

ANZRPNG 9 PROPERTY DEVELOPMENT MANAGEMENT AND 'TERMS OF APPOINTMENT'

1.0 Introduction

1.1 Purpose

The purpose of this Guidance Note is to provide a checklist for Members engaged in Development Management whilst also providing a pro forma 'Terms of Appointment' for those acting as a consultant to a development project.

1.2 Status of Guidance Notes

Guidance notes are intended to embody recognised 'good practice' and therefore may (although this should not be assumed) provide some professional support if properly applied. While they are not mandatory, it is likely that they will serve as a comparative measure of the level of performance of a Member. They are an integral part of the Valuation and Property Standards Manual.

1.3 Scope

This Guidance Note applies to Members appointed as Development Manager in the role of the Principal's representative in the development process, including the initial concept, feasibility and design, obtaining approvals, documentation, construction, compliance, co-ordination of leasing and sales campaigns, (or any part or parts of this development process). It should be used in conjunction with other guidance notes and practice standards which are either over-arching or directly applicable to the type of property, purpose or issues involved.

2.0 Development Projects

2.1 Diverse Range

There is a diverse range of property development projects undertaken. These mainly include:

- Subdivisions

- Housing Estates
- Commercial
- Retail
- Industrial
- Hotels and Resorts
- Infrastructure

These projects may be new, redevelopment, refurbishment, strata, etc.

Managed by Highly Trained Professionals

It is important that this development process is managed by highly trained professionals who understand property development and the principles of delivering the right development, in the right location, at the right time.

3.0 The Role of the Development Manager

3.1 Responsibilities

The Development Manager's responsibilities are mainly in the following areas:

- Manage the process of defining the client's project goals and objectives.
- Acting as the representative and certifier of the Principal in the co-ordination of all professional, technical, administration and other services to be provided.
- Prepare Consultants briefs, analyse proposals, fees submissions and make recommendations.
- Appointment of Consultants on behalf of the Principal.
- Manage the process of achieving the client's stated goals and objectives.
- Carrying out the functions described in the following "Checklist", either directly or through appropriate consultants.

3.2 Broader Development Management Role

It is intended this paper be used as a guide to the broader development management role. It is not intended to be used for the purpose of project or construction management and supervision.

4.0 Development Consultancy Checklist

4.1 List of Duties

The following is a check list of duties for a development project and may involve the appointment of specialist consultants.

Project Site Acquisition/Consolidation

- Negotiations with vendors
- Instruction of Solicitors, Valuers, Surveyors, Town Planners, etc
- Pre-purchase investigations
- Contamination Report
- Due diligence [ANZRPNG 6]

Preliminary Feasibility Study

- Preliminary Market Research
- Town Planning/Resource Management Criteria
- Design Criteria
- Services (water, sewerage, drainage, etc.)
- Legal (title, easements, etc.)
- Defining Highest and Best Use Options
- Value Management Exercise on options
- Preliminary Financial Analysis and Cash Flow
- Development Management Strategy and Program

Concept Design and Planning

- Design Brief
- Global Planning
- Testing Design Options
- Liaison with Authorities
- Initial Dilapidation Report
- Detailed Site Analysis
- Environmental Audits and Impact Statements
- Insurances (Building, Public Risk, Professional Liability, etc.) [ARPGN 1]

- Appointing Development Team*
- Redefine Client's Goals and Objectives

(*Architects, Builders, Engineers, Quantity Surveyors, Town Planners, Surveyors, Environmental Scientists, Solicitors, Selling, Leasing and Managing Agents, Valuers, Financiers, etc.)

Financial Feasibility

- Financial Analysis
- Sensitivity Analysis
- Competitive Analysis
- Finance Establishment
- Marketing Options
- Project Cash Flow
- Project Time Charts

Approvals

- Liaison with Statutory Authorities
- Liaison with Community, Resident Action, etc
- Development/Building Approvals
- Rezoning Applications
- Court Appeals
- Strata and Stratum Title, Dual Occupancy, Community Title, Cluster, Title, etc.
- Land Subdivision Approvals

Pre-Construction

- Value Management Assessment
- Liaison with Existing Tenants
- Working Documents/Alternative Procurement Methods
- Appointing Builder/Construction Manager
- Tender Process
- Environmental Controls
- Construction Staging
- Cost Control and Accounting Systems

