

Attachment #2 Public Comment with responses from Officers

Important Note:

Town officers comments are color coded throughout this document.

The text that has not been highlighted is a summary of public comments (see Attachment 1 for complete copies of submissions).

Lavan Legal

Town officers have had extensive conversations with the town's solicitors regarding the comments from Lava Legal. It has been determined the majority of the comments are trivial and a transparent attempt to stop the development of additional TWAs in the Kingsford Business Park rather than a genuine call for dialogue about the merits of the Business Plan. While officers are confident that the Business Plan was completed in accordance with the Local Government Act, given that the recommendation is to defer the decision until a TWA policy is completed, the Business Plans are likely to undergo significant changes to reflect the updated policy. This would mean the Business Plans would need to be rewritten and republished for six weeks in accordance with the Local Government Act and thus making the comments to these proposals a moot point.

Approved land-use

Page 3 of the Business Plan indicates that Lot 436 has planning approval for a TWA land use.

According to the Town of Port Hedland Town Planning Scheme No.5 (TPS5), the land is zoned "Airport".

Under TPS5 "Transient Workers Accommodation" is classed as an "AA" use in the Airport zone. This means that the use is not permitted unless the Council has granted planning approval.

Our Clients are unaware of any such planning approval being granted.

The land use "transient workforce accommodation" is defined under TPS5 as:

"Dwellings intended for the temporary accommodation of transient workers and may be designed to allow transition to another use or may be designed as a permanent facility for transient workers and include a contractor's camp and dongas".

A "transient worker" is not defined under TPS5. The only Town documents which attempt to classify a transient worker are the Town's Draft FIFO and TWA Strategy and the Town's Pilbara's Port City Growth Plan, which both provide by implication that transient workers are "operational and construction FIFO workers". Operational workers are defined as skilled workers which are required on an ongoing basis whereas construction workers are required for a certain aspect of a project only.

Additionally, in all circumstances where a TWA is proposed, there will always be an effect on the amenity of the locality, and accordingly, all such applications may only be determined by the Council (and not by delegation).

As the Proposal has failed to identify what specific business or project the TWA will be catering to (ie, it has failed to identify an operational or construction workforce), it is questionable if the land use proposed will meet the definition of a TWA

A lease with a 20 year potential is not temporary nature, and as there is no identification of an operational or construction workforce to which the facility will cater, the land use is likely to be a Motel Use (which is an "SA" use under the TPS5 and requires advertising prior to Council exercising its discretion).

Accordingly, unless the Town can produce a valid planning approval for the development of the Land, which has been advertised in accordance with TPS5, then the statement at Page 3 of the Business Plan is misleading and not true.

Lavan Legal correctly points out that a Development Approval has not yet been obtained for the proposed "Transient Workforce Accommodation" (TWA) and is classified as an "AA", requiring Council approval.

As stated by Lavan Legal the Town Planning Scheme No 5 (TPS5) does not define a "Transient Worker", however, the TPS5 does define "Transient Workforce Accommodation" as follows:

"Dwellings intended for the temporary accommodation of transient workers and may be designed to allow transition to another use or may be designed as a permanent facility for transient workers and include a contractor's camp and dongas."

All TWA facilities will and are required to comply with this definition.

The proposed subdivision and land-use is generally consistent with the layout and objectives of Port Hedland International Airport Land Use Master Plan endorsed by Council on 27 July 2011. It is also consistent with the Pilbara Port City Growth Plan that provides a strategic blueprint to facilitate the sustained growth of Port Hedland.

Land Valuation

Page 3 and page 5 of the Business Plan provides that Ausco's proposed offer to lease a 4.5ha portion of the Lot 436 for \$12m² is equal to the current valuation as determined by Australian Property Consultants in August 2013 (APC Valuation).

Section 3.58(3) of the LG Act provides that the Town may dispose of property, otherwise than by highest bidder at public auction or by public tender, if it gives public notice of the proposed disposition, including a description of the property concerned, details of the proposed disposition, and inviting submissions from the public on the proposal.

The details of the proposed disposition that are required under section 3.58 (3) of the LG Act include, as provided under section 3.58(4) of the LG Act, among other things, a market valuation of the disposition, as ascertained by a valuation carried out not more than 6 months before the proposed disposition.

The APC Valuation provides that the \$12m² valuation of the Lot 436 is on the basis that, among other things, the whole 10ha of the Land is leased for TWA purposes.

Page 12 of the APC Valuation also provides that as land area increases the per square metre rate decreases.

Accordingly, as lots 437, 438 and 439 are significantly smaller (3.5ha) than Lot 436 (10ha) the valuation rate for those lots is significantly higher at \$15m² (see page 13 of the Valuation).

It is evident therefore that a true valuation of the disposition (the land the subject of the Proposal, namely the western 4.5ha portion of Lot 436) has not been conducted as required under s.3.58(4)(c) of the LG Act.

It is also evident that the value of Ausco's offer at \$12m² is likely to significantly undervalue, rather than equal the value of the disposition as misleadingly stated by the Town at page 3 and page 5 of the Business Plan.

Please see attached advice from the Town's solicitors dated 4 November 2013

Bias & fettering of discretion

The rule against bias will be offended, and open a decision to legal challenge, in situations where there is a reasonable apprehension of bias.

The test for whether there is a reasonable apprehension of bias is to ask whether a fair minded observer, who is familiar with all the facts and circumstances of a case, would apprehend that there was bias, that is, when there is a reasonable apprehension that the decision maker might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: *Laws v Australian Broadcasting Tribunal* (1990) 10 CLR 70; *Livesey v NSW Bar Association* (1983) 151 CLR 288.

The Proposal and the Business Plan provide a number of examples through which a legal challenge to the ultimate decisions of the Council, under both the LG Act and the *Planning and Development Act 2005* (PD Act), on the basis of a reasonable apprehension of bias, may be made.

