

**NORTHERN TERRITORY OF AUSTRALIA**

**MERLIN PROJECT AGREEMENT RATIFICATION ACT**

As in force at 21 September 2011

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# NORTHERN TERRITORY OF AUSTRALIA

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This reprint shows the Act as in force at 21 September 2011. Any amendments that commence after that date are not included.

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## MERLIN PROJECT AGREEMENT RATIFICATION ACT

**An Act to ratify an agreement between the Northern Territory of Australia and Ashton Mining Limited (A.C.N. 005 466 964) and to provide for security of diamonds produced from the Merlin Project**

### Part 1 Preliminary

#### 1 Short title

This Act may be cited as the *Merlin Project Agreement Ratification Act*.

#### 2 Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

#### 3 Definitions

In this Act, unless the contrary intention appears:

**Agreement** means the agreement between the Territory and the Company that is set out in the Schedule and includes the Agreement as varied from time to time in accordance with its provisions.

**authorised officer** means a person who has a right to enter premises or land when exercising or performing his or her powers or functions under an Act, but does not include a member of the Police Force.

**Company** has the same meaning as in the Agreement.

**Contractors** has the same meaning as in the Agreement.

**controlled access point** means an access point to a designated area declared to be a controlled access point under section 6.

**designated area** means land or premises declared to be a designated area under section 6.

**Merlin Project** has the same meaning as in the Agreement.

**mineral lease** has the same meaning as in the Agreement and includes any mineral lease granted to the Company under clause 10 of the Agreement.

**property** includes goods and articles of any kind.

**security officer** means a person who is:

- (a) the holder of a security officer's licence granted under the *Private Security Act*; and
- (b) employed by the Company or a Contractor.

**uncut diamond** includes any crushed diamond, diamond dust, diamond fragment or partly cut or partly processed diamond.

**vehicle** has the same meaning as in the *Traffic Act*.

## **Part 2                      Ratification and authorisation of implementation of Agreement**

### **4                      Raftification of Agreement**

- (1) The Agreement is ratified for the purposes of clause 2(1) of the Agreement.
- (2) The implementation of the Agreement is authorised.
- (3) The provisions of the Agreement operate and take effect according to their terms despite anything to the contrary in any Act or law in force in the Territory.
- (4) If a provision of the Agreement provides for an Act or law in force in the Territory to be modified, the Act or law operates and takes effect for the purposes of the Agreement as if the Act or law had been modified as provided for in the Agreement.
- (5) An Act passed after the commencement of this Act cannot amend, modify or repeal a provision of the Agreement or affect the operation of a provision of the Agreement unless the Act expressly provides accordingly.
- (6) The Territory, its Ministers, instrumentalities and authorities and any local government authority are authorised, empowered and required to do all things necessary or expedient to carrying out or give full effect to the Agreement.

- (7) Subject to this Act and the Agreement, the Company, its servants, agents and Contractors must observe and comply with all Acts or laws in force in the Territory applying in any way to the Merlin Project.

## **5 Enforcement**

- (1) A decree of specific performance may be granted and enforced against the Territory in respect of its obligations under the Agreement in the same circumstances and on the same conditions as a decree of specific performance could be granted and enforced against a subject of the Crown.
- (2) Subsection (1) applies despite any Act or law in force in the Territory to the contrary.

## **5A Calculation of royalties exclusive of GST**

- (1) For the purpose of calculating or recalculating an amount of royalty under clause 5 of the Agreement, subject to subsection (2), an amount or value that affects the calculation or recalculation is to be taken to be the amount or value exclusive of the amount of GST (if any) payable in relation to a supply to which that amount or value relates.
- (2) Where an amount or value that affects the calculation or recalculation referred to in subsection (1) is directly attributable to an acquisition that relates to a supply that is input taxed, the amount or value is to be taken to be the amount or value inclusive of the amount of GST (if any) payable in relation to the acquisition to which that amount or value relates.
- (3) For the purposes of section 4(5), the Agreement is to be taken to be amended to the extent necessary to give effect to subsections (1) and (2).
- (4) In subsections (1) and (2), **acquisition**, **GST**, **input taxed** and **supply** have the same respective meanings as in the *A New Tax System (Goods and Services Tax) Act 1999* of the Commonwealth.

## **Part 3 Security**

### **6 Designated area**

- (1) The Minister may declare land or premises in the Territory to be a designated area.

- (2) A declaration under subsection (1) is to be made:
  - (a) by notice in the *Gazette*; and
  - (b) only if the Minister is satisfied that diamonds are to be mined, treated, processed, sorted, stored or cut on the land or premises for the purposes of the Merlin Project.
- (3) The declaration is to define the boundaries of the land or the premises.
- (4) The Minister may, by notice in the *Gazette*, declare an access point to a designated area to be a controlled access point.
- (5) A declaration takes effect on the day it is published in the *Gazette* or on a later date that is specified in the declaration.

## **7 Possessing uncut diamonds in designated area or mineral lease**

- (1) A person must not have an uncut diamond:
  - (a) in his or her possession; or
  - (b) under his or her control,in a designated area or the mineral lease without lawful authority or excuse.  
  
Maximum penalty: 170 penalty units or imprisonment for 2 years.
- (2) The burden of proving lawful authority or excuse lies on the person claiming it.

## **8 Entering and leaving designated area**

- (1) A person must not:
  - (a) enter or leave a designated area;
  - (b) drive a vehicle into or out of a designated area; or
  - (c) take or consign any property into or out of a designated area, other than through a controlled access point.Maximum penalty: 85 penalty units or imprisonment for 12 months.

