

PART D: EXHIBITIONS

Chapter 19: Exhibition-Related Consultants

29 May 2008

Panel of Experts:

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19. EXHIBITION-RELATED CONSULTANTS

19.1 Introduction

From time to time, all museums rely on buying-in skills or resources to mount exhibitions. Even large institutions with numerous professional staff, need to retain additional, outside expertise. Accordingly, there is an extensive range of independent museum professionals who provide their services on a project by project basis. They include: exhibition designers, catalogue designers, lighting designers, commissioned contributors to the catalogue, installers, security experts, conservators, photographers and curators.

Even where the museum has this expertise in-house, it may choose to hire a consultant to provide the service. It may do so because its employees are already fully committed with other projects, to promote a new voice or approach or for financial reasons.

All consultants must be properly contracted. The terms of the agreement must very clearly articulate the expectations of both parties. In particular the brief must be fulsome and unambiguous.

19.2 Model consultancy agreement

Museums are great users of consultants: they need to be because they have a continual need for diverse skills and no museum, however wonderfully resourced, has the internal intellectual richness to meet the entire range of demands upon it. The following is an agreement drafted for a major museum to use when retaining the services of consultants providing creative services such as the curator or designer of an exhibition or the author of a catalogue essay. The commentary provided, will assist to understand the significance of the clauses.

Model Consultancy Agreement with Commentary

| Clause | Topic | <i>Contract Text</i> | Commentary |
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| | | <p style="text-align: center;">AGREEMENT dated the day of 2010</p> <p><i>BETWEEN: THE XYZ MUSEUM</i> a statutory authority established pursuant to the XYZ Museum Act 20100 (Cth) (the <i>'Museum'</i>)</p> | |
| | | <p><i>AND:</i> the person named in Item 1 of the Schedule (the <i>'Consultant'</i>)</p> | Make sure whether the Consultant is an individual or is a company that is supplying the services of the individual. |
| 1. | ENGAGEMENT | <p>1.1 <i>The Museum engages the Consultant and the Consultant agrees, to:</i></p> <p>(a) <i>fulfil the brief set out in item 2.1 of the Schedule; and</i></p> <p>(b) <i>provide the services and materials set out in Item 2.2 of the Schedule (the <i>'Deliverables'</i>).</i></p> | <p>Item 2 should describe the job.</p> <p>Describe exactly what you expect to be delivered as the product of the consultancy. What services, materials, documents, advices? In what form or medium? Be precise.</p> |
| | | <p>1.2 <i>The Consultant must:</i></p> <p>(a) <i>carry out the services to the best of the Consultant's skill and ability and in accordance with the directions from time to time given by the Museum;</i></p> | If the Consultant has been well selected, he or she will be highly professional and will comply with this requirement as a matter of course. This clause is there merely for those other unfortunate situations. |
| | | <p>(b) <i>keep the Museum informed of all</i></p> | Good communication is essential. Good |

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| | | <i>significant issues arising in the course of the project consultancy and regularly liaise with the Museum staff;</i> | Consultants do this as a matter of course. Others need to be prodded. This clause must not be assumed to be a substitute for regular formal reports. If you want or need formal reports you must specify when, what format and what information you want. |
| | | <i>(c) attend meetings at the Museum (or such other places as are mutually agreed) whenever the Museum reasonably requires;</i> | It is usual for the Museum retaining the Consultant to pay the travel costs associated with meetings |
| | | <i>(d) where the services of a key person are nominated in Item 1 of the Schedule, the Consultant must ensure that the services are undertaken and delivered by that person.</i> | If you are basing the engagement on the particular skills of an individual, make sure that you are getting that person and not some junior. |
| 2. | DESCRIPTION OF DELIVERABLES | 2.1 The 'Deliverables' are those services and materials set out in Item 2 & 3 of the Schedule. 'Material' means any material in which copyright subsists and which the Consultant create in the course of completing the Deliverables | The articulation of the 'Deliverables' is one of the most important aspects of the agreement. This is what you are paying for. This is what you expect to receive for your money. |
| 3. | COMMISSIONING AND COMPLETION OF THE WORK | 3.1 The Consultant must complete the Deliverables according to the timetable set out in Item 3 of the Schedule. In this regard, time shall be of the essence unless the Museum consents in writing to a variation of timetable. | Timetables are important. Specify your expectations. The statement that "time is of the essence" has legal consequences. It means that if the timelines are not met, that, in itself, is grounds for termination. The use of 'milestones' is a very useful management tool. They permit both parties to judge how the project is progressing. (If you require regular reporting, these should be included as milestones.) |

