

Based on or amended from
AS 4122—2000

AS 4122

Australian Standard™

**General conditions of contract for
engagement of consultants (amended)**

[Insert project name]
[insert location], Melbourne

The University of Melbourne &
[Insert consultant name]

Draft: 30 June 2009

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S t a n d a r d s A u s t r a l i a

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FORMAL INSTRUMENT OF AGREEMENT

DATE

2009

BETWEEN

The University of Melbourne (ABN 84 002 705 224) of c/- Property & Campus Services, 625-631 Swanston St, Carlton, Melbourne, Victoria 3053 (*Client*)

AND

[*Insert Consultant name*] (ACN [*insert ACM*]) of [*Insert Consultant address*] (*Consultant*)

RECITALS

- A The *Client* engages the *Consultant* to carry out the *Services* in its own right and on behalf of [*stakeholders*] in accordance with the requirements of this *Contract*.
- B The *Services* relate to the [*insert type of services*] with respect to the [*insert description of building*] which will be constructed by the *Contractor* on the *Site*.
- C The *Consultant* has represented to the *Client* that it is experienced in the performance of work similar to the *Services* and that it will provide the necessary resources, personnel, skill and expertise required to comply with all of its obligations under the *Contract*.
- D The *Consultant* acknowledges that the *Client* has relied upon the representation in Recital D in entering into the *Contract* and agrees to its engagement on the terms of the *Contract*.

IT IS AGREED

Performance and Payment

1. The *Consultant* shall carry out the *Services* in accordance with the *Contract*.
2. The *Client* shall pay to the *Consultant*:
 - (a) the lump sum fee of \$[*insert*] (exclusive of GST), adjusted by any additions or deductions required pursuant to the *Contract*; and
 - (b) any other amounts specified in the *Contract* which include the expenses and disbursements in *Item 18(b)* of Annexure Part A (if any),
adjusted by way of any deductions required for payments made by the *Client* in full or in part for *Services* already performed by the *Consultant* as at the date of execution of this Formal Instrument of Agreement.
3. The *Client* and the *Consultant* acknowledge and agree that payment of moneys by the *Client* to the *Consultant* is not evidence that the *Services* have been carried out satisfactorily but is payment on account only.
4. Payment of money by the *Client* shall be at the times and in the manner provided for in the *Contract*.
5. Each of the *parties* shall perform the obligations imposed on it by the *Contract*.

Contract documents

6. The *Contract* comprises the documents listed in Annexure Part A, *Item 5* which are listed therein in the order of precedence which will apply to the interpretation of any discrepancy, inconsistency, ambiguity, inadequacy, error or omission between the documents forming the *Contract*.

Entire Contract

7. Once this *Contract* has been executed, it shall contain the entire agreement between the *Client* and the *Consultant* and no reliance shall be had on or regard to any prior dealings between the *parties* including any agreement between the *parties* contained in, or subsequent to:

(a) [insert any prior correspondence or agreements between the parties]

which are expressly superseded by the *Contract*.

8. The *Contract* may be varied only by written instrument executed by both *parties*.

Parties to give effect to the Contract

9. Each of the *parties* agree that they shall do everything reasonably necessary to give effect to the *Contract*.

EXECUTED as an agreement

SIGNED for and on behalf of **The University of Melbourne (ABN 84 002 705 224)** by an authorised officer in the presence of:

)
)
)
)
)

Signature of witness

Signature of authorised officer

Name of witness (please print)

Name of authorised officer (please print)

Title of witness

Title of authorised officer

EXECUTED for and on behalf of [*insert
Consultant name*] (ACN [*insert ACN*]) by)
its duly authorised officers in accordance with)
section 127 of the *Corporations Act 2001*)
(Cth):

Signature of Secretary/Director

Signature of Director

Name of Secretary/Director (please print)

Name of Director (please print)

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STANDARDS AUSTRALIA

Australian Standard

General conditions of contract for engagement of consultants

1 INTERPRETATION

- (a) In the *Contract*, except where the context otherwise requires—

Brief means the *Client's* brief as stated in the *documents* listed in *Item 1*;

business day means a day that is not a Saturday, Sunday or a day that is wholly or partly observed as a public holiday throughout Victoria;

Client means the client or the principal (as the case may be) stated in *Item 2*;

Commonwealth means the Commonwealth of Australia as represented by the *Department*;

Consultant means the Consultant stated in *Item 3*;

Contract means the agreement between the *Client* and the *Consultant* constituted by those documents listed in *Item 5*;

Contractor means the head contractor to be engaged by the *Client* to carry out the *Works*;

Consultancy Services means the consultancy services (other than the *Services*) to be performed and completed by the *Other Consultants*;

Contract Material means those *documents* and materials created or required to be created under the *Contract* (including, without limitation, such documents and materials which result from the *post-novation design Services*) and to be handed over to the *Client*;

Cost Planner means the person stated in *Item 3B* as the Cost Planner in relation to the *Works* and *Consultancy Services* (including the *Services*) or other person appointed from time by the *Client* and notified in writing to the *Consultant*;

day means calendar day;

Department means government department providing funding for the Project, if applicable and its successor Government Departments;

documents includes information stored by electronic and other means;

Expert has the meaning in Clause 15.4;

Expert Determination has the meaning in Clause 15.4;

fit for purpose means in accordance with and also to satisfy the purpose stated in or necessarily inferred from the *Brief*;

GST has the same meaning as given in the *GST Act*;

GST Act means *A New Tax System (Goods and Services Tax) Act 1997* (Cth);

GST Amount means, to the extent that the consideration expressed to be provided by the recipient (or any other entity) is:

Intellectual Property Right means any intellectual or industrial property rights including, without limitation:

- (i) any business names;
- (ii) any registered or unregistered trade mark;
- (iii) any trade secrets, financial, marketing and technical information, ideas, concepts, know-how, technology, processes and confidential information;
- (iv) any patent, patent applications, discoveries, inventions, registered or unregistered designs, copyright, moral rights and similar rights; and
- (v) licenses or similar user rights in respect of any such rights and interests;

Item means an Item in Annexure A;

Legislative Requirements means (but is not limited to):

- (i) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory applicable to the *Services*;
- (ii) certificates, licences, consent, permits, approvals and requirements of authorities and organisations having jurisdiction applicable to the *Services*; and
- (iii) applicable codes of practice, the Building Code of Australia and all Australian Standards to the extent to which compliance with such codes and standards is:
 - (A) mandatory and relevant to the *Services*; and
 - (B) not mandatory but is nevertheless relevant to the *Services* and compliance with the same would be judged prudent by a consultant who regularly acts in the capacity in which the *Consultant* is engaged and who possesses the knowledge, skill and experience of a *Consultant* qualified to act in that capacity;

Other Consultants means the engineers and other professional consultants (including the *Project Manager* but excluding the *Consultant*) engaged or to be engaged by the *Client* or the *Contractor*, as the case may be, to perform the *Consultancy Services*;

PCG means the project control group constituted for the purpose of decision making related to the proper conduct and delivery of the *Works* and *Consultancy Services*, and which has as its core members, representatives of *the University*, [*insert other core members/stakeholders*], and other attendees being the *Project Manager*, the *Cost Planner* and the *Consultant* unless otherwise directed;

Project means [*insert description of this Project*] the *Services*, the *Consultancy Services* and the *Works*;

Minister means the Minister for [*insert relevant Minister*] for and on behalf of the State of Victoria;

Novation Date means the date, as stated in the deed of novation described in clause 7A, on which such deed of novation shall take effect;

OH&S means occupational health and safety;

post-novation design Services means that part of the design and fit-out *Services* which are commenced and/or completed on and after the *Novation Date*;

party means a party to this *Contract*;

prescribed notice has the meaning in clause 14A.1;

Program means a program required pursuant to Clause 3(b);

Project Manager means the party stated in *Item 3A* as the Project Manager of the *Services* or other party appointed from time by the *Client* and notified in writing to the *Consultant*;

Security of Payment Act means the *Building and Construction Industry Security of Payment Act 2002 (Vic)*, as amended from time to time;

Services means those services described in the *Brief* together with those activities which the *Consultant* is required to carry out under the *Contract*;

Site means the land owned by the *Client* situated at the pre-demolition site of [*insert location*], Melbourne on which the construction elements of the *Works* will be performed;

the University means the University of Melbourne (ABN 8400 270 5224); and

Works means the works the subject of a contract to be entered into by the *Client* and the *Contractor* [*insert description of project*];

- (b) The law governing the *Contract*, its interpretation and any agreement to arbitrate is the law of the State or Territory stated in *Item 4*, or if the State or Territory is not stated, the law of the State or Territory where the *Services* are to be carried out.
- (c) The clause and subclause headings in these General Conditions of Contract shall not form part of, nor be used in the interpretation of the *Contract*.
- (d) Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender.
- (e) If the time for giving any notice, making any payment or doing any other act required or permitted by the *Contract*, falls on a day that is not a *business day*, then the time for giving the notice, making the payment or doing the other act shall be deemed to be on the next *business day*.

