

## PART 1 - DEFINITIONS

Unless the context otherwise requires, then in interpreting the Agreement:

“**ADC**” means Australian Disputes Centre (ABN 87 003 042 840) and includes any successor organisation that the ADC is either assimilated by or merges with.

“**ADC Guidelines**” means the ADC Guidelines for Commercial Mediation operating at the time a dispute matter is referred to the ADC.

“**Agreement**” means the entire contractual agreement between the parties and includes these Terms and Conditions, any variation, the Estimate, the list of Services, and any other documents identified in the letter of acceptance as forming part of the Agreement.

“**Australian Consumer Law**” refers to the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

“**Business Day**” means a day that is not a Saturday, Sunday or Public Holiday in the State or Territory that this Agreement operates.

“**Client**” means the party with whom the Consultant contracts to provide Services.

“**Consultant**” means Asset Management Engineers Pty Ltd (ACN 121 381 682).

“**Estimate**” means the letters or other documents prepared by the Consultant and submitted to the Client to describe the scope of work to be undertaken, the personnel and equipment proposed to be utilised, and the amount or method of calculation of the fee and reimbursable expenses.

“**Fee**” means the amount set out in the Agreement.

“**Force Majeure**” means any event or circumstances beyond the reasonable control of a party, including acts of God, wars, civil riots, strikes, lock-outs, trade disputes or labour disturbances, breakdown of plant or machinery, accidents, storms, fires, lightning, floods, earthquakes, disease outbreaks, natural disasters or difficulties in obtaining materials that occurs to the extent that it:

- would be unreasonable to expect the affected party to have planned for, avoided or minimised the impact of such circumstance by appropriate risk management, disaster recovery or business resumption plan; and
- results in a party being unable to perform an obligation under this Agreement on time.

“**GST**” means a goods and services tax, value added tax or a similar tax levied or imposed in relation to a supply (or deemed supply) of any goods, property, services or any other thing.

“**Intellectual Property**” includes but is not limited to all trademarks, patents, copyright, designs, marks, processes, know-how, methodology, concepts, models, specifications, statements, formulae, trade secrets, manner of new manufacture, drawings, artwork and data or other like property or rights owned or held by the Consultant. These rights include but are not limited to:

- marks, logos, images, service marks, trade names, business names, internet domain names, slogans, symbols, brand names, copyright or other trade indicia; and
- all rights in information, know-how, processes, procedures, compositions, devices, methods, formulae, protocols, techniques, software, designs, drawings, programs, source code, dynamic link libraries, graphical user interfaces, trade secrets or data whether or not protectable by patent application design registration, copyright, circuit layouts or otherwise, whether unregistered, registered or registrable.

“**Intellectual Property Rights**” means all present and future rights conferred by statute, common law or equity anywhere in the world in or in relation to copyright, trademarks, designs, patents, methodology, concepts, models, circuit layouts, plant varieties, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include:

- all rights in all applications to register these rights including all rights to claim Paris Convention priority;
- all renewals and extensions of these rights; and
- all rights in the nature of these rights, such as moral rights.

“**Notice**” means a written notice sent pursuant to clause 11.4.

“**PPSA**” means the *Personal Property Securities Act 2009* (Cth).

“**Project**” means the scope of work described in the Agreement in respect of which the Client has engaged the Consultant to provide Services.

“**Reimbursable Expenses**” means the amounts set out in the Agreement.

“**Subconsultant**” means and includes:

- any person, firm, group or company engaged by the Consultant or with whom the Consultant may arrange for any work to be performed for the Client and
- any person who is now or hereafter a servant, agent or subcontractor of the Subconsultant, and includes the successors and assigns of the Subconsultant. “**Security Agreement**”, “**Commingled Goods**”, “**Financing Statement**”, “**Financing Change Statement**”, “**Personal Property**”, “**All Present and After Acquired Property**”, “**Purchase Money Security Interest**”, “**Registration**” and “**Security Interest**” have the meanings given to them in the PPSA.

“**Services**” means those professional services specifically described in the Agreement.

“**Terms and Conditions**” mean these terms and conditions which form part of the Agreement between the Client and Consultant.

