

**POSITIVE COVENANT**  
 New South Wales  
 Section 88E(3) Conveyancing Act 1919

Leave this space clear. Affix additional pages to the left-hand corner.

**PRIVACY NOTE:** Section 31B of the Real Property Act 1900 (RP Act) authorises the Registrar General to collect the information required by this form for the establishment and maintenance of the Real Property Act Register. Section 96B RP Act requires that the Register is made available to any person for search upon payment of a fee, if any.

<b>(A) TORRENS TITLE</b>	Folio		
<b>(B) LODGED BY</b>	Document Collection Box	Name, Address or DX, Telephone, and Customer Account Number if any  Reference (optional):	CODE  <b>PC</b>
<b>(C) REGISTERED PROPRIETOR</b>	Of the above land		
<b>(D) LESSEE MORTGAGEE or CHARGE</b>	Of the above land agreeing to be bound by this positive covenant		
	Nature of Interest	Number of instrument	Name
<b>(E) PRESCRIBED AUTHORITY</b>	Within the meaning of section 88E(1) of the Conveyancing Act 1919 <b>WOOLLAHRA MUNICIPAL COUNCIL</b>		

**(F)** The prescribed authority having imposed on the above land a positive covenant the terms set out in annexure \_\_\_\_\_ hereto applies to have it recorded in the Register and certifies this application correct for the purposes of the Real Property Act 1900.

**DATE** ..... / ..... / .....

**(G) EXECUTION BY THE PRESCRIBED AUTHORITY**

I certify I am an eligible witness and that an authorised officer of the prescribed authority signed this application in my presence. [See note\* below]

Signature of witness:  
 Name of witness:  
 Address of witness:

Signature of an authorised officer:  
 Name of authorised officer:  
 Position of authorised officer:

**(G) EXECUTION BY THE REGISTERED PROPRIETOR**

I certify I am an eligible witness and that the registered proprietor signed this dealing in my presence. [See note\* below] Certified correct for the purposes of the Real Property Act 1900 by the registered proprietor.

Signature of witness:  
 Name of witness:  
 Address of witness:

Signature of registered proprietor:

**(H)** The \_\_\_\_\_ under \_\_\_\_\_ No. \_\_\_\_\_ agrees to be bound by this positive covenant. I certify I am an eligible witness and that the \_\_\_\_\_ signed this application in my presence. [See note\* below]

Signature of witness:  
 Name of witness:  
 Address of witness:

\* s117 RP Act requires that you must have known the signatory for more than 12 months or have sighted identifying documentation.

## **This is the Annexure A to Positive Covenant between and Woollahra Municipal Council**

### **1. Definitions and Interpretation**

1.1. For the purpose of this covenant, the following definitions apply:

**Act** means the Conveyancing Act 1919.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the state of New South Wales.

**Claim** includes any liability, damage, loss, action, application, cause of action or demand.

**Council** means Woollahra Municipal Council.

**Council Land** means the

**Expenses** includes:

- (i) any reasonable expense incurred by Council in exercising its powers under this Positive Covenant. Such expense shall include wages for Council's employees, agents or contractors in effecting any work, supervising any work and administering any work together with the costs for the use of machinery, tools and equipment in conjunction with such work; and
- (ii) reasonable legal costs on an indemnity basis.

**Land** means

**Plan** means

**Prescribed Authority** means Woollahra Municipal Council.

**Registered Proprietor** means \_\_\_\_\_ being the current registered proprietor in fee simple of the Land and includes the registered proprietors of the Land from time to time.

**Relevant Authority** means Council and all and any other governmental or semi-governmental entity entitled to authorise or regulate the construction, use, condition and removal of the Structure.

**Structure** means

### **1.2. Interpretation**

In this Positive Covenant, except where the context otherwise requires:

- (i) the singular includes the plural and vice versa, and a gender includes other genders;
- (ii) another grammatical form of a defined word or expression has a corresponding meaning;
- (iii) a reference to a clause, paragraph, schedule, information table or annexure is to a clause of paragraph of, or schedule or information table or annexure to, this Positive Covenant and a reference to this Positive Covenant includes any schedule or annexure;
- (iv) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (v) a reference to a party includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (vi) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (vii) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (viii) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (ix) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Positive Covenant or any part of it;
- (x) headings are for ease of reference only and do not affect interpretation; and
- (xi) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

## 2. **Obligation to construct**

The Registered Proprietor must construct the Structure on the Council Land:

- (i) in a proper and workmanlike manner by properly insured contractors; and
- (ii) in accordance with the Plans; and
- (iii) in accordance with the requirements of any Relevant Authority.