Construction

- Dilapidation Report
- Monitoring Construction/Variations
- Site Meetings
- Construction Finishes
- Cost Control and Budgets

- Recommendation Progress Payments
- Environmental Controls
- Tenant Co-ordination

Fitout

- Engaging Tenant Coordinator
- Tenancy Negotiations Overview
- Liaison with Occupants
- Appointing Interior Architects/Designers
- Appointing Builder/Fitout Specialist

Completion & Occupation

- Defects Liability Management
- Handover To Owner
- Certificate of Compliance
- Liability and Retention Bonds/Defect Periods
- Construction Manual(sub-contractors, specifications, etc)

Leasing and Marketing

- Leasing/Sales Strategy
- Appointment of Leasing/Selling Agents
- Supervision of Marketing Campaigns
- Rents, Terms and Conditions
- Leases Documentation
- Advising on Sale Prices

5.0 Development Management Fees

5.1 Percentage Basis

The most common method of fee is charged on a percentage basis on the total development cost (including land, building, interest, etc.). This usually ranges between 1% - 3% depending upon the complexity and size of the project.

5.2 Methods

The main methods of calculating fees include:

- Percentage Fees
- Hourly Rates
- Fixed Fee
- Maximum Guaranteed Fee in Agreed Scope of Works

- Incentive Fee
- Disbursements
- Default Interest (in the case of not being paid on time by the Principal).

A detailed schedule is set out in the attached Terms of Appointment (see Appendix).

6.0 Feasibility Study

The Development Manager should prepare a feasibility study, time planning program and cash flow including a financial analysis at the beginning of the appointment. This can be used as the basis of the Development Plan and Strategy for the project and be regularly reviewed during the project. All assumptions should be clearly set out.

7.0 Meetings

It is preferable that the Principal and Development Manager meet at least monthly. The Development Manager should arrange and conduct the meeting, the keeping of records and issuing of minutes including responsibility for actions and a client status report.

8.0 Consultancies

The Development Manager can advise and make recommendations to the Principal on the appointment of and terms of agreement with Consultants. The Development Manager's advice should include details of professional indemnity insurance.

9.0 Terms of Appointment

9.1 Guide for Appointment

The attached Terms of Appointment (see Appendix) is provided as a guide for Members and their clients for the appointment in the role as a Development Manager.

9.2 Not All Inclusive

It is not intended to be an all inclusive agreement but a guide for an agreement between a development manager and his/her client.

10.0 Caution

10.1 Guide Only

This paper is intended as a guide only and all parties should seek their own legal advice as to the basis of specific agreements.

APPENDIX TERMS OF APPOINTMENT OF DEVELOPMENT MANAGEMENT CONSULTANT

BETWEEN THE DEVELOPMENT MANAGEMENT CONSULTANT:

[Name of Company] ('the Consultant')

ACN

[Registered Address]

Represented by ("Development Manager and the Consultant's Representative")

AND THE CLIENT:

[Name of Company] ('the Client')

ACN

[Registered Address]

Represented by ("the Client's Representative")

1. Date of Issue

This Memorandum was issued to the Client by the Consultant on

This day of, 20

2. Scope and Intention of this Document

- i. The purpose of this Memorandum is to confirm the appointment of the Consultant by the Client on a retainer to undertake development management work on terms encompassing or exclusively defined by the following terms and conditions.
- ii. The Client may accept or ratify these terms and conditions either by executing this Memorandum or by other actions described in Clause 4 which may have the effect of confirming the appointment of the Consultant on these terms.
- iii. Upon the happening of the events described in Clause 4 and subject to the operation of that Clause, the Client shall be deemed to have accepted the terms and conditions set out in this Memorandum as applying from the starting date which is established under Clause 3 and these terms shall be binding on the parties from that date.
- iv. This Memorandum shall be dated by the Consultant as at the date of issue of the Memorandum to the Client and that date is not necessarily the date of commencement of the terms of this Agreement.
- v. Where acceptance or ratification by the Client of these terms and conditions occurs by execution of this Memorandum or separately in writing, any statement,

representation, warranty or condition made by either party prior to the date hereof is expressly excluded except as may be required to establish the date of appointment of the Consultant if such appointment occurs separately from or independently of, this document.

- vi. The terms and conditions contained in this Memorandum which are expressed to be essential may not be varied by either party except in writing signed by both parties.

