1. DEFINITIONS
In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

"Agreement" and "this Agreement" means and comprises of the terms and conditions of this Agreement which includes the Registration Form, the Hourly Rates as notified from time to time, the Client's written acceptance of/approval to proceed with the Services or the Client's purchase order indicating acceptance/approval to proceed with the Services but excludes Client's terms of business (which may be specified in writing in the Client's Purchase Order);

"Approved Access" means the scope and extent of the Client's approved access to the Resources as set out in the 'Mode of access' entry of the Registration Form;

"Curtin" means Curtin University of Technology and includes its officers, employees, agents and sub-contractors;

"Client" means the recipient of the Services, whether a Company or an Individual, but for the purpose of access to the Premises means the individual detailed in the Registration Form;

"Commencement Date" is the most practical date for commencement of the Services, as agreed between the Parties;

"Confidential Information" means:
(a) information revealed in confidence by Client or Curtin of either to the other of them;
(b) information designated as confidential by Client or Curtin or of either;
(c) proprietary information including but not limited to trade secrets and proprietary know how of Client or Curtin or of either;
(d) information in or relating to the business of Client or Curtin;
(e) any other information relating to Client or Curtin or of either classifiable in equity as confidential information;
(f) subject to the above, includes but shall not be limited to the following sources of information: source codes, object codes, manufacturing methods, processes, techniques, products, engineering methods, programs and program developments, program listings including microcode and associated manuals, user manuals, programming manuals, modification manuals, flow charts, drawings, models, drafts, diagrams, methods of operation, marketing studies, marketing plans, customer lists and customers; and
(g) extends to all forms of storage or representation of the information referred to above including but not limited to loose notes, diaries, memoranda, drawings, photographs, electronic storage and computer printouts and excludes information which:
(i) is or becomes part of the public domain otherwise than as a result of unauthorised disclosure by the recipient;
(ii) has been independently acquired by the recipient;
(iii) becomes available to the recipient from a source other than the disclosing party and who has not obtained it directly from the disclosing party; or
(iv) is required to be disclosed by law.

"Health and Safety Laws" means all laws and requirements concerning the health, safety and welfare of people at work as amended from time to time;

"Hourly Rates" means the hourly rates provided to the Client upon request, as updated from time to time;

"Intellectual Property Rights" means all but is not limited to copyright, patents, trade marks, designs, inventions, trade secrets, ideas, know how, concepts and techniques and all other intellectual property rights as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation, 1963;

"New Technology" means any processes, procedures, methods, designs, formulations, inventions or improvements to them that are conceived, instigated, made, invented or suggested by the parties at any time during the term of this Agreement or within two years thereafter if connected with or arising out of the provision of the Services or with Confidential Information acquired in providing the Services.

"Parties" means the Client and Curtin;

"Permitted Purpose" means the purpose of accessing the equipment specified in the 'Resources to be accessed' section of the Registration Form for which the Client may have access to the Premises;

"Premises" means the Electron Microscope and/or X-Ray Diffraction Facilities, to which the Client may have authorised access for the purposes of this Agreement;

"Registration Form" means the Registration Form provided along with this Agreement;

"Resources" means the equipment to be accessed by the Client pursuant to this Agreement, as more particularly set out in the 'Resources to be accessed' entry of the Registration Form;

"Results" means the results of any testing services provided by Curtin;

"Services" means the services, right of access and/or supply of any report to be provided by Curtin as mutually agreed in writing between the Parties from time to time, and includes an individual instance of the services if the services are to be repeated more than once during the Term;

"Term" means the period that Curtin is to provide the Services under this Agreement as specified in the Registration Form.

2. INTERPRETATION
In this Agreement, unless the contrary intent appears:
(a) a reference to a legislation includes any amendment to that legislation, any consolidation or replacement of it, and any subordinate legislation made under it;
(b) a reference to the singular include the plural and vice-versa;
(c) a reference to a “person” includes an individual, a body corporate, a trust, an agency and other body;
(d) a reference to the Consultant includes a reference to its executors, administrators, successors and assigns;
(e) an obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally.

3. SERVICES
3.1 Curtin shall provide the Services to the Client in a professional manner.

4. TERM
4.1 The Services shall commence on the Commencement Date and shall be provided for the Term. Each separate instance of the Service is subject to these terms and conditions.

5. REMUNERATION
5.1 The Client shall pay Curtin the fees agreed between and Client and Curtin at the time that the Services are requested of Curtin (whether at the time of registration or a later time), which shall be calculated in accord with the Hourly Rates, including GST and where applicable local duties and taxes.

