DEED OF CONFIDENTIALITY AND FIDELITY (CORE)

This Deed Poll is made on **(INSERT DATE)** by:

**(INSERT NAME OF CONFIDANT AND ACN/ARBN AND ABN AS APPLICABLE)** (**’the Confidant’**) in favour of the Commonwealth of Australia as represented by the Department of Defence ABN 68 706 814 312 (**‘the Commonwealth’**) and the Relevant Third Party.

RECITALS:

1. In performance of any of its obligations in relation to the **(INSERT CONTRACT NUMBER)** dated **(INSERT DATE)** for the provision of **(INSERT BRIEF DESCRIPTION)** (**‘Agreement’**), the Confidant may become aware of or have access to Confidential Information belonging to the Commonwealth, the Relevant Third Party or another person.
2. The Commonwealth requires and the Confidant agrees that it is necessary to take all necessary steps (including the execution of this Deed for the benefit of the Commonwealth and the Relevant Third Party) to ensure that the Confidential Information is kept confidential, is not disclosed to any party that is not authorised to receive it and is only used for the Permitted Purposes.

AGREED TERMS

1. ACKNOWLEDGEMENT
   1. The Confidant acknowledges the truth and accuracy of the statements in the Recitals in every particular.
2. Definitions
   1. In the interpretation of this Deed, unless the contrary intention appears:

‘Confidential Information’ means information (whether or not owned by the Commonwealth or a Relevant Third Party) that meets all of the following criteria:

* + - 1. is specifically identified at Schedule 1 to this Deed;
      2. is commercially sensitive (not generally known or ascertainable);
      3. disclosure would cause unreasonable detriment to the owner of the information or another party; and
      4. was provided with an express or implied understanding that it would remain confidential;
      5. but does not include information which:
      6. is or becomes public knowledge other than by breach of this Deed;
      7. is in the possession of the party without restriction in relation to disclosure before the date of receipt; or
      8. has been independently developed or acquired by the receiving party.

‘Documents’ include:

* + - 1. any paper or other materials on which there are writing, marks, figures, symbols or perforations having meaning for persons qualified to interpret them; and
      2. any article or material from which sound, images or writings are capable of being reproduced with or without the aid of any other article or device.

‘Permitted Purposes’ means

* + 1. the purposes described in Schedule 1 to this Deed; and
    2. any other purpose that may be approved in writing by the Commonwealth from time to time.

‘Personnel’ means any officer, employee, agent, adviser or independent contractor of the Confidant.

‘Relevant Third Party’ means each entity, if any, described in Schedule 1 to this Deed, or as notified to the Confidant by the Commonwealth from time to time.

‘Working Day’, means, in relation to the doing of an action in a place, means any day in that place other than:

* + 1. a Saturday, Sunday or public holiday in that place; and
    2. any day within the two-week period that starts on:
       1. the Saturday before Christmas Day; or
       2. if Christmas Day falls on a Saturday, Christmas Day.