As indicated, it is anticipated the value of the proposed development would be greater than seven million dollars triggering the requirement for the development to be considered by the Joint Development Assessment Panel resulting in the ultimate decision being removed from Council.

Lack of Planning Approval

Both the Business Plan and the Proposal contemplate the entering into of a lease for the purposes of a TWA facility prior to planning approval under TPS 5 being granted.

Page 5 of the Business Plan correctly states that "Ausco will be responsible for obtaining statutory planning and building approvals".

In our submission, neither the Business Plan nor the Proposal should suggest conditions of the lease which are ultimately the subject of other approval mechanisms, such as planning approval under TPS5.

Not only does the imposition of these types of conditions give rise to a reasonable apprehension that the Council will be biased in determining any planning (or other) application, but it also amounts to fettering the Town's and the Council's discretion to determine the applications under TPS5 (and would therefore provide a separate head to challenge the decision)

Please note the following examples alluded to in the Business Plan:

Conditions commercially acceptable to Ausco

Dot point 4 on page 2 of the Proposal reads:

"Subject to the above (meaning subject to an application being made to comply with a proposed precinct plan which is not yet approved) this lease is conditional upon the DA being obtained on terms & conditions reasonably commercially acceptable to Ausco ..."

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Business Plan and Planning approval are two distinct and separate processes administrated under two separate acts and in this instance determination will be administered by two different decision making authorities.

- Business Plan → Local Government Act 1995 → Council
- Development Application → Planning and Development Act → Joint Development Assessment panel

Whilst conditions may have been "suggested" through the proposal by no means will this influence the planning evaluation. Should the application be approved by the Joint Development Assessment Panel the conditions will have been scrutinized by the members to ensure all conditions are appropriate.

Stormwater condition

Dot point 9 on page 2 of the Proposal provides a condition which reads:

"Stormwater discharge to be via external drainage swales as noted in the Kingsford Business Park Design Guidelines ..."

Drainage is a planning consideration, which should be assessed by the Town following the lodgement of an application for planning approval in accordance with the requirements under TPS5.

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Stormwater and fill were considered during the subdivision application, this will be further be evaluated once a full development application has been received. Whilst conditions may have been "suggested" through the proposal by no means will this influence the planning evaluation? Should the application be approved by the Joint Development Assessment Panel the conditions will have been scrutinized by the members to ensure all conditions are appropriate and consistent with subdivision approval and relevant engineering standards as determined by the Manager of Infrastructure and Development.

Fill condition

Dot point 10 and 11 on page 2 of the Proposal provides for conditions which read respectively:

"no import of fill is required to meet the Q100 flood prevention requirements"; and "a 2035 100-year minimum RL of 6.6m is adopted. The 100-year values have the 500mm of freeboard included."

Flooding is a planning consideration specifically provided for under cl.6.16 of TPS5. Any application for the determination of flood issues, finished floor levels, and the requirement to import fill in relation to a development should be assessed by the Town, based on the latest and best information available at the time, following the lodgement of an application for planning approval in accordance with the requirements under TPS5.

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Stormwater and fill were considered during the subdivision application, this will be further be evaluated once a full development application has been received.

No contribution for upgrading condition

Dot point 13 on page 2 of the Proposal provides for 3 conditions, the first condition reads:

"Under Council's current planning instruments and guidelines, we understand that no adopted infrastructure charges, development contribution, community benefit contribution, third party operation agreements or equivalent shall apply to this parcel of land"

Conditions for the imposition of contributions for infrastructure, including for parking, public open space, bridges, roads, drainage and community facilities have the ability to be validly imposed on any planning approval (subject to certain requirements being met) at the discretion of Council (or the Town) under TPS5.

Even if there is no policy to support the imposition, upon the lodgement and assessment of a planning application under TPS5, the Council (or the Town) may impose any condition it sees fit so long as, among other things, the conditions fairly and reasonably relate to the development proposed (ie. there is need and nexus). The test is set out in the seminal case of *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (Newbury).

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

This assumption by Ausco that no additional fees exist as part overall development approval is incorrect. The percent for public art policy will apply to this project. This would clearly show the unbiased way that Town staff implements Council policy regardless of what is in the original offer letter. The proposed development will be subject to a planning application process. Any planning approval will be subject to conditions and any relevant contribution will be imposed at that point in time.

Voluntary development contribution

The second condition contained within dot point 13 on page 2 of the Proposal reads:

"...Ausco will accept a voluntary development contribution within our development approval, stipulating that upon completion of the development, a voluntary contribution of \$3.25 for each occupied room per night above a threshold level of 75% of total rooms (excluding site management personnel) shall be payable on an annual basis."

Apart from the questionable basis for the condition, it is our Clients' view that such a condition is beyond the power of the Council to validly impose on Ausco as a condition on planning approval under TPS5.

This is because there needs to be, among other things, a nexus between the development and the need for the contribution: *Newbury*.

While the condition of that type may still be imposed on any planning application by the Council, and accepted by Ausco in the short term, there is the potential that the condition

may be challenged down the line by Ausco (even after the expiry of the lease) on the grounds of being beyond power. This may provide scope for Ausco to claim the whole of the monies back from the Council as damages (among other things).

A condition of this type is therefore not suitable to be imposed as part of a planning application, and should, if contemplated, be included as a term of the proposed lease itself (and be subject to review in line with CPI).

If the Council agree to enter into the lease on terms which dictate planning conditions, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Typically in accordance with other leases in operation for occupation of Town property, this type of monetary contribution would become part of the lease conditions and not the planning conditions. In addition, the Town's solicitors have stated that a voluntary development contribution would not be a valid basis of appeal as it is voluntary.