5.2 Subject to clause 5.3, the fees agreed as described in clause 5.1 for the Services are the total charges payable by the Client. No further charges shall be made on account of government levies or charges as any other item of expenditure but the Client shall reimburse Curtin for any agreed out of pocket expenses at cost plus an administration charge.

5.3 If any law is introduced, amended or takes effect that has the result of increasing the rate of any taxes (including the goods and services tax), charges, fees or other impost (“Taxes”) levied or assessed in connection with the Services under this Agreement, Curtin may immediately increase the fees chargeable to take into account the net effect of the Taxes.

6. PAYMENT
6.1 Payment of fees shall be made prior to commencement of the Services or as agreed in writing between the parties. If the Client defaults in payment of such fees, Curtin reserves the right, without prejudice to any other remedy available to it, to not commence the Services, or suspend further performance under this Agreement until such payment is made. Curtin may also recover all costs and expenses reasonably incurred in the recovery of any money owing by the Client to it including but not limited to all legal fees, process server's charges and collection agent's expenses.

6.2 Until such time as the Client pays Curtin the full price for the Services, the property in any report provided pursuant to the Services shall not pass to the Client and the relationship between the parties shall be a fiduciary one and during that time the Client shall hold the report as bailee for Curtin. In the event of the Client not paying the full price for the Services within the time specified in Clause 6.1 the parties agree that the Client must on demand in writing return any report provided pursuant to the Services to Curtin without delay.

7. LAWFUL DIRECTIONS
7.1 In the discharge of its duties Curtin shall comply with all reasonable directions of the Client as may lawfully be given from time to time in relation to the performance of the Services.

8. CONTRACTOR'S STATUS
8.1 Each Party enters into this Agreement as an independent contractor. Nothing in this Agreement constitutes or is deemed to constitute a partnership, agency or employee relationship between the parties for any purpose. A Party has no power or authority to bind the other Party or to contract in the name of and create a liability against the other Party in any way or for any purpose.

9. LIABILITY OF CURTIN
9.1 The Client acknowledges that:
(a) it uses the results of the Services and any advice, opinions or information supplied by Curtin or its consultants at its own risk; and,
(b) it is the responsibility of the Client to make its own assessment of the suitability of the Services and any advice or information generated from the Services.
9.2 The parties acknowledge that the liability of Curtin for any material breach of (term, condition or warranty shall be limited, at the option of Curtin to: (ad) refunding the price of the Services, in respect of which the breach occurred or, (b) providing those Services again.

9.3 The Client warrants that it has not relied upon any representation made by Curtin that has not been stated expressly in this Agreement or upon any descriptions contained in any document produced by Curtin.

9.4 Any description of the Services in any communication from Curtin is given by way of description only and the use of such description shall not constitute a contract of sale by description.

10. CONFIDENTIAL INFORMATION

10.1 A Party shall not disclose Confidential Information of the other Party in the course of providing the Services without the prior written consent of the other Party.

10.2 A Party will only disclose such Confidential Information to its employees, agents or contractors for the purpose of the provision of Services under this Agreement on a need to know basis and subject to such officers, employees, agents or contractors executing appropriate confidentiality non-disclosure undertakings.

10.3 The Client has no right to publish any report or part thereof provided by Curtin pursuant to the Services or use Curtin's name without Curtin's prior written consent and subject to such terms and conditions as Curtin considers appropriate.

10.4 The confidentiality obligations under this clause 10 shall survive the expiration or termination of this Agreement for a period of two (2) years.

11. INTELLECTUAL PROPERTY RIGHTS

11.1 Nothing in this Agreement affects the existing Intellectual Property Rights of either Party.

11.2 Unless otherwise agreed and specified in writing by the Parties, Curtin shall retain rights to all Intellectual Property Rights relating to New Technology arising out of or in the course of providing the Services, when that New Technology was developed through use of the Resources by Curtin. The Client shall have the option to enter into a license to use the New Technology on not less favourable terms than Curtin would offer to a third party.

11.3 Intellectual Property Rights in any material developed by the Client using the Results or as a consequence of the Services or of its or their use of the Resources or as a consequence of any other way exercising its rights of Approved Access will be owned by the Client.

11.4 The Client shall own the Results and Curtin shall not publish or utilise those Results outside of the Services without the express written permission of the Client.

11.5 The Client shall at any time at the cost of Curtin execute all documents and, where relevant, shall procure its employees to execute all documents and do all acts and things required by Curtin for the purpose of vesting Intellectual Property Rights as prescribed by this clause 11.2.

11.6 The Client warrants that neither it, nor its employees, agents or contractors, shall infringe the Intellectual Property Rights or any other rights of any third party in doing any act or thing in connection with this Agreement and that it will notify Curtin promptly in writing if it becomes aware of any such infringement.

