



## **TWEED RIVER ENTRANCE SAND BYPASSING PROJECT**



## **SUMMARY OF CONTRACTS**

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March 2001

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# 1. Introduction

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**This report summarises the main contracts, from a public sector perspective, for the Tweed River Entrance Sand Bypassing Project.**

**It has been prepared in accordance with the public disclosure provisions of the 1995 *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*, and has been submitted to the Auditor-General for review and certification prior to tabling in Parliament.**

**In line with the *Guidelines*, this report focuses on those contracts to which the Minister for Land and Water Conservation is party, or which otherwise have a potentially substantive impact on the public sector risks or benefits.**

## 1.1 The Project

The Tweed River Entrance Sand Bypassing Project (“the Project”) is being undertaken jointly by the New South Wales and Queensland Governments (“the Governments”), with the support of the Gold Coast City Council and in conjunction with the Tweed Shire Council.

The dual objectives of the Project are to improve and maintain the navigation conditions through the entrance to the Tweed River and to replenish and maintain sand supply to the southern Gold Coast beaches in perpetuity.

## 1.2 Why the Tweed River Entrance Sand Bypass is being built

The sand shoals at the Tweed River entrance have been a danger to navigation since the earliest days of settlement.

River training works and dredging had been undertaken since late last century in an attempt to reduce the impacts of the entrance bar. These culminated in an extension to the training walls at the Tweed entrance in the period 1962-1965.

The extended training walls improved navigation conditions for a period. However, the entrance bar reformed and again caused navigation difficulties.

Extension of the training walls temporarily interrupted the northerly movement of sand adjacent to the coast (termed the littoral drift).

By 1994, the interruption of the littoral drift had caused accretion of an estimated 4 million cubic metres of sand on Letitia Spit, immediately south of the southern training wall and 3 million cubic metres of sand within or seawards of the entrance.

The accretion of sand on the southern side of the entrance and the build up of sand on the entrance bar contributed to erosion of the southern Gold Coast beaches which has been prevalent since the 1960s.

### **1.3 Preliminary Studies and Negotiations between NSW and Queensland**

Negotiations were held between NSW and Queensland to reach a solution to the problems associated with the entrance to the Tweed River that would be acceptable to both States. A study was jointly commissioned to quantify the magnitude of the problem, to identify preliminary cost estimates and to apportion the relative benefits to the two States. The report on this study (Reference 1) outlined the costs and benefits of a joint sand bypassing system and showed that it would be more economical than if each State took independent action to address its specific problem. The report indicated that the cost of the proposed sand bypassing project would have a Net Present Value (1990 dollars) of \$53.41 million.

Economic justification for the Project was also established in a report by Acil Australia P/L, which was prepared for the NSW Cabinet during the negotiation phase.

### **1.4 Formal Agreements and Legislation covering the Tweed River Entrance Sand Bypassing Project**

The extensive negotiations between the Governments resulted in the respective Premiers executing a Heads of Agreement for the project, in March 1994 (See Reference 2). It was agreed to set up a project to bypass sand around the entrance to the Tweed River.

The Heads of Agreement was subsequently formalised in a Deed of Agreement (See Reference 2), which was signed in March 1995 by the respective Ministers.

This detailed document provided for:

- the establishment and maintenance of a 70m wide navigation channel; and
- The supply of sufficient additional sand to the beaches to restore the recreational amenity of the beaches and then a continuing supply of sand to the southern Gold Coast beaches at a rate consistent with the natural littoral drift rates.

The agreed project consisted of two components:

- initial dredging and placement of sand for beach nourishment; and
- a permanent system to collect sand from the southern side of the Tweed River entrance and transport it to the southern Gold Coast beaches in Queensland.

The Deed of Agreement and the Heads of Agreement have been ratified by NSW in the *Tweed River Entrance Sand Bypassing Act 1995* (Reference 2) and by Queensland in the *Tweed River Entrance Sand Bypassing Project Agreement Act 1998* (Reference 3).

The costs of the Project are shared between the Governments. The cost sharing arrangements for the Project are set down within the Deed of Agreement. In summary, they are:

- Project investigation, development and construction costs are shared 75:25 (NSW:Queensland).
- Operating costs are shared 50:50.

### **1.5 Initial Dredging**

Stage 1 of the Project involved dredging of the entrance bar and placing the dredged sand to nourish the southern beaches of the Gold Coast. The work was

carried out by contract and resulted in 3 million cubic metres of sand being moved between April 1995 and May 1998.

## **1.6 Environmental Impact Assessment and Planning Approval**

The Project was the subject of a combined Environmental Impact Study and Impact Assessment Study (*EIS/IAS*) (Reference 4) in accordance with the requirements of the *NSW Environmental Planning and Assessment Act, 1979* and the *Queensland State Development and Public Works Organisation Act (1971-81)*. The *EIS/IAS* was completed in August 1997 and placed on public exhibition.

The submissions received during exhibition are the subject of a Submission Review Report (Reference 5). Concerns were expressed about a range of issues, the most significant being the impact on surfing conditions at Durambah Beach. A review (Reference 6) found that the proposal presented substantial overall benefits and did not pose unmanageable impacts.

Planning approval for the Project was obtained in June 1998, in accordance with recommendations in the Assessment Report (Reference 7).

## **1.7 The Invitation for Private Sector Proposals**

In February 1998, private sector participation in the design, construction, operation and maintenance of a permanent sand bypassing system was invited via a Call for Proposals (Reference 8). This process yielded ten proposals, of which two best satisfied the objectives of the two State Governments.

## **1.8 The Selection of a Preferred Proponent**

The proponents selected from the Call for Proposals were McConnell Dowell Constructors (Aust.) Pty Limited and Transfield Pty Limited.

In August 1998, the selected proponents were invited to submit detailed proposals via a Call for Detailed Proposals document (Reference 9). As the Governments wished to maximise private enterprise involvement and thereby reduce the risk profile and administrative involvement of the two Governments, the proponents were requested to bid on a Build Own Operate and Transfer (BOOT) basis. Alternate bids were also permitted. The Call for Detailed Proposals closed in November 1998 at the Tender Box of the NSW Department of Public Works and Services.

