

Deed of Gift
The Julie Burgess

Between
Devonport City Council

And
Julie Burgess Inc.

rae&partners
LAWYERS

Devonport

13 Fenton Street
DEVONPORT, TAS 7310
P: 03 6424 0333 F: 03 6424 8833
File Ref: MJP:203548

www.raepartners.com.au

Schedule

1. **Date of Deed** The ____ day of _____
20____
2. **Council** Devonport City Council
of Council Chambers
137 Rooke Street
Devonport in Tasmania ("the Council")
3. **The Association** Julie Burgess Inc. (ABN 84 309 369 064)
of ***
*** in Tasmania ("the Association")
4. **The Vessel** The Julie Burgess
UVI: 453132
AMSA Current 1E & 2D Survey Certificate No:
COS-39385-002 ("the Vessel")
5. **Consideration** Nil
6. **Completion Date** 30 days from the date of this Deed

End of Schedule

This Deed of Gift is made on the date set out at **Item 1** of the Schedule

Between Council as set out at **Item 2** of the Schedule

And The Association set out at **Item 3** of the Schedule

Background

- A.** Prior to the date of this Deed, Council has owned and operated the Vessel.
- B.** For a range of commercial and practical reasons, Council wishes to divest itself of ownership of the Vessel, but wishes to ensure its on-going use and benefit by and for the community.
- C.** The Association is a body corporate formed specifically for the purpose of taking ownership and continuing the operation of the Vessel.
- D.** Having completed a proper expression of interest process, Council has resolved to gift the Vessel to the Association.
- E.** The parties wish to record the arrangements between them on the terms and conditions of this Deed of Gift ("the Deed").

Operative Part

1. Acknowledgements

1.1 Accuracy of Background

The parties acknowledge that the Background of this Deed sets out a true, accurate and complete representation of the commercial relationship between the parties and the circumstances surrounding the parties entering into this Deed.

1.2 General Acknowledgments

Each party separately acknowledges for the benefit of each other party that the acknowledging party has:

- (a)** had a fair and reasonable time and opportunity to read and consider the provisions of this Deed;
- (b)** fully and properly understood the provisions of this Deed and consider that those provisions are just, equitable and satisfactory to the party, having regard to the nature and purpose of the transactions contemplated by this Deed;
- (c)** obtained independent legal advice about the rights and obligations of the party under this Deed or has been made aware of the right to do so and has:
 - (i)** done so to that party's satisfaction; or
 - (ii)** has elected not to do so;

- (d) not relied upon any representation, promise or warranty made by any other party to the Deed, or any other third party, in entering into this Deed, except for those that are expressly stated in this Deed; and
- (e) entered into this Deed entirely of their own volition:
 - (i) after appropriate consideration, reflection, and exercise of independent judgment; and
 - (ii) without any coercion, force, or undue influence having been exercised upon them in the execution of this Deed, either by another party or by any other person or persons.

2. Interpretation Provisions

2.1 Definitions

Unless there is something in the subject or context to the contrary, the following meanings apply in this Deed:

- (a) "Association" means the party set out at **Item 3** of the Schedule and, in the case of a body corporate, the officers, employees, servants, agents and permitted assigns of that company;
- (b) "Background" means the part of this Deed that follows the heading of that name, and enumerated by letters rather than numbers;
- (c) "Completion Date" means the date set out at Item 6 of the Schedule;
- (d) "Council" means the party set out at **Item 2** of the Schedule and, in the case of a body corporate, the mayor, councillors, officers, employees, servants, agents and permitted assigns of that company;
- (e) "Deed" means this Deed of Gift and all of the Background, Items, terms, clauses, schedules, annexures, tables or exhibits to it, as amended by the parties from time to time;
- (f) "Item" means a reference to an item in the Schedule;
- (g) "Partnership Agreement" means the draft partnership agreement instrument currently in negotiation between the parties, a copy of which is annexed and marked "**B**";
- (h) "Reserved Conditions" means the terms and conditions specifically set out at **clause 8** of this Deed; and
- (i) "Vessel" means the PT-Tall Ship/Trainer ship as described in the Valuation Report by D Watson Shipwright Services Pty Ltd, dated 19 June 2020, a copy of which is annexed and marked "**A**".

