

Memorandum of Understanding

Anthon's Landing - Wyndham Boat Ramp Jetty

No.	Clause	
1.	Parties	Shire of Wyndham East Kimberley (ABN 35 647 145 756) of 20 Coolibah Drive, Kununurra, WA 6743 (SWEK) and XXXX
2.	Background	<p>SWEK owns and maintains Anthon's Landing pontoon (Anthon's Landing), which is located within the Port waters.</p> <p>SWEK is permitted to charge fees to third party users of Anthon's Landing (Users) in accordance with SWEK's fees and charges for the use of Anthon's Landing published online from time to time.</p> <p>Historically, SWEK has had low rates of recovery of such fees and charges, as it has limited capacity to oversee Users and to collect such fees. XXX will oversee Users that berth at Anthon's Landing and/or use other Port facilities in proximity to Anthon's Landing, SWEK proposes that XXX collect User Fees (as defined in clause 7) from third party vessels using Anthon's Landing on behalf of SWEK and pay a Quarterly Payment (as defined in clause 8) to SWEK (the Fee Collection Arrangement).</p> <p>SWEK intends to allocate the amount recovered in respect of User Fees for future maintenance, development and enhancement of Anthon's Landing.</p> <p>The parties enter into this MOU to record their intended roles and responsibilities in relation to the Fee Collection Arrangement.</p>
3.	Relationship	Nothing in this MOU creates an agency, partnership, joint venture or employment relationship between any of the parties or their respective employees, agents or contractors. No party nor any person acting on its behalf may hold itself out as being entitled to contract or accept payment in the name of or on account of any other party.
4.	Mutual objective	The parties will have regard to the objective of mutual transparency between the parties, which requires the parties to openly share information with each other in undertaking the Fee Collection Arrangement.
5.	Roles and responsibilities of XXX	<p>XXX will be responsible for:</p> <ul style="list-style-type: none"> (a) overseeing the use of Anthon's Landing by Users; (b) collection of User Fees payable to SWEK from Users embarking and disembarking from Anthon's Landing upon arrival or departure from Port Facilities in respect of vessels under 35 metres in length (clause 7); (c) carrying out a quarterly reconciliation to verify the collection of User Fees and responding to reasonable requests for information by SWEK in relation to overseeing the use of Anthon's Landing by Users, the collection of User Fees and the Reconciliation Statement (clause 7 and clause 8); (d) payment of the Quarterly Payment to SWEK (clause 8); (e) maintaining true and accurate accounts and records of the collection of User Fees (clause 9); and (f) responding to reasonable requests for information by SWEK to enable SWEK to carry out an audit of compliance by 30 September each year for the preceding financial year (LGA Audit) in accordance with the <i>Local Government Act 1995 (WA)</i> (LGA) and subsidiary legislation made under the LGA, including but not limited to <i>Local Government (Audit) Regulations 1996 (WA)</i> (as amended, replaced or substituted from time to time) (clause 10).

Memorandum of Understanding

6.	Roles and responsibilities of SWEK	<p>SWEK is the local government covering the district of the East Kimberley and includes the towns of Wyndham and Kununurra, and has responsibilities and obligations under the LGA.</p> <p>SWEK will be responsible for payment of the Administration Fee to XXX, which shall be paid by way of set-off against User Fees collected by XXX (as defined in clause 7).</p>
7.	Collection of User Fees	<p>(a) In accordance with clause 5, XXX will collect the following fees and charges (all exclusive of GST), which are current as at 1 January 2024, from Users on behalf of SWEK where Users embark and/or disembark from Anthon's Landing upon arrival or departure from Port Facilities in respect of vessels under 35 metres in length:</p> <ul style="list-style-type: none"> (1) Berthage Fee - \$150 minimum per day or part thereof; and (2) Passenger fee - \$25 per passenger (all disembarking and embarking), <p>(collectively User Fees).</p> <p>(b) The above fees do not preclude XXX from charging Users fees which it is entitled to charge in the ordinary course of their business.</p> <p>(c) The User Fees are subject to CPI adjustment (or other adjustment as reasonably determined by SWEK) and may be reviewed from time to time and published on SWEK's website (https://www.swek.wa.gov.au).</p> <p>(d) If the Current CPI for a CPI Adjustment Date is more than the Previous CPI, then the relevant User Fee on and from that CPI Adjustment Date is the relevant User Fee immediately before that CPI Adjustment Date multiplied by the Current CPI and divided by the Previous CPI.</p> <p>For the purposes of this clause 7:</p> <p>CPI means the Consumer Price Index (All Groups) published by the Australian Buereau of Statistics for the City of Perth or such other index that represents the rise in the cost of living in the Kimberley region, as SWEK reasonably determines.</p> <p>Current CPI means the CPI number for the quarter ending immediately before the relevant CPI Adjustment Date.</p> <p>CPI Adjustment Date means 1 January, 1 April, 1 July and 1 October of each year, or such other date as SWEK reasonably determines.</p> <p>Previous CPI means the CPI number for the quarter ending immediately prior to the last date that the relevant User Fee was reviewed, adjusted or increased.</p>
8.	Quarterly Payment and Reconciliation	<p>XXX will, within 30 days of the end of each quarter (being the period 1 January – 31 March, 1 April – 30 June, 1 July - 30 September, 1 October – 31 December of each calendar year) (Quarter) in which User Fees have been collected by XXX:</p> <ul style="list-style-type: none"> (a) carry out a reconciliation of the Users Fees collected during the relevant Quarter (Reconciliation); (b) provide a statement for the relevant Quarter to SWEK containing: <ul style="list-style-type: none"> (1) sufficient details of the User Fees recovered (in a form reasonably acceptable to SWEK, and containing any other information reasonably requested by SWEK); and (2) calculations of the total amount of User Fees collected during the relevant Quarter; and

