistance reasonably requested by FOW to meet this obligation.
- 3.6.2 In order for FOW to meet its requirements under clause 3.6.1, the Council agrees to forward any documentation or other correspondence received by AMSA in connection with the PS Oscar W, or any relevant communication in connection with this Agreement, within three (3) Business Days of receipt of the same by the Council.
- 3.6.3 Notwithstanding the Council's obligations under clause **Error! Reference source not found.**, FOW is responsible for communications with AMSA to ensure the necessary Statutory Requirements are met.
- 3.6.4 In addition to its obligations under clause 3.6.1, FOW must obtain, keep current and comply with all consents, approvals, licences or other Statutory Requirements relating to:
- (a) FOW's use and occupation of the PS Oscar W;
 - (b) the nature of the business or operations conducted on the PS Oscar W by FOW; or
 - (c) any deliberate or negligent act or omission of FOW;
 - (d) any requirement or guideline published by AMSA, including but not limited to those listed in **Annexure H** (as may be updated or replaced in writing from time to time); and
 - (e) including (but not limited to) any requirements for building or marine works

or modifications to the PS Oscar W (whether structural or otherwise).

3.7 Signs

FOW must not place any signs or advertisements on the outside of the PS Oscar W, or inside the PS Oscar W, except a sign or signs which:

- 3.7.1 are approved (in writing) by the Council; and
- 3.7.2 comply with any relevant Statutory Requirements.

3.8 Fire precautions

3.8.1 FOW must:

- (a) comply with all requirements and directives issued by the Council from time to time (if any) with regard to fire safety systems and procedures including fire evacuation drills and other procedures; and
- (b) comply with all Statutory Requirements relating to fire safety and procedures including any required structural works or modifications to any building or structure on the Premises which are required as a result of:
 - (i) FOW's use or occupation of the PS Oscar W;
 - (ii) the nature of the business or operations conducted on the PS Oscar W by FOW; or
 - (iii) any deliberate or negligent act or omission of FOW.

3.8.2 In addition to its obligations under clause 3.8.1, FOW must at all times obtain any necessary permit for fires or activities otherwise banned under the *Fire and Emergency Services Act 2005*, including but not limited to any period that is fixed as a 'fire danger season' or a 'total fire ban' (as those terms are defined under the Act).

3.9 Offensive activities

FOW must not carry on any offensive or dangerous activities on or from the PS Oscar W or create a nuisance or disturbance either:

- 3.9.1 for the Council; or
- 3.9.2 for passengers of PS Oscar W, members of the public or other users of the waters within which the FOW operates the PS Oscar W; and

must ensure at all times that activities conducted on or from the PS Oscar W will not bring any discredit upon the Council.

3.10 Dangerous equipment and installations

FOW may only install or use within the PS Oscar W equipment and facilities which are reasonably necessary for and normally used in connection with the Permitted Use and will not install or bring onto the PS Oscar W:

- 3.10.1 any electrical, gas powered or other machinery or equipment which may pose a danger, risk or hazard;

3.10.2 any chemicals or other dangerous substances which may pose a danger, risk or hazard; or

3.10.3 any heavy equipment or items which may damage the PS Oscar W.

3.11 Notice of defect

FOW must:

3.11.1 give the Council prompt notice of any circumstance or event of which FOW should reasonably be aware that might cause danger, risk or hazard to the PS Oscar W or to any person on the PS Oscar W; and

3.11.2 if required by the Council, promptly rectify any defect or want of repair to make the PS Oscar W safe from any danger, risk or hazard, which rectification work will be at the Council's expense, except where such defect or repair arises as the result of the FOW's neglect, in which case FOW will be responsible for such costs.

3.12 Cleaning

FOW must at all times during the Agreement Term use reasonable endeavours:

3.12.1 to keep the PS Oscar W clean and tidy; and

3.12.2 to keep the PS Oscar W free of vermin, insects and other pests; and

3.12.3 not to cause the PS Oscar W to be left untidy or in an unclean state or condition.

3.13 Security

FOW must at all times use best endeavours to protect and keep safe the PS Oscar W and any property contained in or on it from theft or robbery, including (where applicable) keeping all doors windows and other openings closed and locked when the PS Oscar W is not in use.

3.14 No warranty

The Council makes no warranty or representation regarding the suitability of the PS Oscar W (structural or otherwise) for the Permitted Use or any other purpose, and the warranty of fitness for purpose provided under section 18 of the Leases Act is expressly excluded by the Council in this Agreement.

4. LICENCE TO OCCUPY – GOOLWA RIVERBOAT CENTRE

4.1 In addition to the lease under clause 3, the Council agrees to grant a licence to occupy and moor the PS Oscar to the Riverboat Centre Decking Area on the terms and conditions set out in **Annexure B (Mooring Licence)**.

4.2 FOW must comply with the terms and conditions of the Mooring Licence.

4.3 To avoid doubt:

4.3.1 the PS Oscar W must not be moored, tethered, or otherwise kept (whether for the alighting and disembarking of passengers or otherwise) at any other location within the Authorised Waters, other than the Riverboat Centre Decking Area;

- 4.3.2 a breach of this Agreement is a breach of the Mooring Licence; and
- 4.3.3 a breach of the Mooring Licence is a breach of this Agreement.
- 4.4 Notwithstanding clause 4.3.1:
 - 4.4.1 the Council may, from time to time, authorise in writing, FOW to moor, tether or otherwise keep the PS Oscar W at alternative locations within the Authorised Waters; and
 - 4.4.2 in the event of any emergency or in circumstances where the FOW is unable to moor, tether or otherwise keep, the PS Oscar W at the Riverboat Centre Decking Area, the FOW may temporarily moor, tether or otherwise keep the PS Oscar W at an alternative location, subject to the following conditions:
 - (a) where reasonably possible, any location authorised under clause 4.4.1 will be prioritised;
 - (b) FOW obtains consent or approval (as necessary) from the relevant landowner or occupier of such alternative location;
 - (c) FOW promptly notifies the Council of the need to use an alternative location; and
 - (d) will take any reasonable steps available to it to regain access to and/or use of the Riverboat Centre Decking Area.

5. ASSETS AND FIRST RIGHT OF REFUSAL TO PURCHASE

- 5.1 The Council agrees to transfer the Assets to FOW for \$1.
- 5.2 FOW will maintain the Assets during the Agreement Term and will promptly replace any Asset which requires replacement, or is damaged or destroyed.
- 5.3 At the end of the Agreement Term, FOW must not sell, transfer, or otherwise dispose of the Assets unless the consideration to be received is cash and, before making the transfer, FOW, by notice in writing, has first offered (**Offer**) the Assets to the Council for a specific cash consideration and on terms and conditions to be set out in the Offer which are consistent with this clause 5.
- 5.4 An Offer made pursuant to clause 5.3 remains open for a period of sixty (60) days (or such longer period as FOW may agree, acting reasonably) after the date on which it is made and, within that period, the Council may accept the Offer.
- 5.5 If the Council does not accept the Offer, the Offer shall lapse and FOW may offer the Assets to another single person or entity for cash consideration and on terms which are no more favourable to such person than those contained in the Offer (**Third Party Offer**).
- 5.6 If FOW is unable to transfer the Assets in accordance with clause 5.5 within a further thirty (30) days, the Third Party Offer will lapse and the provisions of clauses 5.3, 5.4 and 5.5 shall apply to any further or new proposed transfer.
- 5.7 Subject to any third party having accepted the Third Party Offer under clause 15.4, the Council may accept the Third Party Offer.