- (2) A security officer may require a person:
- (a) who is entering or leaving a designated area – to stop;
  - (b) driving a vehicle into or out of a designated area – to stop the vehicle;
  - (c) taking or consigning property into or out of a designated area – to permit the security officer to examine the property.
- (3) A security officer may direct a person:
- (a) to enter or leave a designated area;
  - (b) to drive a vehicle into or out of a designated area; or
  - (c) to take or consign any property into or out of a designated area,
- through a controlled access point specified by the security officer.
- (4) A person must not:
- (a) enter a designated area;
  - (b) drive a vehicle into a designated area; or
  - (c) take or consign any property into a designated area,
- without the permission of a security officer who is on duty at a controlled access point.
- Maximum penalty: 8 penalty units.
- (5) A security officer who is on duty at a controlled access point:
- (a) may refuse a person permission to enter a designated area; and
  - (b) is not required to give the person a reason for the person being refused permission to enter the designated area.
- (6) A security officer who is on duty at a controlled access point must not refuse a member of the Police Force who is acting in the course of his or her duty permission to enter a designated area unless the member fails to produce to the security officer evidence that the member:
- (a) is a member of the Police Force; or

- (b) has permission from the Company to enter the designated area.
- (7) A security officer who is on duty at a controlled access point must not refuse an authorised officer permission to enter a designated area unless the authorised officer fails to:
- (a) state his or her name and address;
  - (b) state and provide evidence of his or her authority to enter the designated area; or
  - (c) state the purpose for which he or she wishes to enter the designated area.
- (8) Before permitting a person to enter a designated area, a security officer who is on duty at a controlled access point may require the person to agree in writing to comply with the conditions of entry that the security officer considers necessary for the security of the designated area and of the operations, persons and property in the designated area.
- (9) The conditions may include that the person will allow a security officer to search:
- (a) the person (other than a search by way of an examination of his or her body cavities);
  - (b) the person's vehicle or the vehicle the person is driving or is a passenger in; or
  - (c) any property that is in the person's possession or under the person's control.
- (10) A person who contravenes or fails to comply with a direction given or a requirement imposed by a security officer under this section commits an offence.
- Maximum penalty: 85 penalty units or imprisonment for 12 months.
- (11) In subsection (8), a person does not include a member of the Police Force referred to in subsection (6) or an authorised officer referred to in subsection (7).

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**9 Powers of security officers in designated area and mineral lease**

- (1) A security officer may do any of the following in a designated area or the mineral lease:
- (a) direct a person (except a member of the Police Force) entering or in the designated area or mineral lease not to enter or remain in a part of the designated area or mineral lease specified by the security officer, either absolutely or unless he or she is accompanied by a security officer;
  - (b) require a person in the designated area or mineral lease to stop or require a person driving a vehicle in the designated area or mineral lease to stop the vehicle;
  - (c) require a person in the designated area or mineral lease to state:
    - (i) his or her name and address;
    - (ii) his or her authority for being in the designated area or mineral lease; or
    - (iii) the purpose for which he or she is in the designated area or mineral lease;
  - (d) direct or require a person entering or in the designated area or mineral lease to do anything that the security officer considers necessary for the security of the designated area or mineral lease and of the operations, persons and property in the designated area or mineral lease.
- (2) A security officer may require a person (except a member of the Police Force in the execution of his or her duty) who is in a designated area or the mineral lease to leave the designated area or mineral lease if:
- (a) the person contravenes or fails to comply with a direction given or requirement imposed under subsection (1); or
  - (b) the security officer is not satisfied that a person has a need to remain in the designated area or mineral lease.
- (3) A person who fails without lawful authority or excuse to comply with a direction given or a requirement imposed under subsection (2) commits an offence.

Maximum penalty: 8 penalty units.

- (4) The burden of proving lawful authority or excuse lies on the person claiming it.
- (5) A security officer may use reasonable force:
  - (a) to stop a person who fails to comply with a direction given to or a requirement imposed on the person under this section;
  - (b) to remove a person from a designated area or the mineral lease who fails to comply with a direction given to or a requirement imposed on the person under this section;
  - (c) to remove a vehicle or other property from a designated area or the mineral lease; and
  - (d) to enter a vehicle for the purpose of removing it under paragraph (c) or section 10(2)(b).

## **10 Power to search vehicles or property**

- (1) A security officer may search a vehicle or other property that is:
  - (a) in the possession or under the control of a person in a designated area or the mineral lease; or
  - (b) being driven, taken or consigned out of a designated area or the mineral lease.
- (2) For the purposes of subsection (1), the security officer may do the following:
  - (a) dismantle the vehicle or other property;
  - (b) take the vehicle or property to a place and detain it there pending the search or a further search.
- (3) In this section, ***property*** does not include clothing worn by a person.

## **11 Detaining of persons in designated area or mineral lease**

- (1) A security officer may detain a person who is in a designated area or the mineral lease for a reasonable period if:
  - (a) the security officer suspects that the person has an uncut diamond on his or her person or in his or her possession or under his or her control without lawful authority or excuse;
  - (b) the security officer suspects that the person has stolen or is concealing an uncut diamond; or

