[Version – 14 March 2019]

Dated: <date>

Consultancy Deed

Australian Catholic University Ltd ACN 050 192 660

<Consultant> ACN 000 000 000

<Description of Project>

<Description of Consultancy>

***[BCODE] [LCODE]***

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Consultancy Deed

Dated

Parties

1. **Australian Catholic University Limited** ACN 050 192 660 of 40 Edward Street, North Sydney NSW 2060 (**Principal**).
2. **<Consultant>** ACN 000 000 000 of [insert address] (**Consultant**).

Background

1. The Principal wishes to engage the Consultant to perform and the Consultant agrees to perform the Services in connection with the Project on the terms and conditions of this deed.
2. The parties wish to record the conditions of the engagement.

Operative provisions

# Definitions and Interpretation

## Definitions

In this Deed, unless the context otherwise requires:

**Agreed Program** means the program for provision of the Services as set out in Annexure D, and as otherwise specified by the Project Manager being applicable to the Project from time to time;

**Brief** means the document(s) set out in or referred to in **Item 1** of **Annexure A** which describes the nature, extent, requirements, quality, cost and timing of the Project;

**Building Contract** means the agreement to be made between the Principal’s Head Contractor and the Principal for the construction of the building(s) and as varied from time to time;

**Consequential Loss or Damage** means:

### any loss, not arising naturally, that is according to the usual course of things, from the relevant breach act or omission, whether or not such loss may reasonably be supposed to have been in the contemplation of the parties, at the time they entered this Deed, as the probable result of the relevant breach, act or omission; and

### loss of profit, loss of goodwill, loss of revenue or loss of anticipated savings;

but does not include:

### additional internal administrative and management costs and expenses;

### expenditure or fees rendered unnecessary;

### costs of procuring replacement Services;

### cost of rectification of any work done in connection with the Services;

### cost and expenses associated with procurement of any alternate accommodation that may be required; or

### legal fees on a full indemnity basis.

**Consultancy Fee** means the amount set out in **Item 5** of **Annexure A**;

**Consultant** extends to and includes its permitted assigns;

**Deed** means this document and the annexures thereto;

**Design Documentation** means all design documents, drawings, specifications and information required to be prepared by the Consultant for the Project;

**document** includes but is not limited to any document, drawing, plan, specification, chart, map or computer program and data whether in hard copy or Electronic Form;

**Electronic Form** means and includes but is not limited to PDF, native format soft copies, and AutoCAD and such other electronic form as may be determined from time to time by the Project Manager acting reasonably and recognising different documents may be required in different electronic forms;

**Insolvency Event** means:

### a party advises the other party in writing or its creditors generally that it is insolvent or is unable to proceed with this Deed for financial reasons;

### execution is levied against a party by a creditor and cannot be satisfied within 21 days;

### a party is an individual person or a partnership including an individual person, and if that person:

#### commits an act of bankruptcy;

#### has a bankruptcy petition presented against him or her or he or she presents their own petition;

#### is made bankrupt;

#### makes a proposal for a scheme of arrangement or a composition; or

#### 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

### in relation to a party being a corporation:

#### notice is given of a meeting or creditors with a view to the corporation entering into a deed of company arrangement;

#### the corporation entering into a deed of company arrangement with creditors;

#### a controller, administrator, receiver, receiver and manager, provisional liquidator or liquidator is appointed to the corporation;

#### an application is made to a court for the winding up of the corporation and is not stayed within 14 days;

#### a winding up order is made in respect of the corporation;

#### the corporation resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up); or

#### a mortgagee of any property of the corporation takes possession of that property;

**Intellectual Property** means all current and future intellectual property rights (including all copyright, trademark, design, patent and confidentiality rights) created for or on behalf of the Consultant and the Consultant's right, title and interest in and to all:

(a) the Design Documentation; and

(b) other materials or information prepared by or on behalf of the Consultant as part of or in connection with the Services or this Deed;

**Key Personnel** means the persons specified in **Item 8** of **Annexure A**;

**Owner** means the registered proprietor or proprietors of the Site;

**Principal** extends to and includes its successors in title and assigns;

**Principal’s Head Contractor** means the person ultimately engaged by the Principal to carry out the necessary construction of works for the completion of the Project and where the context so admits includes any sub-contractors;

**Project** means the project, or any part thereof, as described in **Item 2** of **Annexure A**;

**Project Manager** is the party described in **Item 3** of **Annexure A**;

**Reimbursable Expenses** means those items of expenditure incurred by the Consultant, listed in **Item 5(b)** of **Annexure A**, which are reimbursable by the Principal under the terms of this Deed;

**Services** means the design services and other services to be provided by the Consultant pursuant to **clause 5.3** of this Deed, as described in **Annexure C**;

**Site** means the land described in **Item 4** of **Annexure A**;

**SOP Legislation** means the building and construction industry security of payment legislation operative in the State or Territory where the Site is located;

**Variation** has the meaning given to it in **clause 16.1(a)**;

**Wilful Misconduct** means an act or omission committed with reckless disregard for the consequences, and in circumstances where the party knows or ought to know that those consequences would likely result from the act or omission, and which is not due to an honest mistake, oversight, error of judgment accident or negligence; and

**Works** means the works to be performed under the Building Contract.

## Headings

Headings, sub-headings, bold print and capitals have been included for ease of reference. This Deed must not be construed or interpreted by reference to such headings, sub-headings, bold print or capitals.

## Statutes

Reference to statutes includes consolidations, amendments, re-enactments or replacements of those statutes.

## Entire Agreement

This Deed contains the entire agreement between the parties and supersedes all previous correspondence and negotiations concerning the commissioning of the Consultant for the Project.

## Interpretation

In this Deed unless the contrary intention appears:

### the singular includes the plural and vice versa;

### the word 'person' includes a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any authority;

### an agreement, representation or warranty undertaking in favour of two or more persons is for the benefit of them jointly and severally;

### an agreement, representation or warranty undertaking on the part of two or more persons binds them jointly and severally;

### if a period of time is specified and dates from a given day or the day of an act or event it is to be calculated exclusive of that day;

### a provision of this Deed must not be construed to the disadvantage of a person merely because that person was responsible for the preparation of this Deed or the inclusion of that provision in this Deed.

## Nature of Consultant’s obligations

* + 1. The parties acknowledge and agree that if the Principal is not the owner and registered proprietor of the Site, that the Owner will have the benefit of all of the Consultant’s obligations under or in connection with this Deed, including without limitation obligations in connection with the quality of design, but that the Owner will have no liability whatsoever to the Consultant under or in connection with this Deed.
		2. The Consultant's liability to the Owner under or in connection with this Deed will not be greater than the Consultant's liability to the Principal under or in connection with this Deed and under no circumstances will the Consultant be obliged to compensate both the Owner and the Principal for the same loss.
		3. The liability of the Consultant under this Deed to the Owner in respect of any breach will be reduced to the extent that the Consultant pays any sum to the Principal in respect of that breach.