3. Starting Date

The terms of this Agreement are effective and operate to govern the appointment of the Consultant by the Client on the earliest of the dates that correctly appear in either a. or b. or c. below :

- a. The parties agree that the Consultant commenced work at the request of the Client on the following date, namely

[insert date that instructions to start were received or that work started, otherwise leave blank]

Or: [delete Clause as applicable]

- b. This appointment shall commence on the following date, namely on

[insert date only if agreed in negotiations, otherwise leave blank]

- c. The date after receipt by the Client of this Memorandum upon which the Consultant is

requested by the Client to commence or continue work in respect of the project or property the subject of this Memorandum, whether such request is made with reference to or independently of this document.

4. Acceptance or Ratification by Client

- i. The Client shall have accepted or ratified the terms and conditions as set out herein either:
 - a. Upon execution of this Agreement by the Client whereupon Clause 4.ii below applies; or
 - b. By conduct of the Client amounting to confirmation or acceptance made at any time after receipt by the Client of this document, whereupon Clause 4.iii below applies.
- ii. In further definition of Clause 4.i.a. above, upon execution by the Client, this document sets out conclusively the agreement between the parties.
- iii. In further definition of Clause 4.i.b. above, even if this document is not signed by the Client, where the Client utilises the services of the Consultant concerning the subject project or property without first expressing non-acceptance of the offer implicit in this Memorandum, a Consultancy Agreement will, to the extent that the context and circumstances permit, come into existence between the parties on the terms and conditions as set out in this Memorandum. If the Client excludes some but not all of the terms and conditions set out herein, and the terms and conditions that remain contain an actionable agreement, the offer remains open to acceptance by conduct of the Client on those terms and conditions that remain.

5. Term of Appointment

- i. The term of appointment is for either:
 - a. Such reasonable period as may be required by the Consultant to undertake the work as specified herein and as otherwise requested by the Client.
Or: [delete wording not required]
 - b. The appointment shall terminate either on the happening of the following event or at the expiration of months/years, whichever shall first occur.
Event referred to:
 - ii. In the event of there being any extraordinary delay in implementing the brief for reasons beyond the control of the Consultant, the term of the appointment shall be extended by the period of any such delay. [delete if not applicable]
- iii. The term of this appointment shall be extended by

any period of delay due to a stand down occurring under Clause 27.

6. Nature of Appointment

- i. The Consultant is engaged as an independent contractor and the relationship of employer and employee is expressly excluded as between the client and the consultant or any person engaged by the consultant including the Development Manager and the Consultant's Representative.
- ii. The Consultant takes complete responsibility for employment and engagement by it of the Development Manager and indemnifies the Client in respect of any claim for remuneration the Development Manager may make against the Client related to or arising from the employment of the Development Manager.

7. Representatives and Authority

- i. The Client is represented by the person whose name appears in Item 3 of Schedule 1 to whom full responsibility for the subject property and the proposed development has been delegated by the Client including the power to provide instructions to the Development Manager and the Consultant and to vary or waive the terms of this Agreement.
 - ii. The Consultant is represented by the person whose name appears in Item 2 of Schedule 1 in all aspects relating to the interpretation and implementation of this Agreement and that person is the sole person responsible for any variation, terms, amendment or addendum to this Agreement made on behalf of the Consultant.
 - iii. The Consultant appoints the person whose name appears in Item 1 Schedule 1 as Development Manager and makes this person available to undertake all of the development management work on behalf of the Consultant required under this Agreement.
 - iv. The Consultant and the Development Manager shall report to and accept directions and supervision at all times from the Client's nominated representative or such other person as may be duly authorised by the Client's nominated representative and or the Client to provide such directions or supervision.
 - v. Either:
 - a. The Consultant may substitute another person as Development Manager only with the consent of the Client whose consent shall not be unreasonably withheld.
- Or: [delete Clause not applicable]

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extent that each is able, to ensure that the Brief specifies:

- a. The expected or agreed time frame for the happening of critical events;
 - b. The scope of works to be undertaken by the Consultant including any foreseeable additional work due to possible contingencies; and
 - c. Any other essential or agreed assumptions.
- iii. The Brief as it stands as at the date hereof is set out in Schedule 4.
- iv. If Schedule 4 is blank at the date hereof:
- a. The Brief may be inferred from all relevant matters communicated between the parties prior to the date hereof, whether orally or in writing, or both.
 - b. The Client may require that the Consultant prepare the Brief and any document prepared by the Consultant which gives effect to this instruction, becomes the initial Brief.
 - v. The Client may vary the Brief at any time provided that:
 - a. Any such variation is given to the Consultant in writing; and
 - b. If the variation involves a material or substantial change in either the time frame, scope of works or agreed assumptions, the parties undertake to review the fees payable under Clause 17 and to try to reach an agreement to adjust these amounts to figures that are considered appropriate under these circumstances to be in keeping with any increase or decrease in the scope or complexity of the task. In the event of failure to agree upon any such adjustment, or in the case of arbitration of this issue under Clause 29 where a party does not accept the determination which is made, either party shall be entitled to terminate this Agreement whereupon Clause 28 shall apply.
- vi. The Client undertakes, as far as is possible to provide advance warning of changes to the Brief and to discuss with the Development Manager the implications and effects of any such change including the expectations of the Client in relation to any review of the fees payable under Clause 17.

14. General Nature of Work to be Undertaken

The work to be undertaken by the Consultant comprises:

- i. Provide the Client with advice that may reasonably assist the Client to make management and investment decisions directed towards maximising the asset value

of the subject property and or maximising the profits of the Client from the subject property.

- ii. In the case of new development schemes or variation of existing schemes:

Use its professional skill and expertise to attempt to obtain approval where appropriate from the relevant Consent Authority for a development scheme or schemes for the subject property which:

- a. Maximises the development potential of the site.

And or

Maximises the residual land value of the site when analysed using a Feasibility Study based on reasonable assumptions.

- b. Takes account of relevant market factors.
- c. Takes account of the physical capability and constraints of the site.
- d. Takes account of planning and development controls.
- e. Complies with the Brief issued by the Client.
- f. Follows the express instruction of the Client ("standing instructions") whether in variation of the Brief or otherwise.
- g. To the extent that the Brief issued by the Client or the standing instructions of the Client compromise or conflict with the objectives stated in a. to d. above, the Brief or the instructions shall prevail.

- iii. In the case of construction:

- a. To ensure the production of detailed working documents and specifications.

[insert own details]

- iv. In the case of disposal:

[insert own details]

- v. In the case of detailed costings being required:

[insert own details]

- vi. In the case of a market study being required:

[insert own details]

- vii. In the case of feasibility studies being required:

[insert own details]

- viii. Other

[insert own details]

15. Specific or Special Duties

Specific or Special duties are as set out in Schedule 5 hereto.

16. Standing Instructions

- i. The Client may issue instructions from time to time relating to the carrying out of this consultancy which must be followed by the Consultant except where any such instruction is inconsistent with this Agreement.
- ii. Such instructions shall be referred to as the "Standing Instructions". These instructions shall be recorded by the Development Manager when and as issued and shall be maintained in a register of all such instructions.

17. Fees and Disbursements Payable

- i. The Development Manager shall be entitled to a fee for those services as follows:
 - a. Percentage Fee (based on the total cost of the development including land, building interest, OR percentage of Gross sales) %
This is payable in equal monthly instalments estimated to be \$ pcm
(Payments may also be paid on a staged basis if specified)
OR
 - b. Rates per Hour:

Executive Director	\$ per hour
Development Manager	\$ per hour
Assistant Development Manager	\$ per hour
Other	\$ per hour

 OR
 - c. Fixed Fee \$
 - d. Incentive
The Development Manager may be paid lump sum payments upon achieving certain objectives (e.g Re-zoning, Development Approval, Practical Completion, etc).
 - e. Fee Upon Termination
In the event of termination by the Client under Clause 28 or upon the ruling of an Arbitrator under Clause 29, the Consultant shall be paid a termination fee as specified in Clause 28.
 - f. Disbursements
The Consultant will be reimbursed by the Client for:
 - Telephone and fax expenses including mobile telephone expenses incurred during business hours and at other times if for work related purposes.

