ARCHITECT-SPECIALIST CONSULTANT AGREEMENT

USER GUIDE

ASCA2017

Australian Institute of Architects

Contents

You will see these new icons throughout this guide. They alert you to important things to consider when completing and using ASCA2017, as well as explanations of the new mechanisums in the contract.

When to use the Architect-Specialist Consultant Agreement

The Architect-Specialist Consultant Agreement 2017 (**ASCA2017**) is intended for use where the Architect is engaging the specialist consultant directly and is paying the specialist consultant directly. It cannot be adapted for use by your client to engage specialist consultants.

The ASCA2017 can be used for projects of all sizes and complexity. For large or complex projects, you might consider a tailored contract, specifically written to better suit your circumstances and the project requirements.

Why use a formal agreement?

To avoid later problems or disputes it is important for architects and their consultants to agree on the scope of the specialist services required in detail. This way, both parties have a clear understanding of what is to be delivered for the project. It is also essential at this time that you and the specialist consultant agree on the fee, or the method for calculating the fees, for the services that the specialist consultant has agreed to deliver.

A written agreement is highly recommended to avoid misunderstandings and to resolve disputes during and after the specialist services are delivered.

The Institute strongly recommends that you also use the Institute's Client Architect Agreement (the **CAA**) to record the agreement between you and your client. The ASCA2017 is written to complement the CAA where it is used by the architect.

Preferring the ASCA2017

Generally, when you are negotiating the fees with specialist consultants that will form part of your fee proposal to your client, we suggest you make the consultant aware that their engagement for the project will be made under the terms and conditions of this agreement.

If you intend to use the ASCA2017, ensure that the fee proposals received from consultants do not state that the parties will use another form of contract or terms and conditions and that they don't include unintended references to other agreements or terms and conditions.

Template Guide letters

The suggested introductory guide letter GL-0 is intended for you to use to make recommendations to your client on which specialist consultants are likely to be needed, to give indicative costs of these consultants and to seek your client's approval of those likely costs as included in your fees.

The other suggested guide letters are intended for you to send to a specialist consultant after meeting and negotiating the general commercial terms of the consultant's engagement.

How to use the Architect-Specialist Consultant Agreement

This guide is intended to give you, the Architect, guidance on the contents and effect of the ASCA2017 and suggestions on how you can complete the details in the contract's schedules.

This guide cannot be used as a substitute for reading the ASCA2017 contract document.

By completing the details in the schedules and both you and your specialist consultant signing it, the ASCA2017 then sets out the contractual obligations and entitlements of each party. Your consultant is referred to as the "Special Consultant" under the ASCA2017 (the Consultant, for short). The Consultant is obliged to perform the scheduled services and do all the other things described. You are obligated to pay the amounts agreed and scheduled for the Consultant's services described. It is important to make sure that all the specialist services you need the Consultant to deliver are set out in the Schedules provided, or clearly set them all out in a separate document and attach them to the ASCA2017 (see the following heading for how to do this).

The schedules and the party details and signing pages of the ASCA2017 can be completed and amended by hand or in digital format, so you can add all relevant details and make additions and/or deletions to the schedules. The digital versions of the schedules can be accessed with your Acumen log in: http://acumen.architecture.com.au/apps/notes/view/1181.

How to include special conditions

Generally, the Institute doesn't encourage amendment of the ASCA2017, but the agreement acknowledges that circumstances and Consultant- or Architect-specific requirements may make it necessary for the parties to amend the ASCA2017 other than by adding or deleting services listed in clause A or the Schedules.

Clause N specifies an order of precedence that means the special conditions inserted in Schedule B override and vary the ordinary terms of the ASCA2017 (see page 16 below).

It is recommended that you use Schedule B to insert special conditions and not some other method of amendment which may be less certain in its legal effect.

A basic way to include additional services (as part of the Extent of Work) in the ASCA2017 is to:

1. Prepare a separate document setting out all the additional (or alternative) services you require from the Consultant and attach it to the ASCA2017.
2. Then write in a special condition in Schedule B (page 9) with the words:
   The Specialist Consultant agrees to provide the additional services set out and attached to the signed ASCA2017 (dated ___/___/____), that are now included in the Extent of Work under clause A.
3. Both you and the Specialist Consultant then need to initial the bottom of every page where a special condition is written or attached.

However, before proposing changes to the text of the ASCA2017 (including any deletions), you should get legal advice to ensure that your ASCA2017, as amended by any special condition proposed, retains its integrity so that it can be relied on by both you and your Consultant.

Your Consultant might also get legal advice on the contract and their lawyer may propose special conditions. If so, we strongly recommend you get your own independent legal advice and not rely on any assurances from your Consultant or their lawyer. See heading N. for suggestions on how to insert your special conditions.

We recommend that you do not write your own special conditions without getting legal advice, particularly after November 2016 when the Unfair Contract Terms legislation was expanded to apply to 'small business contracts'. Using an unmodified ASCA2017 is likely to fall within the definition of small business contract and the protections for both parties in this legislation. So there is a risk that specific contractual obligations can be challenged and be found unenforceable because they are "unfair" to one of the small business parties to a contract.

Cover Page: Party details and signing

The Specialist Consultant	Name			
	ABN	Specialist Consultant's representative		
	Address			
			Telephone	
	Email		Facsimile	
If the Specialist Consultant is an individual, individual trustee, or partnership:	Signed			
If the Specialist Consultant is a corporation, executed in accordance with section 127 of the *Corporations Act* 2001:	Signed	director/sole director	Signed	director/secretary
	Date		Date	

Identity of the Consultant

For both you and the Consultant to be able to enforce and rely on the terms of the ASCA2017, it must be properly executed (signed) by each of you personally or with the authority of the respective legal entities, whichever is the appropriate case. To achieve this, the appropriate authorised person(s) for each party must sign in their correct legal capacity. This capacity varies according to the type of legal entity each party is. So you can rely on the ASCA2017 being binding, the full name of the Consultant should be shown, including whether it is a sole trader, partnership, incorporated entity (such as 'Inc,' 'Pty Ltd,' 'Ltd'), or other entity type like: 'as Trustee for XX' or 'XYZ Pty Ltd trading as A Business Name'.

