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26 April 2018
Matter 82663404
By Email

Dear Kevin

Lot 9 in Deposited Plan 1205673: Restriction on the use of land

1 Summary

The Land owned by Orica is affected by a Restriction and Covenant benefitting the Council. The Restriction imposes a requirement to comply with the restrictions on the use of the Land specified in the section 88B instrument shown at Attachment 1, including that the Land is maintained for the purposes of a flood detention basin.

Clause 5.1 of the Restriction provides that Orica must not:

- use the land at grade within the Land for any purpose except the maintenance of the flood detention basin located within the Land; or
- erect or permit to be erected any permanent structure on the Land except with the consent of the Council.

However, the Restriction does not apply in certain circumstances, as outlined under clauses 5.1 to 5.3.

Under the section 88B instrument, the following three pathways for removing or complying with the Restriction appear to be available:

- (a) the Council can provide consent for the erection of a permanent structure on the Land (clause 5.1(b));
- (b) the Council can release, vary or modify the Restriction and Covenant (clauses 5.3 and 6.3), however it is unlikely to do so; or
- (c) Orica, or any other person, can obtain development consent from a consent authority under the EP&A Act for a use of the Land that does not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin (clause 5.3).

Further, the Covenant does not appear to be an absolute impediment to the potential development of the Land where Orica, at its cost, maintains the Land for the purposes of a flood detention basin.

In light of above, the Restriction and Covenant do not appear to be an absolute impediment to the potential development of the Land. In our opinion:

- the Council (if it were to act reasonably) should respond positively to a request to exercise its powers under item 1(a) above, if the future use of the Land did not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin; or

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- Orica, or any person, may seek development consent from the relevant consent authority under the EP&A Act and, as part of the DA, evidence that the proposed use does not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin.

If the DA meets the requirements under an EPI to be declared SSD, including the relevant capital investment value, the consent authority under the EP&A Act may be the IPC or Minister for Planning. In this case, a request for the Council to provide consent for the erection of a permanent structure on the Land, or exercise its other powers in relation to the Restriction, under the instrument would not be required.

For each pathway, reasonable evidence would be required to satisfy the requirement that any future use of the Land would not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin, such as reports from appropriate technical consultants satisfactory to the consent authority and/or Council.

2 Background

Orica Limited (**Orica**) owns Lot 9 in Deposited Plan 1205673 (**Land**) at Banksmeadow, NSW.

At the date of this letter, the Land is affected by a restriction and positive covenant benefitting the Botany Bay City Council (**Council**) as outlined in the table below.

Description	Terms (see Attachment 1)
Restriction on the use of land (Restriction)	Clauses 5.1 to 5.3 of Part 2
Positive covenant (Covenant)	Clause 6.1 of Part 2

The instrument under section 88B of the *Conveyancing Act 1919* (NSW), which contains the Restriction and Covenant, was registered on 26 October 2015 and affects the whole of the Land (see Attachment 1).

We have been instructed to consider whether or not the Restriction and Covenant restricts the potential development of the Land.

Our comments are set out below.

3 Restriction

3.1 Terms

Clause 5.1 of the Restriction provides that Orica must not:

- use the land at grade within the Land for any purpose except the maintenance of the flood detention basin located within the Land; or
- erect or permit to be erected any permanent structure on the Land except with the consent of the "Prescribed Authority". Under the instrument, the Council is defined as the "Prescribed Authority".

However, this clause is subject to clauses 5.2 and 5.3.

Relevantly, clause 5.3 provides that clause 5.1 does not restrict, limit or in any way apply to uses or activities conducted on the Land which:

- are conducted with the approval of the relevant consent “Authority”, where such approval is required by law; and
- do not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin.

The instrument defines “Authority” to mean:

- any government in any jurisdiction, whether federal, state territorial or local;
- any provider of public utility services, whether statutory or not; and
- any other person, authority, instrumentally or body having jurisdiction, rights, powers, duties or responsibilities over the Land or any part of it.

