

# Commonwealth Funding Agreement

## Next Generation Manufacturing Investment Programme

**[Insert project number]**

Commonwealth of Australia represented by the Department of Industry, Innovation and Science

**(Commonwealth)**

and

**[insert Recipient]**

**ACN [insert]**

**ABN [insert]**

**(Recipient)**

## Details

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### Date

This Funding Agreement is made on .....

### Parties

The parties to this Funding Agreement are:

#### **Commonwealth of Australia**

Represented by the Department of Industry, Innovation and Science

ABN 74 599 608 295

Of 10 Binara Street CANBERRA ACT 2600

**(Commonwealth)**

**[name of Recipient]**

**ACN**

**ABN**

**Of [insert address of Recipient]**

**(Recipient)**

### Recitals

- A The Australian Government announced on 30 April 2014 that it would establish a \$155 million Growth Fund for employees and businesses affected by the closure of automotive manufacturing operations in Victoria and South Australia. The Growth Fund is part of the Australian Government's National Industry Investment and Competitiveness Agenda and includes the Next Generation Manufacturing Investment Programme (NGMIP).
- B The Next Generation Manufacturing Investment Programme aims to accelerate investment in Victoria and South Australia in areas of manufacturing where growth opportunities have been demonstrated. The Programme will support capital projects by businesses that are establishing or expanding their manufacturing operations in areas of high value manufacturing in Victoria and South Australia.
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- C The Australian Government is providing an additional \$29.1 million in grant funding to conduct a Round 2 of the Programme.
- D The Commonwealth is required by law to ensure accountability for the Funds and accordingly the Recipient is required to be accountable for all Funds received.
- E The Commonwealth has agreed to provide the Funds to the Recipient for the purposes of the Project, subject to the terms and conditions of this Agreement.
- F The Recipient accepts the Funds for the purposes of the Project, and subject to the terms and conditions of this Agreement.
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# Agreed Terms

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## Part 1 – Project and Funds

### 1. Definitions and interpretation

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#### 1.1 Defined terms

In this Agreement, except where the contrary intention is expressed, the following definitions are used:

Term	Definition
Advisers	(a) The financial or legal advisers of a party; and (b) The respective officers and employees of those financial or legal advisers
Agreed Terms	clauses 1 to 28 of this Agreement, which set out terms and conditions agreed by the parties.
Agreement	this agreement between the Commonwealth and the Recipient, as varied from time to time in accordance with clause 27.4, and includes its schedules and any attachments.
Agreement End Date	the date on which the Applicant submits a Final Report which is satisfactory to the Commonwealth.
Agreement Material	any Material created on or following the Project Start Date, for the purpose of or as a result of performing its obligations under this Agreement and includes any modifications that may be required under clause 13.6(b).
Agreement Period	the period from the Commencement Date to the Agreement End Date.
Applicant	refers to the Recipient prior to, and during, the assessment of its Application for funding by the Commonwealth under the Programme.
Application	means the Application Form and all supporting material in connection with it, submitted by the Applicant to, and accepted by, the Commonwealth, and in respect of which the parties have entered into this Agreement.
Application Form	the document issued by the Programme Delegate for the purposes of applicants applying for funding under the Programme.
Application Lodgement Date	the date determined by the Commonwealth on which the Applicant lodged a complete and otherwise eligible Application Form with the Commonwealth.
Asset	any item of tangible property purchased, leased, created, modified or otherwise brought into existence, in connection with the project.