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| 4. | FEE | <p>4.1 <i>Provided that the Consultant complies with the Consultant's obligations under this agreement and in consideration for all Deliverables provided and rights granted to the Museum under this agreement, the Museum will pay the Consultant the Fee set out in Item 10 of the Schedule. The milestone for each</i></p> <p>4.2 <i>The Fee will be paid to the Consultant in the instalments and according to the performance milestones set out in Item 3 of the Schedule. The milestone must be accepted and signed off by a representative of the Museum before that part of the Fee is payable.</i></p> <p>4.3 <i>The Fee will paid, in so far as it is practicable to do so, within 30 days of receipt by the Museum of a correctly rendered tax invoice detailing the agreement and the milestone achieved.</i></p> <p>4.4 <i>The Fee will be paid by the Museum into the bank account detailed in Item 8.</i></p> | <p>The Fee is one thing that both parties understand! In this agreement the fee is payable in stages – something on signature, further payment(s) on various performance milestones having been met, and then the balance on completion. Each milestone should be signed off. This gives you the power to supervise the effectiveness of the Consultant's work at regular, agreed, stages. If there is a problem, you are more likely to recognise it early – permitting you to either have the Consultant remedy it, or to terminate the agreement.</p> <p>Remember to separate the fee component from the GST component on the invoice.</p> |
| 5. | EXPENSES | <p>5.1 <i>The Museum will meet the expenses provided for in the approved budget set out in Item 6 of the Schedule. Any other expenses incurred by the Consultant shall be the Consultant's responsibility.</i></p> | <p>Expenses must be specific. Where possible, use real figures. Much unhappiness can lie in expenses that blow out. Similarly, it is essential that the Museum's rules as to the acquittal of expenses be complied with. The Museum is subject to rigorous audit obligations and Consultants must facilitate</p> |

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| | | <p>5.2 <i>The Museum shall reimburse expenses, in so far as it is practicable to do so, within 30 days of receipt by the Museum of a correctly rendered tax invoice detailing the agreement and the milestone achieved.</i></p> <p>5.3 <i>If requested by the Museum, the Consultant must include proof of expenditure. Where requested such proof must be provided before reimbursement will be made.</i></p> <p>5.4 <i>The Museum will provide travel expenses detailed in Item 6. All travel will be via the most inexpensive route and by economy class.</i></p> | <p>compliance with these obligations, not hinder them.</p> |
| <p>6.</p> | <p><i>CONSTRUCTION, DISCONTINUANCE AND TERMINATION</i></p> | <p>6.1 <i>The Museum may, by written notice, terminate or constrict this agreement or any of the Deliverables.</i></p> <p>6.2 <i>In such cases:</i></p> <p>(a) <i>the Museum will provide the Consultant with reasonable notice;</i></p> <p>(b) <i>upon such notice being given the Consultant must cease or reduce work as required by the notice;</i></p> <p>(c) <i>the Consultant must immediately do everything possible to mitigate consequential losses;</i></p> <p>(d) <i>the Museum shall have the right to amend the Fee and other related terms, to take into account the reduction in Deliverables;</i></p> | <p>No Consultant likes it, but the Museum must retain the right to either shrink the scope of the project or to terminate it altogether. This clause grants the Museum that right and spells out the consequences of such action.</p> <p>This sub-clause is necessarily vague, because at the beginning of the project, it is impossible to know what would be a fair revised Fee. If there were a dispute as to what that is to be, that would</p> |