# Role of Project Manager

The Principal has appointed the Project Manager to act on its behalf in relation to the Project where required under this Deed. The Project Manager acts as the agent of the Principal with authority to receive communications, grant approvals, issue instructions, make determinations and where specified in this Deed give notices on behalf of the Principal. The Principal may replace the Project Manager at any time and upon replacement will notify the Consultant in writing of the identity of the replacement Project Manager.

# Appointment and Term

## Appointment

The Principal acknowledges having commissioned the Consultant to provide the Services, and in consideration for the Consultancy Fee set out in **Item 5** of **Annexure A**, the Consultant acknowledges having accepted a commission to provide the Services for the Project as described in this Deed and in accordance with the Brief.

## Term

If the commencement of such commission preceded the date of this Deed, the parties agree that any services provided by the Consultant in relation to the Project prior to the date of execution of this Deed are deemed to have been provided by the Consultant as part of the Services pursuant to the terms of this Deed.

# Information

### The Consultant must immediately give notice to the Project Manager upon discovering any error, inconsistency, omission or defect in any information related to the Project provided to the Consultant by the Principal or the Project Manager.

### The Principal does not represent that information made available shows or explains completely the existing conditions at the Site. Neither the Principal nor the Project Manager is responsible for any interpretations, deductions and conclusions made by the Consultant from the information made available and the Consultant must accept full responsibility for any such interpretations, deductions or conclusions.

### Where there is an ambiguity, discrepancy or inconsistency between the documents, the higher standard, quality or quantum will prevail but if this does not resolve the ambiguity, discrepancy or inconsistency, then, subject to clause 4(d), this Deed will prevail over other documents. Any ambiguity, discrepancy or inconsistency will not as of right entitle the Consultant to any variation, additional cost or expense under this Deed or otherwise at law or in equity. If it is discovered by the Consultant or the Principal, then the party discovering it must promptly give notice to the other.

### The Project Manager must instruct the Consultant as to the course it must adopt within 7 days of the notice under **clause 4(a)** and the Consultant must comply with that instruction.

# Duties of Consultant

## Scope of duties

The Consultant must perform the Services set out in Annexure C in accordance with this Deed.

## Incidental services

The Services to be provided by the Consultant are not limited to those referred to in **clause 5.1** but include all ancillary and incidental services which are reasonably to be inferred.

## Services and skills

### The Consultant must:

#### provide the Services:

##### in accordance with the Agreed Program and a timely manner, including without limitation responding to requests for information within 3 business days unless due to the nature of the request that is impractical;

##### exercising skill, care and diligence to the standard expected of a Consultant providing services of a similar nature in respect of projects comparable to the Project;

#### exercise good faith in the best interests of the Principal.

### The Consultant's Services must comply with:

#### the requirements of the Brief;

#### the requirements of all relevant authorities, legislation, and building codes; and

#### all relevant Australian Standards.

### Without limiting the generality of the foregoing, the Services provided by the Consultant must as far as practical provide effective, efficient and economical solutions to satisfy the performance objectives and other requirements set out in the Brief. Where appropriate, the Consultant must provide details of alternative proposals that satisfy these objectives and requirements.

### The Design Documentation, if any, provided by the Consultant as part of the Services must meet accepted industry standards.

## Consultations with the Project Manager

The Consultant must make its approved personnel available:

### for consultation with the Project Manager (with or without other consultants) at locations as required by the Project Manager, including the Site, as reasonably required by the Project Manager;

### for meetings with the Principal or the Project Manager which the Principal or the Project Manager consider are reasonably necessary to achieve the efficient completion of the Services; and

### to attend and make presentations as reasonably required by the Principal.

## Instructions from the Project Manager

Except where the Consultant is required to act as an assessor or certifier, the Consultant must at all times act in accordance with any instructions given by the Project Manager.

## Performance of obligations

In the performance of its obligations under this Deed the Consultant must use best endeavours not to do or omit to do anything without the Project Manager's prior approval, which causes the suspension of the Project or puts the Principal in breach of any contract into which it has entered in respect of the Project.

## Certification by Consultant

### To the extent that the Services include design and subject to the requirements of the Services specified in Annexure C:

#### at the completion of each stage of the Services, and at such other times as may be reasonably required by the Project Manager, the Consultant must confirm in writing to the Principal that all drawings and documents prepared by the Consultant in the course of providing the Services have as far as is practicable been checked, co-ordinated with all other disciplines and approved for accuracy by the Consultant’s personnel, and that they comply with all relevant statutes and otherwise meet the requirements of the Brief;

#### at the completion of the Project, the Consultant must confirm in writing to the Principal that drawings and documents prepared by the Consultant in the course of providing the Services under this Deed have been checked and approved for accuracy by the Consultant’s personnel, and that they comply with relevant statutes and otherwise meet the requirements of the Brief;

#### on the basis of observations on Site from inspections undertaken monthly or more frequently, the Consultant must, each month during the construction phase and again at practical completion under the Building Contract, prepare and provide to the Principal a certificate or statement confirming that:

##### as far as the Consultant is aware, construction accords in all material respects with the design prepared by the Consultant; or

##### otherwise detail any material non-conformance of construction of which the Consultant is aware as at the end of the period covered by the report, and which has arisen or occurred since the last certificate or statement was signed by the Consultant;

#### the Consultant must ensure that any design document submitted to the Principal is accompanied by a certificate from the Consultant stating that the design documents:

##### comply with this Deed; and

##### meet the functional requirements of the Brief.

### The Consultant must upon request by the Principal, provide a 'safety in design' report for the design prepared by the Consultant.

### any certificate or report provided under this **clause 5.7** must be in such a form as the Principal or Project Manager may reasonably require.

## Conflict of interest

As soon as any facts or circumstances likely to cause any actual or potential conflict of interest in respect of any of the Consultant's duties under this Deed arise, the Consultant must forthwith notify the Project Manager in writing of the conflict and provide details of the facts or circumstances. The Principal and the Project Manager must treat any information so provided as confidential other than as is reasonable in the circumstances.

## Indemnity

### The Consultant indemnifies the Principal against, and must compensate the Principal in respect of, any expense, damage, loss, claim, demand, action or proceedings of any kind that may be brought (whether during or after completion of the Project) against the Principal in respect of loss, injury or damage to property or persons to the extent that such arise out of any act, error, omission, breach or statement by the Consultant, its servants, agents or employees in the performance of its duties under this Deed.

### The Consultant’s liability to indemnify the Principal will be reduced proportionally to the extent that an act or omission of the Principal contributed to the loss, injury, death or damage.

## Consultant's limitation of liability

(a) Subject to **clause 5.10(b)**, the liability of the Consultant to the Principal in connection with this Deed is capped in the amount stated in **Item 12** of **Annexure A.**

(b) The limitation of liability in **clause 5.10(a)** does not apply to, limit or restrict in any way the liability of the Consultant to the Principal:

(i) for any loss or liability arising out of fraud, Wilful Misconduct, abandonment or for breach of intellectual property by the Consultant or persons under its responsibility or control;

(ii) for loss or liability incurred by the Principal or to a third party for personal injury or death; or

(iii) for loss of a sort which is covered by an insurance policy required to be effected under this Deed, for an amount in excess of the cap in **clause 5.10(a)**, in which case the Consultant's liability to the Principal is limited to the amount that:

(A) the Consultant, in the absence of any cap, is entitled to recover; or

(B) the Consultant would have been entitled to recover under an insurance policy required to be effected under this Deed but for any breach of the relevant insurance policy by the Consultant or failure by the Consultant to effect and/or maintain that policy.