6. PS OSCAR W OPERATION & MAINTENANCE – FOW OBLIGATIONS**6.1 Daily operations**

Notwithstanding the obligations of each party under this Agreement, the parties agree that FOW will be responsible for the daily operations of the PS Oscar W.

6.2 Operation and management**6.2.1 FOW must:**

- (a) operate the PS Oscar W with all the skill, care and diligence to be expected from a qualified, competent and experienced provider of services similar to the Voyages;
- (b) devote such of its time and ability as is appropriate and reasonably necessary for the regular operation of Voyages of the Oscar W during the Agreement Term, including but not limited to offering not less than fifty (50) voyages in any calendar year during the Term;
- (c) supply at its own expense all plant and equipment required to operate and maintain the PS Oscar W in accordance with this Agreement;
- (d) perform all necessary maintenance to ensure that the PS Oscar is at all times in a safe and good working condition;
- (e) meet and pay all other operating costs and expenses relating to or required for the operation of the Oscar W; and
- (f) keep the Council fully and regularly informed of all matters affecting or relating to the PS Oscar W and provide to the Council any information reasonably requested by the Council to monitor the performance of FOW's obligations under this Agreement.

6.2.2 If applicable, FOW must ensure that it is at all times registered as an employer under the *Return to Work Act 2014* and that it pays all monthly levies due under it in respect of any employees engaged for the purposes of its obligations under this Agreement.

6.2.3 In operating the PS Oscar W, FOW must comply with:

- (a) any reasonable direction from the Council including any Council policy notified in writing to FOW;
- (b) all Legislation and the requirements of any Authority including the requirements of the *Work Health and Safety Act 2012* and any regulations made under it; and
- (c) any reasonable request of the Council in writing.

6.3 Records & reporting

6.3.1 FOW must keep accurate records and accounts including receipts, proof of purchase and invoices, to demonstrate its revenue and expenditure.

- 6.3.2 FOW must provide a report of its operations for the preceding Quarter, including its quarterly financial statements, to the Council within fifteen (15) Business Days of each Quarter during the Agreement Term (**Quarterly Report**).
- 6.3.3 Each Quarterly Report must include the following:
- (a) income and expenditure relating to this Agreement, including the operations of the PS Oscar W, the Leases, and the Mooring Licence;
 - (b) a review and assessment of actual operations measured against the Annual Operating Budget and Business Plan;
 - (c) an overview of the matters set out in **Annexure C**;
 - (d) details of any maintenance, disposal, replacement or acquisition of any equipment connected with the PS Oscar W; and
 - (e) any other matters that the Council may reasonably require.
- 6.3.4 In addition to the Quarterly Reports, FOW must also provide to the Council:
- (a) Within three (3) Business Days of:
 - (i) the end of any Financial Year during the Agreement Term; and
 - (ii) the date on which this Agreement expires or is terminated,a report detailing the application of any funding advanced by the Council to FOW, including but not limited to the following information:
 - (iii) details of the person to whom the funds were paid (including legal name and ABN where applicable);
 - (iv) amount of funds paid (including any GST component); and
 - (v) details of the application of those funds,(the Reconciliation Report).
 - (b) a copy of its most recent audited financial statements on or before 31 August in each year of the Agreement Term. Such statements must be in accordance with applicable Australian Accounting Standards and based on proper accounts and records and include the following information:
- 6.3.5 If the Council considers that the form or content of a report provided by FOW in accordance with this Agreement is not adequate, the Council may request that FOW submit a revised report. In this case, FOW must submit that revised report within fifteen (15) Business Days of the request, unless the Council specifies a longer timeframe.
- 6.3.6 FOW must, at all reasonable times, allow the Council access to all documents relating to this Agreement, and allow the Council to take copies of the documents should it wish to do so.
- 6.3.7 All records must be kept in their original form for at least five (5) years or for any other period specified by the Council or, as may otherwise be required by Legislation.

6.4 Repair & maintenance

- 6.4.1 Subject to the Leases Act (if the Leases Act applies to this Agreement) and in accordance with FOW's obligations under clause 6.4.2, FOW must at all times during the Agreement Term, at its expense and without any notice or demand from the Council, keep, maintain, repair and replace (as applicable) to the reasonable satisfaction of the Council the PS Oscar W, the FOW Equipment and the Improvements such that they are in good repair, condition and working order (including, subject to the Leases Act, such structural and capital maintenance, repair and replacement as is necessary from time to time).
- 6.4.2 FOW must maintain, repair or replace items in or attached to the PS Oscar W which are damaged or worn with items of the same or similar quality to those in use when they were last replaced with the Council's approval, or if they have not been so replaced, to those in use when FOW took occupation of the PS Oscar W.

6.5 Improvements

- 6.5.1 FOW must not carry out any or undertake any alterations, additions or improvements to the PS Oscar W without the Council's prior written consent (which consent must not be unreasonably withheld or delayed) (**Improvements**).
- 6.5.2 FOW must provide full details to the Council (including plans and specifications where relevant) of any proposed Improvements.
- 6.5.3 The Council may grant or refuse consent in its absolute discretion and where it grants consent may impose any conditions it considers necessary, including requiring FOW to obtain the Council's consent to any agreements that the Lessee enters into in relation to the Improvements.
- 6.5.4 FOW must carry out any approved Improvements at its own cost and:
- (a) in a proper and workmanlike manner;
 - (b) in accordance with the conditions imposed by the Council (if any);
 - (c) to the reasonable satisfaction of the Council;
 - (d) in accordance with all Statutory Requirements; and
 - (e) in a way so as to minimise disturbance to others.
- 6.5.5 FOW will pay all of the Council's costs (including consultant's costs and legal costs) as a result of considering the proposed Improvements (whether or not consent is ultimately granted by the Council).
- 6.5.6 Unless the Council notifies FOW in writing otherwise, any Improvements will remain the property of FOW during the Term and FOW will be responsible for maintaining such Improvements in accordance with this Agreement.

6.6 Employees and volunteers

- 6.6.1 FOW will be responsible to engage and manage the operation of the PS Oscar W in accordance with any applicable Legislation and Statutory Requirements.
- 6.6.2 FOW must procure that any person engaged by FOW in connection with the management and operation of the PS Oscar W:
 - (a) is appropriately licensed, qualified or accredited (as the case may be) in accordance with any Statutory Requirements and/or as otherwise required by the Vessel Management Plan;
 - (b) has undertaken any necessary induction reasonably required by the Council from time to time, prior to commencing any work in connection with the PS Oscar W; and
 - (c) is familiar with, and complies with, the terms of, the Vessel Management Plan and Conservation Plan.
- 6.6.3 FOW must also procure that any person engaged by FOW has received appropriate training or accreditation in connection with any Safe Systems of Work, including but not limited to training from an accredited trainer provider for any person engaged by FOW at the Wood Yard, or otherwise handling or cutting wood in connection with FOW's activities and/or the PS Oscar W;
- 6.6.4 FOW must, upon request from the Council from time to time, provide evidence to demonstrate FOW's compliance with this clause 6.6.

