

## **Annexure C**

### **Noongar Standard Heritage Agreement**

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# Noongar Standard Heritage Agreement

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[XX – Insert name of RC/s]

[XX – Insert name of Proponent]

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## Date

THIS AGREEMENT is made on [XX – last party to execute - insert date ]

## Parties

[XX - Insert name of RC] [insert ICN] (RC)

[XX - Insert name of Proponent] [insert ABN or ACN] (Proponent)

## Recitals

- A. The RC represents the Noongar People in relation to Aboriginal Heritage matters in the Agreement Area.
- B. The Proponent wishes to conduct Activities in the Agreement Area.
- C. The Parties have entered into this Agreement to ensure that the Activities are carried out in a manner that protects Aboriginal Sites and Aboriginal Objects to the greatest extent possible.
- D. Under the *Aboriginal Heritage Act 1972* (WA) the Minister for Aboriginal Affairs and his delegated officers have the responsibility for recording, preserving and protecting places that are of significance in Western Australia. Officers in DAA may provide the Parties with information about the evaluation and recording of sites upon request to assist with the processes set out in this NSHA.

The Parties agree as follows:

## Agreed Terms

### 1. Definitions and interpretation

#### 1.1 Definitions

In this NSHA, unless the contrary intention appears:

**Aboriginal Consultants** means:

- (a) those members of the RC or Noongar persons who have been identified by the RC as persons who can speak about the Survey Area; and, where applicable

- (b) persons identified by DAA in consultation with the RC who have previously been recorded on the Aboriginal Heritage Act Register in relation to particular sites in the Survey Area.

**Aboriginal Cultural Business** means a funeral, event or other ceremony that, in accordance with traditional laws and customs, the members of the RC or Noongar People are required to attend or that prevents the members of the RC or Noongar persons from attending to day to day business.

**Aboriginal Heritage** means the cultural heritage value of an Aboriginal Site or of an Aboriginal Object.

**Aboriginal Heritage Act** means the *Aboriginal Heritage Act 1972* (WA).

**Aboriginal Heritage Act Minister** means the Minister in the Government of the State from time to time responsible for the administration of the Aboriginal Heritage Act.

**Aboriginal Heritage Act Register** means the register of places and objects established and maintained under section 38 of the Aboriginal Heritage Act.

**Aboriginal Heritage Act Registrar** means the 'Registrar of Aboriginal Sites' appointed under section 37(1) of the Aboriginal Heritage Act.

**Aboriginal Heritage Act Section 16 Application** means an application to the Aboriginal Heritage Act Registrar for authorisation under section 16 of the Aboriginal Heritage Act to enter upon an Aboriginal Site and to excavate the site or to examine or remove anything on or under the site.

**Aboriginal Heritage Act Section 18 Application** means an application to the Aboriginal Heritage Act Minister for consent under section 18 of the Aboriginal Heritage Act to use land.

**Aboriginal Heritage Agreement** means an agreement with the RC concerning Aboriginal Heritage Surveys in the Agreement Area. To avoid doubt, this NSHA is a form of Aboriginal Heritage Agreement.

**Aboriginal Heritage Liaison Officer** means the person appointed under clause 10.1(a)(ii).

**Aboriginal Heritage Service Provider** means the person or company engaged by the RC, or by the Proponent, to plan and carry out a Survey or Surveys in the Agreement Area. The Aboriginal Heritage Service Provider may be the same as the Principal Aboriginal Heritage Consultant, or may be a separate entity or person. The Aboriginal Heritage Service Provider may also be the RC.

**Aboriginal Heritage Survey** means a survey conducted to assess the potential impacts of Activities on Aboriginal Heritage, whether or not conducted under this NSHA and may include anthropological, ethnographic or archaeological investigations as appropriate. To avoid doubt, an **Aboriginal Heritage Survey** includes a Survey.

**Aboriginal Object** means an object to which the Aboriginal Heritage Act applies by operation of section 6 of the Aboriginal Heritage Act.

**Aboriginal Site** means a place to which the Aboriginal Heritage Act applies by operation of section 5 of the Aboriginal Heritage Act, including sites that are not on the Aboriginal Heritage Act Register.

**ACMC** means the Aboriginal Cultural Material Committee established under section 28 of the Aboriginal Heritage Act.

**Activity** means physical works or operations, involving entry onto the Agreement Area (whether on the surface of the land or waters, or under or over that surface).

**Activity Notice** means a notice issued by the Proponent to the RC under clause 8.2.

**Activity Notice Response** means notice given by the RC to the Proponent under clause 8.3(a).

**Activity Program** means all Activities described in an Activity Notice.

**Agreement Area** means the area to which this NSHA applies, being the land and waters described in Schedule 3.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in Perth, Western Australia.

**CATSI Act** means the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

**Confidential Information** has the meaning given in clause 19.1.

**CPI** means the Consumer Price Index, All Groups Index, number for Perth, Western Australia, published from time to time by the Australian Bureau of Statistics (catalogue number 6401.0). If that index ceases to be published by the Australian Bureau of Statistics then **CPI** shall mean such other index as represents the rise in the cost of living in Perth, Western Australia, as the State reasonably determines after consulting with the RC.

**CPI Calculation** means:



$$A \times \frac{CPI_n}{CPI_{base}}$$

where:

$A$  = the initial base payment under this NSHA as set out in Schedule 5;

$CPI_n$  = the latest June quarterly CPI number as published each year by the Australian Bureau of Statistics;

$CPI_{base}$  = the June 2014 quarterly CPI number as published by the Australian Bureau of Statistics in the second half of the 2014 calendar year.

**DAA** has the meaning given to **Department** in section 4 of the Aboriginal Heritage Act and as at the Effective Date is the State's Department of Aboriginal Affairs.

**DAA Guidelines** means the Guidelines with respect to preparing Aboriginal Heritage Survey reports and applications to the ACMC under section 18 of the Aboriginal Heritage Act published on the DAA website as modified from time to time.

**Due Diligence Guidelines** means the Aboriginal heritage due diligence guidelines issued by the Department of the Premier and Cabinet and DAA dated [insert date of DDG as at date of execution of NSHA].

**Effective Date** means the date on which this NSHA comes into force and effect as an agreement between the Parties, as more particularly described in clause 4.1.

**Estimated Survey Costs** has the meaning given in clause 9.5(b).

**Event of Default** means any of the events described in clause 17.1(b).

**Force Majeure** means an event or cause beyond the reasonable control of the Party claiming force majeure comprising any of the following:

- (a) act of God, lightning, storm, flood, fire, earthquake, explosion, cyclone or wind and wave conditions associated with a cyclone, tidal wave, landslide, adverse weather conditions;
- (b) strike, lockout or other labour difficulty;
- (c) act of public enemy, war, sabotage, blockade, revolution, riot, insurrection, civil commotion, epidemic, terrorism; or
- (d) the effect of any law or authority exercised by a government authority or official by law.

**Government Proponent** includes a department, agency or instrumentality of the State which is proposing to conduct Activities in the Agreement Area.

**GPS** means a global positioning system device.

**Ground Disturbing Activity** means any Activity that is not Low Ground Disturbance Activity or Minimal Impact Activity.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and includes all associated legislation and regulations and any legislation or regulations substituting for or amending any of the foregoing.

**Heritage Information Submission Form** means the form referred to in Schedule 7 and, if that form is up-dated by DAA, that form as set out at the relevant time on the DAA website.

**ILUA** means the Indigenous Land Use Agreement described in items 1 to 4 of Schedule 2.

**Insolvency Event** means where a Party:

- (a) commits an act of insolvency under and for the purposes of the *Corporations Act 2001* (Cth) or the CATSI Act; or
- (b) is placed under external administration under and for the purposes of Chapter 5 of the *Corporations Act 2001* (Cth); or
- (c) is placed under external administration under and for the purposes of Chapter 11 of the CATSI Act; or
- (d) is unable to pay all its debts as and when they become due and payable.

**Last Fieldwork Day** has the meaning given in clause 12.1.

**Low Ground Disturbance Activity** means any Activity that involves only minor ground disturbance. **Low Ground Disturbance Activity** includes the following:

- (a) sampling using hand methods (including hand augering); and
- (b) geophysical, biological, environmental or conservation surveys, including installing monitoring plots and marker posts; and
- (c) establishing temporary camps for exploration, environment or conservation purposes, where the establishment of the temporary camp does not require the removal of trees or shrubs and does not require any earthworks; and
- (d) reconnaissance and patrol in light vehicles; and
- (e) drilling using hand held rig or rig mounted on 4 wheel vehicle and only on cleared tracks; and
- (f) drilling using existing access and without the construction of new roads and tracks (and where use of the existing roads or tracks involves no disturbance to plant roots); and

- (g) digging pitfall traps and temporary trenches for small animals; baiting and installation of temporary fences and nest boxes; and
- (h) removing soil and flora samples and cores up to 20 kilograms, and up to a depth of two metres from the natural surface; and
- (i) collecting and removing loose rocks, firewood, flora or fauna; and
- (j) fossicking for rocks and gemstones; and
- (k) conducting tests for water, site contamination, or other scientific or conservation purposes; and
- (l) maintaining and refurbishing existing facilities, including recreation and camping facilities, water points, signs and other structures; and
- (m) maintaining but not widening existing roads, drains, culverts, bridges, trails, tracks, fence lines and firebreaks; and
- (n) erecting signage and barriers using hand and mechanical augers; and
- (o) revegetating of degraded areas, including fencing areas of vegetation; and
- (p) rehabilitating previously disturbed areas, including ripping, scarifying, matting, brushing, seeding and planting; and
- (q) carrying out species recovery programs; and
- (r) erosion control activities around existing roads, infrastructure or facilities; and
- (s) weed control using hand, mechanical and chemical methods of control excluding excavation or furrowing of soil; and
- (t) conducting tourism operations that:
  - (i) are based in established facilities; or
  - (ii) require the establishment of new facilities that require no, or only minor, ground disturbance; and
- (u) any other use of hand-held tools, not referred to in the preceding paragraphs; and
- (v) events such as car rallies and marathons using existing roads, stock routes or pastoral lease tracks; and
- (w) walking, driving or riding tours using existing roads, stock routes, pastoral lease tracks or historical trails (official or unofficial); and
- (x) exercise of grazing rights permitted under Division 3, Subdivision G of the *Native Title Act 1993*; and
- (y) the laying of water pipelines across the ground where no excavation is required; and

- (z) any other Activities agreed in writing by the Parties to be Low Ground Disturbance Activities.

**Members** means members of the RC and all of those persons who are eligible to be members in accordance with the membership criteria.

**Minimal Impact Activity** means any Activity that involves minimal or no ground disturbance. **Minimal Impact Activity** includes the following:

- (a) Walking, photography, filming; and
- (b) Aerial surveying and magnetic surveys; and
- (c) Use of existing tracks and water courses; and
- (d) Environmental monitoring; and
- (e) Water and soils sampling; and
- (f) Fossicking using hand held instruments; and
- (g) Spatial measurement; and
- (h) Scientific research, using hand held tools; and
- (i) Cultivation and grazing in previously cultivated/grazed areas; and
- (j) Maintenance of existing paths, walls, fences, roads, tracks, bridges, public infrastructure (e.g. electrical, water, sewage) and community utilities within the existing footprint and adjacent service areas; and
- (k) Feral animal eradication, weed, vermin and pest control, vegetation control and fire prevention; but excluding construction of fences, infrastructure and clearing of native vegetation; and
- (l) Light vehicular access and camping using existing tracks and involving no clearance of vegetation.