The broad definition of “Authority” includes a consent authority under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). If any future development of the Land is State significant development (**SSD**), the designated consent authority under the EP&A Act may be:

- the Independent Planning Commission (**IPC**) (if the development is of a kind for which the IPC is declared the consent authority by an environmental planning instrument (**EPI**)); or
- the Minister for Planning (if the development is not of that kind).

3.2 Potential for development

In light of the Restriction, under the instrument, the following three pathways for development of the Land appear to be available:

- (a) the Council can provide consent for the erection of a permanent structure on the Land (clause 5.1(b));
- (b) the Council can release, vary or modify the Restriction (clause 5.3), however it is unlikely to do so; or
- (c) Orica, or any other person, can obtain development consent from a consent authority under the EP&A Act for a use of the Land that does not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin (clause 5.3).

The pathways described above do not appear to be an absolute impediment to the potential development of the Land. In our opinion:

- the Council (if it were to act reasonably) should respond positively to a request to exercise its powers under item 3.2(a) above, if the future use of the Land did not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin; or
- Orica, or any person, may seek development consent from the relevant consent authority under the EP&A Act and, as part of the development application (**DA**), provide evidence that the proposed use does not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin.

If the DA meets the requirements under an EPI to be declared SSD, including the relevant capital investment value, the consent authority under the EP&A Act may be the IPC or Minister for Planning. In this case, a request for the Council to provide consent for the erection of a permanent structure on the Land, or exercise its other powers in relation to the Restriction, under the instrument would not be required.

For each pathway, reasonable evidence would be required to satisfy the requirement that any future use of the Land would not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin.



4 Covenant

4.1 Terms

Clause 6.1 of the Covenant requires Orica to, at its cost, maintain the Land for the purposes of a flood detention basin.

4.2 Potential for development

In light of the Covenant, under the instrument, the following three pathways for development of the Land appear to be available:

- (a) the Council can provide consent for the erection of a permanent structure on the Land, if the Land is maintained for the purposes of a flood detention basin (clauses 5.1(b) and 6.1);
- (b) the Council can release, vary or modify the Covenant (clause 6.3), however it is unlikely to do so; or
- (c) Orica, or any other person, can obtain development consent from a consent authority under the EP&A Act for a use of the Land that maintains the Land for the purposes of a flood detention basin (clauses 5.3 and 6.1).

In light of the pathways described above, the Covenant does not appear to be an absolute impediment to the potential development of the Land as long as any development is approved by the relevant consent "Authority" (as defined under the instrument) and is designed and built in a way that does not interfere with or affect the maintenance of the Land for the purposes of a flood detention basin.

Please let us know if you would like to discuss.

Yours sincerely

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Attachment 1

Section 88B Instrument - Restriction and Covenant

Instrument setting out terms of Easements or Profits à Prendre intended to be created or released and of Restrictions on the Use of Land or Positive Covenants intended to be created pursuant to Section 88B Conveyancing Act 1919.

Sheet 1 of 12

Plan: DP1205673

Plan of Subdivision of Lot 1 in DP85542
and Lot 11 in DP109505 covered by
Subdivision Certificate No 21 / 2015
Dated: 28 August 2015

**Full name and address of the
Owner of the land:**

Orica Limited
1 Nicholson Street
East Melbourne VIC 3002

Part 1 (Creation)

Number of item shown in the intention panel on the plan	Identity of easement, profit à prendre, restriction or positive covenant to be created and referred to in the plan.	Burdened lot(s) or parcel(s):	Benefited lot(s), road(s), bodies or Prescribed Authorities:
1.	Easement for drainage 3 wide (K)	Lot 9	Lot 10
2.	Easement for access 10 wide (P)	Lot 10	Lot 11
3.	Easement for services 12 wide (Q)	Lot 11	Lot 10
4.	Right of carriageway 12 wide (R)	Lot 11	Lot 10
5.	Restriction on the use of land (S)	Lot 9	Botany Bay City Council
6.	Positive covenant (T)	Lot 9	Botany Bay City Council

Part 2 (Terms)