- (c) the person does not have permission to be in the designated area or mineral lease.
- (2) As soon as practicable after a person is detained, the security officer must notify a member of the Police Force that the person has been detained.
- (3) The security officer must:
  - (a) detain the person in a place set aside for that purpose in the designated area; and
  - (b) deliver the person into the custody of a member of the Police Force as soon as practicable after the member arrives at the designated area or mineral lease.
- (4) Without limiting subsection (1)(b), a security officer has reasonable grounds for suspecting a person of stealing or concealing an uncut diamond if the person refuses to permit a search to be conducted after having agreed under section 8(8) to it being conducted.
- (5) A member of the Police Force may search a person who is detained under this section and any clothing worn by the person.
- (6) The search must be carried out by a member of the Police Force of the same sex as the person to be searched.
- (7) If it is not immediately practicable for subsection (6) to be complied with, the member of the Police Force:
  - (a) may cause the search to be carried out under the direction of the member by a security officer of the same sex as the person to be searched; or
  - (b) may:
    - (i) detain the person until the search can be conducted by a member of the same sex as the person to be searched; or
    - (ii) take the person to a place where the search can be conducted by a member of the same sex as the person to be searched.
- (8) Subsections (5) and (7) do not authorise a search of a person by way of an examination of the body cavities of the person by the member of the Police Force or security officer conducting the search.

- (9) However, a member of the Police Force may arrange for a medical practitioner nominated by the member to examine the body cavities of a person detained under this section.
- (10) The examination by a medical practitioner can only be conducted if:
- (a) the person consents in writing to it being conducted; or
  - (b) a magistrate approves it being conducted.
- (11) The member of the Police Force may apply to a magistrate for the approval in person or by telephone.
- (12) The magistrate may approve the examination being conducted if he or she is satisfied that the examination may provide evidence of an offence.
- (13) For the purposes of subsection (9), the member of the Police Force may:
- (a) detain the person until the medical practitioner conducts the examination; or
  - (b) take the person to a place where the medical practitioner will conduct the examination.
- (14) The examination by the medical practitioner is to be conducted:
- (a) in the presence of a member of the Police Force of the same sex as the person to be examined; or
  - (b) if that is not immediately practicable – in the presence of a security officer of the same sex as the person to be examined.
- (15) A member of the Police Force may use reasonable force, and may call on any assistance that he or she considers necessary, in order:
- (a) to detain a person under this section;
  - (b) to carry out a search under this section; or
  - (c) to facilitate a search or examination being carried under this section.
- (16) A person must not:
- (a) resist being detained under this section;

- (b) escape or attempt to escape:
  - (i) from a place where he or she is being detained under this section; or
  - (ii) from the custody of a member of the Police Force or a security officer;
- (c) obstruct or hinder a member of the Police Force or a security officer who is carrying out a search under this section; or
- (d) obstruct or hinder a medical practitioner who is carrying out an examination under this section.

Maximum penalty: 170 penalty units or imprisonment for 2 years.

- (17) A medical practitioner is authorised to carry out an examination of the body cavities of a person under this section.
- (18) No action lies against a medical practitioner for anything reasonably done by him or her for the purposes of the examination.
- (19) The burden of proving lawful authority or excuse in subsection (1)(a) lies on the person claiming it.

## **12 Averments**

In a prosecution for an offence against this Act, an averment in the complaint that:

- (a) the place where the offence is alleged to have occurred was, or was in, a designated area or the mineral lease;
- (b) a place was a controlled access point for a specified purpose; or
- (c) a person was at a material time a security officer,

is to be taken to have been proved in the absence of proof to the contrary.

## **13 Return of uncut diamonds**

- (1) On finding a person guilty of an offence committed within a designated area or the mineral lease and involving the stealing, receiving or possession of uncut diamonds, a court must order the uncut diamonds to be delivered to the Company.

- (2) Subsection (1) applies:
- (a) to an offence under this or any other Act; and
  - (b) notwithstanding any other law or Act.

#### **14 Protection of security officers and police**

A security officer or member of the Police Force cannot be charged with or be found guilty of an offence of obstructing or hindering a person in exercising a power or performing a function conferred on the person under an Act or law in force in the Territory in respect of anything done by the security officer or member in exercising a power or performing a function under this Act.

#### **15 Regulations**

- (1) The Administrator may make regulations, not inconsistent with this Act, prescribing all matters:
- (a) required or permitted by this Act to be prescribed; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), the Regulations may:
- (a) require the Company to erect and maintain fences, walls and other physical barriers around a designated area in accordance with the Regulations;
  - (b) require the Company to provide and designate places in accordance with the Regulations for:
    - (i) persons to enter and leave a designated area;
    - (ii) vehicles to be driven into and out of a designated area; and
    - (iii) taking or consigning of property into and out of a designated area;
  - (c) require the Company to erect and maintain notices and signs at or near the perimeter of a designated area in accordance with the Regulations;
  - (d) prohibit the damaging, defacing, removal or destruction of fences, barriers, signs and notices erected under the Regulations;

- (e) regulate how persons are to be detained under the Act and, in particular, requiring that areas or places be set aside in designated areas to detain persons;
  - (f) regulate how searches and examinations of persons are to be carried out under this Act;
  - (g) regulate how any vehicle and property detained under this Act is to be searched and stored;
  - (h) provide for offences, including regulatory offences, against the Regulations;
  - (j) provide for penalties of not more than 85 penalty units for offences against the Regulations.
- (3) The Regulations may be made to apply:
- (a) generally or in a particular class of case or particular classes of cases;
  - (b) at all times or at specified time or specified times; or
  - (c) to all designated areas or to a specified designated area or specified designated areas.
- (4) The Regulations may be made to require a matter affected by the Regulations to be:
- (a) in accordance with a specified standard or requirement; or
  - (b) as approved by, or to the satisfaction of, a specified person or body or a specified class of person or body.
- (5) The Regulations may confer a discretionary authority on a specified person or body or a specified class of persons or bodies.