- Travelling expenses including fuel expenses incurred in the use of a motor vehicle during business hours and for work related purposes.
- Accommodation where reasonably required or where the project is more than 50 kilometres from the office of the Consultant.
- Photographs, plan printing and document production costs.
- Such other disbursements as may be approved by the Client from time to time.
- Such other disbursement costs as specified below.
\$
- ii. In the event that the scope or complexity of the brief increases, the Consultant shall:
 - a. Undertake any additional work that may be required at the hourly rates specified in Clause 17.i.b.
OR
 - b. Give notice to the Client that in lieu of a. above, any additional work shall be undertaken only if the Client agrees to increase the amounts or rates payable under 17.i.a., c. or d. (as may be applicable) in proportion to any such increase in scope or complexity.
- iii. Nothing in Clause 17.ii. shall limit the rights of either party to re-negotiate the fees payable in the event of a material or substantial change in the Brief as set out in Clause 13.v.b.
- iv. The rates set out in Clause 17.i.b shall be increased annually in line with any annual increase in inflation during the year immediately before the relevant date, as published by the Australian Bureau of Statistics in the CPI or such other appropriate indice.

18. Standard of Conduct

- i. The Development Manager and the Consultant shall at all times exercise proper or reasonable care in the performance of the duties under this Agreement.
- ii. Work undertaken under this Agreement must always be of a good professional standard.
- iii. The Consultant shall use its best endeavours to perform this Agreement and either:
 - a. The Consultant will try at all times to elicit or promote the best possible outcome for the Client but does not warrant to obtain any particular result.
Or: [delete Clause not applicable]
 - b. The Consultant warrants that it will procure or achieve the following result by the date specified.

Result Warranted

Result Date By:

- iv. The loss claimable against the Consultant for failure to procure or achieve the above result by the date specified shall not exceed the total remuneration payable under this Agreement.

19. Duty to Report

- i. The Development Manager representing the Consultant will report to the Client on a regular basis and otherwise as may reasonably be requested by the Client.
- ii. The Development Manager and where applicable the Consultant shall seek the directions of the Client on a regular basis and at any time where by the standard of prudent management, it would be appropriate to seek such direction on any relevant issue including but not limited to issues such as the conduct of negotiations for development or building approval, any change in design, change in materials or specifications or documentation, problems arising during contract negotiations or administration, matters affecting construction progress, weather or industrial delays, supply logistics, variations, quality problems, budget changes, cash flow, marketing and leasing and tenancy co-ordination.

20. Duty Not to Bind Client

Neither the Development Manager nor the Consultant shall bind the Client to any legal or commercial obligation nor sever or vary any Contract involving or affecting the Client without the express authority of the Client.

21. Duty to Communicate

- i. The Development Manager shall keep the Client fully informed of all significant events affecting or concerning the development when and as the Development Manager becomes aware of such events.
- (a) The Client shall be entitled to communicate with the Development Manager between 7 am and 9 pm on weekdays and 9 am and 5 pm on weekends and holidays.
- (b) The Development Manager will be available for communication with the Client whenever it is reasonable and practicable to do so between the hours referred to in sub-paragraph (a) of this sub-clause.
- ii. The Development Manager shall promptly suggest in writing to the Client such variations to the Brief or to any standing instructions applicable to the

development as the Development Manager considers from time to time may be desirable or necessary.

22. Duty to Control and Direct Others

- i. The Development Manager representing the Consultant is required to direct and have the care and control of other Consultants involved in the development as directed by the Client.
- ii. Except to the extent otherwise agreed between the parties, the Consultant is not responsible for the appointment of any other consultant or for the payment thereof or for any delay or error occasioned by any such consultant, these matters being the sole responsibility of the Client.

23. Normal Work Load

The Development Manager shall be available to work on the tasks required or envisaged by this Agreement as follows:

- i. The Development Manager shall undertake work in performance of this Agreement at such times and for such periods as the Consultant considers as may be reasonably required to complete this Agreement.
 - ii. The Development Manager shall during the period of this Agreement, work either:
 - a. A minimum of hours per week.
- Or: [delete where applicable]
- b. An average not less than hours per week.
 - iii. The Development Manager shall be available at any time reasonably required by the Client.

24. Holidays and Leave

The Development Manager may be absent from active duties on the following occasions and at such time the Consultant shall not be liable to make a replacement person available:

- i. The Development Manager shall be entitled to be absent for the purpose of holidays to a maximum of four (4) weeks per annum to be taken at such times agreed between the Client and the Consultant.
- ii. The Development Manager shall be entitled to be absent from duties on all public holidays so designated in this State.
- iii. The Development Manager shall be entitled to be absent from duty whilst on sick leave for any continuous period not exceeding 10 working days provided that the Consultant must advise the Client of such absence and produce to the Client a Medical Certificate upon request. In the event of sickness exceeding 10 working days, the Consultant shall

make an alternative person of comparable skill available in place of the Development Manager unless exempted from this requirement by the Client.

