

*Heritage of Western Australia Act 1990*  
Section 29

**HERITAGE AGREEMENT**

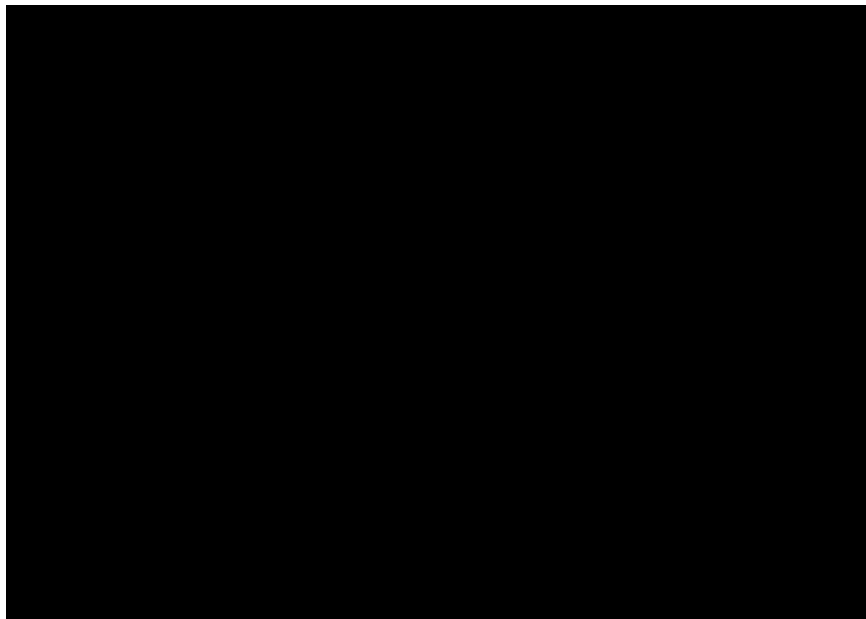
**between**

**CITY OF PERTH**

**and**

**HERITAGE COUNCIL OF WESTERN AUSTRALIA**

**and**



**in respect of**

**ANZ BANK (fmr)**  
**(HCWA Place No. 6101)**

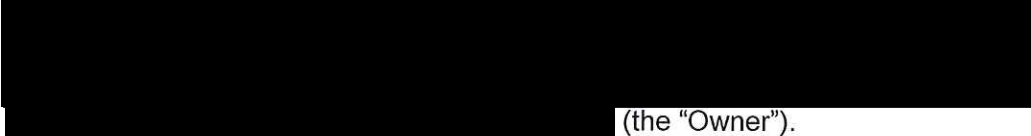
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## HERITAGE AGREEMENT

### **ANZ BANK (fmr) 938-940 Hay Street cnr Milligan Street, Perth**

**THIS AGREEMENT** is made between the following parties:

1. **CITY OF PERTH**, of Council House, 27 St Georges Terrace, Perth, Western Australia, 6000 (the "City");
2. **HERITAGE COUNCIL OF WESTERN AUSTRALIA** a corporate body established pursuant to the *Heritage of Western Australia Act 1990*, of Level 2, 491 Wellington Street, Perth, Western Australia, 6000 (the "Council"); and
3.  (the "Owner").

#### **RECITALS:**

- A. The City's functions include the control and management of planning and development within Perth. The City seeks to preserve and protect the unique character of Perth while balancing the need for growth and development.
- B. The Council's objects are to identify, conserve 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.
- C. The Owner is the Registered Proprietor of the Land.
- D. The Place has been identified as being of cultural significance, and was entered in the Register of Heritage Places on a permanent basis pursuant to the Act on 22 January 2002.
- E. As a condition of approval to transfer unusable plot ratio from the Place pursuant to the City's local planning scheme the Owner is required to enter into an agreement with the City and the Council binding on the current and successive owners of the Place to ensure its ongoing conservation and maintenance.
- F. The City, the Council and the Owner wish to enter this Agreement to provide for the conservation of the Place so as to retain its cultural heritage significance for present and future generations.
- G. This Agreement supersedes and replaces the heritage agreement previously made between the City, the Council and the Owner on 12 January 2007; the heritage agreement of 12 January 2007 is of no effect.

