

Heritage of Western Australia Act 1990
Section 29

HERITAGE AGREEMENT

between

HERITAGE COUNCIL OF WESTERN AUSTRALIA

and



in respect of

ELIZABETH QUAY SITE 10

a portion of

BARRACK SQUARE

(HCWA Place No. P4031)

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HERITAGE AGREEMENT

Elizabeth Quay Site 10

THIS AGREEMENT is made between the following parties:

1. **HERITAGE COUNCIL OF WESTERN AUSTRALIA** a corporate body established pursuant to the *Heritage of Western Australia Act 1990*, of 491 Wellington Street, Perth, Western Australia, 6000 (the "Council"); and
2. [REDACTED] (the "Owner").

RECITALS:

- A. The Council's objects are to identify, conserve, interpret and, where appropriate, enhance those places which are of significance to the cultural heritage of Western Australia; facilitate development that is in harmony with the cultural heritage; and promote public awareness and knowledge of Western Australia's cultural heritage.
- B. The Owner is the Registered Proprietor of the Land.
- C. The Place has been identified as being of cultural significance, and was entered in the Register of Heritage Places on an interim basis pursuant to the Act on 15 October 1999.
- D. Pursuant to the Government Heritage Property Disposal Process (GHPDP), the Owner is required to enter into an agreement with the Council binding on the current and successive owners of the Place to ensure its ongoing interpretation.
- E. The Council and the Owner wish to enter this Agreement to provide for the interpretation of the Place so as to retain and communicate its cultural heritage significance to present and future generations.

AGREEMENT:

The Parties agree with each other as follows:

PART 1 DEFINITIONS & CONSTRUCTION

1.1 Definitions

In this Agreement, unless the contrary intention appears:

"Act" means the *Heritage of Western Australia Act (WA) 1990*;

"Agreement" means this Agreement as it may from time to time be varied as permitted by its terms;

"Damage" means losses, costs, damages, liabilities, expenses, actions, suits or claims of any kind;

"Effective Date" means the date on which this Agreement is certified by the Minister pursuant to Section 32(1) of the Act;

"Event of Default" is defined in clause 5.1;

"Interpretation Plan" means the Interpretation Plan in respect of the Place described in Item 3 of the Schedule, as may from time to time be varied with the prior written approval of the Council;

"Interpretation Works" means the activities described in Item 4 of the Schedule.

"Interpretative Features" means the physical features created and installed as a result of the Interpretation Works.

"Land" means the land described in Item 2 of the Schedule;

"Maintenance" means the continuous protective care of Interpretive Features;

"Minister" means the Minister responsible for the administration of the Act;

"Owner" means:

- (a) subject to clause 2.2(d), [REDACTED] for so long as [REDACTED] retains its interest in the Land as described in Recital B; and
- (b) the Owner or Owners of the Land from time to time, as the expression "Owner" is defined in the Act;

"Place" means the place described in Item 1 of the Schedule;

"Register" means the Register of Heritage Places as defined in the Act; and

"Use" means the functions of the Place as well as the activities and practices that may occur at the Place.

1.2 Construction

In this Agreement, unless the contrary intention appears:

- (a) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws varying, consolidating or replacing them, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (b) a covenant or agreement by more than one person binds, and is enforceable against, those persons jointly and each of them severally;
- (c) no rule of construction applies to the disadvantage of a party on the basis that the party was responsible for drafting this Agreement or any part of it;
- (d) a reference to this Agreement or any other document or instrument includes the Agreement, document or instrument (as the case may be) as varied or replaced, notwithstanding any change in the identity of the parties;
- (e) a reference to the Owner doing or refraining from doing anything includes a reference to the Owner causing a person to do, or causing a person to refrain from doing, that thing (as the case may be);
- (f) a reference to any thing is a reference to the whole and each part of it; and
- (g) words and phrases having defined meanings in the Act, unless otherwise defined in this Agreement, have the meanings so defined in the Act.