11.7 The Client shall fully indemnify Curtin against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party against Curtin resulting from any infringement under clause 11.6.

11.8 The obligations under this clause 11 and the indemnity under clause 11.7 shall survive the expiration of this agreement.

12. INDEMNITY

12.1 Subject to clause 9.2, each party (“The indemnitor”) indemnifies and will keep indemnified the other party and its respective officers, employees, agents or contractors ("the indemnifie") from and against all legal liabilities, actions, suits, proceedings, claims, demands, costs and expenses whatsoever which may arise or be made or taken against the Indemnifie or be incurred or become payable by the Indemnifie in respect of any negligent, wilful or unlawful act or omission on the part of the Indemnitor pursuant to this Agreement but this indemnity does not extend to any act or omission, suits, proceedings, claims, demands, costs or expenses arising out of any negligent, wilful or unlawful act or omission by the Indemnifier or any of its employees, agents or contractors.

12.2 The indemnity given by the Indemnitor pursuant to clause 12.1 will be reduced proportionately to the extent that any negligent, wilful or unlawful act or omission by the Indemnifie or its employees, agents or contractors may have contributed to any injury, death, loss or damage to property referred to in that sub-clause.

13. TERMINATION

13.1 Without limiting the generality of any other clause in this Agreement, Curtin may terminate this Agreement immediately by notice in writing if: (a) any payment due from the Client to Curtin pursuant to this Agreement remains unpaid for a period of 30 days; (b) the Client breaches any clause of this Agreement and such breach is not remedied within 15 days of written notice by Curtin; (c) the Client disposes of equipment or materials or restructures its business, reallocates or restructures its own personnel or otherwise creates a situation in which Curtin, in its opinion, is no longer able to comply with its obligations under this Agreement or no longer able to provide the Services in an efficient and cost effective manner; (d) the Client becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration; (e) the Client, being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving; (f) the Client, being a natural person, dies; or (g) the Client ceases or threatens to cease conducting its business in the normal manner.

13.2 Without limiting the generality of any other clause in this Agreement, the Client may terminate this Agreement immediately by notice in writing if: (a) Curtin breaches any clause of this Agreement and such breach is not remedied within 15 days of written notice by the Client; (b) Curtin becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration; (c) Curtin ceases or threatens to cease conducting its business in the normal manner.

13.3 If notice is given to the Client pursuant to clause 13.1, Curtin may, in addition to terminating the Agreement- (a) retain any monies paid; (b) charge a reasonable sum for work performed in respect of which no payment no sum has been previously charged; (c) be discharged from any further obligations under this agreement; and (d) pursue any additional or alternative remedies provided by law.

13.4 Curtin shall not be liable in any circumstances whatsoever for any failure to perform any obligations under this Agreement where such failure is due to any cause beyond the reasonable control of Curtin including but not limited to instrumental breakdown and failure.

14. ASSIGNMENT

14.1 The benefit of this Agreement shall not be dealt with in any way by the Client (whether by assignment or otherwise) without Curtin's written consent. Curtin may provide personnel to perform services under this Agreement that are independent contractors of Curtin.

15. WAIVER

15.1 No right under this Agreement shall be deemed to be waived except by notice in writing signed by the party granting the waiver.

15.2 A waiver by a party pursuant to clause 15.1 will not prejudice its rights in respect of any subsequent breach of this Agreement by the other party.

15.3 Subject to Clause 15.1, any failure by a party to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by one party to the other, will not be construed as a waiver of the first mentioned party's rights under this Agreement.

16. SURVIVAL

16.1 The covenants, conditions and provisions of this Agreement that are capable of having effect after the expiration of this Agreement including but not limited to such covenants, conditions, and provisions set out in clauses 1, 2, 5, 6, 10, 11, 12, 13, and 14 shall remain in full force and effect following the expiration of this Agreement.

17. ENTIRE AGREEMENT

17.1 This Agreement constitutes the entire agreement between the Parties. Any prior arrangements, agreements, representations or undertakings are superseded. No modification or alteration of any clause of this Agreement will be valid except in writing signed by each party.

18. SEVERABILITY

18.1 The invalidity or unenforceability of anyone or more of the provisions of this Agreement will not invalidate or render unenforceable the remaining provisions of this Agreement. Any illegal or invalid provision of this Agreement will not invalidate and all the other provisions will have full and effect.

19. DISPUTES

19.1 Any dispute arising in connection with this Agreement which cannot be settled by negotiation between the Parties of their representatives shall be submitted to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations for the time being of the Institute of Arbitrators, Australia. During such arbitration, both Parties may be represented by a duly qualified legal practitioner.