## PART 2 - ROLE OF THE CONSULTANT

### 2.1 Professional Standard

In performing the Services, the Consultant shall exercise the degree of skill, care and diligence normally exercised by members of the Consultant’s profession performing services of a similar nature, in accordance with the ethics of the Consultant’s profession.

### 2.2 Information Provided

- The Consultant’s performance of the Services shall be based on the information made available to it by the Client.
- The Consultant shall use all reasonable efforts to consult with the Client as to the requirements for the Project to which the Services relate and as necessary for the performance of the Services.
- The Client is solely responsible for any inaccurate or misleading information it provides to the Consultant.

### 2.3 Additional Information & Documents

If the Consultant considers that the information, documents and other particulars made available to it by the Client are not sufficient to enable the Consultant to provide the Services in accordance with this Agreement, the Consultant may advise the Client who shall then provide such further assistance, information, or other particulars as necessary in the circumstances.

### 2.4 Appoint a Representative

The Consultant shall appoint a person to act as its representative and give Notice to the Client of the name of the person so appointed. The Consultant agrees that the person appointed shall have authority to act on behalf of the Consultant for all purposes in connection with this Agreement.

### 2.5 Notice of Matters Likely to Change Scope or Timing of Services

If the Consultant becomes aware of any matter which may change or which has changed the scope or timing of the Services or the Project, then it will give Notice to the Client as soon as practicable and the Notice will contain, as far as practicable in the circumstances, particulars of the change.

### 2.6 Timely Provision of Services

The Consultant shall perform the Services in a timely manner to the extent that it is within its control to do so.

## PART 3 - ROLE OF THE CLIENT

### 3.1 Provide Information, Documents and Other Particulars

The Client shall as soon as practicable make available to the Consultant all information, documents and other particulars relating to the Client’s requirements for the Project.

### 3.2 Arrange Access to the Site or Related Areas

The Client shall as soon as practicable make arrangements to enable the Consultant to enter the Site or related areas as necessary to enable the Consultant to perform the Services.

### 3.3 Obtain All Necessary Approvals

Unless the parties specifically agree otherwise, the Client shall as soon as practicable obtain all approvals, authorities, licences and permits which are required from governmental, municipal or other responsible authorities for the lawful implementation and completion of the Project.

### 3.4 Provide Additional Professional Services

The Client agrees that the Services do not include any services which are properly carried out by other professions such as legal or accounting and if other such professional services are required, the Consultant shall obtain these services after consultation with the Client and at the Client’s cost.

### 3.5 Supply Necessary Equipment and Facilities

The Client shall make available to the Consultant at the place and at the time specified in the Estimate, the equipment and facilities specified in the Estimate at no cost to the Consultant.

### 3.6 Appoint a Representative

The Client shall appoint a person to act as its representative and give Notice to the Consultant of the name of the person so appointed. The Client agrees that the person appointed shall have authority to act on behalf of the Client for all purposes in connection with this Agreement.

### 3.7 Notice of Matters Likely to change Scope or Timing of Services

If the Client becomes aware of any matter which may change the scope or timing of the Services or the Project, then the Client will give Notice to the Consultant as soon as practicable but in any event no later than seven (7) days after the event occurs.

### 3.8 Comply with Additional Special Obligations

The Client shall carry out the additional special obligations set out in the Estimate.

### 3.9 Co-operate with Consultant

The Client shall co-operate with the Consultant and shall not interfere with or obstruct the proper performance of the Services.

## PART 4 - PAYMENT TO CONSULTANT FOR SERVICES

### 4.1 Client to Make Payment

In consideration of the promise by the Consultant to perform the Services, the Client promises to pay the Consultant the Fee and any Reimbursable Expenses at the times and in the manner set out in this Agreement.

All completed line items may be claimed at the end of each payment period whether the project is complete or not.

## 4.2 Amount or the method of Calculation of Fee

The Amount or method of calculation of the Fee for the Services is set out in the Agreement.

## 4.3 Goods and Services Tax

- This clause applies if GST is imposed in respect of any supply or deemed supply of Services or of any other act, matter or thing by the Consultant under or in connection with this Agreement (a "Supply").
- The Client must pay to the Consultant in respect of a Supply the amount which is necessary to ensure that the Consultant receives a net amount (after payment of the GST imposed in respect of that Supply) that is equal to the full amount it would have received under this Agreement had that GST not been imposed.