25. Health and Medical Condition

- i. A condition of appointment is that the Development Manager is of good health sufficient to fulfil all reasonable duties.
- ii. The Development Manager must submit to any independent medical examination as may reasonably be required by the Client.

26. Other Employment or Business

- i. The Development Manager shall not engage in any other employment or business activity during the continuance of the appointment without the prior approval in writing of the Client whose approval may be given or withdrawn at any time without reasons given.
- ii. The Consultant and Development Manager may during the period of this Agreement take instructions from any other client and be involved in any other development project except where there may be any possible conflict of interest with this Agreement.
- iii. In any event, the Consultant and or the Development Manager must disclose to the Client all other Consultancy appointments relating to projects or properties the undertaking of which that may reasonably be expected to have some bearing on the performance by the Consultant under this Agreement:
 - a. Forthwith, if that other consultancy is current.
 - b. Hereafter, prior to entering any other such consultancy.
 - c. At any time whenever a possible conflict of interest comes to the attention of the Consultant and or the Development Manager.

27. Stand-Downs

- i. The Client may suspend this Agreement at any time that the Development Manager cannot usefully be employed because of any strike, mishap, closure of business or stoppage of work or for any other cause for which the Client cannot reasonably be held responsible. This does not break the continuity of this appointment for the purpose of entitlements.
- ii. Upon recommencement following any stand down under this Clause, the Consultant shall be entitled to a reasonable allowance for start up costs payable on an hourly rate (in addition to the amounts to which the Consultant is otherwise entitled under Clause 17).

28. Termination

- i. This Consultancy may be terminated by either party for any reason by serving on the other party Notice of Termination in accordance with this clause.
- ii. A Notice of Termination shall specify the date on which this Consultancy is to terminate and the reason if any for such termination, and must be served on the other party personally or by registered mail at the last known or published address of that party.
- iii. In the event of termination by the Client without there having been any Default by the Consultant of a fundamental term of this Agreement:
 - a. If the basis of remuneration includes payment under Clause 17.i.b. (hourly rates), upon termination without default by the Consultant the Client shall pay to the Consultant \$
 - b. If the basis of remuneration includes payment under Clause 17.i.a. or c. (percentage fee or fixed fee), upon termination without default by the Consultant the Client shall pay to the Consultant \$
 - c. If the basis of remuneration includes payment under Clause 17.i.e. (incentive), upon termination without default by the Consultant the Client shall pay to the Consultant \$
 - d. Paragraphs a, b and c above operate independently and any amounts payable thereunder are payable cumulatively.
- iv. In the event of termination by the Client following a default by the Consultant of a fundamental term of this Agreement:
 - a. If the basis of remuneration includes payment under clause 17.i.b. (hourly rates), upon termination the Client shall pay to the Consultant notwithstanding any default, any amount due up until the termination takes effect.
 - b. (1) If the basis of remuneration includes payment under Clause 17.i.a. (percentage fee) or 17.i.b. (fixed fee), upon termination the Client shall pay to the Consultant notwithstanding any default, reasonable remuneration in respect of the work performed up to the date of termination.
(2) The amount of such reasonable remuneration shall be agreed between the parties or, failing such agreement, shall be determined by an arbitrator appointed by the parties or failing agreement by the parties, by the President of the API at the request of either party.