1 Terms of easement for drainage numbered 1 in the Plan

1.1 The Owner of the Lot Benefited is granted full, free and unimpeded right to:

- (a) drain water in any quantities across and through the Easement Site through any existing line of pipes located on the Easement Site for the purpose of drainage of water or any pipe or pipes in replacement or substitution for them;
- (b) construct, lay, place, inspect, maintain and repair the pipes, channels, ditches and equipment located on the Easement Site; and



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Plan of Subdivision of Lot 1 in DP85542 and Lot 11 in DP109505 covered by Subdivision Certificate No 21 / 2015 Dated: 28 August 2015

- (c) enter upon the Easement Site with any vehicles, machines, equipment, implements or tools reasonably required and to remain there for any reasonable time for the purpose of exercising its rights under this Easement.

1.2 The Owner of the Lot Benefited must:

- (a) not cause or permit any damage, obstruction or interference with the Containment Line or with the Owner of the Lot Burdened's use of the Containment Line;
- (b) cause as little inconvenience as possible to the Owner of the Lot Burdened and its Authorised Users;
- (c) not restrict, impede or otherwise interfere with access to or use of the Easement Site by the Owner of the Lot Burdened and its Authorised Users;
- (d) not damage any improvements or property on the Lot Burdened;
- (e) at the election of the Owner of the Lot Burdened, either:
 - (i) make good any damage to the Lot Burdened or the improvements on the Lot Burdened to the reasonable satisfaction of the Owner of the Lot Burdened; or
 - (ii) reimburse the Owner of the Lot Burdened for all costs incurred by the Owner of the Lot Burdened in repairing any damage to the Lot Burdened or the improvements on the Lot Burdened,to the extent that damage was caused or contributed to by the Owner of the Lot Benefited or its Authorised Users;
- (f) not cause any unreasonable noise, disturbance or nuisance to the Owner of the Lot Burdened and its Authorised Users;
- (g) not trespass, transgress or egress on any part of the Lot Burdened except within the Easement Site;
- (h) comply with the reasonable directions of the Owner of the Lot Burdened or its nominee while on the Easement Site;
- (i) identify, and procure any Authorised User to identify, himself or herself on demand when upon the Easement Site;
- (j) provide the Owner of the Lot Benefited with at least 10 Business Days' notice of any works that the Owner of the Lot Burdened or its Authorised Users intend to carry out on the Easement Site;
- (k) comply with all reasonable requirements and directions notified to it by the Owner of the Lot Burdened in relation to the carrying out of any works on the Easement Site;

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- (l) ensure all work carried out on the Easement Site is completed properly and in a workmanlike manner; and
 - (m) restore the Lot Burdened as nearly as practicable to its former condition after carrying out any works, and must make good any collateral damage.
- 1.3 The Owner of the Lot Benefited and its Authorised Users enter upon the Lot Burdened at their own risk and release the Owner of the Lot Burdened and its Authorised Users from all Claims of whatever nature (including death or personal injury) except to the extent caused or contributed to by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.
- 1.4 The Owner of the Lot Benefited indemnifies the Owner of the Lot Burdened and its Authorised Users against any Claims incurred in connection with the use of the Easement Site by the Owner of the Lot Benefited or its Authorised Users, except to the extent caused or contributed to by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.
- 2 Terms of easement for access numbered 2 in the Plan**
- 2.1 The Owner of the Lot Burdened grants to the Owner of the Lot Benefited and its Authorised Users full and free right and liberty to enter upon the Easement Site with or without vehicles, machines, equipment, implements or tools, for the purpose of:
 - (a) inspecting, testing, measuring, surveying and evaluating the land within the Easement Site;
 - (b) performing or causing to be performed environmental testing that may require the installation of monitoring wells, taking ground water samples, excavation and other minor earthwork activities;
 - (c) complying with its obligations under any environmental agreements which apply or relate to the Lot Burdened;
 - (d) complying with any obligations which may be imposed on it under any Environmental Law; and
 - (e) complying with any obligations which may be imposed on it by the EPA or any other Authority.
- 2.2 The Owner of the Lot Benefited must:
 - (a) cause as little inconvenience as possible to the Owner of the Lot Burdened and its Authorised Users;
 - (b) not unreasonably restrict, impede or otherwise interfere with access to or use of the Easement Site by the Owner of the Lot Burdened and its Authorised Users; and

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- (c) not damage any improvements or property on the Lot Burdened and must promptly make good any such damage to the reasonable satisfaction of the Owner of the Lot Burdened.