6.7 Survey and safety

- 6.7.1 FOW must, at all times during the Agreement Term:
 - (a) ensure that the PS Oscar W is seaworthy and safe to operate in accordance with Statutory Requirements;
 - (b) keep and maintain the PS Oscar W in accordance with the Conservation Plan;
 - (c) undertake a monthly assessment of the PS Oscar W in accordance with the Vessel Management Plan, and provide a copy of the same within five (5) Business Days to the Council;
 - (d) undertake regular 'test and tag' inspections for electrical equipment located on-board the PS Oscar W and otherwise used by FOW in connection with the PS Oscar W; and
 - (e) not operate the PS Oscar W (other than as necessary to relocate it for servicing requirements), if FOW, the Council, or an Authority deems the PS Oscar W is not seaworthy or is unsafe.
- 6.7.2 FOW will be responsible to procure the survey of the PS Oscar W at the earlier of the following:
 - (a) within three (3) years of the date of this Agreement;
 - (b) upon request by the Council, every two (2) years during the Agreement

Term;

- (c) any Authority issuing a notice in respect of the PS Oscar W, which requires; or
- (d) as otherwise agreed between the parties, having regard to the safety and maintenance requirements of the PS Oscar W.

6.7.3 As soon as is practicable, FOW must promptly notify the Council of any:

- (a) Reportable Incident; or
- (b) regulatory notices served on FOW in relation to this Agreement or the Leases; or
- (c) any potential breach of any Legislation that occurs during or as a result of this Agreement or the Leases.

6.7.4 Within five (5) Business Days of a Reportable Incident (or any such longer period determined by the Council, acting reasonably), FOW must provide a report to the Council giving details, including the result of investigations into its cause and recommendations or strategies for prevention in the future.

6.7.5 Notwithstanding FOW's obligations under clauses 6.7.3 and 6.7.4, in the event of a material or significant Reportable Incident, FOW will endeavour to provide a written report to the Council as soon as practicable, and will use reasonable endeavours to make relevant personnel available to provide any relevant information to the Council promptly upon request.

6.7.6 FOW acknowledges and agrees that the Council may appoint an investigator and/or auditor to investigate the Reportable Incident, or to provide an assessment of any report and strategies provided by FOW under clause 6.7.4. FOW agrees to co-operate with the Council in respect of any such investigation or audit.

6.8 Marketing

6.8.1 FOW will undertake marketing and tourism activities with the support of VIS as set out in **Annexure C**.

6.8.2 To better promote the activities of FOW in connection with the PS Oscar W, FOW must work together with VIS to create and upload at least one (1) social media post each week during the Agreement Term. FOW will use reasonable endeavours to ensure that social media posts are made across a variety of platforms and in a manner so as to enhance the Voyages and related services being offered by FOW.

7. PS OSCAR W OPERATION & MAINTENANCE - COUNCIL OBLIGATIONS

7.1 Funding

The parties agree that:

- 7.1.1 subject to clause 7.1.2, FOW will receive all revenue generated from Voyages; and

- 7.1.2 the Council will provide a grant to FOW to meet any shortfall between FOW's operational expenses to meet its obligations under this Agreement, in accordance with the current Annual Operating Budget and Business Plan (approved by the Council in accordance with clause 8).
- 7.1.3 Any funding granted by the Council under this clause will be:
- (a) subject to the terms of a Deed of Condition of Grant to be executed between the parties; and
 - (b) payable by the Council:
 - (i) on or before 31 July in the applicable Financial Year or, where the Council has not approved its Annual Business Plan before 30 June, within 30 days of end of the month in which the Council approves such plan for the applicable Financial Year; or
 - (ii) within thirty (30) of the end of the month following the receipt of a Reconciliation Report in respect of the prior Financial Year,(whichever is the later); and
 - (c) as a lump sum payment, by direct deposit into an account nominated by FOW.

7.2 Funding in Initial Financial Year

Subject to FOW providing and Annual Operating Budget and Business Plan for the Initial Financial Year in accordance with clause 8.1.6, the Council agrees to advance the amount of \$17,000 to FOW to meet its operating expenses for the Initial Financial Year.

7.3 Survey of PS Oscar W

The Council agrees to pay any reasonable expense incurred by FOW in connection with the survey of the PS Oscar W under clause 6.7.2, including any recommended maintenance arising from such survey (with the exception of any on-going maintenance otherwise the responsibility of FOW under this Agreement).

7.4 Marketing

The Council, through VIS, will provide marketing and tourism support to FOW as set out in **Annexure C**.

8. BUDGET AND FINANCE

8.1 Annual Operating Budget and Business Plan

- 8.1.1 FOW will prepare a draft Annual Operating Budget and Business Plan which must be provided to the Council no later than 31 March in each year of the Agreement Term for review by the Council. The parties will co-operate in finalising the draft Annual Operating Budget and Business Plan in a form and content capable of recommendation to the Elected Members for consideration and approval by the Council (at a properly convened meeting of the elected members of the Council) as part of the Council's Annual Business Plan.

- 8.1.2 FOW acknowledges and agrees that, in order to meet the requirements of clause 8.1.1, it will be necessary to provide a preliminary draft Annual Operating Budget and Business Plan to the CEO of the Council for preliminary review and negotiation, and to this end, unless otherwise agreed by the parties in writing, FOW will provide such preliminary draft Annual Operating Budget and Business Plan to the Council on or before 1 March in each year of the Agreement Term.
- 8.1.3 The Annual Operating Budget and Business Plan must, amongst other things:
- (a) detail proposed income and expenditure, including any shortfall to be met by the Council;
 - (b) provide a year-to-date reconciliation against any budget (including, where applicable, the Annual Operating Budget and Business Plan) and funding provided by the Council for the current Financial Year.
- 8.1.4 FOW acknowledges and agrees that any proposed expense which has not been identified in the Annual Operating Budget and Business Plan must be approved in writing by Council prior to FOW incurring any such expense.
- 8.1.5 If FOW forms the view that it will require funding over and above the amount advanced to it by the Council in any given Financial Year, FOW acknowledges and agrees that it must:
- (a) immediately notify the CEO in writing and keep the CEO apprised of the anticipated shortfall (including to answer any questions); and
 - (b) promptly provide an amended Annual Operating Budget and Business Plan to the Council, for consideration at its next available formally constituted Council meeting; and
 - (c) until such time that any further funds are advanced by the Council (if advanced), must not incur any material or non-essential expense without the prior written approval of the CEO (which approval must not be unreasonably withheld or delayed).
- 8.1.6 Notwithstanding FOW's obligations under this clause 8, FOW must prepare and provide an Annual Operating Budget and Business Plan for the Initial Financial Year (or any part thereof, if commenced) to the Council on or before 31 July 2024.

8.2 Bookings

- 8.2.1 FOW is responsible for making available a suitable platform for taking and managing bookings electronically, for all Voyages.
- 8.2.2 FOW will provide the Council (through VIS) access to the booking platform for the purposes of making bookings on behalf of FOW. To avoid doubt, the Council will not be responsible for the taking of bookings but, through the VIS, will provide an additional customer service point for taking bookings.

9. MEETINGS

- 9.1 The parties agree to meet to discuss the progress of this Agreement and the Leases as and when required. Either party may convene a meeting, on giving the other party prior

written notice, including a draft agenda for such meeting.

