

Attachment 1

# VICTORIAN COMMON FUNDING AGREEMENT

Terms and Conditions

October 2015

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#### **VERSION AND REVIEW**

Victorian Common Funding Agreement Terms and Conditions  
October 2015, Version 2.0, scheduled for review 2019.

#### **ACCESSIBILITY**

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# 1 DEFINITIONS AND INTERPRETATION

## Definitions

1.1 In this Agreement:

Term	Definition and interpretation
<b>Activity</b>	means the Activity related to the services or project described in the Schedule.
<b>Agreement</b>	means these Terms and Conditions, the Details and the Schedule.
<b>Applicable Department Policies</b>	means any applicable Department policies and guidelines, as amended or replaced from time to time, including those set out in the Schedule.
<b>Asset</b>	means a non-consumable item of tangible property (including an Asset that becomes a fixture) that has a service life greater than one (1) year purchased, created or otherwise brought into existence whether wholly or in part with the use of the Funding.
<b>Asset Register</b>	means the register the Organisation will maintain under clause 7.1 [Assets].
<b>Auditor-General</b>	has the meaning set out in section 3 of the <i>Audit Act 1994</i> (Vic).
<b>Australian Accounting Standards</b>	means the accounting standards made by the Australian Accounting Standards Board in accordance with section 227 of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth).
<b>Australian Auditing Standards</b>	means the auditing standards made by the Auditing and Assurance Standards Board in accordance with section 227B of the <i>Australian Securities and Investment Commission Act 2001</i> (Cth).
<b>Background Intellectual Property</b>	means the Intellectual Property of a party which was either created: (a) Before the Start Date; or (b) independently of this Agreement, and all improvements to such Intellectual Property by the party.
<b>Business Day</b>	means a day other than a Saturday, Sunday or public holiday appointed under the <i>Public Holidays Act 1993</i> (Vic).
<b>Change in Control</b>	means any change during the Term in any person(s) who directly or indirectly exercises effective control over the Organisation (including the ability to determine the outcome of decisions about the financial and operating and other policies of the Organisation) by holding the majority of voting shares, units or other interests in the Organisation or by any other means, but does not include a change in respect of a council if that change is due to an election.
<b>Confidential Information</b>	means information or data (including Personal Information and Health Information), whether or not in a material form, that is confidential to a party or should reasonably be considered confidential. Confidential Information does not include information that is already in the public domain, unless the reason it is in the public domain is as a result of a breach of this Agreement.

Term	Definition and interpretation
<b>Conflict of Interest</b>	means a situation, or a risk of a situation, where an officer, board member, employee, member, volunteer, subcontractor, representative or agent of the Organisation has duties or interests arising as a result of holding a position, possessing property, engaging in a business or occupation or from contractual obligations and those duties or interests are in conflict with or might appear to be in conflict with their duties and interest under this Agreement.
<b>Day</b>	(as opposed to "Business Day" as defined above) includes public holidays appointed under the <i>Public Holidays Act 1993</i> (Vic), and weekends.
<b>Department</b>	means the entity described in item 1 of the Details.
<b>Department's Primary Contact</b>	means the person listed in item 10 of the Details or as notified in writing from time to time by the Department.
<b>Details</b>	means the part of the Agreement titled 'Details'.
<b>Dispute</b>	means any dispute: (a) arising out of this Agreement; (b) concerning the performance or non-performance by either party of its obligations under the Agreement; or (c) concerning any decision of a party or interpretation of any clause of this Agreement.
<b>Dispute Resolution Officer</b>	means the person assigned to the position listed in item 5 of the Details or as notified in writing from time to time by the Department.
<b>End Date</b>	means the date set out in item 4 of the Details.
<b>Funding</b>	means money the Department provides to the Organisation under this Agreement.
<b>Health Information</b>	has the meaning set out in the <i>Health Records Act 2001</i> (Vic).
<b>Insolvency Event</b>	means where: (a) the Organisation is unable to pay its debts as and when they fall due; (b) in the case of an individual, the individual enters into a scheme of arrangement with creditors or becomes bankrupt; (c) in the case of a legal entity that is not an individual: (i) a receiver, receiver and manager, administrator, controller, provisional liquidator or liquidator is appointed to the Organisation other than the appointment of an administrator to a council under s 219(2) of the <i>Local Government Act 1989</i> (Vic); (ii) the Organisation enters into a scheme of arrangement with its creditors; or (iii) the Organisation is wound up; (d) the Organisation assigns any of its property for the benefit of creditors or any class of creditors; or (e) a person with a legal right over any assets of the Organisation takes any step towards taking possession or takes possession of those assets or exercises any power of sale.