Term	Definition
Budget	the budget (if any) set out in Table 5 of Schedule 1, as varied from time to time in accordance with this Agreement.
Business Day	a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the act is to be performed or where the Notice is received.
Commencement Date	the date on which this Agreement commences, as specified on page 2 of this Agreement.
Commonwealth	as the context requires: <ul style="list-style-type: none"> <li>(a) the Commonwealth of Australia as represented by the Department of Industry, Innovation and Science (ABN 74 599 608 295); or</li> <li>(b) the Commonwealth of Australia.</li> </ul>
Confidential Information	Information that is by its nature confidential and: <ul style="list-style-type: none"> <li>(a) is designated by a party as confidential, including information that is described in Items 4 and 5 of Table 1 in Schedule 1; or</li> <li>(b) a party knows or ought to know is confidential; or</li> <li>(c) is agreed in writing between the parties after the date of the Agreement to be Confidential Information</li> </ul> but does not include: <ul style="list-style-type: none"> <li>(d) information that is or becomes public knowledge otherwise than by breach of this Agreement or any other confidentiality obligation.</li> </ul>
Commonwealth Material	any Material provided to the Recipient by the Commonwealth
Commonwealth Representative	the person occupying the position of Programme Manager, Next Generation Manufacturing Investment Programme.
Customer Guidelines	means the Guide to Managing Your Grant, the Eligible Expenditure Guidelines and any other guidelines the Programme Delegate publishes for the Programme.
Department	the Department of Industry, Innovation and Science.
Eligible Activity	is an activity that satisfies the requirements of 'an eligible activity' for the purposes of the Guidelines.
Eligible Expenditure	the expenditure incurred by the Recipient in relation to a Project that satisfies the requirements of the Guidelines.
Funds	the amount or amounts described and specified in Table 3 of Schedule 1 which are paid or payable by the Commonwealth to the Recipient under this Agreement.

Term	Definition
Grant Percentage	the percentage of Eligible Expenditure specified in Table 2 of Schedule 1, which is paid or payable by the Commonwealth to the Recipient under this Agreement.
Guidelines	the Next Generation Manufacturing Investment Programme Ministerial Programme Guidelines effective at the Application Lodgement Date.
Independent contractor	any person engaged by the Recipient to undertake work related to the Recipient's business and not directly related to the Project.
Intellectual Property Rights	<p>all intellectual property rights, including:</p> <ul style="list-style-type: none"> <li>(a) copyright, patents, trademarks (including goodwill in those marks), designs, trade secrets, know how, rights in circuit layouts, domain names and any right to have confidential information kept confidential;</li> <li>(b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and</li> <li>(c) all rights of a similar nature to any of the rights in paragraphs (a) and (b) which may subsist in Australia or elsewhere,</li> </ul> <p>whether or not such rights are registered or capable of being registered.</p>
Law	any applicable statute, regulation, rule, by-law, ordinance or subordinate legislation in force from time to time in Australia, whether made by a State, Territory, the Commonwealth, or a local government, the common law and rules and doctrines of equity, in each case as it is applicable from time to time.
LEADR & IAMA	the dispute resolution association with that name and the Australian Business Number 69 008 651 232.
Material	includes property, information, software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.
Milestone	a stage of completion of the Project as set out in Table 4 of Schedule 1.
Milestone Period	that part of the Agreement Period, beginning, for each Milestone, on the Start date and ending on the End date as set out for that Milestone in Table 4 of Schedule 1.

Term	Definition
Notice	a notice, demand, consent, approval or other communication issued under this Agreement.
Other Financial Assistance	the financial contribution (if any) specified in Table 6 of Schedule 1 or notified from time to time under clause 5.2.
Outcomes	the outcomes for the Project, as set out in paragraph 5 of Schedule 1.
Personnel	in relation to a party, any employee, officer, agent, or professional adviser of that party, and in the case of the Recipient, any subcontractor.
Pre-existing Material	Material owned by the recipient before execution of this Agreement.
Programme	the Next Generation Next Generation Manufacturing Investment Programme
Programme Delegate	an employee of the Department who has been empowered by the Minister for Industry, Innovation and Science, or is otherwise duly authorised, to carry out the relevant functions in respect of the Programme.
Project	the Project described in paragraph 4 of Schedule 1.
Project End Date	the date specified in Item 5 of Table 2 of Schedule 1.
Project Period	that part of the Agreement Period beginning on the Project Start Date and ending on the Project End Date.
Project Start Date	the date specified in Item 4 of Table 2 of Schedule 1.
Reports	the reports to be provided under clause 10.2.
Schedules	the schedules to this Agreement.
Subcontractor	any person that the Recipient subcontracts part or all of the work comprised in the Project.
Third Party Material	Material owned by a third party that is: <ul style="list-style-type: none"> <li>(a) included, embodied in or attached to the Agreement Material; or</li> <li>(b) used in undertaking the Project.</li> </ul>
WHS Act	the <i>Work Health and Safety Act 2011</i> (Cth) and any corresponding WHS law as defined in that Act
WHS Laws	the WHS Act, regulations made under the WHS Act and any Code of Practice approved for the purpose of the WHS Act.