## Schedule

section 4

### THE NORTHERN TERRITORY OF AUSTRALIA MERLIN PROJECT AGREEMENT

THIS AGREEMENT is made the 12th day of October 1998

BETWEEN:

The NORTHERN TERRITORY OF AUSTRALIA care of the Department of Mines and Energy of Paspalis Centrepoint Building, Smith Street, Darwin 0800 in the Northern Territory of Australia (*the Territory*)

AND:

ASHTON MINING LIMITED (A.C.N. 005 466 964) whose registered office is situated at Level 4, 441 St Kilda Road, Melbourne 3000 in the State of Victoria (*the Company*)

WHEREAS:

- A. In 1992, the Company discovered diamond bearing kimberlites called the Merlin prospect in the Boomerang Creek District in the Northern Territory of Australia.
- B. On 19 December 1996, the Company made application for the grant of a mineral lease known as MLN 1154 for the mining of diamond bearing ore in the Boomerang Creek District. The lease was granted on 15 June 1998.
- C. The Company wishes to commence development of the Merlin Project.
- D. The Parties wish to enter into this Agreement in respect of the Merlin Project for the purposes of:–
  - (a) facilitating the development, construction and operation of the Merlin Project;
  - (b) ensuring that adequate security procedures are in place in respect of the Merlin Project; and
  - (c) dealing with the manner in which royalties are to be calculated and paid to the Territory in respect of the Merlin Project.

NOW THIS AGREEMENT WITNESSES as follows:

1. Definitions and Interpretation

- (1) In this Agreement, unless the contrary intention appears:

**Agreement** means this Agreement as varied from time to time.

**Contractors** includes Sub-Contractors.

**Merlin Project** means the project to be developed by the Company for the purposes of the mining and processing of diamond bearing ore to enable the recovery of diamonds, and all related activities on the mineral lease.

**mineral lease** means mineral lease N1154 granted to the Company on 15 June 1998, and includes any renewal or replacement lease in respect of the whole or part of the original area of the mineral lease.

**Mortgage** means any mortgage, charge, assignment, encumbrance or other dealing by way of security provided in relation to finance and facilities arranged for the purpose of developing or operating the Merlin Project.

**ore** means ore known as kimberlite containing diamonds together with any associated minerals which must necessarily be mined in conjunction with the kimberlite.

**Services** means the services of engineers, surveyors, architects and other professional consultants, experts and specialists, project managers, manufacturers, wholesalers, retailers, suppliers and Contractors and includes any other service necessary or incidental to the construction, continued operation or care and maintenance of the Merlin Project.

- (2) This Agreement shall be interpreted in accordance with the *Interpretation Act* as if it were a document subject to interpretation in accordance with that Act.

2. Ratification by Parliament

- (1) This Agreement, other than subclause (2) (which shall commence on the date this Agreement is signed by all parties), shall have no force or effect and shall not be binding on any party unless and until it is signed by all parties and ratified by the Legislative Assembly of the Northern Territory of Australia, with the assent as provided by the *Northern Territory (Self Government) Act 1978* (Commonwealth).

- (2) The Territory shall take all necessary action to have submitted to the Legislative Assembly at the earliest practicable date a Bill for an Act to ratify this Agreement.

3. Term

This Agreement shall commence on the date that it has been ratified in accordance with clause 2 and shall continue for the term of the mineral lease unless the Agreement is terminated earlier in accordance with the terms of this Agreement.

4. Security

- (1) The Territory shall enact and maintain legislation to give effect to any agreement between the Territory and the Company for the provision of security for the Merlin Project.
- (2) In order to give effect to the security provisions, the Territory shall, at its discretion, make available such personnel as it considers appropriate from the Northern Territory Police Force Gold Squad. Nothing in this provision shall require the Territory to meet the cost of any personnel or medical practitioners required for the implementation of the security provisions other than the provision of Northern Territory Police Force personnel.
- (3) The Company shall enter into an arrangement with the Northern Territory Minerals Council to provide a contribution to the costs of any assistance provided by the Northern Territory Police Force Gold Squad.

5. Royalty under *Mineral Royalty Act*

- (1) The Company shall not, by virtue only of this Agreement, be exempt from rent, royalty, duties, fees, levies, taxes or any other impost except as may be provided in this clause 5.
- (2) Royalty shall be payable in respect of the Merlin Project in accordance with the provisions of the *Mineral Royalty Act*, and, for the purpose of calculating such royalty, the *Mineral Royalty Act* is modified to the extent necessary to give effect to this clause.
- (3) For the purposes only of determining gross realization and operating costs in respect of the Merlin Project:
  - (a) the production unit is to be treated as though it includes the treatment and sorting facility or facilities at Perth in the State of Western Australia used by the Company for the purposes of the Merlin Project; and

- (b) the saleable mineral commodity is to be deemed to have left the production unit at the time that treatment and sorting at the treatment and sorting facility or facilities at Perth are complete.

The Company shall, within twenty-eight (28) days of commencement of this Agreement, and within twenty-eight (28) days of any change, notify the Territory in writing of the address of the facility or facilities used by the Company for the purposes of the Merlin Project in Perth, Western Australia.

- (4) The Company shall effect and keep in force a policy of insurance in respect of any theft, destruction or any other losses of mineral commodity for the period from the date that the mineral commodity leaves the mineral lease until the saleable mineral commodity is sold, or valued for the purposes of subclause 5(i).