1. Interpretation
   1. In this Deed, unless the contrary intention appears:
      1. headings are for the purpose of convenient reference only and do not form part of this Deed;
      2. the singular includes the plural and vice versa;
      3. a reference to one gender includes any other;
      4. a reference to a person includes a body politic, body corporate or a partnership;
      5. if the last day of any period prescribed for the doing of an action falls on a day which is not a Working Day, the action shall be done no later than the next Working Day;
      6. a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended from time to time, and includes a reference to any subordinate legislation made under the Act;
      7. a reference to a clause includes a reference to a subclause of that clause;
      8. a reference to a ‘dollar’, ‘$’, ‘$A’ or ‘AUD’ means the Australian dollar unless otherwise stated;
      9. a reference to a specification, publication, Commonwealth policy or other document is a reference to that specification, publication, Commonwealth policy or document, in effect on date of entering into the Deed, or alternatively, a reference to another version of the Document if agreed in writing between the parties;
      10. the word “includes” in any form is not a word of limitation; and
      11. a reference to a party includes that party’s administrators, successors, and permitted assigns, including any person to whom that party novates any part of this Deed.
2. Confidentiality Undertakings
   1. The Confidant:
      1. acknowledges and agrees that this Deed is for the benefit of the Commonwealth and any Relevant Third Party and is directly enforceable by the Commonwealth or any Relevant Third Party, even though they are not parties to this Deed;
      2. shall ensure that the Confidential Information is kept confidential and secure from disclosure;
      3. shall only use the Confidential Information for the Permitted Purposes;
      4. shall not without the prior written consent of the Commonwealth, disclose or permit any person to disclose any of the Confidential Information to any person, other than its Personnel who:
         1. have a need to know and access the Confidential Information in order for the Confidant to carry out the Permitted Purposes; and
         2. where required by the Commonwealth, have executed a similar undertaking to this Deed in favour of the Commonwealth and each Relevant Third Party,

and the Commonwealth may grant or withhold its consent; and

* + 1. shall promptly notify the Commonwealth of any unauthorised possession, disclosure or use of the Confidential Information contrary to this Deed, and take all steps necessary to prevent the recurrence of such possession, disclosure or use.
  1. The restrictions imposed by this Deed in relation to Confidential Information will not apply to the disclosure by the Confidant or its Personnel of any Confidential Information to the extent it is required to be disclosed by law or court order.
  2. The Confidant acknowledges that it may be provided with the ability to access Commonwealth-held information (in addition to the Confidential Information) in connection with its performance of the Permitted Purposes, including through access to Commonwealth information technology systems. Without limiting the Confidant’s other obligations under this Deed or otherwise at law, the Confidant shall not seek to access or use Commonwealth-held information except to the extent strictly required to undertake the Permitted Purposes.

