

# MEMO



☒ Confidential   ☐ Urgent   ☐ Routine

**To:** Elected Members  
**From:** Mark Searle, Chief Executive Officer  
**E-mail:** Mark.searle@marion.sa.gov.au  
**Subject:** Craven and Makris Deeds  
**Date:** 15 November 2004  
**Reference:** 4.65.1.8

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Attached for your information is a signed copy of the Craven Deed referred to in the Special General Council meeting held on Tuesday 2 and 9 November 2004.

Relevant signatures for the Makris Deed are currently being sought and the signed deed will be circulated at the Special General Council meeting of 16 November 2004.

Please note that the Deeds relate to a commercial transaction and as such, are subject to the strictest confidence provisions under the Local Government Act. This is further reinforced by the Council resolution that the matter be considered in confidence under Section 90(3)(d) of the Local Government Act 1999. I also highlight that should a breach in confidence occur, the penalty provisions of Section 62 of the Local Government Act 1999 would be applicable.

A handwritten signature in black ink, appearing to read "Mark Searle", written over a horizontal line.

Mark Searle  
Chief Executive Officer



# CONFIDENTIAL

THIS DEED is made the

day of

2004

**BETWEEN: THE CORPORATION OF THE CITY OF MARION** ABN 37 372 162 294 of 25 Sturt Road, Sturt, South Australia, 5047 ("**Council**").

**AND: ISNA PTY LTD** ACN 007 947 668 of 18 Stuart Road, Dulwich, South Australia 5065;

**NEVARC NOMINEES PTY LTD** ACN 007 905 697 of 18 Stuart Road, Dulwich, South Australia 5065;

**CRAVEN SECURITIES PTY LTD** ACN 007 603 867 of 18 Stuart Road, Dulwich, South Australia 5065; and

**CRAVEN LAND PTY LTD** ACN 097 231 779 of 18 Stuart Road, Dulwich, South Australia 5065

("collectively referred to as **Craven**")

## BACKGROUND:

- A. The Council has identified the need to construct the New Road, to provide improved access between the suburbs of Sheidow Park, Trott Park and Hallett Cove.
- B. Craven is together the owner of the whole of the land comprised in Certificates of Title Register Book Volume 5677 Folios 182 and 183 and Volume 5581 Folio 554 ("**Land**").
- C. The Council has identified the most appropriate route for the New Road as being over a disused railway line adjacent to Shakes Crescent, Hallett Cove, across Lonsdale Road and to continue until it joins the western end of Lander Avenue, Sheidow Park.
- D. Most of the proposed route traverses the disused railway line. Subject to the outcomes of engineering testing and final design the road may cross onto Craven's land as depicted on the Plan.
- E. Craven is keen to see the construction of the New Road, as Craven believes that the construction of the New Road will enhance the Land.
- F. Craven will benefit from the construction of the New Road as the owner in the Land as the New Road will provide access from the Land to Lonsdale Road and will facilitate the redevelopment of the Hallett Cove Shopping Centre which will also enhance the Land.
- G. Craven has offered to pay the costs of the construction of Craven's Portion on the terms and conditions set out in this Deed.
- H. Craven has made a development application in respect of certain development proposed to occur on the Land.

- I. Craven has agreed to make available any land required for the construction of the New Road in the form directed by Council. This includes the provision of the road corridor and controlled access reserves.
- J. Craven acknowledges that the Council will institute appropriate control measures to control access to the New Road over the sections that go through Craven's property or alternate corresponding sections along rail corridor if engineering design indicates this to be the more appropriate route.
- K. Craven has agreed to negotiate in good faith any minor realignment of property boundaries to allow the interlinking of the proposed bike / pedestrian path being constructed in conjunction with the New Road with other existing or proposed bike / pedestrian pathways in the vicinity.

## **THE PARTIES AGREE AS FOLLOWS:**

### **1. INTERPRETATION**

#### **1.1 Background**

The background set out above forms part of this Deed and the parties agree that the background is true and accurate.

