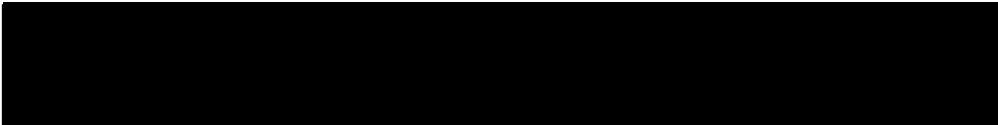


**HERITAGE AGREEMENT**

**between**

**HERITAGE COUNCIL OF WESTERN AUSTRALIA**

**and**



**in respect of**

**WILHELMSSEN HOUSE**

(HCWA Place No. 854)

## TABLE OF CONTENTS

|  |   |         |
|--|---|---------|
| <b>Part 1</b>                          | <b>Definitions &amp; Construction</b>                     |         |
| 1.1                                    | Definitions   | Page 3  |
| 1.2                                    | Construction  | Page 4  |
| <b>Part 2</b>                          | <b>Commencement, Duration and Scope of this Agreement</b> |         |
| 2.1                                    | Commencement and duration of this Agreement               | Page 5  |
| 2.2                                    | Scope of this Agreement                                   | Page 5  |
| <b>Part 3</b>                          | <b>Development and Conservation</b>                       |         |
| 3.1                                    | Conservation Works  | Page 5  |
| 3.2                                    | Development   | Page 5  |
| 3.3                                    | Maintenance   | Page 6  |
| 3.4                                    | Conservation Consultant                                   | Page 6  |
| 3.5                                    | Reporting   | Page 6  |
| 3.6                                    | Insurance   | Page 6  |
| 3.7                                    | Compliance with Statutes                                  | Page 7  |
| <b>Part 4</b>                          | <b>Council's Rights of Entry and Powers of Inspection</b> |         |
| 4.1                                    | Council's rights of entry and powers of inspection        | Page 7  |
| <b>Part 5</b>                          | <b>Default</b>  |         |
| 5.1                                    | Events of default   | Page 7  |
| 5.2                                    | Rights and remedies of Council                            | Page 8  |
| 5.3                                    | Land and Place at risk of Owner                           | Page 8  |
| 5.4                                    | Interest on overdue money                                 | Page 8  |
| <b>Part 6</b>                          | <b>Notices</b>  |         |
| 6.1                                    | Form of notices   | Page 8  |
| 6.2                                    | Address for notices                                       | Page 9  |
| <b>Part 7</b>                          | <b>General</b>  |         |
| 7.1                                    | Variation to be in writing                                | Page 9  |
| 7.2                                    | Governing Law   | Page 9  |
| 7.3                                    | Further assurances  | Page 9  |
| 7.4                                    | Extension of time by Council                              | Page 10 |
| 7.5                                    | Costs   | Page 10 |
| 7.6                                    | No Waiver   | Page 10 |
| <b>The Schedule</b>                    |   | Page 11 |
| <b>Signatures</b>                      |   | Page 12 |
| <b>Certification</b>                   |   | Page 13 |
| <b>Annexure A – Conservation Works</b> |   | Page 14 |

# HERITAGE AGREEMENT

## Wilhelmsen House 11 Cliff 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. [REDACTED] (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 23 June 2000.
- D. The Owner seeks 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;

**"Conservation Works"** means the works 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;

**“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 Works**

The Owner is required to carry out the Conservation Works within the time limits stated in the Conservation Works.

**3.2 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 3.2(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 Council, is kept in a proper, safe and sound standard of repair and condition in all respects, in accordance with Annexure A; 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 the Conservation Works and any Development of the Place or other action which requires the approval of 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) Following completion of the Conservation Works, 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.

- (c) 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.
- (d) The Owner's failure to provide any report or additional information required under this Clause 3.5 or the Conservation Works 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 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.

### **3.7 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 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 3.5, 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 **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 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**

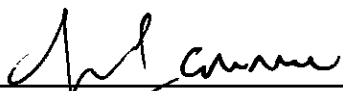
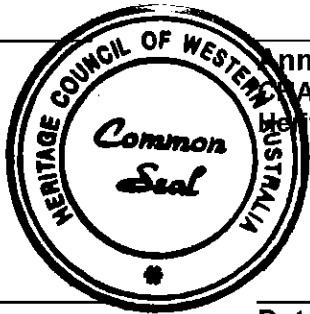
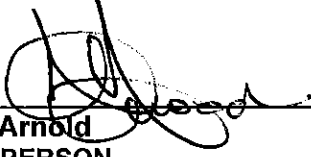
Any failure to enforce this Agreement or any forbearance, delay or indulgence granted by one party to the other party will not be construed as a waiver of any rights, privileges or immunities created under this Agreement.

## THE SCHEDULE

- Item 1:**                    **Place**
- Wilhelmsen House* (HCWA Place No. 854), located at 11 Cliff Street, Fremantle, Western Australia, 6160, 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 the entire building located at 11 Cliff Street, Fremantle, as it existed on the Effective Date.
- Item 3:**                    **Land**
- Lot 800 on Plan 77694 being the whole of the land contained in Certificate of Title Volume 2876 Folio 1000.
- Item 4:**                    **Conservation Works**
- The schedule of works described in Annexure A.

**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:

|  |   |  |
|--|---|--|
| <br>_____<br>Graeme Gammie<br>EXECUTIVE DIRECTOR<br>State Heritage Office |  | <br>_____<br>Anne Arnold<br>CHAIRPERSON<br>Heritage Council of Western Australia |
| <u>11/3/16</u><br>Date signed  |   | <u>11th March 2016</u><br>Date signed  |

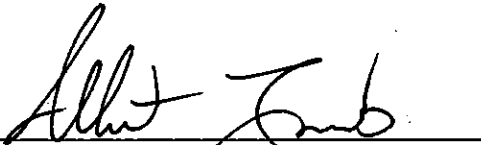
**THE COMMON SEAL** of



**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 23<sup>rd</sup> day of March 2016.

A handwritten signature in black ink, appearing to read "Albert Jacob", written over a horizontal line.

Albert Jacob, MLA  
Minister for Environment; Heritage

## **Annexure A**

### **Conservation Works**

Following the removal of paint and render from the brick elements of the Cliff Street and Phillimore Street facades, regular inspections, at the owner's expense, shall be undertaken by an independent, professional heritage consultant (the consultant) with extensive demonstrated experience in the conservation of built heritage fabric.

These inspections shall be carried out after the completion of the render removal at the following intervals; 1 week, 1 month, 6 months, and then yearly for 5 years.

A brief report supported by referenced photographic evidence is to be generated by the consultant following each inspection to ascertain the condition of the brickwork at various identified and consistent locations across all levels of the facades and the amount of deterioration, if any, which has occurred since the render removal has been completed.

Reports are to be submitted to the State Heritage Office and City of Fremantle within two weeks of the inspection.

If at any point the consultant, the City of Fremantle and/or the Heritage Council are satisfied that there is demonstrable deterioration of the brickwork on the Cliff Street or Phillimore Street facade and it is at risk of further decay due to the deterioration identified in the reports, then the brickwork shall be re-rendered with a lime render to a specification agreed with the City of Fremantle and the Heritage Council, at the owners expense.

The Heritage Council and City of Fremantle retain the right to undertake their own inspections of the condition of the identified brickwork facades.