1. Confidant’s Representatives
   1. The Confidant shall ensure that its Personnel (whether or not still employed or engaged in that capacity) do not do or omit to do anything which, if done or omitted to be done by the Confidant, would be a breach of the Confidant’s obligations under this Deed.
   2. The Confidant shall give the Commonwealth all assistance it reasonably requires to take any action or bring any proceedings for breach of the undertaking contained in clause 5.1.
2. Return of Confidential Information
   1. Without limiting the Confidant’s obligations at law, the Confidant shall deliver to the Commonwealth or the Relevant Third Party (as applicable), or destroy or erase, as required by the Commonwealth, all Documents and any other material (including electronically stored or otherwise) in its possession, power or control which contain or relate to the Confidential Information on the earlier of:
      1. demand by the Commonwealth, and
      2. the time the Documents and any other material are no longer required for the Permitted Purposes.
   2. If the Commonwealth makes a demand under this clause 6, and the Confidant has placed or is aware that Documents containing the Confidential Information are beyond its possession or control, then the Confidant shall provide full particulars of the whereabouts of the Documents containing the Confidential Information, and the identity of the person in whose custody or control they lie.
   3. The Confidant shall ensure that its Personnel and each person to whom it (or its Personnel) has disclosed any Confidential Information comply with the requirements of this clause 6 as if personally bound by it.
   4. Return or destruction of any Confidential Information does not release the Confidant from its obligations under this Deed.
3. Survival
   1. This Deed shall survive the termination or expiry of the Agreement.
4. Indemnity
   1. The Confidant indemnifies the Commonwealth and the Relevant Third Party, their officers, employees and agents against all liability or loss arising directly or indirectly from, and any costs, charges and expenses (including the cost of settling any action) arising or incurred in connection with:
      1. any breach by the Confidant of this Deed; or
      2. any act or omission by any of the Confidant’s Personnel which, if done or omitted to be done by the Confidant, would breach of the Confidant’s obligations under this Deed.
5. Injunctive Relief
   1. The Confidant acknowledges that damages may not be a sufficient remedy for the Commonwealth or a Relevant Third Party for any breach of this Deed and that the Commonwealth and each Relevant Third Party is entitled to injunctive relief (as appropriate) as a remedy for any breach or threatened breach by the Confidant, in addition to any other remedies available at law or in equity.
6. Waiver
   1. Failure by the Commonwealth or a Relevant Third Party to enforce a provision of this Deed shall not be construed as in any way affecting the enforceability of that provision or this Deed as a whole.
7. Remedies Cumulative
   1. The rights and remedies provided under this Deed are cumulative and not exclusive of any rights or remedies provided by law, in equity or any other such right or remedy.
8. Other Instruments
   1. Subject to the other covenants of this Deed, the rights and obligations of the Commonwealth, each Relevant Third Party and the Confidant pursuant to this Deed are in addition to and not in derogation of any other right or obligation between the Commonwealth, Relevant Third Party and the Confidant under any other deed or agreement to which they are parties.
9. Variations and Amendments
   1. No term or provision of this Deed shall be amended or varied unless such amendment or variation is agreed by the Commonwealth in writing.
10. Applicable Law
    1. The laws of **[INSERT STATE/TERRITORY]** shall apply to this Deed. The courts of that State or Territory shall have non-exclusive jurisdiction to decide any matter arising out of this Deed.
11. Notices
    1. Unless the contrary intention appears, any notice under this Deed shall be effective if it is in writing and sent from and delivered to the Commonwealth or Confidant, as the case may be, as detailed below:
       1. **[INSERT COMMONWEALTH ADDRESS, FAX NUMBER AND EMAIL]**; or
       2. **(INSERT CONFIDANT ADDRESS, FAX NUMBER AND EMAIL)**.
    2. A notice given in accordance with this clause 15 is deemed to be delivered:
       1. if hand delivered, when received at the address;
       2. if sent by pre-paid post, in three Working Days when sent within Australia and in eight Working Days when sent by air mail from one country to another;
       3. if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the total number of pages of the notice unless within one Working Day after that transmission, the recipient informs the sender that it has not received the entire notice; or
       4. if sent as an email, when the email enters the recipient’s information system, unless the sender’s information system receives a message within one Working Day that the email has not been delivered to the recipient,
    3. but if the receipt, transmission or entry into the information system is not on a Working Day or is after 5.00pm (recipient's local time) on a Working Day, the notice is deemed to be delivered at 9.00am (recipient’s local time) on the next Working Day.

SIGNED AS A DEED POLL

Note for Deed Signature: Guidance on executing agreements, including some statutory requirements to ensure the execution is effective, are detailed in the ‘Executing Agreements Fact Sheet’, found on the Procurement and Contracting intranet page at:

<http://drnet.defence.gov.au/casg/commercial/CommercialPolicyFramework/Pages/Factsheets-and-Guidance.aspx>

This guidance is developed for Commonwealth Personnel and should be used to assess the Confidant’s execution of the Deed. The Confidant should seek its own independent legal advice on its execution of the Deed.

**(INSERT APPROPRIATE CONFIDANT’S EXECUTION CLAUSE)**

**SCHEDULE 1**

1. CONFIDENTIAL INFORMATION

Note to drafters: It is essential to describe the specific Confidential Information that may be used and provided to the Confidant.

* 1. **(INSERT CONFIDENTIAL INFORMATION BEING PROVIDED)**

1. PERMITTED PURPOSES

Note to drafters: It is essential to describe the Permitted Purposes for which the Confidential Information may be used by the Confidant. The intention of this part of this Annex is to clearly and accurately define the scope of those Permitted Purposes and so confine its use for only those purposes.

1. RELEVANT THIRD PARTY

Note to drafters: Identify any Relevant Third Party with as much precision as possible. If necessary, this can be done by identifying an entity such as a company, or by describing a class of persons that can be readily identified, eg the authors of specified material.