

**DRAFT**

**XYZ LIMITED**

**and**

**ESP CONSULTING PTY LIMITED**

---

**MUTUAL CONFIDENTIALITY AGREEMENT**

---

**THIS AGREEMENT** is made on the \_\_\_\_\_ day of \_\_\_\_\_ 2005  
between the following parties:

**BETWEEN XYZ LIMITED**, ACN \_\_\_\_ \_\_\_\_, (XYZ) having its registered office at ,  
15 XXXXXX Avenue, Rhodes, NSW, 2215, Australia.

**AND ESP CONSULTING PTY LIMITED**, ACN 074 096 825, (ESP) having  
its registered office at Level 1/94 Millwood Avenue, Chatswood, NSW,  
2067, Australia.

### **RECITALS**

- A. XYZ proposes to engage ESP to perform professional services ("SERVICES") for XYZ.
- B. SERVICES supply will be the subject of separate agreements ("SERVICE AGREEMENTS") which will be negotiated from time to time.
- C. In order for ESP to perform its SERVICES, it will be necessary for ESP to receive confidential information from XYZ.
- D. XYZ owns a body of technology, trade secrets and technical know-how and data which comprise valuable secret and confidential proprietary information of XYZ (hereinafter called "XYZ 's Confidential Information").
- E. ESP owns a body of professional methodologies, secrets and business development know-how and information which comprise valuable secret and confidential proprietary information of ESP (hereinafter called ESP's Confidential Information").
- F. XYZ and ESP wish to establish a long term relationship for the supply of SERVICES, the subject of SERVICE AGREEMENTS as negotiated from time to time ("Permitted Purpose").
- G. In the course of carrying out the Permitted Purpose the parties will be disclosing to each other all or some of their respective Confidential Information.

## 1. INTERPRETATION

### 1.1 In this Agreement:

**"Confidential Information"** means know-how, trade secrets, commercial, business, marketing, strategy, technical or scientific information including information relating to any discoveries, theories or hypotheses, Intellectual Property, as well as details of any SERVICE AGREEMENTS, SERVICES and any personnel involved or any other information included in:

- (i) XYZ's Confidential Information; and/or
- (ii) ESP's Confidential Information'

which the disclosing party discloses to the receiving party either orally, electronically or in writing , whether that information is information of the disclosing party, any of its Related Bodies Corporate or any other person PROVIDED THAT at no time will ESP's Confidential Information include or be deemed to include XYZ 's Confidential Information, or will XYZ's Confidential Information include or be deemed to include ESP's Confidential Information.

**"copy"** includes to reproduce or store in any manner and on any medium.

**"Corporations Law"** means the corporations law applying throughout Australia.

**"Intellectual Property"** includes all rights of ownership and the exclusive entitlement to claim ownership and/or registration of exclusive rights created under or by copyright, design registration, patent registration, trade mark registration and all such other exclusive rights in or to intangible property, including rights in present and future intangible property and rights in information, granted by law or equity from time to time.

**"Officer"** has the same meaning as in the Corporations Law.

**"Permitted Purpose"** means the purpose referred to in the Recital to this Agreement.

**"Related Bodies Corporate"** will have a meaning corresponding to the meaning given to "related body corporate" in the Corporations Law.

1.2 In this Agreement:

- (a) words importing the singular include the plural and vice versa and words importing one gender include the other gender;
- (b) headings do not affect the interpretation of this Agreement;
- (c) the reference to a person includes a company, statutory corporation, joint venture, partnership or governmental body;
- (d) a reference to any statute or act includes a reference to regulations, by-laws, ordinances or any other subordinate legislation together with any amendments or consolidations.

**2. OBLIGATION OF CONFIDENTIALITY**

- 2.1 The receiving party acknowledges that the Confidential Information is information that is owned by, or in the lawful possession of the disclosing party and is information of a confidential nature which will cause loss or damage to the disclosing party if it is disclosed contrary to the provisions of this Agreement.
- 2.2 The receiving party acknowledges that the disclosing party has disclosed the Confidential Information to it solely for the Permitted Purpose and the receiving party agrees to use the Confidential Information only for the Permitted Purpose.
- 2.3 In return for the disclosing party disclosing the Confidential Information to the receiving party in terms of Clause 2.2 the receiving party agrees that:
- (a) it will not disclose the Confidential Information to any person or make use of or take advantage of the Confidential Information for any purpose other than as specifically permitted by this Agreement;
  - (b) it will take all reasonable steps necessary to ensure that the Confidential Information is kept confidential;
  - (c) it will not copy the Confidential Information or permit the copying of the Confidential Information in any form other than as permitted by this Agreement;

- (d) upon request, it will return to the disclosing party any Confidential Information, together with any copies of that Confidential Information;
- (e) except in the case of a bona fide dispute with the disclosing party in relation to the Confidential Information, it will not seek to invalidate or contest the disclosing party's ownership of the Confidential Information;
- (f) it will immediately after becoming aware of it, notify the disclosing party of the occurrence of any circumstance where the Confidential Information is used by any person other than pursuant to an obligation of confidentiality in terms of this Agreement;
- (g) it will mark all Confidential Information showing that it is owned by the disclosing party and subject to an obligation of confidentiality and quarantine that Confidential Information from any other information in the possession of the receiving party;
- (h) it will take all necessary steps to ensure that the Confidential Information is protected against unauthorised use and damage; and
- (i) it will not make use of the Confidential Information in any manner so as to obtain any benefit, right or privilege for itself or for any other person that would not have been available but for it having access to the Confidential Information.

### **3. PERMITTED DISCLOSURE**

3.1 The receiving party may:

- (a) subject to Clause 3.2, copy the Confidential Information; or
- (b) , disclose the Confidential Information to any Officer, employee or agent of the receiving party who have a specific need to have access to the Confidential Information, but only to the extent that such copying or disclosure is necessary in order to carry out the Permitted Purpose.