## Consequential Loss

### Neither party will be liable to the other for Consequential Loss or Damage, however and whenever arising and whether arising under this Deed or as a result of the performance of the Services under this Deed, and whether based on negligence, breach of contract, or otherwise.

## Amending documents

The Consultant must, on written request by the Project Manager, use its reasonable endeavours to amend the documents prepared by the Consultant to achieve previously notified Project budgetary or cost limitations. The Consultant will be entitled to an additional fee only where the amendment arises from an act, default or omission of the Principal, its agents or other consultants or from a matter which is beyond the control of, and could not reasonably have been foreseen by, the Consultant, or where modified to suit an alternative method of construction proposed by the Principal's contractor.

## Consultant’s work health and safety obligations

### The Consultant must ensure that persons employed or engaged in the performance of the Services are provided with safe systems of work, adequate welfare facilities and such instruction, training and supervision as is necessary to enable the Services to be provided without risk to health and safety of any person or the environment. Accordingly, the Consultant must implement adequate health and safety and environmental policies and procedures and, at the request of the Principal, provide evidence in writing of

#### those policies and procedures; and

#### the Consultant’s compliance with those policies and procedures.

### The Consultant must comply with the requirements of all relevant laws, statutes, regulations, codes of practice and Australian Standards relating to the protection and preservation of the health and safety of the persons employed or engaged in the performance of the Services.

# Other Consultants

## Appointment of Consultants

The consultants appointed or to be appointed by the Principal to assist with the Project are named in **Item 7** of **Annexure A**. The Principal reserves the right at any time to terminate the engagement of any consultants and to appoint other consultants.

## Co-ordination

The Consultant must at all times use all reasonable endeavours to:

### co-ordinate with all other consultants; and

### advise the Project Manager on, and support the coordination and integration of, the Services performed by the Consultant with the work performed and provided by all other consultants.

# Responsibilities of the Project Manager

## Instructions to Consultants

### The Project Manager must consider promptly all submissions made by the Consultant to the Project Manager and must give its decision and instructions on such submissions to the Consultant so as not to delay the Consultant in fulfilling its obligations under this Deed.

### All instructions provided under **clause 7.1(a)** must be in sufficient detail so as to define clearly the requirements of the Project Manager.

## Representative of the Project Manager

The Project Manager may from time to time nominate a person to act as its representative for the purposes of this Deed. Until otherwise advised, the representative of the Project Manager is specified in **Item 8** of **Annexure A**.

## Consultations with Consultant

The Project Manager's representative must be available for consultation with the Consultant upon reasonable notice at the Site or at another location nominated by the Project Manager's representative.

# Personnel of Consultant

## Approved personnel

### The Consultant must provide competent, professional and qualified personnel to perform the work comprising the Services, such personnel to include the Key Personnel previously approved by the Project Manager.

### The Key Personnel and their respective roles at the date of this Deed are listed at **Item 9** of **Annexure A**.

### With regard to the Key Personnel:

#### the Consultant must take reasonable steps to retain the Key Personnel throughout the Project;

#### no Key Personnel may be replaced during the continuance of this Deed unless:

##### the Project Manager approves the substitute;

##### that person dies, retires or resigns (other than to accept other employment with the Consultant or any associate of the Consultant) or otherwise suffers from ill health or some serious domestic problem; or

##### that person’s section of the work under this Deed has been completed; and

#### any vacancy of Key Personnel must be promptly filled by the Consultant with a person reasonably approved by the Project Manager.

## Skills of personnel

The Consultant warrants that all Key Personnel will have the necessary skills, competence and experience to undertake the duties of the Consultant.

## Removal of Personnel

### The Project Manager may at the direction of the Principal require the Consultant to remove any person:

#### from the Site at the Principal’s absolute discretion; and

#### from work in relation to the Services if the person, in the Principal’s reasonable opinion, is incompetent or otherwise not performing the Services in accordance with this Deed.

### The Consultant must promptly arrange for the removal of any person the subject of a direction of the Project Manager under this **clause 8.3** and their replacement with a person approved by the Principal, such approval not to be unreasonably withheld.

# Payment of Consultant

## Consultancy Fee

### In consideration for the performance by the Consultant of its Services, the Principal will pay the Consultant the Consultancy Fee set out in **Item 5(a)** of **Annexure A** together with the Reimbursable Expenses set out in **Item 5(b)** of **Annexure A,** in accordance with this Deed.

### The Consultant will not be entitled to a Reimbursable Expense unless it obtains prior written approval from the Principal, which approval will not be unreasonably withheld.

## Progress claims

### On or before the day of each calendar month specified in **Item 10** of **Annexure A**, the Consultant must submit to the Project Manager a detailed progress statement, in a form reasonably approved by the Project Manager, showing the value of the Services performed by the Consultant, calculated where applicable on the basis of the Services completed as a percentage of the total Services to be completed by the Consultant and applied to the Consultancy Fee.

### Where applicable, incomplete Services must be included in such progress statements by taking into account the extent to which such Services have been completed.

### Within 10 business days after receipt by the Project Manager of a detailed progress statement, the Project Manager, on behalf of the Principal, will determine and then certify the value of the services completed by the Consultant and the amount the Principal proposes to pay. If the amount the Principal proposes to pay is less than the amount claimed, the Project Manager will provide reasons for the difference and the Consultant will amend and re-submit an amended tax invoice.

### If the Consultant disputes any certification issued by the Project Manager under **clause 9.2(c)**, the Consultant must, not later than seven days after receiving that certification, serve a notice of dispute in accordance with **clause 20.1**. The dispute will then be dealt with in accordance with **clause 20**.

### If the Consultant fails to issue a notice of dispute strictly in accordance with **clause 9.2(d)**, then the Consultant will not have any entitlement to dispute the certification under **clause 9.2(c),** and will have no claim for any monies or any adjustment to the Consultancy Fee or for any cost, expense, loss or damage on any basis whatsoever in respect of the matters the subject of the certification.

### To the extent permitted by law, if the Consultant issues a notice of dispute pursuant to **9.2(d),** the Principal is not required to pay the disputed amount until the dispute has been resolved in accordance with **clause 20** and then only to the extent that the resolution requires the Principal to make a payment to the Consultant.

## Progress payments

### Subject to the Principal's rights under this Deed, the Principal must make a progress payment equal to the value certified in **clause 9.2,** less the value of previous progress payments, within the time provided in **Item 11** of **Annexure A** or where no time is provided, 30 days after the receipt of a detailed progress statement.

