



TENTH REPORT

OF THE

**STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS
AND STATUTES REVISION**

**IN RELATION TO A PETITION REGARDING THE PORT
KENNEDY DEVELOPMENT**

Presented by the Hon M D Nixon (Chairman)

**STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS
AND STATUTES REVISION**

Date first appointed:

21 December 1989

Terms of Reference:

The functions of the Committee are to consider and report on -

- (a) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;
- (b) what amendments of a technical or drafting nature might be made to the Statute book;
- (c) the form and availability of written laws and their publication;
- (d) any petition;
- (e) any matter of a constitutional or legal nature referred to it by the House.

A petition stands referred to the Committee after presentation.

Members as at the date of this report:

Hon M D Nixon MLC (Chairman)
Hon A J G MacTiernan MLC
Hon B M Scott MLC

Staff as at the date of this report:

Ms K A Schmidt, Advisory/Research Officer
Mr A C Evans, Committee Clerk

Previous reports:

See Appendix I

Address:

Parliament House, Perth WA 6000, Telephone (09) 222 7222

PETITION REGARDING THE PORT KENNEDY DEVELOPMENT

1. OVERVIEW

On 12 May 1994, the Legislative Council of Western Australia referred a petition regarding the Port Kennedy development to the Standing Committee on Constitutional Affairs and Statutes Revision. The petition, tabled by the Hon J Scott, Member for the South Metropolitan Region, requests that the Legislative Council

ensure the enactment of the full spirit of the Port Kennedy Development Agreement Act is carried out by confirming the commitment of the Parliamentary Secretary that no residential development¹ would be allowed on land within the Port Kennedy Development area.

The Committee has considered the petition, including submissions from the petitioner and the Minister for Planning. The Committee has also reviewed material regarding the environmental and planning aspects of the development and has met with a representative from Fleuris Pty Ltd, the principal petitioner, and an independent environmental scientist. The Committee visited the Port Kennedy development site on 29 August 1994, and records its appreciation for the two officers of the Department of Land Administration who arranged transport for the visit. The Committee also acknowledges its gratitude to Mr John Gladstone, Deputy Commissioner of Titles, for his assistance and advice.

The Committee considers that two issues arise from the petition. First, the petitioner notes a continuing commitment to the original intention that the project will remain a tourist destination. Second, subsequent discussions with the petitioner indicate concerns regarding the increased impact on the local environment if the development were to include long term residential accommodation.

During the course of the Committee's deliberations, the Committee was cognisant of a range of issues that have surrounded the development's somewhat contentious history. While the Committee notes that a number of concerns regarding the development may not yet have been clarified or resolved to the satisfaction of interested parties, the Committee was mindful of Schedule Two of the Standing Orders of the Legislative Council of Western Australia and restricted its considerations accordingly. The Committee notes that, at the time of this report, two additional petitions regarding the development have been referred to the Committee and will be considered in due course.

It is apparent to the Committee that, since the project's inception, the publicly stated intention of the development has been to create a tourist development that will contain no long term residential accommodation other than that provided for staff accommodation purposes. The Committee has found, however, that while the *Port Kennedy Development Agreement Act 1992* specifically restricts the use of some sections of the development to short stay accommodation, no adequate legal mechanism exists which will enforce such a land use restriction for the entirety of the development. The Committee recommends, therefore, that the State Government amend the *Port Kennedy Development Agreement Act 1992* to give effect to the spirit of the development as it has been presented to the public.

For the purposes of this report, the Committee has taken "residential development" to mean "long term residential accommodation", differentiates this usage from "short stay accommodation".

2. BACKGROUND TO THE PETITION

The State Government identified the need for a regional recreational centre, including yacht club, hotel, shopping facilities, and holiday accommodation at Port Kennedy as early as 1971. In 1985, the Government invited expressions of interest from prospective developers to provide the facilities and infrastructure in return for freehold and leasehold interest in part of the land. The State Government eventually chose Fleuris Pty Ltd ("the Company") to develop the project.