2.2 Interpretation

Unless there is something in the subject or context to the contrary, the following provisions apply in this Deed:

- (a) any covenants implied by law, whether statutory or otherwise, are not negated but are, where modification is permitted, deemed to be modified to the extent of any inconsistency with the provisions of this Deed;
- (b) where two (2) or more persons are named as a party to this Deed the terms, covenants, conditions, obligations, provisions, stipulations and restrictions contained in this Deed bind and benefit each of them jointly and severally;
- (c) if any term, covenant, condition, obligation, provision, stipulation or restriction contained in this Deed is or becomes illegal or unenforceable, then this Deed must be read and construed as if that term, covenant, condition, obligation, provision, stipulation or restriction, as the case may be, has been severed and the balance of this Deed remains in full force and effect;
- (d) a provision of this Deed must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Deed or the inclusion of the provision in this Deed.
- (e) a reference to:
 - (i) a right includes a benefit, remedy, discretion, authority, entitlement or power;
 - (ii) the whole of property or a thing includes part of that property or thing unless stated otherwise;
 - (iii) a statute, code or other law includes regulations and other instruments under it, and consolidations, amendments, re-enactments or replacements of any of them occurring at any time before or after the date of the Deed;
 - (iv) any document or instrument (and, where applicable, to any of its provisions) is a reference to that document or instrument as amended, novated, supplemented or replaced from time to time; and
 - (v) "dollar" or "\$" is a reference to the lawful currency of Australia;
- (f) where:
 - (i) any expression is defined, any other part of speech or grammatical form of that expression has a corresponding meaning;
 - (ii) the word "including" is used, that use does not limit or exclude in any way unless the context requires otherwise;

- (g)** words importing:

 - (i)** the singular include the plural and vice versa;
 - (ii)** the masculine gender include the feminine and/or a corporation and vice versa; and
 - (iii)** persons include a firm, a body corporate, an unincorporated association or an authority and vice versa;
- (h)** headings are inserted for guidance only and are not deemed to form part of the operative provisions of this Deed and must not be used for the purpose of construction or interpretation of this Deed;
- (i)** the first letters of words and expressions defined in this document are indicated by capital letters for convenience and the absence of a capital letter alone does not imply that the word or phrase is used with a meaning different from that given by its definition;
- (j)** in relation to any reference made to a time or date affecting the performance of an obligation by a party:

 - (i)** that reference is to the time and date in Tasmania, even though the obligation is to be or may be performed elsewhere;
 - (ii)** if any period of time is expressed to be calculated from or after a specified day, that day is not included in the period; and
 - (iii)** if the day on or by which anything is to be done is a Saturday, a Sunday or a public holiday in the place in which that thing is to be done then that thing must be done on or by the next succeeding business day.

2.3 Releases and Indemnities

Where any party to this Deed gives a release or indemnity of any description to any other party to this Deed, that release or indemnity is intended to survive, and does not merge on, the completion, determination or other successful resolution of this Deed.

3. Gift of Vessel

3.1 By this Deed, Council gifts to the Association, free from all encumbrances, but subject to the terms and conditions of this Deed, the Vessel, with all fixtures, fittings and equipment presently located on and affixed to the Vessel as set out in the Schedule of Equipment ("the Equipment").

3.2 In addition to, and in connection with, the Vessel, Council also gifts to the Association all of the following goods and chattels:

- (a)** all plant and equipment located in the garden shed but expressly excluding the shed

itself and the spills cupboard, on the adjoining pontoon at Reg Hope Park, East Devonport in Tasmania;

- (b) all the documentation held by Council (some of historical interest and value) of and in connection with the Vessel as expressly set out in the Schedule of Council Documents; and
- (c) all intellectual property of and incidental to the Vessel, as expressly set out in the Schedule of Intellectual Property

(collectively called the "Ancillary Material").

3.3 The Association accepts the gift of the Vessel, the Equipment and the Ancillary Material from Council, free from all encumbrances, but subject to the terms and conditions of this Deed.

3.3 The gift of the Vessel, the Equipment and the Ancillary Material is subject, at all times, to the Reserved Conditions.