### Progress payments are not evidence against, or an admission by, the Principal that any of the Consultant's Services have been provided in accordance with this Deed, but must be taken to be payments on account only.

## Correction

The Principal may in any payment under this clause correct any error which has been discovered in a previous payment.

## Set off

### Without limiting the Principal’s rights under any other provision of this Deed the Principal may at any time deduct from money due to the Consultant:

#### any debt or other money due from the Consultant to the Principal under this Deed; or

#### any other claim to money which the Principal may have against the Consultant under this Deed, whether for damages or otherwise.

### Nothing in this **clause 9.5** restricts the right of the Principal to recover from the Consultant the whole of any moneys, debts or any balance that remains owing after deduction.

## Interest Payable

If the Principal fails to pay any sum due to the Consultant pursuant to this clause by the due date for payment, the Consultant will be entitled to be paid interest on any unpaid amount from 14 days after the due date for payment until the date on which full payment is made at 2 per cent per annum.

## Stages

The Consultant agrees that the Services are, unless otherwise expressly advised in writing, to be provided in the following stages:

### [Concept design, town planning/ development approval;

### Schematic design;

### Design development;

### Construction documentation phase services;

### Construction; and

### Defects liability,]

and the Consultant will have no authority to proceed from one stage to the next unless instructed in writing by the Project Manager to so proceed. Should the Consultant proceed to a stage without the Project Manager's written instruction, the Consultant will only become entitled to payment in respect of the Services provided for that stage if it is subsequently instructed in writing to proceed with that stage.

## Security of Payment Legislation

### If the Principal is required as a result of any action taken under the SOP Legislation to make a payment to the Consultant or to a subconsultant or supplier of the Consultant, any such payment will be deemed to have been paid to the Consultant on account of the Consultancy Fee payable to the Consultant under the Deed and:

#### may be deducted from any further payment due or falling due to the Consultant under the Deed; and

#### to the extent the payment results in the Consultant being paid an amount in excess of the Consultancy Fee payable to the Consultant under the Deed, the excess will be a debt due and payable by the Consultant to the Principal on demand.

### The Consultant must:

#### immediately give to the Principal a copy of any notice the Consultant receives from a subconsultant; and

#### use its reasonable endeavours to procure that each subconsultant immediately gives the Principal a copy of any notice that the subconsultant receives from another party,

under the SOP Legislation.

### This Deed does not limit or exclude the operation of or the rights of either party under the SOP Legislation. If any provision of this Deed would have the effect of excluding, modifying or restricting the operation of the SOP Legislation, then that provision must be construed so as not to have that effect and, if it cannot be so construed, this Deed will be interpreted as if the provision was severed without affecting any other provision of the Deed.

### Nothing in the Deed will be construed to:

#### make any act or omission of the Principal in contravention of the SOP Legislation (including failure to pay an amount becoming due under the SOP Legislation) a breach of the Deed (unless the Principal would have been in breach of the Deed had the SOP Legislation had no application); or

#### give to the Consultant rights or remedies under the Deed which extend or are in addition to rights and remedies given to the Consultant by the SOP Legislation in respect of any act or omission of the Principal in contravention of the SOP Legislation.

# Confidentiality

### The Consultant must regard all information in relation to the Project as confidential. The Consultant must not disclose any such details and information to a third party other than to persons engaged in the performance of the Services, or otherwise for the purposes of performing the Services, without the prior written approval of the Project Manager.

### The Consultant must ensure that its sub-consultants, subcontractors and employees and the employees of its sub-consultants and subcontractors comply with this **clause 10**.

### The obligation imposed upon the Consultant under this **clause 10** will not cease upon the completion, expiry or termination of this Deed.

### The Consultant must not issue any information, publication, document or article for publication in any media without the prior written approval of the Principal. Such approval may be withheld by the Principal at its sole discretion.

### **Clause 10(a)** does not apply in the following circumstances:

#### the information in question was in the possession of the Consultant prior to acquisition from the Project Manager and/or Principal;

#### the information in question was already public knowledge when disclosed to the Consultant;

#### disclosure to the Consultant’s lawyers, taxation accountants or other professional service advisors;

#### where the Consultant obtained the information in question from a third party without an obligation to maintain confidentiality with regard to that information;

#### where disclosure is required by the law; or

#### disclosure to third parties (including subconsultants or subcontractors of the Consultant) which is necessary for the performance of the Services; or

#### disclosure is reasonably necessary for the Consultant to seek professional advice or to defend itself from any suit or claim.

# Novation, Assignment and Subcontracts

## Novation by the Principal

If directed in writing by the Principal the Consultant must, without being entitled to compensation, promptly execute a deed of novation of this Deed, in the form set out in **Annexure B** or a form not less favourable to the Consultant, to such person as the Principal directs.

## Assignment by Consultant

The Consultant must not subcontract any part or the whole of the Services or assign its rights and obligations under this Deed without the prior written approval of the Principal. Such approval may be given or refused or given subject to conditions at the absolute discretion of the Principal.

## Provision of Subcontracts

Any subcontract entered into by the Consultant relating to a part or the whole of the Services must include provisions substantially in accordance with the terms of this Deed and reserve any rights to the Principal that are available to the Principal under this Deed.

## Subcontracting not to relieve Consultant

Approval to subcontract will not relieve the Consultant from any liability or obligation under this Deed. The Consultant will be liable to the Principal for the acts and omissions of subcontractors and employees and agents of subcontractors as if they were acts or omissions of the Consultant.

# Intellectual Property Rights

## Intellectual Property

Intellectual Property in any documents remains vested in the person who prepared the documents but the Principal is hereby granted a perpetual, irrevocable, non-exclusive royalty free licence, together with the right to sub-licence, to use all Design Documents prepared by the Consultant in connection with the Project or any works which may be carried out on the Site at any time, or any alteration or extension of the Site including without limitation construction by a building contractor, maintenance, refurbishment and similar works, notwithstanding any dispute which may arise between the Principal and the Consultant.

## Moral Rights

The Consultant warrants that it will obtain or has obtained from each of its employees, sub-consultants or contractors involved in performing the Services:

### all Intellectual Property in the documents and the design subject of this Deed; and

### written consent for the benefit of the Consultant in relation to any Moral Right in respect of any Work made, created or developed as part of any of the Project.

## Intellectual Property indemnity

The Consultant indemnifies and will keep indemnified the Principal for any loss, damage, expense or liability the Principal may suffer which is caused by or is related to:

### a breach of this **clause 12**; and

### any employee of the Consultant or employee of any sub-consultant or contractor of the Consultant attempting to otherwise enforce their Moral Rights pursuant to the *Copyright Act 1968* (Cth).

## Definitions

In this **clause 12**:

**Moral Right** has the meaning given to it by section 189 of the *Copyright Act 1968*;

**Work** has the meaning given to it by section 189 of the *Copyright Act 1968*.

## Warranty as to rights

The Consultant warrants that it is entitled to provide to the Principal the rights granted to the Principal pursuant to this **clause  12**.