**Noongar Boodja Trust Deed** means the Trust Deed as defined in the ILUA.

**Noongar Boodja Trustee** means the Trustee appointed under the Noongar Boodja Trust Deed from time to time.

**Noongar People** for the purposes of this NSHA means the Native Title Agreement Group as defined in the ILUA.

**NSHA** means this Noongar Standard Heritage Agreement.

**Party** means a party to this NSHA and **Parties** mean any 2 or more of them as the case requires.

**Preliminary Advice** means advice, in writing, complying with clause 12.3(a).

**Principal Aboriginal Heritage Consultant** means the anthropologist, archaeologist or other appropriately qualified professional nominated and agreed under clauses 8.3(d) or 9.6.

**Program of Proposed Works** means the program of proposed works for a specified period prepared by a Proponent that will be carried out, wholly or partially, in the Agreement Area.

**Regional Corporation** has the meaning given in the Noongar Boodja Trust Deed.

**Sensitive Heritage Information** means culturally restricted information about Aboriginal Sites or any other items of Aboriginal Heritage, provided by the Aboriginal Consultants during the course of or in relation to a Survey, including where such information is contained in any Survey Report.

**Site Avoidance Model** means a Survey methodology involving the identification of areas where Activity should not be undertaken because of the presence of an Aboriginal Site within that area.

**Site Avoidance Survey** means a Survey carried out using the Site Avoidance Model.

**Site Identification Model** means a Survey methodology involving the identification of Aboriginal Sites.

**Site Identification Survey** means a Survey carried out using the Site Identification Model.

**Survey** means an Aboriginal Heritage Survey conducted under this NSHA.

**Survey Agreement Date** has the meaning given in clauses 9.1(a) or 9.1(b).

**Survey Agreement Period** has the meaning given in clause 9.1(d).

**Survey Area** means the area of land or waters the subject of a Survey, or proposed to be the subject of a Survey.

**Survey Methodology** means either a Site Avoidance Model or a Site Identification Model.

**Survey Report** means a report of the results of a Survey, containing the information set out in clause 12.4 and Schedule 6.

**Survey Team** has the meaning given in clause 10.1.

## **1.2 Interpretation – general**

In this NSHA, unless the contrary intention appears:

- (a) the headings and subheadings in this NSHA are inserted for guidance only and do not govern the meaning or construction of any provision of this NSHA;
- (b) words expressed in the singular include the plural and vice versa;
- (c) a reference to a clause, schedule or annexure is a reference to a clause, schedule or annexure to this NSHA and a reference to this NSHA includes any recital, schedule or annexure;
- (d) a reference to a document, agreement (including this NSHA) or instrument is to that document, agreement or instrument as varied, amended, supplemented, or replaced;
- (e) a ‘person’ includes a company, partnership, firm, joint venture, association, authority, corporation or other body corporate, trust, public body or Government Proponent;
- (f) a reference to a ‘person’ (including a Party to this NSHA) includes a reference to the person’s executors, administrators, successors and permitted assigns, transferees or substitutes (including persons taking by permitted novation);
- (g) a reference to a person, statutory authority or government body (corporate or unincorporate) established under any statute, ordinance, code, legislation or other law includes a reference to any person (corporate or unincorporate) established or continuing to perform the same or substantially similar function;
- (h) a reference to conduct includes, without limitation, an omission, statement or undertaking, whether or not it is in writing;
- (i) ‘including’ means ‘including but not limited to’;
- (j) a reference to a statute, ordinance, code, legislation or other law includes regulations and other instruments under it and amendments, re-enactments, consolidations or replacements of any of them;
- (k) a reference to dollars or \$ is a reference to the currency of Australia;
- (l) a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;

- (m) a reference to a month is to be interpreted as the period of time commencing at the start of any day in one of the calendar months and ending immediately before the start of the corresponding day of the next calendar month or if there is no such day, at the end of the next calendar month;
- (n) references to time are to local time in Perth, Western Australia;
- (o) where time is to be reckoned from a day or event, that day or the day of that event is excluded;
- (p) if the day on or by which a person must do something under this NSHA is not a Business Day, the person must do it on or by the next Business Day; and
- (q) if any conflict arises between the terms and conditions contained in the clauses of this NSHA and any recitals, schedules or annexures to this NSHA, the terms and conditions of the clauses of this NSHA shall prevail.

### **1.3 Interpretation – liabilities and benefits**

In this NSHA, unless the contrary intention appears:

- (a) any agreement, representation, warranty or indemnity set out in this NSHA which is in favour of the RC and the Members is for the benefit of them jointly and severally; and
- (b) any agreement, representation, warranty or indemnity in favour of the Proponent, where the Proponent comprises more than one entity, is for the benefit of them jointly and severally; and
- (c) any agreement, representation, warranty or indemnity which is given by the Proponent, where the Proponent comprises more than one entity, binds them jointly and severally.

## **2. No Application of this NSHA to Emergency Activities**

This Agreement does not apply to Activities which are urgently required to secure life, health or property, or to prevent or address an imminent hazard to life, health or property of any person.

### 3. Execution and effect of this NSHA

- (a) Execution of this NSHA may take place by the RC and the Proponent executing any number of counterparts of this NSHA, with all counterparts together constituting the one instrument.
- (b) If this NSHA is to be executed in counterparts, the Parties must execute sufficient numbers for each of them to retain one instrument (constituted by the counterparts).
- (c) Notwithstanding the prior provisions of this clause 3, the Parties acknowledge that, in order to avoid possible confusion, it is their intention that all Parties shall execute one instrument (in sufficient copies for each Party to retain an executed copy).

### 4. Term and termination

#### 4.1 Commencement

This NSHA comes into force and effect as between the Proponent and the RC on the date that the last of those Parties executes this NSHA.

#### 4.2 Termination

This NSHA shall terminate on the occurrence of whichever of the following events is first to occur:

- (a) all Parties agree in writing to end this NSHA;
- (b) as referred to in clause 17.2(d), a court order is made to wind up either Party as the result of an Event of Default.

#### 4.3 Termination or de-registration of ILUA does not affect NSHA

Notwithstanding the termination or de-registration of the ILUA, this NSHA shall continue to apply to the Parties with full force and effect, to the extent that this NSHA has commenced under clause 4.1.

#### 4.4 Survival of provisions and entitlements upon termination

This NSHA ceases to have any force or effect on and from the date of termination, save that:

- (a) any entitlements, obligations or causes of action which accrued under this NSHA prior to termination survive termination;
- (b) clauses 1, 4.4, 6, 12.7, 13, 18, 19, 21, 22, 25.2, 25.3, 25.4 and 25.6 survive termination.



## **5. Area to which this NSHA applies**

This NSHA applies to the Agreement Area.

## **6. Authority, representations and warranties**

### **6.1 RC representations and warranties**

The RC represents and warrants, for the benefit of the Proponent, that:

- (a) it is the Regional Corporation for the Agreement Area; and
- (b) it represents its Members in respect of Aboriginal Heritage matters within the Agreement Area; and
- (c) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary authorisations) in order to enable it lawfully to enter into, exercise its rights and perform its obligations under, this NSHA have been fulfilled or done; and
- (d) it knows of no impediment to it performing its obligations under this NSHA.

### **6.2 Proponent representations and warranties**

The Proponent represents and warrants, for the benefit of the RC and its Members, that:

- (a) it is authorised to enter into this NSHA; and
- (b) all conditions and things required by applicable law to be fulfilled or done (including the obtaining of any necessary authorisations) in order to enable the Proponent lawfully to enter into, exercise its rights and perform its obligations under, this NSHA have been fulfilled or done; and
- (c) it knows of no impediment to the Proponent performing its obligations under this NSHA.

### **6.3 Reliance on warranties**

Each Party acknowledges that the other Parties have relied on the warranties provided in clauses 6.1 or 6.2 (as the case may be) to enter into this NSHA.

### **6.4 Acknowledgement regarding legal advice**

Each Party acknowledges that it has:

- (a) had the benefit of legal advice in respect of this NSHA and the effect of it on the rights, obligations and liabilities of each of the Parties to it; and
- (b) been provided with an opportunity to consider that advice and all of the provisions of this NSHA before entering into it.

## **7. Cooperation regarding Aboriginal Sites and proposed Activities**

### **7.1 Early exchange of information – Program of Proposed Works**

The Parties acknowledge the importance of an early exchange of information between the Proponent and the RC about proposed Activities in the Agreement Area to enable informed decisions to be made. In accordance with this objective:

- (a) wherever practical, the Proponent shall provide the RC with a Program of Proposed Works for which Activity Notices are likely to be provided in the foreseeable future; and
- (b) where, as a result of receiving the Program of Proposed Works the RC becomes aware of any particular cultural heritage concern arising from a proposal to conduct an Activity (including concerns as to the extent of the proposed Activity and the number of sites that may be affected), the RC will use its best endeavours to raise those concerns with the Proponent as soon as practicable after receipt of the Program of Proposed Works.

### **7.2 Due Diligence Guidelines**

- (a) The Parties acknowledge the application of the Due Diligence Guidelines as part of the assessment process for considering the impact of any proposed Activity on Aboriginal Heritage; and
- (b) Following the issuing of the Activity Notice if there is any doubt as to the impact of any proposed Activity on Aboriginal Heritage after considering the Due Diligence Guidelines, the Parties may seek the advice and assistance of the Aboriginal Heritage Act Registrar or other relevant officer from DAA, with respect to the provision of further information if appropriate.

### **7.3 No breach of Heritage Act**

- (a) Nothing in this NSHA purports to authorise any act or omission that would be in breach of the Aboriginal Heritage Act.
- (b) If the Proponent carries out any Activities through contractors, then the Proponent shall ensure that such contractors are made aware of the obligations of the Aboriginal Heritage Act and of this NSHA.

## 8. The Activity Notice

### 8.1 Circumstances where no Activity Notice needs to be given

- (a) If the Proponent has reasonable grounds to form the opinion that no Survey is required (taking into account the matters referred to in clause 8.1(b) and the Due Diligence Guidelines), the Proponent may elect not to issue an Activity Notice in respect of a proposed Activity Program.
- (b) The Proponent does not have to issue an Activity Notice where the Activities proposed to be conducted consist entirely of:
  - (i) Minimal Impact Activities; or
  - (ii) Low Ground Disturbance Activities of a class that the RC has notified in writing to the Proponent need not be the subject of an Activity Notice.
- (c) If the Proponent has any doubt, including because of consideration of the Due Diligence Guidelines, as to whether clauses 8.1(a) and 8.1(b) operate to exempt the Proponent from issuing an Activity Notice, then the Proponent shall issue the Activity Notice in any event.

### 8.2 Giving the Activity Notice

- (a) Except where clause 8.1(a) or (b) applies, if the Proponent intends to undertake an Activity in the Agreement Area, it shall issue a notice in writing to the RC in accordance with this clause 8.2 (**Activity Notice**).
- (b) The main purposes of an Activity Notice are:
  - (i) to provide adequate information to assist the RC to make an assessment as to whether a Survey is required and if so, whether a Site Identification Survey or a Site Avoidance Survey; and
  - (ii) if a Survey is required, to provide information relevant to the conduct of that Survey.
- (c) The Activity Notice:  
shall contain:
  - (i) the basic information specified in part 1.1 of Schedule 4; and
  - (ii) the key statements and nominations specified in part 1.2 and the detailed contents specified in part 1.3 of Schedule 4; andmay also contain:
  - (iii) the additional contents specified in part 2 of Schedule 4.