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| | | | be a matter resolved under the Disputes Clause. |
| | | (e) <i>the Museum will consult with the Consultant but, the decision of the Museum on all related issues must be final;</i> | Again, it is vague, but the Museum must be able to control the situation. Unresolved dispute can be resolved through the Disputes Clause. |
| | | (f) <i>the Consultant may submit a claim for compensation and the Museum shall pay the Consultant such sums as are fair and reasonable in respect of any loss sustained by the Consultant in unavoidable consequence provided that the Consultant will not:</i> (i) <i>be entitled to compensation for loss of profits or any indirect loss or expense; nor</i> (ii) <i>will the Museum be liable to pay any sum which in addition to any amounts paid or due or becoming due to the Consultant under the agreement, would together exceed the full price of the Fee.</i> | Where the Museum has shrunk or terminated the project, the Consultant still has the right to be paid for what has actually been done prior to receiving notice from the Museum. This right to compensation is limited. In this case, the Consultant cannot claim for profits that it would have made had the contract proceeded as originally intended. Moreover, it can't claim for indirect loss – for example if the contractor had calculated the terms of another contract on the basis that it would have had the benefit of the present agreement, it can't claim for that consequential but indirect loss. The maximum for which the Museum is liable is the original Fee. It is very rare indeed for the liability to be this high but it is important that there be a cap. Note that it is a ceiling, not a floor. |
| | | 6.3 <i>In the event that the Consultant's engagement is terminated:</i> (a) <i>the Museum will only be obliged to pay the Consultant on a pro rata basis up to that stage actually completed by the Consultant at the time of termination; and</i> | Just as the Consultant has the right to be paid, the Museum has the right to what has been produced up to the time of termination. |

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| | | <p>(b) <i>the Museum will own all rights in the Deliverables created (whether or not completed) up to the date of termination.</i></p> <p>(c) <i>The Consultant must immediately deliver all Materials (whether or not completed) to the Museum.</i></p> | <p>The Consultant has to hand over the fruits of the work to date. It cannot withhold them as a bargaining chip to squeeze out more money from the Museum.</p> |
| 7. | <i>BREACH</i> | <p>7.1 <i>Each party indemnifies the other for any loss, expense or damage suffered as a result of a breach by that party of any promise that it makes in this agreement.</i></p> | <p>This indemnity is fair because it only activates if there has been a breach. A mere claim of breach is not sufficient to create a liability under the clause.</p> |
| 8. | <i>GRANT OF RIGHTS</i> | <p>8.1 <i>All rights (including copyright) in any Deliverables or Material created in the course of the providing the Consultant's services shall, upon delivery of that Deliverable or Material to the Museum, become the property of the Museum.</i></p> <p>8.2 <i>This assignment applies to all present and future rights of copyright, for the full period of copyright including all reversions and extensions, and to all media and technologies, whether now known or yet to be invented.</i></p> <p>8.3 <i>The Consultant shall not use any Deliverables for any purpose other than specified in this agreement, without the prior written consent of the Museum.</i></p> | <p>In most cases, the Museum becomes the owner of all rights in the product of the consultancy. Where the Consultant may wish to reuse the deliverables for other clients, the Museum will want to be able to control that reuse to make sure that it does not conflict with its cultural and corporate needs. If it so decides, the Museum may grant a licence back to the Consultant on negotiated and certain terms.</p> |
| | | <p>8.4 <i>Without limiting the effect of clause 7.1, the Museum shall be entitled to</i></p> | |