# Insurance

## Professional indemnity insurance

### The Consultant must effect and maintain professional indemnity insurance against damage, injury or loss of any nature suffered by the Principal arising from breach of professional duty by the Consultant, for an amount not less than the amount set out in **Item 13** of **Annexure A**.

### The policy of professional indemnity insurance must be renewed by the Consultant, to ensure that there is always a current policy in place to cover all claims made against the Consultant, for a period of 10 years after the completion of the Services.

### The Consultant must produce evidence of the existence of insurance in conformity with the requirements of this clause forthwith upon the request of the Project Manager. In the absence of such request, the Consultant must produce such evidence annually on the anniversary date of this Deed except where it has taken out a pre-paid specific Project policy against claims made within the period referred to in **clause 13.1(b)**.

## Public liability insurance

### The Consultant must obtain and maintain in accordance with **clause 13.2(c)**, a public liability policy of insurance. The policy must cover the acts or omissions of the Consultant, its employees and all of the Consultant's sub-contractors employed from time to time for whose acts and omissions the Consultant is legally liable in relation to the Services, for their respective rights and interests and their liabilities to third parties. The policy must also cover the Consultant's liability to the Principal for loss of or damage to property and the death or of injury to any person (other than liability, which is required by law to be insured under a workers compensation policy of insurance).

### The public liability policy of insurance must be for an amount not less than the sum stated in **Item 14** of **Annexure A**.

### The public liability policy must be maintained until the date of issue of the certificate of final completion of the Project or until the completion of the provision of the Services under this Deed, whichever is the later.

## Insurance of employees

### The Consultant must insure against liability for death of or injury to persons employed by the Consultant including liability by statute and at common law. The insurance cover must be for the amount required by the laws for the time being in force in the state or territory specified in **Item 15** of **Annexure A** and must be maintained until the date of completion of the Services.

### The Consultant must take all reasonable steps to ensure that every sub-consultant and sub-contractor that the Consultant engages, hold insurance equivalent to that required by **clause 13.3(a)**.

## Approval of insurers and terms of policies

### Insurances under this Deed must be effected by the Consultant before the commencement of the Services with a reputable insurance provider approved by the Project Manager, such approval not to be unreasonably withheld, taking into account prevailing market conditions.

### No part of the Consultant's remuneration under this Deed will be payable to the Consultant until it has provided evidence to the Project Manager that it has effected the insurances required by this **clause 13**.

# Suspension of Work

## Suspension by the Principal

The Project Manager may order the Consultant to suspend provision of the Services in respect of the Project or any phase thereof for such time as the Project Manager may think fit and the Consultant must comply with such a suspension order in accordance with the detailed provisions of the suspension order, or failing such specific direction, as soon as practicable.

## Recommencement of work

The Project Manager must advise the Consultant when the reasons for any suspension no longer exist and the Consultant must recommence provision of the Services as soon as practicable thereafter.

## Costs of Suspension

### Any suspension directed by the Project Manager pursuant to **clause 14.1** will not entitle the Consultant to the payment of any additional fees, costs or expenses, except those costs and expenses which have been reasonably incurred by the Consultant in implementing the suspension or in re-commencing the provision of the Services following the receipt of a direction from the Project Manager pursuant to **clause 14.2**.

### For the purposes of determining any payment to the Consultant under **clause 14.3(b)**, the Consultant must promptly provide all information requested by the Project Manager, and the Consultant will not be entitled to any payment until the Project Manager has received that information to its satisfaction.

# Timely provision of Services

## Timely Provision of Services

The Consultant must perform the Services in accordance with the Agreed Program and otherwise in a timely manner satisfactory to the Principal.

## Delay

The Consultant must give immediate notice to the Project Manager of any event or circumstance, which is causing or is likely to cause delay and/or disruption to the provision of the Services. The Consultant must consult with the Project Manager to determine what steps the Consultant must take in order to overcome any inability to comply with **clause 15.1** and minimise any delay to the Project.

## Acceleration

### The Project Manager may on behalf of the Principal direct the Consultant to accelerate the performance of the Services.

### The Consultant must at its own cost accelerate the performance of the Services if it is failing to maintain progress in accordance with **clause 15.1.**

### If the Principal requires the Project Manager to direct acceleration other than under **clause 15.3(b)** and the Consultant performs the Services in accordance with the Project Manager’s direction, the Consultant will be entitled to be paid an amount to be agreed for those reasonable costs or expenses incurred by the Consultant in excess of those costs or expenses which would have been reasonably incurred by the Consultant had the direction to accelerate not been made.

# Variations

## Variations permitted

### The Project Manager may from time to time and at any time during the currency of this Deed give written directions to the Consultant to do all or any one or more of the following things:

#### vary the nature and extent of the Services;

#### increase, change, decrease or omit any part of the Services; or

#### carry out additional Services;

where such written directions necessitate a material change to the services there will be a variation (**Variation**) for the purposes of this Deed and the Consultant must carry out such Variations and be bound by the same terms and conditions as if the Variations were part of the Services originally included in this Deed.

### If the Consultant receives a direction from the Project Manager which it considers constitutes a Variation, but is not specifically marked as such, the Consultant must within 7 days of receipt of the direction provide a variation quotation in respect of the proposed or contemplated change of scope. If the Consultant fails to notify the Project Manager accordingly within the time specified the Consultant will be barred from pursuing any claim for an adjustment to the Consultancy Fee on account of the Variation.

### The Consultant must not make nor approve any material alteration to, addition to or omission from the tender drawings or the specifications for the Project without the prior written consent of the Project Manager. In any such request to the Project Manager for a Variation, the Consultant must in its application provide the following information:

#### details of the proposed Variation;

#### reason for the proposed Variation;

#### estimated cost of the proposed Variation; and

#### assessment of the impact (if any) which the undertaking of the proposed Variation would have on the construction programme for the Project.

### No Variation will vitiate this Deed, but the monies otherwise payable under this Deed will be increased or decreased having regard to the value (if any) of the Variation determined pursuant to **clause 16.2**.

### The Principal is not to be liable for fees and/or reimbursable expenses to the Consultant for Variations in respect of which the Project Manager has not provided its written approval.

## Valuation of Variations

### Wherever fair and reasonable in the Project Manager's opinion, a Variation must be valued by the Project Manager on the basis of the proportion that the Variation represents in relation to the original Services to be provided by the Consultant, expressed as a percentage and applied to the Consultancy Fee and adjusted upwards or downwards, as necessary, to take into account any economies or diseconomies of scale and any other relevant factors.

### If the Project Manager decides the method of valuation in **clause 16.2(a)** is not appropriate, the Project Manager may request the Consultant to submit an estimate of its fee for the Variation as a basis for negotiation and agreement on the valuation of the Variation or, alternatively, the Project Manager may agree to value the Variation on the basis of the rates set out in **Item 6** of **Annexure A**.

### If the Project Manager decides it is appropriate, a Variation may be valued on the basis of any combination of the above mentioned methods.

# Termination

## Insolvency

If an Insolvency Event occurs the other party may, notwithstanding that there has been no breach of contract and in addition to any other rights, by notice in writing forthwith terminate this Deed.