2 NATURE OF CONTRACT

- (a) The *Consultant* shall perform the *Services* in accordance with the *Contract*.
- (b) The *Consultant* shall perform the *Services* to that standard of care and skill to be expected of a *Consultant* who regularly acts in the capacity in which the *Consultant* is engaged and who possesses the knowledge, skill and experience of a *Consultant* qualified to act in that capacity.

2A CONSULTANT'S WARRANTIES

Without limiting any other obligation of the *Consultant* under this *Contract* the *Consultant* warrants to the *Client* that it:

- (a) has examined the *Brief* and the *Services* are suitable, appropriate and adequate for the purpose stated in the *Brief*, having regard to the assumptions that the *Consultant* can be reasonably expected to make in accordance with sound professional principles;
- (b) shall carry out and complete the *Services* in accordance with this *Contract*; and
- (c) shall carry out and complete the *Services* and the *Contract Material* so that the *Works* when carried out and completed by the *Contractor* and/or any other contractor (as the case may be), in accordance with any such *Services* and/or *Contract Material*, shall:

- (i) be fit for purpose; and
- (ii) comply with all Legislative Requirements.

3 RESPONSIBILITIES AND OBLIGATIONS OF THE CONSULTANT

The *Consultant* shall:

- (a) engage and retain subconsultants in accordance with clause 7(b);
- (b) where stated in *Item 6* and within the time and in the form stated in *Item 6*, submit to the *Project Manager* (with a copy to the *Client*), a *Program* (and any revised *Program* requested) that obtains the *Project Manager's* approval and which shows the commencement, progress and completion of the *Services* activities. The *Program* shall not be a *Contract* document;
- (c) with due expedition and without delay and in accordance with the *Program*, provide all professional skill and advice required by the *Contract* for carrying out the *Services*;
- (d) comply with all directions of the *Client* or *Project Manager* given pursuant to and in accordance with a provision of the *Contract*;
- (e) remain fully responsible for the *Services* carried out by the *Consultant* and the *Contract Material* which results notwithstanding any review, comment, direction, approval or acceptance of those *Services* or such *Contract Material* by the *Client* or the *Project Manager* under this *Contract*;
- (f) employ staff with appropriate qualifications and experience to carry out the *Services*;
- (g) ensure that the key personnel stated in *Item 7* (or alternates reasonably approved by the *Client*) are used by the *Consultant* to carry out the duties stated in *Item 7* for the duration of the *Services*;
- (h) promptly give written notice to the *Client* and the *Project Manager* if and to the extent the *Consultant* becomes aware that any document or other information provided by the *Client* or its representatives is ambiguous or inaccurate or is otherwise insufficient to enable the *Consultant* to carry out the *Services*;
- (i) make reasonable enquiries to ascertain the requirements of the *Client* regarding the *Services*;
- (j) regularly consult the *Client* regarding the carrying out of the *Services*;
- (k) as soon as practicable after becoming aware of any matter or circumstance which may adversely affect or has adversely affected the scope, timing or carrying out of the *Services* as required by this *Contract*, give written notice to the *Client* and the *Project Manager* detailing the matter or circumstance and its anticipated effect on the *Services*;
- (l) comply with all *Legislative Requirements* in carrying out the *Services* and promptly inform the *Client* of any new *Legislative Requirements* or changes thereto which, in the *Consultant's* professional opinion, may have an effect on the *Services* and/or the *Contract Material*;
- (m) when on the *Site* and when using any facilities on the *Site*, comply with all directions, procedures and policies relating to occupational health, safety and security requirements relating to the *Site*;
- (n) ensure that appropriate, comprehensive written records of the conduct of the *Services* are retained at the *Consultant's* address in *Item 3(b)* and after reasonable prior written notice by the *Client* or the *Project Manager*, permit the *Client*, the *Project Manager* or any probity or financial advisor, auditor or investigator appointed or authorised by

the *Client*, *Commonwealth*, the *Minister* or the *Department*, to inspect and discuss the work, relevant records, *documents* and *Contract Material* produced by the *Consultant* in carrying out the *Services*;

- (o) except as required by law, treat as confidential any information disclosed or otherwise made available by the *Client* or its representatives (including the *Project Manager*) to the *Consultant* or its representatives in relation to the *Services* and the *Contract* including any information which, by its nature or the circumstances surrounding its disclosure, is or could reasonably be expected to be regarded as confidential to the *Client* or its representatives or any third party (including the *Commonwealth*, the *Minister* or the *Department* and any information related to the funding of the *Works* and *Consultancy Services* by such third parties), with whose consent or approval the *Client* or its representatives uses that information;
- (p) notify the *Client* immediately the existence or likelihood of a conflict of interest becomes apparent to the *Consultant* and cooperate with the *Client* to resolve such conflict of interest;
- (q) take due care of the *Client's documents*, samples, patterns, moulds and other material provided to the *Consultant* in connection with carrying out the *Services*;
- (r) do all things necessary and necessarily incidental for the proper performance of the *Consultant's* obligations under the *Contract*;
- (s) perform the obligations under the *Contract* in harmony, co-operation and co-ordination with the *Other Consultants* and the *Contractor*, as applicable, having due regard to the duties and responsibilities of these parties and any *Services* design interface matters;
- (t) attend meetings of the *PCG* from time to time where requested to do so by the *Client* and the *Project Manager* and report on such matters in relation to this *Contract* and provide such information and *documents* (including *Contract Material*) prior to or at the *PCG* as the *Client* or *Project Manager* may require;
- (u) remain fully responsible for the *Services* carried out by the *Consultant* and the *Contract Material* which results, notwithstanding that the *Consultant* has entered into a deed of novation as required by clause 7A; and
- (v) not disclose any information concerning the *Services*, *Works* or *Consultancy Services* for distribution through any communications media without the *Client's* prior written approval (which may be subject to conditions imposed by the *Client*, *Commonwealth*, *Minister* or *Department*). The *Consultant* shall refer to the *Client* any enquires from any media concerning the *Services*, *Works* or *Consultancy Services*.

3A OH&S OBLIGATIONS

- (w) The *Consultant* must:
 - (i) comply with:
 - (A) all directions from the *Client* or any other person nominated by the *Client* (including any person appointed as 'Principal Contractor' under the *Occupational Health & Safety Regulations 2007*) regarding *OH&S* requirements,
 - (B) all *OH&S* policies and procedures implemented or adopted by the *Client* and/or any other person nominated by the *Client*; and
 - (C) any *Legislative Requirements* relating to *OH&S*; and

- (ii) ensure that its employees, subcontractors, agents and any other person for whom it is responsible complies with the requirements in 3A(a)(i)(A) and 3B(a)(i)(B).
- (x) If, during the performance of the *Services*, the *Client* informs the *Consultant* that the *Client* is of the opinion that the *Consultant* is:
 - (i) not conducting the *Services* in accordance with clause 3A(a); or
 - (ii) is conducting the *Services* in such a way as to endanger the *OH&S* of any person,
 then the *Consultant* must promptly remedy that breach.
- (y) The *Client* may direct the *Consultant* to suspend the performance of the *Services* until such time as the *Consultant* satisfies the *Client* that the *Services* will be resumed in conformity with clause 3A(a). During the period of such suspension the *Client* will not be required to make any payment whatsoever to the *Consultant*.