Memorandum of Understanding

		<p>(3) calculations of the Quarterly Payment owing to SWEK, (Reconciliation Statement);</p> <p>(c) pay a Quarterly Payment in arrears for the relevant Quarter to SWEK, by electronic funds transfer into SWEK’s nominated bank account, calculated as follows:</p> <p>Quarterly Payment = UF – AP</p> <p>Where:</p> <p>UF = Total amount of User Fees collected during the relevant Quarter; and</p> <p>AP = Administration fee of 12.5% of the total User Fees collected during that Quarter (Administration Fee).</p>
9.	Records and Audit	<p>(a) XXX must maintain true and accurate accounts and records of the collection of User Fees under clause 7 and in respect of the method or process of the matters specified in clause 9(b)(1) to (4) in accordance with accounting standards required to be complied with under the <i>Corporations Act 2001</i> (Cth) and any other relevant accounting standards approved by the Australian Accounting Standards Board and generally accepted accounting principles applied from time to time (Records).</p> <p>(b) SWEK may request in writing any further information, documentation or explanation of any method or process, or verification or validation of such method or process, as reasonably required by SWEK, relating to:</p> <ol style="list-style-type: none"> (1) XXX method of overseeing the use of Anthon’s Landing by Users and validation; (2) the collection of User Fees by XXX; (3) the maintenance of accounts and records required under clause 9(a); and (4) matters contained in the Reconciliation Statement (including calculations) prepared by XXX, <p>and XXX must promptly and diligently respond to such written request.</p> <p>(c) XXX will take into account and implement any reasonable changes requested by SWEK in writing in respect of any method or process specified clause 9(b)(1) to (4), or validation or verification of such method or process.</p> <p>(d) XXX will be permitted to invoice SWEK for its reasonable costs of compliance with clause 9(b), in accordance with agreed rates and charges, or an agreed budget of such costs, prior to XXX incurring such costs.</p> <p>(e) SWEK may, on giving 30 days written notice to XXX, but not more frequently than once in every 12 months appoint an independent auditor (including a firm of chartered accountants) (Auditor) to inspect, audit and report on XXX’s Records, and XXX must give the Auditor full and free access to the Records at its offices, or elsewhere as agreed, in respect of the collection of User Fees and payment of the Quarterly Payment (regardless of whether or not XXX has paid the Quarterly Payment or an amount purporting to be the Quarterly Payment).</p> <p>(f) The parties must ensure that any audit undertaken by or on behalf of SWEK under this clause is conducted and concluded promptly and diligently.</p>

Memorandum of Understanding

		<p>(g) SWEK must pay the costs of the auditor, but if the audit reveals an underpayment of the Quarterly Payment to SWEK, then the reasonable costs of the auditor will be paid by XXX within 10 business days of receiving an invoice from SWEK in respect of the auditor's costs (except to the extent such costs are recoverable by XXX pursuant under clause 10 for the purposes of an LGA Audit).</p> <p>(h) If an audit reveals an underpayment made in respect of the Quarterly Payment made to SWEK, then XXX must pay to SWEK the Adjusted Amount, which is the difference between:</p> <ul style="list-style-type: none"> (1) the total amount of the Quarterly Payment required to be paid by XXX to SWEK for the relevant Quarter (as revealed by the audit); and (2) the amount that was actually paid to SWEK by XXX in respect of the Quarterly Payment for that period, (Adjusted Amount), <p>within 10 business days.</p> <p>(i) If the audit reveals an overpayment made in respect of the Quarterly Payment made to SWEK, then SWEK must pay the Adjusted Amount to XXX, within 10 business days.</p>
10.	LGA Audit	<p>(a) SWEK is required to carry out a LGA Audit each year in respect of its operations.</p> <p>(b) SWEK may make a written request for information relating to the Fee Collection Arrangement from XXX, for the purposes of carrying out and completing the LGA Audit, from time to time.</p> <p>(c) Where a written request is made under clause 10(b), XXX will provide all information reasonably requested by SWEK promptly and diligently.</p> <p>(d) XXX will be permitted to invoice SWEK for its reasonable costs of compliance with this clause, in accordance with agreed rates and charges, or an agreed budget of such costs, prior to XXX incurring such costs.</p>
11.	Dispute resolution	<p>(a) Where a dispute or difference arises between the parties in connection with this MOU (including the calculation of the Quarterly Payment(s)), then a party may give written notice to the other party identifying the matter in dispute and the material facts, and nominate a representative on its behalf that is authorized to negotiate and settle the dispute on its behalf (Dispute Notice).</p> <p>(b) Within 7 days of receipt of a Dispute Notice, the other party will nominate a representative on its behalf that is authorized to negotiate and settle the dispute on its behalf.</p> <p>(c) The nominated representatives must negotiate in good faith with a view to resolving the dispute within 21 days after receipt of the Dispute Notice (or such longer period as those representatives agree), failing which the dispute may, if the dispute relates to the calculation of the Quarterly Payment, or any component of it, or a matter arising out of an audit of the Quarterly Payment carried out under clause 9, be immediately referred to an independent expert who is suitably qualified and capable of making an expert determination (Expert) in accordance with clause 12.</p> <p>(d) Notwithstanding the existence of a dispute, the parties must continue to meet their obligations under this MOU until the dispute is resolved and must not commence legal proceedings,</p>