The *Port Kennedy Development Agreement Act 1992* ("the Act") ratified the agreement between the State Government and the Company to develop the Port Kennedy site. Schedule 1 of the Act specifies the construction to be undertaken. Stage One of the development incorporates freehold, leasehold, and reserved land, and includes

- access roads,
- marina,
- five star hotel,
- 240 rental units,
- 25 residential units (staff only),
- town centre including a tavern, restaurant, food outlets, newsagency, pharmacy, delicatessen, liquor store, boat brokerage, bank, leisurewear boutiques, gift/duty free shop, sporting goods store,
- 200m² administration offices,
- multi-purpose hall,
- public club facilities, and
- golf courses.

The area allocated for Stage Two of the development may or may not be developed by the Company. Development of Stage Two is subject to a further environmental review and management programme and shall not be developed unless 75% of the land is reserved under the Land Act 1993 for a purpose related to nature conservation and is classified as class "A" under that Act.

The Act provides for twenty-five (25) hectares of freehold land to be progressively allocated to the Company as a Crown Grant (See Appendix II). The development of any such land issued to the Company is authorised under section 9 of the Act. Section Nine effectively rezones the allocated land

- (a) as "urban" under the Metropolitan Region Town Planning Scheme;
and
- (b) as a "development zone" under the City of Rockingham Town Planning Scheme

with effect from the day on which the grant is issued. This zoning permits long term residential accommodation. While the Act requires that some leasehold development and Lots 7 and 8 of the freehold land be used as short stay accommodation only, it should be noted that the Act does not extend this requirement to the whole of the freehold development as Parliamentary debates suggest was intended. (Refer to paragraph 3.1)

The Act requires that the Company submit to the Minister for Planning a full proposal for the development, including the location, area, layout, design, materials, and construction schedule by 30 June 1994 for consideration by the Port Kennedy Management Board. The Minister for Planning has since allowed two extensions to the submission deadline to enable environmental studies to be concluded and the deliberations of the Foreign Investment Review Board to be finalised. On 20 April 1995, the Minister announced approval of a proposal dated 2 December 1994 which encompasses the findings of the requisite environmental studies and the approval of the Foreign Investment Review Board.

3. ISSUES ARISING FROM THE PETITION

It is apparent to the Committee that the petitioner's central concern is to ensure that all accommodation, except that required for administrative staff, encompassed within the Port Kennedy development is set aside for short stay only. The rationale for this restriction is two-fold. First, the petitioner maintains that, since the project's inception, the publicly-stated intention of the development has been to provide a tourist development that would provide public access to the area. Second, the petitioner claims that long term residential use of the area would have a significantly greater impact on the local environment than would tourism. These two issues are discussed below.

3.1 Commitment to the intention of the project as a tourist destination.

The petition refers to a prior commitment by a Parliamentary Secretary that no residential development would be allowed on the land within the Port Kennedy development area. It is apparent to the Committee that the development has, at least publicly, always been intended as a tourist development with no long term residential accommodation other than that required for administrative staff. The Committee notes that, during the second reading of the Port Kennedy Development Agreement Bill, the then Parliamentary Secretary, Hon John Halden MLC, stated "I make the commitment that it will not be residential in my lifetime". Further, the Minister for Planning, Hon Richard Lewis MLC, stated in Parliament on 30 March 1994 that he had recently rejected a proposal to turn the project into a housing development. The Minister reiterated this position on 27 September 1994 in response to a question from Hon Jim Scott in the Legislative Council.

The 1988 EPA public discussion document "Port Kennedy Regional Recreation Centre: Environmental Review and Management Programme" also states that the project "contains no urban residential component". As recently as 12 April 1995, a representative from the Company advised this Committee that it is the Company's intention that the freehold development be maintained as short stay accommodation only:

We have no proposals at all, either in our mind now or at a later point, for doing any permanent residential on the site.... but, as you are well aware, government policies and things change over periods of time and we do not know what this holds. But basically our plans are for a tourist development. The tourist development we want is one that is for short stay; not a permanent residential.

(Mr Richard Lukin, Transcript of Evidence, 12 April 1995)

3.2 Differential environmental impact of long term residential as opposed to short stay accommodation.

The petitioner is also concerned that residential use of the Port Kennedy area will have a significantly greater impact on the local environment than will a tourism development. The Committee notes that no experimental studies of the differential impact of short stay as opposed to long term residential accommodation have been conducted for a similar environment. Consultation with Dr David Annandale, Lecturer, Environmental Impact Assessment, Murdoch University, however, indicates that short stay accommodation may have a lesser environmental impact than long term residential accommodation. Contributing factors include a reduced likelihood that domestic pets and exotic garden species will be introduced to the area. Short stay residents are also less likely to incur isolated groundwater pollution, such as disposal of oil and grease from motor vehicles. Conversely, short stay residents may contribute to greater vehicle traffic than long term residents. Long term residents are also likely to be more conscious of litter and methods of domestic waste disposal.