4 RESPONSIBILITIES AND OBLIGATIONS OF THE CLIENT

The *Client* shall:

- (a) pay the *Consultant* in accordance with the *Contract*;
- (b) when and as required under the *Contract*, provide the *Consultant* with relevant *documents*, samples, patterns, moulds and other information in the possession or control of the *Client* sufficient to enable the *Consultant* to carry out the *Services*;
- (c) give or cause to be given to the *Consultant* in writing timely directions, instructions, decisions, approvals and information sufficient to define the *Services* required and facilitate the provision of the *Services* by the *Consultant* (including the completion of *Contract Material* or any part thereof which results from those *Services*);
- (d) provide the *Consultant* with such access to premises or sites of the *Client* as is reasonably necessary for the *Consultant* to carry out the *Services*;
- (e) except as required by law and subject to the *Contract*, treat as confidential any information disclosed or otherwise made available by the *Consultant* or its representatives which the *Client* or its representatives receives in relation to the *Services* and the *Contract* including any information which, by its nature or the circumstances surrounding its disclosure, is or could reasonably be expected to be regarded as confidential to the *Consultant* or its representatives or any third party with whose consent or approval the *Consultant* or its representatives uses that information; and
- (f) subject to clause 13.2, pay all fees and charges required to comply with *Legislative Requirements* incurred or which fees and charges the *Consultant* should reasonably have anticipated would be incurred in connection with carrying out the *Services* at the time of entering into this *Contract*.

5 SERVICE OF NOTICES

- (a) All notices, requests, demands, claims, approvals, documents, agreements or other communications ("**notices**") authorised or required to be made under this *Contract*, must be in writing and shall be deemed to have been given and received, if addressed or delivered to the relevant address of a *party* or its representative in Annexure Part A, *Item 9* or *10* (as applicable) and:
 - (i) if delivered by hand, on the day of actual delivery;

- (ii) if sent by post, 2 *business days* after the day on which the notice or document was posted; and
 - (iii) if given by facsimile using the facsimile number in Annexure Part A, at the time when the facsimile is received. If the facsimile is received after 4.00pm on any *business day* or on any day that is not a *business day*, it will be taken to have been received on the next *business day*.
- (b) A notice sent by e-mail is not a valid notice for the purposes of this *Contract*.
 - (c) The relevant address for the *parties* in the *Contract* shall also be the address for service of any proceedings which may be instituted under this *Contract*.
 - (d) The *Client* and the *Consultant* shall each notify the other of a change of address.

6 CLIENT'S REPRESENTATIVE (AND THE PROJECT MANAGER) AND THE CONSULTANT'S REPRESENTATIVE

6.1 Client's Representative

The person named in *Item 9* or such person as the *Client* substitutes by written notice to the *Consultant*, shall act as the *Client's* representative to exercise functions of the *Client* for the purposes of the *Contract* subject to clauses 6.1A and 6.1B.

6.1A Project Manager - Agency functions

- (a) The *Consultant* acknowledges and agrees that the *Client* has appointed the *Project Manager* as its agent under the *Contract* in relation to the following functions and any other required functions (other than those listed in clause 6.1B):
 - (i) assessing the value of *Services* performed under the *Contract*;
 - (ii) certification of monies due and owing as between the *Client* and the *Consultant* by way of the issue of a payment schedule under clause 13.3; and
 - (iii) any determination required as to the quality of any *Services*.
- (b) The *Client* shall ensure that in the exercise of the functions of the *Project Manager* under the *Contract* as the *Client's* agent, the *Project Manager*—
 - (i) acts honestly; and
 - (ii) acts within the time prescribed under the *Contract* or where no time is prescribed, within a reasonable time,

but is not, as the *Client's* agent, required to act independently or impartially.

6.1B Project Manager - Independent functions

- (a) In addition to the *Project Manager's* functions as the *Client's* agent as set out in clause 6.1A, the *Project Manager* shall also act as assessor and certifier in respect of whether the *Consultant*;
 - (i) is entitled to an extension of time under clause 12; and
 - (ii) has achieved completion of the *Services* under the *Contract*.
- (b) In relation to these two functions, the *Project Manager*:
 - (i) shall act independently of the *Client* and the *Consultant* and shall not receive and act on directions given to him by either *party*;

- (ii) is entitled to consult with either one of or both the *parties* but is not obliged to consult with both *parties*; and
 - (iii) shall act reasonably in exercising the identified functions and shall have regard to the express requirements of the *Contract* and not the commercial interests of either *party* to the *Contract*.
- (c) Notwithstanding that the *Project Manager* is engaged by the *Client* and will act as the *Principal's* agent as provided for in clause 6.1A, the *Client* agrees that the *Project Manager* will perform his functions in this clause 6.1B independently of the *parties* as provided for in this clause 6.1B and the fact of that engagement shall not of itself mean that the *Project Manager* has not acted or is not capable of acting independently.

6.2 Consultant's Representative

The person named in *Item 10* or such person as the *Consultant* substitutes by written notice to the *Client*, shall act as the *Consultant's* representative under the *Contract* and any direction given by the *Client* to the *Consultant's* representative shall be binding. The *Consultant* shall not substitute the *Consultant's* representative, without the prior consent of the *Client*, which consent shall not be unreasonably withheld.

7 ASSIGNMENT AND THE ENGAGEMENT OF SUBCONSULTANTS

- (a) The *Consultant* shall not:
- (i) without the prior written approval of the *Client* and except on such reasonable terms and conditions as are determined in writing by the *Client*, assign the *Contract* or any payment or any other right, benefit or interest thereunder; and
 - (ii) subcontract any part of the *Services* without the prior written approval of the *Client*, which approval may be granted on such conditions as the *Client* imposes including, without limitation, the *Consultant* obtaining from a subconsultant or subcontractor the corresponding *Intellectual Property Rights* granted to or vested in the *Client* pursuant to Clause 8.1 and appropriate professional indemnity insurance.
- (b) Any subcontracting under this clause 7 shall not relieve the *Consultant* from any liability or obligation under the *Contract*.

7A NOVATION

When directed by the *Client*, the *Consultant*, without being entitled to compensation, shall promptly execute a deed of novation in the form of Annexure Part D, such deed being between the *Client*, the *Consultant* and the *Contractor* and which provides that the *Consultant* will perform the remainder of the *Services* under this *Contract* for the *Contractor* and be paid for such *Services* by the *Contractor* as if the *Contractor* were the *Client*, on the same terms and conditions contained in this *Contract* and on the terms and conditions contained in the deed of novation.

8 COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

8.1 Ownership

- (a) Immediately upon creation by the *Consultant*, the *Intellectual Property Right* in or relating to the *Contract Material* shall vest in the *Client* but such vesting shall not affect any lien or other rights of the *Consultant* specified in the *Contract*.

- (b) The *Client* grants to the *Consultant* a perpetual, royalty free, non-exclusive, sub-licensable licence to use that *Intellectual Property Right* for the purpose of carrying out the *Services*.
- (c) The *Consultant* shall retain the *Intellectual Property Right* in any original ideas, equipment processes or systems created outside the terms of the *Contract* and used in carrying out the *Services*. The *Consultant* shall grant or cause to be granted to the *Client* an irrevocable, perpetual, royalty free, non-exclusive, sub-licensable licence to use such *Intellectual Property Right* for any purpose the *Services* are provided including any subsequent repairs to, or servicing supply of replacement parts, additions or alterations to the completed *Works* so constructed on the *Site* (including, without limitation, any services and systems therein).
- (d) To the extent the *Intellectual Property Right* in or relating to the *Contract Material* is not capable of being vested in the *Client* because the *Consultant* does not own that *Intellectual Property Right*, the *Consultant* shall ensure the *Client* is granted an irrevocable perpetual, royalty free, non-exclusive, sub-licensable, licence to use that *Intellectual Property Right*.