Any price or other consideration referred to in this Agreement does not include GST unless it is expressly included.

The Consultant must provide to the Client a tax invoice or other document, or any information or other things, as required by law.

This clause takes precedence over any other term of this Agreement to the extent of any inconsistency.

## 4.4 Reimbursable Expenses

In addition to the payment referred to in clause 4.2, the Client agrees to pay and indemnify the consultant for all costs and expenses incurred by the Consultant in connection with the matters set out in the Agreement.

## 4.5 Timing of Payment

At or about the end of each payment period specified in the Agreement, the Consultant will give to the Client an account for the Services performed, and for Reimbursable expenses incurred, during the period.

The Client shall pay the full amount owing in respect of each account by the due date for payment stated on the account. Unless otherwise agreed, the due date for payment shall be thirty (30) days after the date of issue of the account.

## 4.6 Failure of Client to Make Payment by Due Date

If the Client fails to make payment by the due date, the Consultant reserves the right to cease work, or to withhold delivering to the Client the documentation of any work which has been carried out. If the Consultant exercises this right, then the Project shall be considered delayed by the Client, and clause 4.9 shall apply.

## 4.7 Interest on Overdue Payment

The Client agrees that in addition to all other rights and remedies of the Consultant, if the Client fails to pay all moneys as and when due, the Consultant shall be entitled to payment of interest on overdue accounts. The interest shall be calculated on daily balances at the current CBA corporate overdraft Reference Rate plus 2% per annum on all moneys which are not paid by the due date.

## 4.8 Disputed Claims

If the Client disputes the whole or any portion of the amount claimed in an account submitted by the Consultant, it shall pay that portion of the amount stated in the account which is not in dispute and it shall simultaneously notify the Consultant by Notice of the reasons for disputing the account.

If the parties are unable to reach agreement within seven (7) days of the Consultant receiving the Client's Notice, the dispute may be determined in accordance with this Agreement. If it is resolved that some or all of the amount in dispute ought properly to have been paid at the time it was first claimed, then the Client shall pay the amount finally resolved together with interest on that amount in accordance with clause 4.7.

## 4.9 Payment of Costs if Project Delayed

If the performance of the Services is delayed beyond a reasonable period for any reason other than a breach of the Agreement by the Consultant, the Client shall be liable to the Consultant for loss and damage suffered, including loss of profits and consequential costs and expenses incurred as result of the delay.

## 4.10 Effect of Termination on Right to Payment

If the engagement of the Consultant is terminated by any reason other than for breach of this Agreement by the Consultant, the Consultant shall be entitled to pro rata payment for the Services carried out and the Client shall be liable to the Consultant for loss and damage suffered, including loss of profits and consequential costs and expenses incurred as a result of the termination.

## 4.11 Effect of Change of Circumstances

The Fee for the Services performed under this Agreement has been calculated on the assumption of both parties that the Services are to be provided under circumstances normally pertaining to the carrying out of the type of project in question.

The parties agree that if the Consultant is required to perform the Services in circumstances other than those normally pertaining to such a project or if there is a change in the scope, timing or order of the Services, then the Consultant shall be entitled to payment of an amount which is reasonable in the circumstances.

## 4.12 Changes in Laws

If after the date of this Agreement there is any change to the laws, by-laws, regulations or ordinances of the Commonwealth of Australia, or a State or Territory of Australia, or any statutory authority, and that change directly or indirectly affects the cost or reimbursable expenses incurred by the Consultant in performing the Services, then the fee and reimbursable expenses otherwise payable to the Consultant under this Agreement shall be increased or decreased accordingly.

## PART 5 - SCOPE OF LIABILITY

### 5.1 No Consequential Loss

The Consultant and any Subconsultants engaged by the Consultant shall not be liable to the Client for any consequential loss or damages (**Consequential Loss**) howsoever arising out of, related to or in connection with this Agreement, and such exclusion will apply in contract, tort and otherwise at law irrespective of cause and notwithstanding the negligence or breach of duty of the parties or any other party. For the avoidance of doubt, Consequential Loss includes but is not limited to loss of revenue, loss of profit, loss of product or production, business interruption, loss of business opportunity, loss of savings, failure to realise expected profits, loss of goodwill, downtime and other like risks in each case whether direct or indirect and whether or not foreseeable at the date of execution of this Agreement or any time.