In the Call for Detailed Proposals, the two selected Proponents were requested to submit detailed proposals for the financing, design, obtaining approvals, construction, commissioning and the long term operation and maintenance of the permanent sand bypassing system for the period to 30 September 2024, together with the transfer of that system to the Governments at the end of that period, with all the works being in accordance with the Governments' requirements.

A Tender Board was convened by the NSW Department of Public Works and Services and the Detailed Proposals were opened under secure conditions and the relevant parts of all submitted documents were stamped and initialled by the tender board members. The opening of the Detailed Proposals was witnessed by an independent Probity Adviser.

Following processing of the Detailed Proposals by the tender board, the Detailed Proposals were reviewed by an Assessment Panel comprising

representatives of the NSW Department of Land and Water Conservation, the former Queensland Department of Environment and Heritage (now the Environmental Protection Agency), and the Gold Coast City Council. They were attended by Kinhill Pty Limited (the Government's Project Manager) and now renamed as Brown and Root Services, the NSW Department of Public Works and Services (as Project Risk Manager in accordance with NSW Treasury requirements), and the independent probity adviser.

The Assessment Panel considered each Detailed Proposal and clarification meetings were held between the Panel and the two Proponents (with the Probity Adviser in attendance). As a result of these deliberations, the consortium led by McConnell Dowell Constructors (Aust) Pty Ltd was recommended as the Preferred Proponent. The NSW Board of Advice and Reference concurred with this recommendation and it was accepted by the Governments.

## **1.9 Negotiations between the Governments and the Preferred Proponent**

Negotiations took place between the Governments and the Preferred Proponent, in the presence of legal, financial and other advisers of both parties as necessary over a period of several months.

The Governments retained the services of Clayton Utz Lawyers (Legal Advisers), Mr Peter McClellan QC (legal-environmental advice), A McLachlan Management Services Pty Limited (Probity Adviser), Westpac Corporate Finance (Financial Advisers), Marsh Pty Limited (Insurance Advisers), the Audit Office of NSW (as accounting advisers),

the NSW Department of Public Works and Services (Project Risk Managers) and Kinhill Pty Limited (Project Managers).

Queensland Crown Law, the NSW Crown Solicitor, and NSW and Queensland Treasuries also provided advice.

The NSW Board of Advice and Reference concurred with the final outcome.

## **1.10 Outcome**

Contract documents comprising a Development Agreement, to cover the estimated 16 month construction period, a Concession Agreement, to cover the operation of the scheme until September 2024, a Multi Party Deed which deals with the rights and obligations of the Project's financiers, and a variety of agreements providing access to land were signed on 22 December 1999.

## **1.11 The Structure of this Summary**

**Section 2** summarises the structure of the Tweed River Entrance Sand Bypassing Project contracts and liabilities and the sharing of the Project risks.

**Section 3** summarises the main features of the key agreements and explains the inter-relationships of the various agreements between the public and private sector parties.

**Section 4** lists references.

## 2. Overview of the Project's Contracts

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A summary of the agreement provisions between the private sector consortium and the two Governments follows.

### 2.1 Risk Management

As this is a unique project on a high wave energy coastline, using state-of-the-art technology, the Governments chose a long term contract with the private sector that covers design, construction and ongoing operation of the system.

The agreements have been developed on the basis that the contractor takes all risks associated with design, approvals further to the EIS/IAS process, construction, financing, operation and maintenance.

The Governments have accepted risk in a limited number of well-defined areas as described in Section 2.8 and summarised in Table 2.1.

### 2.2 Details of the Successful Private Sector Proponent

Construction of the jetty and sand pumping system will be undertaken by McConnell Dowell Constructors (Aust.) Pty. Limited [A.C.N. 002 929 017], a wholly owned subsidiary of the publicly listed McConnell Dowell Corporation Limited [A.C.N. 008 444 880]. The ownership of the jetty and sand pumping system will be transferred to the Governments upon successful commissioning of the Works. The right to operate the permanent system will be granted to the Tweed River Entrance Sand Bypassing Company Pty Limited [A.C.N.087 986 392], a wholly owned

subsidiary of McConnell Dowell Corporation Limited.

The Australia and New Zealand Banking Group [A.C.N 005 357 522] will provide finance for the Project.

The interaction of the companies and the Governments is indicated in Figure 1.

### 2.3 Scope of the Contract between the Private Sector and the Governments

Contracts for the financing, design, obtaining approvals, construction, commissioning and the long term operation and maintenance of a permanent sand bypassing system for a period of approximately 24 years have been awarded.

As shown on Figure 2, the fixed system will consist of:

- a jetty and pumping stations at the northern end of Letitia Spit, and
- permanent pipelines to supply sand to Snapper Rocks and Kirra Point with provision of temporary outlets for nourishment at Duranbah, Greenmount Beach and the Tweed River lower estuary shoals.

The fixed system will be complemented by:

- dredging during the development phase to improve navigation conditions and deliver sand to the southern Gold Coast beaches; and
- dredging (when and as required) during the operating phase consisting of:

- ❑ maintenance dredging to remove sand that bypasses the fixed jetty system and remains in the navigation channel; and
- ❑ dredging to ensure an adequate quantity of sand is delivered to the southern Gold Coast beaches.

## **2.4 System Development and Commissioning**

The system will be designed and built by McConnell Dowell Constructors (Aust) Pty Limited. The fixed assets involved are:

- the jetty collection structure (designed for 50 year life) at the northern end of Letitia Spit;
- pumping stations on Letitia Spit; and
- permanent pipelines to Snapper Rocks and Kirra Point

When completed, the system will undergo a number of tests including a 30 day operating trial.

The system is to be paid for with initial payments totalling \$1.9M and with promissory notes having a face value of \$21.4M that are payable over a 12 year period following successful commissioning. The promissory notes are not issued if the system is not successfully commissioned.

Any unpaid promissory notes are not redeemable and associated interest payments are not payable if the system does not operate satisfactorily and the contract is terminated.