3 Terms of easement for services numbered 3 in the Plan

3.1 The Owner of the Lot Burdened grants to the Owner of the Lot Benefited and its Authorised Users full and free right and liberty to:

- (a) erect, construct, install, maintain, repair and replace Conduits anywhere within the Easement Site;
- (b) have Services travel along the Conduits; and
- (c) enter upon the Easement Site with any vehicles, machines, equipment, implements or tools reasonably required and to remain there for any reasonable time for the purpose of exercising its rights under this Easement.

3.2 The Owner of the Lot Benefited must:

- (a) cause as little inconvenience as possible to the Owner of the Lot Burdened and its Authorised Users;
- (b) not restrict, impede or otherwise interfere with access to or use of the Easement Site by the Owner of the Lot Burdened and its Authorised Users;
- (c) not damage any improvements or property on the Lot Burdened;
- (d) at the election of the Owner of the Lot Burdened, either:
 - (i) make good any damage to the Lot Burdened or the improvements on the Lot Burdened to the reasonable satisfaction of the Owner of the Lot Burdened; or
 - (ii) reimburse the Owner of the Lot Burdened for all costs incurred by the Owner of the Lot Burdened in repairing any damage to the Lot Burdened or the improvements on the Lot Burdened,

to the extent that damage was caused or contributed to by the Owner of the Lot Benefited or its Authorised Users;

- (e) not cause any unreasonable noise, disturbance or nuisance to the Owner of the Lot Burdened and its Authorised Users;
- (f) not trespass, transgress or egress on any part of the Lot Burdened except within the Easement Site;
- (g) comply with the reasonable directions of the Owner of the Lot Burdened or its nominee while on the Easement Site;

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- (h) identify, and procure any Authorised User to identify, himself or herself on demand when upon the Easement Site;
 - (i) provide the Owner of the Lot Benefited with at least 10 Business Days' notice of any works that the Owner of the Lot Burdened or its Authorised Users intend to carry out on the Easement Site;
 - (j) comply with all reasonable requirements and directions notified to it by the Owner of the Lot Burdened in relation to the carrying out of any works on the Easement Site;
 - (k) ensure all work carried out on the Easement Site is completed properly and in a workmanlike manner; and
 - (l) restore the Lot Burdened as nearly as practicable to its former condition after carrying out any works, and must make good any collateral damage.
- 3.3 The Owner of the Lot Benefited and its Authorised Users enter upon the Lot Burdened at their own risk and release the Owner of the Lot Burdened and its Authorised Users from all Claims of whatever nature (including death or personal injury) except to the extent caused or contributed to by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.
- 3.4 The Owner of the Lot Benefited indemnifies the Owner of the Lot Burdened and its Authorised Users against any Claims incurred in connection with the use of the Easement Site by the Owner of the Lot Benefited or its Authorised Users, except to the extent caused or contributed to by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.
- 4 Terms of right of carriageway numbered 4 in the Plan**
- 4.1 The Owner of the Lot Burdened grants full, free and unimpeded right for the Owner of Lot Benefited and its Authorised Users to:
- (a) erect, construct, install, maintain, repair and replace a driveway for vehicular access across the Easement Site; and
 - (b) go, pass and repass at all times over the Easement Site with vehicles or on foot.
- 4.2 The Owner of the Lot Benefited and its Authorised Users must:
- (a) cause as little inconvenience as possible to the Owner of the Lot Burdened;
 - (b) not restrict, impede or otherwise interfere with access to or use of the Easement Site by the Owner of the Lot Burdened and its Authorised Users;
 - (c) not damage any improvements or property on the Lot Burdened;
 - (d) at the election of the Owner of the Lot Burdened, either:

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- (i) make good any damage to the Lot Burdened to the reasonable satisfaction of the Owner of the Lot Burdened; or
- (ii) reimburse the Owner of the Lot Burdened for all costs incurred by the Owner of the Lot Burdened in repairing any damage to the Lot Burdened,

to the extent that damage was caused or contributed to by the Owner of the Lot Benefited or its Authorised Users;

- (e) not cause any unreasonable noise, disturbance or nuisance to the Owner of the Lot Burdened;
- (f) not trespass, transgress or egress on any part of the Lot Burdened except within the Easement Site;
- (g) comply with the reasonable directions of the Owner of the Lot Burdened or its nominee while on the Easement Site;
- (h) identify, and procure any Authorised User to identify, himself or herself on demand when upon the Easement Site;
- (i) provide the Owner of the Lot Benefited with at least 10 Business Days' notice of any works that the Owner of the Lot Burdened or its Authorised Users intend to carry out on the Easement Site;
- (j) comply with all reasonable requirements and directions notified to it by the Owner of the Lot Burdened in relation to the carrying out of any works on the Easement Site;
- (k) ensure all work carried out on the Easement Site is completed properly and in a workmanlike manner; and
- (l) restore the Lot Burdened as nearly as practicable to its former condition after carrying out any works, and must make good any collateral damage.

4.3 The Owner of the Lot Benefited and its Authorised Users enter upon the Lot Burdened at their own risk and release the Owner of the Lot Burdened and its Authorised Users from all Claims of whatever nature (including death or personal injury) except to the extent caused by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.

4.4 The Owner of the Lot Benefited indemnifies the Owner of the Lot Burdened and its Authorised Users against any Claims incurred in connection with the use of the Easement Site by the Owner of the Lot Benefited or its Authorised Users, except to the extent caused by the act, omission or negligence of the Owner of the Lot Burdened or its Authorised Users.

4.5 The Owner of the Lot Burdened may install a security gate for the purpose of controlling vehicular access to the Easement Site provided that the Owner of the Lot

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Burdened provides to the Owner of the Lot Benefited (at the cost of the Owner of the Lot Burdened), a reasonable number of keys, access cards or other access devices to enable the Owner of the Lot Benefited and its Authorised Users to access the Easement Site at all times.

5 Terms of restriction on the use of the land numbered 5 in the Plan

5.1 Subject to clauses 5.2 and 5.3, the Owner of the Lot Burdened must not:

- (a) use the land at grade within the Easement Site for any purpose except the maintenance of the flood detention basin located within the Easement Site; or
- (b) erect or permit to be erected any permanent structure on the Easement Site except with the consent of the Prescribed Authority.

5.2 Despite clause 5.1, the Owner of the Lot Burdened and its Authorised Users may:

- (a) install and maintain utilities, Conduits and Services on, above, underneath, across and through the Easement Site;
- (b) have Services travel along the Conduits;
- (c) construct and maintain fencing on the boundaries of the Lot Burdened;
- (d) enter upon and remain on the Easement Site at all times on foot or with or without vehicles, machines, plant, equipment, implements or tools, for any reasonable purpose including without limitation:
 - (i) inspecting, testing, measuring, surveying and evaluating the land within the Easement Site;
 - (ii) performing or causing to be performed environmental testing that may require the installation of monitoring wells, taking ground water samples, excavation and other minor earthwork activities;
 - (iii) complying with its obligations under any environmental agreements which apply or relate to the Lot Burdened;
 - (iv) complying with any obligations which may be imposed on it under any Environmental Law;
 - (v) complying with any obligations which may be imposed on it by the EPA or any other Authority; and
 - (vi) go, pass and repass at all times over the Easement Site.
- (e) carry out any activity within the Easement Site reasonably considered necessary to remove or reduce a risk of personal injury or damage to property.



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5.3 Despite any clause in this instrument, clause 5.1 does not restrict, limit or in any way apply to uses or activities conducted on the Easement Site which:

- (a) are conducted with the approval of the relevant consent Authority (where such approval is required by law); and
- (b) do not interfere with or affect the maintenance of the Easement Site for the purposes of a flood detention basin.