3.2 If the receiving party is permitted by this Agreement to copy the Confidential Information, it must:

- (a) keep a record of all copies and make those records available to the disclosing party on request;
- (b) take all precautions to ensure that the copies are protected from unauthorised access or from damage; and
- (c) ensure that the copies are returned to the disclosing party or in the case of copies stored or reproduced other than in a physical form, expunged at the earlier of:
  - (i) a request being made by the disclosing party; or
  - (ii) upon completion of the tasks or discussions in connection with the Permitted Purpose.

3.3 If the receiving party is permitted to disclose the Confidential Information to an Officer, employee or agent who is not already subject to an obligation of confidentiality in the terms of this Agreement, then unless the disclosing party otherwise provides, it must first:-

- (a) ensure that each of such persons executes a confidentiality agreement in the form set out in Annexure A to this Agreement; and
- (b) obtains the consent of the disclosing party to such disclosure.

3.4 Nothing in this Agreement will prohibit the receiving party from disclosing so much of the Confidential Information as is required to be disclosed by law. The receiving party will notify the disclosing party if such a disclosure is made and will also take advantage of any provisions pursuant to that law which restricts the amount of or the nature of the information liable to be disclosed or which provides a mechanism for protecting the confidentiality of the disclosed information.

#### **4.0 LIABILITY**

4.1 The receiving party agrees that:

- (a) it will be liable for any unauthorised disclosure of the Information by its Officers, employees or agents, and
- (b) it will be liable for any breach of a confidentiality agreement executed by any party referred to in Clause 3.3.

## **5. MISCELLANEOUS**

- 5.2 This Agreement will be governed and construed in accordance with the laws of the State of New South Wales and the Commonwealth of Australia and the parties agree to submit to the non-exclusive jurisdiction of the courts of New South Wales.
- 5.3 If any clause or part of a clause is held or be deemed invalid or unenforceable for any reason then that clause or that part of the clause will be deemed to be deleted from this Agreement and the Agreement will otherwise remain in full force and effect.
- 5.4 No forbearance, delay or indulgence by a party in enforcing the provisions of this Agreement will prejudice or restrict the rights of that party nor will any waiver of those rights operate as a waiver of any subsequent breach.
- 5.5 Nothing in this Agreement should be construed as rendering either party the servant, agent or employee of the other for any purpose.
- 5.6 Each party will pay their own legal costs in respect of this Agreement.
- 5.7 The parties agree that in addition to obtaining damages for any breach of this Agreement a party may obtain injunctive, declaratory or any other relief at law, equity or under any applicable legislation in relation to any such breach or any threatened breach of this Agreement.
- 5.8 The obligations of confidentiality and non-use imposed upon the receiving party under the terms of this Agreement shall apply for a minimum period of five (5) years from the date of execution of the last Services Agreements.
- 5.9 Nothing in this Agreement shall be construed so as to impose any obligations upon either party to disclose Confidential Information to the other party.
- 5.10 ESP and XYZ hereby respectively severally warrant and confirm that the signatory to this Agreement on each party's respective behalf is authorised to sign for and on that party's behalf and to so bind that party.

**EXECUTED BY THE PARTIES AS AN AGREEMENT**

SIGNED for and on behalf of **XYZ LIMITED**  
by its duly authorised Officer in the presence of:

.....  
Signature

.....  
Witness

\_\_\_\_\_  
Name in BLOCK letters

\_\_\_\_\_  
Name in BLOCK letters

\_\_\_\_\_  
Title

SIGNED for and on behalf of  
**ESP CONSULTING PTY LIMITED** by its duly  
authorised Officer in the presence of:

.....  
Signature

.....  
Witness

\_\_\_\_\_  
Name in BLOCK letters

\_\_\_\_\_  
Name in BLOCK letters

\_\_\_\_\_  
Title

**ANNEXURE "A"**

I, \_\_\_\_\_, the undersigned, HEREBY DECLARE that I have read and am familiar with the provisions of a certain Mutual Confidentiality Agreement dated \_\_\_\_\_ 2005 between XYZ LIMITED (XYZ) and ESP CONSULTING Pty Limited ("ESP") ("Mutual Confidentiality Agreement") and in particular the non-disclosure & confidentiality provisions contained in that Mutual Confidentiality Agreement.

Terms defined in the Mutual Confidentiality Agreement shall have the same meaning when used herein. In regard to the Mutual Confidentiality Agreement I HEREBY COVENANT AND AGREE AS FOLLOWS:

1. I shall keep all Confidential Information known to and possessed and controlled by me strictly secret and confidential.
2. I shall not make any use whatsoever of confidential information except for the purposes specified in a ESP-XYZ SERVICES Agreement.
3. I shall not reveal or disclose any Confidential Information to any person unless such person is an authorised person.
4. I shall, at any time on demand of XYZ or of ESP, return all Confidential Information then in my possession or under my control to XYZ or as it directs.
5. I will comply with all the terms and conditions of the Mutual Confidential Agreement.

The foregoing commitments are made by me both to ESP by virtue of my receiving Confidential Information from or employment by the ESP and to XYZ by virtue of the obligations placed on ESP in the Mutual Confidentiality Agreement to secure such commitments from me. If I am an employee I understand that the foregoing commitments will survive termination of my employment by ESP for any reason whatever or if I am not an employee I understand that the foregoing commitments will survive any retainer contract or other relationship between me and ESP.

**SIGNED** by \_\_\_\_\_

\_\_\_\_\_  
Name in BLOCK letters

in the presence of:

\_\_\_\_\_ Title

Signature, Witness \_\_\_\_\_

\_\_\_\_\_  
Name in BLOCK letters