## **2.5 Concession Period**

Upon commissioning the Governments take ownership of the Project assets. However, the system will be operated and maintained by the Tweed River Entrance Sand Bypassing Company Pty. Limited from commissioning until 30 September 2024 when the operation of the system will be taken over by the Governments (at no cost).

The annual operating payments will depend on the quantity of sand transported. Once the channel is cleared, excess sand removed from the entrance area, and the natural system has reached equilibrium, an average operating fee of about \$1.9M is anticipated. Payment of the operating fees is also conditional on the system performing satisfactorily.

## **2.6 Maintenance Provisions in the Contract**

The maintenance of the Works includes:

- life cycle management of each component of the Works and replacement strategies during the operating phase;
- contingency plans in the event of a defect or failure of a component of the Works;
- a scheduled maintenance program for each component of the Works (as an asset, item of plant or equipment) comprising details of inspection, repair and replacement frequencies; and
- provision of a Maintenance Manual that is updated during the contract.

To facilitate this work, the operator is required to keep a separate bank account with funds sufficient to meet maintenance expenditure for the ensuing 12 months.

## 2.7 Provisions for Renegotiation

During the development phase, variations can be requested by the Governments.

There is provision for good faith negotiations during the operating phase for upgrades and installation of new technologies that may have a beneficial impact or improve the operation of the System.

There is also provision for good faith negotiations during the operating phase for unforeseen circumstances, such as changes to taxation laws and Force Majeure events.

## 2.8 Government Indemnities

The Governments have indemnified the Contractor and Operator against any loss arising as a result of:

- a) a Native Title Claim;
- b) pre-existing contamination of the construction site/ land, which affects the site/land or other land or waters;
- c) third party claims in connection with:
  - pre-existing contamination; or
  - the Contractor and Operator carrying out its obligations in accordance with the Project agreements;
- d) relevant data supplied by the Governments being incorrect in a material respect, or
- e) land tenure being unavailable.

These indemnities do not apply in circumstances where the Contractor or Operator is negligent or fails to comply with its obligations under the Project Documents.

## 2.9 Guarantees

The publicly listed McConnell Dowell Corporation Limited [A.C.N. 008 444 880] has guaranteed the completion of construction and the operating obligations of its subsidiaries, McConnell Dowell Constructors (Aust) Pty Ltd and Tweed River Entrance Sand Bypassing Company Pty. Limited under the Development Agreement and Concession Agreement respectively.

In addition, the following unconditional undertakings are held in favour of the Governments:

- During the development phase, the Governments hold undertakings in the form of a security bond to the value of \$2,000,000.

This security is to be released upon the successful completion of the 30 day commissioning trial and payment of any liquidated damages owing to the Governments.

- During the operating phase, the Governments will hold undertakings in the form of two security bonds to the aggregate value of \$1,500,000.

The \$1,000,000 bond will be returned to the Operator upon the successful completion of an extended operating trial, which will operate over a period of at least 12 months.

The Governments will retain the \$500,000 bond which will be replaced every 5 years (or if the CPI increases by more than 10% from the time the bond was replaced) with new security bonds where the value has been indexed in accordance with movements in the CPI. The security bond will be retained until the successful completion of the hand over of the fixed system to the Governments on 30 September 2024 following satisfaction of any claims

the Governments have against the Operator.

## 2.10 Other

To assure an adequate level of scrutiny and verification of the integrity of the procurement process an independent probity adviser was appointed. In particular the evaluation and appointment of the successful proponent was observed and monitored to attest all dealings with the private sector met acceptable standards.

## 2.11 Financial Approvals

The promissory notes defer payment for the construction of the bypass and make payment conditional upon its successful completion and ongoing operation. The use of promissory notes linked to successful operation of the system for a period of twelve years after commissioning meets the requirements for allocating the risks associated with the system and its technologies to the private sector operator. Financing by way of promissory notes is covered by the *Public Authorities (Financial Arrangements) Act 1987* (PAFA Act).

Entities which are eligible to apply for approval to borrow under PAFA are defined in section 6 of the Act. They must be included in Schedule 1 of the Act or declared by Regulation to be an “Authority” before being eligible to apply to the Treasurer for approval to borrow under the Act. Each actual borrowing transaction must be approved by the Treasurer and no borrowing transaction may be entered into without such an approval.

On 23 September 1999 the Minister for Land and Water Conservation requested declaration as an Authority for the purposes of Part 2 of the PAFA Act for

the Minister to be then able to seek financial accommodation under the terms of that Act in the course of entry into the contracts to deliver the scheme.

A regulation was drafted to declare, under section 6 of the PAFA Act, the Minister administering the *Tweed River Entrance Sand Bypassing Act 1995* as an “Authority” for the purposes of Part 2 of the Act. This enabled the Minister to seek approval to issue the promissory notes. On 14 October 1999 the Regulation granting borrowing powers under the PAFA Act to the Minister administering the *Tweed River Entrance Sand Bypassing Act 1995* was approved by the Executive Council but only for the purposes of functions exercised in connection with the carrying into effect of the *Tweed River Entrance Sand Bypassing Act 1995*.

On 15 December 1999 approval was given by the Governor in Council pursuant to section 7 of the PAFA Act, to the Minister administering the *Tweed River Entrance Sand Bypassing Act 1995* to obtain, in accordance with section 8 of the PAFA Act, financial accommodation by means of the issue to McConnell Dowell Constructors (Aust) Pty Limited of 48 conditional Promissory Notes with a total value of up to \$31 million for the purposes of financing the Tweed River Entrance Sand Bypassing Project.

No guarantee under the PAFA Act is to be granted and no guarantee fees pursuant to s22D of the PAFA Act are to be charged. An exemption under section 9(2) of the *Treasury Corporation Act 1983* to enable the financial accommodation to be provided by the ANZ Bank rather than New South Wales Treasury Corporation (NSW TCorp) was also granted.