3.4 Risk and ownership of the Vessel, the Equipment and the Ancillary Material and the passes to the Association on the Completion Date set out at **Item 6** of the Schedule.

4. No Consideration

4.1 The parties expressly record that the transfer of the Vessel, the Equipment and the Ancillary Material from Council to the Association is a gift and that no consideration is transferred from the Association to Council for the Vessel, the Equipment or the Ancillary Material.

4.2 For the avoidance of doubt, the creation of rights and obligations between the parties under this Deed do not amount to non-monetary consideration and are the ordinary rights and obligations of ownership imposed upon parties to a transaction where tangible goods are transferred.

5. Completion

5.1 Subject to any conditions precedent set out in this Deed, the transfer of the Vessel, the Equipment and the Ancillary Material will be completed on the Completion Date.

5.2 At completion Council will tender and provide to the Association:

- (a) constructive, if not actual, possession of the Vessel and the Equipment;
- (b) evidence of completion of the AMSA Form 1780 (Transfer of Domestic Commercial Vessel);
- (c) duly signed MAST Notice of Disposal of Vessel form;
- (d) constructive, if not actual, possession of the Ancillary Material;

- (e) duly executed counterpart copy of the Partnership Agreement (if not already exchanged) evidencing the licence to access the pontoon at Reg Hope Park as the means of access and egress to and from the Vessel; and
- (f) any other item or thing that Council has agreed to provide to the Association pursuant to this Deed.

6. Conditions Precedent

6.1 It is a condition precedent of Council's obligation to effect the gift contemplated by this Deed, that the Association:

- (a) enters into a Partnership Agreement with Council to manage the on-going relationship between Council and the Association generally on the terms of the instrument annexed and marked "**B**" but otherwise on terms wholly satisfactory to Council, on or before the Completion Date, with each party responsible for its own costs of negotiating, drafting and executing that agreement;
- (b) provides to Council on or before the Completion Date satisfactory evidence that the Vessel is adequately insured for an amount not less than the value disclosed in the Valuation Report annexed and marked "**A**"; and
- (c) provides to Council on or before the Completion Date satisfactory evidence that the Association has obtained a Certificate of Operation from AMSA.

6.2 The benefit of the conditions precedent in **clause 6.1(a)** is solely for Council.

6.3 Council may waive the benefit of any condition precedent set out in **clause 6.1(a)**.

6.4 If the Association does not give unconditional notice of satisfaction of each condition precedent set out in **clause 6.1(a)**, Council may, if Council elects to do so, terminate this Deed without further reference to the Association and if so terminated, no claim in damages lies against either party.

7. State & Condition

7.1 The Association unconditionally accepts the gift of the Vessel, the Equipment and the Ancillary Material in the state and condition in which all of that property is found as at the date of this Deed and, in respect of the Vessel, in current survey, and no claim for compensation may be made by the Association against Council in this regard.

7.2 Notwithstanding the covenants made in the preceding clause, Council agrees to use Council's reasonable endeavours to maintain the Vessel, the Equipment and the Ancillary Material in its state and condition as at the date of this Deed until Completion.

8. Reserved Conditions

8.1 Notwithstanding the purpose and intent of this Deed, Council reserves to itself the rights contained in this clause, which rights do not merge on the completion of the gift contemplated by this Deed.

8.2 It is a condition subsequent to this Deed that:

(a) if the Association is wound up (whether voluntarily or otherwise) within 5 years of the Completion Date that the Vessel, the Equipment and the Ancillary Material (as it then exists) automatically reverts to the ownership of Council absolutely and this Deed and the Partnership Agreement are effectively null and void; and

(b) if the Association is wound up (whether voluntarily or otherwise) more than 5 years from the Completion Date that Council has the first right of refusal to re-acquire, by way of gift, the Vessel, the Equipment and the Ancillary Material (as it then exists).

8.3 It is a condition subsequent to this Deed that if, at any time, the Vessel falls into disrepair, which status is to be determined by:

(a) an objective matter of fact; or

(b) the unilateral action of Council, acting reasonably, including the obtaining of an independent inspection of the state of repair of the Vessel,

Council, may, by notice to the Association, repossess the Vessel, the Equipment and the Ancillary Material (as it then exists) and this Deed and the Partnership Agreement are effectively null and void.

