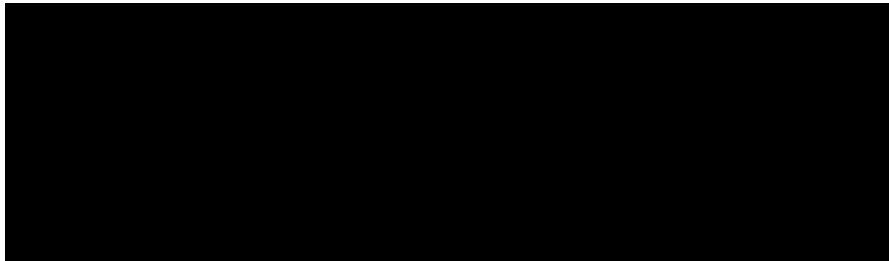


**HERITAGE AGREEMENT**

**between**

**HERITAGE COUNCIL OF WESTERN AUSTRALIA**

**and**



**in respect of**

**ELECTRICITY SUBSTATION, FREMANTLE (fmr)**  
**(HCWA Place No. 3711)**

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## HERITAGE AGREEMENT

### Electricity Substation, Fremantle (fmr) 12, 12A and 12B Parry Street Fremantle

**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 Level 2, 491 Wellington Street, Perth, Western Australia, 6000 (the "Council"); and
2.   
Western Australia, 6010 (the "Owner").

#### **RECITALS:**

- A. 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.
- 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 a permanent basis pursuant to the Act on 3 February 2012.
- D. As a condition of support for planning approval 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 conservation and maintenance.
- E. 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.

#### **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;

**"Completion Date"** means the first anniversary of the date on which the relevant building permit is issued;

**"Conservation Works"** means works necessary to conserve the place's



Significant Fabric as specified in Item 4 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 3 of the Schedule;

**"Maintenance"** means the continuous protective care of the Significant Fabric as specified in Item 5 of the Schedule;

**"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] 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 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.
- (c) The rights and obligations of the Owner under this Agreement are not assignable by the Owner without the prior written consent of 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 Conservation Works**

The Owner must undertake the conservation of the Place in accordance with the Conservation Policy and is required to carry out the Conservation Works, by the Completion Date. All such works must be referred to the Council for advice prior to the works actually being undertaken.

### **3.3 Development**

Unless approved in advance in writing by 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.

### **3.4 Maintenance**

The Owner shall ensure that:

- (a) the Significant Fabric, as restored and adapted with the approval of 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.

### **3.5 Conservation Consultant**

The Owner must appoint a consultant approved in advance in writing by the Council to supervise the Conservation Works and any Development of the Place or other action which requires the approval of the Council under clause 3.3.

### **3.6 Reporting**

- (a) All reports required in this clause shall be prepared on behalf of the Owner by the consultant appointed pursuant to clause 3.5, 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 describing the completed Conservation Works is provided within 30 days after the Completion Date of Conservation Works.
- (c) 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 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;
  - (ii) the condition of the Significant Fabric at the time of the report; and
  - (iii) any other matters regarding the conservation 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.



- (d) In the event that the Council requires further information, detail, explanation or other clarification beyond that provided in a submitted report, the Council 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 from the Council.
- (e) The Owner's failure to provide any report or additional information required under this Clause 3.6 shall constitute an Event of Default.

### **3.7 Insurance**

- (a) The Owner shall 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 Significant Fabric 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 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.

### **3.8 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 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) 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 dealing with the Development, Conservation or Maintenance of the Land or the Place. Without limitation, all Development, Conservation or 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 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, Conservation, 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 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:

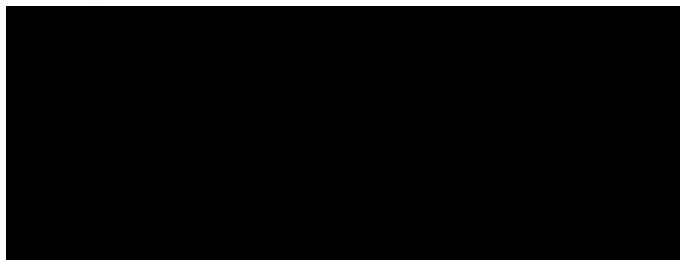
- (a) must be in writing in order to be valid;
- (b) is sufficient if executed by the Party giving, serving or making the notice, or if executed on such Party's behalf by any officer, director, attorney or solicitor having the authority to so act for such Party;
- (c) is sufficient, in the case of the Owner's obligations under clause 3.6, if executed by the relevant consultant appointed pursuant to clause 3.5;
- (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 **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](mailto: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 shall be effective unless in writing and executed by 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 Council**