The Company shall:

- (i) when reasonably required by the Territory to do so, provide evidence of the currency of the insurance required under this sub-clause;
  - (ii) not do or omit to do or permit to be done or omitted any act whereby any insurance required under this sub-clause may be rendered void or voidable;
  - (iii) indemnify the Territory against all losses and damages suffered by the Territory as a result of a breach by the Company of this sub-clause.
- (5) Where there has been a removal without sale of a saleable mineral commodity from the production unit for the Merlin Project, then the value of that saleable mineral commodity for the purposes of section 4A(3) of the *Mineral Royalty Act* shall be as follows:
    - (i) where the Company has nominated in writing to the Territory that saleable mineral commodity is to be withheld from sale by the Company, the value shall be the value attributed to such saleable mineral commodity by an independent Valuer appointed by the Territory. The Territory shall appoint a Valuer for the purposes of conducting a valuation in accordance with this subclause within 30 days of receipt of notification by the Company that saleable mineral commodity is to be withheld from sale. In the event that the Territory fails to appoint a Valuer within 30 days, the Company may appoint the Valuer. For the purpose of allowing the valuation to be conducted, the Company shall ensure that no cutting or polishing or further treatment of the saleable mineral

commodity is undertaken until such time as the Territory has notified the Company in writing that the valuation has been completed. The costs of any valuations conducted under this sub-clause shall be shared equally by the Territory and the Company ;

- (ii) in every other case, the value of the saleable mineral commodity shall be calculated in accordance with the following formula:

$$GR = SP + EV - EV(\text{previous year}) + AOP$$

where:

GR is the value of the saleable mineral commodity for royalty purposes;

SP is the sum of:

- (A) the sales proceeds, received or receivable by the Company for all arms length sales of saleable mineral commodity made during the royalty year, calculated in Australian Dollars, and, where any sales take place in another currency, calculated by reference to the Reserve Bank of Australia representative rate for the date of the sale; and
- (B) the value (calculated in the same manner as a valuation for the purpose of sub-clause (5)(i)) of the saleable mineral commodity sold during the royalty year in any non arms-length transactions;

EV is the value, in Australian Dollars, attributed by the Company to the saleable mineral commodity removed from the production unit without sale and on hand at the end of the royalty year, being the value which the Company estimates is equal to the amount for which the Company could sell the saleable mineral commodity on the open market on the last day of the royalty year;

EV (previous year) is the EV amount used in the GR calculation for the previous year; and

AOP is:

- (A) the value of any saleable mineral commodity removed from the production unit without sale and not sold during the royalty year, nor on hand at the end of the royalty year, which value shall be the amount equivalent to the price which would have

been received for the saleable mineral commodity on the open market; less

- (B) the amount included in AOP in any previous royalty year in respect of any saleable mineral commodity where the sales proceeds for that saleable mineral commodity are included in the SP calculation in the current royalty year

and the result may be a negative amount.

For the purpose of this subclause, ***on hand*** includes in the possession of a sales agent and a transport carrier.

- (6) Words used in this clause and defined in the *Mineral Royalty Act* have the same meaning as in that Act for the purposes of this clause, and this clause is to be interpreted as though it were part of that Act.
- (7) The *Mineral Royalty Act* shall apply to this clause as though this clause were part of that Act.

6. Infrastructure

- (1) The Territory shall use its best endeavours to comply with any request by the Company for the issue of any necessary consents, permits, licences, easements, rights of way, approvals or mining tenements to allow construction, maintenance and operation of all infrastructure and facilities which the Company determines are required for the Merlin Project.
- (2) Nothing in this clause shall require the Territory to take any action which might be required as a pre-requisite to the issue of such consent, permits, licences, easements, rights of way, approvals or mining tenements pursuant to the *Native Title Act* 1993 of the Commonwealth or any Territory legislation relating to native title.
- (3) Nothing in this Agreement shall require the Territory to provide any infrastructure or facilities for the Merlin Project including construction and maintenance of roads, tracks and highways, provision of electricity, water or gas supply and electronic communication facilities.
- (4) Nothing in this Agreement shall entitle the Territory to require the provision by the Company of any infrastructure or facilities including construction and maintenance of roads, tracks and highways, provision of electricity, water or gas supply and electronic communication facilities.

7. Use of Professional Services, Labour and Materials

- (1) The Company shall, for the purposes of the Merlin Project, use its best endeavours to:
  - (a) use for labour those persons available within the Northern Territory with suitable qualifications, skills and experience;
  - (b) use Services providers located and available within the Northern Territory who are competent and capable to provide those Services, or if such Services are not available within the Northern Territory then as far as practical use Services otherwise available within Australia;
  - (c) when preparing specifications, calling for tenders and letting contracts for works, materials, plant, equipment and supplies, ensure that the Services providers within the Northern Territory are given a reasonable opportunity to tender or quote;
  - (d) give, and require the Contractors of the Company to give, preference to workers and Services providers within the Northern Territory when letting contracts or placing orders for works, materials, plant, equipment and supplies where price, quality, delivery, service and compliance with safety and environmental requirements are equal to or better than that obtainable elsewhere and where the workers have suitable qualifications, skills and experience; and
  - (e) consult with, and have regard to any advice provided by, the Northern Territory Industry Search and Opportunities Office on the manner in which local participation in the Merlin Project can be maximised.
- (2) The Company shall, when requested in writing by the Territory Minister with responsibility for the *Mining Act* to do so (such request not to be made more frequently than annually) submit a written report detailing:
  - (a) the Company's actual expenditure on Services providers and labour in the Northern Territory compared with the Company's Australian and overseas expenditure on Services providers for the purpose of the Merlin Project;
  - (b) the Services providers who are located in the Northern Territory and who have supplied goods and Services for the purposes of the Merlin Project;

- (c) the consultations with, and advice provided by, the Northern Territory Industry Search and Opportunities Office, and the extent to which such advice has been followed by the Company; and
- (d) an explanation of why labour and Services have been sourced from outside the Northern Territory, and details of the opportunities that have been provided to Services providers within the Northern Territory to bid for such Services,

and shall use its best endeavours to provide similar information concerning the compliance of any Contractors with paragraph (1)(d) of this clause.