Voluntary development contribution in exchange for public acknowledgements etc.

The third condition contained within dot point 13 on page 2 of the Proposal reads:

"...The voluntary contribution shall be utilized by Council towards community benefits programs identified in consultation between the two parties and recognized by Council through public acknowledgements, naming rights or similar".

As detailed above, a condition of this type is not suitable for inclusion as a condition within a planning approval. Conditions are the price to be paid for the benefit of the approval: *Lloyd v Robinson* (1962) 107 CLR 142. The "condition" stipulated above is not a condition, it is a commercial offer and should be included as commercial consideration of the Town within a lease itself.

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Typically in accordance with other leases in operation for occupation of Town property, this type of monetary contribution would become part of the lease conditions and not the planning conditions.

Construction of a "Fly Camp"

Dot point 4 on page 2 of the Proposal provides a condition which reads:

Land use, and the approval of a fly-camp is a planning consideration, which should be assessed by the Town following the lodgement of an application for planning approval in accordance with the requirements under TPS5.

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

Any fly camp will require a development application prior to obtaining a building permit.

Removal of modular buildings

Dot point 1 on page 3 of the Proposal provides two conditions which read:

"Handover of the site at the end of the lease will include removal of modular buildings and equipment. In ground services and other improvements will be capped and left in situ".

As a TWA is fundamentally a temporary land use, the planning approval must be granted only for a specific term, and should contain remediation provisions for the end of the term of the approval and the lease. Any such conditions which should be assessed by the Town following the lodgement of an application for planning approval in accordance with the requirements under TPS5.

If the Council agree to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent conditional planning approval will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

First right of refusal to purchase

Dot point 2 on page 3 of the Proposal provides a condition which reads:

"Ausco Modular to have a first right of refusal to purchase the site in the event that the ToPH resolves to dispose of the suite during the period of the lease or extended period"

Section 3.58 of the LG Act provides very strict controls on the Town in circumstances where it wishes to dispose of property.

It would be potentially beyond power for the Town to enter into the lease on such a term, any subsequent decision of the Town or the Council will be tainted due to the reasonable apprehension that any subsequent sale will be granted on terms beneficial to Ausco, which but for the lease, the Council would never have imposed.

This is correct, in accordance with the LGA, the Council of the time would need to consider this matter. The Town has already determined that these parcels will not be sold due to the long term strategic value of the 4 TWA lots to the airport

Whilst conditions may have been "suggested" through the proposal by no means will this influence the planning evaluation. Should the application be approved by the Joint

Development Assessment Panel the conditions will have been scrutinized by the members to ensure all conditions are appropriate.

Money to upgrade Airport

The wording at page 8 of the Business plan reads

"The funds derived from the lease will also pay for significant redevelopment improvements to the Port Hedland International Airport"

We have been informed by our Clients that the Town requires circa \$2.5m in new funding to pay for its promised upgrading of the Port Hedland International Airport (Airport).

At the same time the Business Plan, the Proposal and the APC valuation all question the viability of the proposed TWA facility (and the viability of other accommodation providing facilities in the Town of Port Hedland) given the significant increase in reborn vacancy rates and oversupply of housing (over 500 houses for rent or sale) which has developed over the past 12 months.

If the Council agree to enter into the Proposal, the decision of the Town or the Council will be potentially tainted due to the reasonable apprehension that any approval was granted for the improper purpose of requiring money to upgrade the Airport, while at the same time failing to take into account other material considerations, including the effect of the Proposal on the viability of existing accommodation providers within Port Hedland (as required by 3.59(3)(b) of the LG Act.

This section is moot. The initial umbrella business plan for the Precinct 3 subdivision allocated \$40mil of the revenue proceeds from the development of these sites to be directed into the redevelopment of the airport.

Failures of the Town to comply with the basic requirements of producing a Business Plan as set out in the *Local Government Act 1995 (WA)*;

General

Clause 3.2 of the Business Plan refers to clause 3.58 (30) (2a) and 3.59(4)(2a) of the LG Act. No such sections of the LG Act exist.

It also appears that Clause 3.2 of the Business Plan is attempting to quote directly from the LG Act, but does so inaccurately.

Clause 3.7 of the Business Plan refers to a terms and conditions of a sale. It appears that this has been cut and paste from a previous application and therefore the Town may have failed to turn its mind to (and consider to the relevant standard) a relevant consideration as required under section 3.59(3)(e) of the LG Act.

Failure of the Town to describe the property concerned

The Town has failed to adequately describe the property the subject of the disposition as required under section 3.58 (3)(a)(i) of the LG Act.

The Business Plan loosely defines the land as a 4.5ha portion of the 10ha Lot 436.

The Proposal also loosely defines the land as a 4.5ha western portion of the 10ha Lot 436.

No plan has been provided which demonstrates what 4.5ha portion of the 10ha lot 436 is the subject of the Proposal and the Business Plan.

The publically advertised Business Plan provided an image and a description of the site.

Failure of the Town to describe the name of all other parties concerned

The Town has failed to adequately describe all other parties concerned with the Proposal as required under section 3.58 (4)(a) of the LG Act.

The Business Plan and the Proposal do not detail what specific project or business the proposed residents of the TWA will identify with, as required to be considered a TWA under TPS5.

The Business Plan and the Proposal do not detail who the financiers of the Proposal are.

The Business Plan and the Proposal do not detail whether Ausco intend to utilise any contractors in effecting the lease (including on an ongoing basis).

The Business Plan fails to identify which town officer/ officers prepared the Business Plan.

As none of this information has been provided, there is no way to ascertain whether the Town, its officers or Councillors have any conflicts of interest with Ausco, its contractors, or the businesses who's staff will utilise the TWA, contrary to the requirements of the LG Act.