The name of the persons empowered to release, vary or modify the restriction on use of the land

Botany Bay City Council.

6 Terms of positive covenant numbered 6 in the plan

6.1 The Owner of the Lot Burdened must, at its own cost, maintain the Lot Burdened for the purposes of a flood detention basin.

The name of the persons empowered to release, vary or modify the positive covenant

Botany Bay City Council.

7 Definitions

Terms used in this Instrument have the following meanings:

Authorised User means the Owner of the Lot Benefited or the Owner of the Lot Burdened (as applicable) and their respective successors, assigns, transferees, contractors, tenants, licensees, representatives, employees, agents, customers and invitees.

Authority means:

- (a) any government in any jurisdiction, whether federal, state, territorial or local;
- (b) any provider of public utility services, whether statutory or not; and
- (c) any other person, authority, instrumentality or body having jurisdiction, rights, powers, duties or responsibilities over the property or any part of it.

Business Day means any day except a bank or public holiday in New South Wales or a Saturday or Sunday.

Claim means claims, liabilities, demands, suits, causes of action, proceedings, loss, damage, cost, and expense (whether by reason of injury to or death of any person or damage to property).

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CLM Act means the Contaminated Land Management Act 1997 (NSW).

Conduits means all apparatus for the transmission of services, including drains, wires, fibres, cables, ducts, pumps and sumps.

Containment Line means the pipeline constructed on Lot 9 in the Plan and known as the Second Containment Line for the Botany Groundwater Cleanup Project.

Easement means each easement in this Instrument, or any one of them.

Easement Site means, in relation to an Easement or Restriction on Use, the part of the Lot Burdened shown as the site of the Easement or Restriction on Use on the Plan.

Environmental Law means any law or regulation which relates to an aspect of environment or health and safety and includes the Environmental Planning and Assessment Act 1979, the Protection of the Environment Operations Act 1997 and the CLM Act and any consolidations, amendments, re-enactments or replacements of them, and any regulations or other statutory instruments issued under them.

EPA means the New South Wales Environment Protection Authority and its successors.

Instrument means this instrument under section 88B of the *Conveyancing Act 1919* and includes the Plan.

Lot Benefited means the land referred to in Part 1 of this Instrument as being the land benefited by the Easement.

Lot Burdened means the land referred to in Part 1 of this Instrument as being the land burdened by the Easement.

Owner, in relation to a lot, means every person who is at any time entitled to an estate or interest in that lot, including any freehold or leasehold estate or interest in possession in that lot.

Plan means the deposited plan registered together with this Instrument.

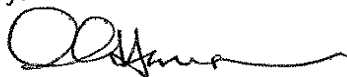
Prescribed Authority means the authority referred to in Part 1 of this Instrument as being benefited by an easement, profit à prendre, restriction or positive covenant.

Services means all services including but not limited to all electricity, gas, telephone, communications, water, sewerage and drainage within and through all wires, cables, ducts, pipes, conduits, drains and all other appurtenances of whatever nature.

Plan: **DP1205673**

Plan of Subdivision of Lot 1 in DP85542 and Lot
11 in DP109505 covered by Subdivision
Certificate No 21 / 2015 Dated: 28 August 2015

Signed by Orica Limited ACN 004 145
868 by:



Signature of ~~director~~/company secretary

Christopher Andrew Hansen

Print name



Signature of director

ALBERTO CALDERON

Print name



Plan: **DP1205673**

Plan of Subdivision of Lot 1 in DP85542 and Lot
11 in DP109505 covered by Subdivision
Certificate No 21 / 2015 Dated: 28 August 2015

Signed, sealed and delivered by Botany
Bay City Council by its authorised
delegate in the presence of:

Peter Ward
Signature of witness

PETER WARD
Print name

Lara Kirchner
Signature of General Manager

LARA KIRCHNER
Print name

GENERAL MANAGER
Title

REGISTERED



26.10.2015