8. Non-Discrimination

- (1) Except as provided by this Agreement and section 64 of the *Mining Act*, the Territory must not impose or allow its instrumentalities or authorities, or any local government authority to impose discriminatory taxes, rates or charges on or in respect of the activities of the Company, its agents or Contractors in respect of the Merlin Project, including but without limitation charges or levies related to the maintenance of the Carpentaria Highway and provisions of signs thereon in the vicinity of the Merlin Project.
- (2) The Territory must not take, or permit to be taken, any other discriminatory action which would deprive the Company of full enjoyment of the rights granted or to be granted under this Agreement, provided that nothing in this subclause shall prevent the Territory, its servants and agents, from taking any lawful action under a law in force in the Territory relating to the protection, conservation or rehabilitation of the environment as provided for by the *Mining Act* and the mineral lease.

9. Finance

- (1) The Company shall notify the Territory of the name, address, telephone and facsimile numbers of any party which has the benefit of a Mortgage:
  - (a) upon execution of this Agreement;
  - (b) within fourteen (14) days of the date of any additional Mortgage: and
  - (c) within fourteen (14) days of any change in such details.

- (2) The Territory shall, if it gives a notice, request or demand to the Company under this Agreement, concerning other than routine matters, provide to a party which has the benefit of a Mortgage a copy of that notice, request or demand.
  - (3) It is agreed between the parties that such notice or written statement provided by the Territory to the Company shall in no way affect the Territory's remedies at law against the Company.
  - (4) A party which has the benefit of a Mortgage shall not be liable for the Company's operation of the Merlin Project or for the performance of any of the Company's obligations under this Agreement provided that where pursuant to any Mortgage such a party conveys to itself an interest in a mineral lease and the Merlin Project or otherwise assumes liabilities of the Company in respect of the Merlin Project, such party may then become so liable to the extent of the interest so conveyed or the liability so assumed.
10. Application of Agreement to further Mineral Leases
  - (1) The terms of this Agreement shall apply, to the extent that it is possible, to any further mineral lease granted to the Company for the mining of diamond bearing ore where the whole or part of the processing of that ore takes place at the mill established or to be established within Mineral Lease N1154, provided that at least part of each such mineral lease is not further than 100 kilometres from a point on the boundary of Mineral Lease N1154.
  - (2) In the event that this Agreement has application to another mineral lease or mineral leases by operation of subclause (1), the definition of "mineral lease" in clause 1 of this Agreement shall be read so as to include the further mineral lease or further mineral leases.
  - (3) In the event that this Agreement has application to another mineral lease or mineral leases by operation of subclause (1), the Territory shall amend the legislation enacted in accordance with clause 4 hereof so that it has application to the further mineral lease or further mineral leases.
11. Variation
  - (1) The parties may vary this Agreement by further agreement in writing signed by the Territory and the Company.
  - (2) The Territory must cause any further agreement made pursuant to this clause to be laid before the Legislative Assembly at the next sitting of the Legislative Assembly.

- (3) The Legislative Assembly may, within ten (10) full sitting days including the day upon which the further agreement was laid before it, pass a resolution disallowing the further agreement, but if after the last day in which the further agreement might have been disallowed, the Legislative Assembly has not passed such a resolution, the further agreement shall have effect from and after that last day.

12. No Assignment

- (1) The Company must not assign its rights or obligations under this Agreement or any of them without the prior written consent of the Territory, which consent shall not be unreasonably withheld.
- (2) The Company may mortgage, charge or encumber the mineral lease and the Minister must consent to that mortgage, charge or encumbrance for the purposes of the *Mining Act*, provided that the consent of the Territory shall be required under subclause (1) for any subsequent sale or transfer by the mortgagee, charge, or encumbrancee exercising its power under the mortgage, charge or encumbrance.
- (3) Nothing in this Agreement shall operate to restrict the ability of the Company to mortgage, charge, encumber or sell or assign the mineral lease.

13. Power to Vary Periods

Notwithstanding any provision in this Agreement, the Territory may in writing at the request of the Company vary any period in this Agreement whether or not the period to be varied has expired.

14. Force Majeure

- (1) Subject to this clause, the time for the performance of any obligation of this Agreement or the mineral lease, except an obligation to pay money, which performance is delayed by circumstances beyond the reasonable control of the party responsible for the performance of such obligation, shall be extended by the period of the delay but no longer and, subject to subclauses (2) and (3), the party shall not be liable in damages to the other nor shall any action, claim or demand be taken or made against a party by reason solely of such delay in the performance of such obligation in circumstances beyond the reasonable control of that party.
- (2) The party responsible for the performance of any such obligation shall use all reasonable diligence to remove the said circumstances and minimise the effects of the said circumstances as soon as is reasonably practicable after notice of the same shall have come to

its attention save and except that the settlement of any strike, lock out or any other industrial dispute shall be entirely in the discretion of any party directly concerned therewith and nothing herein shall require the settlement thereof by acceding to the demands of the opposing party or parties where such settlement is considered inadvisable in the absolute discretion of the party so concerned.