#### **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;

“**Conservation Plan**” means the Conservation Plan in respect of the Place described in Item 5 of the Schedule, as may from time to time be varied with the prior written approval of the Council;

“**Conservation Policy**” means the policy specified in Item 3 of the Schedule;

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

“**Development**” means the development or use of the Place, including:

- (a) any demolition, erection, construction, alteration of or addition to any building or structure on the Land;
- (b) the carrying out on the Land of any excavation or other works;
- (c) any act or thing that is likely to change the character of the Place or the external appearance of any building;
- (d) any act or thing that would constitute an irreversible alteration of the Significant Fabric; and
- (e) a material change in the Use of the Place;

“**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;

“**Land**” means the land described in Item 4 of the Schedule;

“**Maintenance**” means the continuous protective care of the Significant Fabric as specified in Item 6 of the Schedule;

“**Minister**” means the Minister responsible for the administration of the Act;

“**Owner**” means:

- (a) subject to clause 2.2(d),

 is the registered proprietor of

the Land; 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;

“**Significant Fabric**” means all the physical material of the Place specified in Item 2 of the Schedule; 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 City, the Council and the Minister.

#### **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.

- (c) The rights and obligations of the Owner under this Agreement are not assignable by the Owner without the prior written consent of the City and the Council, which consent shall not be unreasonably withheld.
- (d) Subject to clause 2.2(e), on the person who is at the time the Owner (“**Outgoing Owner**”) transferring the whole of that person's interest in the Place to another person, the Outgoing Owner is released from all personal liability under this Agreement. For the avoidance of doubt, this clause 2.2(d) operates only to release the Outgoing Owner personally and does not release, vary or otherwise affect the obligations of the Owner under, or in connection with, this Agreement.
- (e) The provisions of clause 2.2(d) shall not apply in respect of any liability or claim which arose prior to the date of registration of the transfer of the whole of the interest of the Outgoing Owner to another person.

### **PART 3 DEVELOPMENT AND CONSERVATION**

#### **3.1 Conservation Plan**

The parties acknowledge that the Conservation Plan is the primary guiding document for the conservation and future use of the Place and should be read in conjunction with this Agreement as an essential reference document. For the avoidance of doubt, all express obligations on the Owner in this Agreement which are derived from the Conservation Plan are described in the Annexures.

#### **3.2 Development**

Unless approved in advance in writing by the City and the Council, the Owner shall not:

- (a) carry out any Development;
- (b) without prejudice to the generality of clause 3.3(a), do or permit to be done anything on or in relation to the Place which adversely affects the cultural heritage significance or characteristics of the Place;
- (c) sub-divide or make application to sub-divide the Land; or
- (d) remove or demolish or make application to remove or demolish any Significant Fabric.

#### **3.3 Maintenance**

The Owner shall ensure that:

- (a) the Significant Fabric, as restored and adapted with the approval of the City and the Council, is kept in a proper, safe and sound standard of repair and condition in all respects, in accordance with the Conservation Policy; and
- (b) reasonable measures are taken to secure the Place against trespass, vandalism, vermin and pests during any period in which the place is to be unoccupied for at least 90 consecutive days.

#### **3.4 Conservation Consultant**

The Owner must appoint a consultant approved in advance in writing by the Council to supervise any Development of the Place or other action which requires the approval of the City and the Council under clause 3.2.

### **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 3.4, 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 City and the Council on a date which is 12 months after the Effective Date, and thereafter on every anniversary of the Effective Date during the currency of the Agreement, describing
  - (i) all conservation works, Maintenance, or Development 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
  - (ii) the condition of the Significant Fabric at the time of the report.
- (c) In the event that the City or the Council requires further information, detail, explanation or other clarification beyond that provided in a submitted report, the City or the Council, respectively, shall 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.
- (d) The Owner's failure to provide any report or additional information required under this Clause 3.5 shall constitute an Event of Default.