- (3) In determining the amount of such reasonable remuneration, the parties or the arbitrator as the case may be, shall have regard only to:
 - a) The totality of the work required to be performed under this Agreement by the Consultant.
 - b) The percentage of that total work which has been completed by the Consultant.
 - c) Any additional work performed by the Consultant.
 - d) The quality and competence of the work performed by the Consultant.
 - e) The time spent on the work performed by the Consultant.
 - f) The level of remuneration to the Consultant under this Agreement.
 - g) Any other amounts payable to the Consultant pursuant to this Agreement.
 - h) Any other relevant factors including (but not limited to) the difficulty and complexity of the assignment; the value if any added to the profitability or asset value of the Client as a consequence of the work of the Consultant and the nature of the default by the Consultant.
- (4) The Client shall be immediately entitled to payment of incidental expenses incurred in appointing another Consultant to complete the work.
- (5) Other than as provided in Clause b(4) hereof, the Consultant shall not be liable for any loss or damage suffered by the Client as a result of the breach or the termination, whether directly or indirectly and the Client hereby agrees to indemnify and keep indemnified the Consultant in respect of any claim for such loss or damage.
- v. In the event of termination by the Consultant the Client shall pay the Consultant forthwith such amounts under Clause 17.i.b. (hourly rates) and 17.i.f. (disbursements) as may be due to the Consultant. Where termination by the Consultant follows a change in the Brief and failure by the parties to agree on adjusted fees as described in Clause 13.v.b., the Client shall also pay the Consultant the amounts specified in Clause 28.iii.a., b., c. & d.
- vi. Notwithstanding any other provision, this Consultancy may be terminated summarily by the Client for reasons of dishonesty, gross incompetence or neglect of duty, proven criminality involving minors, violence and or dishonesty of the Consultant or the Development Manager, effective upon receipt by the Consultant of a Notice of Termination given under this Clause that states the reason which reason is true.

29. Dispute Resolution

If any dispute or grievance concerning this appointment arises, it must be dealt with in the following manner:

- i. A party claiming that a dispute has arisen must give written notice to the other party specifying the nature of the dispute.
- ii. The matter in dispute specified in the notice must be discussed between the nominated representatives of the parties in an attempt firstly to settle the matter.
- iii. If the matter is not resolved within seven (7) days or within such further period as the parties may agree, the dispute or grievance must be submitted for mediation by a Mediator appointed by the parties or failing agreement for such appointment, a Mediator appointed by the President of the Australian Property Institute (API);
- iv. The mediation shall be conducted in accordance with Mediation Guidelines published by the Australian Commercial Disputes Centre Limited (ACDC) or its successor excluding those guidelines dealing with selection of the Mediator;
- v. If after mediation the dispute has not been settled, the dispute shall be submitted to arbitration conducted in accordance with the ACDC's Arbitration Guidelines the terms of which are deemed to be incorporated into this Agreement;
- vi. The parties agree to submit the dispute to arbitration and, if so agreed, to abide by the rules of arbitration administered by the ACDC and will accept any determination made by arbitration subject to any right of appeal on a matter of procedure or law that may be available except if Clause 13.v.b applies in which case either party may refuse to accept the outcome of arbitration;
- vii. Until the matter is determined by mediation or arbitration, or until this Agreement is terminated, the work required under this Agreement must continue at the direction of the Client; and
- viii. The parties must co-operate to ensure that these procedures are carried out expeditiously.

30. Confidentiality

- i. The parties must not divulge or use, either for their own benefit or that of others, any confidential information acquired during this appointment. Confidential information refers to any information (written or oral) which is not publicly available and this obligation extends beyond the date the Consultant ceases work for the Client under this Agreement.

- ii. The Consultant must not communicate information of any kind relating to the Client, the Board of Directors, shareholders, Managing Director or General Manager of the Client to staff of the Consultant or to persons outside the Client except as is necessary for the business and objectives of the Client.
- iii. The Development Manager shall not engage in discussions nor communicate with any Member of staff or contractor of the Client concerning the terms of this Agreement or specific details of the work being undertaken pursuant to this Agreement.

31. Copyright

- i. All plans, reports, drawing, printed and handwritten documents produced by the Consultant relating to the proposed development shall remain the property of the Client except where otherwise agreed by the Client (e.g Architect's copyright).
- ii. The Consultant shall be entitled to retain a copy of all such plans, drawings, reports and the like for its own records.
- iii. Copyright in all plans, drawings, reports, documents and the like is vested in the Client subject to such other rights that may exist.
- iv. Copyright in any method or system devised by or owned by the Consultant including any software program, worksheet or spreadsheet shall remain vested in the Consultant.

32. Notices

Notices other than notices of termination may be served by either parties by fax subject to machine printed proof of transmission being retained by the sender and being produced on request to the receiver. Notice of termination must be served personally or by mail at the last known or published address of the other party.

33. Guarantee

- i. The performance of the obligations of the Client are guaranteed by the following natural person:
..... ("the Guarantor")
- ii. The Guarantor unconditionally guarantees the due and punctual performance, any obligation of the Client to pay moneys to the Consultant which are payable.
- iii. This guarantee is a fundamental term of the appointment.
- iv. This guarantee is:
 - a. A principal obligation and is not ancillary or collateral to any other right or obligation.