#### **1.2 Definitions**

In the interpretation of this Deed unless the contrary intention appears or unless the context otherwise requires, the following expressions have the following meanings:

- 1.2.1 "Access Point to the New Road" means a point on the New Road which enables Craven, subject to all necessary approvals, authorisations and consents, to construct a road or other means of access to the New Road. An Access Point to the New Road may include the provision of a break in the kerb of the New Road but does not include the construction of such roads or other means of access to land adjacent to the New Road;
- 1.2.2 "Council's Programme" means the programme set by the Council to complete the construction of the New Road, and as amended or varied by the Council from time to time.
- 1.2.3 "Craven's Portion" means the portion of the New Road to be constructed from the eastern edge of the pavement of Lonsdale Road to the western side of the ETSA Easement, which is marked in red on the Plan.
- 1.2.4 "Default Rate" means the rate of interest published from time to time by the National Australia Bank as its *Benchmark Rate* plus 2% calculated on a daily basis and capitalised monthly;

- 1.2.5 “Fill” means uncontaminated dirt, soil, earth, rock or other material which is, in the reasonable opinion of the Council, suitable for use in the construction of the New Road;
- 1.2.6 “Liabilities” means debts, obligations, claims, losses, liabilities, costs or expenses of any kind and however arising, including penalties, fines and interest and including those which are prospective or contingent and those the amount of which for the time being is not ascertainable;
- 1.2.7 “New Road” means the new road which is to be constructed from the intersection of Gledsdale Road and Shakes Crescent, Hallett Cove to intersection of Berrima Road and Lander Avenue, Sheidow Park wholly along the route of the disused railway line or, subject to final engineering assessment, partially along the route of the disused railway line and partially over that portion of Certificate of Title Register Book Volume 5677 Folio 182 identified as proposed allotment 5142 on the Plan.
- 1.2.8 “Plan” means, subject to Clause 4.4, the plan of the route of the New Road as depicted on the plan attached as Annexure I, which is subject to the outcome of the final engineering design.
- 1.2.9 “Staging” means the staging as set out in Clause 3.
- 1.2.10 “Works” means the design and construction of the New Road in accordance with recognised standards taking into account expected traffic and pedestrian movements.

### 1.3 General

Unless the contrary intention appears:

- 1.3.1 Words denoting the singular number only shall include the plural number and vice versa.
- 1.3.2 Reference to any gender shall include every other gender and words denoting individuals shall include corporations and vice versa.
- 1.3.3 Reference to any Act of Parliament, Statute or Regulation shall include any amendment currently in force at the relevant time and any Act of Parliament, Statute or Regulation enacted or passed in substitution therefor.
- 1.3.4 A reference to the “parties” means the parties to this Agreement.
- 1.3.5 Headings are for convenience of reference only and do not affect the interpretation or construction of this Deed.
- 1.3.6 A requirement in this Deed for liaison and consultation is a requirement for full and frank exchange and discussion and includes a requirement where necessary and appropriate, for full disclosure of relevant information and material.

- 1.3.7 A reference to a Clause, Schedule, Annexure or exhibit is to a clause, schedule, annexure, or exhibit of or to this Agreement, each of which forms part of this Agreement.
- 1.3.8 Including and similar expressions are not and must not be treated as words of limitation.
- 1.3.9 Where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning.
- 1.3.10 Where an expression is defined anywhere in this Agreement, it has the same meaning throughout.
- 1.3.11 A reference to any instrument (such as a deed, agreement or document) is to that instrument (or, if required by the context, to a part of it) as amended, novated, substituted or supplemented at any time and from time to time.

#### **1.4 Writing required**

No variation or waiver of, or any consent to any departure by either party from, a provision of this Deed is of any force or effect unless it is confirmed in writing, signed by the parties and then that variation, waiver or consent is effective only to the extent to which it is made or given.

#### **1.5 Waiver and exercise of rights**

The failure, delay, relaxation, or indulgence on the part of either party in exercising any power or right conferred upon that party by this Deed does not operate as a waiver of that power or right, nor does any single exercise of any power or right preclude any other or further exercise of it or the exercise of any other right or power under this Deed.

#### **1.6 Entire agreement**

This Deed constitutes the sole and entire agreement between the parties and no warranties, representations, guarantees or other terms or conditions of whatsoever nature not contained and recorded herein shall be of any force.

#### **1.7 Invalid or unenforceable provisions**

If any provision of this Deed is invalid and not enforceable in accordance with its terms, all other provisions which are self-sustaining and capable of enforcement without regard to the invalid provisions shall be and continue to be valid and enforceable in accordance with their terms.