The proposal is from Ausco modular Pty Ltd and this is clearly stated. The business plan has been prepared for consideration of a land lease and not a ToPH led/managed project. Many of the entities that Lavan Legal are requesting be listed and named in the Business Plan have not yet been determined and therefore it would be impossible to identify in the Business Plan.

Failure of the Town to detail the consideration to be received by the Town for the disposition

The Town has failed to adequately detail the value of the consideration to be received by the Town for the disposition as required by s.3.58(4)(a) of the LG Act.

The Proposal details a \$rate/m², a "voluntary contribution" as well as numerous conditions, all of which make up the consideration to be received by the Town for the disposition.

The Business Plan only details a \$12m² figure, it fails to detail the other relevant consideration (as outlined at paragraph 46 above).

Failure of the Town to detail the market value of the disposition

As detailed at paragraph 16-23 above, the Town has failed to detail, in any way, the market value of the disposition as required by s.3.58(3)(c) of the LG Act.

The APC Valuation provides a \$12m² valuations for Lot 436 on the basis that, among other things, the whole 10ha of the Land is to be leased for TWA purposes only.

Page 12 of the Valuation also provides that as land area increases the per square metre rate decreases.

Accordingly, as lots 437, 438 and 439 are significantly smaller (3.5ha) than Lot 436 (10ha) the valuation rate for those lots is significantly higher at \$15m² (see page 13 of the Valuation).

It is evident therefore that a true valuation of the disposition (the land the subject of the Proposal, namely the unidentified western 4.5ha portion of Lot 436) has not been conducted to the standard required under s.3.58(4)(c) of the LG Act.

Further, even if the Proposal was for the whole of Lot 436, the APC Valuation is flawed in any event.

The APC Valuation mistakenly assumed that the only use permitted on the Land was for TWA developments.

The land is zoned Airport under TPS5 where a variety of uses are permitted on the land subject to approval by the Council. There is no development plan or otherwise which restricts the use of the Land to TWA land use only.

Accordingly, it does not appear that the APC Valuation has been prepared to consider the potential value of other land uses on the land and therefore has failed to conduct the valuation on highest and best use principles, as detailed at page 9 of the APC Valuation.

The Town has recently completed several valuations in the exact same area and are happy to share those with any upon request.

As the Town has based its Business Plan on the false assumption that the land has been properly described and valued, there is the potential that the land the subject of the Proposal is undervalued.

Failure of the Town to detail an overall assessment of the major land transaction

Due to all of the failures of the Town in preparing the Business Plan, as detailed above and below, the Town has failed to provide an overall assessment of the major land transaction in accordance with s.3.59(3) of the LG Act.

Failure of the Town to consider the Proposals expected effect on the provision of facilities and services provided by the Town for the extent of the lease term and extensions

The Town is required to detail its consideration of the Proposal's expected effect on the provisions of facilities and services provided by the Town for the extent of the lease term and extensions in accordance with s.3.59(3)(a) of the LG Act.

Clause 3.3 of the Business Plan (page 7) is deficient in achieving the minimum standards expected by s.3.59(3)(a) as:

It cites "adverse effect" yet the LG Act requires a consideration of both positive and negative effects;

It is obvious that the proposal will not have any adverse effect on the current provision of facilities and services in the Town of Port Hedland as the TWA is not currently built;

The Business Plan therefore fails to consider the effect (both positive and negative) of the proposal on the provision of facilities and services provided by the Town for the extent of the lease term and extensions; and The Town has failed to consider the "development costs" and "financial risks" for the development, and the effect that these will have on the provision of services by the Town, such as, among other things:

The risk of the development not completing the first stage, as required by the condition at dot point 13 of Page 2 of the Submission;

The risk of the development not achieving 75% occupancy for a significant proportion of the lease term, as required by dot point 13 of page 2 of the Submission;

The risk of the development not being completed, as required by the condition at dot point 14 of page 2 of the Submission;

The risk that over 20 years the Airport runways may need to expand, and as a result the Town may have to terminate the lease. If this is the case will the Town be liable for remediation as provided at dot point 1 of page 3 of the Submission?

The risk of a challenge to the Business Plan and subsequent planning application (if any), including significant legal costs likely in defending the Town's position; and

The potential risk that the Town will be unable to market, or will only be able to market at reduced rates, the remaining 5.5ha portion of Lot 436, due to the Proposal accounting for the western 4.5ha portion away from the runway.

Failure of the Town to consider the Proposals expected effect on other persons providing facilities and services in the district for the extent of the lease term and extensions;

The Town is required to detail its consideration of the Proposal's expected effect on the provisions of facilities and services provided by the other persons in the district for the extent of the lease term and extensions in accordance with s.3.59(3)(b) of the LG Act.

Clause 3.4 of the Business Plan (page 7) fails to consider, in any way, the requirements under s.3.59(3)(b) of the LG Act.

The APC valuation made it very clear to the Town that there is currently a significant oversupply of TWA accommodation in Port Hedland and that this is unlikely to change in the foreseeable future.

Further, the oversupply of TWA accommodation is having detrimental effects on the viability of existing permanent hotel and motel accommodation providers within Port Hedland. This is due to the failure of the Town to properly condition, and subsequently enforce against TWA operations under, among other things, the PD Act.

This failure to properly condition or enforce TPS5 has lead to TWA operators advertising, and catering, to the general public in contravention of their planning approvals.

The only way that the Town can demonstrate the effect of the proposed development on other persons providing facilities and services in the district is to obtain a commercial needs assessment for the proposed development.

Town staff have raised this comment with our solicitor whom has stated this provision in the Local Government Act refers to other service providers such as roads, and not existing for-profit business. Furthermore, the solicitor has informed the Town staff that it would be a violation of fair-trading to consider proposals in terms of what competition they would bring to existing businesses.