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| | | <p><i>make use of the Deliverables:</i></p> <p>(a) <i>in such manner as the Museum shall in its sole discretion think fit including (but not by way of limitation) the right to make changes, substitutions and additions thereto, deletions therefrom and adaptations and rearrangements thereof and translations into any and all languages; and</i></p> | <p>The Museum insists that it can make the widest use of the work that it has commissioned. It must be able to adapt it and change it for its own purposes. Of course this does not give the Museum the right to pass off the edited or amended deliverables as the original work of the Consultant rather than an adaptation.</p> |
| | | <p>(b) <i>by means of all technologies and all media, whether now known or yet to be invented.</i></p> | <p>This is important so that it is clear that the Museum has the right to exploit the results of the consultancy in the future when new and unforeseen technologies may have developed. In recent years there has been much controversy as to whether assignments of book rights granted in the pre-digital era impliedly included the right to digitise the book and include it on a CD-ROM or website. (The settled answer is – no.)</p> |
| | | <p>8.5 <i>Early termination will not affect the Museum's rights under this clause.</i></p> | |
| 9. | MORAL RIGHTS | <p>9.1 <i>Except to the extent specified in this agreement, the Museum will comply with the XYZ Museum Moral Rights Policy (as amended from time to time).</i></p> <p>9.2 <i>The Museum will make best endeavours to ensure that the Consultant is acknowledged as the author but any inadvertent breach of this provision shall not be a breach of this agreement.</i></p> <p>9.3 <i>Without limiting the operation of the</i></p> | <p>Moral rights cover the author's right to be acknowledged as the author of the work and the right to object to the alteration or mutilation of that work. If the Museum is not going to acknowledge authorship or requires the right to adapt, that must be specifically consented to in the agreement. A mere general waiver of moral rights is ineffective.</p> |

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| | | <p><i>above, the Consultant consents to the Museum, its licensees or assigns:</i></p> <p><i>(a) adapting, modifying, deleting or contextually placing the Material so that the Material may be exploited in any and all media (whether now known or yet to be invented) including without limitation CD-Rom, DVD, on-line, classified, directors-cut, video, in-flight, prequels, sequels, spin-offs, documentaries, "making of" or other versions of the Material, print media and merchandising;</i></p> <p><i>(b) Incorporating advertising into the Material or using the Material in advertising or promotions for the Museum, the Material, the Services or a third party;</i></p> <p><i>(c) to make foreign language versions of the Material including dubbing, translating and subtitling; and</i></p> <p><i>(d) any material alteration required by any agreement between the Museum and any third party.</i></p> | |
| | | <p><i>9.4 The Museum also specifically retains the right to withdraw the whole or any part of the Materials, the Deliverables from public view (whether by public exhibition or any other means or medium of access.</i></p> | <p>This provision will only be relevant where the consultancy involves deliverables that form part of an exhibition or other public display.</p> <p>At the end of the day, the Museum is a public institution and must retain the right to determine what is shown to the public on its premises or in its name. This covers issues such as defamation,</p> |

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| | | | obscurity, appropriate curatorial quality, appropriateness for children etc. |
| | | <i>9.5 If the Consultant does not agree with any such action by the Museum, the Consultant's sole right shall be to request the Museum not to attribute the Consultant as the author. The Museum shall make reasonable efforts to comply with this request but it shall not be obliged to vary any materials already printed and/or distributed.</i> | If the Museum insists on changes that the Consultant does not agree with, the Consultant can take its name off the work but cannot stop the Museum from making the changes it requires. The Consultant's remedies are restricted to making authorship of the work anonymous. That right is not retrospective. The Museum does not have to withdraw or reprint materials already in existence. |
| 10. | MUSEUM RESOURCES & FACILITIES | <i>10.1 The Museum shall provide the assistance and functions set out in Item 8 of the Schedule.</i> | Spell out in detail, exactly what the Museum is going to provide by way of resources and facilities. (For example, if the Museum were to provide office space, how much space would be provided, for what purpose and for how long? Would it include access to computers, photocopiers, fax and other equipment?) |