If you are unsure what the correct details of the company entity are, you should seek clarification from the Consultant.

ABN number: It is recommended you insert your Consultant's ABN for your reference. If the Consultant has an ABN, a proper tax invoice must be given to you so you can account for the GST.

Consultant's address: The Consultant's address to be shown here is the address for delivery of notices (which you need to give in writing) under the ASCA2017. This enables you to give notices by hand delivery, mail, or (if stated) facsimile.

To properly issue or serve notices under the ASCA2017, you should insert the Consultant's business address, or the company's registered office, as applicable.

E-mail: The Schedule provides for an email address to be inserted. If the parties are confident that e-mail is an acceptable and reliable communication method, you can either insert e-mail addresses in the schedule, or establish a 'pattern of dealing' by using e-mail to communicate and send notices or documents after the ASCA2017 is signed. If the parties do either, you both need to be aware that, at law, communication by e-mail becomes an acceptable and effective method of giving notices under the ASCA2017 and it does not matter that the receiving party does not actually receive the particular e-mail, or receives it but doesn't read it.

The risks with an e-mail are that it may not be received because the e-mail did not leave your server or ISP, or the recipient's e-mail address might not be accessed or monitored regularly, might have changed, or delivery to it may be unreliable.

When using or relying on email to send notices or important correspondence under the ASCA2017, you should always request a Delivery and Read Receipt confirmation via your email client or webmail application.

Fax and post continue to be the most legally secure way to serve notices and important correspondence under the ASCA2017. In the event that there is a dispute under the ASCA2017 and lawyers are involved, they will need to rely on post or fax for formal service of notices or documents.

Using a fax number, for which you can receive an instant delivery confirmation, is the most reliable method of giving notices and is good evidence of delivery.

Telephone numbers: Telephone numbers can be mobile or fixed landlines or both. If there is no facsimile number stated, the space can be used for other contact methods.

Consultant's representative: For the smooth operation of the ASCA2017, a Consultant should nominate only one representative (where shown) for the purpose of communications. If that representative has different contact details, they can be inserted alongside the person's name, or provided by separate correspondence.

Signing by the Consultant: The correct place for the Consultant to sign and the number of signatures required depends on the Consultant's legal entity type according to the guidance shown in the left column of the signing page.

The first signature line option is for consultants who are individuals, individual trustees, or a partnership. Typically, only one signature by an individual consultant or an authorised person is required here, but more than one person might need to sign in the case of some entity types.

You should satisfy yourself that at least one signatory has the authority to legally bind the Consultant to the ASCA2017. The authorised person may not necessarily be the Consultant's representative.

The second signature line option is for companies, including corporate trustee companies, either 'Pty Ltd' or 'Ltd.' This section must have the signatures of: two directors or one director and the company secretary or a sole director/secretary. If the latter, you should verify that the company is a sole director company before accepting a single signature. Otherwise you might face the risk that you are not able to enforce the ASCA2017 against the company.

Date of signing: In every case, each signatory must insert the date they actually sign. The agreement comes into binding effect when the last signatory signs (whether that person is the Consultant's last signatory or your last signatory).

After all parties have signed, at the top of the first page, you should then insert the date which is the actual day of the last signature. This then records the formal execution date for the legal document.

Architect registration: The explanatory note under 'The Architect' is intended to alert the Consultant that they are formally entering into a binding engagement with an architect and you are (or your practice is) expressly representing that you are registered as such in the state or territory of the Site.

You must ensure you, or your practice, is properly registered in the relevant state or territory, where the Site is located.

Architects engaged under the ASCA2017 should be only those currently registered as architects in the relevant state or territory where the Site is located. While requirements vary, mutual recognition principles should make it reasonably straightforward, for architects registered elsewhere, to register in the state or territory where the project is located.

Entering into the ASCA2017, when not registered as an architect in the state or territory, could be used as documentary evidence that a non-registered person is claiming to be or representing themselves as a registered Architect. This would be a breach of the Architects Acts in all states and territories and can result in civil penalties against you.

The Architect

Under the *Architects Acts* in each state and territory, an Architect is a person who is registered by the relevant Architects Registration Board.

Name

ABN Registration No.

Address

Telephone

Email Facsimile

If you are not registered as an architect and want to enter into the ASCA2017, you may want to insert special conditions into the ASCA2017 at Schedule B clarifying that wherever 'Architect' appears in the document it means 'non-architect' and that Clause J.4 is deleted or doesn't apply. But be wary that merely clarifying your unregistered status in the contract may not be enough to avoid a breach of a relevant Architects Act.

If you are a non-architect (including architects not registered in the state or territory of the project) thinking of using the ASCA2017, you should first check with the Registration Board responsible for the Architects Act in the state or territory where the project is located.

If you are not registered and the services you carry out under the ASCA2017 are considered to be architectural services, or if you have made representations by words, actions or even omissions to people other than the Consultant that you are registered or are authorised to deliver architectural services, this may be a breach of the Architects Act and may also be a breach of consumer legislation, which attracts fines or penalties. In this context, 'representations' can include letting another person have the impression that you are an architect (when you are not) and not taking steps to correct that impression.