8.4 For the purposes of **clause 8.3**, "disrepair" means any of the following:

(a) the failure, at any time, of the Association to maintain the certificate of survey for the Vessel;

(b) the Vessel is rendered inoperable because of damage, wear and tear or dilapidation caused by, or allowed by, the Association without the required remedial works being performed; or

(c) the Vessel otherwise becomes unseaworthy, unsound or unsafe in any way; or

(d) the Vessel, for any other reason, is not able to provide sea-faring sailings to members of the public for any consecutive period exceeding 12 months.

9. No Warranties

9.1 Council makes no warranty or representation to the Association that the Vessel, the Equipment or the Ancillary Material will be delivered in the same condition on the Completion Date as it is on the date of this Deed, nor about any other deed, matter or fact of or in connection with the Vessel, the Equipment or the Ancillary Material.

10. Indemnity

10.1 Council unconditionally and irrevocably indemnifies the Association from all liability and claims for injury, loss or damage arising to the Association from any act or omission of Council or any other party, whether negligent, reckless or wilful, in respect of the Vessel, the Equipment or the Ancillary Material occurring prior to the Completion Date.

10.2 On and from the Completion Date the Association unconditionally and irrevocably indemnifies Council from all liability and claims for injury, loss or damage arising to Council from any act or omission of the Association or any other party, whether negligent, reckless or wilful, in respect of the Vessel, the Equipment or the Ancillary Material up to the Completion Date.

11. Assignment of Interests

11.1 Council acknowledges that this may be commercially advantageous for the Association to:

- (a) change its entity structure; or
- (b) partner with another organisation; or
- (c) make some other material change that may affect this Agreement

in the future to continue the work of the Association with respect to the Vessel.

11.2 The Association must not:

- (a) assign, transfer or otherwise dispose of its interest under this Agreement; or,
- (b) take any other course of action contemplated in **clause 11.1**

without first obtaining the express written consent of Council, which consent must not, subject to **clause 11.3**, be unreasonably withheld.

11.3 In respect of any request to assign, transfer or otherwise deal with the Association's interest under this Agreement, Council may take any course of action, or impose any condition, to protect Council's interest under this Agreement, including but not limited to:

- (a) requiring any assignee, transferee or new business partner of the Association to execute a deed of accession in respect of this Deed in terms wholly satisfactory to Council; and
- (b) requiring the Association to remedy any breach of this Agreement, including to pay monies owing, which may exist and subsist at the time of the request.

12. Duty

12.1 The Association must pay any duty liability that arises from this Deed pursuant to the *Duties Act 2001* and the Association unconditionally indemnifies Council against any liability in this regard.

13. Dispute Resolution

13.1 If any dispute arises between the parties, over any right, obligation or other aspect of this Deed, prior to issuing any proceedings in any Court with appropriate jurisdiction, the parties must engage, acting reasonably, in the following course of action in order to resolve the dispute:

- (a)** firstly, commercial negotiation, undertaken in good faith, for a period of not less than thirty (30) days from the date of the first notice of the dispute by one party to the other;
- (b)** if no resolution is secured through commercial negotiation, then mediation, which process must be completed not more than thirty (30) days from the conclusion of the time allowed under **clause 13.1(a)**. For that purpose, if the parties cannot agree on an independent third party mediator within seven (7) days of the commencement of the mediation period, then either party may request the then President of the Law Society of Tasmania to appoint a mediator; and
- (c)** if no resolution is secured through mediation (but not otherwise if no mediation has occurred) then recourse to any other statutory or judicial remedy that is available to the aggrieved party.

13.2 In relation to the exercise of the dispute resolution process:

- (a)** each party must bear its own costs of the dispute resolution process; and
- (b)** the parties who are in dispute must share the costs of an independent third party mediator, equally.

13.3 For the avoidance of doubt, a dispute, to which the provisions of this **clause 5** apply, does not include a breach of this Deed, which amounts to a default, which exists as a matter of fact or law.