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| 11. | <p>ADDITIONAL PROMISES BY CONTRACTOR</p> | <p>11.1 <i>The Consultant promises the Museum that:</i></p> <p>(a) <i>the Deliverables shall not be defamatory nor constitute a breach of confidence;</i></p> <p>(b) <i>the Deliverables provided to the Museum will be of a high professional standard;</i></p> <p>(c) <i>the Consultant shall comply with the reasonable instructions of the Museum;</i></p> <p>(d) <i>the Consultant will not incur any debts, liabilities or obligations in the name of the Museum or any person company or corporation associated with the Museum;</i></p> <p>(e) <i>unless otherwise specifically approved in writing by the Museum, the Deliverables will be the Consultant's original work, will not infringe any third party's rights and will not have been previously licensed, assigned or otherwise transferred to any third party;</i></p> <p>(f) <i>the Consultant has the full right and authority to enter into this agreement;</i></p> <p>(g) <i>the Consultant has no knowledge of any claims that if sustained would be contrary to the grant of rights or any of the warranties and representations obtained in this agreement;</i></p> <p>(h) <i>the Consultant will ensure to the</i></p> | |
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| | | <p><i>best of the Consultant's ability that the Deliverables will conform to the standards and requirements of any relevant government law or regulation; and</i></p> <p><i>(i) the Consultant will not seek to injunct the Museum or any exploitation by the Museum of the Deliverables. The Consultant acknowledges that any breach of this agreement by the Museum will be able to be remedied by damages.</i></p> <p><i>(j) The Consultant will comply with all relevant Museum and Government policies and codes of conduct.</i></p> | |
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| 12. | ASSIGNMENT | 12.1 <i>The Museum shall be entitled to assign or license the benefit of this agreement in whole or in part to any third party. In the event of any such assignment the Consultant undertakes to fulfil its obligations under this agreement to any such assignee, provided that the assignee gives the same promises to the Consultant as the Museum makes in this agreement.</i> | This clause permits the Museum to transfer or license its rights to others. This is fair so long as it does not operate to reduce the rights of the consultant. That is accommodated in this provision. |
| 13. | CONFIDENTIALITY & PRIVACY | 13.1 <i>The Consultant, its employees or agents shall not disclose or make public any information or material acquired or produced in connection with or by the performance of this agreement (except to professional advisors or as required by Law), without prior approval in writing of the Museum.</i> | It is commonplace to require Consultants to keep confidential anything that they learn in the course of the consultancy. Confidential information does not cover knowledge that is already in the public domain or material that the Consultant knew prior to the consultancy. |
| 14. | FORMER AGREEMENTS | 14.1 <i>This agreement supersedes any former agreements between the parties in respect of the Services.</i> | 'No former agreements' clauses are important because it stops either of the parties from alleging that the written agreement does not contain all of the terms of the agreement. Sometimes, a party will say that there were verbal terms agreed or that the content of prior correspondence is relevant. With this clause, the parties get certainty. If it is a term of the deal – it is in this document. If not – it is not. |
| 15. | INDEPENDENT CONTRACTOR | 15.1 <i>The Consultant is commissioned in the capacity of an independent</i> | It is important to make the legal relationship between the parties, clear. It needs to be clear |

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| | | <p><i>contractor and the Consultant is not an agent, employee, partner or joint venturer of the Museum</i></p> <p><i>15.2 The Consultant agrees not to present or misrepresent itself as an agent, employee, partner or joint venturer of the Museum.</i></p> <p><i>15.3 The Consultant warrants that it has its own current workers compensation policy (also covering any employees, contractors or agents of the Contractor) and will obtain and maintain any insurances set out in the Schedule as Required Insurances.¹</i></p> | <p>that the parties are independent contractors and that the responsibilities and burdens of employment and partnership are negated.</p> |
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¹ The insurance requirements change depending on the kind of services that are being delivered. These can be specified in the Schedule.