Identity of Architect: As noted above, for both you and the Consultant to be able to enforce and rely on the terms of the ASCA2017, it must be properly executed (signed). To achieve this, the appropriate person(s) must sign in their appropriate legal capacity, as Architect. This capacity varies according to the type of legal entity the Architect is. For this reason, the full name of the Architect's legal entity should be shown, including whether it is a 'Pty Ltd' 'Ltd' company or other entity type like 'as Trustee for XX' or 'ABC Pty Ltd trading as Another Business Name'.

If you are unsure what the correct details of your company entity are, you should seek clarification from your lawyer or accountant.

ABN number: Because you are (or your practice is) carrying on business as an architect and registered for GST, you must state your (or your practice's) ABN.

Registration number: As required by most state and territory Architect's Acts, you must as an architect include your registration number. Whether this is the number of a registered practice or of an individual architect in the practice depends on the Architects Act of the state or territory where the site is located. The required registration number may or may not be the registration number of the Architect's representative.

Architect's address: This is the address for delivery of notices (giving notice in writing) under the ASCA2017 enabling the Consultant to give you notices by hand delivery, mail, or (if stated) facsimile.

E-mail: The considerations on page 3, about a Consultant's e-mail address, apply here as well.

Telephone numbers: The notes on page 4 about telephone numbers apply here as well.

Architect's representative: It is equally important for the smooth operation of the ASCA2017 that your representative, and only one representative, is nominated where shown. If that person has different contact details, they can be inserted with the person's name, or provided by separate correspondence.

Signing by the Architect: Just as the Consultant can be an individual or other type of organisational entity, different signatories are required depending on the type of the architectural practice. So that the ASCA2017 can be relied on as a legal document by both you and the Consultant, the correct alternative should be completed and signed.

Signatures: As for the Consultant, the correct place for you (or on behalf of your firm) to sign, and number of signatures required depends on the Architect's entity type, according to the information shown in the left column of the Schedule on the cover page.

Date of signing: Again, insert the date on which each signatory of the Architect has signed.

The agreement comes into effect when the last necessary signatory signs (whether that person is the Consultant's signatory or the Architect's signatory). Insert this date in the space provided at the top of the cover page.

The Specialist Service: Briefly describe the Consultant's discipline and broadly describe the type of services the Consultant is to provide under the ASCA2017.

The Project, the Site and the Client: Briefly describe the scope of the Client's project (e.g. Addition of Infinity swimming pool to existing dwelling), its location at the Site (for example, the address geographical identifier or land title information) and the name of the Client (either a person or a company).

Initialling each page: Clause A anticipates that some of the services listed will be crossed or struck out by hand or digital amendment. It is important to accurately record the specific conditions of the ASCA2017 and that you and the Consultant initial each page to the edited or editable clauses, even if no services are actually struck out in clause A. The bottom of page 1 of the ASCA2017 provides a place for the initials.

For the same reason, it is important that you initial each page of the Schedules. Each page of the Schedule provides a place for both parties to initial.

Wherever corrections are made by hand, make sure both parties initial every change, deletion or insertion at the time they sign the contract.

A. The Extent of Work

Throughout the ASCA2017, every reference to the word 'Item' refers to that numbered Item in Schedule A on pages 7 and 8.

The **'Extent of Work'** in **clause A** Is the list of basic services that the Consultant will provide. Think of this definition as 'the scope of services' that the Consultant will provide.

Clause A Is divided into subclauses A.1 to A.4 and each subclause heading represents the different stages of the Specialist Service with bullet points listing the services to be provided in that stage.

You can rule a line through or strike out those services that you don't need the Consultant to deliver. If you need to add additional services not listed in clause A, you can easily add 'Other Specialist Services' in Item 2 of Schedule A for each stage of the Extent of Works. See the notes under How to include Special Conditions above about attaching additional pages.

Services you don't need the Consultant to provide must be crossed out. You can cross out either the whole bullet point Item or as much of that Item you and the Consultant agree will be delivered. If not, the Consultant can rely on, deliver and expect to be paid for the services which are not crossed out, even if no fee basis is indicated in Item 3 of Schedule A. The risk is that the basis on which they can enforce payment for these services may not be favourable to you, for example, on a direct cost, or quantum meruit ('do and charge') basis.

During the course of the project, you may need to change the scope of the Extent of Works. If so, clause D sets out what the parties need to do to achieve this change in scope (see page 10).

B. Administration

This clause covers the parties' respective general obligations that apply throughout the Agreement.

For example: under **clause B.3**, you must not take an unreasonable amount of time to consider all requests from the Consultant for information or clarification, before giving your decision. This is consistent with your obligations to your client to ensure the efficient and timely administration of the project and is intended to make sure the Consultant has all the information and answers to deliver the Specialist Service in a timely way.

Agency: Your representative (if you have nominated one) is expressly authorised to give instructions to the Consultant on your behalf.

Importantly, except in very limited circumstances, the Consultant is not and must not act as your agent or on your behalf for the Project. This would include claiming or making statements or representations that they are authorised to act on your behalf. The limited circumstances in which the Consultant can do so is when dealing with its own sub-consultants, or other consultants engaged by you (see **clause H.5**).

C. Fees

In exchange for delivering the Extent of Work for the Project, you must pay the Consultant the Service Fee plus Delay Costs, if they apply. The Service Fee is calculated by the method that is indicated in **Item 3**, either as: a Lump Sum Fee, Percentage Fee, Hourly Rate or a combination of those methods.

If you require additional services from the Consultant after the ASCA2017 is signed, you and the Consultant must negotiate and agree on the cost of those additional services using the method in **clause D**. See heading D. Change in Extent of Work for how to implement this method.

Where there is a discrepancy between the allocation of percentage or lump sum fees to the individual services or stages of the project, or ambiguity or omission, the Total shown in **Item 3** takes precedence.