### 3. Obligations in relation to Structure

The Registered Proprietor must at all times without notice from Council:

- (i) subject to clause 4(i)(B), keep and maintain the Structure in good and tidy condition and in a proper state of repair;
- (ii) carry out regular inspections of the Structure to ensure that the Structure is securely constructed and meets all requirements from time to time of Relevant Authorities and the law; and
- (iii) paint (if applicable) and refurbish the Structure whenever required to do so by the Council,

to the satisfaction of the Council.

### 4. Covenants of the Registered Proprietor

The Registered Proprietor:

- (i) at its own cost must:
  - (A) ensure that the Structure is at all times securely constructed and meets the requirements of all Relevant Authorities and complies with all building codes and the law;
  - (B) except in the case of an emergency, submit to the Council details of any proposed repairs, maintenance, refurbishment, alteration or replacement of the Structure for approval by the Council and shall not carry out any such work without first obtaining the written approval of the Council and any other Relevant Authority;
  - (C) if applicable, procure the consent of the Relevant Authority under section 138 of the Roads Act 1993 (NSW) in relation to the Structure or any works associated with the Structure;
  - (D) promptly comply with all orders and notices issued by the Council or any Relevant Authority in relation to the Structure, including without limitation as to the need to construct, repair, maintain, replace, refurbish or alter the Structure; and
  - (E) if required by Council in writing, remove the Structure and make safe the site of the Structure to the satisfaction of Council within one (1) month of any notice issued by the Council pursuant to this clause,

- (ii) covenants that in carrying out its obligations and exercising its rights under this Positive Covenant, it must use its best endeavours not to cause any inconvenience to the public and adjoining owners.

## 5. Rights and obligations of the Council

- (i) By written notice to the Registered Proprietor the Council at any time may require the Registered Proprietor to attend to any matter and to carry out any further work to the Structure within such time as the Council may specify or require to ensure structural soundness and proper and efficient maintenance of the Structure. The Registered Proprietor must comply with the notice at its own costs.
- (ii) If the Registered Proprietor fails to comply with the terms of any written notice by the Council as set out in the clause 5(i), the Council or any person authorised by the Council may repair, replace or otherwise remedy any failure by the Registered Proprietor to observe its obligations under this Positive Covenant and may recover all Expenses incurred by Council of so doing from the Registered Proprietor.

## 6. Insurances

- (i) The Registered Proprietor must at the Registered Proprietor's own cost and expense take out and keep in force:
  - (A) a public liability policy of insurance for a sum of \$20,000,000.00 or such other amount as the Council from time to time may require against liability arising in respect of personal injury to or death of any person in or about the Structure; and
  - (B) an adequate insurance policy for all risks including damage to person or property and the replacement and reinstatement cost of the Structure and any other interest Council may from time to time require.
- (ii) The policies of insurance referred to in clause 6(i) must:
  - (A) be in the name of the Registered Proprietor and note the interest of Council;
  - (B) be taken out with an insurance company approved by Council;
  - (C) be endorsed to indemnify the Council in respect of the indemnity given by the Registered Proprietor to the Council under clause 8;
  - (D) have no exclusions, endorsements or alterations unless first approved of by the Council; and
  - (E) be on such terms and conditions as the Council from time to time require.

- (iii) If the Registered Proprietor fails to maintain the insurances required by this clause 6, the Council may effect and maintain those insurances and the Council's reasonable costs of doing so must be paid by the Registered Proprietor.
- (iv) The Registered Proprietor must produce or cause to be produced to the Council the relevant policy, certificates of currency and premium receipts as and when required by the Council. If the Registered Proprietor does not do so, the Council may insure against the relevant risk and the Registered Proprietor must pay all reasonable expenses incurred by the Council in obtaining the relevant policy to the Council within seven (7) Business Days of receipt of a written demand from the Council.