- 9.2 Despite clause 9.1, the parties agree to convene a meeting at least every six (6) months during the Term.

10. INSURANCE

10.1 Council to pay

- 10.1.1 Subject to clause 10.1.2, the Council agrees to pay or reimburse (as the case may be) the reasonable cost of any insurance required to be kept and maintained by FOW under this clause 10.

- 10.1.2 FOW agrees to provide to the Council:

- (a) a copy of any proposed insurance policy (and the premium payable); and
- (b) evidence that the proposed insurance policy will be issued at market competitive rates,

for review by the Council.

- 10.1.3 If the Council considers the proposed insurance policy provided under clause 10.1.2 does not meet the requirements of this clause 10, or the premium payable is excessive, the Council may, acting reasonably:

- (a) refuse to pay or reimburse the cost of any such policy; or
- (b) where the Council has formed the view that the premium is excessive, pay or reimburse only the portion of the premium that it considers reasonable.

The Council agrees that if it refuses to pay or reimburse the cost of any policy of insurance (or any part thereof) under this clause 10.1.2, it will first:

- (c) give reasons to FOW of any such proposed action, having regard to competitive market rates for insurance policies appropriate for the purposes of this Agreement (including the age, significance and replacement value, of the PS Oscar W); and
- (d) provide FOW with not less than ten (10) Business Days to obtain a more competitive insurance policy (or, where the current insurance policies are scheduled to expire before the expiry of such time granted to FOW under this subclause (d), such lesser period to expiry, less one (1) Business Day).

10.2 FOW must insure

FOW must keep current during the Agreement Term, in connection with this Agreement:

- 10.2.1 public liability insurance to the value of at least \$20 million per claim (or any other amount the Council reasonably requires);
- 10.2.2 all insurance in respect of FOW's Equipment and any Improvements for their full replacement value;
- 10.2.3 workers' compensation insurance as required by law;

- 10.2.4 where volunteers are engaged by FOW, volunteers' personal accident insurance; and
- 10.2.5 other insurances required by law or which the Council reasonably requires for at least the amounts the Council reasonably requires.

10.3 Requirements for policies

Each policy FOW takes out under this clause 10 must:

- 10.3.1 note the Council as an interested party;
- 10.3.2 have no limit on the number of claims that can be made under it;
- 10.3.3 cover events occurring during the policy's currency regardless of when claims are made; and
- 10.3.4 note that despite any similar policies of the Council, FOW's policies will be primary policies.

10.4 Evidence of insurance

- 10.4.1 On or before the Commencement Date, FOW must give the Council certificates evidencing the currency of the policies that FOW has taken out under this clause 10.
- 10.4.2 During the Agreement Term FOW must:
 - (a) pay or, provide an invoice for each premium promptly to the Council to pay, before it is due for payment;
 - (b) give the Council certificates of currency each year when the policies are renewed and at other times upon the Council's request;
 - (c) not allow any insurance policy to lapse or vary without the Council's consent; and
 - (d) notify the Council immediately if a policy is cancelled or if an event occurs which could prejudice or give rise to a claim under a policy.

10.5 Insurance affected

- 10.5.1 FOW must not do anything which will or may:
 - (a) prejudice any insurance required under this clause 10; or
 - (b) increase the premium for any insurance required under this clause 10.
- 10.5.2 If FOW does anything (without the Council's consent) that increases the premium of any insurance the Council has in connection with the premium, FOW must pay the amount of that increase to the Council on demand.

11. FORCE MAJEURE EVENT

- 11.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this Agreement:

- 11.1.1 neither party is liable for such delay or failure; and
- 11.1.2 all obligations of a party under this Agreement are suspended until the Force Majeure Event ceases to apply.
- 11.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement must:
 - 11.2.1 notify the other party as soon as possible giving:
 - 11.2.2 reasonably full particulars of the Force Majeure Event;
 - 11.2.3 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and
 - 11.2.4 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - 11.2.5 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
 - 11.2.6 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;
 - 11.2.7 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
 - 11.2.8 notify the other party when resumption of performance occurs.
- 11.3 If a delay or failure under this clause exceeds sixty (60) days, either party may immediately terminate this Agreement by notice to the other party.
- 11.4 In this clause 11, **Force Majeure Event** means an unforeseeable and unknown event occurring after the Commencement Date which is beyond the reasonable control of the relevant party and the effect of which the relevant party could not take reasonable measures to prevent or mitigate. Such circumstances include:
 - 11.4.1 acts of God, lightning strikes, earthquakes, floods (including subsequent low river levels in required sailing route), storms, explosions, fires and any natural disaster;
 - 11.4.2 acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution;
 - 11.4.3 any measures that are introduced, escalated or implemented by any Governmental Agency to address the impact of the COVID-19 pandemic, to the extent that such measures preclude a party from performing any obligation under this Agreement;
 - 11.4.4 an epidemic or pandemic is declared by a Governmental Agency after the Commencement Date and measures are implemented by the Governmental Agency to address the epidemic or pandemic which preclude a party from performing any obligation under this Agreement; and/or

11.4.5 in respect of an obligation, any change in Legislative Requirements that makes a party's compliance with that obligation unlawful,

but does not include any event or circumstance which a party ought to have reasonably foreseen.

12. DEFAULT AND TERMINATION

12.1 Termination

The following are Termination Events:

12.1.1 the expiry of the Agreement Term;

12.1.2 the termination of either or both of the Leases; or

12.1.3 a party to this Agreement issues a termination notice in accordance with clause 12.2.

To avoid doubt, the expiry of either or both of the Riverboat Centre Lease or the Mooring Licence is not a Termination Event.

12.2 Events of Default

12.2.1 A party (**Innocent Party**) may issue a termination notice to the other party (**Defaulting Party**) if:

- (a) the Defaulting Party commits a Material Breach of this Agreement which the Defaulting Party cannot remedy;
- (b) the Defaulting Party commits a Material Breach of this Agreement which the Defaulting Party can remedy but does not remedy within twenty (20) Business Days of being notified of the breach by the Innocent Party;
- (c) the Defaulting Party is guilty of Wilful Misconduct which in the reasonable opinion of the Innocent Party brings either party into disrepute and fails to:
 - (i) put in place a plan (**Remediation Plan**) agreed between the parties (acting reasonably) to remediate the impact of that act or omission within twenty (20) Business Days (or any longer period agreed between the parties) after receiving notice from the Innocent Party requiring it to do so; or
 - (ii) take the steps required in the Remediation Plan once agreed.

12.2.2 In addition to any of the events in clause 12.2, the Council may issue a termination notice to FOW:

- (a) if FOW commits any act of bankruptcy or becomes insolvent or under administration within the meaning of section 9 of the *Corporations Act 2001* (Cth);
- (b) FOW becomes an externally administered body corporate within the meaning of section 9 of the *Corporations Act 2001* (Cth); or
- (c) FOW is wound up or otherwise dissolved by its members in accordance with the *Associations Incorporation Act 1985*.

12.3 Innocent Party can remedy

- 12.3.1 To the extent that the Defaulting Party is in Material Breach under this Agreement and the Material Breach is not remedied, the Innocent Party at the Innocent Party's election (without in any way being obliged so to do), may remedy the Event of Default specified in the notice at its sole cost and expense in all respects and may recover the amount owing from the Defaulting Party as a liquidated debt.
- 12.3.2 If the Innocent Party exercises its right under clause 12.3.1, its right to issue a termination notice under clause 12.2 in respect of the relevant Event of Default is waived.