- (d) If the Proponent omits to specify or nominate, in an Activity Notice, any of the particular items referred to in parts 1.2 and 1.3 of Schedule 4, then the default provisions provided in part 3 of Schedule 4 shall apply.
- (e) The Parties acknowledge that the Proponent may require compliance with the DAA Guidelines where the Proponent envisages that it may wish to file an Aboriginal Heritage Act Section 18 Application or Aboriginal Heritage Act Section 16 Application.
- (f) The RC acknowledges that the inclusion in an Activity Notice of the matters described in parts 1.2(c) to (f) of Schedule 4 does not prejudice any statement by the Proponent that it considers that no Survey is required.
- (g) To avoid doubt, the Proponent may modify any aspect of the Activity Notice up to the time of receiving the Activity Notice Response. Proposed modifications to the Activity Notice after receipt of the Activity Notice Response shall be discussed between the Parties but, acting reasonably, the RC shall have the right to request a fresh Activity Notice instead of dealing with the proposed modified Activity Notice. If a fresh Activity Notice is issued the time limits in clause 16.1(a) shall apply as if that were a new Activity Notice. The Proponent may also request any of the items referred to in part 1.2(f) of Schedule 4 at any later time, in accordance with clause 12.2.

### **8.3 Considering the Activity Notice and deciding whether a Survey is required**

- (a) The RC will consider the Activity Notice and shall, within 15 Business Days after receipt of such Activity Notice or modified Activity Notice, notify the Proponent in writing as to whether the RC considers that a Survey is required (**Activity Notice Response**). In coming to its decision the RC shall take into account:
  - (i) the extent to which the Activity Program described in the Activity Notice consists of Low Ground Disturbance Activities; and
  - (ii) the extent to which the land and waters the subject of the Activity Notice have been the subject of a previous Aboriginal Heritage Survey. In considering this factor, the RC will consider whether it is clear from the reported results of the previous Aboriginal Heritage Survey that the Activities disclosed in the Activity Notice can be carried out without damaging Aboriginal Heritage; and
  - (iii) any relevant previous decisions by the RC under clause 8.3(b); and
  - (iv) any other matter the RC reasonably considers relevant, including if appropriate a visit to the Agreement Area with representatives from the Proponent and from DAA.

- (b) The Proponent shall be free to carry out any Activity in the Agreement Area without conducting a Survey where:
  - (i) the RC so agrees in writing; or
  - (ii) the RC waives its right under this NSHA to require a Survey of the proposed Activity;
 

whether in an Activity Notice Response or otherwise.
- (c) Either Party may request additional information from the other at any time to enable discussion and proper consideration of the Activity Notice.
- (d) If in its Activity Notice Response the RC indicates that it considers that a Survey is required, then the Activity Notice Response shall set out the following additional information:
  - (i) if different to the opinion given by the Proponent in the Activity Notice in accordance with part 1.2(a) of Schedule 4 a statement of the extent to which the Activity Program consists of Low Ground Disturbance Activity, in the RC's opinion; and
  - (ii) if different to the nomination by the Proponent in the Activity Notice in accordance with part 1.2(c) Schedule 4, a nomination of the RC's proposed Survey Methodology; and
  - (iii) if different to the date or dates nominated by the Proponent in the Activity Notice in accordance with part 1.2(e) of Schedule 4, a nomination of a proposed Survey start date or finish date taking into account the availability of the Aboriginal Heritage Service Provider, if contracted by the RC; and
  - (iv) if practicable, and subject to clause 9.5(a), an estimate of costs to conduct the Survey; and
  - (v) an election, or not, by the RC as to whether it will:
    - (A) contract the Aboriginal Heritage Service Provider; or
    - (B) perform the functions of the Aboriginal Heritage Service Provider itself and, if so, whether it will need to contract a Principal Aboriginal Heritage Consultant; and
  - (vi) if electing to contract the Aboriginal Heritage Service Provider, a nomination of the RC's preferred proposed Aboriginal Heritage Service Providers and (if different to the Aboriginal Heritage Service Provider,) Principal Aboriginal Heritage Consultants; and
  - (vii) if the RC does not elect either to be the Aboriginal Heritage Service Provider or to contract the Aboriginal Heritage Survey Provider under clause 8.3(d)(v), the names and contact details of the proposed Aboriginal

Consultants for the Survey. If these details are not provided to the Proponent either in the Activity Notice Response or within 10 Business Days after the Survey Agreement Date, the Proponent may contact DAA for details of persons identified by DAA who have previously been recorded on the Aboriginal Heritage Register in relation to particular sites in the Survey Area.

#### **8.4 Disagreements following Activity Notice Response**

If, following receipt by the Proponent of the Activity Notice Response, the Parties are in disagreement on any matter concerning the conduct of a proposed Survey, the Parties shall then endeavour to agree on all outstanding matters by following the provisions of clause 9. To avoid doubt, until the Parties have consulted under clause 9 during the period of 20 Business Days referred to in clause 9.1(d), no Party is entitled to invoke the dispute resolution provisions of clause 18 in respect of any matter the subject of this clause 8.

### **9. Survey agreement and planning**

#### **9.1 Operation of this clause 9 – Survey Agreement Date**

- (a) Subject to clause 9.1(b), the date on which agreement is reached on all matters referred to in clauses 9.2 to 9.7 (inclusive) is the **Survey Agreement Date**.
- (b) If after receipt by the Proponent of the Activity Notice Response under clause 8.3(a) the Parties are in agreement about all matters regarding a proposed Survey, then the date of receipt of the Activity Notice Response shall be deemed to be the Survey Agreement Date referred to in clause 9.1(a).
- (c) The Parties' discussions under this clause 9 shall be conducted reasonably and in good faith.
- (d) The Parties shall ensure that the Survey Agreement Date occurs within 20 Business Days after the date of receipt by the Proponent of the Activity Notice Response (**Survey Agreement Period**).
- (e) If any of the matters referred to in clauses 9.2 to 9.7 (inclusive) cannot be agreed during the Survey Agreement Period, then either Party may serve a notice of Dispute in accordance with clause 18.9(a) on or after the first Business Day after the expiry of the 20 Business Days comprising the Survey Agreement Period referred to in 9.1(d).

#### **9.2 Whether a Survey is required**

- (a) The Parties' discussions regarding whether a Survey is required will be guided by the matters in clauses 8.3(a), and 9.2(b).

- (b) The following provisions shall apply to the Parties' discussions about whether a Survey is required.
  - (i) Where no previous Aboriginal Heritage Survey (whether under this NSHA or otherwise) has been undertaken in relation to the area of land and waters the subject of the Activity Notice, there is a non-binding presumption that a Survey is required unless otherwise agreed or waived in accordance with clause 8.3(b).
  - (ii) Where this NSHA does not deal with the particular circumstance as to whether a Survey is required, there is a non-binding presumption that a Survey is required.
  - (iii) Where a previous Aboriginal Heritage Survey (whether conducted under this NSHA or otherwise) has, or if not clear, reasonably appears to have, covered the area the subject of the Activity Notice, there is no presumption either way as to whether a Survey is required. Subject to confidentiality provisions, the Proponent must (if it is in their possession or control) provide by way of notice a copy of the written report of the previous Aboriginal Heritage Survey to the RC (if such copy has not already been provided with the Activity Notice).
  - (iv) Subject to the presumptions in clauses 9.2(b)(i) and 9.2(b)(ii), and the matters described in clause 9.2(b)(iii), in determining whether a Survey is required, the Parties will have regard to the following matters:
    - (A) the nature of the Activities outlined in the Activity Notice; and
    - (B) whether there has been any previous Aboriginal Heritage Survey and the age, methodology, participants, standard and results of that survey; and
    - (C) the extent to which the land has been affected by previous ground disturbing activities; and
    - (D) whether the Aboriginal Heritage Act Register discloses any Aboriginal Sites on the land the subject of the Activity Notice; and
    - (E) any relevant matters relating to Noongar practices, laws and customs; and
    - (F) any other relevant matters raised by any of the Parties.

### **9.3 Agreements regarding Low Ground Disturbance Activity**

- (a) The Parties' discussions to confirm the extent of Low Ground Disturbance Activity, and whether a Survey is required in respect of such Activity, will be guided by the definition of Low Ground Disturbance Activity in this NSHA.

- (b) If the RC considers that a Survey in respect of any Low Ground Disturbance Activity is required, then the RC and the Proponent will each use their reasonable endeavours to address the concerns of the RC, by modifying the proposed Low Ground Disturbance Activity to limit the impact it may have on Aboriginal Heritage to the extent necessary to remove the need to conduct a Survey.

#### **9.4 Selection of Survey Methodology**

The discussions between the RC and the Proponent about Survey Methodology shall be conducted with a view to reaching agreement on a Survey Methodology that is fit for purpose, having regard to the RC's concerns for the Survey Area and the Activities proposed by the Proponent.

#### **9.5 Estimate of costs of Survey when RC is contracting Aboriginal Heritage Service Provider**

Where the RC has elected to be the Aboriginal Heritage Service Provider or to contract an Aboriginal Heritage Service Provider under 8.3(d)(v), the following provisions apply:

- (a) the Parties acknowledge that it may not always be possible for the RC or the RC's nominated Aboriginal Heritage Service Provider to provide an accurate cost estimate at the time of providing an Activity Notice Response, and that a cost estimate in many cases may need to be provided, or revised, following resolution of all other matters under this clause 9.
- (b) if an estimate of Survey costs has not been provided earlier, then the RC must ensure that by the end of the Survey Agreement Period, the Aboriginal Heritage Service Provider submits a written and itemised estimate of Survey costs to the Proponent for approval by the Proponent (the **Estimated Survey Costs**).

#### **9.6 Selection of Aboriginal Heritage Service Provider and Principal Aboriginal Heritage Consultant**

- (a) If the RC is contracting an Aboriginal Heritage Service Provider, and the RC's Activity Notice Response does not identify the RC's nominated Aboriginal Heritage Service Provider and (if different to the Aboriginal Heritage Service Provider) the Principal Aboriginal Heritage Consultant, then the RC will advise the Proponent of these nominations during the Survey Agreement Period.
- (b) The Parties acknowledge that, if the RC is contracting an Aboriginal Heritage Service Provider, the Proponent will not usually have any role in nominating an Aboriginal Heritage Service Provider or a Principal Aboriginal Heritage



Consultant (if different), subject however to the rights of the Proponent under clause 16.1(e) in the event of delays.

- (c) If the Proponent or the RC has reasonable concerns about the expense, competence or impartiality of the Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant (as the case may be) to be contracted by the RC or the Proponent (as the case may be), it may request the other Party to consider another anthropologist, archaeologist or appropriately qualified professional to act as Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant (as the case may be).
- (d) If the Parties cannot reach agreement on the Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant (as the case may be) to be contracted by the RC or the Proponent within the Survey Agreement Period, then in addition to and without limiting the Proponent's general rights under clause 16.1(e), the RC or the Proponent (whichever is the non-contracting party) may nominate an alternative proposed Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant and the other Party shall promptly respond to any such nomination and shall ensure that it does not unreasonably withhold its approval to appointing such nominee as the Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant (as the case may be).

## **9.7 Estimate of time for Survey commencement or completion**

If following the Activity Notice Response and where the RC is contracting the Aboriginal Heritage Service Provider the Parties are not in agreement about the date of commencement of fieldwork for the Survey or the date of completion of fieldwork for the Survey (as the case may be), then during the Survey Agreement Period, the Parties shall agree on such date or dates.