#### **1.8 Contra Proferentem**

In the interpretation of this Deed, no rule of construction applies to the disadvantage of one party on the basis that that party put forward or drafted this Deed or any provision in it.

## **1.9 Joint and Several**

Where a right is conferred or a Liability is imposed on two or more parties to this Deed (the “relevant parties”), a right conferred on the relevant parties is a right conferred on the relevant parties jointly and must be exercised jointly. A Liability imposed on the relevant parties is a Liability imposed on each of the relevant parties severally as well as all of the relevant parties jointly.

## **2. CONDITIONS PRECEDENT**

### **2.1 Land Procurement**

2.1.1 The rights and obligations of the parties under this Deed are subject to the condition precedent that the Council at its cost on or prior to 30 May 2005 (“First Approval Day”):

2.1.1.1 acquires the land required for the New Road from TransAdelaide which land will include but not be limited to the following land:

- (a) A portion of Certificate of Title Volume 5888 Folio 40 being that portion comprising the whole of pieces 72 & 73 and a portion of piece 71 in Filed Plan 218863;
- (b) A portion of Certificate of Title Volume 5855 Folio 552 being the closed road marked ‘S’ and ‘T’ in Road Plan 1188;
- (c) The whole of Certificate of Title Volume 5721 Folio 702 being the closed road marked ‘D’ in Road Plan 6360; and
- (d) A portion of Certificate of Title Volume 5470 Folio 667 being that portion comprising the whole of piece 1 and a portion of piece 2 in Filed Plan 148236;

(which land shall be referred to as the “TransAdelaide Land”); and

2.1.1.2 that the acquisition of the TransAdelaide Land is on terms and conditions to the sole satisfaction of Council.

2.1.2 If this condition precedent is not fulfilled before the First Approval Day, either party may terminate this Deed by 7 days’ written notice to the other (unless this condition precedent is fulfilled during the notice period).

### **2.2 Funding**

2.2.1 The rights and obligations of the parties under this Deed are subject to the condition precedent that the Council acquires the necessary funding to construct the new road by the First Approval Day.

2.2.2 The acquisition of necessary funding can be from sources both internal to and external from the Council. It is at the Council's sole discretion as to the suitability of the level of funding achieved to meet the required outcome.

2.2.3 If this condition precedent is not fulfilled before the First Approval Day, either party may end this Deed by 7 days written notice to the other (unless Condition Precedent is fulfilled during the notice period).

### **3. COUNCIL'S OBLIGATIONS**

3.1 The Council acknowledges and agrees to undertake the following obligations:

3.1.1 to prepare plans and specifications depicting the construction of the New Road, in accordance with recognised standards taking into account expected traffic and pedestrian movements;

3.1.2 to, subject to the acquisition of necessary funding, construct the New Road by 31 December 2006;

3.1.3 to provide three Access Points to the New Road from the Land in the vicinity of the points shown in the Plan unless the New Road is constructed wholly along the route of the disused railway line in which case the Council will only be required to provide two Access Points to the New Road from the Land in the vicinity of the points shown on the Plan; and

3.1.4 to advise Craven as to the proposed date of completion of Craven's Portion; and to provide Craven with written advice within 7 days of any variations to the completion date of the New Road

3.2 It is the current intention of the Council to commence construction of the New Road on or before the thirtieth day of June 2005 but this should not be taken by Craven to be an undertaking of the Council to commence construction of the New Road by this date.

### **4. NOTIFICATION OF THE PLAN**

4.1 The parties acknowledge and agree that the Plan is a draft plan and does not necessarily depict the final route or specification of the New Road.

4.2 On or before 30 June 2005, the Council will provide Craven with a plan showing the final route and specification of the New Road.

4.3 Craven agrees that so long as the Access Points to the New Road depicted on the plan provided by the Council pursuant to Clause 4.2 are within fifty (50) metres of the Access Points to the New Road shown in the Plan, it will have no right to, and will not, take any action to prevent the construction of the New Road in accordance with that plan or to object to any control measures taken by Council in relation to access to the New Road.