- b. To be enforced against the Guarantor with/without the Consultant first exhausting any remedy it may have against the Client.
- c. Is a continuing guarantee for all moneys payable as and when the same ought to be paid and for the due and punctual performance by the Client of its financial obligations to the Consultant.
- d. Is irrevocable and will remain in full force and effect until the Consultant has received all moneys due and payable to it by the Client.

34. Essential Terms

The following clauses of this document and the annexures thereto are essential terms of this Agreement;

- i. Those clauses expressed to be essential terms.
- ii. Clauses 2, 3, 4, 5, 7.1., 17, 18, 20, 28, 29, 30, 32, 33, 34
- iii. The following clauses;

[Insert Clause No. of any other essential term]

.....

35. Some Agreed Terminology

In the interpretation of this document except to the extent the same is excluded or contrary to the construction or intended meaning taken in its context:

- i. This Memorandum shall be referred to as "The Consultancy Agreement" which is further abbreviated in this document as "the Agreement" or "this Agreement".
- ii. The natural person whose name appears in Item 1 of Schedule 1 shall be referred to as "the Development Manager".
- iii. Any reference to "the Consultant" is a reference to the Development Management Consultant.
- iv. Any reference to a duty or obligation of the Development Manager is also a reference to the duty or obligation of the Consultant and vice-a-versa.
- v. The Client and the Development Management Consultant may be referred to as "the parties".
- vi. Any reference to a "person" means a natural person.
- vii. Any reference to "mediation" is a reference to a private negotiation between the parties before an independent third party (the Mediator) as further described in Schedule 6.
- viii. 'Extraordinary delay' means delay which is not expected by the parties at the date of this Agreement

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or is outside any time frame for the happening of events agreed between the parties but excludes any delay that does not impact on the critical time path as expected by or as has been agreed between the parties.

OFFER & ACKNOWLEDGMENT BY CONSULTANT

I offer the appointment on the terms and conditions set out above and acknowledge that I agree to be bound by these:

Signed:

Name Printed:

Date:

Address for Notices:

ACCEPTANCE & ACKNOWLEDGMENT BY CLIENT

I accept the appointment on the terms and conditions set out above:

Signed:

Name Printed:

Date:

Address for Notices:

ACKNOWLEDGMENT & ACCEPTANCE BY GUARANTOR

I guarantee the performance of the Client under this Agreement.

Signed:

Name Printed:

Date:

Address for Notices:

NOTE: SCHEDULES TO BE ATTACHED

Schedule 1	Nominated Representatives
Item 1 -	The Development Manager
Item 2 -	The Development Management Consultant's Representative
Item 3 -	Client's Representative
Schedule 2	Curriculum Vitaé of Development Management Consultant
Schedule 3	Curriculum Vitaé of Development Manager
Schedule 4	Development Brief
Schedule 5	Specific Duties
Schedule 6	Mediation (attached)

SCHEDULE 6 – MEDIATION

- Mediation is a private negotiation between the parties before an independent third party (the Mediator). It is not open to any other party.
- The Mediator's role is to manage the communication process and assist the parties to resolve the dispute.
- A mediation is generally an informal process.
- The Mediator opens the hearing and invites the person who has requested help to present an outline of the facts. The other party will then be asked to respond.
- Either party may present a proposal to resolve the issues at any time during the mediation.
- The Mediator has no legal jurisdiction to issue orders or give directions. His role is to assist the parties to reach an agreement.
- Following negotiations an agreement may be reached or alternatively the parties may seek an adjournment to consider matter raised in the mediation.
- If agreement is reached during a mediation, a Mediation Agreement should be signed by both parties and the Mediator. The Mediation Agreement is then binding on both parties.
- The cost of the mediation, and sometime the meeting place should be shared equally by the parties.
- In some cases mediation may be unsuccessful. Should this occur, the Mediator will certify that the mediation has failed and if one or both parties requires, the matter may be referred to the Australian Commercial Disputes Centre Limited for a determination by arbitration.
- To the extent that any of the matters set out above are contrary to or inconsistent with the Mediation Guidelines from time to time of the Australian Commercial Disputes Centre Limited ACN 003 042 840 or its successor ("the ACDC"), the ACDC Mediation Guidelines shall prevail.