# **10. Survey Team and commencement of Survey**

## **10.1 Survey team**

- (a) As soon as possible after the Survey Agreement Date, and where either the RC or the Proponent is contracting the Aboriginal Heritage Service Provider, the Aboriginal Heritage Service Provider, in conjunction with the Principal Aboriginal Heritage Consultant if appointed, after receiving names and contact details of the Aboriginal Consultants from the RC in accordance with 8.3(d)(vii), will organise a Survey Team (**Survey Team**), which shall consist of:
  - (i) up to 8 Aboriginal Consultants, with appropriate experience and authority, as are necessary, in the opinion of the Aboriginal Heritage

Service Provider in consultation with the RC, to examine the Survey Area and assist in the Survey; and

- (ii) if considered necessary by the Aboriginal Heritage Service Provider and agreed to by the Parties, an Aboriginal Heritage Liaison Officer, who will be responsible for Survey logistics and on-ground operations; and
  - (iii) where considered necessary by the Aboriginal Heritage Consultants, the RC or the Aboriginal Heritage Service Provider, and agreed to by the Parties, another anthropologist of a specific gender; and
  - (iv) where the Survey being conducted is a Site Identification Survey, or where considered necessary by the Aboriginal Heritage Service Provider and agreed to by the Parties, including during the course of the Survey, an archaeologist.
- (b) Where considered necessary by the Aboriginal Heritage Service Provider and agreed to by the RC and the Proponent, more than one archaeologist may be appointed to the Survey Team.
- (c) The number of paid Aboriginal Consultants to be appointed to the Survey Team will not be more than the number specified in clause 10.1(a)(i) unless particular circumstances can be demonstrated to exist including, for example:
- (i) a large number of registered Aboriginal Sites are known to exist within a Survey Area and the number of Aboriginal people who have authority to speak for those Aboriginal Sites and should be consulted about them is greater than 8; and/or
  - (ii) the Survey Area crosses the boundaries of two or more RCs.

In these circumstances the Proponent and the RCs must agree on the number of additional Aboriginal Consultants for the Survey Team.

- (d) Additional Aboriginal Consultants may accompany the Survey Team but the Proponent will not be liable for additional costs.
- (e) The Proponent may send one or two nominees with appropriate authority on the Survey to assist the Survey Team conducting the Survey with provision of information and requests where required.

## **10.2 Commencement and conduct of Survey**

- (a) If the RC is contracting the Aboriginal Heritage Service Provider, the RC will use its, and must ensure that the Aboriginal Heritage Service Provider and the Principal Aboriginal Heritage Consultant (if different to the Aboriginal Heritage Service Provider) each uses its best endeavours to commence the

Survey within the time agreed by the Parties, or in the absence of agreement within 30 Business Days after the Survey Agreement Date unless clauses 11(c) and 18.9 apply, in which case the time for commencement of the Survey will be extended in accordance with the timeframes set out in the relevant clauses if the Dispute is resolved.

- (b) The RC and/or the Proponent (depending upon which is contracting the Aboriginal Heritage Service Provider) will ensure that the Survey Team observes and complies with any safety and other procedures and policies implemented from time to time by the Proponent over the Survey Area. The Proponent will provide the RC with details of and explain these procedures and policies in order for the RC to provide these details and explain the procedures and policies to the Aboriginal Consultants before the Survey commences. The Proponent will also provide members of the Survey Team (and any other attending members of the RC) with protective clothing and equipment if reasonably necessary in all the circumstances. To the extent that the Proponent has control of the Survey Area, the Proponent shall take such measures as are practicable to ensure that the members of the Survey Team are not exposed to hazards.
- (c) The RC acknowledges that the members of the Survey Team are not employees of the Proponent, and that the Proponent is not required to have insurance in place for the protection of Survey Team members. The onus is on the Party contracting the Aboriginal Heritage Service Provider to ensure that the Aboriginal Heritage Service Provider has insurance in place to adequately cover the Survey Team.
- (d) The Survey Team will as appropriate in the circumstances:
  - (i) visit the Survey Area; and
  - (ii) identify any Aboriginal Sites in the Survey Area or, in the case of a Site Avoidance Survey, determine the area to be avoided due to the presence of an Aboriginal Site; and
  - (iii) provide sufficient information to the Aboriginal Heritage Service Provider, or any other heritage consultant accompanying the Survey Team, to enable them to:
    - (A) record the external boundaries of all Aboriginal Sites or, in the case of a Site Avoidance Survey, the area to be avoided due to the presence of an Aboriginal Site, using a GPS; and
    - (B) record relevant Aboriginal Site information or, in the case of a Site Avoidance Survey, the area to be avoided, on a Heritage Information Submission Form; and

- (C) mark the external boundaries of identified Aboriginal Sites or, in the case of a Site Avoidance Survey, the external boundaries of the area to be avoided due to the presence of an Aboriginal Site, on a map; and
  - (D) make recommendations for the protection and management of any Aboriginal Site identified by the Survey Team; and
  - (E) generally, prepare a Survey Report that complies with the requirements of clause 12.
- (e) When in the field, and in response to Aboriginal Heritage concerns raised by the Aboriginal Consultants, the representatives of the Proponent nominated under clause 10.1(e):
  - (i) shall withdraw from discussion and inspections in order to ensure the confidentiality of Sensitive Heritage Information or other information pertaining to Aboriginal Sites; and
  - (ii) may make modifications to the Activity Program and the Survey Team will then proceed to assess the Aboriginal Heritage significance of the modified Activity Program in accordance with the applicable Survey Methodology.

## 11. Payment for Surveys when the RC is contracting the Aboriginal Heritage Service Provider

Where the RC has elected to contract an Aboriginal Heritage Service Provider or to perform the functions of the Aboriginal Heritage Service Provider under clause 8.3(d)(v), the following provisions apply:

- (a) The Proponent shall pay the costs and expenses of the Survey at the rates set out in Schedule 5.
- (b) The Proponent agrees to pay 100% of the approved Estimated Survey Costs to the RC:
  - (i) within 10 Business Days before the commencement of the Survey, or
  - (ii) within 10 Business Days after the approval of the Estimated Survey Costs under clause 9.5(b),whichever is the earlier (the **Relevant Period**).
- (c) If the Proponent fails to pay the Estimated Survey Costs within the Relevant Period the RC may serve a notice of Dispute in accordance with clause 18.9(a) on or after the first Business Day following the end of the Relevant Period.
- (d) The monies constituting the Estimated Survey Costs must be:
  - (i) held by the RC in an account established specifically for survey costs at a bank and must be kept separate from all other bank accounts of, or monies received or held by, the RC; and
  - (ii) used only for the payment of the Estimated Survey Costs and any repayment to the Proponent under clause 11(e) or 11(g).
- (e) If the Survey is cancelled by the Proponent before it is completed, the part of the Estimated Survey Costs that has been expended and any of the disbursements that have been paid and cannot be recovered will be forfeited and the balance will be refunded to the Proponent.
- (f) The RC must provide a tax invoice of the Survey costs to the Proponent that reconciles the Estimated Survey Costs with the costs incurred. This tax invoice must be accompanied by all relevant receipts and invoices, and any other relevant supporting documentation, and must be certified as correct by the chief executive officer of the RC or their delegate.

- (g) If the costs incurred are less than the Estimated Survey Costs, the RC shall refund the balance of the monies paid in accordance with clause 11(b) to the Proponent.
- (h) If the costs incurred exceed the Estimated Survey Costs by 5% or less, the Proponent shall pay the additional amount to the RC within 20 Business Days of receiving a tax invoice (accompanied by all relevant receipts and invoices and any other relevant supporting documentation) that must be certified as correct by the chief executive officer of the RC or their delegate.
- (i) If the Proponent receives notification of revised costs from the RC under clause 12.2(b), the Proponent will pay 100% of any additional costs to the RC within 10 Business Days of their approval by the Proponent. Once paid, these monies will be added to the Estimated Survey Costs and dealt with in accordance with (c) – (h) above.

## 12. Survey Report

### 12.1 Timing of Preliminary Advice and Survey Report

After the last day of fieldwork for a Survey (**Last Fieldwork Day**) if either the Proponent or the RC is contracting the Aboriginal Heritage Service Provider, the Proponent or the RC, as the case may be, will ensure that Aboriginal Heritage Service Provider or the Principal Aboriginal Heritage Consultant provides the Parties with:

- (a) Preliminary Advice (if requested by the Proponent in the Activity Notice or at any other time under clause 12.2), as soon as reasonably practicable, and in any event to the RC within 5 Business Days after the Last Fieldwork Day and, after taking into account any comments from the RC, to the Proponent within 12 Business Days after the Last Fieldwork Day;
- (b) a draft Survey Report (if requested by the Proponent in the Activity Notice or at any other time under clause 12.2), as soon as reasonably practicable, and in any event to the RC within 15 Business Days after the Last Fieldwork Day, to enable the RC to comment on it; and after taking into account any comments from the RC, to the Proponent within 25 Business Days after the Last Fieldwork Day;
- (c) a final Survey Report, taking into account any comments from the Proponent about any identified technical, factual or typographical errors or any issues of non-compliance with the guidelines in part 1, part 2 and/or part 3 of Schedule 6, within 35 Business Days after the Last Fieldwork Day.

## **12.2 Requests for reports and compliance with DAA Guidelines at any time**

- (a) Notwithstanding the relevant nominations by the Proponent in the Activity Notice under:
  - (i) part 1.2(f)(i) and (ii) of Schedule 4 the Proponent may by notice in writing at any time ask that the RC (if contracting the Aboriginal Heritage Service Provider) request the Aboriginal Heritage Service Provider to provide a Preliminary Advice or draft Survey Report.
  - (ii) part 1.2(f)(iii) of Schedule 4, the Proponent may by notice in writing at any time advise the RC that it has become aware that an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application may need to be made and ask that the RC (if contracting the Aboriginal Heritage Service Provider) request the Aboriginal Heritage Service Provider to comply with the DAA Guidelines when preparing the Survey Report. The Parties shall discuss any changes required to matters previously agreed under clause 9 and clause 10, to enable the Aboriginal Heritage Service Provider to comply with the DAA Guidelines when preparing the Survey Report. If the Parties cannot agree on any changes required, then either Party may serve a notice of Dispute in accordance with clause 18.9(a) 5 Business Days after receiving the notice in writing.
  - (iii) part 1.2(f)(iii) of Schedule 4, if the party contracting the Aboriginal Heritage Service Provider is notified by the Aboriginal Heritage Service Provider that they have become aware that an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application may need to be made, the contracting Party shall by notice in writing advise the other Party, and the Parties shall discuss any changes required to matters previously agreed under clause 9 and clause 10, to enable the Aboriginal Heritage Service Provider to comply with the DAA Guidelines when preparing the Survey Report. If the Parties cannot agree on any changes required, then either Party may serve a notice of Dispute in accordance with clause 18.9(a) 5 Business Days after receiving the notice in writing.
- (b) The Proponent acknowledges that a notification under clause 12.2(a)(i) – (iii), may impact on the times and costs for the Survey, and, if the RC is contracting the Aboriginal Heritage Service Provider, the RC shall ensure that any revised times and costs (together with supporting documentation) are notified promptly to the Proponent.

### **12.3 Preliminary Advice**

- (a) The Preliminary Advice should provide sufficient information (without disclosing any Sensitive Heritage Information) to allow the Proponent to know whether to proceed or not with any Activities, with or without conditions.
- (b) Upon receipt by the Proponent of the Preliminary Advice, and subject to any reasonable recommendations in the Preliminary Advice, the Proponent may commence the Activities described in the relevant Activity Program (except any Activities indicated in the Preliminary Advice as potentially resulting in a breach of the Aboriginal Heritage Act).

### **12.4 Contents of Survey Report**

The Party contracting the Aboriginal Heritage Service Provider must ensure the following:

- (a) that the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant will, in consultation with the Survey Team, prepare a Survey Report in accordance with the guidelines:
  - (i) in part 1 and part 2 of Schedule 6, where the Survey being conducted is a Site Avoidance Survey; or
  - (ii) in part 1 and part 3 of Schedule 6, where the Survey is a Site Identification Survey.
- (b) where the Proponent has requested in writing (whether in the Activity Notice or at any other time allowable under clause 12.2) that the Survey Report complies with the DAA Guidelines and the Proponent envisages that it may wish to file an Aboriginal Heritage Act Section 18 Application or Aboriginal Heritage Act Section 16 Application, that the Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant includes sufficient information in the Survey Report to assist:
  - (i) the ACMC in considering an Aboriginal Heritage Act Section 18 Application; or
  - (ii) the Aboriginal Heritage Act Registrar in considering an Aboriginal Heritage Act Section 16 Application.
- (c) that in addition to the matters described in Schedule 6, the Survey Report:
  - (i) describes which aspects (if any) of the Activity Program described in an Activity Notice, if carried out, would be likely to result in a breach of the Aboriginal Heritage Act;
  - (ii) records sufficient information to enable the Proponent to plan and, subject to the law and this NSHA to comply with the Aboriginal Heritage Act in



the course of undertaking the things that are the subject of the Activity Notice; and

(iii) complies with the DAA Guidelines.