With respect to the first issue discussed above, the Committee concurs with the petitioner that the various parties involved in the project have made it publicly apparent that tourism is the development's sole focus. The Committee shares the petitioner's concerns that no mechanism appears to be currently available to ensure that this intention is implemented with respect to the freehold component of the development. To this end, the Committee has examined the strategies available for ensuring that the accommodation on freehold land is restricted to short stay accommodation. These are discussed below. In terms of environmental concerns, the Committee acknowledges factors which suggest that short stay accommodation may have less of an impact on the local environment.

4. LAND USE RESTRICTION OPTIONS

While the Committee is of the opinion that the public intention of all parties involved in the development has been to create a tourist facility that includes no long term residential accommodation, other than for staff purposes, within the Port Kennedy Development Area, the Committee acknowledges that appears not to be entrenched in the Act. Accordingly, the Committee has examined a number of legal options for mechanisms that could be employed to restrict the use and enjoyment of the freehold land to be issued to the Company under the Act.

4.1 Restrictive Covenants.

Restrictive covenants are essentially an agreement or promise to restrict the use and enjoyment of certain land for the benefit of other surrounding land and are binding on every owner of the burdened land having notice of the covenant. Restrictive covenants may be created either in the form of a deed or as a condition of an agreement for the sale of land. All restrictive covenants must be negative in nature. They must require the owner of the burdened land to refrain from performing certain activities or exercising certain rights which would otherwise be available to her or him. A restrictive covenant represents a legal arrangement that is intended to "run with the land" so as to bind not just the original parties to the covenant, but also their successors in title provided they have notice of the covenant. Usually in Western Australia, this notice is automatically provided by the Registrar of Titles pursuant to his powers under the *Transfer of Land Act 1893-1972* ("TLA") who notes the restrictive covenant as an encumbrance upon the certificate of title of the land to be burdened.

The Committee has considered the possibility of requiring that the Company enter into a restrictive covenant to limit the use of the freehold land to short stay accommodation only.

However, the Committee recognises that a restrictive covenant may not be a suitable here for a number of reasons. Firstly, the provisions of the *TLA* (Section 129A) specifically require that for a restrictive covenant over land under its operation to be effective, that covenant must be "in respect of land under this Act". This means that both the land to be benefited (the Crown land) and the land to be burdened (the freehold land) must be within the scope of the *TLA*. However, the land proposed to be benefited by a restrictive covenant is Crown land, and accordingly, it is not subject to the provisions of the *TLA*. It follows, therefore, that the Registrar of Titles would not be empowered to record a restrictive covenant executed in favour of the State in relation to the land contained within the Port Kennedy Development Area.

Notwithstanding section 129A of the *TLA*, it may be possible for the State to enter into a restrictive covenant with the Company at common law. However, the Committee notes that such a restrictive covenant may not be effective against a successor in title to the freehold land as its rights under the covenant could be defeated by the principle of indefeasibility which underlies the *TLA*.

Accordingly, the Committee has concluded that the use of restrictive covenants to prohibit long term residential accommodation on the freehold land granted to the Company under the Act is not an appropriate solution. In addition, the Committee expresses some concern at the State Government's apparent lack of a general power within the *TLA* to provide environmental protection to Crown Lands adjacent to urban, commercial, or rural developments. The Committee, therefore, recommends that this issue should be addressed by legislative amendment to the *TLA*.

4.2 Planning Legislation Amendment Act (N°2) 1994.

The *Planning Legislation Amendment Act (N°2) 1994* amends the *Town Planning and Development Act 1928* by inserting section 12A with the effect that the State Planning Commission may prepare a notice for registration upon a title as part of a subdivision or strata title scheme approval regarding a "factor affecting the use or enjoyment of the land".