Memorandum of Understanding

		except for urgent or interlocutory relief, until the parties have complied with this clause 11.
12.	Expert determination	<p>(a) Where a Dispute is required under this MOU to be determined by an Expert, then this clause 12 will apply.</p> <p>(b) The parties must attempt to agree on the identity of the Expert within 21 days. Failing such agreement, the Expert is to be nominated by the Chair of the Resolution Institute (ACN 008 651 232) (or a professional dispute resolution organisation of equivalent standing) or such person occupying his or her position or performing his or her role from time to time (or the nominee of the Chair or occupying person).</p> <p>(c) Each of the parties may provide submissions to the Expert explaining the matter for determination and setting out information and calculations in support of its version of the validity or otherwise of the claim and must concurrently provide a copy of the submission to the other party.</p> <p>(d) The Expert must act as an expert and not as an arbitrator. The Expert must:</p> <ol style="list-style-type: none"> (1) accept submissions from the parties as to the subject matter of the dispute within 21 days after his or her appointment; (2) state his or her determination of the dispute in writing within 28 days after his or her appointment but need not give reasons; and (3) undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment. <p>(e) The determination of the Expert is final and binding on the parties other than in the case of fraud or manifest error, and the parties must do everything reasonably required by the Expert to assist him or her to reach a decision.</p> <p>(f) If the amount determined to be payable by the Expert is greater than the amount actually paid to SWEK in respect of the disputed payment, XXX must pay SWEK the difference within 10 business days after the handing down of the Expert's determination.</p> <p>(g) If the amount determined to be payable by the Expert is less than the disputed amount, SWEK must refund the difference to XXX within 10 business days after the handing down of the Expert's determination.</p> <p>(h) Subject to clause 12(i), each party must pay its own costs of and incidental to the expert determination process set out in this clause 12, unless otherwise agreed by the parties or determined by the Expert.</p> <p>(i) If the Expert determines that there has been an underpayment made in respect of the Quarterly Payment made to SWEK, then XXX must pay all costs of and incidental to the expert determination process set out in this clause 12 (including, for the avoidance of doubt, SWEK's costs).</p>
13.	Termination	<p>(a) Either party will be permitted to terminate this MOU at any time, on giving 30 days' written notice; or</p> <p>(b) The parties may terminate this MOU by agreement in writing.</p> <p>(c) Any amounts which remain payable to SWEK by XXX pursuant to this MOU at the time this MOU is terminated must be paid to SWEK within 30 days of termination.</p>
14.	Nature of Memorandum of	This MOU is intended to be legally binding on the parties.

Memorandum of Understanding

	Understanding (MOU)	
15.	Miscellaneous	<p>(Assignment) No assignment, transfer of any rights or obligations of a party or grant of any encumbrances in relation to the Fee Collection Arrangement is permitted without the other party's written consent.</p> <p>(Survival of obligations) This clause and clauses 11, 12 and 13 survive termination of this MOU.</p> <p>(Confidentiality) All information disclosed by the parties to each other pursuant to this MOU in relation to the Fee Collection Arrangement (Confidential Information) is confidential and, unless otherwise agreed in writing by the parties, each party shall ensure that the Confidential Information remains confidential, except that the parties may make disclosure to their relevant advisors on a confidential basis, as otherwise required by the law or where reasonably necessary for the purposes of any audit under this MOU, Expert determination, dispute resolution or administrative or legal proceedings involving the Fee Collection Arrangement. For the avoidance of doubt, the parties agree that the terms of this MOU will not be treated as Confidential Information.</p> <p>(Costs) The parties will bear their own costs in relation to the negotiation, preparation and execution of this MOU.</p> <p>(Governing law and jurisdiction) State of Western Australia.</p>

DRAFT

Memorandum of Understanding

Dated this day of 2024

Executed by the parties:

The **COMMON SEAL** of the **Shire of Wyndham-East Kimberley** ABN 35 647 145 756 is hereunto affixed in the presence of:

Signature of Shire President

Signature of Chief Executive Officer

Print full name of Shire President

Print full name of Chief Executive Officer

Executed by **XXX ACN xxx xxx xxx** in accordance with section 127 of the *Corporations Act 2001* (Cth):

Director

Director/Secretary

Print full name of Director

Print full name of Director/Secretary