Delay Costs: In summary, Delay Costs can only be claimed by the Consultant where:

i. The Consultant is delayed in delivering the Extent of Work and has incurred additional time costs because of the delay, and

ii. The delay was not caused by or was not the fault of the Consultant or the Consultant didn't reasonably have control over the delay, and

iii. The Consultant took steps to limit the time cost to the Architect of the delay, and

iv. You have approved (in writing) the amount of the Delay Costs claimed by the Consultant.

The Consultant may then claim for all or part of the Delay Costs, plus GST, in the monthly Invoice Claim or Payment Claim.

Payment of Invoices: Your Consultant may submit only one claim each month for the whole or part of the Service Fee (and Delay Costs, if any), depending on how much of the Extent of Work has been carried out. The Consultant can submit a claim under the agreement (this is an **Invoice Claim**), or under the Security of Payments legislation in the relevant state or territory (this is a **Payment Claim**).

In this section, "**SOP**" means the Security of Payments legislation that is applicable in the state or territory where the Site is located.

If the Consultant submits an **Invoice Claim:**

- It can only be submitted on or after the date you have submitted your claim or invoice to the Client. If you haven't submitted a claim, or haven't told the Consultant when you have, the default date is the 15th day of that month.
- You must then pay the Invoice Claim (including GST) within 21 days after receiving it.

If you dispute any part of the Invoice Claim, you still need to pay within 21 days the amount (including GST) of the Invoice Claim that is not disputed. All disputed amounts should be dealt with using the dispute resolution method in **clause L** (see page 14).

In NSW, an Invoice Claim is a Payment Claim if the Consultant chooses to pursue their rights under the NSW SOP legislation. Failure to observe the time constraints and procedures of that legislation can have serious implications for your ability to resist unwarranted claimed amounts. We recommend that you become familiar with the SOP legislation if you are practising in NSW.

If the Consultant submits a **Payment Claim** (under the SOP legislation):

You must give the Consultant, within 10 business days, a statement in accordance with the applicable SOP Act of the amount you agree to pay, including GST. If the Consultant agrees with your statement, it must issue to the Architect a tax invoice for the corresponding amount. If not, the payment schedule provisions of the applicable SOP Act should be followed in respect of the **Payment Claim.**

You must pay the Specialist Consultant the amount on a tax invoice issued in accordance with the SOP Act, within the time required by the SOP legislation.

If you do not comply with the time constraints and procedures of SOP legislation it can have serious implications for your ability to resist unwarranted amounts claimed. We recommend that you be very familiar with the aplicable SOP procedures.

The amounts being claimed in a given invoice must be calculated by the methods selected in **Item 3** and in proportion to the progress of the Extent of Work completed up to and including the date the claim is submitted, unless you and the consultant have agreed otherwise in writing. All amounts in an Invoice or Payment Claim must be stated as inclusive of GST. The amounts of the Service Fee stated in **Item 3** are exclusive of GST and so GST must be added by the Consultant to the amounts in each claim.

Disbursements: You are required to pay only for those disbursements listed in **Item 5** of **Schedule A** which are marked 'Architect to Pay'. You must reimburse to the Consultant (after receiving the relevant claim from the Consultant) those disbursements marked 'Reimbursable'. Those disbursements marked 'Service Fee' are included in the Service Fee and will be paid by the Consultant.

Disbursements that are set out in **Item 5** of **Schedule A** may be included on the Consultant's tax invoice. Disbursements must be itemised and the Consultant should tell you if they don't include GST.

The Consultant is only entitled to add a 'service fee' or other surcharge on to the cost of disbursements if the Consultant pays directly (for those disbursements where the "service fee" box is selected).

Item 5: Disbursements (including GST)

See clause C.4

Item	Architect to pay	Architect reimburses	Service Fee inclusive	Rate or basis (incl. GST unless stated otherwise)
Fees, taxes, levies or charges paid to authorities	☐	☐	☐	
Advertisements and published notices for the Project authorised by the Architect	☐	☐	☐	
Special presentation material, models, perspectives	☐	☐	☐	
Rental of special equipment for the Project authorised by the Architect	☐	☐	☐	
Photographic records authorised by the Architect	☐	☐	☐	
Courier and parcel postage services	☐	☐	☐	
Providing more than one hard copy of documents or drawings	☐	☐	☐	
Colour reproductions of documents	☐	☐	☐	
Travel time	☐	☐	☐	
Vehicle use beyond 50km from office	☐	☐	☐	

Clause C.4: Also gives you the flexibility (at your discretion) to agree to reimburse the Consultant other disbursements the Consultant incurs that weren't anticipated at the time you signed this contract.

Percentage Fees:

Total Project Costs is defined as: the cost of all Project works executed by the Architect for and on behalf of the Client, including the cost of any work approved by the Client but later abandoned or not completed, but not including the Service Fee payable to the Consultant.

If you have agreed on a Percentage Fee for calculating the Service Fee for any of the stages you must select the relevant box in **Item 3**. If so, then **clause C.5** will then apply to calculating the Service Fee. It is very important that you and the Consultant understand that the Service Fee is based on the ***Total Project Cost*** as defined above and that a final adjustment of the Service Fee will need to be made when the final ***Total Project Cost*** is known. The practical effect of this is that there may be an adjustment of the total fee amount either in your or the Consultant's favour at the completion of the Project, or if this agreement is terminated early (see heading M. Termination).

Lump Sum Fees: A lump sum Service Fee is a fixed sum intended to apply irrespective of the ***Total Project Cost.*** This sum is agreed on the basis of the scope of services to be provided by the Consultant, defined as the Extent of Works in **clause A**.

Depending on what the parties agree in **Item 3**, lump sum fees can apply only to discrete stages of the Extent of Works, while the fees for other stages or services can be charged on a percentage basis, or on hourly rates.