The Committee recognises, however, that the operation of this amendment was intended to be limited to hazards and other environmental factors. Accordingly, it does not provide the State Planning Commission with the ability to effect an encumbrance upon the title of freehold land.

4.3 Port Kennedy Development Agreement Act 1992.

The Committee recommends an amendment of the Act to accurately reflect the original intention of the parties to prohibit the use of the Crown and freehold land within the Port Kennedy Development Area for long term residential accommodation.

Currently, the Act only provides for a restriction as to the accommodation constructed on the leasehold over the Crown land in Stage Two and Lots 7 and 8 of the freehold land to be granted. The Committee considered various possibilities of extending this restriction to the entirety of the freehold land under the terms of the Act as it presently stands. In particular, the Committee gave consideration to the operation of clause 5(5)(c) of the First Schedule, which provides the Minister administering the Act with the ability to make his approval of the Project proposals subject to conditions. However, the Committee is of the opinion that the scope of clause 5(5)(c) may not be sufficiently wide to allow a restriction on the use of the freehold land. Firstly, the conditions referred to in clause 5(5)(c) are expressly referred to as "conditions precedent" which must be complied with before the Minister will approve the Project proposals. Secondly, it would appear from the operation of clause 10(1) of the First Schedule that clause 5(5)(c) is not intended to operate in relation to the freehold land. The Committee notes that clause 10(1) of the First Schedule expressly states that the Crown Grant of the freehold land is to be "subject to the exceptions, reservations and conditions usual in Crown Grants but otherwise free of encumbrances." As a result, the Committee believes that the only remaining option is to alter the terms of the Act to specifically provide for a restriction on land use to short stay accommodation only.

In this regard, the Committee understands that such an alteration can result in the creation of a perpetual prohibition on long term residential accommodation in the Port Kennedy Development Area. However, as noted above, there are two alternative methods available to achieve this alteration in the terms of the Act.

The first is by agreement in writing between the State and the Company pursuant to clause 21 of the First Schedule. Notwithstanding the Company's willingness, the concerns of the Committee are whether the obligation to restrict usage of the freehold land to short term accommodation will adequately confine the Company and be binding on any successor in title and what remedies the State will have in the event of default.

Such alteration by agreement to include a prohibition against the long term use of the land will contractually bind the Company. The Committee recognises, however, that the current endorsement provision of the Act embodied in section 4 does not convert the contractual terms of the agreement between the Company and the State into statutory duties. The Committee believes this is not desirable.

The relevant legal authorities dictate that a ratifying Act (such as the present Act) which does no more than authorise, ratify or approve the making of an agreement between the State and a private entity does not transform the terms of the agreement into statutory duties. The agreement, while embodied in a statute, remains a contract and succeeds only in making the obligations attendant upon the parties to such an agreement contractually binding. For the terms of an agreement to be transformed into statutory duties, there must be an expression of legislative intention by Parliament within the body of the ratifying Act that can be construed as an explicit adoption of each and every provision of the agreement as an express enactment. Examples of such provisions that have been held to have such a result include the direction that the agreement "shall take effect as if enacted in this Act", repetition of the terms of the agreement within the body of the ratifying Act itself or a statutory direction to the parties that the terms of the agreement are to be carried out. This view rests on the authority of the High Court decision of *Sankey v Whitlam* (1978) 21 ALR 505 where Mason J (as he then was) pointed to the distinction

between a statutory provision which merely gives validity to a contract and makes its provisions binding on the parties, and one which goes further by imposing a statutory obligation on the parties to carry out the terms of the contract, thus giving them the force of law...

His Honour went on to state that while one may say that the effect of statutory approval of an agreement is to make it binding on the parties and to deny the operation of inconsistent statute law, this does not mean that the provisions of the agreement have the force of law in the sense that they are laws.

In the case of the present Act, it seems clear that the endorsement provision found in section 4 does not currently satisfy the test laid down by Mason J to transform the obligations under the agreement into statutory duties. Section 4 provides that :

- "4. (1) The Agreement is ratified.
- (2) The implementation of the Agreement is authorized.
- (3) Without limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Agreement shall operate and take effect notwithstanding any other Act or law."

