

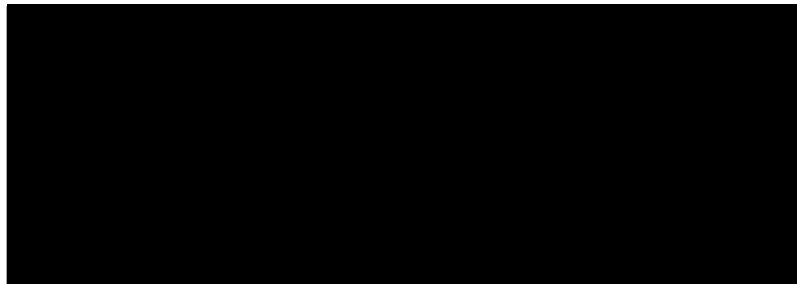
Heritage of Western Australia Act 1990
Section 29

HERITAGE AGREEMENT

between

HERITAGE COUNCIL OF WESTERN AUSTRALIA

and



in respect of

**THE RURAL AND INDUSTRIES BANK OF WESTERN
AUSTRALIA (SITE OF)**

aka Foundation Park

portion of

**CENTRAL GOVERNMENT OFFICES & TOWN HALL
PRECINCT**

(HCWA Place No. P3480)


TABLE OF CONTENTS

Part 1	Definitions & Interpretation	
1.1	Definitions	Page 3
1.2	Interpretation	Page 5
Part 2	Commencement, Duration and Scope of this Agreement	
2.1	Commencement and duration of this Agreement	Page 5
2.2	Scope of this Agreement	Page 6
Part 3	Development and Conservation	
3.1	Development	Page 6
3.2	Maintenance	Page 6
3.3	Conservation Consultant	Page 7
3.4	Reporting	Page 7
3.5	Insurance	Page 7
3.6	Compliance with Statutes	Page 8
Part 4	Council's Rights of Entry and Powers of Inspection	
4.1	Council's rights of entry and powers of inspection	Page 8
Part 5	Default	
5.1	Events of default	Page 8
5.2	Rights and remedies of Council	Page 9
5.3	Land and Place at risk of Occupier	Page 9
5.4	Interest on overdue money	Page 9
Part 6	Notices	
6.1	Form of notices	Page 10
6.2	Address for notices	Page 10
Part 7	General	
7.1	Variation to be in writing	Page 11
7.2	Governing Law	Page 11
7.3	Further assurances	Page 11
7.4	Extension of time by Council	Page 11
7.5	Costs	Page 11
The Schedule		Page 12
Signatures		Page 13
Certification		Page 14
Annexures		Page 15

HERITAGE AGREEMENT

The Rural and Industries Bank of Western Australia (Site of) aka Foundation Park 54 Barrack Street, Perth

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. 

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 Occupier is under a contractual obligation to undertake development works on the land and for that purpose has been granted a legal interest in the Land from the owner, which interest may or may not be recorded on the Certificate of Title.
- 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 7 January 1994.
- D. The Council and the Occupier 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.
- E. The Occupier's entry into this agreement satisfies a condition imposed by the City of Perth for the grant of Development Approval for the development works contemplated by the Development Deed.

AGREEMENT:

The Parties agree with each other as follows:

PART 1 DEFINITIONS & INTERPRETATION

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;

“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;

Development Approval means the approval granted by the City of Perth on or about 17 October 2011 to the application made on 30 June 2011 for ‘Old Treasury Buildings’ (Lot 1108) St Georges Terrace, 54 — 56 (Lot 1065) Barrack Street and Cathedral Avenue (Lot 100), Perth — Proposed Conservation of the existing heritage buildings for adaptive re-use as a 48 room boutique hotel, including dining, retail, entertainment and office uses and the construction of a 35 storey office tower with basement parking at 553 — 565 (Lots 22 and 23) and 567 — 579A (Lots 20 and 21) Hay Street, Perth — Off-Site Tenant Parking.

“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;

“Fabric” means all the physical material of the Place including, but not limited to:


- (a) components, fixtures, contents and objects, including those that are temporarily removed for repair, safekeeping, exhibition or other purposes;
- (b) building interiors, sub-surface remains and excavated material; and
- (c) natural material such as the landform, vegetation, streams, soil and rock;

“Land” means the land described in Item 3 of the Schedule;

“Maintenance” means the continuous protective care of the Significant Fabric and other elements of the Place as specified in Item 4 of the Schedule;

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

“Occupier” means:

- (a) 
- (b) the Occupier or Occupiers of the Land from time to time, as the expression “Occupier” 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 the elements of Fabric 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 Interpretation

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 Occupier doing or refraining from doing anything includes a reference to the Occupier 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 or superseded by a new Agreement pursuant to paragraph (c) or (d).
- (c) If the Occupier transfers its interest in the Place, at the sole discretion of the Council the transferee must either
 - (i) assume the Occupier's obligations under this Agreement, or
 - (ii) enter into a new Heritage Agreement with the Council on terms substantially similar to this Agreement.
- (d) If the Occupier enters into a new agreement with the owner of the land whereby the Occupier acquires a long-term lease or other interest that supersedes the interest described in Recital B and that is recorded on the Certificate of Title, the Occupier and the Council shall enter into a new Heritage Agreement on terms substantially similar to this Agreement, which shall be made binding on the Occupier's successors by the lodgment of a memorial on the Certificate of Title pursuant to s. 29(8) of the Act.