12.4 Material Breach

For the purposes of clauses 12.2 and 12.3, a 'Material Breach' means any one or more of the following:

- 12.4.1 a breach of clauses 3 or 6 of this Agreement;
- 12.4.2 a breach of a Lease or the Mooring Licence;
- 12.4.3 a wilful or reckless breach of a party's obligations under this Agreement or the Leases; and
- 12.4.4 any Wilful Misconduct of a party to this Agreement that has the effect of preventing the operation of the PS Oscar W in accordance with this Agreement.

12.5 Consequences of termination

In the event of any early termination of this Agreement:

- 12.5.1 any funds which have been advanced to FOW under a Deed of Condition of Grant (in accordance with clause 7.1) which have not been expended or otherwise allocated at the date of termination, must be repaid to the Council within twenty (20) Business Days (or as otherwise provided in the Deed of Condition of Grant); and
- 12.5.2 any insurances under this Agreement or the Leases are to be cancelled immediately with the balance of any remaining premium reimbursed to the Council within twenty (20) Business Days.

13. DISPUTE RESOLUTION

- 13.1 If any dispute or disagreement arises between the parties in connection with this Agreement, the parties undertake to use all reasonable endeavours, in good faith, to settle the dispute or disagreement by negotiation between representatives of both parties.
- 13.2 If the representatives appointed under clause 13.1 are unable to resolve the dispute within thirty (30) days, they must promptly refer the dispute:
- 13.2.1 in the case of the Council to the CEO; and
- 13.2.2 in the case of FOW, to its President (or similarly senior member with delegation to resolve the dispute in accordance with this clause 13).

- 13.3 In the event that negotiations commenced under clause 13.2 do not resolve the dispute within a further thirty (30) days then a mediator agreeable to both parties may be engaged to seek a resolution. If the parties cannot agree upon a mediator, the mediator will be appointed by the President or Acting President of the Law Society of South Australia. The cost of the mediator will be borne equally by both parties.
- 13.4 Nothing in this Agreement is intended to limit either party's right to seek a legal remedy for any dispute that arises.
- 13.5 The parties agree that matters arising out of any conflict must be kept confidential.

14. ASSIGNMENT AND SUBLETTING

14.1 Assignment and subcontracting

Subject to clause 14.3, FOW must not subcontract or assign its interest in the PS Oscar W or any part of it under this Agreement, without the consent of the Council which consent may be withheld in the Council's absolute discretion unless the Leases Act applies to this Agreement, in which case the Council's consent may be withheld by the Council only if:

- 14.1.1 the proposed assignee proposes to change the use to which the PS Oscar W is put;
- 14.1.2 the proposed assignee is unlikely to be able to meet the financial obligations of FOW under this Agreement;
- 14.1.3 the Council reasonably considers that the proposed assignee's business skills are inferior to those of FOW; or
- 14.1.4 FOW has not complied with procedural requirements for obtaining the Council's consent as set out in section 45 of the Leases Act.

14.2 Request for assignment

If FOW requests that the Council consent to any assignment or transfer of this Agreement or the PS Oscar W, or parting with possession of the PS Oscar W, FOW must immediately on receipt of a request to do so from the Council:

- 14.2.1 pay all arrears of Vessel Rent any other moneys outstanding under this Agreement and remedy all outstanding breaches and defaults and pay to the Council or its solicitors or agents such sum of money as is reasonably estimated by the Council as being required to remedy such breaches or defaults;
- 14.2.2 submit a true copy of all agreements to be entered into in respect of any proposed dealing with the Agreement and/or the Leases including a true copy of any business sale agreement entered into by FOW as vendor, if applicable, and evidence satisfactory to the Council that the proposed transferee or assignee is respectable responsible solvent and suitable and any other information reasonably required by the Council about the financial standing and business experience of the proposed transferee or assignee;
- 14.2.3 if the proposed assignee or transferee is a trustee of a trust to submit a copy of the instrument under which such trust was constituted and the full names addresses and occupations of the beneficiaries of such trust;

- 14.2.4 procure the proposed assignee or transferee to submit to the Council a business plan setting out the proposed assignee's plans, intentions (and containing such details and particulars as are reasonably required by the Council); and
- 14.2.5 pay to the Council or its solicitors the reasonable costs and expenses of and incidental to any inspection of the PS Oscar W or the premises described in any of the Leases and/or Mooring Licence, and enquiries concerning the proposed dealing or the persons concerned in such dealing and of the perusal, preparation, negotiation and stamping of the documents deemed necessary by the Council;

and if such consent is given, FOW shall ensure that prior to the date of any assignment or transfer the person to whom it is proposed to assign or transfer enters into a direct covenant with the Council to observe the terms of this Agreement and furnishes such guarantees of the performance of such person's obligations under this Agreement as the Council may reasonably require.

14.3 Approved Subcontractors

- 14.3.1 Notwithstanding clause 14.1, FOW may engaged Approved Subcontractors to undertake approved maintenance of the PS Oscar W.
- 14.3.2 The Council may amend the list of Approved Subcontractors from time to time upon written request from FOW.

14.4 Sub-lease, mortgage or licence

FOW may not:

- 14.4.1 grant any sub-lease, licence or concession for the whole or part of this Agreement or the PS Oscar W;
- 14.4.2 otherwise part with possession of the whole or a part of the PS Oscar W; or
- 14.4.3 mortgage or otherwise charge or encumber FOW's interest under this Agreement;

without the prior written consent of the Council which the Council may withhold in its absolute discretion.

14.5 No release

Subject to the Leases Act, where the Council grants consent or is deemed to grant consent to an assignment, FOW as assignor will not be released or discharged from its current and future obligations and liabilities under this Agreement for the balance of the Agreement Term.

15. INDEMNITY

- 15.1 Each party (**Indemnifying Party**) indemnifies the other party (**Indemnified Party**) from and against any Loss suffered or incurred by any other party to this Agreement, arising from or in connection with:
 - 15.1.1 any act or omission of the Indemnifying Party;
 - 15.1.2 a breach of this Agreement by the Indemnifying Party;

- 15.1.3 any negligent act or omission by the Indemnifying Party,
except to the extent that such claims, losses, demands, actions, orders, damages, costs or expenses are caused or contributed to by the breach of this Agreement or negligent act or omission by the party seeking to rely on the indemnity under this clause 15.1.
- 15.2 In addition to the indemnity under clause 15.1, FOW is liable for and indemnifies the Council against all actions, liabilities, penalties, claims or demands for any Loss incurred or suffered directly or indirectly in connection with:
- 15.2.1 the overflow or leakage of water or any other harmful agent into or from the PS Oscar W;
- 15.2.2 any fire on or from the PS Oscar W;
- 15.2.3 loss or damage to property or injury or death to any person caused by FOW, the use of the PS Oscar W by FOW, or otherwise relating to or occurring on the PS Oscar W;
- 15.2.4 FOW's use or occupation of the PS Oscar W.
- 15.3 The obligations of each party under this clause 15 survive the termination or expiry of this Agreement and do not in any way prevent any party from pursuing any remedies available to it either at law or in equity.
- 15.4 Each party must take reasonable steps to mitigate any Loss it suffers or incurs under or in connection with this Agreement.
- 15.5 In this clause 15:
- 15.5.1 a reference to each of the Indemnifying Party and the Indemnified Party includes that party's officers, employees, contractors or agents; and
- 15.5.2 **Loss** means and includes any personal injury, death, claim, loss, demands, action, order, damage, cost or expense.