Clearly, such an endorsement does not transform the obligations of the agreement into statutory duties. Section 4 merely provides basic statutory approval of the agreement and confers the authority on the executive branch to perform the agreement. It does not require or bind the executive or the Company to carry out or give effect to the terms of the agreement. Accordingly, section 4 fails the test set down in *Sankey v. Whitlam* and cannot be said to have been an expression of Parliament's intention to adopt each provision of the Act as its own enactment and thus transform the parties obligations under the agreement into statutory duties.

Accordingly, failure to comply with its obligations under the Act as it presently stands would only render the Company in default of the contract and empower the State to terminate the agreement. It will not allow the State to specifically enforce the Company's obligations as a statutory duty. The Committee recognises that, under the current operation of the Act, the available remedies are not necessarily suitable to the State's purposes.

In the event of default of the Company's obligations (or its successors) under the Act, the State has the right, subject to a ninety day notice period, to terminate the agreement contained within the Act, or alternatively, to remedy or cause to be remedied the default of the Company's obligations. The effect of such termination under the Act is that the rights of the Company (or its successors) shall cease upon the date of termination and the Company shall pay all moneys due to the State forthwith, although the Company's ownership of any freehold land issued up to that point will not be affected. Further, the Committee notes the specific operation of clause 24(1)(a), which provides that in the event of default which the State considers "material in the due performance or observance of any of the covenants or obligations of the Company ...", the extinction of the Company rights in the Port Kennedy Development Area extends to all assignees, successors in title, chargees and mortgagees.

Notwithstanding the provision of these remedies, the Committee expresses concern at the limitation and unsuitability of the present legal effect of the Act and the State's available remedies as outlined in clause 25(1), particularly clause 25(1)(c) which prevents either party to the Act from having any claims against the other in relation to any matter or thing arising from the Act, other than those outlined in clause 25(1)(a) and (b) and already discussed above. The Committee notes that the current operation of clause 25(1)(c) may exclude the State from pursuing other normally available remedies.

The Committee has also considered the question of binding successors in title to the Company's contractual obligations, including any subsequent alterations. Specifically, the Committee notes the operation of clause 20.1 of the First Schedule to the Act, which provides that no sale or assignment by the Company of any of its interests or rights under the Act will be effective unless the assignee or purchaser executes a Deed of Covenant in favour of the State to comply with all the provisions and obligations of the Company under the Act. The Committee also notes that the form of this Deed of Covenant must be approved by the Minister. This power of approval could be utilised to ensure that a similar Deed of Covenant is executed in favour of the State upon each and every assignment, sub-letting or disposition affecting the freehold land during the currency of the Agreement. As a result, clause 20.1 will be effective to bind all successors in title to the freehold land to observe the restriction on long term residential accommodation, with failure to do so also resulting in the State's right to terminate. However, the Committee still considers the remedies available against successors in title, like those available against the Company, would be inadequate as they do not provide for specific performance of the obligations under the agreement. Accordingly, the Committee is of the opinion that it is insufficient to amend the Act only at the contractual level.

Consequently, the Committee strongly recommends that consideration be given to the alternative option of varying the terms of the Act through legislative amendment. To ensure that the obligation to abide by the restriction against long term or residential accommodation is given statutory, as opposed to contractual force, the Committee recommends that such a provision restricting the use of the freehold land should be entrenched within the body of the Act, not merely within the First Schedule embodying the terms of the agreement. In this way, the restriction would have the force of law and would naturally be made perpetually binding on the Company and all successors in title, subject only to alteration by the Parliament itself. Furthermore, any failure to abide by such a statutory restriction would embody a criminal offence for breach of statutory duty.

Lastly, the Committee notes the operation of section 11 of the Act, which duly provides that the Registrar of Titles or any other person authorized to record or register transaction affecting land or property, must take cognisance of the Act and record or register in the appropriate manner such matters as are necessary to give effect to the Act. In the Committee's opinion, this section will require the Registrar or other authorized person to register the restriction to short stay accommodation over the freehold land granted to the Company on the Registry or other records. In this manner, all prospective purchasers of the freehold land will have notice of the restriction on its use. The Committee notes that section 11 will provide this notice regardless of whether the amendment to the Act imposing the restriction was achieved by written agreement between the parties or unilaterally by Parliament as Section 11 provides a statutory duty on the Registrar or other authorized person to register or record the transaction affecting the estate or interest in the land under the Act.