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 Occupier to the extent that the Occupier has an interest in the Land.
- (b) All of the obligations of the Occupier 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 Occupier under this Agreement are not assignable by the Occupier 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 Occupier ("**Outgoing Occupier**") transferring the whole of that person's interest in the Place to another person, the Outgoing Occupier 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 Occupier personally and does not release, vary or otherwise affect the obligations of the Occupier under, or in connection with, this Agreement.
- (e) The provisions of clause 2.2(d) will 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 Occupier to another person.

PART 3 DEVELOPMENT AND CONSERVATION

3.1 Development

Unless approved in advance in writing by the Council, the Occupier shall not:

- (a) carry out any Development;
- (b) without prejudice to the generality of clause 3.1(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; or
- (c) sub-divide or make application to sub-divide the Land.

The Council acknowledges it has given approval to any action described in paragraph (a), (b) or (c) undertaken in connection with the Development of the Land in accordance with the Development Approval.

3.2 Maintenance

The Occupier shall ensure that the Significant Fabric, as restored and adapted with the approval of the Council, and other elements of the Place identified in Item 4 of the Schedule, are kept in a proper, safe and sound standard of repair and condition in all respects.

3.3 Conservation Consultant

The Occupier must appoint a consultant approved in advance in writing by the Council to supervise the Conservation Works and any Development of the Land or other action which requires the approval of the Council under clause 3.1.

3.4 Reporting

- (a) All reports required in this clause shall be prepared on behalf of the Occupier 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 Occupier 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 Maintenance or Development activities which the Occupier 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.
- (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 Occupier in writing of the particular information required and the time in which the Occupier 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 Occupier's failure to provide any report or additional information required under this Clause 3.4 shall constitute an Event of Default.

3.5 Insurance

- (a) The Occupier 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 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 Occupier shall, using monies recovered from its insurance policy and its own monies, fully and properly replace, reinstate or restore the destroyed or damaged 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 will 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 will each bear their own costs associated with any such negotiation or informal mediation.

3.6 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 Occupier to comply with all relevant statutory and other requirements in connection with the Development of the Land, and the Occupier is responsible for obtaining all approvals consents and licences required for Development of the Land, including planning approvals and building licences, 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 Land at reasonable times, and on reasonable prior notice, for any purpose related to the provisions of this Agreement, including without limitation to inspect the Land with a view to ensuring compliance with the provisions of this Agreement.
- (b) Subject to clause 4.1(c), the Council will comply with any reasonable requirement imposed by the Occupier for the purpose of exercising the rights of the Council under clause 4.1(a), including compliance with any conditions or restrictions which the Occupier is subject to in respect of the Occupier's invitees accessing the Land, including constraints under its development agreement and ground lease with the freehold owner of the Land.
- (c) The Occupier 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 Land and ensuring access to and use of any facility at the Land which is necessary to facilitate inspection.

PART 5 DEFAULT

5.1 Events of default

An Event of Default occurs if:

- (a) the Occupier 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 Occupier 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 Occupier

- (a) The Land and the Place shall remain at the risk of the Occupier 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 Occupier and the Occupier 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, maintenance or occupation of the Land or the Place by the Occupier or any person acting through, on behalf of, or under the direction of the Occupier.
- (b) The indemnity provided by the Occupier 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.
- (c) Nothing in this clause 5.3 affects any rights or entitlements of the Occupier under its development agreement or ground lease or sub-lease with the freehold owner of the land or any other governing agency or body.

5.4 Interest on overdue money

If the Occupier 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 Occupier 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

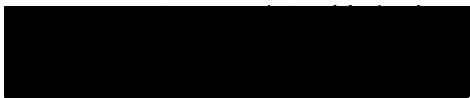

Any notice, report or other communication which must be given, served or made under or in connection with this Agreement:

- (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 Occupier'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 **Occupier**: 


**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 Occupier.

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 Occupier, extend any time period for performance by the Occupier of any of its obligations under this Agreement.

7.5 Costs

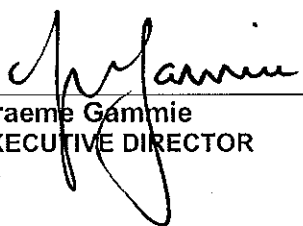
- (a) The Occupier shall pay or reimburse the Council on demand for all costs and expenses incurred by the Council in relation to:
 - (i) the exercise or enforcement by the Council of any right, power or remedy under this Agreement, at law, in equity or otherwise; and
 - (ii) any act or omission by the Occupier 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.