8.2 Warranty and Indemnity by Client

- (a) Unless otherwise provided in the *Contract*, the *Client* shall indemnify the *Consultant* against the *documents* provided by the *Client* under the *Contract* infringing the *Intellectual Property Right* of any third party.
- (b) In addition to the purposes stated in the *Brief*, the *Contract Material* may be used by or with the authority of the *Client* for the additional purposes stated in *Item 13*.
- (c) Except to the extent that the *Contract Material* infringes the *Intellectual Property Right* of a third party, the *Client* shall indemnify the *Consultant* against any liability, loss or damage arising out of the use (other than by the *Consultant*) of the *Contract Material* by or with the authority of the *Client* for any purpose not reasonably contemplated under the *Contract*.

8.3 Warranty and Indemnity by Consultant

The *Consultant* warrants that, unless otherwise provided in the *Contract*, in providing the *Services* the *Consultant* owns or is licensed to use the *Intellectual Property Right* in the *Contract Material* and the *Consultant* shall indemnify the *Client* against liability, loss or damage arising out of the use of the *Contract Material* infringing the *Intellectual Property Right* of a third party.

8.4 Moral rights

- (a) References to "*moral rights*" under this clause 8.4 have the same meaning and effect as given to that expression under the *Copyright Act 1968 (Cth)* as amended from time to time, and any applicable laws whether under statute or otherwise in respect of such rights which may come into force or otherwise have effect after the date of this *Contract*. Further, references to moral rights include but are not limited to moral rights subsisting in any building, structure, part of a building or structure, plan, instruction, design, interior design, sketch, drawing, document or other work made, created, prepared, provided or procured as part of the performance of the *Contract*.
- (b) In addition to the *Consultant's* obligations in relation to moral rights under this clause 8.4, the *Consultant* must use its best endeavours to obtain from each of its agents, subcontractors and subconsultants, irrevocable and unconditional consents that are sufficient to ensure that the *Client* and the *Consultant* and its agents, subcontractors and subconsultants ("*Recipients*") can reproduce, transmit, communicate, adapt and

publish any *Contract Material* under the *Contract* provided by the *Consultant* and its agents, subcontractors or subconsultants to Recipients under the *Contract* (and any changes to the *Contract Material*), in a manner that is consistent with the rights granted under the *Contract*, anywhere in the world and in any form required by the applicable Recipient.

- (c) Except to the extent that the *Client* does not comply with clause 8.4, the *Consultant* agrees and irrevocably consents to waive its rights to make or bring any claim, demand, action, suit or proceeding in relation to any purported or actual infringement by the *Client* or any other *party* (including the *Consultant*) of any moral rights of the *Consultant* or its agents, subcontractors or subconsultants including rights subsisting in the *Contract Material* created or to be created by the *Consultant* under this *Contract*, whether such infringement occurs before or after the date of the *Contract*.

9 LIABILITY OF CONSULTANT

9.1 Liability

- (a) Where a monetary limit of liability is stated in *Item 14*, the *Consultant's* liability to the *Client* arising out of the performance or non-performance of the *Services*, whether under the law of contract, tort or otherwise, shall be limited to that monetary limit of liability.
- (b) However, nothing in this Clause 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 the *Contract* of all or any of the provisions of the *Trade Practices Act 1974* as amended and in force from time to time or any relevant State Act or Territory Act which by law cannot be excluded, restricted or modified.

9.2 Indemnity by Consultant

Subject to Clause 9.1 the *Consultant* shall indemnify the *Client* against:

- (a) loss of or damage to property of the *Client* including the *Contract Material*; and
- (b) claims by any person against the *Client* in respect of personal injury or death or loss of or damage to any other property,

arising out of or in consequence of any breach by the *Consultant* of this *Contract* and any negligent, fraudulent or unlawful act or omission of the *Consultant* or the *Consultant's* representative in carrying out the *Services* by the *Consultant* but the *Consultant's* liability to indemnify the *Client* shall be reduced proportionally to the extent that the act or omission of the *Client* or the employees, agents or other contractors of the *Client* contributed to the loss, damage, death or injury. The indemnity under this Clause 9.2 shall not apply to the extent that the liability of the *Consultant* is limited by another provision of the *Contract* or exclude any other right of the *Client* to be indemnified by the *Consultant*.

10 INSURANCE

10.1 Professional Indemnity Insurance

Before the *Consultant* commences carrying out the *Services*, the *Consultant* shall effect a professional indemnity insurance policy for the *Services* covered in the *Contract* with a total aggregate cover of not less than the sum stated in *Item 15(a)*. The policy shall include provisions for one automatic reinstatement of the sum insured and for loss of *documents*. The policy and such level of cover shall be maintained until the *Consultant* completes carrying out the *Services* and thereafter for a period as stated in *Item 15(b)*.

10.2 Public Liability Insurance

The *Consultant* shall maintain a public liability policy for an amount in respect of any one claim or series of claims arising from the one original cause of not less than the sum stated in *Item 16*. The policy shall be maintained until the *Consultant* completes carrying out the *Services*. The policy shall cover the *Consultant* in respect of liability to the *Client* and third parties in respect of any claim for loss of or damage to property or death or injury to any person arising from the acts or omissions of the *Consultant*, its employees and subconsultants in the course of carrying out the *Services* and shall extend to indemnify the *Client* as one of the class of persons constituting the Insured but not in respect of liability to the extent that the loss, damage, death or injury is due to or results from an act or omission of the *Client*.

10.3 Insurance of Employees

Before the *Consultant* commences carrying out the *Services*, the *Consultant* shall insure against liability for death or injury to persons employed by the *Consultant* including liability by statute and at common law. The insurance cover shall be maintained until the *Consultant* completes carrying out the *Services*. Where permitted by law, the insurance cover shall be extended to indemnify the *Client* for the *Client's* statutory liability for persons employed by the *Consultant*. The *Consultant* shall ensure that employees of the *Consultant's* subconsultants are similarly insured.

10.4 Insurance cover does not limit liability

The effecting of insurance by the *Consultant* under clauses 10.1, 10.2 and 10.3 will not limit the liabilities or obligations of the *Consultant* under or in relation to this *Contract*, whether under the law of contract, tort (including negligence), equity, restitution, statute or otherwise.

11 DIRECTIONS AND VARIATIONS

11.1 Directions by the Client or the Project Manager

- (a) Except where the *Contract* otherwise provides, a direction may be given orally but the *Client* or the *Project Manager*, as the case may be, shall as soon as practicable confirm it in writing.
- (b) If the *Consultant* in writing requests the *Client* or the *Project Manager* to confirm an oral direction, the *Consultant* shall not be bound to comply with the direction until the *Client* or the *Project Manager* confirms it in writing.

11.2 Variations

- (a) Subject to Clause 11.3, the *Client* may, by written notice to the *Consultant*, direct the *Consultant* to increase, decrease, omit or change the scope of the *Services* and the *Consultant* shall be bound to comply with that direction.
- (b) Any variation in the fee payable to the *Consultant* as a consequence of a direction issued by the *Client* under this Clause shall be agreed between the *Client* and the *Consultant*, otherwise Clause 11.4 shall apply.

11.3 Variations which Change the Scope of the Services

- (a) The *Consultant* shall not be obliged to comply with a direction which would change the general scope of the *Services* if the *Consultant* within 7 days of receipt of the direction gives a written notice to the *Client* in accordance with this Clause 11.3.
- (b) If the *Client* directs a variation to the *Services* which the *Consultant* considers changes the general scope of the *Services*, the *Consultant* shall so advise the *Client* in writing within 7 days, stating whether the *Consultant* agrees to comply with the

direction and, if so, a fee proposal for carrying out the direction. Where the *Consultant* requests in its written notice to the *Client* accepting the direction, a further specified period of time within which to provide the fee proposal, the *Client* may grant such request if it considers the request to be reasonable in light of the scope of the variation direction or may propose an alternative reasonable period of time within which to submit the fee proposal.

- (c) If the *Client* accepts a *Consultant's* proposal, the *Consultant* shall effect the variation in accordance with that proposal.
- (d) If the *Client* either does not agree within 7 days of receipt of the *Consultant's* notice given under this Clause 11.3 that the direction changes the general scope of the *Services* or does not accept a *Consultant's* proposal, Clause 15 shall apply if the *Client* directs the *Consultant* to proceed with the variation.

11.4 Valuation of Variations

Unless otherwise agreed, the value of a variation shall be determined using the basis on which the fee and expenses are determined pursuant to Clause 13 except that if the fee or fee and expenses to be determined pursuant to Clause 13 is a lump sum, then reasonable prices and the rates in *Item 16A* shall apply.