Therefore, the Committee is of the opinion that the most effective ~~and accessible~~ method of restricting the use of the freehold land to short stay accommodation is to amend the terms of the Act itself.

4.4 City of Rockingham Town Planning Scheme

The Committee has also considered the application of local government town planning to the freehold land in the Port Kennedy Development Area and is of the opinion that local government measures, such as appropriate zoning, should be used to complement the amendments to the Act outlined above. In particular, the Committee feels that the relevant local authority would be well placed to monitor and enforce the spirit of the agreement.

It has been noted above that the twenty-five (25) hectares of freehold land to be granted to the Company are to be zoned as a "development zone" under the City of Rockingham Town Planning Scheme ("the Scheme"). While the City of Rockingham itself has no specific legislative powers to limit the type of accommodation constructed on the freehold land within the Port Kennedy Area, the Committee has considered two alternative courses of action within the town planning legislation that might be availed of to achieve a restriction on the freehold land to short stay accommodation only.

Firstly, it has been suggested to the Committee that the State Planning Commission might be able to use its powers pursuant to the section 20 of the *Town Planning and Development Act 1928* ("*Town Planning and Development Act*") to impose such a condition on its approval of a development under the Scheme.

However, the Committee considers that this suggestion may not be an appropriate one for the following reasons. Firstly, the remedies available for breach of such conditions do not provide a satisfactory mechanism for enforcing the restrictions. More importantly, the Committee considers that such a purported use of the powers granted pursuant to section 20 of the *Town Planning and Development Act* would probably be ultra vires. Section 20 provides only for the placing of conditions precedent upon the approval of proposals for any sale, amalgamation or subdivision of lots. It does not contain within its terms the authority to place perpetual conditions upon the use and enjoyment of such land. In addition, it is well-established law that any condition imposed on a development approval must be made for a planning purpose and not for any other ulterior purpose, however desirable that purpose may be to the public interest², particularly, where there

is a more appropriate manner or forum for achieving the desired purpose or object³. As there is some uncertainty as to what is a "planning purpose", it is possible that a utilisation of section 20 of the *Town Planning and Development Act* to restrict the use of freehold land in Port Kennedy would be found to be an inappropriate use of the Commission's powers, unrelated to the Scheme and designed to achieve the ulterior purpose of remedying the shortfalls of the agreement between the State and the Company concerning Port Kennedy. Moreover, as discussed below in section 4.4, there exist alternative methods to achieve the purpose of restricting the use of the freehold land which are ~~both~~ less complex and more appropriate.

Alternatively, the Committee has considered the possibility of the City of Rockingham drafting by-laws under section 248 of the *Local Government Act 1960* to achieve the desired restriction on the freehold land. Section 248 provides local authorities with the general power to enact by-laws relating to matters set forth in the Second Schedule to the *Town Planning and Development Act*. Section Three of the Second Schedule provides that by-laws may be made concerning the classification or zoning of an area for "residence, flats, trade, business, industry, commercial recreation, education or other public or institutional purposes, and including areas for agricultural or rural use and for any other general or particular purposes whether of the same class or kind as the class or kind before enumerated or not, and fixing the sites or areas for any of the purposes included in this Schedule and prohibiting in any of these zones or classifications any building or use of land of or for a general or particular nature or purpose".

The Committee acknowledges that the drafting of a by-law by the City of Rockingham would not, of itself, completely achieve the original intention for the Port Kennedy Development but considers that it would provide a suitable complement to amendment of the Act by State Parliament. The Committee therefore feels that there is merit in recommending to the City of Rockingham that it consider exercising its powers under s248 of the *Local Government Act* to restrict the use of the area in question to short stay accommodation.

4.5 Government Agreements Act 1979 (WA)

The Committee has taken account of the operation of the *Government Agreements Act 1979 WA*, which specifically provides that government agreements such as the Act are to stand alone on their own terms and where they are inconsistent with any other written law, that inconsistent written law is held to have been modified for the purposes of the government agreement. In addition to the matters pertaining to this legislation discussed above, the Committee amongst other things, gave consideration to the general application of this statute. Specifically, the Committee explored the idea of modifying sections 58 and 129A of the TLA by including provisions in any alteration of the Act to specifically direct the Registrar of Titles to register a restrictive covenant or memorial to give notice of the restriction on the use of the freehold land to any prospective purchaser. However, the Committee has considered it unnecessary to further explore this as the State can achieve its purpose of restricting the use of the freehold land through a localised alteration of the Act alone and this restriction must be registered by the Registrar of Titles pursuant to section 11 of the Act. However, the Committee has made recommendations to amend the *Transfer of Land Act* on other grounds.