14. Notices

14.1 A notice or other communication in connection with this Deed must be given in writing and:

- (a)** must be given either:
 - (i)** by the notifying party directly to the other party or parties or to their lawyer(s) if the other party or parties have independent legal representation; or
 - (ii)** by the notifying party's lawyer to the other party or parties and to their lawyer(s) if the other party or parties have independent legal representation; and

- (b)** must be:
- (i)** delivered in person to the address of the other party or parties as set out in this Deed; or
 - (ii)** sent by prepaid post to the address of the other party or parties as set out in this Deed;
 - (iii)** sent by fax to the fax number of the other party or parties as set out in this Deed, or as otherwise notified by the parties from time to time;
 - (iv)** sent by email to the email address of the other party or parties as set out in this Deed, or as otherwise notified by the parties from time to time, including by replying to an email address from which another party to this Deed has communicated by to the notifying party;

14.2 Notwithstanding the provisions of **clause 14.1**, if the intended recipient of a notice has advised or informed the notifying party of a changed:

- (a)** street address;
- (b)** postal address;
- (c)** fax number; or
- (d)** email address

then the communication must be to that changed street address, postal address, fax number or email address.

14.3 If a notice is:

- (a)** delivered personally to a street address, then that notice is deemed to take effect from the time it is delivered, unless a later time is specified in the notice;
- (b)** delivered sent by prepaid post to a postal address, then that notice is deemed to take effect:
 - (i)** two (2) days after the date on which it is posted, if it is sent by registered or express post;
 - (ii)** four (4) days after the date on which it is posted, if it is sent by regular post; or
 - (iii)** seven (7) days after the date on which it is posted, if it is sent by registered or express post from outside Australia; or
 - (iv)** fourteen (14) days after the date on which it is posted, if it is sent by regular post from outside Australia;

unless a later time is specified in the notice;

- (c) sent by fax, it is taken to be received at the time shown in the transaction report as the time that the whole of the fax was sent; and
- (d) sent by email it is taken to be delivered:
 - (i) at the time it is sent, but only if the notifying party has obtained a delivery or read-receipt notification for that email;
 - (ii) on the next business day in all other casesunless the sender receives a delayed or failed delivery notification, in which case the notice is deemed not to be delivered at all.

14.4 Notwithstanding the provisions of **clause 14.3** the effective delivery date of a notice is deemed to be shortened, and the relevant notice is deemed to be given, received and effective, if the party or parties receiving the notice:

- (a) expressly acknowledge receipt of the notice;
- (b) respond to the notice; or
- (c) act in any manner that unequivocally evidences the receipt of the notice.

15. General Provisions

15.1 The Deed

This Deed:

- (a) constitutes the entire agreement between the parties about the subject matter of this Deed. It expressly supersedes and extinguishes all prior agreements, understandings, representations, warranties or covenants previously given or made between the parties about the subject matter;
- (b) may be executed by the parties in two or more counterparts, each of which is deemed to be an original, but all of which together constitute one and the same instrument. The parties must execute and exchange original signed counterparts of this Deed unless there is a specific provision in the Deed or subsequent written agreement between the parties that permits the exchange of counterparts by fax or scanned email copy;
- (c) must not be amended, varied, modified or supplemented except by a written instrument signed on behalf of the respective parties.

15.2 Further Actions by Parties

Each of the parties to this Deed agrees to sign and execute any further documents and do any deeds, acts and things as the other party reasonably requires for effecting the intention of the parties under this Deed. However, this obligation does not extend to incurring a liability:

- (a) to pay any money, or to provide any financial compensation, valuable consideration or any other incentive to or for the benefit of any person except for payment of any applicable fee for the lodgement or filing of any relevant application with any government agency, unless a provision of this Deed expressly requires otherwise; or
- (b) to commence any legal action against any person, to procure that the thing is done or happens.

15.3 Performance Obligations

- (a) The rights and obligations of the parties under this Deed are subject to the express condition that whenever a party is required to perform or do any act or thing, the performance of that obligation is not required if it is rendered reasonably or practically impossible on account of any riot, civil commotion, strike, lockout, act of God, act of the public enemy, health epidemic or pandemic, priority, allocation, rationing or the regulation or prohibition of the use of any material, heat, fuel, hours of work or award, of the party.
- (b) Any term, covenant, condition, obligation, provision, stipulation or restriction in this Deed that requires a party to do something after completion does not merge on completion and that party is obliged to perform the obligation within the time allowed for doing so. A failure to perform an obligation of this nature is a breach of the Deed retrospectively and gives rise to a claim for injury, loss and damage to the party with the benefit of the performance of the obligation.