## **12.5 Provision of Aboriginal Heritage Information to DAA**

Following the preparation of the Survey Report:

- (a) if the RC is the Aboriginal Heritage Service Provider it must provide: or
- (b) if the RC is not the Aboriginal Heritage Service Provider the Party contracting the Aboriginal Heritage Service Provider must ensure that the Aboriginal Heritage Service Provider provides,

the following information to the Aboriginal Heritage Act Registrar:

- (c) a copy of the Survey Report; and
- (d) if Aboriginal Sites have been identified during the Survey, a Heritage Information Submission Form (as attached at Schedule 7, or as amended from time to time) with respect to each site.

## **12.6 Provision of Survey Information to DAA**

- (a) If the Proponent contracted the Aboriginal Heritage Service Provider, the Proponent must, within 15 Business Days after the preparation of the Survey Report, provide to the RC, in writing, the details required by items 24 and 25 of Schedule 8.
- (b) Subject to clause 12.6(a), following the preparation of the Survey Report the RC must ensure that the information set out in Schedule 8 is provided to the Aboriginal Heritage Act Registrar.

## **12.7 Reliance on Survey Report**

The Parties each acknowledge that they may rely upon the contents of a Survey Report.

# **13. Intellectual property**

## **13.1 Intellectual property of the Proponent to be assigned to the RC**

If the Proponent is contracting the Aboriginal Heritage Service Provider, the Proponent assigns all intellectual property rights it holds in the Survey Report to the RC upon its creation.

## **13.2 Licence to use Survey Report**

Subject to clause 19, the RC shall grant to the Proponent an irrevocable, transferable, non-exclusive, royalty-free licence to use any Survey Report for the purposes of the Proponent:

- (a) conducting its Activities as set out in the Activity Notice; or
- (b) seeking any necessary or desirable statutory approvals relevant to its Activities including under the Aboriginal Heritage Act; or
- (c) enforcing, defending or establishing its rights, including through court proceedings, and complying with its obligations, under this NSHA or any relevant statutory approvals.

## 14. Effect of NSHA on other Aboriginal Heritage Agreements

If the Proponent:

- (a) has one or more Aboriginal Heritage Agreements (other than this NSHA) with the RC or any of its Members, which were entered into prior to the Effective Date (including ones entered into prior to the ILUA, and which is or are specified in item 5 of Schedule 2; and
- (b) the pre-existing Aboriginal Heritage Agreement applies to an Activity to which this NSHA relates,

then the provisions of this NSHA shall prevail over the provisions of any such pre-existing Aboriginal Heritage Agreement unless otherwise provided in item 6 of Schedule 2.

## 15. Proponent must consult about Aboriginal Heritage Act applications

- (a) The Proponent shall not lodge an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application in respect of any area within the Agreement Area without first giving the RC at least 30 Business Days' notice of its intention to do so.
- (b) The Proponent must consult, including by making reasonable efforts to meet with the RC, about any proposal that is the subject of such an Aboriginal Heritage Act Section 16 Application or Aboriginal Heritage Act Section 18 Application.
- (c) Prior to the ACMC considering the Aboriginal Heritage Act Section 18 Application or the Aboriginal Heritage Act Registrar considering the Aboriginal Heritage Act Section 16 Application, as the case may be, the Proponent must give reasonable notice to the ACMC (or the Aboriginal Heritage Act Registrar as the case may be) and to the Aboriginal Heritage Service Provider of the detail of the consultation that has taken place.

- (d) Subject to clause 15(a), nothing in this NSHA prevents the Proponent lodging an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application.

## 16. Time limits

### 16.1 Time for compliance and consequences of non-compliance

- (a) The Parties, as applicable, must each meet the time limits imposed under the following provisions of this NSHA:
  - (i) the receipt by the Proponent of an Activity Notice Response (clause 8.3(a)); and
  - (ii) subject to clauses 9.1(e) and 18.9, the reaching of the Survey Agreement Date within the Survey Agreement Period (clause 9.1(d)); and
  - (iii) the commencement of fieldwork for a Survey (clause 10.2(a)) and the agreed date (if any) for completion of the fieldwork for a Survey (clauses 8.3(d)(iii)) or 9.7; and
  - (iv) the receipt by the Proponent of the Preliminary Advice following completion of a Survey (clause 12.1(a)); and
  - (v) the receipt by the RC and by the Proponent of the draft Survey Report (clause 12.1(b));
  - (vi) the receipt by the Proponent of the final Survey Report (clause 12.1(c)).
- (b) The time limits on the steps referred to in clause 16.1(a) may be extended by agreement in writing between the Parties. Any such agreed extension will apply only to a single Activity Program, unless expressly agreed otherwise in the written agreement under this clause.
- (c) To avoid doubt, any failure to comply with the time limits for the steps described in clause 16.1(a) does not give a Party a right to terminate this NSHA, but failure to comply with those time limits has the consequences described in the following provisions of this clause 16.1.
- (d) If the RC does not meet, or, if the RC is contracting the Aboriginal Heritage Service Provider, fails to ensure that the Aboriginal Heritage Service Provider meets, any applicable time limits on the steps listed in clause 16.1(a), then the Proponent may provide a written notice to the RC, with such a notice to nominate a date by which the non-compliance with the time limits must be rectified. The date nominated by the Proponent must allow a reasonable period, in all the circumstances, for rectification of the non-compliance with the time limits, and in any event the date must not be less than 10 Business Days after the date on which the notice of non-compliance is sent.

- (e) If the RC fails to comply with a notice sent by the Proponent under clause 16.1(d), then the Proponent may notify the RC that the Proponent is no longer bound by clauses 9 to 12 inclusive of this NSHA in respect of the relevant Activity Program with effect from the date on which the RC receives the latter notice. The Proponent may then at its election:
  - (i) decide not to proceed with the relevant Activity Program; or
  - (ii) after seeking the advice and assistance of the Aboriginal Heritage Act Registrar or other relevant officer from DAA if appropriate, make alternative arrangements for the carrying out of Aboriginal Heritage Surveys, including appointing an independent anthropologist or archaeologist, or other appropriately qualified professional, to conduct such surveys.
- (f) If the Parties to a Dispute referred to mediation under clause 18.9 fail to resolve that Dispute, then the Proponent may notify the RC that the Proponent is no longer bound by clauses 9 to 12 inclusive of this NSHA in respect of the relevant Activity Program with effect from the date on which the RC receives the latter notice. The Proponent may then at its election:
  - (i) decide not to proceed with the relevant Activity Program; or
  - (ii) after seeking the advice and assistance of the Aboriginal Heritage Act Registrar or other relevant officer from DAA if appropriate, make alternative arrangements for the carrying out of Aboriginal Heritage Surveys, including appointing an independent anthropologist or archaeologist, or other appropriately qualified professional, to conduct such surveys.
- (g) In the circumstances described in clauses 16.1(e) and (f), where the Proponent makes arrangements for an Aboriginal Heritage Survey to be conducted by an independent anthropologist, archaeologist or other professional, then:
  - (i) the Proponent shall inform the RC of the alternative arrangements made (including any advice and assistance obtained from DAA); and
  - (ii) the RC shall not have any claim against the Proponent arising from the making of those alternative arrangements.
- (h) To avoid doubt:
  - (i) the effect of this clause 16.1 is not limited by any dispute resolution processes under clause 18 of this NSHA other than those set out in clause 18.9, and in particular the time limits on the steps referred to in clause 16.1 continue to apply where a dispute resolution process is commenced under clause 18.1; and

- (ii) the dispute resolution provisions in clause 18 of this NSHA do not apply to any decision by the Proponent to issue a notice of non-compliance under clause 16.1(d). However, the Proponent may elect, by notice in writing to the RC, to allow use of the dispute resolution provisions in clause 18.
- (i) The Proponent will act reasonably in asserting its rights under this clause 16.1.

## **16.2 Justifiable delay**

- (a) Delay caused by any event of Force Majeure or Aboriginal Cultural Business notified under clause 24 will be excluded from the time limits referred to in clause 16.1.
- (b) A Party asserting the existence of a delay to which clause 16.2(a) applies must advise the other Party of that delay and take reasonable steps to mitigate that delay.

## **17. Default and enforcement**

### **17.1 Interpretation**

- (a) In this clause 17 a reference to a Party means a party to the default or dispute.
- (b) An **Event of Default** occurs where a Party:
  - (i) breaches an obligation under this NSHA; or
  - (ii) commits an Insolvency Event.

### **17.2 Default**

- (a) If a Party (the **Defaulting Party**) commits an Event of Default, the other Party (the **Non-defaulting Party**) may serve a notice (**Default Notice**) on the Defaulting Party specifying the Event of Default and, on receiving the Default Notice, the Defaulting Party must remedy the Event of Default within 5 Business Days after receiving the Default Notice.
- (b) If the Event of Default is of the kind described in clause 17.1(b)(ii) and applies to the RC, then the RC shall as soon as possible notify the Proponent:
  - (i) that the Event of Default has occurred; and
  - (ii) of the appointment of any administrator, receiver or manager to manage the affairs of the RC; and
  - (iii) when the relevant Event of Default ceases to exist.

- (c) If the Event of Default is of the kind described in clause 17.1(b)(ii) and applies to the Proponent, then the Proponent shall as soon as possible notify the RC:
  - (i) that the Event of Default has occurred; and
  - (ii) of the appointment of any administrator, receiver or manager to manage the affairs of the Proponent; and
  - (iii) when the relevant Event of Default ceases to exist.
- (d) Where the Event of Default results in a court order to wind up either Party, this NSHA shall by force of this clause terminate with effect from the date of the court order.
- (e) The Non-defaulting Party may, by notice in writing to the Defaulting Party, suspend the performance of its obligations and the Defaulting Party's rights under this NSHA until either clause 17.2(a) is complied with or the Event of Default no longer exists, as applicable.
- (f) Any remedy exercised under this clause 17 is without prejudice to any other rights a Party may have under this NSHA or otherwise at law (including the right to seek interlocutory relief and specific performance).

## **18. Dispute resolution**

### **18.1 No arbitration or court proceedings**

- (a) Subject to clause 18.1(b) and 18.9, if a dispute arises under this NSHA including a dispute in respect of this clause 18.1 (Dispute), a Party must comply with clauses 18.2 to 18.4 before commencing arbitration or court proceedings (except proceedings for urgent interlocutory relief).
- (b) The provisions of this clause 18 are subject to clause 8.4.

### **18.2 Notification**

A Party claiming a Dispute has arisen must give the other Parties to the Dispute notice setting out details of the Dispute.

### **18.3 Parties to resolve Dispute**

During the 20 Business Days after a notice is given under clause 18.2 (or longer period if the Parties to the Dispute agree in writing), each Party to the Dispute must use its reasonable endeavours to resolve the Dispute. If the Parties cannot resolve the Dispute within that period, any Party to the Dispute may request that the Dispute be referred to a mediator and, if a Party so requests, the Dispute must be referred to mediation in accordance with clause 18.4.