5. RECOMMENDATIONS AND CONCLUSION

5.1 The Port Kennedy Development

It is apparent to the Committee that, since the project's inception, the central premise underlying the Port Kennedy development has been to create a tourist destination containing no long term residential accommodation other than that required for staff accommodation purposes, either on the Crown land to be leased by the State for development by the Company, or the freehold land which will be progressively granted to the Company. This intention has been stated publicly by both the Company and successive State Governments. It is the opinion of the Committee, however, that the intention has not been sufficiently carried through to the terms of the *Port Kennedy Development Agreement Act 1992*. At present, no adequate legal mechanism exists, either within the *Port Kennedy Development Agreement Act 1992* itself or at common law, which will enforce such a land use restriction in relation to the entirety of the freehold land, particularly against any future successors in title.

In considering the options available for restricting the freehold land to short stay accommodation, the Committee concluded that the most effective mechanism would be to vary the terms of the *Port Kennedy Development Agreement Act 1992*. While it will be incumbent upon the State Government to propose the necessary amendments, the Committee suggests that these should encompass:

- a) an amendment to achieve a restriction to short stay accommodation and the provision of adequate remedies in favour of the State in the event of a default by the Company or its successors in title in respect of both Crown and freehold land within the Port Kennedy Development Area. This restriction should make specific reference to section 11 of the Act, which requires the Registrar of Titles to give effect to the transactions affecting any estate or interest in the land under the cognisance of the Act;
- b) an amendment to Clause 6.1 of the Second Schedule to incorporate all of the Lots; and
- c) a definition of the terms "short stay accommodation" and "long term residential accommodation" or their equivalents.

The Committee also suggests that it would be advisable for the City of Rockingham to supplement the amendment to the Act with a corresponding zoning over the freehold land pursuant to s248 to the *Local Government Act*.

In the Committee's view, it is essential that these recommendations are implemented to ensure that the development of the Port Kennedy Area takes place in the manner originally intended by the State Government and the Company. In particular, the Committee acknowledges the need to keep faith with the local community, who, from the Project's inception, has accepted undertakings from both the Company and the State Government that there would be no long term residential accommodation within the Port Kennedy Development. Further, the Committee also accepts that tourism development may have materially lesser impact on the local environment than will long term residential use of the Port Kennedy area.

5.2 Other Matters

The Committee notes that similar agreement acts in other jurisdictions embody the provisions of the agreement within legislative body of the agreement act itself, effectively obviating such requirements for bilateral agreement to future variations (See, for example, the *Sanctuary Cove Resort Act 1985 (Q'ld)*). This approach has the additional advantage of providing a more effective basis for liability between the parties, based on statutory duty rather than contractual obligation. The Committee recommends that the State Government give consideration to drafting future agreement acts in this manner. In the present case, however, given the Company's publicly expressed position in regard to the question of short stay accommodation, the Committee does not anticipate that obtaining agreement to the proposed variation will present an obstacle to giving legal effect to the stated intention of the project.