16. NOTICES AND COMMUNICATION

- 16.1 A notice under this Agreement is ineffective unless it is in writing.
- 16.2 A notice may be given:
- 16.2.1 by hand delivery; or
- 16.2.2 by post, including Express Post or Registered Post; or
- 16.2.3 by email,
- to the attention of:
- 16.2.4 in the case of the Council:
- Chief Executive Officer
alex@alexandrina.sa.gov.au
11 Cadell Street GOOLWA SA 5214

with a copy addressed to the General Manager, Community
Stacey.Bateson@alexandrina.sa.gov.au

- 16.2.5 in the case of FOW:
- President, George Kaiser
PSOscarW@gmail.com
PO Box 527 Goolwa SA 5214
Riverboat Centre, Goolwa Wharf
- 16.3 A notice, if validly given, is taken to have been received:
- 16.3.1 if delivered by hand, upon delivery to the party;
- 16.3.2 if posted by:
- (a) Express Post, the next Business Day following confirmation on Australia Post's website that such notice has been successfully delivered; and
 - (b) pre-paid post or Registered Post, five (5) Business Days after posting;
- 16.3.3 if sent by email and the sender does not receive a 'bounce message' notifying the sender that the email has failed to be delivered,
- (a) between 9am and 5pm on any Business Day, at the time the notice is sent; and
- on any day that is not a Business Day, at 10am on the next Business Day.
- 16.4 In addition to the obligations under this clause in relation to notices:
- 16.4.1 FOW acknowledges and agrees that all communications from FOW to the Council are to be addressed to the General Manager Community, and/or the Chief Executive Officer; and
- 16.4.2 the Council agrees to acknowledge receipt of any communication from FOW within 3 Business Days of receipt of any communication, including any notice, received under or in accordance with this Agreement.
- (a)

17. POWER OF ATTORNEY

- 17.1 FOW irrevocably appoints the Council to be the attorney of FOW to execute any documents and perform any acts the Council requires to give full effect to this Agreement, including the Mooring Licence.
- 17.2 The Council may do, execute and perform all things relating to this Agreement (including in connection with the PS Oscar W and Riverboat Centre Decking Area) and as fully and effectually as FOW could do. FOW must ratify and confirm the appointment of and all actions by the Council under this clause 17.

18. COUNCIL'S DISCRETION

The Council enters into this Agreement as a council acting under sections 7 and 36 of the LG Act and not in any other capacity. This Agreement does not preclude or pre-empt the exercise

by the Council of any other regulatory function or power.

19. OVERSIGHT LEGISLATION

FOW acknowledges and agrees that:

- 19.1 this Agreement, or any of the steps or actions contemplated by it, may be an administrative act and that the *Ombudsman Act 1972* (SA) may apply. FOW agrees to co-operate and to comply with all of their legal obligations under that or any other Act;
- 19.2 by entering into this Agreement, FOW will be deemed to be a public officer for the purposes of the *Ombudsman Act 1972* and the *Independent Commissioner Against Corruption Act 2012* (SA) and is obliged to comply with the that Act and any Directions and Guidelines issued pursuant to it.
- 19.3 that the Council is an 'agency' for the purposes of the *Freedom of Information Act 1991* (SA) and that documents, correspondence or other information relating to this Agreement may be subject to disclosure under that Act.

20. LEASES ACT

20.1 The parties acknowledge and agree that this Agreement (including the Vessel Lease and Mooring Licence) has been entered into on the basis that the Leases Act does not apply to this Agreement by virtue of section 4(2)(g) of the Leases Act and Regulation 4(1) of the Leases Regulations for the following reasons:

- 20.1.1 the Council is a district council;
- 20.1.2 the Vessel Rent and Mooring Licence Fee are less than \$50,000 per annum; and
- 20.1.3 FOW is an entity that is not carried on for the purpose of profit or gain to its individual members and that is, by the terms of its constitution, prohibited from making any distribution, whether in money, property or otherwise, to its members.

20.2 Notwithstanding clause 20.1, if:

- 20.2.1 a Court of competent jurisdiction determines that the Leases Act does apply to this Agreement (or any part of it); or
- 20.2.2 any Legislation is adopted or changed that has the effect of the Leases Act applying to this Agreement (or any part of it),

FOW agrees to consent an application under section 77 of the Leases Act that the Leases Act not apply to this Agreement.

21. MISCELLANEOUS

21.1 Incorporated association

- 21.1.1 The persons executing this Agreement on behalf of FOW have warranted to the Council that FOW is incorporated under the *Associations Incorporation Act 1985*, and that FOW has the power to enter into this Agreement; and
- 21.1.2 FOW agrees to provide the Council with the following documents:

- (a) upon request by the Council, a copy of FOW's constitution, rules or by-laws;
- (b) within twenty-eight (28) days of amendment of FOW's constitution, rules or by-laws, an updated copy of those documents; and
- (c) upon execution of this Agreement and upon any change in the appointment of officers of FOW, the full name and contact details of the current officers of FOW.

21.2 Governing law

This Agreement is governed by the law in South Australia.

21.3 Costs

Each party agrees to bear its own costs and expenses (including legal costs and expenses) of preparing, negotiating and stamping this Agreement.

21.4 Confidentiality

21.4.1 Subject to applicable laws, FOW must keep confidential any information about the Council that becomes known as a result of this Agreement or the transactions it contemplates and, which information is not in the public domain.

21.4.2 This clause 21.4 will remain enforceable by the Council notwithstanding the expiry or termination of this Agreement.

21.5 Waiver

If the Council accepts or waives any breach of this Agreement by FOW, that acceptance or waiver cannot be taken as an acceptance or waiver of any future breach of the same obligation or of any other obligation under this Agreement.

21.6 Severance

If any part of this Agreement is found to be invalid or void or unenforceable, then that part will be severed from this Agreement and the remainder of this Agreement will continue to apply.

21.7 Entire agreement

The Council and FOW acknowledge and agree that this Agreement contains and represents the entire agreement reached between them with regard to the subject matter contained herein, and that no promises, representations or undertakings, other than those contained in this Agreement, were made or given or relied upon.

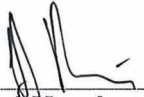
EXECUTED AS AN AGREEMENT.