The Town has fails to include a commercial needs assessment for the proposed development and therefore has failed to demonstrate that the proposed development will not have a detrimental effect on the viability of existing accommodation providers in the district.

Town staff have raised this comment with our solicitor whom has stated this provision in the Local Government Act refers to other service providers such as roads, and not existing for-profit business. Furthermore, the solicitor has informed the Town staff that it would be a violation of fair-trading to consider proposals in terms of what competition they would bring to existing businesses. We will not be undertaking a commercial needs assessment.

Failure to consider the Proposals expected financial effect on the local government;

The Town is required to detail its consideration of the Proposal's expected financial effect on the Town under for the extent of the lease term and extensions in accordance with s.3.59(3)(c) of the LG Act.

The Town has failed to adequately detail the value of the consideration to be received by the Town for the disposition as required by s.3.58(4)(a) of the LG Act.

The Proposal details a \$rate12/m², a "voluntary contribution" as well as numerous conditions, all of which make up the consideration to be received by the Town for the disposition.

The Business Plan only details a \$12 rate/m², it fails to detail the other consideration.

As detailed at paragraph 60.4 above, the Town has failed to consider the "development costs" and "financial risks" for the development, and the potential financial effect that these will have on Town, such as, among other things:

The financial risk of the development not completing the first stage, as required by the condition at dot point 13 of Page 2 of the Submission;

The financial risk of the development not achieving 75% occupancy for a significant proportion of the lease term, as required by dot point 13 of page 2 of the Submission;

The financial risk of the development not being completed, as required by the condition at dot point 14 of page 2 of the Submission;

The financial risk that over 20 years the Airport runways may need to expand, and as a result the Town may have to terminate the lease. If this is the case will the Town be liable for remediation as provided at dot point 1 of page 3 of the Submission.

The financial risk that the Towns incompetence in preparing the Business Plan and subsequent planning application (if any), will open the Town to significant legal costs in defending un-defendable positions;

This failure to properly condition or enforce TPS5 has lead to TWA operators advertising, and catering, to the general public in contravention of their planning approvals.

The only way that the Town can demonstrate the effect of the proposed development on other persons providing facilities and services in the district is to obtain a commercial needs assessment for the proposed development.

Town staff have raised this comment with our solicitor whom has stated this provision in the Local Government Act refers to other service providers such as roads, and not existing for-profit business. Furthermore, the solicitor has informed the Town staff that it would a violation of fair-trading to consider proposals in terms of what competition they would bring to existing businesses.

The Town fails to include a commercial needs assessment for the proposed development and therefore has failed to demonstrate that the proposed development will not have a detrimental effect on the viability of existing accommodation providers in the district.

Town staff have raised this comment with our solicitor whom has stated this provision in the Local Government Act refers to other service providers such as hospitals and schools, and not existing for-profit business. Furthermore, the solicitor has informed the Town staff that it would a violation of fair-trading to consider proposals in terms of what competition they would bring to existing businesses.

Failure to consider the Proposals expected affect on matters referred to in the local government's current plan prepared under section 5.56;

The Town is required to detail the Proposals expected effect on the matters referred to in the Strategic Community Plan in accordance with s.3.59(3)(d) of the LG Act.

The Town has failed to identify how, under clause 3.6 of the Business Plan, the Proposal will comply with the Strategic Community Plan for the following 1-4 years.

The Town has failed to identify how the Proposal will comply with the Strategic Community Plan for the following 5-20 years under which the lease may be in operation.

The Town has failed to consider how the TWA Proposal helps to retain a permanent population in the Port Hedland, "a *place that residents are proud to call home and establish themselves as permanent fixtures in the landscape*", as required under the Environmental strategic theme of the Strategic Community Plan.

The Town has failed to consider how the TWA Proposal encourages families to grow and prosper in the community, as required under the Economic strategic theme of the Strategic Community Plan.

The Town has failed to consider how the TWA Proposal, which is located next to the Airport's runway, and isolated from the rest of the residents in the Port Hedland, help to unify and connect the community, as required under the Community strategic theme of the Strategic Community Plan.

The Town has failed to consider how the implementation of the Proposal, and the preparation of a Business Plan deficient in a number of respects, will help the Town demonstrate to the community that the Town is meeting its "ethical and legislative obligations", as required under the Local Leadership theme of the Strategic Community Plan.

The Strategic Community Plan 2012-2022 is a guiding document which offers a high level assessment of the town's aspirations. It is unrealistic for officers to assess the proposal in this manner.

Inability of the Town to manage the undertaking or the performance of the transaction.

The Town is required to detail how it has the ability to manage the Proposal over the extent of the lease term and the extensions in accordance with s.3.59(3)(e) of the LG Act.

The Town has failed to demonstrate how the management of the offer is within the resources and capacity of the Town as alluded to at clause 3.7 of the Business Plan.

The inadequacies and deficiencies identified in the Business Plan draw into question the Town's ability to manage complex, long term lease arrangements.

Officers manage similar projects on airport land which have been very beneficial to the Town.

Conclusion

- In light of the above, we request that the Town and the Council:
- Not approve the Proposal;
- carefully consider the issues outlined above;
- seek the advice from the Town's solicitors regarding the ability of the Town and/or the Council to approve the proposal (and subsequent applications) given the content of the Business Plan; and
- Introduce an urgent moratorium to refrain from determining any further development approvals or lease arrangements incorporating TWA facilities in the district until the Town can competently deal with the issues that inevitably arise.

Landcorp

LandCorp shares the Town's vision for growing Port Hedland into a city of some 50,000 people. However, LandCorp is concerned that support for a new temporary workers accommodation (TWA) will discourage public and private investment in permanent development outcomes in Port and South Hedland.