PART 2

COMMENCEMENT, DURATION AND SCOPE OF THIS AGREEMENT

2.1 Commencement and duration of this Agreement

- (a) This Agreement is made pursuant to Section 29 of the Act and is conditional upon the Minister

- (i) being satisfied that this Agreement is necessary for the purposes of, and complies with, the Act; and
 - (ii) certifying that fact upon each executed copy of this Agreement.
- (b) This Agreement commences on the Effective Date and shall be of permanent effect unless terminated with the written consent of the Council.

2.2 Scope of this Agreement

- (a) This Agreement:
 - (i) applies to the Land and the Place;
 - (ii) binds the Land and the Place; and
 - (iii) binds the Owner.
- (b) All of the obligations of the Owner under this Agreement dealing with development or use of the Land or any part of the Land or the conservation or care of any building, natural feature or other object on the Land are covenants made pursuant to section 29(10) of the Act and are intended to run with the Land.

PART 3 INTERPRETATION WORKS

3.1 Interpretation Plan

The parties acknowledge that the Interpretation Plan is the primary guiding document for the interpretation of the Place and should be read in conjunction with this Agreement as an essential reference document.

3.2 Interpretation Works

- (a) The Owner will undertake the interpretation of the Place in accordance with the Interpretation Plan and will carry out the Interpretation Works.
- (b) Prior to the Owner undertaking Interpretation Works, the specific design, content, materials and placement of the resulting Interpretative Features must be referred to the Council for approval. It is assumed by the parties that this will occur as part of the planning approval process.
- (c) Fabrication and installation of Interpretive Features shall be completed no later than the date agreed to by the Council and the Owner.

3.3 Maintenance

The Owner shall ensure that any and all Interpretive Features created and affixed to the Place with the approval of the Council are kept in a proper, safe and sound standard of repair and condition in all respects.

3.4 Conservation consultant

The Owner must appoint a consultant approved in advance in writing by the Council to supervise the Interpretation Works.

3.5 Reporting

- (a) All reports required in this clause shall be prepared on behalf of the Owner by the consultant appointed pursuant to clause 3.3, or such other person with the necessary skills approved in writing in advance by the Council.

- (b) The Owner must ensure that a proper, detailed and comprehensive written report is provided to the Council within 60 days after receipt of a written request from the Council for a report describing
 - (i) all Interpretation Works and Maintenance activities which the Owner has undertaken pursuant to this agreement since the later of the Effective Date or the date of any previous report; and
 - (iii) any other matters regarding the conservation or interpretation of the Place as specified in the written request;provided that no more than one such report shall be required within any 12-month period.
- (c) In the event that the Council requires further information, detail, explanation or other clarification beyond that provided in a submitted report, the Council will notify the Owner in writing of the particular information required and the time in which the Owner is to provide that information, which shall not be less than 30 days from the date of receipt of the written notice from the Council.
- (d) The Owner's failure to provide any report or additional information required under this Clause 3.4 shall constitute an Event of Default.

3.6 Insurance

The Owner will maintain an insurance policy with a reputable insurance company approved in advance in writing by the Council, sufficient to enable full and proper replacement, reinstatement or restoration of the Interpretative Features in the case of damage or destruction and provide a copy of such a policy and a Certificate of Currency to the Council. In the event of damage or destruction the Owner shall, using monies recovered from its insurance policy and its own monies, fully and properly replace, reinstate or restore the destroyed or damaged Interpretative Features.

3.7 Compliance with statutes

The provisions of this Agreement are in addition to the Act and any other written laws and nothing in this Agreement removes, limits or modifies the obligations on the Owner to comply with all relevant statutory and other requirements in connection with installation and/or Maintenance of the Interpretative Features, and the Owner is responsible for ascertaining the need for and obtaining all approvals, consents, licences and permits required for installation and/or Maintenance of the Interpretative Features, including planning approvals and building permits, from all relevant bodies and authorities including the local authority.

3.8 Indefinite Extension of Interim Registration

Pursuant to Section 53(2)(b) of the Act, the Owner hereby consents to the indefinite extension of the interim registration of the land.

3.9 Permanent Entry of the Place in the Register

The Owner consents to the entry of the land in the Register on a permanent basis under the Act at such time as the Council may so recommend to the Minister.