Term	Definition and interpretation
<b>Intellectual Property</b>	includes: <ul style="list-style-type: none"><li>(a) all copyright (including rights in relation to all documents, reports, charts, drawings, data bases, software, source codes, models, systems, slides, tapes and specifications);</li><li>(b) all copyright and all rights in relation to inventions (including registered and registrable patents), registered and unregistered trade marks, registered and unregistered designs, circuit layouts, and know-how; and</li><li>(c) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.</li></ul>
<b>Laws</b>	includes: <ul style="list-style-type: none"><li>(a) Acts of the Commonwealth and the State(s) and Territory(ies) in which the Activity will be delivered, and any other relevant State or Territory;</li><li>(b) ordinances, regulations, by-laws, orders and proclamations or other instruments made under those Acts referred to in paragraph (a); and</li><li>(c) lawful directions by any person exercising statutory powers regarding the Activity.</li></ul>
<b>Licence</b>	means a non-exclusive, world-wide, everlasting, irrevocable, royalty free licence to the Department to exercise all rights in relation to the Intellectual Property it applies to as if the licensee were the owner, including the right to sub-license. A Licence does not include the right to transfer or assign the Intellectual Property, or to seek or enforce remedies for infringements of the Intellectual Property against a third party.
<b>Material Breach</b>	means: <ul style="list-style-type: none"><li>(a) a breach which constitutes a substantial failure in the performance of the Activity and the Agreement by the Organisation; or</li><li>(b) a series of minor breaches which together constitute a substantial failure in the performance of the Activity and the Agreement of the Organisation.</li></ul>
<b>Ombudsman</b>	means the person appointed under section 3 of the <i>Ombudsman Act 1973</i> (Vic).
<b>Organisation</b>	means the entity described in item 2 of the Details.
<b>Organisation's Primary Contact</b>	means the person listed in item 6 of the Details or as notified in writing from time to time by the Organisation.
<b>Personal Information</b>	has the meaning set out in the <i>Privacy and Data Protection Act 2014</i> (Vic).
<b>Project Intellectual Property</b>	means all Intellectual Property (excluding Background Intellectual Property) developed, created, discovered, brought into existence or otherwise acquired (other than from the Department) by the Organisation under the Agreement.
<b>Public Sector Data</b>	has the meaning set out in the <i>Privacy and Data Protection Act 2014</i> (Vic).

Term	Definition and interpretation
<b>Record</b>	means any document within the meaning of the <i>Evidence Act 2008</i> (Vic), including: <ul style="list-style-type: none"><li>(a) anything on which there is writing;</li><li>(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;</li><li>(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or</li><li>(d) a map, plan, drawing or photograph;</li></ul> created, managed, maintained, brought into existence or otherwise acquired or used by the Organisation (or subcontractor) in relation to the Funding, the Activity, or the performance of the Organisation's obligations under the Agreement.
<b>Schedule</b>	means the schedule to the Agreement.
<b>Services</b>	means the Activity described in the Schedule.
<b>Start Date</b>	means the date set out in item 3 of the Details.
<b>Subcontracting</b>	is when the Organisation engages another organisation or person (excluding employees of the Organisation), to deliver all or a material part of the Activity in accordance with clause 10 [Assignment and Subcontracting].
<b>Term</b>	means the period of this Agreement as detailed in clause 2 [Term of Agreement].
<b>Terms and Conditions</b>	means this part of this Agreement entitled 'Terms and Conditions'.

## Interpretation

- 1.2 In this Agreement, unless it specifically states differently:
- (a) words implying one gender include the other gender;
  - (b) the plural includes any singular and vice versa;
  - (c) a reference to a statute, ordinance, code or other Law includes subordinate legislation, consolidations, amendments, re-enactments, and replacements of it;
  - (d) references to the Agreement include the Details, the Terms and Conditions, the Schedule, and any annexures and attachments;
  - (e) "including" and "includes" when introducing an example, does not limit the meaning to that example or examples of that kind;
  - (f) where a term is defined, the definition includes all grammatical forms of that term;
  - (g) headings and references to headings contained in square brackets ("[]") are inserted for readability and do not affect the interpretation of this Agreement; and
  - (h) a reference to a person includes an entity recognised by Law including a body politic, and incorporated and unincorporated bodies.

## Priority of Documents

- 1.3 Inconsistencies between the terms of this Agreement will be resolved in the following order of priority:
- (a) these Terms and Conditions;
  - (b) the Details; and
  - (c) the Schedule.

## Governing Law

- 1.4 The laws of the State of Victoria apply to the Agreement. The Organisation and the Department agree to the jurisdiction of the courts of the State of Victoria and courts entitled to hear appeals from those courts.

## 2 TERM OF AGREEMENT

- 2.1 The Agreement will start on the Start Date and will end on the End Date, unless the Agreement is terminated earlier under clause 14 [Termination of Agreement].
- 2.2 The Organisation and the Department agree that the Department is not obligated to continue to provide funding to the Organisation beyond the Funding set out in the Schedule [Funding] nor to renew the Agreement at the end of the Term.

## 3 ACTIVITY DELIVERY

- 3.1 The Organisation will deliver the Activity in accordance with the Agreement to the reasonable satisfaction of the Department and will at all times:
- (a) deliver the Activity in a proper, timely and efficient manner using the standard of care, skill, diligence and foresight that would reasonably be expected from an expert and experienced provider of the Activity;
  - (b) act in accordance with the ethical standards that are generally accepted to apply in the area of professional practice relevant to the Activity;
  - (a) demonstrate a commitment to ethical practices and behaviours, and make sure that ethical practices are implemented and ethical behaviours are promoted through appropriate staff training and monitoring;
  - (c) inform the Department about all matters the Department should reasonably be made aware of and provide information about the delivery of the Activity that may reasonably be required by the Department;
  - (d) obtain and maintain any accreditation or registration required for the delivery of all or part of the Activity or requested in writing by the Department; and
  - (e) comply with:
    - (i) the standards and performance targets listed in the Schedule in respect of the Activity;
    - (ii) all Applicable Department Policies; and
    - (iii) all applicable Laws including Laws relating to fire protection, industrial relations and employment, health, general safety and taxation.
- 3.2 The Department will provide the Organisation with access to all Applicable Department Policies and standards.



## 4 FUNDING

- 4.1 If the Organisation meets its obligations under this Agreement to the reasonable satisfaction of the Department, the Department will pay the Funding to the Organisation as set out in the Schedule.
- 4.2 The Organisation and the Department agree that payment of all or part of the Funding is not an admission by the Department that the Organisation has met its obligations under this Agreement to the reasonable satisfaction of the Department.
- 4.3 If the Schedule indicates that the Funding is to be increased on a yearly basis, the Department will increase the Funding payable each year of the Term by the rate of indexation approved by the Victorian Government and advised by the Department.