LandCorp accepts that "TWA's may be required to deal with peak construction demands. However, it is essential that the volume of accommodation provided is limited so far as possible and does not detract from the demand for the take up of short Medium and long term permanent housing product. The softening of the residential market in Port Hedland is such that it is considered there are currently sufficient short-stay accommodation options available to cater for existing population demands.

The proposed TWA is intended to support future city building projects. The TWA is intended to cater for construction workforce that will deliver future subdivisions, buildings and necessary infrastructure. The cost of accommodation has affected the feasibility of development projects in Port Hedland and this proposal will improve that situation. The construction workforce accommodated in the TWAs would not be intended to be accommodated in hotels or other short stay accommodation.

Further, the letter of objection from the Pilbara Development Commission to this proposal states that "Clearly the provision of a Temporary Worker Accommodation facility at the airport would not address residential housing issues as the facility targets a totally different market

segment.” This statement would seem to alleviate the fear that this proposed development will adversely detract from the local housing market as they target a totally different market segment.

The current occupancy rates of 60% as at the June 2013 quarter at existing short-stay accommodation businesses in Port and South Hedland continues to trend down. LandCorp is also endeavoring to encourage further private investment in strategically placed short-stay accommodation areas (i.e. Finbar Development, Spoilbank Marina, South Hedland Town Centre), some of which have recently been unsuccessful such as the Mirvac Hotel development and the Old Port Hedland Hospital site due to feasibility.

The addition of a new TWA has the ability to further undermine existing local short-stay businesses and the ability to discourage new private investment in short-stay accommodation in strategic locations throughout Port and South Hedland. The table below illustrates the significant amount of rooms available within TWA's in Port and South Hedland in comparison with hotels and motels.

Hotels and Motels		
	Location	Keys
Upper Scale		
Ibis Styles	Port	65
Esplanade	Port	108
Budget		
Hospitality Inn	Port	40
Walkabout	Airport	61
South Hedland Motel	South Hedland	104
The Lodge	South Hedland	135
Cooke Point	Port	53
Total		
TWA's		
	Location	Keys
Upper Quality		
Hamilton Motel	South Hedland	900
Port Haven	Airport	1,200
Basic		
Beachfront Village	Port	438
Wedgfield	South Hedland	700
Mia Mia	Airport	192
Kings at the Landing	Airport	600
Mooka	25 kms South	519
	Total	4,549

This inventory has been or will be significantly reduced by up to 1,738 beds in the near future. This should increase the likelihood that additional short term accommodation would be more viable for Landcorp and other existing businesses as pointed out in the Dubois report. The Mooka camp is some 25 Kilometers away from the Town and is used primarily as accommodation for rail employees. In addition, Landcorp seems to be arguing the negative

consequences of additional short stay accommodation of existing providers while at the same time proposing additional supply of short stay accommodation. This stance seems to be a contradiction?

Taking into account the unsuccessful Mirvac Hotel site deal, LandCorp commissioned Dubois Group Pty Ltd (May 2013) to undertake a study on the current short stay accommodation market in Port Hedland. Part of this study focused on the "Impact of TWAs on the Commercial Short-Stay Accommodation market". Some of the findings of this report are as follows:

- a. It is clear that some TWA's in Port Hedland are actively securing business that typically is accommodated in hotels and motels and are offering highly competitive rates to these facilities.
- b. In our view, with the softening market conditions, TWA are having some adverse impact on the town's hotels and motels and in doing so, the TWA's may be operating outside of their permitted terms of use
- c. Whilst the provision of this form of accommodation {TWA's) may have been of assistance in dealing with the acute shortage of accommodation during the past t years, given the recent change in market conditions, this is now having an adverse effect on the hotels and motels of Port Hedland.
- d. In our view, the current situation with respect to the hotel market in Port Hedland is very unsettled and presents and extremely challenging market to attract hotel developers who would have the capacity to proceed to finance and de119lop a major hotel or other short stay facility...
- e. In our view the key to the development of any major new short stay accommodation facility is dependent on the situation with respect to TWA's and the respective employment policies of the major mining houses with respect to FIFO operational staff.

Town officers have reviewed the Dubois Group Pty Ltd Report completed for Landcorp in May of 2013. While the comments from Landcorp imply the report was a comprehensive report related issues that might adversely affect the short stay accommodation market, this report is primarily focused upon the adverse impact of TWA's upon the short stay market. The report does not look at a host of other factors that could also have considerable impact upon this market such as construction pricing, available infrastructure, land availability and cost. The report also makes it very clear that Port Hedland is not a normal market for such properties and that the increased residential population provided by the increased housing stock would help improve that outlook. The report also mentions the need for improvements to existing short stay accommodation offerings something that would be most welcome by the market.

The Dubois Report also points out that "The level of activity within Transient Worker Accommodation facilities (TWA's) to house fly-in fly-out employees (FIFO) has also declined as construction projects have ended, however with the impending closure of lesser quality facilities and the termination of leases, this segment may well be facing shortages in the medium terms."

The proposed TWAs can also have different clauses in their lease which mitigate against the perceived drawbacks upon the community. For example, they can house only construction workforce, have no public access to the facility and not be allowed to cater for outside functions.

The proposal has the potential to dilute activity and Investment in Port and South Hedland and there is a continued risk of creating a third township between Port and South Hedland activity centres.

The proposed TWAs have the potential to facilitate the development of projects within these key activity centres by housing the construction workforce. In addition, hotels are planned by many different parties on private property in areas of Port and South Hedland that are away from the immediate vicinity of these activity centres due to the unavailability of land and the long difficult process to obtain that land via the State of Western Australia. The lack of commercial amenity and visible progress on announced developments also serve to frustrate the market and discourage development of this type.

A new TWA will not serve to further normalize the housing market and will add to the perception that Port Hedland is an industrial town populated by temporary fly-in-fly out workers.