### **3.6 Insurance**

- (a) The Owner shall maintain an insurance policy with a reputable insurance company approved in advance in writing by the City in consultation with the Council, sufficient to enable full and proper replacement, reinstatement or restoration of the Significant Fabric in the case of damage or destruction and provide a copy of such a policy and a Certificate of Currency to the City. 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 Significant Fabric.
- (b) In the event of a dispute between the parties as to whether replacement, reinstatement or restoration of the Significant Fabric is practical and feasible, following an occurrence of damage to or destruction of the Place, prior to seeking any legal remedies the parties shall attempt to resolve the dispute through good faith negotiation and, if necessary, informal mediation facilitated by a neutral mediator acceptable to all parties to the dispute. The parties shall each bear their own costs associated with any such negotiation or informal mediation.

### **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 the Development of the Land and/or Conservation or Maintenance of the Place, and the Owner is responsible for ascertaining the need for and obtaining all approvals, consents, licences and permits required for Development of the Land and/or Conservation or Maintenance of the Place, including planning approvals and building permits, from all relevant bodies and authorities including the local authority.

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

**4.1 City's and Council's rights of entry and powers of inspection**

- (a) Subject to clause 4.1(b) the City and the Council shall, in consultation with each other and through their respective nominated representatives or nominated officers 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 City and the Council shall comply with any reasonable requirement imposed by the Owner for the purpose of exercising the rights of the City and the Council under clause 4.1(a).
- (c) The Owner must do all things necessary to enable the City and the Council to exercise their 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 City and Council**

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

- (a) through their agents, contractors or employees enter the Place and take such actions as are in the City's and 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 City or 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 City or Council under the Act,

and nothing in this Agreement limits or prejudices or shall hinder the exercise by the City of Perth, the Council or the Minister or any other person of any of the rights, powers or remedies available to the City, 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 dealing with the Development or maintenance of the Land or the Place. Without limitation, all Development and maintenance of the Land or the Place 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 City, 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 the Development, maintenance or occupation of the Land or the Place 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 City or the Council pursuant to this Agreement or arising from any matter the subject of this Agreement, the Owner shall pay to the City or the Council, respectively, 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, 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 3.5, if executed by the relevant consultant appointed pursuant to clause 3.4;
- (d) shall 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) shall 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:

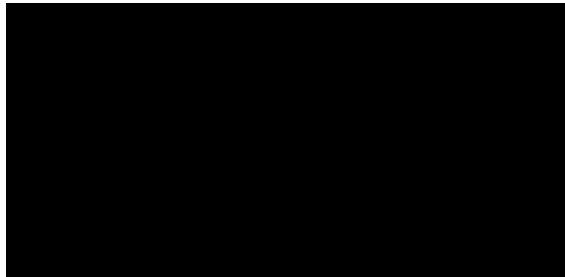
(a) the **City**:

Council House  
27 St Georges Terrace  
PERTH WA 6000  
  
Phone: (08) 9461 3333  
Email: info.city@cityofperth.wa.gov.au  
  
ATTENTION: Chief Executive Officer

(b) 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

(c) the **Owner**:



## PART 7 GENERAL

### 7.1 Variation to be in writing

No variation of this Agreement shall be effective unless in writing and executed by the City, the Council and the Owner and certified by the Minister.