The contracts with McConnell Dowell also provide for a case in which the company receives an unacceptable ruling from the Australian Tax Office in respect of the taxation treatment of the assignment

of the promissory notes by the Contractor to the financier ANZ in order to repay the construction facility. In such an event, instead of the Minister issuing Promissory Notes upon commissioning, a payment of \$21.4 million would be made by the Governments to the Contractor. The ANZ would provide the Governments with an unconditional letter of credit with a value of \$21.8 million (reducing over a period of 12 years from commissioning). The Governments would be entitled to draw upon the unconditional letter of credit in certain circumstances to repay any outstanding balance in the event of termination for Operator default.

Since the signing of the agreement, a favourable tax ruling has been sought and received from the Australian Tax Office.

## **2.12 Summary**

A competitive bidding process has been undertaken in a manner that has achieved the best possible deal for both the Governments and the community. There is a net benefit to the Governments and the community on a “whole of life basis”. An equitable sharing of risks and rewards between the private sector and the Governments has also been achieved.

## Tweed River Entrance Sand Bypassing Project

**TABLE 2.1 RISK ALLOCATION TABLE**

RISK	ALLOCATION	COMMENT
<p><b>1. Site Access</b></p>          <p>Pipeline Routes</p>	<p>Governments</p>          <p>Contractor/Operator/ Governments</p>	<p>The Contractor has contractual rights to access and use the construction site for construction purposes.</p> <p>Further necessary leases and licences will be granted by third parties, such as the Tweed Byron Local Aboriginal Land Council, Tweed Shire Council and the Queensland Department of Natural Resources, to the Operator upon the completion and commissioning of the works.</p> <p>The Governments will indemnify the Contractor and the Operator against loss suffered as a result of native title claims, the land leases and licences being terminated (other than as a result of the default or negligence of the Contractor or Operator) or the resumption or compulsory acquisition of the site.</p> <p>The Contractor will be entitled to claim for an extension of time during construction to the extent the Contractor is delayed in achieving a Milestone (or the clearing of the channel) as a result of a native title claim.</p> <p>The Contractor will identify the pipeline routes. Governments and other third parties, such as the Tweed Shire Council and the Queensland Department of Natural Resources, will grant rights including licences, easements and leases to the Operator for the operation and maintenance of the pipelines.</p>
<p><b>2. Site Conditions</b></p>          <p>Relevant Data</p>	<p>Contractor</p>          <p>Governments</p>	<p>Governments will make available to Contractor on an "information only" basis geotechnical and environmental reports on the site.</p> <p>The Contractor warrants that it has not relied on information provided by Governments, except the Relevant Data, being a set of government supplied data specified in the Agreements.</p> <p>The Contractor is entitled to claim for an extension of time during construction and the Contractor and Operator to be indemnified for loss suffered as a result of the Relevant Data being incorrect in a material respect.</p>

RISK	ALLOCATION	COMMENT
<p>Latent conditions</p> <p>Pre-existing contamination</p> <p>Heritage and archaeological items, fauna/flora</p> <p>Sea and other weather conditions</p>	<p>Contractor</p> <p>Contractor</p> <p>Governments</p> <p>Contractor/Governments</p> <p>Contractor/Governments</p>	<p>The Contractor is liable for the impact on time and cost of latent conditions eg hard rock, including any delay costs.</p> <p>Construction land and site is provided in its present condition and the Contractor is responsible for making the land suitable for the Project.</p> <p>Governments indemnify the Contractor and the Operator for loss suffered including due to third party claims, as a result of contamination, pollution or environmental hazard existing prior to the date of the contract (other than as a result of the Contractor's or the Operator's negligence). The Contractor will be entitled to claim an extension of time during construction to the extent of any delay to completion of a Milestone (or clearing of the channel) as a result of such pollution or contamination.</p> <p>The Contractor is responsible for any cost or delay (up to a total of 3 weeks) associated with uncovering Artefacts. For further delays, Governments to allow extra time and indemnify the Contractor for such costs and third party claims.</p> <p>Governments will extend the time for construction and for clearing the channel for agreed Limiting Conditions, eg. sustained high seas, wind or rainfall. The Contractor is responsible for any associated costs.</p>
<p><b>3. Planning and other approvals</b></p> <p>EIS/IAS</p>	<p>Contractor/Operator/ Governments</p>	<p>The Contractor and the Operator are responsible for obtaining DUAP approval of their respective Environmental Management Plans and approval of any subsequent substantial modifications to them. The Contractor and the Operator will bear the risk of delays in obtaining, or failure to obtain, approvals and of conditions of approvals which increase costs or cause delay. Governments indemnify the Contractor for any loss suffered if the Contractor is unable to obtain an approval (including the DUAP approvals) despite all reasonable endeavours.</p> <p>The Contractor must carry out design and construction in accordance with the EIS/IAS Determination and all other applicable approvals, permits and licences. Governments responsible for conditions of EIS determination which are not able to be undertaken by the Contractor/Operator as identified in the Agreement.</p>

RISK	ALLOCATION	COMMENT
Other construction approvals	Contractor	The Contractor must carry out construction in accordance with all applicable approvals, permits and licences.
Operation approvals	Operator	The Operator must carry out operations in accordance with all other applicable approvals, permits and licences.
<b>4. Design, Construction and Commissioning</b>	Contractor	Design and construction must be in accordance with the pre-agreed requirements. The Contractor warrants design and construction fit for purpose, and in accordance with the Governments' requirements. Parent Company guarantees performance of Contractor. Governments will monitor compliance of design and construction against requirements. The Contractor must ensure that all Quality Assurance provisions are observed. Performance measured against agreed milestones will be monitored by Governments.
	Governments	Extension of time to be allowed if a particular event (Force Majeure, Act of Prevention, Discriminatory Change in Law, default by Governments, incorrect Relevant Data) is likely to delay completion of a Milestone Event or the Commissioning Date or the establishment of the Clear Navigation Channel prior to Commissioning Date.
	Contractor	<p>The Contractor is otherwise liable for cost overruns and for costs of delay. However, the Contractor will be paid for sand delivered during the 30 day Operating Trial even if commissioning is not achieved.</p> <p>The Contractor has provided a \$2 million performance guarantee to the Governments as security.</p> <p>The Contractor to pay liquidated damages of \$3,000.00 per day between Date for Commissioning and Commissioning Date. There is no limit on Liquidated Damages payable.</p> <p>The Governments have the right to terminate the Development Agreement for non performance. The Governments are not liable for payment/compensation to the Contractor after such termination. Reasonable cure periods are available to the Contractor to remedy a Delivery Default which can be extended provided that the Contractor is diligently pursuing a remedy of the default. No additional cure periods are available to the Financier.</p>