Section D provides that if the Extent of Work changes, you and the Consultant will agree in writing to a pricing method for the Changed Service Fee. See heading D. Change in Extent of Work.

Item 3: Service Fee (ex. GST)

See clause C

Includes the 'Other Specialist Services' listed in Item 2.

Service	Percentage	Lump Sum	Hourly Rate	Amount of percentage fee allocated to each service	Amount of lump sum fee allocated to each service (excl. GST)
3a Pre-design	☐ or	☐ or	☐	%	$
3b Design development	☐ or	☐ or	☐	%	$
3c Construction documentation	☐ or	☐ or	☐	%	$
3d Contract administration	☐ or	☐ or	☐	%	$
Total Percentage Fee and/or Lump Sum Fee (ex. GST):				**%**	**$**

Hourly Rate Fees: For the reasons above, these rates must be stated in Item 4 for each of the personnel delivering the Specialist Service. If the Specialist Service is to be charged at hourly rate fees, these will apply to the Extent of Work and the parties may even agree that hourly rate fees apply to adjustments to the Extent of Work where additional services are required during the course of the project (see heading D. Change in Extent of Work).

You should always insert hourly rates into **Item 4.**

Even if another pricing method for the increased Extent of Work is agreed, hourly rates are still required to calculate the ***Delay Costs*** where they apply (see heading C. Fees > Delay Costs).

As set out in **Item 3,** hourly rate fees can also apply to discrete items or elements of the services, while other stages or services can be charged fees on a percentage basis, or on a lump sum basis.

Under **clause C.7** you can require the Consultant to give you time sheets or other documentation to substantiate the actual hours being charged and claimed.

Item 4:
Hourly Rates

See clause C.7

For all Projects, insert hourly rate figures in this item. These rates are used to calculate the Service Fee payable in accordance with either clause C.7 or clause D.2.

Personnel	Hourly rate	
Principal/Director	$	per hour (excluding GST)
Associate Director	$	per hour (excluding GST)
Senior Consultant	$	per hour (excluding GST)
Consultant	$	per hour (excluding GST)
Technician	$	per hour (excluding GST)
Assistant	$	per hour (excluding GST)
	$	per hour (excluding GST)
	$	per hour (excluding GST)
	$	per hour (excluding GST)

Overdue payments: Under **clause C.8**, the Consultant has the right to suspend the Specialist Service if:

- An Invoice Claim or Payment Claim has been submitted, is payable and is not disputed, and
- Payment is more than 30 days overdue, and
- The Consultant has given you 14 days written notice of their intention to suspend the services.

In addition to the right to suspend the services, the Consultant also has the option of exercising the right under **clause M** to terminate the agreement. If the Consultant doesn't choose to terminate the agreement and you pay all overdue claims, then on the next business day the Consultant must resume delivering the Specialist Services to you.

Note that this contractual right to suspend is in addition to any rights the Consultant may have to suspend work under SOP legislation for a given Payment Claim.

D. Change in Extent of Work

The needs of the Project may change while it is being carried out and you may need more or fewer services from the Consultant's particular discipline. If this happens, **Section D** provides a mechanism for you and the Consultant to negotiate and agree on a change in the Extent of Work, as well as a change in the Service Fee that reflects the new Extent of Work. It is for you, the Architect, to initially decide whether the Project requires a change in the scope of the Consultant's service, but in practice it may be that the Consultant suggests to you that a smaller or greater scope, or additional services might be needed.

In order to change the Extent of Work, you and the Consultant must meet to negotiate and attempt to agree the changed Extent of Work that is to be delivered by the Consultant (the **Changed Services**), as well as the new service fee that is payable for the original Extent of Works plus that changed scope (the Changed Service Fee). If agreed, this new agreement then needs to be recorded or confirmed in writing. There are no limits in ASCA2017 on how many times you and the Consultant can change the Extent of Work, provided both parties agree on the changes each time.

Use the method in **Section D** whether the new Extent of Works is to be larger or smaller than the original Extent of Works. If there is a change to the Extent of Works, the mechanism for pricing the new 'scope' is as follows:

1. You and the Consultant negotiate and agree the new (increased or decreased) scope = **Changed Services.**
2. You and the Consultant negotiate and agree the new fee for the new scope = **Changed Services Fee.**
3. Once there is agreement, if the changed services and fee are higher than the original, the Client first needs to approve that increase. (The Consultant should not start work on the changed scope until the Client has agreed.)
4. If that is all agreed, then:
   The **Changed Services** replaces and becomes the "Extent of Work" for Clause A and Item 2.

   The **Changed Services Fee** replaces and becomes the "Service Fee" for Clause C and Item 3.

This mechanism can be followed as many times throughout the project as needed and each time there is agreement, then the agreed Changed Services and Changed Services Fee replaces the previous terms Extent of Work and Service Fee, respectively.

Variations of an agreement can be a frequent source of disputes between contracting parties. We strongly recommend that you keep consistent and coherent written records of all correspondence and agreements under section D. A good idea is to set out the new, changed "Extent of Work" scope and "Service Fee" amount and send this to the Consultant and to your client every time section D is used and agreement reached.

If you and the Consultant can't agree on a changed Extent of Work or a Changed Service Fee for that different scope of services, then the original (or previous) scope and fee applies – so that the Consultant continues to deliver the scope of Extent of Work and you must still pay the Service Fee that was agreed.

It is important for both parties to understand that, if you both agree to change the Extent of Works with an increase in the Service Fee under clause D, the Client must first approve that increase in the Changed Service Fee before the Consultant carries out the new or additional Changed Services. If not, the Specialist Consultant is not entitled to the additional amount of the Service Fee.