#### **18.4 Mediation**

- (a) If the Parties to the Dispute cannot agree on a mediator within 10 Business Days after a request under clause 18.3, the chairman of LEADR will appoint a mediator at the request of either Party.
- (b) The role of the mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a Party to the Dispute except if the Party agrees in advance in writing.
- (c) Any information or documents disclosed by a Party under this clause 18:
  - (i) must be kept confidential; and
  - (ii) may only be used to attempt to resolve the Dispute.
- (d) Each Party to a Dispute must pay its own costs of complying with this clause 18.4. The Parties to the Dispute must equally pay the costs of any mediator.
- (e) The Parties will engage in the mediation process in good faith and with the aim of reaching a resolution of the Dispute. If the Parties fail to achieve a resolution of the Dispute by mediation within 20 Business Days of the appointment of a mediator under this clause, or such further time as is agreed by the Parties, any Party may take such action as it considers appropriate, including (subject to clause 18.6) referring the matter to arbitration or commencing legal proceedings.

#### **18.5 Arbitration**

- (a) If the Parties to a Dispute have complied with clauses 18.2 to 18.4 then the Dispute may be referred to arbitration by either Party under the *Commercial Arbitration Act 2012* (WA).
- (b) The arbitration will be held within the Agreement Area or any other place agreed by the Parties.
- (c) The Parties shall appoint a person agreed between them to be the arbitrator of the Dispute.
- (d) If the Parties fail to agree on a person to be the arbitrator under clause 18.5(c), then the Parties shall request the President of the Law Society of Western Australia to appoint an arbitrator who has experience in the area of the Dispute and in Indigenous cultural matters.
- (e) Any Party to a Dispute may appeal to the Supreme Court of Western Australia on any question of law arising out of an interim or final award in the arbitration.

## **18.6 Breach of this clause**

If a Party to a Dispute breaches clauses 18.1 to 18.4, the other Parties to the Dispute do not have to comply with those clauses in relation to the Dispute before starting court proceedings.

## **18.7 Obligations continue**

Subject to clause 18.8, if a Dispute is referred for mediation or arbitration under any part of this clause 18 or court proceedings are started in respect of it, the Parties must, during the period of such mediation, arbitration or litigation and pending the making of a decision, determination or judgment as the case may be, continue to perform their respective obligations under this NSHA so far as circumstances will allow and such performance will be without prejudice to the final decision, determination or judgment made in respect of the matter in dispute.

## **18.8 Extension of time**

Without prejudice to the power of a mediator, arbitrator or court to grant any extension of any period or variation of any date referred to in this NSHA, in order to preserve the rights of a Party to a Dispute, the Parties to the Dispute will consult with each other and use all reasonable endeavours to agree such extension or variation so required.

## **18.9 Dispute in relation to clauses 9, 11(b) or 12.2(a)(ii) and (iii)**

- (a) A Party claiming a Dispute has arisen in relation to any matter to be agreed under clauses 9, 11(b), or 12.2(a)(ii) and (iii) must give the other Parties to the Dispute notice setting out details of the Dispute, and at the same time as the notice is served upon the other Parties must request the chairman of LEADR to appoint a mediator within 5 Business Days.
- (b) The role of the mediator with respect to a Dispute arising in relation to any matter to be agreed under clauses 9, 11(b), or clause 12.2(a)(ii) and (iii), is to assist in negotiating a resolution of the Dispute. A mediator cannot make a binding decision on a Party to the Dispute except if the Party agrees in advance in writing.
- (c) Any information or documents disclosed by a Party under this clause 18.9:
  - (i) must be kept confidential; and
  - (ii) may only be used to attempt to resolve the Dispute.
- (d) Each Party to a Dispute must pay its own costs of complying with this clause 18.9. The Parties to the Dispute must equally pay the costs of any mediator.
- (e) The Parties will engage in the mediation process in good faith and with the aim of reaching a resolution of the Dispute. To the extent possible, all issues



identified under clauses 9, 11(b), and 12.2(a)(ii) and (iii) should be dealt with and resolved in the one mediation.

- (f) If the Parties fail to achieve a resolution of the Dispute by mediation within 15 Business Days of the appointment of a mediator under this clause, or such further time as is agreed by the Parties, the provisions of clause 16.1(f) – (g) will apply.

## 19. Confidentiality

### 19.1 Confidential information

Each Party agrees that the following information disclosed by one Party (**Disclosing Party**) to another Party (**Receiving Party**) is confidential (**Confidential Information**) and may not be disclosed except in accordance with clause 19.2:

- (a) information disclosed during the course of a Survey and the contents of any Survey Report provided under this NSHA, including any Sensitive Heritage Information; and
- (b) information given by the Proponent to the RC in respect of the Activities of the Proponent where the Proponent advises the RC that the relevant information is confidential; and
- (c) any other information disclosed by one Party to another under this NSHA which is identified by the Disclosing Party as confidential,

but not including information:

- (d) the Receiving Party, prior to disclosure, already knew or created (whether alone or jointly with any third person) independently of the Disclosing Party; or
- (e) that is public knowledge (otherwise than as a result of a breach of confidentiality by the Receiving Party or any of its permitted disclosees).

### 19.2 Permitted disclosure

- (a) Subject to clauses 19.2(b) and 19.2(c), a Receiving Party may disclose Confidential Information:
  - (i) if it has the prior consent of the Party which provided the information;
  - (ii) to the extent required by any law or applicable securities regulation or rule;
  - (iii) to the extent that the information is reasonably necessary for any processes or applications or related to any statutory approvals;

- (iv) in connection with any dispute or litigation concerning this NSHA or its subject matter;
  - (v) to the Receiving Party's members, officers, employees, agents, auditors, advisers, financiers, consultants, contractors, joint venturers, partners and related bodies corporate, or an Aboriginal Heritage Service Provider or Principal Aboriginal Heritage Consultant appointed under this NSHA;
  - (vi) where the Receiving Party is the Proponent, to a *bona fide* proposed assignee of the Proponent's rights or obligations under this NSHA;
  - (vii) where the disclosure is for the purpose of managing or planning any existing, planned or potential Activity;
  - (viii) to a proposed registered native title body corporate assignee of the RC's rights, title and interests under this NSHA;
  - (ix) in accordance with clauses 12.5 and 12.6;
  - (x) where disclosure is required by the Proponent to any judicial, legislative or executive arm of the Government of Western Australia or of the Commonwealth of Australia; and
  - (xi) as otherwise permitted or required by the terms of this NSHA.
- (b) To avoid doubt, where the Confidential Information is contained in a Survey Report, then the Proponent may disclose that Confidential Information to the DAA and ACHM, including for the purposes of the Proponent:
- (i) making an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application;
  - (ii) providing a copy of each Survey Report to the DAA for DAA's collection of Aboriginal Heritage Survey reports; and
  - (iii) seeking any necessary or desirable statutory approvals or enforcing, defending or establishing its rights, including through court proceedings, under this NSHA or any relevant statutory approvals, including under the Aboriginal Heritage Act.
- (c) To avoid doubt, except for the circumstances described in clause 19.2(b), disclosure of Sensitive Heritage Information may only occur if the RC consents to the form and content of the disclosure or the disclosure is required by any law or applicable securities regulation or rule.
- (d) The RC must inform the Proponent of any information contained in a Survey Report, which comprises Sensitive Heritage Information.

### **19.3 Disclosure requirements**

Before making any disclosure to a person under clause 19.2, the Receiving Party must:

- (a) in each case, inform the entity or person to whom the Confidential Information is being disclosed of the Receiving Party's obligations under this NSHA;
- (b) at least 10 Business Days before any disclosure, notify the Disclosing Party of its intention to disclose the Confidential Information and give the Disclosing Party a reasonable opportunity to take any steps that that Party considers necessary to protect the confidentiality of that information; and
- (c) in the case of a disclosure to a person or entity under clauses 19.2(a)(v), 19.2(a)(vi), 19.2(a)(vii), or 19.2(a)(viii), but with the exception of employees or officers of a Receiving Party, procure that the person or entity executes a deed with the Disclosing Party in such form acceptable to the Disclosing Party (acting reasonably) imposing on the person or entity an undertaking of confidentiality having substantially similar effect as this clause 19.

## **20. Assignment**

### **20.1 Generally**

Neither the RC nor the Proponent may assign, transfer, novate or otherwise dispose of its rights, title, obligations or interests under this NSHA except in accordance with this NSHA.

### **20.2 Assignment or Novation by Proponent**

- (a) The Proponent may from time to time assign or transfer all or part of its rights, title, and interests under this NSHA to any person (whether by farm out, joint venture, sale or otherwise) where the Proponent is assigning all or part of its interest in the tenure in the Agreement Area to which this NSHA applies.
- (b) Before such assignment or novation, the Proponent must:
  - (i) give the RC at least 20 Business Days' notice prior to the proposed assignment or novation;
  - (ii) provide a draft of the proposed deed of assignment or novation for the RC's approval, which approval must not be unreasonably withheld, and the Proponent must take into account any reasonable amendments put forward by the RC;
  - (iii) within 20 Business Days after receiving the RC's approval to the terms of the draft deed of assignment or novation provide to the RC either:

- (A) the deed of assignment in the form approved by the RC executed by the outgoing Proponent and the incoming proponent in favour of the RC by which the assignee agrees to be bound, alone or jointly with the Proponent, by the provisions of this NSHA and to assume, observe and perform (alone or jointly with the Proponent) the rights and obligations of the Proponent under this NSHA to the extent of the rights, title and interest assigned in accordance with clause 20.2(a); or
- (B) the deed of novation in the form approved by the RC executed by the outgoing Proponent and the incoming proponent in which the incoming proponent agrees to obtain the rights and obligations of the Proponent under this NSHA, the incoming proponent being bound by this NSHA and the outgoing Proponent being released from its obligations under this NSHA to the extent of the rights, title and interest transferred in accordance with clause 20.2(a); and
- (c) The RC will then execute the deed of assignment or the deed of novation as the case may be and return copies of the fully executed deed to both the outgoing Proponent and the incoming proponent.

### **20.3 Assignment by RC**

- (a) The RC must assign its rights, title and interests under this NSHA to a replacement Regional Corporation if:
  - (i) a replacement Regional corporation is appointed by the Noongar Boodja Trustee as the Regional Corporation for land and waters including the land and waters within the Agreement Area; and
  - (ii) the replacement Regional Corporation agrees to enter into a deed, in a form acceptable to the Proponent (each acting reasonably), by which it agrees to be bound by this NSHA and to assume all of the RC's obligations under this NSHA, and provides a copy of that deed to the Proponent.
- (b) If the requirements of clause 20.3(a)(i) and (ii) are satisfied, the Regional Corporation must do all other things necessary to give effect to the assumption by the replacement Regional Corporation of the obligations under this NSHA.

### **20.4 Effect of Assignment or Novation**

- (a) Once an assignment or novation by a Proponent of all or any part of its rights, title and interests under this NSHA has occurred under clause 20.2, then the assigning or outgoing Proponent will be deemed to have been released to the extent of the assignment or transfer from all claims and liabilities arising under

or in respect of this NSHA arising after the effective date of the assignment or novation, but without affecting any claim or liability arising prior to such date.

- (b) Once an assignment of this NSHA has occurred under clause 20.3, the assigning RC will be deemed to have been released, to the extent of the assignment from all claims and liabilities arising under or in respect of this NSHA arising after the effective date of the assignment, but without affecting any claim or liability arising prior to such date.
- (c) Unless otherwise agreed by the Parties in writing or required by law, an assignment under this clause 20 shall not affect the operation of this NSHA.