RISK	ALLOCATION	COMMENT
<p><b>5. Operation &amp; Maintenance</b></p> <p>Breakdown and plant replacement</p>	<p>Operator</p> <p>Operator</p>	<p>The Operator will provide operation and maintenance services to pre-agreed standards (Asset Management Plan, Environmental Management Plan and Quality Assurance Plan and audits required).</p> <p>The Operator must provide 2 performance undertakings (\$1 million and \$500,000) as security for its performance prior to the commencement of operating period. The \$1 million bond is returnable upon successful completion of an 18 month operating trial of the system.</p> <p>McConnell Dowell Corporation, the Operator's ultimate parent, guarantees the performance of its operating subsidiary's obligations.</p> <p>If the Operator defaults and the default is not remedied within appropriate cure periods up to a maximum of 24 months, Governments will have the right to terminate the Concession Agreement. No compensation is payable by the Governments. No additional cure periods are available to the Financier.</p> <p>Asset management of facilities is the responsibility of the Operator. The Operator must establish and maintain a sinking fund to cover planned preventative maintenance.</p>
<p><b>6. Revenue &amp; Pricing Structure</b></p>	<p>Operator/Governments</p>	<p>Structured to take into account variable need by the Governments for sand delivery. Quarterly deferred capital payments are made by the Governments for a period of 12 years following successful commissioning of the system. The NSW Minister for Land and Water Conservation will issue 48 promissory notes to the Contractor (upon successful commissioning of the system) representing the Governments' promise to pay the deferred capital payments. A Service Charge is payable monthly to the Operator irrespective of the volume of sand delivered. A Usage Charge is payable based on the volume of sand delivered. The Usage Charge is reduced in circumstances of non-performance by the Operator.</p> <p>Governments liable for cost of placement of unacceptable sand material.</p>
<p><b>7. Services</b></p>	<p>Operator/Governments</p>	<p>Contractor and Operator to procure necessary services. Governments will not be liable for the consequences of any failure of services other than failures of the electricity supply in excess of 7 days which is a Force Majeure event. The Contractor is entitled to claim an extension of time but no money.</p>

RISK	ALLOCATION	COMMENT
<b>8. Industrial Relations</b>	Contractor/Operator/ Governments	The Contractor/Operator will be responsible for site/operator specific industrial relations and will bear the risk of any such industrial disruptions. The Contractor is entitled to claim for an extension of time but no money for non-site and non-contractor specific industrial disputes lasting more than 7 days.
<b>9. Force Majeure (Operations)</b>	Operator/Contractor	<p>The Operator and Contractor will bear all financial consequences of a Force Majeure event during the operation phase eg. additional financing costs, loss of revenue, rebuilding and repair. However, Governments continue to pay base amount (pursuant to promissory notes) if Force Majeure is not insurable.</p> <p>The Operator is entitled to a suspension of its obligations for the period of time during which its obligations are affected as a result of a Force Majeure event.</p>
<b>10. Rates &amp; Taxes</b>		
Council and other rates	Contractor/Operator	The Contractor and the Operator are liable for council rates and charges and any other rates.
Land tax	Contractor/Operator	The Contractor and the Operator are liable for land tax as applicable.
State taxes	Contractor/Operator	The Contractor and the Operator will be liable for all increases in taxes except for a change in law which discriminates against the Project and which has a material adverse effect on the financial viability of the Project (during construction) or on the ability of the Operator to carry out its obligations (during operations).
Federal taxes	Contractor/Operator	The Contractor and the Operator will be liable for all increases in Commonwealth taxes.
	Governments	Governments liable to the extent that the Contractor or Operator are liable to the Commissioner for Taxation for GST. Governments entitled to be reimbursed by Commissioner for Taxation.
Sales tax	Contractor/Operator	The Governments are not liable for sales tax. The Contractor and the Operator are liable to the extent that sales tax is applicable to the Project.
Stamp duty	Contractor/Operator	The Contractor and the Operator will be liable for any stamp duty which is payable in relation to the Project.

RISK	ALLOCATION	COMMENT
<b>11. Changes in Law</b>	Contractor/Operator  Contractor/Operator	The Contractor and Operator will bear the consequences of all changes in law except changes in NSW or Queensland laws or requirements of authorities in NSW and Queensland which discriminate against the Project and which have a material adverse effect on the financial viability of the Project or the ability of the Operator to meet its obligations.  Where the change in law has such an adverse effect, the Contractor or the Operator (as applicable) and Governments will enter into good faith negotiations to overcome such adverse affect.
<b>12. Financing</b>	Contractor	The Contractor is responsible for obtaining finance for development. It will be liable for changes in interest rates, any foreign exchange exposure and any change in law which increases financing costs.
<b>13. Inflation</b>	Contractor	All risks of inflation during construction will be borne by the Contractor. Charges for operation, maintenance and sand delivery to be adjusted as per the escalation formula in accordance with relevant indices.
<b>14. Insurance</b>	Contractor/Operator	The Contractor and the Operator must effect and maintain appropriate insurance with reputable companies (eg damage by storm, damage by collision, marine liability, public liability etc). Upon a casualty event, insurance proceeds must be applied to repair/reinstatement unless (during the construction phase) the Contractor is insolvent at the time of the damage or (during the term) the works are so damaged that reinstatement will take in excess of 2 years.
<b>15. Community Relations</b>	Contractor/Operator/ Governments	Governments retain overall responsibility for community relations and media liaison on the Tweed River Entrance Sand Bypassing Project. The Contractor and the Operator will be responsible for immediate local issues during construction and operation.  The Contractor and the Operator are not liable for adverse impact to third parties if claim arises due to an Act of Prevention or where the Contractor or the Operator (as applicable) is acting in accordance with the Agreements and/or the instructions of Governments. (The Contractor or the Operator to be indemnified by the Governments for loss suffered in these circumstances).

