

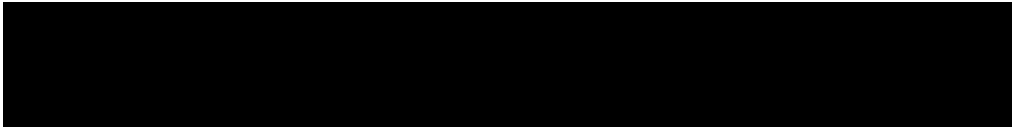
Heritage of Western Australia Act 1990
Section 29

HERITAGE AGREEMENT

between

HERITAGE COUNCIL OF WESTERN AUSTRALIA

and



in respect of

RAILWAY INSTITUTE AND TECHNICAL SCHOOL

a portion of

MIDLAND RAILWAY WORKSHOPS

(HCWA Place No. 3273)

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HERITAGE AGREEMENT

Railway Institute and Technical School Midland Railway Workshops Yelverton Drive Midland

THIS AGREEMENT is made between the following parties:

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

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 Land owned by the Metropolitan Redevelopment Authority, and agent of the State Government of Western Australia.
- C. The Occupier has entered into a lease agreement with the Metropolitan Redevelopment Authority in respect of the Land for a period of 25 years, which lease may be renewed for an additional period of 25 years.
- 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 10 June 2008.
- E. Pursuant to the Government Heritage Property Disposal Process the Occupier is required to enter into an agreement with the Council binding on the current and successive Occupiers of the Place to ensure its ongoing conservation and maintenance.
- F. 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.

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;

“Conservation Works” means the works specified in Item 6 of the Schedule;

“Completion Date” means:

- (a) in the case of **“Urgent Works”** as described in Item 6 of the Schedule, the first anniversary of the Effective Date;
- (b) in the case of **“Short-term Works”** as described in Item 6 of the Schedule, the second anniversary of the Effective Date;

“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 an approval granted by the Metropolitan Redevelopment Authority pursuant to Section 66(2)(b) of the *Metropolitan Redevelopment Authority Act 2011*;

“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.

“Interpretation Concepts Plan” means the Interpretation Concepts Plan in respect of the Place described in Item 8 of the Schedule, as may from time to time be varied with the prior written approval of the Council;

“Interpretation Works” means the activities described in Item 9 of the Schedule.

“Interpretive Features” means the physical features created and installed as a result of the Interpretation Works.

“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 7 of the Schedule and the continuous protective care of Interpretive Features;

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

“Occupier” means:

- (a) subject to clause 2.2(d), [REDACTED] for so long as [REDACTED] is the lessee of the Land; and
- (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, as may be amended from time to time by written agreement of the parties; 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 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 remain in effect for the duration of the Occupier’s lease 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 Occupier.
- (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 the transfer of the whole of the interest of the Outgoing Occupier to another person.

PART 3 DEVELOPMENT, CONSERVATION AND INTERPRETATION

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 Occupier in this Agreement which are derived from the Conservation Plan are described in the Annexures.

3.2 Conservation Works

The Occupier must undertake the conservation of the Place in accordance with the Conservation Policy and is required to carry out the Conservation Works, by the Construction 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 Occupier 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 Interpretation Concepts Plan

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

3.5 Interpretation Works

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

3.6 Maintenance

The Occupier 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) Interpretive Features fabricated and installed with the approval of the Council, are kept in a proper, safe and sound standard of repair and condition in all respects.

3.7 Conservation Consultant

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

3.8 Reporting

- (a) All reports required in this clause shall be prepared on behalf of the Occupier by the consultant appointed pursuant to clause 3.7, 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 describing the completed Conservation Works is provided within 30 days after the Completion Date of each category of Conservation Works (i.e., "Urgent Works" and "Short-term Works", respectively).
- (c) 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 Development, Conservation Works, Interpretation Works and Maintenance 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.
- (d) 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.
- (e) The Occupier's failure to provide any report or additional information required under this Clause 3.8 shall constitute an Event of Default.

3.9 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.