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

## **PART 8 TRUSTEE'S LIMITATION OF LIABILITY**

### **8.1 Definitions**

In this Part 8, the following definitions apply:

- (a) **Trust** means the [REDACTED] as established by the Trust Deed;
- (b) **Trust Deed** means the constitution of the [REDACTED] dated [REDACTED]; and
- (c) **Trust Property** means all assets, property rights real and personal of any value whatsoever of the Trust.



## **8.2 Acknowledgement**

The parties acknowledge and agree that:

- (a) The Owner enters into this Agreement in its capacity as trustee of the Trust and in no other capacity;
- (b) Except in the case of any liability of the Owner under or in respect of this Agreement resulting from the Owner's own fraud, negligence, or breach of trust, the recourse for any person to the owner in respect of any obligations and liabilities of the Owner under or in respect of this Agreement is limited to the Owner's ability to be indemnified from the Trust Property; and
- (c) If any party does not recover the full amount of any money owing to it arising from non-performance by the Owner of any of its obligations, or non-payment by the Owner of any of its liabilities, under or in respect of this Agreement by enforcing the rights referred to in clause 8.2(a)(ii), that party may not (except in the case of fraud, negligence or breach of trust by the Owner) seek to recover the shortfall by:
  - (i) bringing proceedings against the Owner in its personal capacity; or
  - (ii) applying to have the Owner wound up.

## **8.3 Owner's Covenants and Warranties**

The Owner covenants with, and warrants to, the Council the following:

- (a) It has full powers pursuant to its constitution and the Trust Deed to enter into this Agreement and to perform its obligations under this Agreement;
- (b) The Trust is lawfully and validly constituted and the Trust Deed has been properly executed;
- (c) It is indemnified out of the assets of the Trust;
- (d) It has obtained all consents and approvals necessary to execute this Agreement so as to bind the property of the Trust and all necessary conditions precedent for that purpose have been met;
- (e) No facts are known to it, as at the date of this Agreement, whereby:
  - (i) the Trust might be wound up voluntarily or otherwise;
  - (ii) the trustee might be changed; or
  - (iii) the assets of the Trust might be vested in another person;
- (f) If, while the Owner is bound by this Agreement, there is any variation to, or amendment of, the terms of the Trust Deed (trust variation), or a change that affects the covenants and warranties given in the preceding paragraphs (change of covenant and warranty), it will provide a copy of the trust variation, or details of the change of covenant and warranty, as the case may be, to the Council as soon as practicable after the trust variation or change of covenant and warranty occurs.

## **8.4 Application of this Part 8**

The limitations on liability established by this Part 8 apply despite any other provision of this Agreement or any principle of equity or law to the contrary.

## THE SCHEDULE

- Item 1: Place**  
*Electricity Substation, Fremantle (fmr)* (HCWA Place No. 3711), located at 12, 12A and 12B Parry Street, Fremantle, 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 Significant Fabric is all of the main Substation building.
- Item 3: Land**  
Lots 2 & 3 and portion of Lot 1 on Diagram 9418 being part of the land contained in Certificate of Title Volume 2033 Folio 12, as shown labelled "M" on Deposited Plan 71479.
- Item 4: Conservation Works**  
The schedule of works described in Annexure A.
- Item 5: Maintenance**  
The schedule of maintenance activities described in Annexure B.