## **20.5 No encumbrance**

- (a) Except as permitted by clause 20.5(b), no Party may grant an encumbrance, mortgage or charge in respect of the whole or any part of its rights, title and interests under this NSHA.
- (b) The Proponent may with the prior written consent of the RC grant an encumbrance, mortgage or charge in respect of the whole or any part of its rights, title and interests under this NSHA provided that clause 20.2 shall apply with necessary changes to any assignment upon enforcement of such encumbrance, mortgage or charge.

## **21. Notices**

Any notice:

- (a) must be in writing and signed by a person duly authorised by the sender; and
- (b) must be delivered to the intended recipient by registered post or by hand or fax to the intended recipient's address or fax number specified in Schedule 1 (or the address in Western Australia or fax number last notified in writing by the intended recipient to the sender, including where so notified in an Activity Notice given to the RC under clause 8.2);
- (c) will be taken to be received by the recipient:
  - (i) in the case of delivery in person, when delivered; and
  - (ii) in the case of delivery by post, 2 Business Days after the date of posting; and
  - (iii) in the case of delivery by fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number of name of recipient and indicating that the transmission has been made without

error, but if the result is that a notice would be taken to be given or made on a day that is not a Business Day or at a time that is later than 4.00pm (local time), it will be taken to have been duly given or made at 9.00am on the next Business Day.

## **22. GST**

### **22.1 Interpretation**

Words capitalised in this clause 22 and not otherwise defined have the meaning given in the GST Act.

### **22.2 GST payable**

- (a) Where an amount of Consideration is payable for a Taxable Supply made under this NSHA (whether that amount is specified or can be calculated in accordance with this NSHA), it does not include GST and must be increased by the GST Rate.
- (b) The Party making a Taxable Supply under this NSHA must issue a Tax Invoice or Adjustment Note to the Recipient in accordance with the GST Act. Notwithstanding any provision to the contrary in this NSHA, payment will be due within 20 Business Days of a Party receiving a Tax Invoice in accordance with this clause 22.
- (c) If any Party has a right to be reimbursed or indemnified for any cost or expense incurred under this NSHA, that right does not include the right to be reimbursed or indemnified for that component of a cost or expense for which the indemnified Party can claim an Input Tax Credit.
- (d) A Party may issue a Recipient-created Tax Invoice in respect of payment made to it by the other Party.

## **23. Costs and duties**

- (a) The Proponent shall bear any duties or fees or taxes of a similar nature associated with this NSHA.
- (b) Each Party shall bear their own costs including legal costs associated with the negotiation, drafting and execution of this NSHA.

## **24. Force Majeure and Aboriginal Cultural Business**

- (a) If a Party is prevented in whole or in part from carrying out its obligations under this NSHA as a result of an event of Force Majeure or Aboriginal

Cultural Business, it must promptly notify the other Party accordingly. The notice must:

- (i) specify the obligations it cannot perform;
  - (ii) sufficiently describe the event of Force Majeure or Aboriginal Cultural Business;
  - (iii) estimate the time during which the Force Majeure or Aboriginal Cultural Business will continue; and
  - (iv) specify the measures proposed to be adopted to remedy or abate the Force Majeure or the delay caused by the Aboriginal Cultural Business.
- (b) Following this notice, and while the Force Majeure or Aboriginal Cultural Business continues, this NSHA shall nevertheless continue and remain in force and effect but the obligations which cannot be performed because of the Force Majeure or Aboriginal Cultural Business will be suspended, and any time limit for performance of those obligations will be extended by the period of the Force Majeure or Aboriginal Cultural Business.
- (c) The Party that is prevented from carrying out its obligations under this NSHA as a result of an event of Force Majeure or Aboriginal Cultural Business must take all action reasonably practicable to mitigate any loss suffered by the other Party as a result of its failure to carry out its obligations under this NSHA.

## **25. General**

### **25.1 Review and variation**

Where this NSHA is to be amended or varied, then this NSHA may only be amended or varied by a document in writing signed by each of the Parties to the agreed amendment or variation.

### **25.2 Entire agreement**

Subject to clause 14, this NSHA constitutes the entire agreement between all of the Parties as to its subject matter and, in relation to that subject matter, supersedes any prior understanding or agreement between any of the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

### **25.3 Governing law and jurisdiction**

- (a) This NSHA is governed by the law applicable in the State of Western Australia.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia.

## **25.4 Severance**

If any provisions of this NSHA is void, voidable by any Party, unenforceable or illegal according to the law in force in the State of Western Australia, it shall be read down so as to be valid and enforceable or if it cannot be so read down, the provision (or where possible the offending words), shall be severed from this NSHA to the extent necessary unless it would materially change the intended effect and objectives of this NSHA.

## **25.5 Waiver**

A right or power under this NSHA shall only be deemed to be waived by notice in writing, signed by the Party waiving the right or power, and:

- (a) no other conduct of a Party (including a failure to exercise, a delay in exercising or a partial exercise of a right or power or any forbearance or indulgence granted by one Party to another Party in respect of a right or power) operates as a waiver of the right or power or otherwise prevents the exercise of that right or power; and
- (b) a waiver of a right or power on one or more occasions by a Party does not operate as a waiver of that right or power if it arises again in the future or prejudices that Party's other rights or powers or future rights or powers in respect of the right or power waived; and
- (c) the exercise of a right or power does not prevent any further exercise of that right or power or of any other right or power.

## **25.6 No merger**

The rights and obligations of the Parties will not merge on the completion of any transaction contemplated by this NSHA. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing a transaction.

## **25.7 Further action**

Each Party must use all reasonable efforts to do all things necessary or desirable to give full effect to this NSHA and the matters contemplated by it.



# Schedule 1 – Party Details

(Clause 21 Notices)

[XX –Insert RC's name] Notice details	Address:	[XX – Insert RC's address in Western Australia]
	Fax No:	[XX – Insert RC's fax details]
[XX –Insert Proponent's name] Notice details	Address:	[XX – Insert Proponent's address in Western Australia]
	Fax No:	[XX – Insert Proponent's fax details]

## Schedule 2 – Details of ILUA and Pre-existing Aboriginal Heritage Agreements

Item No.	Item Description	Details
<b>Details of ILUA (as recorded on the Register of Indigenous Land Use Agreements)</b>		
Item 1	Short name of ILUA	[XX]
Item 2	National Native Title Tribunal file no.	[XX]
Item 3	Date registered	[XX]
Item 4	Local government region(s)	[XX]
<b>Pre-existing Aboriginal Heritage Agreements</b>		
Item 5	Details of all pre-existing Aboriginal Heritage Agreements to which clause 14 applies.	[XX – insert sufficient details of prior agreements]
Item 6	List of provisions of a pre-existing Aboriginal Heritage Agreement which will prevail over this NSHA (if the entire pre-existing Aboriginal Heritage Agreement prevails, write ‘whole agreement’).	[XX – insert sufficient details of prior agreements]

## Schedule 3 – Agreement Area

(Clause 1.1 Definition of **Agreement Area**)

[XX] – Insert map and written description which clearly identifies the area to which this NSHA relates]

# Schedule 4 – Contents of Activity Notice

## Part 1 – Primary contents of Activity Notice

(Clause 8.2 Giving the Activity Notice)

### 1.1 Basic information

Every Activity Notice must contain:

- (a) a statement that it is an Activity Notice issued under this NSHA (by reference to the name of the ILUA as set out in item 1 of Schedule 2);
- (b) the name of the Proponent, and:
  - (i) an address in Western Australia for service of notices, under this NSHA, on the Proponent (if no address for service has previously been given by the Proponent); and
  - (ii) full contact details for a primary contact person within the Proponent (if a body corporate).

### 1.2 Key statements and nominations under clause 8.2

(Clause 8.2(c)(ii))

Every Activity Notice must, subject to clause 8.2(f), contain the following required key statements:

- (a) a statement of the extent to which the Activity Program consists of Low Ground Disturbance Activity, in the opinion of the Proponent; and
- (b) a statement of whether the Proponent considers that a Survey is required (taking into consideration the matters referred to in clauses 8.1(b) and 8.3); and
- (c) a nomination, by the Proponent, of a preferred Survey Methodology, being either a Site Avoidance Model or a Site Identification Model; and
- (d) where a Site Avoidance Model is nominated, a statement of whether the Proponent requires any Survey to be conducted in respect of:
  - (i) only the area or areas to be impacted by specific Activities as described and mapped in the Activity Notice; or
  - (ii) a broader area or areas, encompassing the Activities and surrounding land as described and mapped in the Activity Notice; and
- (e) a nomination, by the Proponent, of a proposed Survey fieldwork start date or end date; and

- (f) a nomination, by the Proponent, as to whether it requires:
  - (i) a Preliminary Advice (see clause 12.1(a));
  - (ii) a draft of the Survey Report (see clause 12.1(b));
  - (iii) an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application (if known at the relevant time) (see clause 8.2(e)).

Where any of those key statements are omitted, Part 3 of this Schedule 4 provides default provisions.

### **1.3 – Detailed contents of Activity Notice**

(Clause 8.2(c)(ii))

In accordance with clause 8 of this NSHA, the purpose of the information provided in and with the Activity Notice is to determine whether a Survey is required and if so, its nature and extent. In order to facilitate this objective, an Activity Notice must contain the following additional details where applicable:

- (a) a map showing clearly the area the subject of the Activity Notice, identifying the location of the area the subject of the Activity Notice within the Agreement Area and including scale, zone and north point, as well as nearby towns, roads and landscape features; and
- (b) aerial photographs (if available) or smaller scale maps of the area the subject of the Activity Notice which must contain UTM Grid Coordinates (eastings and northings), datum, north point and, where applicable, land tenure details such as parcel identifier, plan or lot, reserve numbers, and coordinates and/or polygon defining the area the subject of the Activity Notice; and
- (c) where applicable, identifying numbers (or other identifying information) of each tenure to which the Activity Notice relates; and
- (d) all known vehicular access routes to the area the subject of the Activity Notice; and
- (e) any ground disturbing notice provided to any government agency including (where mining exploration Activities are proposed) to the District Mining Engineer; and
- (f) details of any Activity Program, and the area and level of potential Activity, on the area the subject of the Activity Notice; and
- (g) the techniques and types of infrastructure, items of equipment and vehicles to be used in relation to any proposed Activity; and

- (h) the approximate number of personnel who will be involved in any proposed Activity; and
- (i) any water, biological or other materials or resources proposed to be obtained from the area the subject of the Activity Notice, in relation to any proposed Activity.
- (j) Where any of the detailed content is omitted, the default provisions of Part 3 of this Schedule 4 will apply.

## Part 2 – Additional contents of Activity Notice

(Clause 8.2(c)(iii))

An Activity Notice may also set out:

- (a) whether there has been any previous Aboriginal Heritage Survey and, subject to any confidentiality restrictions, the age, methodology, participants, standard and results of that survey. If a written report of that previous Aboriginal Heritage Survey is in the possession or control of the giver of the Activity Notice, then (subject to confidentiality provisions) the Activity Notice shall be accompanied by a copy of the written report; and
- (b) the extent to which the area the subject of the Activity Notice has been affected by previous ground disturbing activities; and
- (c) whether the Aboriginal Heritage Act Register discloses any Aboriginal Sites on the area the subject of the Activity Notice; and
- (d) any additional information which explains what sort of Survey outcome is being sought (if a Survey is required), including whether an Aboriginal Heritage Act Section 16 Application or an Aboriginal Heritage Act Section 18 Application is intended to be made (if known at the relevant time) (see clause 8.2(e)); and
- (e) any other background material which will better help the RC to understand the potential impacts of what is proposed.

## Part 3 – Default provisions of Activity Notice

(Clauses 8.2(c)(ii) and 8.2(d))

For the purposes of clause 8.2(d), the following default provisions apply in respect of any item in part 1.2 of this Schedule 4 that is not specified or nominated in the Activity Notice.