11.5 Variations due to a Change in a Legislative Requirement

If a new *Legislative Requirement* or a change in a *Legislative Requirement* after the date of the *Contract* necessitates:

- (a) a change to the *Services*;
- (b) has effect after the date of the *Contract*; and
- (c) could not reasonably have been anticipated at that date,

then the extent to which the *Services* are changed by that *Legislative Requirement* shall be deemed to be a variation pursuant to Clause 11.2.

11.6 Errors or Omissions in the Contract Material

- (a) The *Consultant* is liable for and shall correct errors or omissions in the *Contract Material* at the *Consultant's* own expense.
- (b) Where due to circumstances beyond the reasonable control or anticipation of the *Consultant*, the *Consultant* is required to alter, add to or delete *Contract Material* previously submitted and which otherwise would have complied with the *Contract*, the *Consultant* shall inform the *Client* and seek directions. Any subsequent alteration, addition or deletion shall be deemed to be a variation pursuant to Clause 11.2.

12 DELAY AND EXTENSION OF TIME

- (a) The *Consultant* shall proceed with the work under the *Contract* with due expedition and without delay.
- (b) When it becomes evident to a *party* that anything including an act or omission of the *Client* or an employee, other consultant, contractor or agent of the *Client*, may delay carrying out the *Services*, that *party* shall promptly notify the other *party* and the *Project Manager* in writing with details of the possible delay and the cause.
- (c) If the *Consultant* is or will be delayed in carrying out the *Services* by a cause beyond the reasonable control of the *Consultant*, the *Project Manager* shall direct that the time for carrying out the *Services* shall be extended by the extent of the delay.

- (d) If the cause of the delay is an act or omission of the *Client* or an employee, other consultant, contractor or agent of the *Client*, the *Client* shall pay the *Consultant* such extra costs as are necessarily incurred by the *Consultant* by reason of the delay.
- (e) The *Client* or the *Project Manager* may, at any time, by written notice to the *Consultant* extend the time for carrying out the *Services* for any reason.
- (f) The *Client* or the *Project Manager* may direct the *Consultant* in what order and at what time the *Services* shall be performed. If the *Consultant* can reasonably comply with the direction, the *Consultant* shall do so. If the *Consultant* cannot reasonably comply with the direction the *Consultant* shall so notify the *Client* in writing, giving reasons. If compliance with the direction causes the *Consultant* to incur more or less cost than otherwise would have been incurred had the *Consultant* not been given the direction, the difference shall be valued pursuant to Clause 11.4 as though the direction was a direction to vary the *Services*.
- (g) Nothing in this Clause 12 shall:
 - (i) oblige the *Client* to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the *Contract*; or
 - (ii) limit the *Client's* liability for damages for breach of *Contract*.

12A PERSONNEL

The *Consultant* acknowledges and agrees that:

- (a) it is obliged to use its best endeavours to procure that the key personnel stated in *Item 7* (or alternates reasonably approved by the *Client* as provided in clause 12A(b)), carry out the duties stated in *Item 7* for the duration of the *Services* as provided in clause 3(g);
- (b) it shall not commit or otherwise agree to the key personnel stated in *Item 7* performing services in relation to other projects or otherwise within the *Consultant's* business which may compromise that person's ability or availability to carry out the duties stated in *Item 7* for the duration of the *Services*;
- (c) as soon as practicable after it becomes aware that a person in the key personnel list in *Item 7* is or will be unable to carry out the duties stated in *Item 7* for the duration of the *Services*, the *Consultant* must nominate for the *Client's* consideration and approval (acting reasonably), a replacement person employed by the *Consultant* of equivalent skill, qualification, experience and competency to the person that is being replaced and who will be available to carry out and complete the duties of the person being replaced for the remainder of the *Contract* term with a minimum amount of disruption to the *Services* (the "*criteria*"). If the *Client* makes a reasonable objection to the nominated replacement person on the basis that this replacement person does not meet the *criteria*, the *Consultant* must promptly nominate another replacement person who does meet the *criteria*.

13 PAYMENT

13.1 Payment claims

At the times stated in *Item 17*, the *Consultant* shall submit a written payment claim of fees and reimbursement of expenses to the *Project Manager* accompanied by the following information and documentation to verify the claim (unless otherwise directed by the *Project Manager*), as a condition precedent to the *Consultant's* entitlement to make a payment claim:

- (a) a statement and evidence in support of the portion of the *Consultant's* fees in *Item 18(a)* claimed for the relevant claim period based on the portion of the *Services* completed;
- (b) a statement and evidence (by way of copies of invoices and receipts) in support of the expenses and disbursements stated in *Item 18(b)* (if any) to be reimbursed by the *Client*;
- (c) a statement and evidence in support of any other amount then due to the *Consultant* in accordance with the provisions of the *Contract*;
- (d) a statement of the total amount previously assessed under clause 13.3; and
- (e) a certificate that the *Services* carried out for the relevant claim period to which the portion of the *Consultant's* fees claimed in clause 13.1(a) relates, have been performed in accordance with this *Contract* and to the extent there is any non-conformance with the same, notification of such non-conformance. Notification of any non-conformance in the certificate need not be confined to the *Services* the subject of the relevant payment claim period.

13.2 Payment of Disbursements, Fees and Expenses

- (a) The *Consultant's* fees shall be determined in accordance with the *Item 18(a)*, being a fixed lump sum as adjusted in accordance with this *Contract*. The fixed lump sum in *Item 18(a)* shall not increase as a result of any increase in the *Consultant's Services* costs unless expressly provided for in this *Contract*.
- (b) The *Client* shall bear the expenses and disbursements stated in *Item 18(b)*. Except as provided in this Clause 13.2 or elsewhere in the *Contract*, the *Consultant* shall bear all other expenses and disbursements incurred by the *Consultant* in performing the *Services*.
- (c) Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that the *Services* have been executed satisfactorily but shall be a payment on account only.

13.3 Payment Schedule and payment

- (a) The *Project Manager* shall (on behalf of the *Client* for the purposes of the *Security for Payment Act*), within 10 *business days* after the payment claim has been given by the *Consultant*, serve a payment schedule on the *Consultant* and the *Client*.
- (b) The payment schedule must:
 - (i) identify the payment claim to which it relates;
 - (ii) be in the form prescribed and contain the information prescribed should there be any prescribed form or prescribed information under or pursuant to the *Security of Payment Act* or its regulations;
 - (iii) state the *Project Manager's* opinion of the moneys due and payable by the *Client* to the *Consultant* or by the *Consultant* to the *Client* (as the case may be) in respect of the payment claim and in respect of any adjustment required to the lump sum in *Item 18(a)* as provided in clause 13.2;
 - (iv) identify any amount of the payment claim that the *Project Manager* alleges is an "excluded amount" as that term is defined in the *Security of Payment Act*;
 - (v) set out the calculations employed at to arrive at the amount certified in the payment schedule and the reasons for any difference between the amount in the payment

claim and the amount in the payment schedule (including, if the amount in the payment schedule is less than the amount in the payment claim because the *Client* is withholding payment for any reason, the *Client's* reasons for withholding payment).

- (c) If the *Consultant* does not serve a payment claim in accordance with clause 13.1, the *Project Manager* may still serve the payment schedule on the *Consultant*.
- (d) If the *Project Manager* does not serve the payment schedule within 10 *business days* after the payment claim is served on it, the payment claim shall be deemed to be the relevant payment schedule but such deeming does not prevent the *Project Manager* from setting out in a later payment schedule, any amount it omitted to set-off earlier.
- (e) Within 3 *business days* after the issue of the payment schedule, or if no payment schedule has been issued, the expiry of the period referred to in clause **Error! Reference source not found.**, the *Consultant* shall issue a valid tax invoice to the *Client* in respect of the amount of such payment schedule (or, if no payment schedule has been issued, in the amount of the *Consultant's* payment claim) which separately identifies the *GST* component, the *Consultant's* Australian Business Number (ABN) and the *Client's* project reference number (if any).
- (f) Within 10 *business days* of receipt by the *Client* of a valid tax invoice referred to in clause **Error! Reference source not found.**, the *Client* shall pay to the *Project Manager* an amount not less than the amount shown in such tax invoice as due to the *Project Manager*.
- (g) Payment of moneys by the *Client* is not evidence of the value of *the Services* or an admission of liability or that any *Services* been carried out satisfactorily by the *Consultant*.
- (h) Payment other than final payment under the *Contract* is payment on account only.