## **7. Risk**

- (i) The Registered Proprietor acknowledges and agrees that it and its contractors, employees, agents, invitees, licensees, lessees and sublessees and anyone associated with the Registered Proprietor will use the Structure at its or their own risk.
- (ii) To the full extent permitted by law, the Registered Proprietor releases the Council from liability for any Claim in respect of or arising from:
  - (A) any Structure connected with the Land existing at the date of this Positive Covenant;
  - (B) any Structure to be erected on the road reserve connected with the Land;
  - (C) any fault in the construction or state of repair of the Structure;
  - (D) any defect in the Structure;
  - (E) any failure by the Registered Proprietor to properly maintain the Structure;
  - (F) any damage or injury to any person on or about the Structure except to the extent caused by the Council's negligent or wrongful act or omission; and
  - (G) any of the circumstances set out in clause 8.

## **8. Indemnity**

The Registered Proprietor must indemnify and keep indemnified the Council from and against all Claims, costs (including legal costs calculated on a solicitor and own client basis), charges, damages and expenses of whatsoever nature and kind to which the Council or any of the Council's employees, agents, officers or contractors is or may be liable for or in respect of any loss, damage, accident or

injury of any nature or kind arising from the failure of the Registered Proprietor including its employees, agents, contractors and invitees, to comply with the terms and conditions of this Positive Covenant except to the extent that the Claims, costs, charges, damages and expenses arising in whole or in part out of the negligent or wrongful act or omission of the Council or its employees, agents, officers or contractors.

## **9. Termination**

The Registered Proprietor acknowledges that if the improvements on the Land are demolished or if the improvement erected on the Land cease to be used for the purpose for which they are used at the date of this Positive Covenant the Council may require the Structure be demolished and removed from the road reserve within one (1) month of any notice issued pursuant to this clause.

## **10. Notices**

Any notice, approval, consent or other communication required to be given or served in connection with this Positive Covenant must be in writing and must be served in accordance with section 170 of the Act.

## **11. Governing Law**

The laws of the State of New South Wales and of the Commonwealth of Australia apply to this Positive Covenant to the exclusion of any other laws and the parties agree to submit to the jurisdiction of the Courts of New South Wales in relation to this Positive Covenant.

## **12. Severability**

In the event that any provision of this Positive Covenant is held to be invalid, illegal or unenforceable, that provision must to the extent of the invalidity, illegality and unenforceability be ignored in the interpretation of this Positive Covenant and all other provisions of this Positive Covenant will remain in full force and effect.

## **13. No waiver**

A party to this Positive Covenant is not to be taken to have waived any right or entitlement it may have under this Positive Covenant unless and until that waiver is notified in writing to the party seeking the benefit of the alleged waiver. Waiver by a party in respect of any act or thing required to be done under this Positive Covenant does not constitute a waiver of any other act or thing (whether of the same or of a different nature) required to be done under this Positive Covenant.

## **14. Right to extinguish**

The only party with the authority to release, vary or modify or extinguish this Positive Covenant is the Council.

## 15. Legal costs

The Registered Proprietor must pay all the Council's reasonable legal costs and expenses in respect of the preparation of this Positive Covenant and the costs of registering this Positive Covenant.

I certify that the authorised officer of the prescribed authority who is personally known to me or as to whose identity I am otherwise satisfied signed this application in my presence:

### Execution by the Prescribed Authority

\_\_\_\_\_  
Signature of Witness

\_\_\_\_\_  
Signature of an authorised officer

\_\_\_\_\_  
Name of Witness

\_\_\_\_\_  
Name of authorised officer

\_\_\_\_\_  
Address of Witness

\_\_\_\_\_  
Position of authorised officer

### Execution by the Registered Proprietor

"I certify I am an eligible witness and that the registered proprietor signed this dealing in my presence. [See note \* below]

Certified correct for the purposes of the Real Property Act 1900 by the registered proprietor

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Signature of registered proprietor

\_\_\_\_\_  
Name of Witness

\_\_\_\_\_  
Address of Witness"

**For a corporation the following form of execution should be used:**

"Certified correct for the purposes of the Real Property Act 1900 and executed on behalf of the company named below by the authorised persons(s) whose signatures(s) appear(s) below pursuant to the authority specified:



Company:  
Authority:

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Signature of authorised person

\_\_\_\_\_  
Name of authorised person

\_\_\_\_\_  
Name of authorised person

\_\_\_\_\_  
Office held:

\_\_\_\_\_  
Office held:"