3.10 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, Conservation or Maintenance of the Place and/or installation or Maintenance of Interpretive Features, and the Occupier is responsible for ascertaining the need for and obtaining all approvals, consents, licences and permits required for Development of the Land, Conservation or Maintenance of the Place and/or installation or Maintenance of Interpretive Features, 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 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).
- (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 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 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) 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.

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 3.8, if executed by the relevant consultant appointed pursuant to clause 3.7;
- (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.

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**
- Railway Institute and Technical School, a portion of *Midland Railway Workshops* (HCWA Place No. 3273), located at Yelverton Drive, Midland, and consists of:
- (a) the Land;
 - (b) all buildings, structures and works on the Land from time to time;
 - (c) significant machinery and objects identified in Annexure D; and
 - (d) any thing in connection with the Land, entered or deemed to be entered in the Register.
- Item 2: Significant Fabric**
- The Significant Fabric is described in Conservation Plan Section 4.4, "Levels of Significance", at pages 66-71, including Figures 16-18.
- Item 3: Conservation Policy**
- The Conservation Policy is described in Conservation Plan Sections 5.0, "General Conservation Policies", and 6.0 "Physical Conservation Policies", at pages 73-90.
- Item 4: Land**
- Lot 707 on Deposited Plan 49263 being the whole of the land comprised in Certificate of Title Volume 2615 Folio 195.
- Item 5: Conservation Plan**
- Midland Railway Institute and Technical School, Yelverton Drive, Midland, Conservation Plan* prepared by Philip McAllister Architect (August 2009; updated September 2011; revised September 2015).
- Item 6: Conservation Works**
- The schedule of works described in Annexure A.
- Item 7: Maintenance**
- The schedule of maintenance activities described in Annexure B.
- Item 8: Interpretation Concepts Plan**
- Midland Railway Workshops: Interpretation Concepts Plan* prepared by Stephen Carrick Architects Pty Ltd et al (August 2012).
- Item 9: Interpretation Works**
- The Interpretation Works are described in Annexure C.