15.4 Waiver

No term, covenant, condition, obligation, provision, stipulation or restriction created under this Deed may be waived except in writing, signed by the party with the benefit of that term, covenant, condition, obligation, provision, stipulation or restriction and in that respect, no waiver:

- (a) by any party of any default in the strict and literal performance or compliance with any other term, covenant, condition, obligation, provision, stipulation or restriction of this Deed is deemed to be a waiver of the strict and literal performance of or compliance with any other provision, condition or requirement in this Deed; or
- (b) of any term, covenant, condition, obligation, provision, stipulation or restriction in any manner releases any other party from strict compliance with any term, covenant, condition, obligation, provision, stipulation or restriction in the future;
- (c) will prejudice or is prejudiced by any delay or omission of any party to exercise any right under this Deed in any manner so as to impair the exercise of any right accruing to it after completion.

15.5 Warranties

Each party warrants and represents to the other parties that:

- (a) the signing or performance under this Deed does not conflict with or result in a breach of its constituent documents (howsoever described) or any writ, order, judgment, law, rule or regulation which is binding upon the party; and
- (b) they have not relied on any material, representation, promise or inducement in entering into this Deed except as otherwise expressly set out in this Deed.

15.6 Costs

In relation to costs:

- (a) where a provision of this Deed expressly provides for the payment of some or all of the costs of one party by the other, those costs must be paid by the party with the burden of that obligation;
- (b) in all other respects, each party must bear that party's own costs of and incidental to the negotiation, execution and performance of this Deed, including the costs of its legal, accounting and other professional advisers and consultants; and
- (c) where a party to this Deed is entitled to take enforcement or recovery action against another other party to this Deed, that party is entitled to recover that party's fees, costs and expenses of and incidental to that enforcement or recovery action from the other party or parties on a full indemnity basis.

15.7 Jurisdiction

This Deed is governed by and construed in accordance with the law of Tasmania and the Commonwealth of Australia and each of the parties to this Deed submit to the jurisdiction of the Courts of the State of Tasmania and the Courts of the Commonwealth of Australia.

End of Deed

Schedule of Equipment

1. Engine (Gardner 6LXB)
2. Gearbox (Dong DMTP5100)
3. Generator/Invertor
4. 18hp Tohatsu Outboard Motor
5. Heat exchanger
6. VHF Radio
7. Navigation System/Automatic Pilot
8. Satellite Navigation System (Nimbrad NX40/45 radar/GPS/plotter/sounder)
9. 4 burner LPG stove with oven/grill
10. Refrigerator
11. Defibrillator
12. Life jackets
13. Zodiac inflatable dinghy
14. 2*12 man GHD life rafts
15. Surplus equipment in Council storage pertaining to the operation of the Vessel, including spare parts

Schedule of Council Documents

1. Operations Manual (including Safety Management systems, Risk Assessments; and various forms)
2. History of the Vessel
3. Insurance documentation
4. Budgets and Financial data
5. Certificates of Survey
6. Julie Burgess Electrical and Process Flow diagrams
7. Life jacket servicing records
8. Material Safety Data Sheets (MSDS)
9. Special Sailings – Information
10. Australian Wooden Boat festivals data
11. Restoration records

Schedule of Intellectual Property

1. Naming Rights for the Vessel
2. Digital images of the Vessel's logo

DRAFT

Execution

Council

THE COMMON SEAL of the)
DEVONPORT CITY COUNCIL)
as Donor was affixed)
in the presence of)

Matthew Atkins – General Manager

The Association

THE COMMON SEAL of the)
JULIE BURGESS INC.)
as Donee was affixed)
in the presence of)

***Name – *** Office

***Name – *** Office

Annexures

- A. D Watson Shipwright Services Pty Ltd Valuation**
- B. Draft Partnership Agreement**

DRAFT