20. GOVERNING LAW

20.1 This Agreement will be governed by and construed according to the law of the State of Western Australia.

21. NOTICES

21.1 Notices under this Agreement may be delivered by hand, by mail or by facsimile to the addresses specified in Item 8 of the Schedule for each of the Parties;

21.2 Notice will be deemed given: (a) in the case of hand delivery, upon written acknowledgement of receipt by an officer or other duly authorised employee, agent or representative of the receiving party; (b) in the case of posting, on the first business day being not less than two days after dispatch.
22. ACCESS TO RESOURCES

22.1 Curtin will provide the Client with access to the Resources for the Term subject to the terms of clauses 22 to 25 of this Agreement.

(a) The Client warrants that access to the Resources is sought solely for the Permitted Purpose. Access to the Resources is not authorised by Curtin except for a Permitted Purpose.

(b) Access to the Resources will be limited to the person designated on the Registration Form. Access by a person who has not been approved by Curtin, or who has not completed a Registration Form, is only permitted at Curtin’s unfettered discretion.

(c) In accessing the Premises and using the Resources, the Client will comply with all reasonable resolutions, regulations and directions of Curtin and its representatives as may be lawfully given from time to time as to the nature and scope of the Approved Access.

(d) Nothing in subclause 22.1(c) will affect the Client’s right to exercise its own judgment and to utilise its skills as it considers most appropriate in order to achieve compliance with the said resolutions, regulations and directions or otherwise to comply with its obligations under this Agreement.

(e) The Client undertakes to refrain from any act which might cause damage of any kind (other than reasonable wear and tear) to tangible assets, including the Premises. The Client will be responsible to Curtin for the cost of all breakages and other damage which it causes to Curtin equipment, facilities or premises.

(f) The Client may not remove any of Curtin’s materials from the Premises, except with the express written permission of Curtin and subject to any conditions which Curtin may stipulate.

(g) The Client acknowledges that there is no transfer of title in any of the Resources and that ownership of such resources remains with Curtin.

(h) Access to the Resources and to the Premises remains at Curtin’s discretion at all times. Curtin may suspend access to the Resources at any time and for any period. Curtin agrees to act reasonably in this regard but is under no obligation to explain the purpose of the suspension to the Client.

(i) Curtin will use its reasonable endeavours to ensure that the Client is provided with safe access to the Resources and the Premises. Subject to foregoing, access to the Resources is at the Client’s risk, including the risk of personal injury.

(j) As a condition of accessing the Resources, the Client must undertake such training sessions and observe such training protocols as may be stipulated by Curtin.

(k) Curtin may, at its discretion, require the Client to be accompanied by a Curtin representative, employee or agent for the purpose of advising on, and supervising compliance with, Curtin’s security procedures.

23. INSURANCE– ACCESS TO RESOURCES

23.1 The Client will, in respect of the Approved Access, maintain insurance cover adequate for the purposes of this Agreement. The Client must produce evidence on demand, to the reasonable satisfaction of Curtin, of insurance affected and maintained in accordance with this Agreement.

24. INDEMNITY- ACCESS TO RESOURCES

24.1 Without limiting clause 12.1 the Client will be solely liable for and will indemnify Curtin, its officers and employees against any liability, loss, damage, claim, suit, action, demand, expense or proceedings of whatever nature caused by any unlawful, wilful or negligent act, error or omission of the Client, its sub-contractors, officers, employees or agents in the course of exercising its right of access or other obligations incidental thereto.

(a) whether arising under any statute or at common law in respect of personal injury (which expression will include illness) to or death of any and all persons whosoever, or

(b) in respect of loss or destruction of or injury or damage to or loss of use of any and all property real or personal (including but not limited to the property of Curtin).

25. SAFETY MANAGEMENT SYSTEM- ACCESS TO RESOURCES

25.1 In order to meet its obligations to ensure, insofar as is reasonably practicable, that the health and safety of its staff and others who are at the workplace is not exposed to hazards, Curtin operates a safety management system (accessible on its intranet) with which it requires compliance.

25.2 The Client will fully comply with Health and Safety Laws and Curtin’s Health and Safety Management System requirements as directed by Curtin and in accordance with Curtin’s Health and Safety policies.

25.3 To the extent that the Client’s safety management system may be less onerous than or is inconsistent with Curtin’s system, the Client agrees at its sole cost to comply with Curtin’s system to the extent of any such deficiency or inconsistency.

25.4 To the extent that the Client does not operate a business specific safety management system, the Client at its sole cost agrees to comply with the Curtin system.

25.5 The Client will provide Curtin with a detailed report of accidents or other incidents involving damage to its employees or contractors by completing an incident report on the Curtin University online incident reporting system.