## Termination by the Principal

The Principal may by notice in writing to the Consultant terminate this Deed:

### if the Consultant commits a substantial breach of this Deed and the breach has not been remedied within 7 days of the Principal having provided notice of the breach to the Consultant; or

### for the Principal’s convenience upon giving 30 days’ notice in writing to the Consultant at any time.

## Termination by Consultant

The Consultant may by notice in writing to the Principal terminate this Deed forthwith if there is a failure to pay any instalment of the Consultancy Fee by the due date for payment or the Principal otherwise breaches this Deed and such default continues for a period of 30 days after the Consultant has demanded payment in writing or otherwise given notice in writing of the breach to the Principal indicating an intention to terminate this Deed if payment is not made or the breach remedied as the case may be.

## Post termination obligations

If this Deed is terminated under **clauses** **17.1, 17.2 or 17.3**:

### subject to **clause 17.4(e)**, the Consultant must in the case of termination under:

#### **clauses 17.1** and **17.2**, immediately cease the performance of the Services; and

#### **clause 17.3**, cease performance of the Services after expiry of the 30-day period.

### subject to **clause 9.5(a)**, the Principal must pay to the Consultant any part of the Consultant's remuneration which has accrued prior to the termination and any further amount of which would have been payable if this Deed had not been terminated and the Consultant had made a progress claim on the date of termination.

### except as provided in this **clause 17.4**, the termination is without prejudice to any rights which may have accrued to either party prior to the date of termination;

### should the Consultant's commission be terminated the Consultant must:

#### deliver to the Project Manager all documents, books, records, plans, drawings, papers, models and information of any kind relating to the Project which are the property of the Principal or the Project Manager subject to the right of the Consultant to retain one file copy and a continuing duty of confidentiality;

#### provide to the Project Manager a copy (at the Principal's cost) of all documents relating to the Project produced by the Consultant, pursuant to its commission under this Deed, prior to the date of the Consultant's termination. If required by the Project Manager, the Consultant must provide a copy of all documents in Electronic Form; and

#### if required by the Project Manager, assign to the Principal all rights and benefits under contracts with third parties which relate to the Services or the Project.

### to the extent permitted by its professional indemnity insurance policy (required pursuant to **clause 13.1**) the Consultant must, if reasonably requested so to do by the Project Manager (whether during or after the term of this Deed) cause its personnel (so far as they are able so to do) engaged in the performance of its duties under this Deed, to assist the Principal in resolving any dispute (including arbitration proceedings) between it and contractors on the Project. The Consultant must be remunerated for such services at the hourly rates indicated in **Item 6** of **Annexure A** payable monthly in arrears.

# Applicable law

This Deed must be governed by and construed with reference to the laws for the time being in force in the jurisdiction specified in **Item 14** of **Annexure A** and the parties hereby submit to the non-exclusive jurisdiction of the relevant courts of the jurisdiction specified in **Item 14** of **Annexure A**.

# Notices

## Method of giving

Any notice or communication in writing to be given by either party to the other under this Deed must be delivered, forwarded or transmitted to the recipient at its address set out in **Annexure A** (or such other address as may have been notified in writing for that purpose) in one of the following ways:

### by delivery, in which case the notice is received at the time of delivery;

### by prepaid post or registered mail, in which case the notice is deemed to have been received at the time when it would have been delivered in the ordinary course of post; or

### by facsimile transmission, in which case the notice is deemed (until the contrary is proved) to have been received at the time shown in the transmission confirmation report containing the recipient's identification code and indicating that the transmission was error free;

### by email transmission, in which case the notice is deemed (until the contrary is proved) to have been received at the time shown in an electronic mail received receipt indicating that the email was received by the intended recipient.

## Receipt after business hours

Any notice received or deemed to have been received after 5.00 pm on any business day and before 9.00 am on the following business day is (in the absence of any earlier response from the recipient) deemed to have been received at 9.00 am on that following business day.

## Execution by the Project Manager

Any notice given by the Project Manager to the Consultant may be signed by its representative referred to in **clause 7.2** or by an agent of the Project Manager's representative approved by the Project Manager's representative.

## Execution by Consultant

Any notice given by the Consultant to the Project Manager must be signed by a Director for the time being of the Consultant.

# Resolution of Disputes

## Notice of dispute

If any dispute or difference arises between the parties either during or after the completion of the Project or after the termination of this Deed as to the construction of this Deed or as to any matter arising under this Deed, then either party may give to the other notice in writing setting out the particulars of the dispute (**notice of dispute**).

## Private negotiation

Within 10 days of the service of a notice of dispute senior executives of the parties (**Representatives**) must confer at least once to attempt to resolve the dispute or to explore other methods of resolving the dispute. At each such conference each party must be represented by a person having authority to resolve the issues in dispute.

## Process

If the dispute is not resolved within the 10 day period referred to in **clause 20.2** (or within any further period agreed by the Representatives in writing) the parties must ensure that the Representative within a further 10 days (or within any further period agreed by the Representatives in writing) use their best endeavours to agree on a process for resolving the whole or any part of the dispute through means other than litigation or arbitration, such as further negotiations, mediation, conciliation, independent expert determination or appraisal, or mini-trial. The parties must ensure that the Representatives also use their best endeavours to agree on:

* + 1. the procedure and timetable for any exchange of documents and other information relating to the dispute;
		2. procedural rules and a timetable for the conduct of the selected mode of proceeding;
		3. a procedure for selection and compensation of any neutral person who may be employed by the parties in dispute; and
		4. whether the parties should seek the assistance of a dispute resolution organisation.

## Exchange of information

The purpose of any exchange of information or documents or the making of any offer of settlement under this clause is to attempt to settle the dispute between the parties. No party may use any information or documents obtained through the dispute resolution process established by this clause for any purpose other than an attempt to settle the dispute between the parties.

## Commencement of litigation

If:

* + 1. a party has failed to appoint a Representative as required; or
		2. the time established by or agreed under **clause 20.3** for agreement on a dispute resolution process has expired,

any party which has complied (and whose Representative has complied) with this clause may, by notice to the other parties, terminate the process and commence litigation or arbitration.

## Services of Consultant to continue

Notwithstanding the existence of a dispute, the Consultant must at all times continue to fulfil its obligations under this Deed and must comply with all directions given to the Consultant by the Project Manager in accordance with this Deed.

## Rights not affected

The respective rights and obligations of the parties under this Deed are not affected by the existence of a dispute pursuant to this **clause 20**.

# Goods and Services Tax

## GST exclusive

The parties acknowledge that unless specified otherwise, any Consideration payable under this Deed has been negotiated without any allowance for a *GST* and is the *Value* of a *Taxable Supply*.

## GST amounts

A *Recipient* under this Deed must, in addition to any Consideration, pay or reimburse the *Supplier* any amount of *GST* for which the *Supplier* is or may become liable with respect to the *Taxable Supply* to which that *Consideration r*elates, so that the net amount retained by the *Supplier* after payment of that *GST* is the same as if the *Supplier* was not liable to pay *GST* in respect of that *Taxable Supply*.