### Use of Funding

- 4.4 The Organisation agrees to use the Funding only for the Activity and in accordance with the Agreement or as agreed by the Department in writing.
- 4.5 The Organisation will do all things necessary to make sure that all payments made by the Organisation from the Funding (including payments to subcontractors) are correctly made and properly authorised and that the Organisation maintains proper and diligent control over the incurring of all liabilities.
- 4.6 The Organisation will not use any of the following as security for the purpose of obtaining or complying with any form of loan, credit, payment or other interest unless the Department consents in writing:
  - (a) the Funding;
  - (b) the Agreement including any right, title or interest created under it; or
  - (c) any Asset or Project Intellectual Property.
- 4.7 The Organisation will not spend the Funding on donations to members of a State or Commonwealth Parliament or political parties.
- 4.8 If the Organisation complies with the Agreement and delivers the Activity to the Department's reasonable satisfaction, the Organisation can retain all unspent and uncommitted Funding at the expiry of the Agreement, unless otherwise notified by the Department in accordance with the terms of any Applicable Department Policy or stated in the Schedule.
- 4.9 If, in the reasonable opinion of the Department, the Organisation:
  - (a) does not comply with the Agreement;
  - (b) does not deliver all or part of the Activity to the Department's reasonable satisfaction; or
  - (c) has used, spent or committed all or part of the Funding other than in accordance with the Agreement,

the Department may in its absolute discretion give written notice to the Organisation requiring the Organisation to repay that part of the Funding and any GST paid to the Organisation which, in the Department's reasonable opinion, has not been applied in accordance with the Agreement and the Organisation will repay that amount to the Department within thirty (30) Days, or such other time period as agreed, of receiving the written notice from the Department.

### Goods and Services Tax (GST)

- 4.10 In this clause, italicised words or expressions have the same meaning as set out in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (GST Act).
- 4.11 The Funding set out in the Schedule is exclusive of GST. If GST is payable on all or part of the Activity under clause 4.12, it will be paid to the Organisation at the same time as the Funding set out in the Schedule.

- 4.12 The Organisation and the Department agree that if GST is payable on a *supply* of the Activity by the Organisation under this Agreement, the Department will pay the Organisation an additional amount equal to the GST payable on or for the *taxable supply*.
- 4.13 If GST is payable on the *supply* of the Activity by the Organisation under this Agreement, unless otherwise specified in the Schedule, the Organisation and the Department agree to a recipient created tax invoice (RCTI) arrangement under this Agreement authorised under section 29-70(3) of the GST Act and that:
- (a) the Department at the Start Date is registered for GST and agrees that it will notify the Organisation if it ceases to be registered for GST or ceases to satisfy any of the requirements of GST Ruling GSTR 2000/10;
  - (b) the Department will reasonably comply with its obligations under the taxation Laws;
  - (c) the Department can issue a RCTI in respect of a *taxable supply* made to the Department of goods or services provided by the Organisation under this Agreement;
  - (d) the Department will issue a copy of each RCTI to the Organisation and retain the original;
  - (e) the Department will issue a copy of each *adjustment note* to the Organisation and retain the original;
  - (f) the Department will not issue a document that would otherwise be an RCTI, on or after the date when it or the Organisation has ceased to satisfy the requirements of GST Ruling GSTR 2000/10;
  - (g) the Organisation will not issue *tax invoices* in respect of taxable supplies of goods or services to the Department;
  - (h) the Organisation acknowledges that as at the Start Date it is registered for GST and has an active Australian Business Number and agrees that it will notify the Department within seven (7) Days if it ceases to be registered.
- 4.14 If, as at the Start Date the Organisation is not required by Law to be registered for GST and during the Term of the Agreement the Organisation becomes registered for GST, the Organisation will give written notice to the Department within seven (7) Days of becoming registered for GST.
- 4.15 If for any reason the RCTI arrangement specified in clause 4.13 is unable to be implemented or ceases, the Organisation must give the Department a tax invoice in respect of any *taxable supply* made to the Department by the Organisation in connection with the Agreement prior to any payment of Funding to the Organisation.
- 4.16 Any repayment under clause 4.9 that includes an amount for GST must be accompanied by an *adjustment note* relating to taxable supplies for which the Department previously issued an RCTI to the Organisation or the Organisation previously issued a *tax invoice* to the Department.

## Funding Acknowledgement

- 4.17 The Organisation will acknowledge any Funding support provided by the Victorian Government, as specified in any Applicable Department Policy and any Schedule.

## 5 CONFLICT OF INTEREST

- 5.1 The Organisation:
- (a) warrants that, to the best of its knowledge after making diligent inquiry, it has no actual or potential Conflict of Interest and no actual or potential Conflict of Interest is likely to arise during the Term; and
  - (b) will take all reasonable steps to ensure that no actual or potential Conflict of Interest arises during the Term.

- 5.2 If during the Term the Organisation becomes aware of any matter that gives rise to an actual or potential Conflict of Interest, the Organisation will:
- (a) immediately give written notice to the Department of the actual or potential Conflict of Interest and of the steps the Organisation proposes to take to resolve or manage the actual or potential Conflict of Interest;
  - (b) make full disclosure to the Department of all relevant information relating to the actual or potential Conflict of Interest; and take such steps as the Department may, if the Department chooses to, reasonably require to resolve or manage the actual or potential Conflict of Interest.
- 5.3 If the Organisation fails to notify the Department, or is unable or unwilling to resolve or deal with the Conflict of Interest as required by the Department, the Department may terminate this Agreement under clause 14 [Termination of Agreement].