## 3. The Project Agreements

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The contracts to which the Governments are party are a Development Agreement, a Concession Agreement, a Multiparty Deed and various leases for land and easements both in NSW and Queensland.

The Contractual Structure for the Project, identifying the relationships between the various parties (excluding the various land tenures) is represented in Figure 1 .

### 3.1 Summary of Project Documents Inter-relationships

The Development Agreement is an agreement between the Governments, McConnell Dowell Constructors (Aust) Pty Limited (“the Contractor”) and McConnell Dowell Corporation Limited (“Parent Guarantor”). The Development Agreement covers the finance, design and construction of the Works.

The Concession Agreement is an agreement between the Governments, the Tweed River Entrance Sand Bypassing Company (“the Operator”) and McConnell Dowell Corporation Limited (“Parent Guarantor”). The Concession Agreement covers the operation and maintenance of the System and is in force from the Date of Commissioning of the Works to the 30 September 2024.

The Multiparty Deed is an overarching deed which sets down the relationships between the Governments, McConnell Dowell Constructors (Aust) Pty Limited, the Tweed River Entrance Sand Bypassing Company Pty Limited, McConnell Dowell Corporation Limited and the Australia and New Zealand Banking Group.

A number of lands leases, easements and permits to occupy have also been executed giving McConnell Dowell Constructors (Aust) Pty Limited and the Tweed River Entrance Sand Bypassing Company Pty Limited rights to occupy land for construction and operational purposes.

Key features of the obligations of the Governments and the Contractor or Operator under the Project Agreements dated 22 December 1999, are summarised below.

### 3.2 The Development Agreement

The Development Agreement is essentially an Agreement between the parties for the design and construction of the permanent sand bypassing works.

Under this Agreement, the Contractor is responsible for the design, construction, financing and commissioning of the system in accordance with technical specifications set by the Governments. The Contractor is also responsible for gaining any additional approvals necessary to achieve this objective.

The Contractor carries all risks associated with the design, construction and financing of the works.

The Governments and the Contractor share risks associated with delays in construction or commissioning due to adverse weather conditions or force majeure events occurring during construction. The completion risk borne by the Governments is restricted to the granting of extensions of time due to the above mentioned situations and the

application of extended cure periods to enable the Contractor to continue with construction, maintaining of the clear navigation channel, or commissioning in order to remedy a default prior to the Governments being entitled to terminate the Development Agreement. The Governments take the risk of ordered variations, acts of prevention, discriminatory changes in law or Government breach.

Under the terms of the Development Agreement there are grounds for termination of the Agreement by the Governments in the event of a Delivery Default occurring. The following events are Delivery Defaults:

- a milestone event is not completed on or prior to its target date;
- practical completion does not occur on or prior to the target date for practical completion;
- commissioning does not occur on or prior to the target date for commissioning;
- the Development Agreement or any other project document is or becomes wholly or materially void, voidable or unenforceable as against the Contractor and this has a material adverse effect;
- the Contractor effects an unauthorised amendment to any of the Project documents to which it is a party;
- there is a material change in the ownership, management or control of the Contractor (other than as a result of an act of the Governments), and the Governments form the reasonable opinion that, as a result, the Contractor is likely not to be able to perform its obligations under the Development Agreement;

- the Contractor breaches its obligations to use its reasonable endeavours to remedy the effects of a force majeure promptly;
- the Contractor defaults in a material respect in the due observance and performance of any of its obligations under the Development Agreement or any other project document and (if remediable) the Contractor does not remedy such defaults;
- the Contractor becomes insolvent; and
- the Contractor displays an intention to permanently abandon the project.

Upon the occurrence of a Delivery Default, the Governments may, at their option, terminate the Development Agreement by giving the Contractor 120 Business Days written notice to remedy the Delivery Defaults or such longer period as may be agreed.

The Development Agreement is in force from the date of execution of the contracts until the system is commissioned and all the promissory notes are redeemed. Upon termination of the Development Agreement, the Governments would not be liable to pay any compensation or other moneys to the Contractor, or to make any further payments in respect of the promissory notes.

### **3.3 The Concession Agreement**

The Operator will operate and maintain the works in accordance with the Concession Agreement from the Date of Commissioning until 30 September 2024.

The Operator is obliged under the terms of the Agreement to:

- maintain a Clear Navigation Channel as defined in the Agreement;

- to deliver sand to the southern Gold Coast beaches in accordance with annual orders placed by Governments;
- to maintain the fixed system for the duration of the Agreement; and
- to hand over the fixed system to the Governments at the end of the concession period at no cost to the Governments.

Under the Concession Agreement the Governments have undertaken to order varying quantities of sand for the duration of the Agreement, within agreed upper and lower limits. Payment to the Operator will be on the basis of:

- a) a service charge, payable for providing a clear navigation channel and transporting the ordered quantities of sand,
- b) additional fees based on the quantities of sand delivered. The unit rates vary depending on the delivery location of the sand, and on the quantity of sand delivered, and
- c) charges relating to specific activities, such as additional surveys.

Payments made to the Operator will be indexed, to take account of variations in labour costs, energy costs and other factors relevant to the operation of the project.

Under the terms of the Concession Agreement there are grounds for termination of the Agreement by the Government in the event of an Operating Default occurring. The following events are Operating Defaults:

- the Operator fails to operate or maintain the system in accordance with the Concession Agreement;
- without the prior written consent of the Governments, the Operator

transfers, conveys, loses or relinquishes its right to occupy the works other than in accordance with the Concession Agreement or the project documents;

- the Concession Agreement or any other Project document is or becomes wholly or partially void, voidable or unenforceable as against the Operator and this has a material adverse affect;
- the Operator effects an unauthorised amendment to any of the project documents to which it is a party;
- there is a material change in the ownership, management or control of the Operator (other than as a result of an act of the Governments) without the prior written consent of the Governments, and the Governments form the reasonable opinion that, as a result, the Operator is likely not to be able to perform its obligations under the Concession Agreement;
- the Operator breaches its obligations to use its best endeavours to remedy the effects of a force majeure promptly, including making any reasonable expenditure of funds which may mitigate or avoid the effect of the force majeure;
- the Operator defaults in a material respect in the due observance and performance of any of its other obligations under the Concession Agreement or any other project document;
- at the end of a contract year, the deficiency in sand delivered by the Operator compared with the ordered quantity is greater than 400,000m<sup>3</sup>;
- the Operator delivers more than 400,000m<sup>3</sup> of sand over the quantity ordered;

- the Operator repeatedly fails to comply with material terms of the Concession Agreement in a material respect; or
- the Operator becomes insolvent.