## Time of payment

The *Recipient* must pay to the *Supplier* the amount of any *GST* owing in accordance with this Deed at the same time and in the same manner as the *Recipient* is required to pay for the *Taxable Supply* to which that amount of *GST* relates.

## Tax invoice

The *Recipient* will not be obliged to pay any amount of GST to the Supplierunder this Deed unless the *Supplier* has first issued to the *Recipient* a *Tax Invoice* which complies with the GST Act.

## Reimbursements

If this Deed requires the *Recipient* to pay, reimburse or contribute to an amount paid or payable by the *Supplier*, in respect of an *Acquisition* from a third party for which the *Supplier* is entitled to an *Input Tax Credit*, the amount for payment, reimbursement or contribution will be:

### the *Value* of the *Acquisition* by the *Supplier*; plus

### if the *Supplier's* recovery from the *Recipient* of the *Value* of the *Acquisition* will be a *Taxable Supply*, the GST payable in respect of that *Taxable Supply*.

## Other Supplies

This **clause 21** applies to *Consideration* for *Taxable Supplies* relating to the breach, termination of, and obligations arising from this Deed.

## Definitions

In this **clause 21**:

**Consideration** means any amount payable or treated as payable (whether or not monetary) for a supply made under this Deed;

**GST** means a tax, any related additional tax, interest, penalty, fine or other charge imposed by or under a GST Act;

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and/or any other Act relating to the imposition or administration of a goods and services tax;

**Recipient** means in relation to a supply made under or in relation to this Deed the entity to which the supply was made;

**Supplier** means in relation to a supply made under or in relation to this Deed the entity which made the supply;

**Value** has the meaning given to that term in the GST Act, and in relation to a Taxable Supply or a Creditable Acquisition, means the GST-exclusive amount of that Taxable Supply or Creditable Acquisition; and

Any expression in italics has the meaning given to that term in the GST Act.

# Design Process

* 1. **Preparation and submission of design documentation**

 The Consultant must prepare all design documents necessary or desirable to provide the Services. Copies of the design documents must be provided to the Project Manager as soon as reasonably practicable after their preparation and in any event 60 days prior to the intended date or time when construction of that part of the Works is to be commenced.

* 1. **Design documents to comply with the Deed**

 Design documentation submitted to the Project Manager must be accompanied by a confirmation from the Consultant or the relevant sub-consultant that the design meets the requirements of the Deed and complies with the intent of the Building Code of Australia.

* 1. **Disapproval of design documents**

 If the Project Manager notifies the Consultant of its disapproval of any design documentation within 35 days of receipt by it, the Consultant must revise the design documentation and submit revised design documentation to the Project Manager.

* 1. **Issue of design documents for Construction**

 Design documents must not be issued to the Contractor for construction if rejected by the Project Manager under this **clause 22**.

* 1. **No Consultancy Fee increase due to disapprovals**

 No adjustment to the Consultancy Fee will be payable by the Principal for any change or revision due to any rejection by the Project Manager under this **clause 22** if the Project Manager is of the reasonable opinion that such change or revision was necessary as a result of any error or failure of the design documents to comply with the requirements of the Deed and any reasonable requirements of the Principal previously notified in writing to the Consultant.

* 1. **Effect of Approval**
		1. An approval of design documents or an authorisation to proceed with construction by the Project Manager will not amount to an acceptance that the design documents complies with this Deed and will be construed as an authorisation to proceed with construction only. The Principal will have no liability whatsoever to the Consultant by reason of any errors or deficiencies in any design documents notwithstanding any review, amendments requested or approval by the Project Manager.
		2. Once approval of design documents is given or deemed to have occurred the Consultant must not vary those documents without the prior approval of the Project Manager which will not be unreasonably withheld.

# General provisions

## Amendments

Any amendment to this document has no force or effect, unless effected by a document executed by the parties.

## Further assurance

Each party must execute any document and perform any action necessary to give full effect to this document, whether before or after performance of this document.

## Continuing performance

### The provisions of this document do not merge with any action performed or document executed by any party for the purposes of performance of this document.

### Any representation in this document survives the execution of any document for the purposes of, and continues after, performance of this document.

### Any indemnity agreed by any party under this document:

#### constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and

#### survives and continues after performance, expiry or termination of this Deed.

## Waivers

Any failure by any party to exercise any right under this document does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.

## Remedies

The rights of a party under this document are cumulative and not exclusive of any rights provided by law.

## Severability

Any provision of this document which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this document or the validity of that provision in any other jurisdiction.

## Counterparts

### This Deed may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

### A duly signed and legible copy of this Deed delivered by a party by facsimile, email or other means of electronic transmission, will be binding and of the same legal effect as though a copy of this Deed with original ink signatures had been delivered by that party.

Execution Page

**Dated:**

**Executed** as a deed.

|  |  |  |
| --- | --- | --- |
| **Signed, Sealed and Delivered** by **Australian Catholic University Limited** **ACN 050 192 660** in accordance with section 127(1) of the *Corporations* Act *2001* (Cth): |  |  |
|  Signature of Director |  |  Signature of Director/Secretary |
|  Name of Director(Block Letters) |  |  Name of Director/Secretary(Block Letters) |

|  |  |  |
| --- | --- | --- |
| **Signed, Sealed and Delivered** by **<Consultant>** **ACN 000 000 000** in accordance with section 127(1) of the *Corporations* Act *2001* (Cth): |  |  |
|  Signature of Director |  |  Signature of Director/Secretary |
|  Name of Director(Block Letters) |  |  Name of Director/Secretary(Block Letters) |

Annexure A

Item

|  |  |  |
| --- | --- | --- |
| 1.
 | The Brief is comprised in the following documents:(clause 1) | The Brief is comprised of the following documents, forming part of Annexure C:* + 1. [Brief issued # (if available)]
		2. [Scope of Works dated #]
		3. [Proposal dated #]
		4. [Other – list documents]
 |
| 1.
 | The Project is:(clause 1) | [insert short description of the Project] |
| 1. 2
 | The Project Manager is:(clause 1) | [Insert Organisation details] |
| 1.
 | The Site is:(clause 1) | [Insert] |
|  | (a) The Consultancy Fee is: (clauses 3.1 and 9.1) | Lump sum of $[#] (excluding GST)  |
|  | (b) The expenses and disbursements to be reimbursed to the Consultant will be: (clause 9.1(b)) | Those disbursements approved in accordance with clause 9.1(b).   |
| 1.
 | The relevant hourly rates for the Consultant are:(clause 16.2(b)) | Director $[#] per hourSenior Consultant $[#] per hourJunior Consultant $[#] per hourTechnical Staff $[#] per hour |
| 1.
 | Other consultants appointed by the Principal:(clause 6.1) | [Insert name and general nature of services e.g. Services Engineer] |
| 1.
 | Project Manager's representative(clause 7.2) | [Insert name and full contact details] |
| 1.
 | The Consultant's approved personnel(clause 8.1) | [Insert] |
| 1.
 | Progress claims for payment will be made:(clause 9.2) | The 25th day of each calendar month |
| 1.
 | The Principal will make a progress payment within:(clause 9.3)(if no time is specified 30 days from the date of receipt of the progress claim) | If the Project is located in:Victoria or South Australia – within 30 days of the Principal’s receipt of a detailed progress statementNSW, ACT or Queensland – within 21 days of the Principal’s receipt of a detailed progress statement |
|  | Consultant limitation of liability(clause 5.10) | [e.g. $5,000,000.00] |
| 1.
 | Amount of professional indemnity insurance must not be less than:(clause 13.1) | [Insert amount of PI insurance required in accordance with the amount prescribed in Professional Indemnity Insurance Table.] |
| 1.
 | The amount of public liability insurance must not be less than:(clause 13.2) | [$20 million per occurrence and no limit in the aggregate] |
| 1.
 | The law applicable is that of the state or Territory of:(clauses 13.3 and 18) | [Insert] |
| 1.
 | Address for Notices:(clause 19.1) | Principal:[Insert][Insert]Consultant[Insert][Insert] |