## 6 RECORDKEEPING

### Financial Records

- 6.1 The Organisation will keep full and accurate Records so that:
- (a) all financial transactions, including receipts and payments, from the Funding are clearly and separately identifiable;
  - (b) if required by Law or the Department, financial statements under the Australian Accounting Standards can be prepared;
  - (c) if required by Law or the Department, the Organisation's accounts and Records can be audited in accordance with Australian Auditing Standards; and
  - (d) all of the Organisation's taxation liabilities and payments can be clearly identified.

### Recordkeeping

- 6.2 Subject to 6.3, the Organisation will deal with all its Records in accordance with its usual recordkeeping practices, unless agreed otherwise in writing with the Department.
- 6.3 The Organisation will:
- (a) maintain and manage the Records:
    - (i) as specified by the Department and in accordance with any Applicable Department Policy; and
    - (ii) in such a way that will allow the Records to be quickly and easily accessed, retrieved, reviewed, used and kept by the Department and Victorian Government.
  - (b) retain the Records for a period of seven (7) years after the termination or expiry of the Agreement or the completion of the Activity (whichever is the earlier).
- 6.4 In addition to any other obligation under clause 6 or clause 15 [Transition of Activity], the Organisation will immediately provide access to Records at the Department's written request and in any of the following circumstances:
- (a) in accordance with the requirements of all relevant Laws;
  - (b) if requested by the Auditor-General or Ombudsman in writing;
  - (c) to the Department or any third party nominated by the Department in accordance with any written request by the Department; or
  - (d) for the purposes of audit and performance monitoring under clause 9 [Audit and Performance Review].

## Freedom of Information

- 6.5 The Organisation will provide access to the Records during such time as they remain in the Organisation's possession or control to the Department and any other person authorised by the Department exercising rights under the *Freedom of Information Act 1982* (Vic), or any other Laws that apply to the Records.

## 7 ASSETS

- 7.1 The Organisation will maintain an Asset Register listing and containing the details of each Asset in accordance with any Applicable Department Policies. The Organisation will provide the Department with a copy of the current Asset Register at the Department's request.
- 7.2 The Organisation will not dispose of any Asset worth over \$5,000 (exclusive of GST) at the time of disposal which is listed or that should be listed on the Asset Register without the Department's prior consent. For the purposes of this clause 7.2, the value of an Asset at the time of disposal will be the depreciated value from the time the Asset was purchased, calculated by reference to the standard method for calculating depreciation on an Asset of that type, as determined from time to time by the Commonwealth Commissioner for Taxation unless as otherwise agreed by the Department and the Organisation.
- 7.3 If the Organisation disposes of any Asset listed or that should be listed on the Asset Register, the Organisation will record the details of the disposal in the Asset Register and the Department may:
- (a) reduce the amount of Funding payable under this Agreement by the depreciated value of that Asset on giving written notice to the Organisation; or
  - (b) request the Organisation to reimburse the Department with an amount equal to the depreciated value of the Asset and the Organisation will reimburse the Department.
- 7.4 If the Organisation loses, damages, destroys or sells any Asset listed or that should be listed on the Asset Register the Organisation will repair or replace it at its own expense and record details of the repair or replacement in the Asset Register unless otherwise agreed by the Department in writing.
- 7.5 All Assets purchased with the Funding will be used to support the delivery of the Activity.
- 7.6 The Organisation is responsible for and will bear all risks, expenses and running costs for all Assets, including insurance and registration costs.
- 7.7 If the Organisation ceases to deliver all or part of the Activity (for whatever reason), the Organisation agrees to comply with any request of the Department for the Organisation to:
- (a) transfer ownership of and deliver each Asset to the Department or to a third party as the Department directs; or
  - (b) reimburse the Department with an amount equal to the depreciated value of that Asset.

## 8 REPORTING

- 8.1 The Organisation will provide the Department with information about and report on the Activity in accordance with the Schedule and as and when requested by the Department.
- 8.2 The Organisation will provide the Department with any information or Record that relates to the delivery of the Activity or shows how the Funding has been spent by the Organisation as and when requested by the Department.
- 8.3 The Organisation will prepare its financial Records in accordance with:
- (a) if required by the Department, any Applicable Department Policies; and
  - (b) if required by Law or the Department, the Australian Accounting Standards.

- 8.4 The Organisation will comply with the Department's financial accountability requirements and provide the Department with the information and documentation set out in any Applicable Department Policies including but not limited to:
- (a) a certification signed either in writing or electronically, in accordance with any Applicable Department Policy, by an authorised officer from the Organisation; and
  - (b) the Organisation's annual report containing financial statements, if applicable, or completed Department financial reporting forms.

## 9 AUDIT AND PERFORMANCE REVIEW

- 9.1 The Department may conduct, or the Department may engage a third party to conduct, a performance review or an audit of the Organisation at any reasonable time, at the Department's own expense:
- (a) for the purpose of monitoring and assessing the Organisation's performance of its obligations under this Agreement or delivery of the Activity;
  - (b) if the Department has reasonable concerns that the Organisation may not be delivering, or may be unable to deliver, all or part of the Activity in accordance with this Agreement;
  - (c) if the Organisation's Records give the Department reasonable concern about the Organisation's compliance, or ability to comply, with this Agreement;
  - (d) if the Department has reasonable concerns that the Organisation is not financially stable;
  - (e) if the Department has reasonable concerns that the Organisation has misused all or part of the Funding; or
  - (f) to confirm whether the Funding has been used for the correct purposes.
- 9.2 The Organisation will:
- (a) cooperate with and provide assistance to the Department or any third party engaged by the Department to conduct an audit or performance review;
  - (b) make available to the Department or any third party engaged by the Department all information and Records needed for the audit or performance review in accordance with any written request from the Department or third party engaged by the Department; and
  - (c) allow the Department or any third party engaged by the Department access to the Organisation's premises or place of business to carry out the audit or performance review.