PART 4
COUNCIL'S RIGHTS OF ENTRY AND POWERS OF INSPECTION

4.1 Council's rights of entry and powers of inspection

- (a) Subject to clause 4.1(b) the Council shall, through its nominated representative or nominated officer from time to time, have the power to enter the Place at reasonable times, and on reasonable prior notice, for any purpose related to the provisions of this Agreement, including without limitation to inspect the Place with a view to ensuring compliance with the provisions of this Agreement.
- (b) Subject to clause 4.1(c), the Council shall comply with any reasonable requirement imposed by the Owner for the purpose of exercising the rights of the Council under clause 4.1(a).
- (c) The Owner must do all things necessary to enable the Council to exercise its rights of inspection as set out in clause 4.1(a), including without limitation, ensuring that reasonable access is provided to all parts of the Place and ensuring access to and use of any facility at the Place which is necessary to facilitate inspection.

PART 5
DEFAULT

5.1 Events of default

An Event of Default occurs if:

- (a) the Owner is in breach of, or does not comply with, any of its obligations under this Agreement and the breach or non-compliance continues for 30 business days, or such longer period as is reasonable for rectification having regard to the nature of the breach or non-compliance, after receipt of written notice from the Council to effect compliance; or
- (b) the Owner repudiates or commits a fundamental breach of this Agreement.

5.2 Rights and remedies of Council

In the event any Event of Default occurs, the Council shall be entitled to exercise any one or more of the following powers:

- (a) subject to clause 4.1(b) through its agents, contractors or employees enter the Place and take such actions as are in the Council's opinion necessary to rectify the Event of Default (including attending to any construction or other works) together with or separately from;
 - (b) any rights and remedies which may be available to the Council at law or in equity, including applying to the court for an order for specific performance, together with or separately from;
 - (c) the rights, powers and remedies available to the Council under the Act,
- and nothing in this Agreement limits or prejudices or shall hinder the exercise by the Council or the Minister or any other person of any of the rights, powers or remedies available to the Council, the Minister or that person under the Act if an Event of Default occurs, or any other event occurs which is a breach of any provision of the Act.

5.3 Land and Place at risk of Owner

- (a) The Land and the Place shall remain at the risk of the Owner in all respects, notwithstanding any provisions in this Agreement. Without limitation, all Interpretation Works and Maintenance shall be conducted entirely at the risk of the Owner and the Owner shall, subject to clause 5.3(b), indemnify and keep indemnified and save harmless the Council, the Minister, the State of Western Australia and any of their respective servants or agents (each an '**Indemnified Party**') against all Damage incurred or suffered by any of them arising from or in connection with any activity undertaken pursuant to this Agreement by the Owner or any person acting through, on behalf of, or under the direction of the Owner.
- (b) The indemnity provided by the Owner in clause 5.3(a) shall be reduced proportionately to the extent that it can be shown any Damage has been caused by a negligent or deliberately malicious act or omission by an Indemnified Party.

5.4 Interest on overdue money

If the Owner becomes liable to pay any amount of money to the Council pursuant to this Agreement or arising from any matter the subject of this Agreement, the Owner shall pay to the Council interest on that amount from and including the due date for payment of the amount to but excluding the actual date of payment of that amount. The interest is to be paid on demand by the Council, is to be calculated on daily balances, and is to be at the rate then payable on judgment debts pursuant to the provisions of the *Supreme Court Act (WA) 1935*.

PART 6 NOTICES

6.1 Form of notices

Any notice, report or other communication which must be given, served or made under or in connection with this Agreement:

- (a) must be in writing in order to be valid;
- (b) is sufficient if executed by the Party giving, serving or making the notice, or if executed on such Party's behalf by any officer, director, attorney or solicitor having the authority to so act for such Party;
- (c) is sufficient, in the case of the Owner's obligations under clause 3.4, if executed by the relevant consultant appointed pursuant to clause 3.3;
- (d) will be deemed to have been duly served, given or made in relation to a person if it is delivered or posted by prepaid post to the address, or sent by facsimile or sent by email to the address of that person identified in clause 6.2 or at such other address or number as is notified in writing by that person to the other Parties from time to time; and
- (e) will be deemed to be served, given or made:
 - (i) if delivered by hand, on delivery;
 - (ii) if sent by prepaid post, on the second day after the date of posting;
 - (iii) if sent by facsimile, on receipt of a transmission report confirming successful transmission; and
 - (iv) if sent by email, on receipt of confirmation of successful delivery.