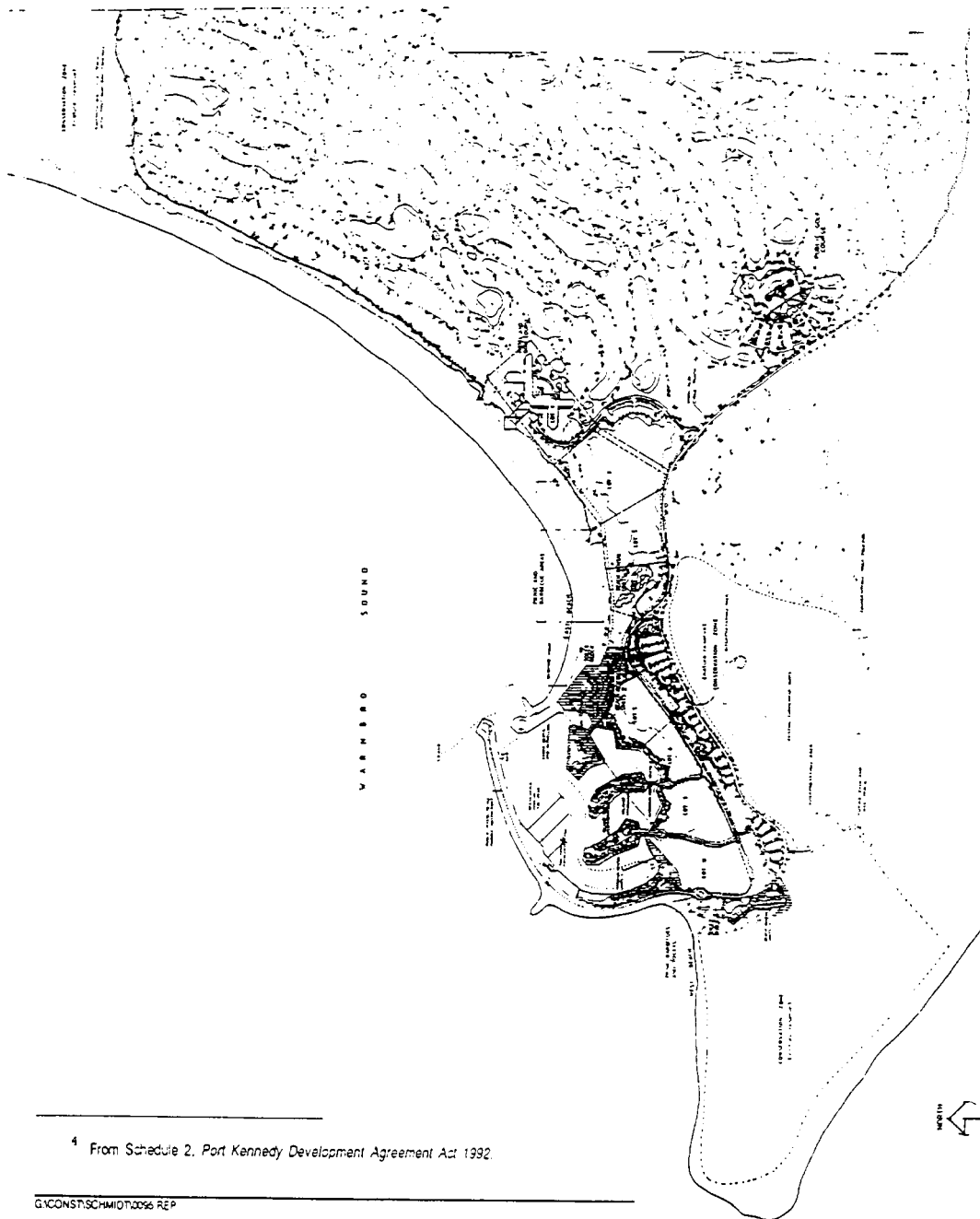
The Committee expresses some concern at the State Governments apparent lack of a general power within the *Transfer of Land Act* to provide environmental protection to Crown Lands adjacent to freehold developments. The Committee recommends that this issue should be addressed by legislative amendment to the *Transfer of Land Act*.

LIST OF REPORTS

1. Report regarding a petition seeking legislation on various aspects of substantive law and procedural law relating to sex offences against children.
2. Interim report into links between Government agencies and the failed Western Women Group.
3. Second interim report into links between Government agencies and the failed Western Women Group.
4. Report regarding a petition requesting the Legislative Council to investigate whether the proposed dissolution of the City of Perth contravenes the Constitution Act 1889 or any other Act or Statute.
5. Report in relation to a petition requesting the ban on the use of fishing nets (other than prawn drag nets and throw nets) for recreational fishing in the Pilbara region and the phasing out of certain professional licence endorsements.
6. Report in relation to a petition concerning the export of iron ore through Esperance.
7. Report in relation to a petition concerning the town of Wittenoom.
8. Overview of Petitions: April 1993 - March 1994.
9. Overview of Petitions: May 1994 - December 1994.

APPENDIX II

PORT KENNEDY DEVELOPMENT AREA⁴



⁴ From Schedule 2, Port Kennedy Development Agreement Act 1992.