## 10 ASSIGNMENT AND SUBCONTRACTING

- 10.1 The Organisation may not assign its rights or obligations under this Agreement without the Department's prior written consent.
- 10.2 The Organisation may only Subcontract all or part of the Activity with the Department's prior written consent.
- 10.3 Without limiting clause 22 [The Department's Consent], the Department will only provide consent to a proposed subcontract if:
- (a) the Organisation satisfies the Department that the subcontractor can deliver the Activity to be Subcontracted on the same terms and conditions as this Agreement;
  - (b) the contract between the Organisation and the subcontractor is made on the same terms and conditions as this Agreement, including a term that expressly allows the Department to access the subcontractor's premises or place of business to conduct a performance review or audit of the subcontractor on the same terms and conditions as clause 9 [Audit and Performance Review]; and
  - (c) the Organisation agrees to comply with any conditions imposed by the Department as a condition of granting its consent.

- 10.4 The Organisation agrees that it is:
- (a) responsible for the delivery of the Activity including any part of the Activity that is Subcontracted; and
  - (b) accountable for any acts, omissions and mistakes of any subcontractor in performing all or part of the Activity as though they were the Organisation's own acts, omissions and mistakes.

## 11 DISPUTE RESOLUTION

- 11.1 The Organisation and the Department will enter into good faith discussions to resolve any Dispute.
- 11.2 If a Dispute cannot be resolved under clause 11.1, it will be resolved in good faith as follows:
- (a) the party claiming that the Dispute has arisen will give written notice to the other party describing in full the details of the Dispute (the "First Notice");
  - (b) within fourteen (14) Days of receipt of the First Notice, the parties will meet to discuss and try to resolve the Dispute;
  - (c) if the Dispute remains unresolved twenty one (21) Days after receipt of the First Notice, then either party may give written notice (the "Second Notice") to the other party requesting that the Dispute be referred to the Dispute Resolution Officer for resolution;
  - (d) within fourteen (14) Days of receipt of the Second Notice, the parties will either meet with the Dispute Resolution Officer to discuss the Dispute or provide written submissions regarding the Dispute; and
  - (e) within twenty-eight (28) Days of receipt of the Second Notice, the Dispute Resolution Officer will provide their decision to the parties in writing. The parties agree that any decision of the Dispute Resolution Officer will be final and binding on the parties.
- 11.3 The parties will continue to perform their obligations under this Agreement despite the existence of any Dispute. Nothing in clause 11 affects the parties' abilities to exercise their rights under clauses 12 [Suspension], 13 [Cessation] and 14 [Termination of Agreement].

## 12 SUSPENSION

### Suspension of Activity

- 12.1 At any time during the Term, the Department may by written notice, require the Organisation to immediately suspend delivery of the Activity, or part of the Activity if:
- (a) the Organisation has failed, or in the Department's reasonable opinion, is likely to fail, to deliver the Activity in accordance with this Agreement;
  - (b) the Organisation has misused or is reasonably suspected to have misused Funding, or has shown an inability to properly manage its Assets;
  - (c) the Organisation has breached this Agreement and notice has been given to the Organisation by the Department under clause 14.1 [Termination of Agreement]; or
  - (d) the Organisation or its officer, board member, employee, member, volunteer, subcontractor, representative or agent has breached, or is reasonably suspected to have breached, any Law material to the Activity or the operation of the Organisation.
- 12.2 The Organisation will suspend delivery of all or part of the Activity at the request of the Department under clause 12.1.
- 12.3 The Department may, by giving written notice to the Organisation, reduce the Activity to be delivered under this Agreement to reflect any suspension of all or part of the Activity under clause 12.2.

- 12.4 The Organisation agrees that the Department may fund a third party to deliver all or part of the Activity that have been suspended under clause 12.2.

## **Suspension of Funding**

- 12.5 The Department may immediately suspend payment of all or part of the Funding if any of the following occurs:
- (a) the Organisation has failed, or in the Department's reasonable opinion is likely to fail, to deliver the Activity in accordance with this Agreement;
  - (b) the Organisation has misused or is reasonably suspected to have misused Funding, or has shown an inability to properly manage its Assets;
  - (c) the Organisation has breached the Agreement and notice has been given to the Organisation by the Department under clause 14.1 [Termination of Agreement];
  - (d) the Department has concerns on reasonable grounds that the Organisation is not financially stable; or
  - (e) the Department has requested the Organisation to suspend all or part of the Activity under clause 12.1.
- 12.6 The Department may, by giving written notice to the Organisation, reduce the Funding to be paid by the Department under this Agreement to reflect any suspension of all or part of the Funding under clause 12.5.

## **Department may vary Schedule**

- 12.7 The Organisation acknowledges that the Department may vary the Schedule to reflect any reduction of the Activity under clause 12.3 or reduction of Funding under clause 12.6.

## **Parties may exercise rights**

- 12.8 The Organisation and the Department may exercise any of their rights under clauses 12 [Suspension], 13 [Cessation] and 14 [Termination of Agreement] at any time during a suspension of the Activity or the Funding under this clause 12.

## **13 CESSATION**

- 13.1 The Organisation and the Department agree that Activity will not be ceased other than in accordance with this Agreement.

## **14 TERMINATION OF AGREEMENT**

### **Termination for Breach**

- 14.1 If the Organisation or the Department is in breach of this Agreement, the party in breach will remedy the breach within thirty (30) Days of that party receiving written notice requiring it to fix the breach.
- 14.2 If notice has been given under clause 14.1 and the breach is not satisfactorily remedied within thirty (30) Days, the party who gave notice may immediately terminate this Agreement by giving written notice.