### 5.2 Other Direct and Indirect Loss

Under no circumstances, whether as a result of any act, neglect or default or otherwise howsoever, shall the Consultant have any liability for, or in relation to any work, reports, information, plans, designs or specifications supplied or performed by any third party, including any Subconsultant or any third party engaged by or at the suggestion of the Consultant.

### 5.3 Limitation of Liability

- Notwithstanding any other provision to the contrary in this Agreement, the Consultant's (including any Subconsultant engaged by the Consultant) maximum aggregate liability to the Client, howsoever arising out of, related to or in connection with the performance or non-performance of this Agreement, whether in contract, tort or otherwise at law, irrespective of cause and notwithstanding the negligence or breach of duty (statutory or otherwise) of the Consultant or any other entity or party, shall be limited to the sum of the cost of the Services that are the subject of this Agreement.
- The Consultant's (including any Subconsultant engaged by the Consultant) liability to the Client for any loss or damage, including a claim for damages for a breach of the Agreement by the Consultant, shall be reduced to the extent that an act or omission of the Client, the Client's employees, agents or consultants, or any third party, caused or contributed to the loss or damage.
- The Consultant (including any Subconsultant engaged by the Consultant) is not liable to the Client for any loss or damage the Client incurs outside of the performance of the Services. For the avoidance of doubt, this includes circumstances where the Consultant performs and completes Services and the Client fails to adhere to or follow up on any recommendations provided as part of the performance of the Services.

### 5.4 Indemnity regarding the Limitation of Liability

To the extent permitted by law, the Client will indemnify and forever keep indemnified the Consultant and the Consultant's Subconsultants from any suit, cost, demand or claim for damage which exceeds the sum of the cost of the Services that are the subject of this Agreement.

### 5.5 Indemnity Regarding Third Party Claims

To the extent permitted by law, the Client will indemnify and forever keep indemnified the Consultant and the Consultant's Subconsultants against all claims, costs, suits and demands by third parties howsoever arising whether in respect of the Services or in respect of the performance or non-performance of the Services or otherwise.

### 5.6 Duration of Liability

Unless otherwise agreed in writing, the Consultant and the Consultant's Subconsultants shall be deemed to have been discharged from all liability in respect of the Services, whether under the law of contract, tort or otherwise, on the expiration of one year from the date of invoice in respect of the final amount claimed by the Consultant pursuant to Part 4, and the Client (and persons claiming through or under the Client) shall not be entitled to commence any action or claim whatsoever against the Consultant or the Consultant's Subconsultants (or any employee of the Consultant or the Consultant's Subconsultants) in respect of the Services after that date.

### 5.7 Estimates of Project Cost

If the Services include giving to the Client an estimate of the likely costs for the Project, the Consultant warrants only that it will exercise the reasonable skill, care and diligence normally exercised by members of the Consultant's profession in the preparation of its professional opinion of those estimated costs.

### 5.8 Extent of Warranty

The Consultant does not give any warranty nor accept any liability in relation to the performance or non-performance of the Services except to the extent, if any, required by law or specifically provided for in this Agreement. If apart from this clause any warranty would be implied whether by law, custom or otherwise that warranty is to the full extent permitted by law hereby excluded. Nothing herein contained shall be read or applied so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods or services pursuant to this Agreement of all or any of the provisions of the Australian Consumer Law or any relevant State or Territorial legislation or subordinate legislation which by law cannot be excluded, restricted or modified.

### 5.9 Client Directing Consultant

Where the Client is instructing a staff member of the Consultant directly as to their work to be performed, the Client shall acquire professional liability insurance for the work performed by the Consultant.

To the extent permitted by law, the Client, will indemnify and will forever keep indemnified the Consultant from any claim, loss, damage, demand, suit, costs, actions, interest, expenses and liability whatsoever or howsoever arising, whether presently accrued or arising in the future, for the work performed by the Consultant's staff that the Client has instructed the Consultant's staff to perform directly.