If an Operating Default occurs, the Governments may, by notice in writing to the Operator, require the Operator to rectify the Operating Default within a period specified in the notice. This period must be reasonable and not less than:

- 4 months in the case of achieving a Clear Navigation Channel,
- 4 months in the case of a Delivery Deviation, or
- 3 months in the case of any other Operating Default.

The period in which to remedy the Operating Default is limited to a maximum of 10 months.

If the Operator has submitted to the Government prior to the issue of the notice, a program for remedying the Operating Default, the Governments will consider the program in good faith in determining the length of the period.

If an Operating Default occurs and:

- the Operating Default is not remedied within the period specified in the notice, or
- during an extended period the Operator ceases to diligently pursue a remedy, or
- there have been 3 or more Operating Defaults in the 5 year period prior to the Operating Default which have taken longer than 6 months to remedy,

the Governments may terminate the Concession Agreement and the Operator's involvement in the project.

Upon termination of the Concession Agreement, the Governments shall not be liable to pay any compensation or other moneys to the Operator.

### **3.4 The Multiparty Deed**

The Multiparty Deed sets down the relationships between the Governments, McConnell Dowell Constructors (Aust) Pty Limited, the Tweed River Entrance Sand Bypassing Company Pty Limited, McConnell Dowell Corporation Limited, and the Australia and New Zealand Banking Group (ANZ), under the Development Agreement and Concession Agreement.

The Deed documents Governments' termination rights, emergency rights and cure rights. It also documents ANZ's rights in respect of insurance and the circumstances leading to termination of the Development Agreement and the Concession Agreement. No additional cure periods are available to the Financiers under this Deed.

### **3.5 Land Leases**

The Contractor has been granted construction licences and on commissioning, the Operator will be granted leases, sub-leases, easements and other necessary permits or rights to occupy the areas covered by the works, pipelines and access roads for the duration of the Concession Agreement.

The NSW Government will lease land at the landward end of the jetty from the Tweed Byron Local Aboriginal Land Council and sub-lease it to the Operator.

Crown Land has been leased to the Contractor and Operator by the NSW Minister for Land and Water

Conservation, in his capacity of Minister administering the *Crown Lands Act, 1989*.

Tweed Shire Council has entered into a Right to Occupy Agreement with the Contractor and Operator for land under its control.

The Queensland Department of Natural Resources has issued a Permit to Occupy over the pipeline route in Queensland. A Strata Lease will be offered to the Operator following completion and commissioning of the pipelines.