6.2 Address for notices

The details of each Party for the purposes of giving notice are as follows:

- (a) the **Council**: Heritage Council of Western Australia
PO Box 7479
CLOISTERS SQUARE PO WA 6850
Phone: (08) 6552 4000 Fax: (08) 6552 4001
Email: info@stateheritage.wa.gov.au
ATTENTION: Manager, Development Referrals
- (b) the **Owner**: 

PART 7 GENERAL

7.1 Variation to be in writing

No variation of this Agreement will be effective unless in writing and executed by the Council and the Owner.

7.2 Governing Law

This Agreement is governed by the Laws of the State of Western Australia and the parties submit to the jurisdiction of that State.

7.3 Further assurances

Each party shall do all things and execute all further documents as are necessary to give full effect to this Agreement.

7.4 Extension of time by Council

The Council may, at the Council's discretion and by written notice to the Owner, extend any time period for performance by the Owner of any of its obligations under this Agreement.

7.5 Costs

- (a) The Owner shall pay or reimburse the Council on demand for all costs and expenses incurred by the Council in relation to:
- (i) the exercise or enforcement by the Council of any right, power or remedy under this Agreement, at law, in equity or otherwise; and
 - (ii) any act or omission by the Owner causing Damage to the Council, including (without limitation) the Council's legal costs and expenses.
- (b) Each party shall pay all its own legal costs and expenses in relation to the preparation, execution and stamping of this Agreement.

7.6 No Waiver

Any failure to enforce this Agreement or any forbearance, delay or indulgence granted by one party to the other party will not be construed as a waiver of any rights, privileges or immunities created under this Agreement.

THE SCHEDULE

- Item 1: Place**
- Elizabeth Quay Site 10, a portion of *Barrack Square* (HCWA Place No. 4031), and consists of:
- (a) the Land;
 - (b) all buildings, structures and works on the Land from time to time; and
 - (c) any thing in connection with the Land, entered or deemed to be entered in the Register.
- Item 2: Land**
- Lot 10 on Deposited Plan 401000, being the whole of the land contained in Certificate of Title Volume ---- Folio ---.
- Item 3: Interpretation Plan**
- Perth Waterfront Project: Heritage Interpretation Strategy* prepared by Malloway Studio and Paul Kloeden for Hocking Heritage Studio on behalf of the Metropolitan Redevelopment Authority (August 2012).
- Item 4: Interpretation Works**
- Interpretation Works are described generally in the Interpretation Plan with respect to "Site 10" and shall be designed with the approval of the Council in consultation with the Metropolitan Redevelopment Authority (MRA) and fabricated and installed to the satisfaction of the Council. Interpretive Features may be combined with public art installed in accordance with the MRA's *Perth Waterfront Public Art Strategy* (April 2012) and *Elizabeth Quay Design Guidelines* (August 2012).

EXECUTED AS A DEED

EXECUTED by [REDACTED] in accordance with section 127 of the Corporations Act:

[REDACTED]

THE COMMON SEAL of the HERITAGE COUNCIL OF WESTERN AUSTRALIA is affixed in the presence of:



Graeme Gammie
EXECUTIVE DIRECTOR

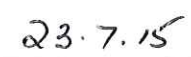




Marion Fulker
CHAIRPERSON



Date signed



Date signed

**CERTIFICATE UNDER SECTION 32
OF THE HERITAGE OF WESTERN AUSTRALIA ACT (WA) 1990**

I, the Hon. Albert Jacob, MLA, Minister for Environment; Heritage, hereby certify that this Agreement is necessary for the purposes of, and complies with, the *Heritage of Western Australia Act (WA) 1990*.

Dated the 11th day of August 2015.



Albert Jacob, MLA
Minister for Environment, Heritage