After the Client approves the increase, clause D.2 'automatically' operates so that the original Service Fee stated in Item 3 is updated to equal the amount of the Changed Service Fee. Only then does the Changed Service Fee become the Service Fee under the ASCA2017 and the Consultant is now entitled to the increase. This is why in clause C.1, the obligation on you to pay is described only in terms of paying "the Service Fee" (plus Delay Costs, if applicable).

E. Sub-Consultants

Clause E describes the arrangements for the engagement of specialist Sub-Consultants by the Consultant. If the need for a specialist Sub-Consultant has been decided upon before you have engaged the Consultant, information about the discipline, service description, or identify (if known) of the Consultant's specialist Sub-Consultants can be shown in **Item 6** of **Schedule A**.

The Consultant must directly engage the Sub-Consultants listed in **Item 6** on the terms set out in **Clause E.2.** The Consultant directly engages a specialist Sub-Consultant on the basis that:

- The Consultant directly pays the Sub-Consultant's fees, unless agreed otherwise.
- You are not professionally or legally responsible (in relation to this contract between you and the Consultant) for the services provided by a specialist Sub-Consultant.
- You have the authority to co-ordinate the services of any specialist Sub-Consultant as part of your services under the client retainer.

You are free to negotiate on and agree that the Sub-Consultant will not be paid by the Consultant. If you agree that the Sub-Consultant will be paid by you directly, or on another basis, but not by the Consultant, we suggest you include a special condition that the Client must first approve and agree to pay for the Sub-Consultant, so that you have the right of reimbursement. This could be agreed before this agreement is entered into, where in **Item 6** you have recorded that the Sub-Consultant will be engaged, or in writing after this agreement is entered into.

Under **clause E.2** you have the right to ask the Consultant to confirm that the service invoiced by the Sub-Consultant has actually been delivered.

You also have a right to exercise a 'veto' of the Consultant's choice of a Sub-Consultant who is not listed in Item 6. If you decide to exercise this right, you must act reasonably and give the Consultant written reasons why you have objected to the choice of Sub-Consultant.

F. Intellectual Property

This section covers copyright, moral rights and the conditions for transferring digital data.

Copyright: The designs, data and documentation created by the Consultant for the Project are referred to in the ASCA2017 as the ***Specialist Designs***. Under **clause F.1a**, copyright ownership of the Specialist Designs is 'automatically' passed on to you when created, but on the condition that the Consultant has been paid the proportion of the Service Fee for that part of the Extent of Work completed, up to and including the date the design is created. You then are allowed to use or pass on (licence) that copyright in the Specialist Designs to the Client or to other sub-consultants working on the Project.

During the agreement, the transfer of copyright the Consultant gives to you in the ***Specialist Designs*** is conditional on you paying that proportion of the Service Fee that has been delivered up to the date the Specialist Designs is created.

This transfer of copyright is intended to give you a clear right to use the work created by the Consultant (or sub-consultant) for your design and documentation and to minimise the legal and copyright risks to you and the Client when applying for development or planning approval drawings and documentation that incorporate the Specialist Designs.

If the Consultant insists on retaining copyright ownership, you will need to insert a special condition that gives you a broad licence to use the Specialist Designs for the project, including the right to pass on that licence to others, and otherwise overrides the automatic transfer of copyright that happens under **clause F.1.**

Clause F.1a works to 'automatically' pass copyright on to you whether the Project is completed or not and whether or not the agreement is terminated under **clause M**, so long as all invoices issued up to the date the design or document was created, have been paid.

You own the copyright in the designs and materials that you create (***the Architect Materials***) and nothing in the ASCA2017 gives the Consultant or the sub-consultants the copyright in your materials. However, under **clause F.1c**, for the purpose of the Consultant delivering the Specialist Service, you give the Consultant and the sub-consultants a copyright licence to use your materials and documentation only in their Specialist Designs for that Project. This licence can be withdrawn by you at any time.

Moral rights: Under the federal *Copyright Act* 1968, each individual author/creator of a work has a personal legal right to be attributed as the creator of that work. Moral rights are personal to the author and different from copyright.

Under the ASCA2017 and consistent with the *Copyright Act*, the Consultant (as an individual) and its staff as individuals have the right to be recognised and attributed as the author(s) of the Specialist Designs. The Consultant may prefer that the practice is attributed as the sole author. If a 'form of attribution' of the Consultant's authorship is provided by the Consultant and stated in **Item 7** of **Schedule A**, you must use that form of attribution in all Public Material about the Project distributed or communicated by you. You also need to make all reasonable efforts to have the Client do so too, if they use the Public Material. This obligation would include, for example, using the Consultant's form of attribution for their contribution to the design if the Project is entered into the Institute Awards.

Public Material is defined as: all information or material, whether in digital or printed format, containing a 2- or 3-dimensional representation of the Project, or a substantial part of it, published, exhibited or communicated to persons other than the Client or Architect (or their representatives), whether or not the Project is completed or complete, or is or will be modified, extended or demolished.

If at the time you enter into the Agreement **Item 7** has not been completed, then the Consultant is effectively agreeing, as well as on behalf of each individual author of the Specialist Design, that they do not need to be attributed as authors in all Public Material. It's the Consultant's responsibility to tell you whether, and who the other authors are and you can rely on the information given or representations made by the Consultant about the authorship of the Specialist Designs.

You are entitled to rely on the information and form of attribution given by the Consultant about the authors and that the consent of all individual authors to that form of attribution was properly obtained by the Consultant. If there is any doubt, explain to the Consultant what is required here and the consequences of **Item 6** being left blank.

Electronic data transfer: Under **clauses F.3a** to **F.3d**, the parties agree that you can issue data electronically (i.e. in a digital format); but that the party supplying is not responsible for accuracy, completeness or non-contamination of that data. Bear in mind that under clause F, the "data" being transmitted electronically is not the same thing as the accuracy and completeness of the drawings or specialist work the Consultant or Architect has put into the digital files.