THE SCHEDULE

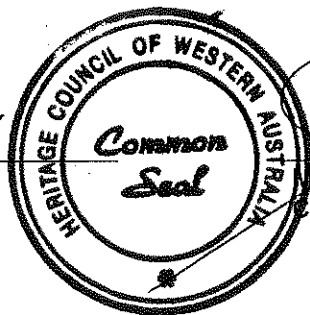
- Item 1: Place**
- The Rural and Industries Bank of Western Australia (Site of) aka Foundation Park, a portion of *Central Government Offices & Town Hall Precinct* (HCWA Place No. 3480) located at 54 Barrack Street, Perth, and consists of:
- (a) the Land;
 - (b) all buildings, structures and works on 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 Significant Fabric consists of interpretive features describing the significance of the site that may be required by the Heritage Council as a condition of its support for the City of Perth's issuance of planning approval in 2011.
- Item 3: Land**
- The land that is the subject of this agreement is approximately that area of land included in Crown Reserve 24876.
- Item 4: Maintenance**
- The schedule of maintenance activities described in Annexure A.

EXECUTED AS A DEED

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



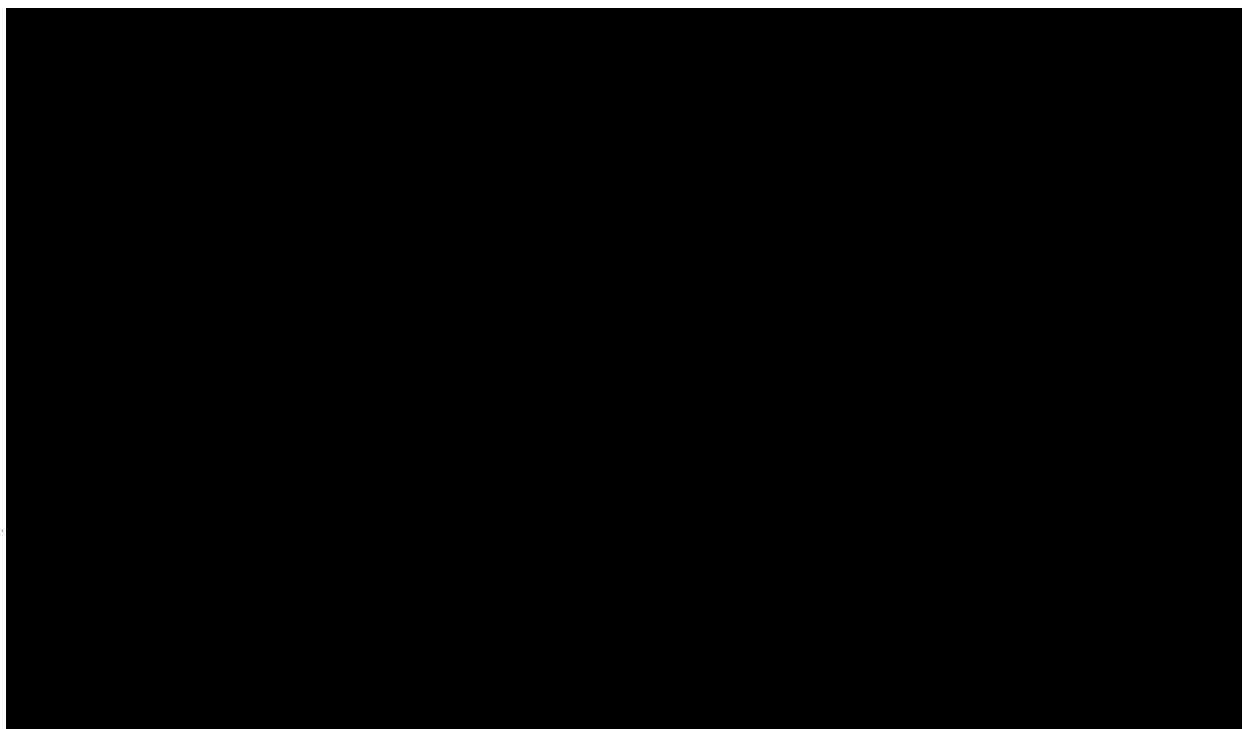
Graeme Gammie
EXECUTIVE DIRECTOR



Marion Fulker
CHAIRPERSON

3 May 2012
Date signed


11.5.12
Date signed



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

I, the Hon. G M Castrilli, MLA, Minister for Local Government; Heritage; Citizenship and Multicultural Interests, hereby certify that this Agreement is necessary for the purposes of, and complies with, the *Heritage of Western Australia Act (WA) 1990*.

Dated the 23rd day of May 2012.



Minister for Local Government; Heritage; Citizenship and Multicultural Interests

Annexure A

Maintenance

The Occupier shall maintain the land as follows:

- a) Maintain reasonable public access across the Land between Barrack Street and Hay Street;
- b) Maintain reasonable public access across the Land to the Town Hall and Old Treasury Buildings; and
- c) Maintain such interpretive features as currently exist on the Land at Foundation Park, and such other interpretive features as may be required by the Council.