## Termination by the Department

- 14.3 The Department may terminate this Agreement immediately by giving written notice to the Organisation:
- (a) if an Insolvency Event occurs in relation to the Organisation;
  - (b) if the Organisation is a natural person and becomes:
    - (i) mentally incapacitated;
    - (ii) dies;
    - (iii) is incapacitated through illness for more than thirty (30) Days; or
    - (iv) is convicted of a crime punishable by a term of imprisonment;
  - (c) if the Organisation has a Change in Control which the Department reasonably believes would negatively affect the Organisation's ability to comply with this Agreement;
  - (d) if, in the reasonable opinion of the Department, the Organisation commits a Material Breach of this Agreement which is not capable of remedy;
  - (e) if the Organisation behaves in a way that the Department believes that its continued association with the Organisation may be detrimental to the reputation of the Department;
- or
- (f) if the Organisation breaches an essential term of this Agreement as described in clause 14.4. The breach of an essential term is a repudiation of this Agreement.
- 14.4 The essential terms of this Agreement are clauses 4.4, 4.5, 4.6 and 4.7 [Funding].
- 14.5 If the Department does not receive sufficient funds from either the Victorian Parliament or the Commonwealth Government to finance the program or the Activity, the Department will give written notice to the Organisation as soon as possible and may terminate this Agreement by giving reasonable notice.
- 14.6 If there is a change in Victorian Government policy which affects the program or the Activity, the Department may terminate this Agreement by giving the Organisation at least three (3) month's written notice.
- 14.7 The Organisation will immediately comply with any directions in a notice given under clauses 14.3, 14.5 or 14.6.

## Termination without Fault

- 14.8 Either the Organisation or the Department may terminate this Agreement at any time by giving the non-terminating party at least three (3) months' written notice.
- 14.9 The party electing to terminate this Agreement under clause 14.8 will pay the reasonable costs (other than loss of profit or income) necessarily incurred and substantiated by the non-terminating party that arise directly from the termination. The non-terminating party will use its best efforts to minimise any such costs arising from termination.
- 14.10 The total amount payable by the Department to the Organisation, if any, on termination of this Agreement under clause 14.9 will not exceed the total amount of Funding that would have been payable under the Agreement had it not been terminated, less any amount already paid under the Agreement.

## 15 TRANSITION OF ACTIVITY

- 15.1 On expiry or termination of this Agreement for any reason or if the Organisation ceases to deliver the Activity, the Organisation will, unless otherwise stated in the Schedule:
- (a) hand over all material and Records held by the Organisation or any subcontractor engaged by the Organisation necessary for the delivery of the Activity, regardless of



the manner of storage, to the Department and/or to any third party nominated by the Department.

- (b) provide (and require any subcontractor engaged by the Organisation to provide) all reasonable assistance, advice and information to the Department to transfer all or part of the Activity, functions and operations provided by the Organisation under this Agreement to the Department or any third party nominated by the Department in a smooth and orderly way.

## 16 INTELLECTUAL PROPERTY

- 16.1 The Background Intellectual Property of each party remains the property of that party.
- 16.2 The Organisation will own all Project Intellectual Property unless clause 16.3(a) applies.
- 16.3 The Department will give written notice to the Organisation prior to the delivery of all the Activity if the Department considers that:
  - (a) all or part of the Project Intellectual Property arising from the delivery of the Activity should be owned by the Department; or
  - (b) the Department requires a Licence to use all or part of the Project Intellectual Property for any purpose, including publication on the internet.
- 16.4 If the Department gives written notice to the Organisation under clause 16.3(a), the Project Intellectual Property specified in the notice is owned by the Department.
- 16.5 The Organisation grants, and the Department accepts:
  - (a) a Licence over:
    - (i) the Project Intellectual Property not owned by the Department;
    - (ii) the Background Intellectual Property, if any; and
    - (iii) any Intellectual Property of a third party, if any,only to the extent needed to allow the Department to enjoy the full benefit of the Activity and this Agreement; and
  - (b) if the Department gives written notice to the Organisation in accordance with 16.3(b) a Licence to use the Project Intellectual Property specified in the notice for the Department's purposes, including publication on the internet.
- 16.6 At the request of the Department, the Organisation will provide the Department with copies of all Licensed materials and Intellectual Property and in a way that allows the Department to exercise the Department's rights under the Licence.
- 16.7 The Organisation warrants that it has the right to grant the Licences referred to in clause 16.5.
- 16.8 The Organisation will obtain all consents needed for any Licence, including in relation to any Moral Right. For the purposes of clause 16.8, 'Moral Right' has the meaning set out in section 189 of the *Copyright Act 1968* (Cth).
- 16.9 The Organisation will properly manage the Project Intellectual Property to allow the Department to enjoy the full benefit of the Activity and this Agreement, which may include taking any necessary action to:
  - (a) register, maintain the registration of, protect, manage, exploit and (as appropriate) commercialise the Project Intellectual Property for the benefit of the Victorian public;
  - (b) maintain, improve, enhance and develop the Project Intellectual Property to the fullest extent reasonably necessary to maintain its usefulness and appropriateness to the Organisation and the Department for the delivery of the Activity;
  - (c) use, reproduce, publish, adapt, disseminate, communicate to the public, broadcast, and perform the Project Intellectual Property for the benefit of the Victorian public; and
  - (d) comply with all applicable Department or other Victorian government policies in respect of the Project Intellectual Property.

- 16.10 The Organisation will not accept co-funding, or involve any person in the delivery of the Activity, on terms that would jeopardise or limit any Licence to be granted to the Department without obtaining the Department's prior agreement and consent in writing.