Both parties should understand that although they are not obliged under this agreement to give each other digital drawing files (or a specific digital format), they can agree to do so if a valid digital file format is inserted in **Item 8**.

Agreeing to exchange digital files, or digital files in the format stated in **Item 8**, does not make the party that supplies them responsible for accuracy, completeness or non-contamination.

You should be aware that whether the parties will exchange digital files may influence the Consultant's or a sub-consultant's fee. Whether the parties share them in a particular digital format may also be a factor in the amount of the Consultant or sub-consultant's fee. If the position is unclear, you should ask the Consultant for fee alternatives.

G. Insurance and Liability

In **Clause G.1** the Consultant agrees to maintain insurance cover for public liability, professional indemnity and workers compensation. The latter two insurances may be required by law in the relevant state or territory.

Level of cover: For professional indemnity and public liability, you can specify minimum dollar value levels of cover for each in **Item 9** of **Schedule A**. You may want to discuss and negotiate with your Consultant what those minimum levels should be. Factors to be considered when deciding what minimum level of cover you should insert are: the value of the Project; the value of the Specialist Services; your potential legal liability 'in turn' to the Client under your client architect agreement; your current level of insurance cover; and the Consultant's current level of insurance cover.

Liability to You:

Clause G.2 is intended to give you a right to be indemnified and compensated by the Consultant, for as long as you are exposed to liability to the Client (or to a third party) and to the extent that the Consultant has some responsibility for that liability arising. For example, liability might arise:

- in contract under the client-architect retainer, if the Project design is not delivered as contractually promised;
- under tort law, if someone is injured because of something negligent in the design of the Project; or
- because legislation or regulations make you liable for certain acts done or not done by you, in connection with the design of the Project.

This right to be compensated or reimbursed by the Consultant (or their insurer, where applicable) is triggered where:

- You have incurred or suffered some cost, loss or damage, and
- The Consultant has caused or contributed to that cost, loss or damages, by their negligence, recklessness or other wrongdoing (including by their employees or consultants).

However, the amount of the indemnity the Consultant (or the Consultant's insurer) will be required to compensate you will be reduced by the amount of cost, loss or damage for which you (or your employees or direct consultants) have caused or incurred because of your own negligence, recklessness, illegal act, or failure to act (an omission).

Depending on the terms of your client architect agreement, you may or may not be liable to your Client under that agreement for some limited time. If so, this would enable you to limit the Consultant's liability in time as well. However, you cannot avoid or limit your liability for personal injury or harm to a third party sooner in time than the statutory limits specify. Remember that statutory limits take priority over any contractual limits. If necessary, you should get legal advice about this, or speak to your professional indemnity insurer or broker.

It is recommended that you use the CAA for the retainer between you and your client. It provides you with options, if your client agrees, to limit the period of time for which you are liable to the client for breach of contract and for liability in tort.

Consumer Law obligations:

The *Trade Practices Act* and parallel state and territory fair trading legislation have all been replaced by the Australian Consumer Law (**the ACL**). The ACL and equivalent state provisions apply to persons, corporations and partnerships who carry on business in Australia.

Sections 60 and 61 of the ACL contain warranties implied by the law that businesses give to their 'customers' when conducting their business. These warranties potentially also apply to business to business transactions, like the Specialist Services the Consultant will provide to you. To the extent that any part of the Specialist Services falls within the consumer-protection warranties contained in the ACL, the Consultant will only need to supply those deficient parts of the Specialist Services again to you, or effectively refund the cost of those services.

Note that if the Consultant is an engineer, the "fitness for purpose" warranty in the ACL does not apply to their services to you (or the client). Both engineers and Architects have a specific exemption from this consumer warranty in the ACL.

If you find yourself in circumstances where you might need to rely on this **clause G**, you should get legal advice and notify your insurer as soon as practical.

H. Consultant Obligations

Clauses **H.1.** to **H.12.** list the general obligations of the Consultant to you and specific obligations not set out elsewhere in the ASCA2017.

The following list is a summary of the 'essential' obligations the Consultant must strictly observe throughout the agreement:

- Deliver the Extent of Work and exercising reasonable skill, case and diligence.
- Be solely responsible to deliver the Specialist Services (unless a Sub-Consultant engaged under **clause E** is responsible for some part of the Specialist Services).
- Work co-operatively with you and contribute to the efficient progress and satisfactory development of the design and other services provided by you to the client.
- Not give instructions directly to the building contrator and only give instructions for the builder to you.
- Not contact the client, without your prior permission to do so...
- Maintain all professional or technical registration required to deliver the Specialist Service.

These obligations are considered 'essential' on the basis that: if the Consultant had not promised under the Agreement to strictly deliver on them, the ordinary, reasonable architect would not have engaged the Consultant on any lesser terms or expectations. Under **clause M.2**, if the Consultant fails to observe or breaches these essential obligations (and the clauses listed on page 15), you may immediately terminate the Agreement by giving written notice.

We suggest you become very familiar with these obligations because they reflect rights you can rely on, should you need to more closely manage the delivery of the Consultant's services.

Errors or omissions:

If a potential error or omission becomes apparent in the Consultant's work, the Architect can ask for clarification or corrections from the Consultant. Under **clause H.12**, the Consultant must promptly give a written response to that request. However, clause C says that the Consultant is not entitled to be paid (and can't claim) the time cost of making any correction or clarification where the Consultant is at fault.

If the Consultant gives a correction or clarification to you in person or by telephone, the Consultant must then confirm that in writing, including by sending an email. See the suggestions about using email under heading Cover Page > E-mail.