## **PART 6 - INTELLECTUAL PROPERTY**

### **6.1 Intellectual Property**

The Client expressly agrees and acknowledges that:

- (a) any of the Consultant's Intellectual Property (whether unregistered, registered or registrable) is the Consultant's property; and
- (b) nothing in the Agreement is intended to provide the Client with any interest in the Consultant's Intellectual Property.

### **6.2 No modification to Intellectual Property**

- (a) The Client agrees that it must not copy, alter, modify or in any other way interfere with (including but not limited to reverse engineering) the Consultant's Intellectual Property unless express advance written approval is given by the Consultant.
- (b) The Client must not do anything that may infringe on the Consultant's Intellectual Property Rights.

### **6.3 Title and Ownership of Improvements to Intellectual Property**

- (a) Title and ownership of any developments, improvements, enhancements or modifications to the Consultant's Intellectual Property shall:
  - i) not accrete back to the Client;
  - ii) not be the Client's property; and
  - iii) vest in the Consultant.
- (b) If during the course of providing the Services the Consultant discovers, develops or first reduces to practice a concept, product or process capable of being patented, then the Consultant grants to the Client a royalty free, non-exclusive, non-transferable, non-sublicensable licence to use the same during the life of the works comprising the Project.

### **6.4 Client's Right to View Consultant's Documents**

Subject to the Client paying all invoices, fees and other amounts due under the Agreement by their respective due dates, the Consultant gives to the Client a licence to view the documents containing the Consultant's Intellectual Property for the purpose of completing the Project.

### **6.5 Publication of Articles**

The Consultant may, with the consent of the Client, publish, either alone or in conjunction with others, articles, photographs and other illustrations relating to the Project.

### **6.6 Publicity Material**

The Client shall ensure, to the extent reasonably possible, that the Consultant's input into the Project is duly recognised in any publicity material generated by the Client in respect of the Project.

## **PART 7 - DISPUTE DETERMINATION**

### **7.1 Dispute Procedure**

Unless a party has complied with the provisions of this Part 7, that party may not commence court proceedings relating to any dispute, controversy or claim arising under this Agreement except where that party seeks urgent interlocutory relief or the other party has failed to comply with this Part 7.

### **7.2 Executive Negotiation**

If any dispute, controversy or claim in relation to this Agreement arises between the Parties, then a senior representative from each party shall meet within ten (10) days of the giving of a Notice setting out the areas of dispute between the parties, and negotiate in good faith to resolve the dispute, controversy or claim.

### **7.3 Mediation**

- (a) In the event that the dispute, controversy or claim has not been resolved within twenty-eight (28) days (or such other period as agreed to in writing between the parties hereto) of the giving of Notice referred to in clause 7.2, the dispute, controversy or claim shall be submitted to mediation.
- (b) Mediation of the dispute shall be conducted by a person or body agreed to by the parties, or failing agreement, within twenty-eight (28) days after receipt of the dispute Notice, as nominated by the ADC.
- (c) Any mediation meetings and proceedings shall be held in the capital city of the State or Territory in which the Agreement is made.
- (d) The mediation shall be conducted in accordance with the ADC Guidelines, the terms of which are hereby deemed incorporated into the Agreement.
- (e) This clause shall survive termination of the Agreement.

### **7.4 Costs of Mediation**

The costs of any mediation proceedings shall be borne between the parties equally.

### **7.5 Litigation / Arbitration**

The parties shall only have recourse to arbitration or litigation in the event that mediation fails to resolve the dispute within twenty-one (21) days of the mediation commencing.

## **PART 8 - TERMINATION OF SERVICES**

### **8.1 Termination by Client**

The Client may terminate this Agreement:

- (a) by Notice to the Consultant if the Consultant is in breach of these Terms and Conditions and/or the Agreement and the breach has not been remedied within twenty-eight (28) days (or longer period as the Client may allow) of the date of the said Notice requiring the breach to be remedied; or

- (b) by not less than sixty (60) days Notice to the Consultant.

### **8.2 Termination by Consultant**

The Consultant may terminate the Agreement:

- (a) immediately, by Notice to the Client if the Client is in breach of any of the provisions of Part 4 of these Terms and Conditions;
- (b) by Notice to the Client if the Client is in breach of the provisions of any other Part of the Agreement (being any part other than Part 4 of these Terms and Conditions) and the breach has not been remedied within twenty-eight (28) days (or longer period as the Consultant may allow) of the date of the said Notice requiring the breach to be remedied; or
- (c) by not less than sixty (60) days Notice to the Client.