## 17 PRIVACY, DATA PROTECTION AND PROTECTED DISCLOSURES

### Privacy

- 17.1 The Organisation is bound by the Information Privacy Principles contained in the *Privacy and Data Protection Act 2014* (Vic) (PDP Act) and any applicable code of practice made under the PDP Act when performing its obligations under this Agreement in the same way and to the same extent that the Department would be bound if the Department were to perform the Organisation's obligations under this Agreement.
- 17.2 In performing this Agreement, the Organisation must:
- (a) collect, hold, use, manage, disclose and transfer Personal Information and Health Information obtained while delivering the Activity, only for the purposes of providing the Activity in accordance with this Agreement and in accordance with the PDP Act and the *Health Records Act* (HR Act) (as applicable);
  - (b) not to do anything that would breach a Health Privacy Principle contained in the HR Act or an Information Privacy Principle contained in the PDP Act;
  - (c) comply with the HR Act and any applicable code of practice made under the HR Act;
  - (d) comply with the PDP Act and any applicable code of practice made under Division 3 of Part 3 of the PDP Act;
  - (e) comply with any applicable direction, guideline, determination or recommendation made by the Victorian Commissioner for Privacy and Data Protection or the Victorian Health Services Commissioner; and
  - (f) unless the Organisation is excluded from the operation of the PDP Act by s 84(2) of that Act:
    - (i) not act or engage in any practice that contravenes a protective data security standard issued by the Victorian Commissioner for Privacy and Data Protection under s 86 of the PDP Act in respect of Public Sector Data collected, held, used, managed, disclosed or transferred by the Organisation for the Department; and
    - (ii) comply with any provision of a protective data security plan developed by the Department under the PDP Act that applied to the Organisation.
- 17.3 The Organisation must also:
- (a) make sure that any person (including any subcontractor) who may deal with Personal Information, Health Information or Public Sector Data on behalf of the Organisation in relation to the Activity or this Agreement is made aware of the obligations in this clause 17;
  - (b) immediately notify the Department if the Organisation becomes aware of a breach, or possible breach, of any of the obligations in clause 17.2, by the Organisation, or any person acting for or on behalf of the Organisation (including any subcontractor) in relation to all or part of the Activity or this Agreement; and
  - (c) make sure that any Subcontract it enters into imposes the obligations in this clause 17 on the subcontractor.

### Protected Disclosure Act

- 17.4 If the *Protected Disclosure Act 2012* (Vic) applies to the Organisation, the Organisation agrees to comply with and be bound by the provisions of that Act.

## 18 CONFIDENTIAL INFORMATION

- 18.1 The Organisation and the Department may disclose information (including on the internet) about the content of this Agreement unless the information is Confidential Information.
- 18.2 Each party agrees to treat all Confidential Information as confidential and not to disclose it to any third party without the prior written consent of the other party, except in the following circumstances:
- (a) where the disclosure is required by Law or by this Agreement;
  - (b) where the disclosure is reasonably required by any persons performing their obligations under this Agreement;
  - (c) any disclosure to that party's own professional advisers, or its insurer; or
  - (d) if requested by the Auditor-General, the Ombudsman, or the Minister responsible for the portfolio under which the Activity operates.
- 18.3 Subject to clause 18.2, each party will ensure that any third party to which it discloses Confidential Information is made aware of the confidential nature of the Confidential Information.

## 19 INDEMNITY

- 19.1 The Organisation indemnifies the Department against all Liability the Department may incur in respect of any Claim including Claims relating to:
- (a) loss of or damage to property;
  - (b) death or personal injury;
  - (c) a breach of any third party's Intellectual Property rights;
  - (d) a breach of privacy Law; and
  - (e) a breach of its obligations under clause 6 [Recordkeeping],
- arising in any way from:
- (i) the Organisation's breach of this Agreement or any Law; or
  - (ii) an unlawful or negligent act or omission of the Organisation or its officers, board members, employees, agents, volunteers or subcontractors in connection with the Activity or this Agreement.
- 19.2 The Organisation's Liability will be reduced to the extent that Liability is caused or contributed to by an unlawful or negligent act or omission of the Department or its officers or employees.
- 19.3 For the purposes of clause 19:
- (a) 'Liability' includes all costs, damages, expenses and losses of any kind;
  - (b) 'Claim' includes all demand, rights, actions, suits or proceedings of any kind; and
  - (c) 'Department' includes all its officers and employees.

## 20 INSURANCE AND RISK MANAGEMENT

### Insurance

- 20.1 The Organisation will:
- (a) on and from the Start Date have appropriate insurance coverage for its operational and business risks with one or more of the following:

- (i) the Victorian Managed Insurance Department or Liability Mutual Insurance
  - (ii) an insurer authorised under the *Insurance Act 1973* (Cth); or
  - (iii) an insurer approved in writing by the Department;
- (b) provide the Department with proof of the Organisation's insurance cover on request;
  - (c) maintain appropriate insurance coverage for the Term, and, if those insurance policies are underwritten on a 'claims made' basis, for no less than six (6) years after the completion of the Activity; and
  - (d) undertake periodic reviews to make sure the Organisation's operational and business risks are adequately insured, particularly in regard to public and products liability and professional indemnity risks.