13.4 Interest on Overdue Payments

If any moneys due and payable to either *party* remain unpaid after the date upon which or the expiration of the period within which they should have been paid, then interest shall be payable thereon at the rate stated in *Item 20* from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid.

13.5 Client's right of set-off

Without limiting any other provisions of this *Contract*, the *Client* (or *Project Manager* on its behalf) may deduct, withhold or set-off from moneys otherwise due to the *Consultant*, whether by way of the *Consultant's* fee, reimbursements, payments or otherwise any moneys, damages or losses due and payable by the *Consultant* to the *Client*.

14 TERMINATION, DEFAULT, SUSPENSION AND FRUSTRATION

14.1 Termination Other than Due to Default

- (a) The *Contract* may be terminated at any time by mutual agreement or by the *Client* at its convenience (at any time and for whatever reason) giving reasonable prior written notice to the *Consultant*. If the *Contract* is terminated pursuant to this Clause 14.1, the *Client* shall pay the *Consultant* a fair and reasonable fee for the *Services* carried out up to and including the date of termination together with payment of any costs and expenses reasonably incurred by the *Consultant* to that date.

- (b) The *Consultant* acknowledges and agrees that any amounts paid by the *Client* to the *Consultant* under clause **Error! Reference source not found.** are in full and final satisfaction of any damages and other losses which might otherwise be payable by the *Client* for any reason whatsoever arising from the termination of the *Contract* including any loss of profit or loss of opportunity.
- (c) Upon termination and payment of the amount due to the *Consultant* under this Clause 14.1, the *Consultant* shall, subject to any lien or other rights of the *Consultant* under the *Contract*, deliver to the *Client* the *Contract Material* including sketches, plans, designs, estimates, calculations, reports, models, computer source codes, articles, information, files and data produced by the *Consultant* up to the date of termination regardless of their stage of completion but without any liability in respect of the *Contract Material* which is incomplete by reason only of such termination.

14.2 Termination due to Default by Either Party

- (a) If either *party* commits a substantial breach of *Contract*, the other *party* may give to the *party* who committed the breach, a written notice to show cause. Failure to make a payment due under the *Contract* shall be a substantial breach of *Contract*.
- (b) A notice to show cause shall:
 - (i) state it is a notice given under Clause 14 of these General Conditions of Contract;
 - (ii) specify the alleged breach with reasonable details;
 - (iii) require the *party* who committed the breach to show cause in writing why the *party* giving the notice should not exercise a right referred in this Clause 14; and
 - (iv) specify the date by which the *party* who committed the breach must show cause (which date shall be not less than 20 *business days* after the notice is given to that *party*).
- (c) If by the time specified in a notice given under this Clause 14.2 the *party* who committed the breach remedies the breach the subject of the notice to the reasonable satisfaction of the other *party*, the *party* no longer in breach shall be entitled to continue to perform this *Contract*.
- (d) If by the time specified in a notice given under this Clause 14.2 the *party* who committed the breach fails to show reasonable cause the other *party* may, by further written notice, terminate the *Contract* or suspend the *party*'s obligations to perform the *Contract*.
- (e) If the *Contract* is terminated pursuant to this Clause 14.2, the rights and liabilities of the *parties* shall be the same as they would have been at common law had the defaulting *party* repudiated the *Contract* and the other *party* had elected to treat the *Contract* as at an end and recover damages.
- (f) If a *party* suspends performance of the *Contract* pursuant to this Clause 14.2, that *party* shall lift the suspension if the other *party* remedies the breach. If the *party* in default fails, within a reasonable time, to remedy the breach the other *party* may, by further written notice, terminate the *Contract*.
- (g) A *party* who suspends performance of the *Contract* pursuant to this Clause 14.2 shall be entitled to recover any damages incurred by reason of the suspension.

14.3 Suspension for Convenience

- (a) The *Client* may, at any time by prior written notice to the *Consultant*, suspend the carrying out of the *Services* or any part thereof.
- (b) If fees or expenses have not been agreed in advance, the *Client* shall pay the *Consultant* the fees and expenses reasonably incurred by the *Consultant* in carrying out the *Services* to the date of suspension together with any costs and expenses reasonably incurred by the *Consultant* by reason of the suspension. The *Client* shall give the *Consultant* reasonable notice to recommence carrying out those *Services* so suspended.

14.3A Suspension under the Security of Payment Act

- (a) The *Consultant* must notify the *Client* and *Project Manager* in writing if any of the *Consultant's* subcontractors or subconsultants are or may be entitled to exercise a right to suspend services under their relevant subcontract or subconsultancy agreement pursuant to the *Security of Payment Act*.
- (b) In these circumstances:
 - (i) the *Client* is entitled (but is not obliged) to pay the subcontractor or subconsultant to avoid the suspension work by such *party*; and
 - (ii) the *Consultant* indemnifies the *Client* for any cost, expense, loss or damage (direct or indirect) that the *Client* may suffer as a result of a suspension by a subcontractor or subconsultant.
- (c) If the *Client* exercises its entitlement to pay a subcontractor or subconsultant under clause 14.3A(a), then the amount of this payment plus any associated costs to the *Client* arising from this payment, is a debt due by the *Consultant* to the *Client* and may be set-off by the *Client* against any other payments that are due or become due to the *Consultant*.

14.4 Insolvency

If:

- (a) a *party* informs the other *party* in writing or creditors generally that the *party* is insolvent or is financially unable to proceed with the *Contract*;
- (b) execution is levied against a *party* by a creditor;
- (c) a *party* is an individual person or a partnership including an individual person, and if that person:
 - (i) commits an act of bankruptcy;
 - (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
 - (iii) is made bankrupt;
 - (iv) makes a proposal for a scheme of arrangement or a composition;
 - (v) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration order made, under Part X of the *Bankruptcy Act 1966* (Cth); or
- (d) in relation to a *party* being a corporation:
 - (i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
 - (ii) the *party* enters a deed of company arrangement with creditors;

- (iii) a controller or administrator is appointed;
- (iv) an application is made to a court for the winding-up of the *party* and not stayed within 14 days;
- (v) a winding-up order is made in respect of the *party*;
- (vi) resolves by special resolution that the *party* be wound up voluntarily (other than for a members' voluntary winding-up); or
- (vii) a mortgagee of any property of the *party* takes possession of that property;

then, the other *party* may, notwithstanding that there has been no breach of contract and in addition to any other rights, terminate the *Contract* without giving prior notice.

14.6 Return of Client's Documents, etc.

On completion of the *Services* or on termination or frustration of the *Contract*, the *Consultant* shall promptly return to the *Client* the *Client's documents*, samples, patterns, moulds and other information provided to the *Consultant* in carrying out the *Services*.

14.7 Preservation of Other Rights

- (a) If a *party* breaches (including repudiates) the *Contract*, nothing in this clause shall prejudice the right of the other *party* to recover damages or exercise any other right or remedy.
- (b) If the *Contract* is terminated pursuant to Clauses 14.2 and 14.4 the *parties'* remedies, rights and liabilities shall be the same as they would have been under the law governing the *Contract* had the defaulting *party* repudiated the *Contract* and the other *party* elected to treat the *Contract* as at an end and recover damages.
- (c) Notwithstanding any other provision of this *Contract*, a *party* must mitigate any loss or damage which it may suffer or incur by reason of the other *party's* breach or repudiation of this *Contract*.