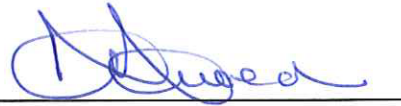
EXECUTED AS A DEED

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





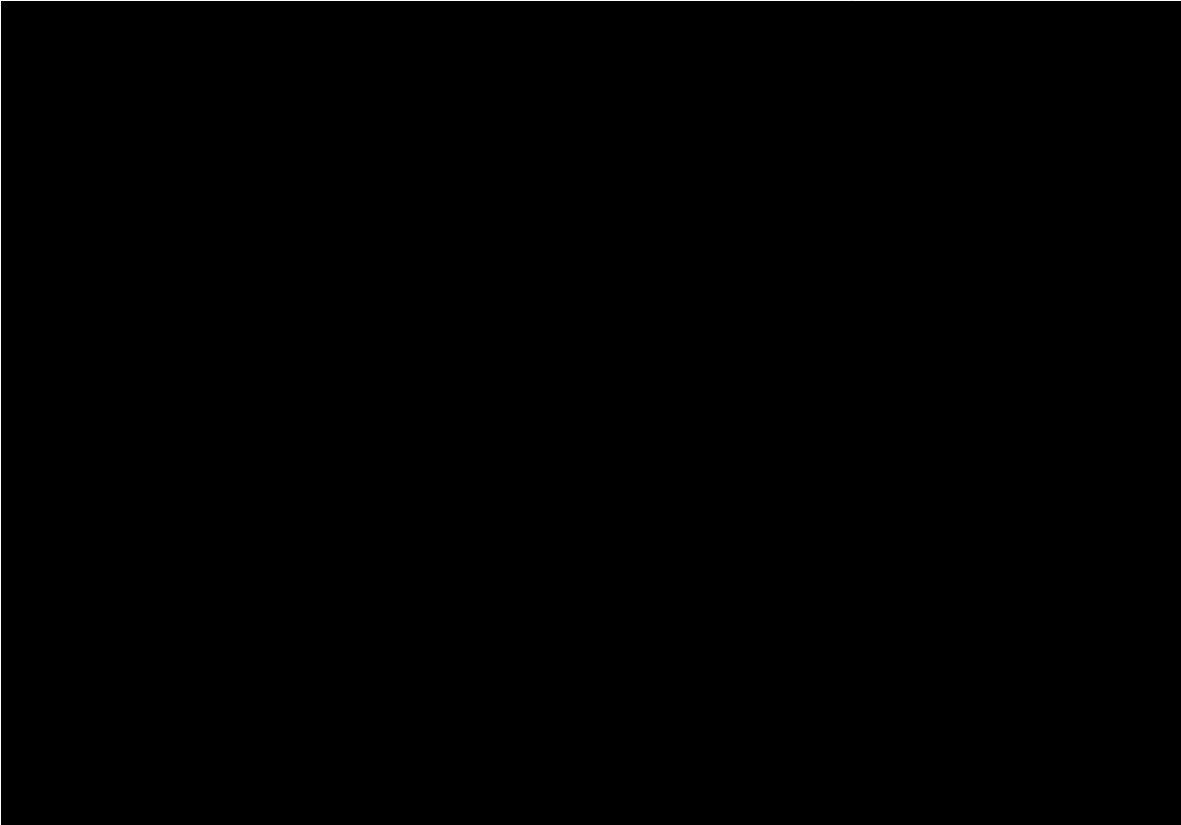
Anne Arnold
CHAIRPERSON

18/11/16

Date signed

22.11.2016

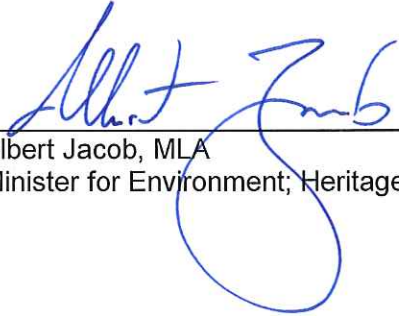
Date signed



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

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

Dated the 24th day of November 2016.



Albert Jacob, MLA
Minister for Environment; Heritage

Annexure A

Conservation Works

The following list of Conservation Works is based on Conservation Plan Section 6.4, "Physical Conservation Works", at page 88. Room numbers are found in Figures 12 and 13 at pages 45 and 46.

Urgent Works (To be completed within 12 months of the Effective Date)

1. Sand, prime and paint to all external joinery using products and finishes to match the existing.
2. Check the external south-western wall near the chimney and fireplace in room 14 and ensure that flashings are sound. Repair as necessary, to match existing.
3. Replace the dust seals to the windows in room 15.
4. Replace the missing cover to the vent pipe on the west elevation.

Short-term Works (To be completed within two years of the Effective Date)

5. Prepare and paint the internal joinery and internal fabric generally. Materials and finishes to match the existing detail of the building.
6. Repair the crack in the concrete step off the southern platform entry to match existing.

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:

- Check all fire-fighting equipment and detection devices are in operational order and ensure all points of egress remain clear.
- Check all electrical fittings, switchboards, etc. for safety reasons.
- 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.
- Inspect structure for cracks and signs of movement, and remedy as required.
- Inspect internal joinery, and repair and/or repaint as required to match existing.

Five Yearly:

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

Re-painting

- Re-paint interior at 5-7 year intervals
- Re-paint exterior at 7-10 year intervals.

Annexure C

Interpretation Works

Interpretation Works are described generally in the *Midland Railway Workshops Interpretation Concepts Plan* (August 2012) and shall be designed with the approval of the Council in consultation with the Metropolitan Redevelopment Authority (MRA) and fabricated and installed to the satisfaction of the Council.

Interpretation outcomes and objectives should be determined as new development and adaptive reuse is being planned for within the building, as well as to inform design outcomes and be integrated into the staging of the new development. Proposals will align with the Interpretation Principles and relate to the endorsed central theme and sub-themes for the Workshops as set out in the Interpretation Concepts Plan. Designs will be based on the selection presented in the Design Concepts included in Interpretation Concepts Plan.