Annexure B – Form of Deed of Novation

DEED OF NOVATION

Dated

Parties

1. **# ACN #** having its office at # (**Principal**).
2. **# ACN #** having its registered office at # (**Recipient**).
3. **# ACN #** having its registered office at # (**Consultant**).

Background

1. The Principal and the Consultant have entered into a consultancy deed (**Deed**) dated ## under which the Consultant has agreed to provide # .
2. The Principal and the Recipient have entered into a # construction deed dated ##.
3. The Principal has decided to novate the Deed to the Recipient and the Recipient and Consultant have agreed to accept novation of the Deed from the Principal to the Recipient on the terms of this Deed.

Operative Provisions

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

In this Deed of Novation, unless the context otherwise requires:

**Deed** means the consultancy agreement between the Principal and the Consultant dated ##

**Effective Date** means the date set out in the Novation Notice;

**Novation Notice** means the notice given by the Principal under clause 11.1 of the Agreement; and

defined terms in the Deed will have the same meaning in this Deed of Novation.

* 1. **Interpretation**

In this Deed of Novation, unless the contrary intention appears:

* + 1. The clause and subclause headings in this Deed will not form part of, nor be used in the interpretation of this Deed of Novation.
		2. 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.
		3. The word “person” includes a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any authority.
		4. An agreement, representation or undertaking in favour of two or more persons is for the benefit of them jointly and severally.
		5. An agreement, representation or undertaking on the part of two or more persons binds them jointly and severally.
		6. Without limiting clause 1.2(d) or 1.2(e), the Consultant specifically acknowledges the Recipient is not required in any way to allocate any responsibility, obligation, fee or any other matter under this Deed of Novation or the Deed between the two persons comprising the Consultant.
1. Novation

As and from the Effective Date, the Deed must be read and construed subject to the terms of this Deed of Novation and if there is any inconsistency between the terms and conditions of the Deed and the terms and conditions of this Deed of Novation, this Deed of Novation will, to the extent of any inconsistency, prevail.

1. Rights and Liabilities
	1. **Acknowledgment**

The parties acknowledge that the Principal has given written notice of novation and the Consultant has received such Novation Notice.

* 1. **Recipient's Obligations**

Subject to this Deed of Novation the Recipient undertakes to the Principal and separately undertakes to the Consultant:

* + 1. to be bound by the Deed as if the Recipient had originally been named in the Deed in place of the Principal and
		2. to perform all of the obligations of the Principal under the Deed which have not been performed at the Effective Date,

with the exception that the Principal will remain responsible to pay to the Consultant any progress payment or other entitlement to payment under the Deed which had accrued prior to the Effective Date.

* 1. **Consultant's Obligations**

Save and except for the obligation set out in clause 3.2 as and from the Effective Date:

* + 1. the Principal is released from all its obligations under the Deed and all actions, claims or proceedings that the Consultant may have against the Principal in relation to an act or omission of the Principal;
		2. the Consultant will duly perform and observe the obligations, terms and conditions to be performed and observed by it under the Deed; and
		3. the Recipient will be entitled to exercise all of the rights, powers and remedies which would otherwise have been available to the Principal under the Deed but for the novation, in the same manner as if the Recipient had always been a party to the Deed.
1. Consultant's Covenants

The Consultant covenants to each of the Recipient and the Principal that:

* + 1. it has performed its obligations under the Deed to the date of this Deed of Novation in accordance with all of the requirements of the Deed, and
		2. without limiting clause 4(a) it has used and will continue to use skill, care and diligence contemplated by the Deed so as to ensure that all services supplied by the Consultant fulfil the requirements of the Deed.
1. Enquiries of Recipient and Consultant

In addition to any other rights which the Principal may have, the Consultant and the Recipient each agree that the Principal and the person appointed as Principal's representative under the Deed may make reasonable enquiries at any time of the Consultant for the purpose of establishing whether the Recipient is complying with its obligations under the Deed and this Deed of Novation.

1. Copy Reports

Copies of all reports the Consultant is required to provide under the Deed subsequent to the execution of this Deed of Novation will be provided to the Principal when provided to the Recipient.

1. Notification of Non-Compliance

If the Consultant considers that any direction, act or omission of the Recipient will have a material and adverse effect on the Project or will result in a significant non-conformance of any part of the Project to the drawings or the specifications forming part of the building contract between the Principal and the Recipient, the Consultant must forthwith inform the Project Manager appointed under the building contract and the Recipient accordingly.

1. General
	1. **Severability of Provisions**

Any provision of this Deed of Novation which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of the prohibition or unenforceability, without invalidating the remaining provisions of this Deed of Novation or affecting the validity or enforceability of any other jurisdiction.

* 1. **Waivers**

No failure to exercise and no delay in exercising, on the part of any party of any right, power or privilege under this Deed of Novation will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

* 1. **Rights and Remedies Cumulative**

The rights and remedies provided in this Deed of Novation are additional to and not exclusive of any rights or remedies provided by law.

* 1. **Counterparts**

This Deed of Novation may be executed in any number of counterparts and all of such taken together will be deemed to constitute one and the same instrument.

* 1. **Further Assurances**

Each party must sign, execute and deliver all documents, instruments in writing and must do all other acts, matters and things as may be necessary or desirable to give full effect to this Deed of Novation.

* 1. **Assignment**
		1. The Principal may assign its rights and obligations under this Deed of Novation to any person without the consent of the Recipient or the Consultant.
		2. The Consultant and the Recipient must not assign their respective rights and obligations under this Deed of Novation without the prior consent of the Principal.
	2. **Proper Law**

This Deed of Novation will be interpreted in accordance with the laws of the State or Territory in which the Site is located and any dispute arising in any way related to this Deed of Novation will be determined by the Courts of that State or Territory and any Court having jurisdiction to hear appeals therefrom.

**EXECUTED** as a Deed.

Annexure C – Brief

Annexure D – Agreed Program