14A NOTIFICATION OF CLAIMS

14A.1 Communication of claims

- (a) Except where an earlier time is prescribed elsewhere in the *Contract* (in which case the earlier time limit will prevail), the *Consultant* shall within 21 days after it could reasonably have been aware of any facts or circumstances likely to give rise to a claim in connection with the *Contract* or the subject matter thereof, give to the *Client* and the *Project Manager* the *prescribed notice* or a notice of dispute under clause 15.1.
- (b) The *prescribed notice* is a notice in writing of the general basis and quantum of a claim which includes detailed particulars of all of the following:
 - (i) the breach, act, omission, direction, approval or circumstances on which the claim is or will be based;
 - (ii) the provision of the *Contract* or other basis for the claim or proposed claim; and
 - (iii) the quantum or likely quantum of the claim or proposed claim.

14A.2 Liability for failure to communicate

If the *Consultant* fails to comply with clause 14A.1, then to the full extent permitted by law the *Consultant* ceases to be entitled to make the claim and forever releases the *Client* from any claim or demand it otherwise may have had in relation to or in connection with the claim or its subject matter.

14A.3 Claim assessment

- (a) If within 20 *business days* of giving the *prescribed notice*, the Consultant does not notify the *Client* and the *Project Manager* of the particulars of the claim, the prescribed notice shall be deemed to the claim.
- (b) Within 40 *business days* of receipt of the *prescribed notice*, the *Project Manager* shall (on behalf of the *Client*) assess the claim and shall promptly notify the *Consultant* in writing of the decision (with a copy to the *Client*). Unless the *Consultant* within a further 20 *business days* of such notification serves a notice of dispute under clause 15.1 which includes a claim, the *Project Manager* on the *Client's* behalf, shall include the amount of that assessment in the next payment schedule.

15 DISPUTE RESOLUTION

15.1 Notice of dispute

- (a) If a difference or dispute (together called a '*Dispute*') between the *parties* arises in connection with the subject matter of the *Contract*, including a *Dispute* concerning:
 - (i) an alleged breach of *Contract*; or
 - (ii) a claim:
 - (A) in tort;
 - (B) under statute;
 - (C) for restitution based on unjust enrichment or other quantum meruit; or
 - (D) for rectification or frustration,
 or like claim available under the law governing the *Contract*,

then either *party* shall, by hand or by registered post, give the other and the *Project Manager* a written notice of *Dispute* adequately identifying and providing details of the *Dispute*.
- (b) Notwithstanding the existence of a *Dispute*, the *parties* shall, subject to clause 14 and 16.4, continue to perform the *Contract*.

15.2 Conference

- (a) Within 10 *Business Days* after receiving a notice of *Dispute*, the *parties* shall confer at least once to resolve the *Dispute* or to agree on methods of doing so. At every such conference each *party* shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
- (b) If the *Dispute* has not been resolved or the method of resolving the *Dispute* has not been agreed within 20 *Business Days* of service of the notice of *Dispute*, then the parties may agree to refer the *Dispute* to mediation.

15.3 Mediation

If the parties agree to refer a *Dispute* to mediation under clause 16.2:

- (a) the mediator shall be agreed between the parties within 10 *Business Days* of the date of referral of the *Dispute* to mediation, or failing agreement, either *party* may request that the President for the time being of the Victorian Bar Council (or paramount officer of any successor organisation) to appoint another mediator; and

- (b) the mediation will be conducted by the mediator at a time and place agreed between the parties or otherwise nominated by the mediator, within 60 *Business Days* of the referral of the *Dispute* to mediation.

15.4 Summary Relief

Nothing herein shall prejudice the right of a *party* to institute proceedings to enforce payment due under the *Contract* or to seek injunctive or urgent declaratory relief.

16 SEVERABILITY

If any provision of the *Contract* is illegal, void, invalid or unenforceable for any reason, all other provisions which are self-sustaining and capable of separate enforcement shall, to the maximum extent permitted by law, be and continue to be valid and enforceable.

17 GOODS AND SERVICES TAX

17.1 Construction

Terms defined in the *GST Act* have the same meaning when used in this clause or in the definition of *GST Amount*, unless expressly stated otherwise.

17.2 Consideration *GST* exclusive

Unless expressly stated otherwise, any consideration payable or to be provided or amount used in the calculation of a sum payable under the *Contract* has been determined without regard to *GST* and shall be increased, on account of any *GST* payable under this clause.

17.3 Payment of *GST*

- (a) If *GST* is payable as a consequence of any supply made under or in connection with the *Contract* by a *Party* making a supply ("**Supplier**"), the recipient of that supply shall pay the *GST Amount* as an additional amount to the *Supplier*.
- (b) The recipient shall pay any *GST Amount* at the same time and in the same manner as making payment of any consideration on which the *GST Amount* is calculated. If the *GST Amount* is not calculated on consideration, the recipient shall pay the *GST Amount* within 5 *Business Days* of receipt of a written demand by or on behalf of the *Supplier*.
- (c) For the avoidance of doubt, if a *GST Amount* is payable on any taxable supply that is made for a period or on a progressive basis and the consideration for the taxable supply is to be provided on a progressive or periodic basis, the recipient shall pay the *GST Amount*, subject to the receipt of a *Tax Invoice*, as if each progressive or periodic component of the supply were a separate supply.
- (d) If at any time an adjustment is made or required to be made between the *Supplier* or any other payer of *GST* and the relevant taxing authority on account of any amount paid as *GST* as a consequence of any supply made under or in connection with the *Contract* by the *Supplier*, a corresponding adjustment shall be made as between the *Supplier* and the recipient and any payment necessary to give effect to the adjustment shall be made.
- (e) The recipient shall pay any amount it is required to pay under this clause in full and without deduction, notwithstanding any entitlement that it may have to a credit or offset however arising.

- (f) As a condition precedent to payment of any *GST Amount* or any amount including any *GST Amount*, the *Supplier* shall provide to the recipient a *Tax Invoice* complying with the *GST Law*.

17.4 Reimbursements

Despite any other provision of the *Contract*, if either *Party* is required to reimburse to the other or indemnify the other for any cost, expense or other amount (or part) that the other *Party* has incurred or will incur in connection with the *Contract*, the amount shall be reduced by any part of that amount which is recoverable by the other *Party* (or representative member if this is not the other *Party*) by way of an input tax credit or partial input tax credit.

17.5 Non-merger

This clause does not merge on completion.

17.6 Gross up of consideration

Despite any other provision in the *Contract*, if a *Party* (**'Provider'**) makes a supply under or in connection with the *Contract* on which *GST* is imposed (not being a supply the consideration for which is specifically described in the *Contract* as '*GST* inclusive'):

- (a) the consideration payable or to be provided for that supply under the *Contract* but for the application of this clause ('*GST* exclusive consideration') is increased by, and the recipient of the supply (**'Recipient'**) shall also pay to the Provider, an amount equal to the *GST* payable by the Provider on that supply; and
- (b) the amount by which the *GST* exclusive consideration is increased shall be paid to the Provider by the Recipient without set off, deduction or requirement for demand, at the same time as the *GST* exclusive consideration is payable or to be provided.

17.7 Reimbursements (net down)

If a payment to a *Party* under the *Contract* is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that *Party*, then the payment will be reduced by the amount of any input tax credit to which that *Party* is entitled for that loss, cost or expense.

17.8 Tax invoices

The *Recipient* need not make a payment for a taxable supply made under or in connection with the *Contract* in respect of a taxable supply until the *Provider* has given the *Recipient* a *Tax Invoice* for the supply to which the payment relates.

18 LIMITATION OF LIABILITY

The *Consultant* acknowledges and agrees that the *Client* will not be liable for any indirect or consequential loss or damage whatsoever suffered by the *Consultant* or any third party arising out of or in connection with the *Contract*.

19 ENFORCEMENT CAPACITY

The *Consultant* acknowledges and agrees that:

- a) the *Client* has or will enter into an agreement with [*insert relevant parties*] whereby the *Client*, [*insert relevant parties*] agree that the *Client* will engage the *Consultant* to undertake the *Services* under the *Contract* in its own right and on behalf of [*insert relevant parties*];

- b) the benefit of the *Client's* rights in respect of the *Contract* and the warranties and indemnities given by the *Consultant* under the *Contract* are held by the *Client* in its own right and on trust for each of [*insert relevant parties*]; and
- c) the *Client* may enforce the *Contract* and those warranties and indemnities given by the *Consultant* under the *Contract* itself and on behalf of [*insert relevant parties*]

20 GENERAL

20.1 Costs

The *Consultant* shall bear its own legal, accounting and other costs, charges and expenses of and incidental to the preparation and execution of this *Contract*.