## Risk Management

20.2 The Organisation will:

- (b) manage risk in accordance with Australian/New Zealand Risk Management Standard: AS/NZS ISO 31000:2009 (Australian Standard) as amended from time to time or as otherwise specified in any Applicable Department Policies.
- (c) arrange for its chief executive officer or a board member of the Organisation to attest that:
  - (i) the Organisation's risk management processes (Processes) are consistent with the Australian Standard or any Applicable Department Policies;
  - (ii) during the Term, the Organisation has managed risk in accordance with the Australian Standard or any Applicable Department Policies;
  - (iii) within the twelve (12) months prior to attestation, the Organisation has undertaken a review of the Processes to ensure compliance with the Standard or any Applicable Department Policies;
  - (iv) the Processes satisfactorily and effectively manage the Organisation's risks; and
  - (v) the Organisation's board, committee of management or audit or risk committee has verified that the Processes satisfactorily and effectively manage the Organisation's risks.

## 21 VARIATION

21.1 The Organisation and the Department agree that this Agreement may only be varied if:

- (a) both parties agree in writing to the variation; or
- (b) the Department notifies the Organisation in writing of a proposed variation to this Agreement and the date the proposed variation will take effect from ("the Effective Date"), and the Organisation continues to deliver all or part of the Activity or delivers new activity as described in the proposed variation after the Effective Date.

## 22 THE DEPARTMENT'S CONSENT

22.1 Where the Department's consent or approval is required under this Agreement:

- (a) the Organisation will:
  - (i) make its request in writing a reasonable time before the date on which the consent or approval is required by the Organisation; and
  - (ii) provide any information or documentation required or requested by the Department;

- (b) the Department may:
    - (i) provide its consent or approval subject to any terms or conditions it considers appropriate; or
    - (ii) withhold its consent or approval;
  - and
  - (c) the Department's consent will not be valid unless provided in writing.
- 22.2 Any consent provided under this Agreement is not deemed to be consent in the context of any other Agreement.
- 22.3 The Organisation will comply with the terms and conditions of any consent.
- 22.4 Where the Department's consent or approval is requested by the Organisation under this clause, the Department will provide its response to the Organisation under clause 22.1(b) within a reasonable time.

## 23 STATUS OF ORGANISATION

- 23.1 The Organisation and the Department agree and acknowledge that:
- (a) nothing in this Agreement creates any joint venture, partnership, employment or agency relationship between the Organisation and the Department; and
  - (b) neither party has Department to incur any liability or make any representation on behalf of the other.
- 23.2 The Organisation is solely responsible and liable for paying superannuation, payroll or any other tax, WorkCover levy or any similar payments or entitlements in relation to its employees.
- 23.3 The Organisation warrants that it is a legal entity capable of entering into this Agreement and that it complies with all Laws under which it is incorporated.
- 23.4 The Organisation will provide the Department with evidence of the Organisation's legal status if requested by the Department and will give written notice to the Department within five (5) Business Days of any changes to the Organisation's legal status coming into effect.
- 23.5 Prior to any proposed Change in Control, the Organisation will:
- (a) give written notice to the Department with reasonable time for the Department to consider the impact of the proposed Change in Control; and
  - (b) provide any information or documentation required or requested by the Department about the proposed Change in Control.
- 23.6 If the Organisation is a partnership, joint venture or consortium of two (2) or more persons, all such persons are liable both individually and as a group to the Department for the full performance of this Agreement.
- 23.7 Where the Organisation or any part of it is a partnership, this Agreement will not terminate automatically on the death, retirement or resignation of one or more members of such partnership.

## 24 NOTICES

- 24.1 Any notice, approval or consent from one party to another must be in writing and be signed by an officer who is authorised to sign and legally bind that party. This clause 24 does not apply to variations to this Agreement made in accordance with clause 21 [Variation].
- 24.2 Any notice, approval or consent must be addressed to the Department's Primary Contact or the Organisation's Primary Contact and will be properly given or served by a party if that party:
- (a) delivers it by hand;

- (c) posts it by mail to the address listed in the Details or to another address as notified in writing by the relevant party;
- (d) transmits it by facsimile to the facsimile number listed in the Details or to another facsimile number as notified in writing by the relevant party; or
- (e) transmits it by electronic mail to the email address listed in the Details or to another email address as notified in writing by the relevant party.

24.3 A notice will be taken to be received:

- (a) if delivered by hand, on the day of delivery if the party giving the notice has a receipt for the delivery of the notice signed by a person employed by the party receiving the notice, unless delivery is made:
  - (i) on a non-Business Day; or
  - (ii) after 5:00 pm on a Business Day,in which case the notice will be taken to be received on the next Business Day;
- (b) in the case of a posted letter, on the third Business Day after the date of posting if posted in Australia;
- (c) in the case of a facsimile transmission, on the day of transmission if the party giving the notice has a transmission confirmation report showing an error-free facsimile transmission, unless the transmission is made:
  - (i) on a non-Business Day; or
  - (ii) after 5:00 pm on a Business Day,in which case the notice will be taken to be received on the next Business Day;
- (d) in the case of an email, on the day the email is sent if the party giving the notice has a confirmation report or any other written evidence that the email has reached the recipient's mailbox, unless the email is sent:
  - (i) on a non-Business Day; or
  - (ii) after 5:00 pm on a Business Day;in which case the notice will be taken to be received on the next Business Day.

## 25 WAIVER

- 25.1 No waiver of any right of a party to this Agreement will be effective unless it is in writing and signed by that party.
- 25.2 A single or partial exercise or waiver of a right under this Agreement does not prevent any other exercise of that right or the exercise of any other right.

## 26 SURVIVAL

- 26.1 The following clauses will continue to apply after the end of this Agreement: 4.8 to 4.9 [Funding], 6 [Recordkeeping], 7.2, 7.3 and 7.7 [Assets], 8 [Reporting], 11 [Dispute Resolution], 15 [Transition of Activity], 16 [Intellectual Property], 17[Privacy Data Protection and Protected Disclosures], 18 [Confidential Information], 19 [Indemnity] and 20 [Insurance and Risk Management].

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