Currently many of the houses in South and Port Hedland that could be available to families are occupied by several non-related FIFO workers. This has a whole host of issues that adversely affect the surrounding neighborhood including five or six work trucks outside a single family house. This situation decreases the attractiveness and increases the cost of the surrounding properties to families and those who would settle in Port Hedland on a more permanent basis. These factors contribute more to the perception that Port Hedland is an industrial town than a well-planned well provisioned high amenity TWA which would help alleviate this situation. This statement also seems to ignore the incredible amount of work done to add amenity to the town so that people want to live here and are proud to call Port Hedland home which have gone a long way towards ending that perception. In addition, clauses in the lease for the proposed TWAs could mandate that they not house permanent or operational workforce and could contribute to a normalized housing market by lower the cost of housing the required construction workforce.

The Port Hedland Growth Plan (Implementation Plan) demonstrates a land supply time line that is capable of releasing significant volumes of permanent development outside the current proposal as part of a planned outcome. Examples of some of these developments are the Western Edge in South Hedland, Stage 1 (Athol Street) in East Port Hedland and the South Hedland Town Centre which LandCorp is currently partnering with the private industry to deliver.

More generally, LandCorp is concerned at the number of short-stay housing solutions that are being considered. It is LandCorp's view that short-stay accommodation should be encouraged in strategic locations such as the South Hedland Town Centre and Spoilbank (or other high amenity areas identified through a planning process). The well-planned development of these areas will leave a legacy of activated focus centres. However ad-hoc development will make it difficult to develop these areas to their full potential and discourage permanent housing

solutions. It would be disappointing and contrary to the Pilbara Cities vision if the legacy of the housing demand is a proliferation of short-stay projects that are divorced from high amenity area.

PDC

Facilitate commercial, industry and town growth the PDC is seeking to implement the Government's Pilbara Cities vision through substantial investment in a variety of land development projects in Port and South Hedland. In particular, LandCorp are seeking to encourage private investment in strategically placed short-stay accommodation areas such as Finbar's Sutherland Street development, the Spoilbank Marina and South Hedland Town Centre. The addition of further TWA facilities at the airport has the ability to undermine the financial viability of these existing, town-building, initiatives and as such would work against 'facilitating commercial, Industry and town growth'. This view is given substance through the recent unsuccessful attempts by Mirvac to secure a hotel development at the old Port Hedland Hospital site.

The proposal has the potential to significantly dilute activity and investment In Port and South Hedland and as such would, again, have the capacity to work against 'facilitating commercial, industry and town growth'.

It should be noted that the use of temporary accommodation can provide a buffer for governments and communities to develop local community infrastructure and services once there is an assurance of sustainable populations and thus the facilitation of commercial, industry and town growth. The intent of these TWAs is not dilute activity and investment in Port Hedland. The intent is to facilitate investment in the Town of Port Hedland. The proposed TWAs should bring down of the cost of accommodating the workforce needed for projects that enhance the town. In addition, many different clauses could be incorporated into the lease so that new TWAs do not compete against traditional hotel operators such as a minimum length of stay.

Draft work undertaken by the Commission in September 2012, which has been shared with the Town, shows existing and planned TWA provision reaching over 12,000 beds by 2014, which includes 2,000 beds for BHP at the airport. Given the substantially changed market conditions, and the deferral of the Outer Harbour construction, it is not clear why additional TWA beds at the airport would be required at this time. Karratha's experience is salient: recent work by the Shire of Roeboume indicates that their long-term TWA need is in the order of 3,000 to 4,000 beds and that supply is well in excess of this. Before committing to the proposals Council should consider reviewing the TWA supply/demand equation in Port Hedland -we would be happy to assist with this.

The existing number of beds in all types of short stay accommodation in Port Hedland is 5274. This inventory has been or will be significantly reduced by up to 760 beds in the near future. The numbers being quoted by the PDC include inflated numbers of questionable origin such as an unnamed "East Port Hedland" camp with over 2,000 beds. Other examples that are listed by the PDC include the fly camp for the construction of Osprey Village to be 990 beds. This fly camp only has 100 beds and is not counted in the inventory of available accommodation because the facility is temporary for the construction workforce only.

Facility	Total Rooms ³	Ave. Occupancy ³	Percentage Vacant ³
Esplanade	108	41	62%
Ibis Styles	65	58	11%
Hospitality Inn	36	22	39%
Pier Hotel	20	7	65%
Walkabout	121	73	40%
South Hedland Motel	104	15	85%
The Lodge	130	18	86%
Port Tourist Park (Caravan Park)	208	193	7%
Cooke Point Caravan Park	103	51	50%
Blackrock Caravan	60	28	53%
Wedgefield Camp	760	330	57%
Port Haven	1202	800	33%
Pundulmurra	188	30	84%
Club Hamilton	919	599	35%
Mia Mia	250	187	25%
Gateway	1000	400	60%
	5274	2852	50%
	Total	Total	Average

The Chamber of Minerals and Energy of Western Australia states "The workforce required to meet current growth plans for the resource sector in the Pilbara is expected to peak at just over 65,000 in 2014, up from over 51,000 in 2011-an increase of 28.4%. At a local Government area level, total employment is forecast to decline to 2020 in the Shire of Ashburton and Shire of Roebourne as current major construction projects are completed. However, this fall is offset by growth in employment in the Town of Port Hedland and Shire of East Pilbara."

A new TWA facility is likely to add to the perception that Port Hedland is an industrial town populated by temporary fly-in/fly-out workers and as such would not be supportive of 'town growth'.

The Business Cases do not demonstrate that there are no other available or planned TWA facilities in Hedland, nor do they demonstrate what legacy city- building benefits would arise from acceptance of one of these proposals. This then makes It difficult to determine if the proposals 'facilitate' or hinder 'town development'.