- 4.4 Once the Council provides Craven with a new plan pursuant to Clause 4.2, that plan will be deemed to replace the Plan, and from that date, throughout this Deed the term "Plan" shall refer to that plan.

## **5. CONSTRUCTION OF THE NEW ROAD**

- 5.1 Council will:
- 5.1.1 perform or complete the construction of the New Road using the Council's own employees plant and equipment; or
  - 5.1.2 cause the performance or completion of the construction of the New Road by an independent contractor who shall be chosen by the Council in its absolute and unfettered discretion
- 5.2 The Council shall act in a reasonable and competent manner to ensure the performance of the construction of the New Road by it or by a contractor of its choice shall be effected within a reasonable time taking into account the nature and amount of the construction of the New Road to be performed, the weather prevailing from time to time and all other relevant factors.
- 5.3 Craven hereby grants to the Council, including the Council's employees, agents, contractors and other personnel necessary to construct the New Road, a licence to enter on and alter such portion of the Land as reasonably necessary to construct the New Road.

## **6. CRAVEN OBLIGATION**

- 6.1 When Council undertakes the Works then Craven acknowledges and agrees that:
- 6.1.1 the payment for the construction of Craven's Portion is to benefit the Land, by way of granting access to the opposite side of Lonsdale Road; and
  - 6.1.2 Subject to Clause 6.3, Craven will pay the costs of construction of Craven's Portion which is agreed as being two hundred thousand dollars (\$200,000.00) excluding GST to the Council within three (3) months of receiving written demand for payment from the Council, which demand may not be issued until construction of the New Road has commenced.
- 6.2 In order to enable the Council to perform the Works Craven must use its best endeavours to procure the transfer of Craven's Portion to the Council unless Council notifies Craven that the Portion is not required.
- 6.3 **Payment Review - CPI**
- 6.3.1 The payment made by Craven pursuant to Clause 6.1.2, will be reviewed and adjusted on the date that the Council issues written demand for that payment ("the Review Date") so that the payment shall be re-calculated and adjusted by a proportion

equivalent to the proportional change in the Consumer Price Index ("the CPI") over the period from the date of this Deed to the Review Date.

For the purposes of this Clause 6.3:

6.3.1.1 CPI means the Consumer Price Index for Adelaide, All Groups, published from time to time by the Commonwealth Bureau of Statistics;

6.3.1.2 a reference to the CPI at a particular point in time means the CPI which has been published and is then current; and

6.3.2 Regardless of the outcome of any review under this Clause 6.3, the payment as reviewed hereunder will not decrease.

## **7. PROVISION OF FILL**

Craven agrees to provide and place any Fill that Council requires to perform the Works up to a maximum of five thousand (5,000) cubic metres. The Fill is required at Council's discretion but is expected to be required no earlier than 31 March 2005 and no later than 31 August 2006.

## **8. PROJECT STAGES**

8.1 The Council and Craven agree that the New Road may be completed in stages.

8.2 The Council and Craven agree that Craven's Portion may constitute a stage in the completion of the New Road.

## **9. CO-OPERATION AND GOOD FAITH**

9.1 The parties agree that they will co-operate with each other and at all times act in good faith and with the joint objective of successfully and expeditiously concluding all of the arrangements contemplated in this Deed.

9.2 In particular, the parties agree to negotiate in good faith any minor realignment of property boundaries to allow the interlinking of the proposed bike / pedestrian path being constructed in conjunction with the New Road with other existing or proposed bike / pedestrian pathways in the vicinity.

## **10. COSTS**

Unless and except as specified otherwise herein, the parties will bear their own costs and expenses incurred in connection with negotiating, agreeing and stamping this Deed and of all other transfers and instruments to be prepared, executed and stamped hereunder.

## 11. INTEREST ON LATE PAYMENT

- 11.1 If either party fails to pay any amount payable by it under this Deed by the due date, that party must, if demand is made by the other party, pay interest at the Default Rate on the unpaid amount accrued daily from the time it falls due until the amount has been paid in full.
- 11.2 The right to demand payment of interest under this Clause 11 is without prejudice to any other rights and remedies that a party may have in respect of a payment default under this Deed.

## 12. ASSIGNMENT

Neither party may assign any of its rights or obligations hereunder without the prior written consent of the other party.