### **8.3 Termination Not to Affect Rights in Respect of Prior Breaches**

Termination shall be without prejudice to any claim which either party may have against the other in respect of any breach of these Terms and Conditions and/or the Agreement which occurred prior to the date of termination.

## **PART 9 - SECURITY INTEREST AND PPSA**

### **9.1 Security Agreement**

The Client acknowledges that this Agreement constitutes a Security Agreement and the Client grants a Security Interest in favour of the Consultant in all the Services and any goods supplied by the Consultant to the Client from time to time. The Client grants to the Consultant a Purchase Money Security Interest. Further, the Client grants to the Consultant a Security Interest in the Client's All Present and After Acquired Property to secure the as security for the goods and performance of its obligations under this Agreement.

### **9.2 PPSA Registration**

The Client accepts, acknowledges and agrees that:

- (a) the Consultant can, without notice to the Client, affect and maintain a Registration (in any manner that the Consultant considers appropriate) of its Security Interest on the PPSR in relation to any Security Interest contemplated or constituted by this Agreement including but not limited to the Consultant's goods, any Services, contract rights or Intellectual Property; and
- (b) pursuant to section 275(6) of the PPSA, the Client agrees the Consultant is not required to disclose to an interested person information pertaining to the Consultant's Security Interest unless required to do so pursuant to the PPSA or at law generally.

### **9.3 Client's Obligations**

The Client will:

- (a) sign any documents and/or provide any further information (which information the Client warrants to be complete, accurate and up-to-date in all respects) and/or assistance which the Consultant may reasonably require to enable perfection of its Security Interest or Registration of a Financing Statement or Financing Change Statement on the PPSR;
- (b) not register a Financing Change Statement or make a demand to alter the Financing Statement pursuant to section 178 of the PPSA in respect of the goods, including any Services, without the prior written consent of the Consultant;
- (c) give the Consultant not less than fourteen (14) days Notice of any proposed change in their name and/or any other changes in their details (including but not limited to, changes in their address, facsimile number, email address, trading name or business activities);
- (d) indemnify the Consultant against any costs the Consultant incurs in perfecting and maintaining its perfected Security Interest in any goods or such other Personal Property under the PPSA and any costs the Consultant may incur in the course of enforcing any of its rights under this Authority, the PPSA or at law generally; and
- (e) procure from any persons considered by the Consultant to be relevant to its security position, such agreement and waivers as the Consultant may at any time reasonably require.

### **9.4 Client's undertakings**

The Client undertakes not to register, or permit to be registered, a Financing Statement or a Financing Change Statement in respect of a Security Interest contemplated or constituted by this Agreement in favour of a third party without the Consultant's prior written consent.

### **9.5 PPSA Provisions not to Apply**

If Chapter 4 of the PPSA would otherwise apply to the enforcement of a Security Interest arising in connection with this Agreement to which these Terms and Conditions apply, the Client agrees that the following provisions of the PPSA will not apply to the enforcement of this Agreement:

- (a) Section 95 (notice of removal of accession), to the extent that it requires the Consultant to give a notice to the Client;
- (b) Section 96 (when a person with an interest in the whole may retain an accession);
- (c) Subsection 121(4) (enforcement of liquid assets – notice to grantor);
- (d) Section 125 (obligation to dispose of or retain collateral);
- (e) Section 129 (disposal by purchase);
- (f) Section 130 (notice of disposal of collateral), to the extent that it requires the Consultant to give a notice to the Client;
- (g) Section 132(3)(d) (contents of statement of account after disposal);
- (h) Section 132(4) (statement of account if no disposal);
- (i) Section 135 (notice of retention of collateral);

- (j) Section 142 (redemption of collateral); and
- (k) Section 143 (reinstatement of security agreement)

## 9.6 PPSA Notices

Notices or documents required or permitted to be given to the Consultant for the purposes of the PPSA must be given in accordance with the PPSA.

## PART 10 - CHARGE

### 10.1 Charge

Subject to this Agreement and the PPSA:

- (a) where the Client is the owner of any real property, the Client agrees to mortgage and/or charge all of their joint and/or several interest in the said real property to the Consultant or the Consultant's nominee to secure all amounts and other monetary obligations payable under this Agreement.  