The Western Australian Governments Pilbara Planning and Infrastructure Framework acknowledges that FIFO workforce are important methods of adapting to constantly changing labour requirements, particularly for specialist skills and during the construction stage of projects. The Framework also recognizes that there has been a cause and effect relationship between an insufficient supply of Land and accommodation, and the demand for FIFO workforce accommodation. The Business Plans do not demonstrate that there are no other

available or planned TWAs in Port Hedland because this would be incorrect. For example, the site at Pippingarra is already approved for TWA. A TWA in this location would offer no benefit to the town in terms of a lasting legacy and would be far removed from Port Hedland. A report completed by the AEC Group for the Pilbara Regional Council and the Pilbara Development Commission titled "Demand needs analysis for Short Stay Accommodation in the Pilbara Region dated February 2013 states "TWAs that are better integrated with nearby towns are more likely to result in positive socio-economic outcomes. This will encourage permanent population growth and the development of economic activities outside mining.". In contrast the funds from the proposed TWAs in the Kingsford Business Park have already been allocated to substantial legacy projects such as the planned Marina.

The business plans do not demonstrate what legacy city building projects would be accommodated in the TWA because that is impossible to determine. Examples of projects that would benefit from TWA accommodation include:

- Relocation of the Port Hedland Waste Water Treatment Plant to South Hedland
- Port Hedland Sewerage plan rehabilitation
- Potential upgrade of the Port Hedland and South Hedland water towers
- Electricity infrastructure upgrades- South Hedland, Wedgefield and Boodarie power station
- Airport redevelopment
- Marina development
- Pilbara Fabrication & Services Common Use Facility Projects-Lumsden Point
- Development of Boodarie Strategic Industrial area
- Port facility upgrade including operational and office space
- Detention centre redevelopment
- Waste to energy project.
- The New South Hedland Library and Youth Precinct

It is not clear to us how the proposed TWA facilities would contribute, in a physical sense, to making Port Hedland a leading regional airport. TWA facilities are reasonably flexible in their locational needs – as evidenced above, there are already proposals for similar facilities elsewhere in Hedland – and such facilities might also be used to make some marginal residential developments viable. In contrast land close to the airport, by definition, is limited and may be better used to support businesses (e.g. inter-modal freight operations, logistics, aircraft servicing) that rely on proximity to an airport for their operations. The case for a TWA use to support 'developing Port Hedland airport as a leading regional airport' is not made in the Business Plans.

The Kingsford Business Park will contain 38 bulky goods, showroom and light industrial lots fully serviced, in a variety of sizes competitively priced as well as 40 hectares of land within the street grid which will be held in reserve. The Land Use Master Plan (LUMP) for the airport address freight hub, terminal land, commercial land and logistics which should address the concerns of the PDC.

We accept that the income the Town would receive from the proposed deal would assist in the redevelopment of the airport. However, the Business Plan does not explore other funding options such as loans, public-private partnerships, grants from bodies such as

Infrastructure Australia or municipal bonds. In our view these options should be explored before committing to a proposed deal.

This would be out of the scope of a business plan. There may be other business models to fund the airport redevelopment and the town's Airport Director is investigating these options.

The *Pilbara's Port City Growth Plan* demonstrates a land supply timeline that is capable of releasing significant volumes of permanent residential development to deliver a Town of 50,000 people by 2035: examples of current residential projects include the Western Edge, Hamilton Precinct, Project Osprey, the Town's own Eastern Gateway work, Athol Street in East Port Hedland and the South Hedland Town Centre.

A TWA caters to a completely different market segment than permanent residential development. TWAs will not compete with the development of these subdivisions and may enhance the feasibility of projects by making it easier to accommodate the needed project delivery workforce. In addition, of the developments listed only the Osprey development (delivered by the Department of Housing-whom did not object to this proposal) is actually underway. Many of the developments still require substantial predevelopment work including huge amounts of required infrastructure and have yet to turn a shovel or even receive required planning scheme amendments from the State. Given that the Kingsford Business Park infrastructure is well underway and knowing the difficulty the State has had in delivering projects such as the South Hedland Town Centre one could wonder why the PDC would object to a project that is already commenced and as clearly stated will target a clearly different market than the projects listed above (as stated below)?

Clearly the provision of a Temporary Worker Accommodation facility at the airport would not address residential housing issues as the facility targets a totally different market segment. It might be argued that such a facility would assist by providing accommodation for construction workforce, but this case is not explored in the Business Plans and may not be supportable in light of other TWA provision elsewhere in the Town. Even if an argument could be mounted to view the proposed facility as being suitable for long-term residential purposes, it is arguable as to whether or not the airport is an appropriate location for such a use, especially given the volume of residential developments elsewhere in the Town.

The draft *Hedland Infrastructure Capacity study and Action Plan*, which the Town has contracted NS Projects to prepare, states that, in relation to housing mix, "... the primary focus should be on delivering 3 bedroom and 4+ bedroom stock to the Hedland market with "... a lesser focus on 1 bedroom and 2 bedroom stock." By way of volume, the draft *Action Plan* states (pg. 20) that the demand for one bedroom apartments to 2018 is no more than 134 units. Given this, it is difficult to see how the airport TWA proposal would address housing shortage and affordability in Hedland.

As already mentioned TWAs target a completely market segment and could very well assist with the delivery of new residential development by accommodating the required workforce.

We share the Town's vision for growing Port Hedland into a city of some 50,000 people. Our concern is that support for a new Temporary Worker Accommodation facility at the airport will

discourage public and private investment in permanent development outcomes in Port and South Hedland.

In order to ensure that the proposed Temporary Worker Accommodation facility at the airport will 'create local employment and investment and diversify the economy and not adversely impact on existing businesses, The Council should undertake an Economic Impact A