It is important to ensure you get all such clarifications and corrections from the Consultant in writing for your records. This will also help avoid the potential for confusions or disputes during the course of the agreement.

I. Not Used

So that the parties (and their legal advisers) can avoid confusion over trying to identify a clause I.1.i.

J. Architect Obligations

Clauses J.1 to **J.5**, sets out your obligations to the Consultant not specifically described elsewhere in the ASCA2017.

Most importantly, you must be and remain registered with the registration board in the state or territory where the Project is located, for the whole time this Agreement is in place. If you are not registered as an architect and want to use the ASCA2017 as a non-architect, you will need to amend this obligation by way of a Special Condition. See the considerations at page 5.

K. General Conditions

Clauses K.1. to **K.7.** set out the general conditions of the ASCA2017. These terms override all other terms elsewhere in the ASCA2017 (where there is a conflict), but adding in Special Conditions will override clause K.

In summary, you and the Consultant also agree that:

1. A party needs the prior written consent of the other party to transfer or pass their obligations or entitlements under the Agreement to another party.
2. A party needs the prior written consent of the other party to change this agreement.
3. The laws that apply to the Agreement are those of the state or territory where the Project is located (including all Commonwealth laws).
4. Nothing makes ineffective, or reduces, your or the Consultant's protection from liability according to the laws of the state or territory of the Project.
5. This agreement is the final agreement between the parties and overrides all previous agreements, representations or understandings between you and the Consultant.
6. The 'postal rule' applies: a document or notice under the agreement sent by post is assumed to have been received by the receiving party 3 days after the sender posted it (and 7 days for international mail).
7. Notices or documents sent by fax (provided an error-free transmission report is received) after 5pm; and email delivery receipts received by the sender after 5pm, are treated as having been delivered on the next business day.

For paragraph 5 to be effective for the benefit of both you and the Consultant, this agreement (including special conditions) needs to accurately reflect those things communicated and agreed between the parties before it is signed.

L. Dispute Resolution

This clause sets out the agreed procedure for dealing with disputes under the ASCA2017 between you and the Consultant. If a dispute or disagreement arises, both you and the Consultant must continue to perform your respective obligations.

Either you or the Consultant can give written notice to the other of the details of the dispute. Both parties must then meet within 7 days after the notice is received. At this meeting, both parties must make a genuine attempt to resolve the dispute.

If the dispute is not resolved at that meeting or within 21 days after it, **paragraph b** provides that either party may refer the dispute to mediation by giving a written notice to the other. This 'Proposal of Mediation' must state the name of an accredited mediator from the Resolution Institute in the relevant state or territory, who is independent of both parties and willing to act.

Under **paragraph c**, you and the Consultant must agree in writing to the mediator within seven days after the other party receives the proposal. If the parties don't or can't agree, either party (usually the proposer) must ask the Chapter President of the Resolution Institute to nominate a suitable mediator.

The mediation must follow the rules of the Resolution Institute for a mediation. Both parties will be required to each pay half of the costs of mediation.

If the mediation does not resolve the dispute or disagreement, the mediator will then confirm this in writing. Only after this confirmation is given, can you or the Consultant take legal action outside this procedure to resolve or settle the dispute.

Other Disputes: The Consultant also has an obligation to comply with all reasonable requests from you to assist with a dispute between you and the Client or you and any sub-consultant, provided the dispute that has some connection with the Specialist Services. Such assistance might include attending dispute resolution meetings between the parties, providing copies of documents, giving evidence or attending mediations, arbitrations or court. The Consultant is entitled to be paid the reasonable costs of doing so by the Architect.

M. Termination

Under **clause M.1,** either party may give the other notice that they want to terminate the agreement. If so, that party must first give notice in writing at least 30 days in advance of the intended date of termination. A party does not need to give a reason for deciding to terminate under this clause.

Under **clause M.3**, if the Consultant breaches or doesn't strictly carry out a term or obligation that is of fundamental importance to the agreement (called an Essential Term), the architect can terminate the Agreement, effective immediately, by giving the Consultant a notice in writing under **clause M.3**. You don't have to give reasons for terminating under this clause, but your notice must specify which Essential Term the Consultant has breached.

The Essential Terms are clauses: **A, B.4, F.1a, G.1 and clauses H.1, H.2, H.4, H.6, and H.10**.

Under **clause M.4**, after this Agreement is properly terminated you must (unless the parties otherwise agree in writing) pay the Consultant:

1. All outstanding amounts of the Service Fee for all Invoice or Payment Claims (whichever is applicable) submitted in accordance with **clause C.1**. However, you are not obliged to include those amounts you have disputed, unless the resolution of a dispute or operation of a SOP Act requirement says you must.
   PLUS
2. All Delay Costs approved before the termination date
   PLUS
3. All outstanding disbursements submitted for payment by the Consultant in accordance with **clause C.4.**
   LESS
4. If you choose, the dollar value of reasonable costs you incurred in connection with the termination. It doesn't matter whether you or the Consultant terminated the agreement.

If you are considering terminating this agreement or the contractor is attempting to terminate it, we recommend you get legal advice.

N. Special Conditions

The effect of this clause is to incorporate into the terms of the ASCA2017 those special conditions that the parties insert in **Schedule B**. A special condition inserted in **Schedule B** takes priority over and overrides any other term of the ASCA2017.

For this reason, we recommend that you only amend the terms of the ASCA2017 by inserting special conditions in **Schedule B,** other than where you cross out by hand the services listed in **clauses A.1** to **A.4.** For how to do this, see page 2.

It is recommended that both parties get their own legal advice to assist writing and incorporating special conditions. Otherwise there is a risk that the special conditions may not be binding; or you unintentionally affect the operation of other clauses of the ASCA2017; or they create a conflict with applicable laws.