**EXECUTED AS A DEED**

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

  
\_\_\_\_\_  
Graeme Gammie  
EXECUTIVE DIRECTOR

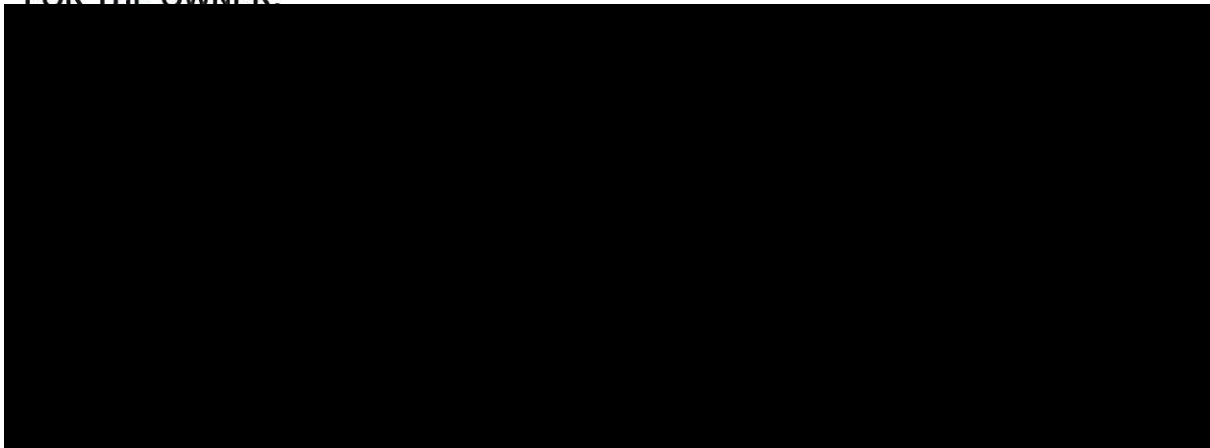
  
\_\_\_\_\_  
Date signed



  
\_\_\_\_\_  
Anne Arnold  
CHAIRPERSON

  
\_\_\_\_\_  
Date signed

**FOR THE OWNER:**






**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 17<sup>th</sup> day of August 2016.

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

## **Annexure A**

### **Conservation Works**

#### **Conservation Works**

The following schedule is derived from "12 Parry Street, Fremantle. Conservation Works Schedule" prepared by TPG.

#### **Urgent Works (to be completed within 12 months of issuance of relevant building permit)**

1. Repaint timber bargeboard and eaves linings.
2. Remove wall mounted lights and make good fixing points.
3. Remove intrusive electrical conduits and makes good fixing points.
4. Gutters and downpipes to be removed and replaced with examples to match original and repainted with suitable exterior paint system.
5. Air condensers and associated fixings to be removed from roof and roof sheeting made good.
6. Repoint masonry joints where mortar is defective with mortar to match original in appearance and performance.
7. Rebuilding localised areas of masonry collapse to match original construction.
8. Make good brick masonry following approved demolition of lean-to.
9. Remove paint from face brick elements.
10. Replace decayed wall vents with matching example.
11. Retain, conserve and repaint existing timber doors and associated hardware.
12. All steel framed windows to be retained and conserved with broken glazing to be replaced to example to match original.
13. Remove aluminium door on east elevation and replace with suitable alternative.
14. Repair cracks to render with material to match original composition.
15. Retain existing rendered finish, clean to remove surface dirt and organic growth and repaint.
16. Retain and conserve timber awning to North and West elevations. Repaint timber elements.
17. Retain existing staircase.
18. Retain and repair batten and plasterboard ceilings.
19. Retain and conserve cornices relating to office layout on ground floor.
20. Retain and conserve winch structure and related mechanics.
21. Remove paint from ground floor brickwork and expose bricks to match original appearance.

## **Annexure B**

### **Maintenance**

The Programme below will form part of the maintenance regime for this place. The programme will be the responsibility of the Owner or the Owner's nominee. Should the property be sold the new proprietor shall nominate the person responsible for carrying out this maintenance schedule. The Heritage Council of Western Australia 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**

As needed:

- Keep grass and other vegetation on the perimeter of structures trimmed short.
- Maintain ground levels around buildings to ensure that the masonry wall of the foundation is visible by 300mm in the clear.
- Promptly remove graffiti.

Annually:

- Sweep chimneys and clean fireplaces (if in use).
- Inspect buildings for termites and other potentially damaging pests; treat as necessary.
- Inspect exterior painted timber for deterioration; repaint as necessary.
- Clean gutters and downpipes for free flow, prior to winter.
- Inspect for rising damp or water penetration and repair immediately as necessary.

Five Yearly:

- Inspect metal roofing, fixings, wall flashings, box gutters and downpipes for corrosion and repair as necessary
- Inspect and repair external glazing as necessary.