### 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 City and Council

The City and the Council acting together, at their discretion and by written notice to the Owner, may 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 City or the Council, respectively, on demand for all the City's or the Council's costs and expenses in relation to:
  - (i) the exercise or enforcement by the City or 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 City or the Council;including (without limitation) the City's or 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**
- ANZ Bank (fmr)* (HCWA Place No. 6101), located at 938-940 Hay Street cnr Milligan Street, Perth, 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: Significant Fabric**
- The Milligan and Hay Street facades on both floors, the Milligan Street cantilevered awning, the coffered panel ceiling in the former bank chamber and the stairs, newels, handrails and upper balustrade to both stairs are all of considerable significance.
- The interior finishes and fitout, including ceilings and walls of the ground and first floor tenancies other than the "Dome" Café (corner tenancy), are of no significance.
- Item 3: Conservation Policy**
- The Conservation Policy is described in Section 8.0 of the Conservation Plan, "Conservation Policy", at pages 66-71.
- Item 4: Land**
- Lot 4 on Strata Plan 33018 being the whole of the land contained in Certificate of Title Volume 2108 Folio 493, Lot 6 on Strata Plan 33018 being the whole of the land contained in Certificate of Title Volume 2108 Folio 495, Lot 7 on Strata Plan 33018 being the whole of the land contained in Certificate of Title Volume 2108 Folio 496, Lot 9 on Strata Plan 33018 being the whole of the land contained in Certificate of Title Volume 2131 Folio 244, Lot 10 on Strata Plan 33018 being the whole of the land contained in Certificate of Title Volume 2131 Folio 245 and all Common Property on Strata Plan 33018.
- Item 5: Conservation Plan**
- R. N. Smyth House 938-940 Hay Street, Perth: Conservation Plan* prepared by Michael Broderick (August 2008).
- Item 6: Maintenance**
- The schedule of maintenance activities described in Annexure A.

EXECUTED AS A DEED



THE COMMON SEAL of the CITY OF PERTH is affixed by authority of its Council in the presence of:

*[Signature]*  
Signature of authorised person

*[Signature]*  
Signature of authorised person

Lord Mayor  
Office held

CEO  
Office held

LISA SCAFFIDI  
Name of authorised person

GARY STEVENSON  
Name of authorised person

28/5/15  
Date signed

28/5/15  
Date signed

THE COMMON SEAL of the HERITAGE COUNCIL OF WESTERN AUSTRALIA is affixed by authority if its Board in the presence of:

*[Signature]*  
Graeme Gammie  
EXECUTIVE DIRECTOR

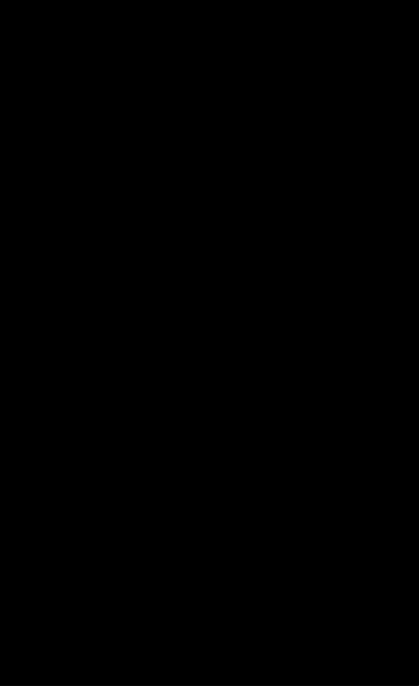
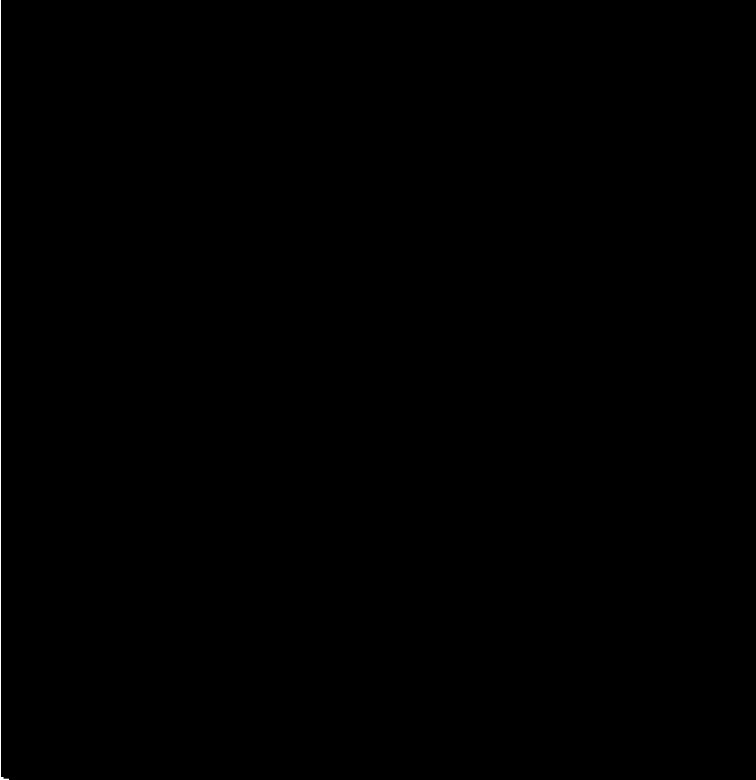