- (3) A party shall as soon as reasonably practicable give notice to the other party of:
- (i) each event alleged to constitute circumstances beyond its reasonable control;
  - (ii) any delay in the performance of any obligation of this Agreement and the mineral lease;
  - (iii) the likely duration of the delay; and
  - (iv) the cessation of the circumstances.
- (4) In this clause, the expression ***circumstances beyond the reasonable control*** shall include, without limitation, earthquakes, floods, storms, tempests, cyclones, wash-aways, fires not caused by the wilful default or gross negligence of the party responsible for such performance, acts of God, acts of war, acts of public enemies, riots and civil commotions, strikes, lock-outs, bans, ***go slow*** activity, stoppages, restraints of labour or other similar acts (whether partial or entire), acts or omissions of the Commonwealth or any instrumentality of the Commonwealth (whether legislative, executive, or administrative) or any other government or governmental authority or instrumentality or any local government authority (whether legislative, executive or administrative) shortages of labour or of essential materials, reasonable inability to obtain contractors or retain contractors, delays of contractors, actual or reasonably forecast inability to profitably sell the diamonds, delays or restrictions on the remittance or provision of funds to a party, inability or delay in obtaining any government or local government authority approval, permit or licence or any other cause whether of a kind specifically enumerated above or otherwise which is not reasonably within the control of the party delayed.

15. Termination

- (1) In the event that the Company:
- (a) is in default in the due and punctual performance or observance of any of the provisions in this Agreement, which default the Territory reasonably considers material;

- (b) subject to clause 14 abandons the Merlin Project and does not resume operations on the Merlin Project and for the purposes of this provision, **abandons** shall include placing the Merlin Project on a care and maintenance basis for a period of more than three (3) years or a number of periods which total more than three (3) years, provided that the Territory may in writing at its discretion extend that period of three (3) years; or
- (c) repudiates any obligation the Territory reasonably considers material under this Agreement,

the Territory may give notice in writing to the Company requiring the Company to remedy that default or to pay to the Territory such sum as is specified in the notice, being a sum which, in the opinion of the Territory, is adequate to compensate the Territory, its servants, agents, contractors, instrumentalities, authorities and any relevant local government authorities for that default.

- (2) If within 150 days of the said notice the Company has neither rectified the default nor paid compensation in accordance with the notice, the Territory may terminate this Agreement by giving not less than 30 days written notice to the Company.

Provided that if the Company, upon receipt of the notice referred to in subclause (1) promptly commences to use and continues to use its best endeavours to remedy the default, the Minister shall extend the notice period for such further period as is reasonably necessary to remedy the default.

Provided further that if the Company has given the Territory a notice in accordance with clause 17 of this Agreement, and such notice has been given not less than 90 days after the notice referred to in subclause (1), the Territory shall not give the Company a notice of termination under sub-clause (2) until the dispute resolution process in clause 17 has terminated.

- (3) The Territory may terminate this Agreement by giving not less than ninety (90) days notice in writing to the Company if the Company goes into liquidation (other than voluntary liquidation for the purposes of reconstruction) and the Agreement shall terminate at the expiration of that ninety (90) day period unless within that period the interest of the Company in this Agreement is assigned to an assignee approved in writing by the Territory.

(4) The Company may terminate this Agreement by giving not less than one hundred and eighty (180) days notice in writing to the Territory in the event that the Territory:–

(a) is in default in the due and punctual performance or observance of the provisions in this Agreement, which default the Company reasonably considers material and which has not been remedied within that notice period;

(b) enacts legislation which significantly increases the obligations of the Company in relation to the Merlin Project; or

(c) enacts legislation which significantly diminishes:–

(i) the rights of the Company; or

(ii) the profitability of the Merlin Project;

and this Agreement shall terminate upon the expiration of that notice period unless such default has been sooner remedied, or unless such legislation has been sooner repealed.

(5) Notice given pursuant to this clause shall specify the nature of the default or the ground entitling the party to exercise such right of termination.

(6) A party who has the benefit of a Mortgage shall be entitled but not obliged to rectify the default within the relevant notice period.

(7) This Agreement may be terminated at any time by agreement in writing signed by the Territory and the Company.

#### 16. Effects of Termination

(1) On termination of this Agreement, the Company shall immediately pay all amounts due under this Agreement but unpaid to the Territory.

(2) Termination of this Agreement shall not terminate the mineral lease or any lease, licence, easement or right of way.

(3) Notwithstanding any notice of termination by the Territory, nothing in this Agreement shall prevent the Territory from administering and enforcing any law in force in the Territory in its application to the Company, the Merlin Project and the mineral lease.

(4) Any obligations of confidentiality between the parties shall continue after termination of this Agreement unless otherwise agreed.

- (5) Termination of this Agreement shall not otherwise affect any accrued rights or remedies a party may have against the other party.

17. Resolution of Disputes

- (1) A party shall not commence court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute concerning any clause of this Agreement (a **Dispute**) unless it has complied with this clause.

- (2) A party claiming that a Dispute has arisen shall notify the other party to the Dispute by notice in writing.

- (3) Within ten (10) days after a notice is given under subclause (2) each party to the Dispute shall nominate in writing a representative authorised to settle the Dispute on its behalf.

- (4) The parties shall ensure that during the 45 day period after a notice is given under subclause (2) (or such longer period as is agreed between the parties), their representatives shall use their best endeavours:

- (a) to resolve the Dispute; or

- (b) to agree on:

- (i) a process to resolve all or any part of the Dispute without court proceedings (for example, arbitration, mediation, conciliation, executive appraisal or independent expert determination); and

- (ii) the selection and payment of any third party to be engaged by the parties and the involvement of any dispute resolution organisation.

- (5) The role of any third party will be to assist in negotiating a resolution of the Dispute. A third party may not make a decision that is binding on a party unless that party's representative has so agreed in writing.