THE COMMON SEAL OF ALEXANDRINA COUNCIL ABN 20 785 405 351 was affixed in the presence of:





Keith Parkes
Mayor



Nigel Morris
Chief Executive Officer



THE COMMON SEAL OF THE FRIENDS OF THE OSCAR W INCORPORATED [was affixed in accordance with the Rules of the Association the presence of:



Signature of Authorised Office Bearer

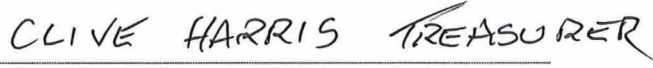


Signature of Authorised Office Bearer

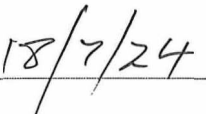


Name of Authorised Office Bearer


President

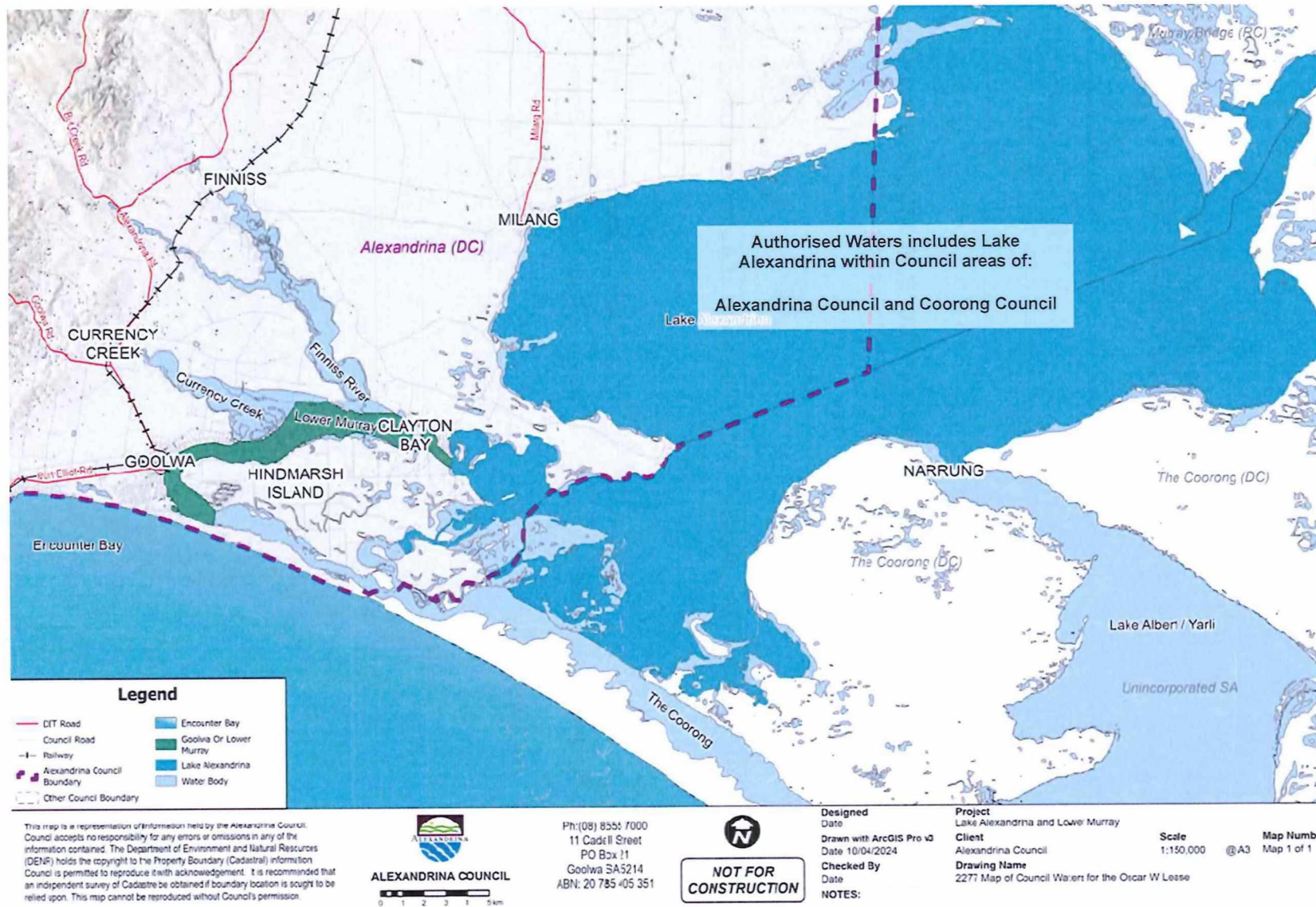


Name of Authorised Office Bearer



Date

ANNEXURE A – AUTHORISED WATERS



ANNEXURE B – MOORING LICENCE

LICENCE TERMS

1. Definitions

Unless otherwise defined in this Licence, a term defined in the Agreement has the same meaning in this Licence

FOW Equipment means any and all fixtures and fittings and other equipment installed in or brought onto or kept in or on the Riverboat Centre Decking Area by FOW as and from the date that FOW first took occupation of the Riverboat Centre Decking Area

Land means the whole of the land identified in Crown Record Volume 5956 Folio 100, and more commonly known as the Goolwa Riverboat Centre

Licensed Use means the mooring of the PS Oscar W in waters adjacent to the Wharf Decking Area and for the congregation, alighting, and disembarkation of passengers and crew of the PS Oscar W, and for related purposes

Mooring means the area designated for the mooring of a vessel, delineated in red on the plan annexed to this licence as Annexure B1

Mooring Licence Fee means \$1 excluding GST, if demanded

Mooring Licence Term means the period commencing on the date on which the Tenancy Conditions are satisfied or waived and expiring at midnight contemporaneously with the Initial Term

Riverboat Centre Decking Area means the portion of the Land delineated in green on the plan annexed to this licence as Annexure B1

2. Grant of Mooring Licence

- 2 1 Subject to the terms and conditions of this Mooring Licence, the Council grants and FOW accepts, a non-exclusive licence during the Mooring Licence Term to use the Riverboat Centre Decking Area for the Licensed Use
- 2 2 Subject to the Council obtaining any necessary consents, the Council agrees to grant to FOW an exclusive licence during the Mooring Licence Term to use the Mooring for the Licensed Use. In the absence of the Council securing the necessary consents, the Council agrees to grant to FOW a non-exclusive licence during the Mooring Licence Term to use the Mooring for the Licensed Use
- 2 3 The rights conferred by this Mooring Licence rest in contract only and do not and are not intended to create or confer upon FOW any tenancy, estate or interest in or over the Riverboat Centre Decking Area or the Land and the rights of FOW under this Mooring Licence shall be those of a licensee only and do not comprise or include any further or other rights

3. Mooring Licence Fee

- 3.1 FOW must pay the Mooring Licence fee to the Council annually in advance in the manner directed by the Council.
- 3.2 If this Mooring Licence is terminated prior to the expiration of the Mooring Licence Term (provided such termination is not as a consequence of a breach of this Mooring Licence by FOW), FOW shall not be liable for the remaining portion of the Mooring Licence Fee, and shall be entitled to a pro-rata refund of any portion of the Mooring Licence Fee paid in advance by FOW for that relevant period of occupation.

4. Utilities

If requested by the Council, FOW will pay when they fall due for payment, all costs for the use and the consumption of electricity (if any) and all other services and utilities supplied to the Riverboat Centre Decking Area or used in connection with the Licensed Use.

5. FOW rights & obligations**5.1 Licensed Use**

- 5.1.1 FOW must use the Riverboat Centre Decking Area only for the Licensed Use and must not use or allow the Riverboat Centre Decking Area to be used for any other purpose.
- 5.1.2 FOW will be responsible for repairing or correcting any damage to the Riverboat Centre Decking Area which results from any misuse or abuse of the Riverboat Centre Decking Area by FOW.