### Clause No.      Default Provision

Item (a)	The Activity Program contains Ground Disturbing Activity.
Item (b)	A Survey is required.
Item (c)	Site Avoidance Model.
Item (d)	Only the areas of specific Activities described in the Activity Notice are required to be Surveyed.
Item (e)	Not applicable (Parties to discuss and agree proposed Survey fieldwork start date or end date).
Item (f)	There is no requirement for a Preliminary Advice or a draft of the Survey Report.

# Schedule 5 – Costs for conduct of a Survey

(Clauses 8.3(d)(iv), 9.5 and 11)

No.	Item	Rate	GST	Description
<b>Ethnographic Assessment</b>				
1.	Aboriginal Heritage Service Provider	At cost  [Usually \$900-\$1000 (Indexed to CPI)]  + Administration Fee of 15% of total expenditure capped at \$5,000 (Indexed to CPI)  + Disbursements At cost	+GST	per person per day or pro rata for part thereof
2.	Principal Aboriginal Heritage Consultant	At cost  [Usually \$900-\$1000 (Indexed to CPI)]	+GST	per person per day or pro rata for part thereof
3.	Aboriginal Heritage Liaison Officer (if necessary and agreed)	\$500 (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
<b>Archaeological Assessment (if necessary and agreed)</b>				
4.	Archaeologist (archaeological team external contractors)	At cost  [Usually \$900 - \$1000] (Indexed to CPI)]	+GST	per person per day or pro rata for part thereof
5.	Fieldwork and reporting	At cost  [Usually \$900 - \$1000] (Indexed to CPI)]	+GST	per person per day or pro rata for part thereof
<b>Aboriginal Consultants</b>				



No.	Item	Rate	GST	Description
6.	Aboriginal Consultants – up to 8 unless otherwise agreed	\$500 (max) (Indexed to CPI)	+GST	per person per day or pro rata for part thereof
<b>Field Expenses</b>				
7.	Aboriginal Heritage Liaison Officer or Anthropologist accommodation/meals	At cost	+GST	
8.	Archaeologist or Archaeological Team accommodation/meals	At cost	+GST	
9.	Aboriginal Consultants accommodation/meals	At cost	+GST	
<b>Travel Expenses</b>				
10.	Vehicle mileage (km)	\$ As per tax schedule for location	+GST	per km
11.	Hire Vehicle (if survey vehicle is hired)	commercial rates, plus fuel	+GST	
12.	Aboriginal Consultants travel expenses (if required)	Rate as per tax schedule for location	+GST	per km
13.	Airfares	At cost	+GST	
14.	Taxi travel (to and from airports or meetings)	At cost	+GST	
<b>Incidental Expenses</b>				
15.	Film, maps, report production and expendables	At cost	+GST	

Initials:                      Aboriginal                      Heritage                      Service                      Provider

\_\_\_\_\_

Initials: Proponent/Authorised officer of the Proponent \_\_\_\_\_

### **CPI Indexation**

Where a rate listed in this annexure is indicated to be "*Indexed to CPI*" it shall be varied annually on 31 August of each year in accordance with the CPI Calculation.

# Schedule 6 – Contents of Survey Report

(Clause 12.4)

## Part 1 – Guidelines for all Survey Reports

### 1.1 Copyright and confidentiality

Insert a statement to the effect that the report may only be copied in accordance with this NSHA and subject to any other restrictions agreed to, from time to time, by the Proponent and the RC on behalf of the RC.

### 1.2 Survey personnel

- (a) Author's name in full and occupation and author's business or company name.
- (b) Full name and gender of each Aboriginal Consultant, and the group they represent.
- (c) Full names and gender of other personnel participating in the Survey and their role.
- (d) Explanation as to how Aboriginal Consultants were selected.

### 1.3 Survey date(s)

Insert the date(s) on which fieldwork was conducted.

### 1.4 Spatial information

- (a) The general location of the area within which the Survey was undertaken (e.g. title numbers 'x' to 'z', or the 'abc' pastoral lease, or the area shown on a map contained in the Survey Report).
- (b) Grid references of the Survey Area.
- (c) A map of the Survey Area.

### 1.5 Other information

- (a) Summary of results of searches of the Aboriginal Heritage Act Register at the DAA including the site number and name, if given, and the reference number.
- (b) A general description of the fieldwork undertaken.
- (c) Details of ethnographic and (if relevant) archaeological work carried out during the Survey.

- (d) Description of the Survey Methodology used by the Survey Team (that is, a Site Avoidance Model or a Site Identification Model) and any other relevant methodological notes.
- (e) In respect of any Aboriginal Objects identified:
  - (i) a description of such Aboriginal Objects;
  - (ii) the location of any Aboriginal Objects so identified; and
  - (iii) the date on which each Aboriginal Object was identified.
- (f) Any discussion and recommendations.

## Part 2 – Additional guidelines for Survey Reports where Site Avoidance Model is used

### 2.1 Details of areas where Activity should not be undertaken (because of the presences of an Aboriginal Site within that area) and other Survey information

- (a) Description of any areas where Activity should not be carried out because of the presence of an Aboriginal Site within that area.
- (b) Grid references of the area where Activity should not be carried out, i.e. Eastings and Northings (of the coordinate description e.g. AMG/MGA), the AMG Zone (i.e. Zone 51) and the type of equipment used – GPS or DGPS or other.
- (c) Dimensions of the area, e.g. approximately 100m east-west and 50m north-south.
- (d) Location, i.e. where the area to be avoided is located in relation to tenure or significant topographical feature, e.g. the northern corner of mining lease X about 100m east of the prominent hill.
- (e) Full names of person(s) who identified each Aboriginal Site and other persons present when site identified, and date site identified.

## Part 3 – Additional guidelines for Survey Reports where Site Identification Model is used

### 3.1 Details of new or registered Aboriginal Sites recorded during the Survey and other Survey information

- (a) Site name and number, if given to existing sites, and DAA reference number, if known.
- (b) Site type, e.g. archaeological or ethnographic or both.
- (c) Grid references of the site, i.e. Eastings and Northings (of the coordinate description e.g. AMG/MGA), the AMG Zone (i.e. Zone 51) and the type of equipment used – GPS or DGPS or other.
- (d) Dimensions of the site, e.g. approximately 10m east-west and 5m north-south.
- (e) Location, i.e. where the site is located in relation to tenure or significant topographical feature, e.g. the northern corner of mining lease X about 100m east of the prominent hill.
- (f) Description, e.g. rock pool, granite outcrop.
- (g) Full names of person(s) who identified each Aboriginal Site and other persons present when site identified and date site identified.
- (h) Significance, if known.

### 3.2 Recommendations and comments

Recommendations regarding the Aboriginal Site, e.g. whether the site is:

a place of importance or significance where persons of Aboriginal descent have, or appear to have left any object used for or made or adapted for use for any purpose connected with traditional cultural life of Aboriginal people (past or present); and/or

- (a) a sacred/ ritual or ceremonial site of importance and special significance to persons of Aboriginal descent; and/or
- (b) a place of historical, anthropological, archaeological or ethnographic importance and/or significance; and/or
- (c) a place where Aboriginal objects are traditionally stored; and

recommendations for how the Aboriginal Site(s) should be protected.

## Schedule 7 – DAA Heritage Information Submission Form

(Clause 12.5 Provision of Aboriginal Heritage Information to DAA)

Complete and submit the form entitled 'Heritage Information Submission Form' that is available for download on the DAA website at:

[http://www.daa.wa.gov.au/Documents/HeritageCulture/Aboriginal%20heritage/Heritage\\_Submission\\_Form.pdf](http://www.daa.wa.gov.au/Documents/HeritageCulture/Aboriginal%20heritage/Heritage_Submission_Form.pdf).

# Schedule 8 - Noongar Standard Heritage Process Information

(Clause 12.6 Provision of Survey Information to DAA)

The RC will report the following information to DAA:

## **DETAILS OF THE PERSON FILLING IN THIS FORM**

1. **Name:**
2. **Job Title:**
3. **Noongar Corporation Name:**

## **ABOUT THE PROPONENT**

4. **Proponent Name:**
5. **Contact phone number:**
6. **Brief summary of the project or activity:**
7. **Does the Project fall within more than one Regional Noongar Corporation's agreement area: Y/N**
8. **Please list any other affected Regional Corporation:**

## **ACTIVITY NOTICE**

9. **Did the Activity Notice contain all requisite information (As per Schedule 4): Y/N**
10. **If not did the Regional Corporation:**
  - (a) **Utilise the Default Provisions:**
  - (b) **Request a new notice:**
11. **When considering whether or not a survey was required did the RC seek advice from the DAA:**

## **SURVEY**

12. **Select the survey methodology used: Site ID/Site Avoidance**

### **COMPOSITION OF THE SURVEY TEAM**

- 13. Name of the Aboriginal Heritage Service Provider:**
- 14. Name of the Principal Aboriginal Heritage Consultant:**
- 15. Number of paid Aboriginal Consultants (If more than eight, detail why):**
- 16. Number of additional (unpaid) Aboriginal Consultants (detail why there was additional Consultants):**
- 17. Was an Aboriginal Heritage Liaison Officer appointed: Y/N**
- 18. Was an additional anthropologist/archaeologist or heritage specialist appointed:**
- 19. Were there any proponent nominees on the survey team:**

### **SURVEY REPORTING**

- 20. If Preliminary Advice was requested was it received by the RC within the time period of 5 days after the last day of fieldwork:**
- 21. Did the RC provide any additional comments about the Preliminary Advice:**
- 22. If a draft Survey Report was requested was it received by the RC within 15 Business Days after the last day of Fieldwork:**
- 23. Did the RC provide any additional comments:**

### **COST AND PAYMENTS**

- 24. What was the total cost paid to the Aboriginal Heritage Service Provider (if the RC was acting as the Aboriginal Heritage Service Provider or was contracting them):**
- 25. What was the total cost of the Aboriginal Consultants:**

### **OTHER CIRCUMSTANCES**

- 26. Do you know if the proponent lodged or intended to lodge a section 16 or section 18 application under the *Aboriginal Heritage Act 1972*:**
- 27. If yes, did the RC receive a Notice of this intention at least 30 days before the approval was lodged with the DAA:**
- 28. During the process did either party access the dispute resolution process: Y/N**



**29. Did the RC access the provisions under 'Dispute in relation to clauses 9, 11(b) or 12.2(a)(ii) and (iii)':**

**ADDITIONAL COMMENTS**

**30. Please provide any additional details about the process worth noting. All comments welcomed.**

# Signing Pages

**EXECUTED** as a deed

**Executed** in accordance with section 99-5 )  
of the *Corporations (Aboriginal and* )  
*Torres Strait Islander) Act 2006* (Cth) on )  
behalf of [XX –insert name of RC]: )

\_\_\_\_\_  
Director (signature)

\_\_\_\_\_  
Director or secretary (signature)  
(Delete whichever is not applicable)

\_\_\_\_\_  
Director (print full name)

\_\_\_\_\_  
Director or secretary (print full name)

\_\_\_\_\_  
Date

**Executed** by (XX – Insert name of )  
[Proponent] ACN [XX – Insert ACN number] )  
in accordance with section 127(1) of the )  
*Corporations Act 2001* (Commonwealth): )

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
Director/Secretary's signature

\_\_\_\_\_  
(print name)

**The Common Seal** of [XX – Insert name of  
Proponent] ACN [XX – Insert ACN number]  
was hereunto affixed by authority of its  
Directors in the presence of: )  
)  
)  
)

\_\_\_\_\_  
Director's signature

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
Director/Secretary's signature

\_\_\_\_\_  
(print name)

**Executed** by [XX – Insert name of  
Proponent (if an individual)] in the presence  
of: )  
)

\_\_\_\_\_  
Witness' Signature

\_\_\_\_\_  
(print name)

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