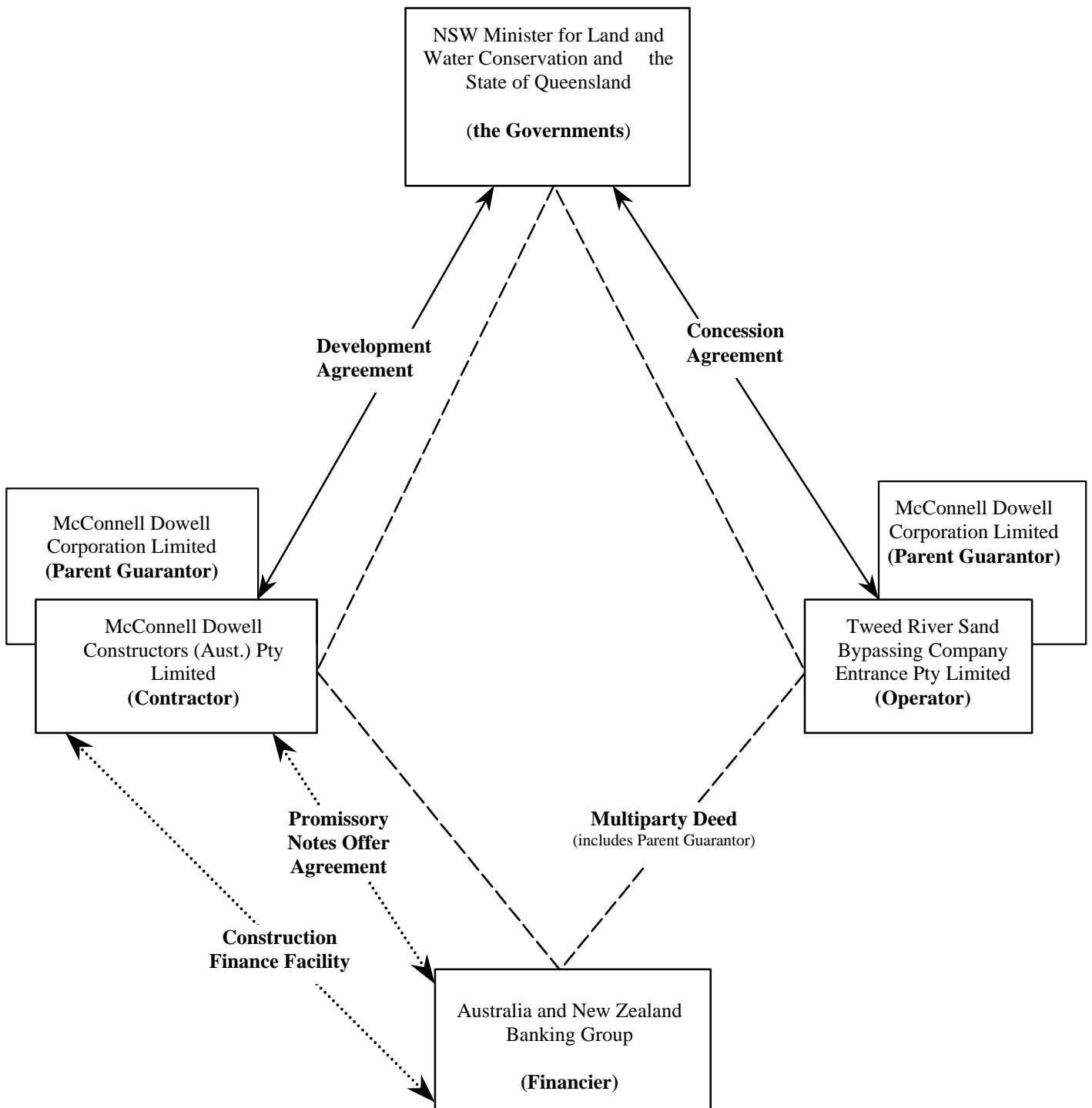
### **3.6 Other Contract Documents**

Financing agreements between the Contractor and the Australia and New Zealand Banking Group Limited support the main contracts. These are the Construction Financing Facility Agreement, the Promissory Notes Offer Agreement and related security documentation.

## 4. References

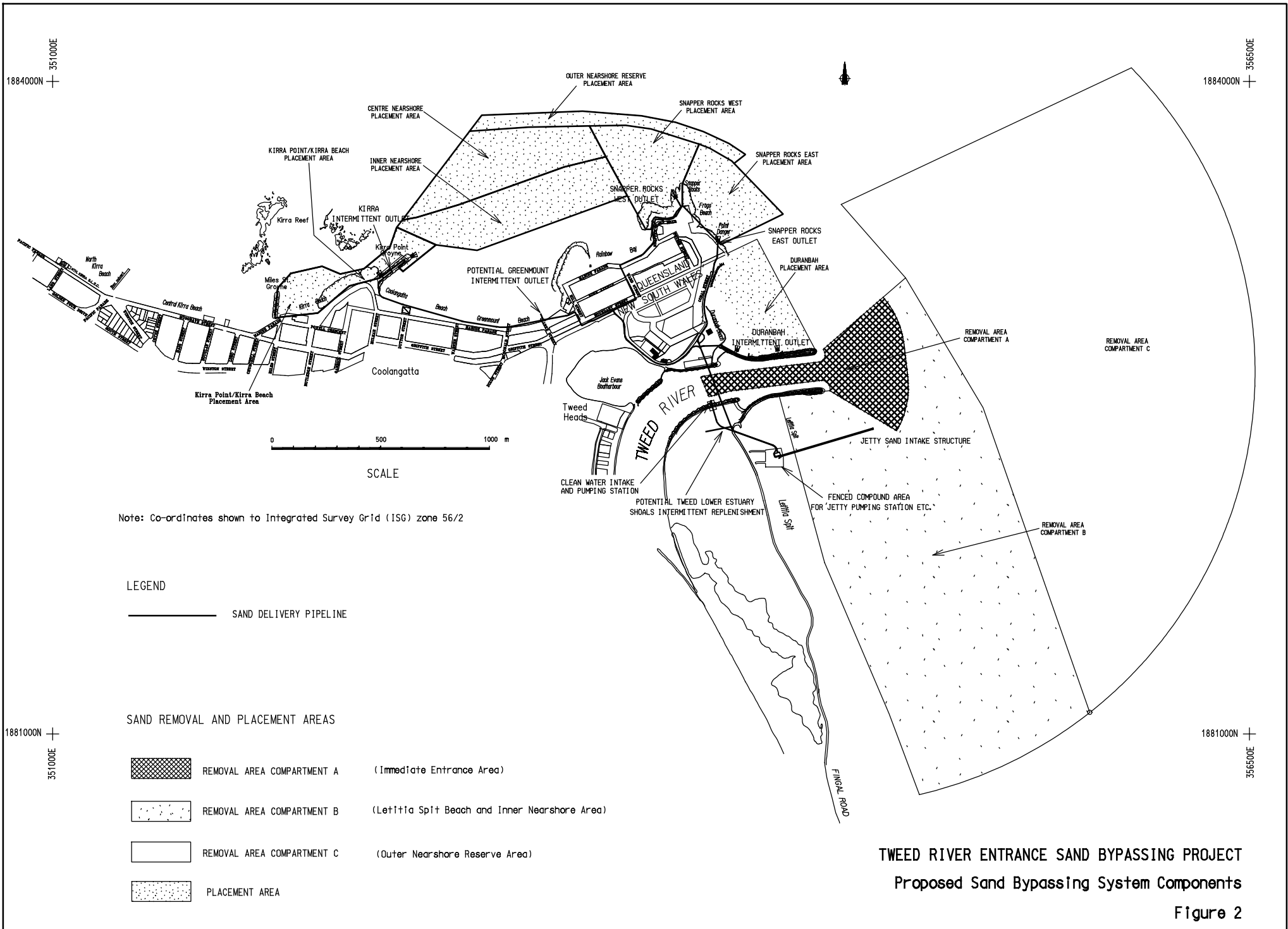
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- 3 **Tweed River Entrance Sand Bypassing Project Agreement Act 1998 (Queensland)**.
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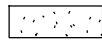

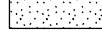
TWEED RIVER ENTRANCE SAND BYPASSING PROJECT  
CONTRACTUAL STRUCTURE

FIGURE 1



Note: Co-ordinates shown to Integrated Survey Grid (ISG) zone 56/2

LEGEND

- SAND DELIVERY PIPELINE
- SAND REMOVAL AND PLACEMENT AREAS
-  REMOVAL AREA COMPARTMENT A (Immediate Entrance Area)
-  REMOVAL AREA COMPARTMENT B (Letitia Spit Beach and Inner Nearshore Area)
-  REMOVAL AREA COMPARTMENT C (Outer Nearshore Reserve Area)
-  PLACEMENT AREA

TWEED RIVER ENTRANCE SAND BYPASSING PROJECT  
 Proposed Sand Bypassing System Components  
 Figure 2