The Client acknowledges and agrees that the Consultant (or the Consultant's nominee) is entitled to lodge an absolute caveat, where appropriate and the caveat, if so lodged, will be withdrawn once all payments and other monetary obligations payable hereunder have been met; and
- (b) should the Consultant elect to proceed in any manner in accordance with this clause 10.1, the Client will indemnify the Consultant from and against all the Consultant's incurred costs and disbursements including legal costs on a solicitor and own client basis; and the Client agrees to irrevocably nominate, constitute and appoint the Consultant or the Consultant's nominee as the Client's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 10.1.

## PART 11 - GENERAL MATTERS

### 11.1 Transfer and Assignment

- (a) The Consultant and the Client each binds itself and its partners, successors, executors, administrators, assigns and legal representatives to the other party to this Agreement and to the partners, successors executors, administrators, assigns and legal representatives of the other party in respect of all covenants and obligations of this Agreement.
- (b) Neither the Consultant nor the Client shall assign, sublet or transfer any right or obligation under the Agreement without the written consent of the other party. Unless specifically stated to the contrary in any written consent to an assignment, no assignment shall release or discharge the assignor from any obligation under the Agreement.
- (c) Nothing contained in this clause shall prevent the Consultant from employing within its fee such persons or companies as it may deem appropriate to assist it in the performance of the Agreement.

### 11.2 Severability

If any provision of this Agreement shall be determined by any statute or any court having jurisdiction in relation thereto to be illegal, invalid, void or voidable, the legality or validity of the remainder of this Agreement shall not be affected and the illegal, invalid, void or voidable provision shall be deemed deleted from this Agreement to the same extent and effect as if never incorporated in this Agreement, but the remainder of this Agreement shall continue in full force and effect.

### 11.3 Subconsultants

The Consultant may license or sub-contract all or any part of its rights and obligations (including supplying of the Services) without the Client's consent.

### 11.4 Notices

- (a) Notices under this Agreement must be in writing and either delivered by hand, by mail or by email to the then-current publicly known or last communicated mail or by email address of the addressee party or parties.
- (b) Any Notice or other document relating to this Agreement will be deemed to be served:
  - i) on the second (2nd) Business Day after the date on which it was posted – if sent by ordinary pre-paid or registered post addressed to the parties;
  - ii) on the day on which it was sent – if it is sent by email transmission before or during normal business hours on a Business Day; or
  - iii) on the next Business Day following the day on which it was sent – if it is sent by email transmission after normal business hours on a Business Day or on a day other than a Business Day.
- (c) Each party must notify the other parties by Notice in the event their postal, delivery and email addresses for service of Notices changes and give full details of those new addresses. Such Notice is to be given as soon as is reasonably practicable.

### 11.5 Moneys

All reference to moneys in the Agreement shall be deemed to be references to Australian currency unless otherwise specified and all moneys to be paid shall be paid to the relevant party in places it may reasonably nominate in writing.

### 11.6 Provision of Services Not Exclusive

The Client acknowledges that, unless agreed otherwise, the provision of Services by the Consultant for the Project is not given on an exclusive basis.

### 11.7 Governing Law

The Agreement and all disputes arising out of it are governed by the laws of the State or Territory of the Consultant's office as set out in the Estimate and the parties submit to the non-exclusive jurisdiction of courts of that State or Territory.

### 11.8 Headings

Headings have been inserted for guidance only and do not affect the interpretation of this Agreement.

### 11.9 Non-Poaching

- (a) The Client will not, without the Consultant's prior written consent, employ or otherwise engage personnel employed by the Consultant during the term of the Agreement and for a period of 3 months thereafter.  

The Consultant may give permission on such conditions as it deems appropriate, including but not limited to the payment by the Client to the Consultant of a fee of up to \$75,000 plus GST. The Consultant will advise the Client of any conditions in writing prior to the granting of permission.
- (b) The above stipulation as to a fee is agreed by the parties to represent a genuine estimate of the benefit of the introduction of personnel to the Client, the cost to the Consultant of having to re-hire and train a new employee, and the loss of income expected to arise due to the Client engaging the employee directly.
- (c) Reference above to an employee of the Consultant includes all persons employed by the Consultant during the term of this Agreement.