20.2 Amendment

This *Contract* may not be amended or varied unless such amendment or variation is reduced to writing and signed by the *parties*.

20.3 Further assurances

Each *party* shall exercise all such powers as are available to it, do all such acts, matters and things and sign, execute and deliver all such documents and instruments as may be necessary or reasonably required to give full force and effect to the provisions of this *Contract*.

20.4 Denial of partnership or agency

Nothing in this *Contract* shall be construed as creating the relationship of partnership or principal and agent between the *parties*. No *party* may pledge or purport to pledge the credit of another *party* or make or purport to make any representations, warranties or undertakings for another *party*.

20.5 Counterparts

This *Contract* may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original and such counterparts together shall constitute one and the same instrument.

20.6 Indemnities

Each indemnity given under the *Contract* is a continuing obligation separate and independent from other obligations under the *Contract* and notwithstanding anything else in the *Contract* is intended to be enforceable and to survive the termination, completion of *Services* or expiry of the *Contract*.

20.7 National Code of Practice for the Construction Industry

- (a) Without limiting the *Consultant's* obligations under the *Contract*, the *Consultant* shall comply with the National Code of Practice for the Construction Industry (*Code*) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (*Guidelines*), revised September 2005, and reissued June 2006. Copies of the *Code* and *Guidelines* are available at www.workplace.gov.au/building.
- (b) The *Consultant* shall maintain adequate records of the compliance with the *Code* and *Guidelines* by:
 - (i) the *Consultant*; and

- (ii) its related entities (as defined in the Guidelines).
- (c) The *Consultant* shall provide, and shall require that its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the *Services*; and
 - (iii) interview any person,
as is necessary to demonstrate its compliance with the *Code* and *Guidelines*.
- (d) The *Consultant* shall comply, and shall require that its related entities comply, with a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.

**ANNEXURE to the Australian Standard
General Conditions of Contract for
Engagement of Consultants**

Part A

Item

- 1 The *Brief* is comprised in the following **[insert relevant documents]**
documents:
(Clause 1)
- 2 (a) The *Client* or Principal is: **The University of Melbourne**
(Clause 1) ACN 002 705 224 ABN 84 002 705 224
- (b) The *Client's* or Principal's
address is: C/- Property & Campus Services
625-631 Swanston St,
Carlton, Melbourne 3053
- 3 (a) The *Consultant* is: **[insert Consultant name]**
(Clause 1) ACN **[insert ACN]** ABN **[insert ABN]**
- (b) The *Consultant's* address is: **[insert address]**
- 3A *Project Manager* **[insert Project Manager name]**
(clause 1) ACN **[insert ACN]** ABN **[insert ABN]**
Attention: **[insert name]**
insert address]
Phone **[insert number]** Fax **[insert number]**
- 3B *Cost Planner* **[insert Cost Planner name]**
(clause 1)
- 4 Applicable law The law applicable is that of the State of Victoria
(Clause 1)
- 5 The *Contract documents* are: 1 Formal Instrument of Agreement;
(Clause 2) 2 These General Conditions of Contract including the amended
and supplementary terms and conditions thereof and this
Annexure Part A;
3 Annexure Part C: Scope of *Services*;
4 The *Brief* stated in *Item* 1; and
5 Annexure Part D: Deed of Novation.

- 6 (a) If required by Clause 3(b), the *Consultant* shall submit a *Program* for carrying out the *Services*:
(Clause 3(b)) Yes
- (b) If yes, the *Program* shall be in the following form:
(Clause 3(b)) Time scale bar chart
- (c) If yes, the *Program* shall be submitted at the following time:
(Clause 3(b)) within 5 days after a request for submission by the *Project Manager* (including with respect to any request for a revised *Program*)
- 7 Key personnel:
(Clause 3(g))
- | <u>Name</u> | <u>Duties to be carried out</u> |
|---------------|---------------------------------|
| [Insert Name] | [Insert duties] |
| [Insert Name] | [Insert duties] |
| [Insert Name] | [Insert duties] |
| [Insert Name] | [Insert duties] |
- 8 Fees and charges to satisfy *Legislative Requirements* payable by the *Consultant*:
(Clause 4(f)) Not used
- 9 The *Client's* representative is:
(Clause 6.1) [Insert name of Client's Representative]
- 10 The *Consultant's* representative is:
(Clause 6.2) [Insert name of Consultant's representative]
- 11 Intellectual Property Rights—
Alternative applying:
(Clause 8.1) Alternative 2
- 12 If Alternative 2 applies, the additional fee payable to the *Consultant* to vest the *Intellectual Property Right* in or relating to the *Contract Material* in the *Client*:
(Clause 8.1) Not used

- 13 Additional Purposes for which *Contract Material* may be used: (Clause 8.2) For promotional purposes by *the University* in various media including on the *University's* website, on any *University Faculty's* web-site or in other publications in accordance with the publicity requirements of the *Commonwealth*, the *Minister* or the *Department* as the case may be
- 14 The *Consultant's* liability is limited as follows: (Clause 9.1) Unlimited
- 15 (a) Amount of professional indemnity insurance shall not be less than: (Clause 10.1) A\$*[insert figure]* (*[insert amount]* dollars) with an excess or deductible not greater than \$*[insert figure]* per occurrence.
- (b) The period for which professional indemnity insurance shall be maintained is: (Clause 10.1) 10 years after the date of completion of the *Services*
- 16 The amount of public liability insurance shall not be less than: (Clause 10.2) A\$*[insert figure]* (*[insert amount]* dollars) with an excess or deductible not greater than \$*[insert figure]* per occurrence.
- 16A Valuation of variations (clause 11.4)
- | <u>Time charge:</u> | <u>Rate (\$) p/hour (excl. GST)</u> |
|---------------------------------------|-------------------------------------|
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
| <i>[Insert position of personnel]</i> | \$ <i>[Insert amount]</i> |
- [BM: Please confirm rates for variations.]***
- 17 Claims for payment shall be made: (Clause 13.1) On the last *business day* of each month (being the "reference date" as that term is defined in and for the purposes of the *Security of Payment Act*) for *Services* performed up to the last *business day* of that month
- 18 (a) The *Consultant's* fee shall be determined as follows: (Clause 13.2) **Lump Sum Fee:** \$*[insert]* (exclusive of GST)
Where the fee is payable on a lump sum basis it is not adjustable except as provided for in the *Contract*.
- (b) The expenses and disbursements to be reimbursed to the *Consultant* shall be: (Clause 13.2) Nil.

- 19 The times and place for payment shall be: Not used
(Clause 13.3)
- 20 The rate of interest on overdue payments is: The rate prescribed from time to time under the *Penalty Interest Act 1983 (Vic)*
(Clause 13.4)
- 21 Not used
- 22 *Expert Determination*
(Clause 15)
- (a) Person to nominate an *Expert* The Chairperson for the time being of the Victoria Chapter of the
(Clause 15.3) Institute of Arbitrators & Mediators Australia
- (b) Not used
- (c) Rules for expert determination Expert Determination Rules of the Institute of Arbitrators &
(Clause 15.4) Mediators Australia

**Annexure to the Australian Standard
General Conditions of Contract for
Engagement of Consultants**

Part B

Deletions, amendments and additions

This *Contract* incorporates deletions, amendments and additions to the standard wording of AS4122-2000 as indicated by the tracked change mark-ups in the document comparison at **Attachment 1**.

**Annexure to the Australian Standard
General Conditions of Contract for
Engagement of Consultants**

Part C

In addition to that stated in the *Contract* documents at *Item 5* (and in accordance with the *Contract* document order of precedence stated therein), the scope of the *Consultant's Services* under this *Contract* is as follows:

Scope of Services

[To be inserted]

Long Form Deed of Novation

(clause 7A)

As follows.

Attachment 1

The attached comparison between Australian Standard General Conditions of Contract AS 4122-2000 and the amended General Conditions of Contract, does not form part of the Contract, but is provided for the information of the parties only to highlight the clauses which have been deleted, amended or differ from the Australian Standard General Conditions of Contract AS 4122-2000.