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| 16. | GST | <p>16.1 <i>In this clause, the terms used are as defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) ('GST Act'). The supply of goods or services pursuant to this agreement may make the supplier of those goods or services liable by law to pay GST on that supply. If this is so, the consideration payable by the recipient shall be increased by an amount equal to the GST paid or payable by the supplier, after taking account of any cost savings to the supplier as a result of the removal of any taxes due to the introduction of the GST Act. Each party agrees to do all things, including providing tax invoices and other documentation that may be necessary to assist the other party to claim any input tax credit, set-off, rebate or refund for that supply.</i></p> | <p>The usual approach is that the Museum will pay GST in addition to the fee, so long as the Consultant is registered for GST and provides a GST Invoice.</p> |
| 17. | DISPUTES | <p>17.1 <i>In the event of a dispute arising from the interpretation or subject of this agreement, either party may refer the dispute for conciliation through the Mediation Service of the Arts Law Centre of Australia or such other person(s) as the parties may agree. The parties agree to do such things as may be necessary to facilitate the speedy conciliation and resolution of the dispute.</i></p> | <p>It is a sensible precaution to include a mechanism to facilitate and promote the resolution of disputes without recourse to litigation. Most parties are reasonable but sometimes, it needs the intervention of a trained facilitator to get both parties to see whether compromise is achievable and desirable.</p> <p>The Arts Law Centre of Australia provides a mediation service using trained mediators. It is considerably cheaper than most alternatives.</p> |

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| 18. | A | 18.1 <i>This agreement shall be governed by and construed in accordance with the law for the time being in force in the [state or territory] and the parties submit to the jurisdiction of the courts of [state or territory] and</i> | Different States and countries have their own laws and court systems. Where the parties come from different jurisdictions, this clause settles the often-vexed issue of which laws and which court system would apply in the event of litigation. |
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Schedule

The model contract will then have a Schedule that sets out the nitty gritty that assists the administration and supervision of the contract. For example, the above contract may have a Schedule that looks like the following. Just make sure that all of the items set out in the Schedule are actually referred to in the principal agreement.

SCHEDULE

Item 1: CONTRACTOR DETAILS

Name: (referred to as '**the Consultant**')

Address:

Telephone: Fax: Email:

Key person who is to deliver the Services:

Item 2: BRIEF:

Item 2.1: The Brief: [*description of the project/activities for which the Contractor is contracted*]

Item 3: PRICE AND DELIVERY

| Date (due COB) | Deliverables/Miles tones | Format /Conditions | Payment ex GST AUD | GST(if applicable) |
|-------------------------------|--|---|-----------------------------------|-------------------------------|
| <i>31 August 20xx</i> | <i>Report on visitors to Museum – June – July 20xx</i> | <i>Word or compatible format 2 x hard copy version</i> | <i>x000.00</i> | <i>x00.00</i> |
| <i>5 Septembe</i> | <i>Meeting with Museum Executive</i> | <i>To be held in Museum</i> | <i>Nil</i> | |

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| <i>r 20xx</i> | <i>to brief on outcomes of report</i> | <i>board room</i> | | |
| <i>10 days from delivery of the Work by Author.</i> | <i>Acceptance by the Museum of all Deliverables</i> | | <i>x000.00</i> | <i>x00.00</i> |

Item 6: APPROVED BUDGETED EXPENSES:

| <u>Detail of expense</u> | <u>Maximum amount to be reimbursed by Museum</u> |
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| | |
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| | |
| <i>TOTAL</i> | |

Item 7: TRAVEL EXPENSES:

| | <u>Detail of travel (eg: flights to and from & carrier & class)</u> |
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Item 8: MATERIAL AND FACILITIES TO BE PROVIDED BY THE MUSEUM:

(eg: access to work facilities, conference rooms, meetings with staff)

Item 9: SPECIAL CONDITIONS:

Item 10: BANK ACCOUNT DETAILS

The Museum will make payment via electronic funds transfer into the following account:

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| Name of account: | |
| Institution: | |
| Bank State Branch (BSB) no. | |
| Account no: | |

Australian Business Number:

The Consultant's ABN is

Item 15: REQUIRED INSURANCES