## 13. NOTICES

Any notice required or permitted to be given or served under this Deed must be in writing and will, without prejudice to any other form of service, be treated as being duly given or served if it is:

- 13.1 left at the recipient party's address;
- 13.2 sent by pre-paid mail to the recipient party's address (in which case it will be deemed to have been given three (3) days after the date on which it was posted);  
or
- 13.3 transmitted by facsimile to the recipient party's address.

For the purposes of this clause, a reference to an address means the party's principal and current business address which in the absence of notice to the contrary is deemed to be the address stated herein.

## 14. GST

### 14.1 All amounts are GST exclusive amounts

Subject to this Clause 14, all amounts expressed or described in this Deed are GST exclusive amounts.

### 14.2 All amounts to be increased for any GST

If any GST (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* as amended from time to time, 'GST') is payable by any party ('Supplier') in respect of the supply of any goods, services, real property or any other things to another party ('Recipient'), then the amount expressed or described in this Deed ('Original Amount') is to be increased so that the Supplier receives an amount ('Increased Amount') which, after subtracting the GST liability of the Supplier on that Increased Amount, results in the Supplier retaining the Original Amount after payment of that GST liability.

### 14.3 Supplier to assist Recipient

The Supplier will do all things reasonably available to it to assist the Recipient to claim on a timely basis any input tax credits the Recipient may be entitled to claim for any acquisition of goods, services, real property or any other thing from the Supplier. This includes the Supplier maintaining its registered status for GST purposes, and issuing tax invoices for supplies made under this Deed on a timely basis as reasonably requested by the Recipient.

**EXECUTED** as a Deed.

**THE COMMON SEAL OF THE  
CORPORATION OF THE CITY OF  
MARION** was hereunto affixed in the  
presence of: )  
)  
)  
)

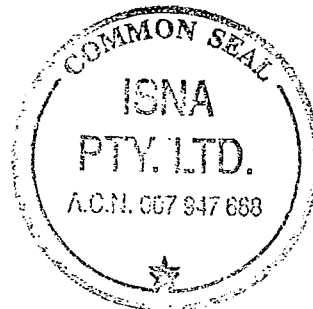
.....  
Chief Executive Officer

.....  
Mayor

**THE COMMON SEAL of ISNA PTY  
LTD** was hereunto affixed in the  
presence of: )  
)  
)  
)

*[Signature]*  
.....  
Director

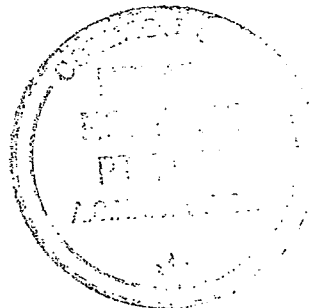
*E K Craven*  
.....  
Director/Secretary



**THE COMMON SEAL of NEVARC  
NOMINEES PTY LTD** was hereunto  
affixed in the presence of: )  
)  
)  
)

*[Signature]*  
.....  
Director

*E K Craven*  
.....  
Director/Secretary



THE COMMON SEAL of CRAVEN )  
SECURITIES PTY LTD was hereunto )  
affixed in the presence of: )  
)

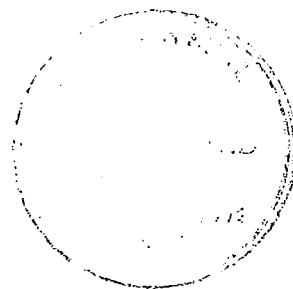
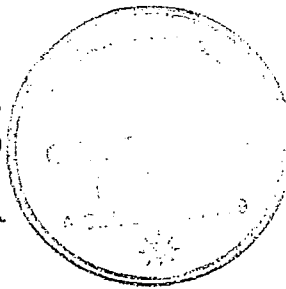


.....  
Director

*E K Craven*  
.....

Director/Secretary

THE COMMON SEAL of CRAVEN )  
LAND PTY LTD was hereunto affixed )  
in the presence of: )  
)



.....  
Director

*E K Craven*  
.....

Director/Secretary

**THE CORPORATION OF THE CITY OF MARION**

and

**ISNA PTY LTD**

**NEVARC NOMINEES PTY LTD**

**CRAVEN SECURITIES PTY LTD**

**CRAVEN LAND PTY LTD**

**DEED**

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