5.2 Interference with the Land

- 5.2.1 Subject to clause 5.2.2, FOW must ensure that its use of the Riverboat Centre Decking Area will not interfere with or in any way restrict public access to the remainder of the Land, notwithstanding that such use may be consistent with the Licensed Use.
- 5.2.2 The Council acknowledges and agrees that FOW may cordon off an area of the Land from time to time as reasonably required by it to load wood onto the PS Oscar W, subject to FOW using reasonable endeavours to minimise the disruption to the Land, including to:
 - (a) avoid undertaking such activities during peak visitation to the Land and Riverboat Centre Decking Area;
 - (b) enclosing the area using high-visibility temporary safety barriers;
 - (c) using appropriate and visible signage to warn the public of the activities being undertaken, as required by any Statutory Requirements and any reasonable direction of the Council.
- 5.2.3 FOW must not carry on any offensive or dangerous activities on or from the Riverboat Centre Decking Area or create an unreasonable nuisance or disturbance (having regard to the Licensed Use) either:
 - (a) for the Council; or

- (b) for members of the public using or accessing the Riverboat Centre Decking Area or the remainder of the Land; or
- (c) for the owners or occupiers of any property adjoining the Land; and
- (d) must ensure at all times that activities conducted on or from the Riverboat Centre Decking Area will not bring any discredit upon the Council.

5.3 Statutory Requirements

FOW must comply with all Statutory Requirements in connection with the FOW's use and occupation of the Riverboat Centre Decking Area.

5.4 Alterations by FOW

- 5.4.1 FOW must not carry out any other alterations or additions to the Riverboat Centre Decking Area without the Council's prior written consent. FOW must provide full details to the Council of any proposed alteration and additions to the Riverboat Centre Decking Area.
- 5.4.2 The Council may impose any conditions it considers necessary if it gives its consent, including requiring FOW to obtain the Council's consent to any agreements that FOW enters into in relation to any alterations or additions pursuant to this clause 5.4.
- 5.4.3 Unless otherwise agreed in writing between the parties, all alterations and additions to the Riverboat Centre Decking Area made by FOW are the property of FOW (and thereby comprise the FOW Equipment).

5.5 Repair and Maintenance

FOW must at the cost and expense of FOW keep, maintain and repair the FOW Equipment:

- 5.5.1 in a good and workmanlike manner; and
- 5.5.2 in accordance with any Statutory Requirements; and
- 5.5.3 to the reasonable satisfaction of the Council; and

promptly repair any damage to the Riverboat Centre Decking Area to the extent that it is caused or contributed to by the act, omission, negligence or default of FOW within seven (7) days of the Council having required the repairs to be undertaken.

5.6 Cleaning

FOW must at all times and at FOW's cost in all things, use reasonable efforts to keep the Riverboat Centre Decking Area clean, tidy and free of rubbish.

5.7 To obey directions

FOW must comply with all reasonable directions given by the Council from time to time in writing regarding FOW's use of the Riverboat Centre Decking Area.

6. Insurance**6.1 FOW must:**

- 6.1.1 take out and maintain during the Mooring Licence Term of the Licence a public liability insurance policy that provides coverage and excess for in the following amounts:
 - (a) public liability - \$20,000,000.00;
- 6.1.2 provide the Council with a copy of the certificate of currency for all insurance policies referred to in clause 6.1.1 at the commencement of the Mooring Licence Term, on each renewal date of the insurance policies and at all other times requested by the Council (acting reasonably); and
- 6.1.3 keep the insurance required under clause 6.1.1 current during the Mooring Licence Term, and must notify the Council immediately if the policy lapses or is cancelled.

6.2 Subject to clause 6.3 of this Licence, the Council agrees to pay or reimburse (as the case may be), the reasonable cost of any premiums payable under an insurance clause identified in this clause 6.

6.3 FOW agrees to provide to the Council a copy of any proposed insurance policy (and the premium payable) for review by the Council. If the Council considers the proposed policy does not meet the requirements of this clause 6, or the premium payable is excessive, the Council may, acting reasonably:

- 6.3.1 refuse to pay or reimburse the cost of any such policy; or
- 6.3.2 where the Council has formed the view that the premium is excessive, pay or reimburse only the portion of the premium it considers reasonable.

7. Council's obligations and rights

The Council, its employees, contractors and agents may enter onto the Riverboat Centre Decking Area on five (5) Business Days' notice to:

- 7.1 ensure FOW's compliance with this Mooring Licence;
- 7.2 undertake repairs to the Riverboat Centre Decking Area or other works which cannot reasonably be done unless the Council enters the Riverboat Centre Decking Area; or
- 7.3 do anything the Council must or may do under this Mooring Licence or must do under any law;
- 7.4 carry out any repairs or maintenance works that FOW is required to undertake under clause 5.5 where FOW fails to carry out such works, but only after the Council has first given notice in writing to FOW of its intention to do so and FOW has failed to carry out the works within the timeframe specified in that notice,

PROVIDED THAT such access may be refused by FOW if and only if such access would be in breach of FOW's work, health and safety obligations. If access is refused on this basis,

FOW must provide an alternative access arrangement within five (5) Business Days.

8. No assignment

FOW must not assign or sublicense this Mooring Licence or any right or obligation under this Mooring Licence.

9. Termination

To the extent permitted by law the Council and FOW mutually agree that the Council may terminate this Mooring Licence immediately by notice in writing to FOW but without prejudice to any right of action of the Council in respect of antecedent breach of this Mooring Licence by FOW if:

9.1 the Council has a right to terminate any or all of the Agreement or the Leases;

9.2 FOW fails to perform and observe any of its obligations under this Mooring Licence and such failure has continued for a period of twenty (20) Business Days after being notified by the Council in writing; or

9.3 FOW is wound up.

10. Rights and obligations on expiry

10.1 Expiry

This Mooring Licence will come to an end at midnight on the last day of the Mooring Licence Term unless it is terminated earlier by the Council or FOW under any other provision of this Licence.

10.2 Make Good

Before this Mooring Licence comes to an end (whether by termination or the expiry of the Mooring Licence Term or otherwise), FOW must:

10.2.1 remove all of FOW's Equipment and repair and make good any damage caused by such removal; and

10.2.2 reinstate, to the Council's satisfaction, the Riverboat Centre Decking Area to the same condition it was in immediately prior to FOW's occupation.

10.3 Abandoned Goods

10.3.1 Subject to the *Unclaimed Goods Act 1987*, if FOW leaves any goods or equipment (including FOW's Equipment) at the Riverboat Centre Decking Area for more than fourteen (14) days following expiration or sooner termination of the Mooring Licence Term, then FOW forfeits the goods or equipment to the Council and the Council is entitled to deal with and dispose of the goods or equipment as it deems fit.

10.3.2 Where the Council deals with or disposes of FOW's Equipment under clause 10.3.1, the Council may recover from FOW the costs of any such disposal as a debt due and payable on demand.

10.4 Holding Over

The Council and FOW mutually agree that if FOW holds over after the expiration of the Mooring Licence Term with the consent of the Council, FOW will become a weekly bare licence only, which licence may be terminated by the Council by notice in writing at any time and by FOW by one week's notice in writing at a weekly licence fee equivalent to one tenth of the Licence Fee and otherwise on the same terms and conditions (with the necessary changes) as those set out in this Licence.

11. Indemnity

Clause 15 of the Agreement applies to this Mooring Licence *mutatis mutandis*.

ANNEXURE B1 – RIVERBOAT CENTRE DECKING AREA