- (6) Any information or documents disclosed by a representative under this clause:

- (a) must be kept confidential; and

- (b) may not be used except to attempt to settle the Dispute.

- (7) Each party must bear its own costs of resolving a Dispute under this clause and the parties must bear equally the costs of any third party engaged.
- (8) After the forty-five (45) day period referred to in subclause (4) (or longer period agreed between the representatives), a party that has complied with subclauses (2) to (4) may terminate the dispute resolution process by giving notice to the other parties to the Dispute.
- (9) If a party to a Dispute does not comply with any provision of subclauses (1) to (4) the other party to the Dispute will not be bound by subclause (1) to (4).
- (10) In the event that a Dispute arises in relation to termination the dispute resolution process shall be commenced within the notice period referred to in clause 15.

18. Territory Assistance

- (1) The Company may from time to time make such application to the Commonwealth or to a Commonwealth agency, authority or instrumentality for the grant to it of any permit, consent, approval, authorisation, licence under the laws of the Commonwealth required for the purposes of the Merlin Project.
- (2) On the request by the Company and where the Territory considers it appropriate, the Territory shall make representations to the Commonwealth or to the Commonwealth agency, authority or instrumentality concerned in support of the grant to the Company of any permit, consent, approval, authorisation, licence or permission referred to in subclause (1).

19. No Requirement to Register this Agreement

For the avoidance of doubt, it is hereby agreed that this Agreement does not require approval and registration in accordance with the provisions of Section 173 of the *Mining Act*.

20. Notices

- (1) A notice given under this Agreement shall be:–
  - (a) in writing; and
  - (b) addressed to the address of the recipient specified in accordance with this Agreement or as altered by notice given in accordance with this clause; or

- (c) hand delivered or sent by pre-paid post to that address or sent by telex or facsimile transmission and immediately confirmed by hand delivery or pre-paid post.
- (2) A notice given in accordance with subclause (1) shall be deemed received:–
- (a) if hand delivered, on the date of delivery;
  - (b) if sent by pre-paid post three (3) days after the date of posting;  
or
  - (c) if sent by facsimile, on receipt by the sender of a transmission report confirming transmission of the facsimile.

Provided that any notice hand delivered or sent by facsimile and received after 5.00 pm on a day shall be deemed to have been delivered at 9.00 am on the next business day.

- (3) Notice shall be sent to the parties at the following addresses:–

The Territory  
The Secretary  
Department of Mines and Energy  
Paspalis Centrepoint Towers Building  
Smith Street  
DARWIN NT 0800  
Telephone: (08) 8999 5461  
Facsimile: (08) 8941 4284

The Company

The Company Secretary  
Ashton Mining Limited  
Level 4  
441 St Kilda Road  
MELBOURNE VIC 3001  
Telephone: (03) 9828 4200  
Facsimile (03) 9828 4211

or such other address which is advised in writing by one party to the other parties from time to time.

21 Applicable Law

This Agreement is governed by the laws in force in the Northern Territory of Australia and, the Company shall comply with all applicable laws of the Commonwealth and, subject to this Agreement, all laws of the Territory applicable to the Merlin Project.

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IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year herein before written.

SIGNED by Eric Houguet Poole, )  
Minister for Resource Development )  
for and on behalf of the NORTHERN )  
TERRITORY OF AUSTRALIA ) (Sgd.) Eric Poole

(Sgd.) R L Adams

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Witness  
ASHTON MINING LIMITED )  
(A.C.N. 005 466 964) by its )  
Attorney MICHAEL BOHM )  
under Power of Attorney )  
dated 5 October 1998 )  
in the presence of: ) (Sgd.) Michael Bohm

(Sgd.) Markus Ziemer

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Witness

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**ENDNOTES**
**1 KEY**

Key to abbreviations

<b>amd = amended</b>	<b>od = order</b>
<b>app = appendix</b>	<b>om = omitted</b>
<b>bl = by-law</b>	<b>pt = Part</b>
<b>ch = Chapter</b>	<b>r = regulation/rule</b>
<b>cl = clause</b>	<b>rem = remainder</b>
<b>div = Division</b>	<b>renum = renumbered</b>
<b>exp = expires/expired</b>	<b>rep = repealed</b>
<b>f = forms</b>	<b>s = section</b>
<b>Gaz = Gazette</b>	<b>sch = Schedule</b>
<b>hdg = heading</b>	<b>sdiv = Subdivision</b>
<b>ins = inserted</b>	<b>SL = Subordinate Legislation</b>
<b>lt = long title</b>	<b>sub = substituted</b>
<b>nc = not commenced</b>	

**2 LIST OF LEGISLATION*****Merlin Project Agreement Ratification Act 1998 (Act No. 84, 1998)***

Assent date	7 December 1998
Commenced	22 December 1998 ( <i>Gaz S47</i> , 22 December 1998)

***Financial Relations Agreement (Consequential Provisions) Act 2000 (Act No. 32, 2000)***

Assent date	27 June 2000
Commenced	1 July 2000 (s 2)

***Penalties Amendment (Children and Families, Health and Primary Industry, Fisheries and Resources) Act 2011 (Act No. 28, 2011)***

Assent date	31 August 2011
Commenced	21 September 2011 ( <i>Gaz G38</i> , 21 September 2011, p 4)

**3 LIST OF AMENDMENTS**

s 5A	ins No. 32, 2000, s 46
ss 7 – 9	amd No. 28, 2011, s 5
s 11	amd No. 28, 2011, s 5
s 15	amd No. 28, 2011, s 5