### 11.10 Acceptance of Terms and Conditions

Any instructions received by the Consultant from the Client in relation to the following:

- (a) acceptance of the Consultant's quotation for the Services;
- (b) the provision of a purchase order from the Client to the Consultant;
- (c) the Client issuing a Notice to the Consultant to supply the Services and/or any goods;
- (d) the supply of the Services and/or any goods by the Consultant to the Client;
- (e) the Client and the Consultant entering into a formal agreement (including this Agreement); or
- (f) the Client's acceptance of the Services and/or any goods supplied by the Consultant, will constitute acceptance of these Terms and Conditions by the Client.

### 11.11 Entire Agreement

This Agreement constitutes the sole and entire agreement between the parties in relation to the subject matter of this Agreement and a warranty, representation, guarantee or other term or condition of any nature not contained or recorded in this Agreement is of no force or effect.

### 11.12 Breach of Agreement

In the event of any breach of this Agreement by the Consultant, the remedies of the Client shall be limited to damages which under no circumstances shall exceed the fees paid for the Services under this Agreement.

### 11.13 No set off by Client

The Client shall not be entitled to set off against or deduct from the amounts owed or claimed to be owed to the Consultant under this Agreement.

### 11.14 No Partnership, Agency or Employment Arrangement

Nothing in this Agreement or these Terms and Conditions gives rise to any relationship of partnership, agency, employment or otherwise between the parties.

### 11.15 Variation

This Agreement can only be varied or amended by written agreement between both parties.

### 11.16 No Waiver

The failure by the Consultant to enforce any provision of this Agreement shall not be treated as a waiver of that provision, nor shall it affect the Consultant's right to subsequently enforce that provision.

### 11.17 No Warranty

The Client acknowledges that the Consultant does not make under this Agreement or outside it, any representations or warranties regarding goods and services or any matter which is or might be relevant to the Client utilising any services other than the representations or warranties expressed in this Agreement.

### 11.18 Force Majeure

- (a) A party affected by Force Majeure shall not be deemed to be in breach of this Agreement, or otherwise be liable to the other, by reason of any delay in performance, or the non-performance, of any of its obligations under this Agreement to the extent that the delay or non-performance is due to any Force Majeure of which it has notified the other party in accordance with clause 11.18(b). The time for performance of that obligation shall be extended accordingly, subject to clause 11.18(c).
- (b) If any Force Majeure occurs in relation to either party which affects or is likely to affect the performance of any of its obligations under this Agreement, it shall notify the other party within a reasonable time as to the nature and extent of the circumstances in question and their effect on its ability to perform.
- (c) If the performance by either party of any of its obligations under this Agreement is prevented or delayed by Force Majeure for a continuous period in excess of three (3) months, the parties shall negotiate in good faith, and use their best endeavours to agree upon such amendments to this Agreement or alternative arrangements as may be fair and reasonable with a view to alleviating its effects; but if they do not agree upon such amendments or arrangements within a further period of thirty (30) days, the other party shall be entitled to terminate this Agreement by giving Notice to the party affected by the Force Majeure.

## 11.19 Interpretation

In this Agreement, the following rules of interpretation apply unless the contrary intention appears:

- (a) headings are for convenience only and do not affect the interpretation of these Terms and Conditions and/or this Agreement;
- (b) the singular includes the plural and vice versa;
- (c) words that are gender neutral or gender specific include each gender;
- (d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (e) a reference to "includes" means without limitation;
- (f) a reference to a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
- (g) a reference to a party includes its successors and permitted assigns;
- (h) a reference to a document includes all amendments or supplements to that document;
- (i) a reference to a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to, this Agreement;
- (j) this Agreement includes all schedules and attachments to it;
- (k) an agreement other than this Agreement includes an undertaking, or legally enforceable arrangement or understanding, whether or not in writing;
- (l) any Act of Parliament includes any amendments or re-enactments of the same or any Regulations made under that Act;
- (m) an agreement on the part of two or more persons binds them jointly and severally;
- (n) when the day on which something must be done is not a Business Day, that thing must be done on the following Business Day; and
- (o) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it.

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