*[Signature]*  
Marion Fulker  
CHAIRPERSON

29/5/15  
Date signed

4/6/15  
Date signed

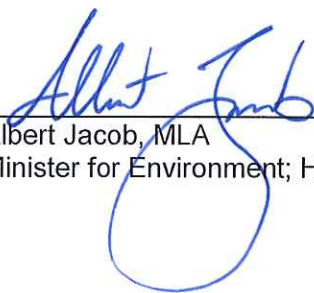
FOR THE OWNERS:



**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 15<sup>th</sup> day of June 2015.

  
\_\_\_\_\_  
Albert Jacob, MLA  
Minister for Environment; Heritage

## **Annexure A**

### **Maintenance**

The Programme below will form part of the maintenance regime for this place. The programme will be the responsibility of Mr Brad Smyth or his nominee. Should the property be sold the new proprietor shall nominate the person responsible for carrying out this maintenance schedule. The Perth City Council (Heritage Officer) and the State Heritage Office should be notified of any change of the person responsible.

This schedule is concerned with the significant heritage fabric and the presentation of the place. It does not aim to cover all the statutory requirements concerning plant and machinery. The required inspection of these items should form part of a broader more comprehensive schedule prepared by the proprietor or building manager.

This schedule should be regarded as provisional and should be adapted by mutual agreement to suit circumstance and experience. This schedule should be regarded as a minimum standard. The schedule should be adhered to in any period where the place is wholly or partially unoccupied.

Should the place be subject to damage by fire, infestation, seismic or building activity or alteration of the foundation, an inspection of the building frame by a qualified structural engineer will be required and any recommendations implemented.

### **Periodic Maintenance Schedule**

#### **Weekly:**

A weekly maintenance routine should include a check for general presentation and cleanliness, particularly in parts of the building adjacent to public spaces. In particular this should cover:

- Removal of graffiti
- Clearing of litter and vegetation
- Checking general cleanliness
- Ensuring that no locks or windows have been tampered with
- Replacing any broken windows

#### **Monthly:**

A monthly maintenance check should look at areas that may be affected by wear-and-tear or that may be a risk to the occupants or public. During winter or severe weather, additional attention should be focussed on maintaining the building's weatherproofing. The monthly inspection schedule should include:

- Trip hazards from worn carpets, loose tiles or uneven paving slabs
- Security and fire detection equipment
- Emergency and external lighting
- Loose or missing roof tiles or shingles
- Blockage or damage to gutters and downpipes
- Evidence of activity by pests, especially termites
- Ensuring that awnings / canopies are secure
- Tidying of gardens and public spaces, particularly in unoccupied buildings



**Annually:**

Annual maintenance should include overall checks for evidence of change to the building and setting up maintenance for the following year. Work should be carried out to:

- Renew pest control and buildings insurance
- Ensure arrangements for security and fire prevention are in place, especially for unoccupied buildings
- Assess changes to brickwork, stone lintels, pointing etc and plan remedial action
- Check for cracks in render – repair if necessary
- Check paintwork and refresh if required
- Check for signs of damp, assess causes and arrange remedial action
- Check roof space for damage and pests and take remedial action if required
- Monitor mechanical systems (air conditioning etc) – repair if necessary
- Check for rust and damage to metalwork - repair if necessary
- Inspect metal roofing, fixings, wall flashings, box gutters and downpipes for corrosion and repair as necessary