## **2. Priority of documents**

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If there is inconsistency between any of the documents comprising this Agreement, those documents are to be interpreted in the following descending order of priority to the extent of the inconsistency:

- (a) Agreed Terms - which prevail over;
- (a) Schedules - which prevail over;
- (b) any attachments to a Schedule - which prevail over; and
- (c) documents incorporated into this Agreement, in whole or in part, by reference.

## **3. Term**

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### **3.1 Duration of Agreement**

This Agreement begins on the Commencement Date and continues until the Agreement End Date, unless terminated in accordance with clause 24.

### **3.2 Duration of Project**

The Project will commence on the Project Start Date and end on the Project End Date, unless this Agreement is terminated in accordance with clause 24.

## **4. Project**

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### **4.1 Undertaking the Project**

The Recipient must:

- (a) undertake the Project to achieve the Outcomes;
- (b) undertake the Project diligently, effectively, to a high professional standard and in accordance with:
  - (i) all applicable Laws;
  - (ii) Customer Guidelines;
  - (iii) the Guidelines; and
  - (iv) good industry practice;
- (c) complete the Project within the Project Period; and
- (d) achieve the Milestones by their respective due dates, as specified in Table 4 of Schedule 1.

### **4.2 Acknowledgement of support**

Subject to clause 17, the Recipient must, in all:

- (a) publications, promotional and advertising materials in all media; and
- (b) public announcements, events and activities in relation to the Project

acknowledge the financial and other support received from the Commonwealth as approved by the Commonwealth prior to its use.



### 4.3 Warranties

The Recipient represents and warrants that:

- (a) all information provided by the Recipient and included in this Agreement and any information given to the Commonwealth from time to time under this Agreement, is true and correct and not false or misleading in any material respect;
- (b) the Recipient is not aware of any circumstances which adversely affects or might adversely affect the Recipient's ability to fulfil its obligations under this Agreement;
- (c) it can fund the costs of the Project not covered by the Funds;
- (d) it has the power and authority to enter into and perform this Agreement;
- (e) it, and its subcontractors and Personnel, have the necessary experience, skill, knowledge, expertise and competence to undertake the Project and (where appropriate) will hold such licences, permits or registrations as are required under any State, Territory or Commonwealth legislation to undertake the Project, and are fit and proper people;
- (f) it is compliant with the *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**) and that:
  - (i) if it becomes non-compliant with the WGE Act during the Agreement Period, the Recipient must notify the Commonwealth as soon as practicable;
  - (ii) if the Agreement Period exceeds 18 months, the Recipient must provide a current letter of compliance under the WGE Act within 18 months from the Commencement Date and following this, annually to the Commonwealth;
  - (iii) compliance with the WGE Act does not relieve the Recipient from its responsibility to comply with its other obligations under this Agreement.
- (g) it is not receiving any financial assistance for activities in connection with the Project under a Commonwealth granting programme other than the Programme;
- (h) it is aware that the Commonwealth will rely on all the representations and warranties in this clause 4.3 in entering into this Agreement and providing Funding.

### 4.4 Project Performance

- (a) The Recipient must notify the Commonwealth immediately upon becoming aware of any circumstances that are likely to adversely affect the Recipient's ability to comply with the terms of this Agreement, including its solvency or ability to ensure that the Project is carried out in accordance with this Agreement.
- (b) The giving of Notice by the Recipient pursuant to this clause 4.4, will not, in any way, limit the obligations of the Recipient under this Agreement or excuse the Recipient in any way from the performance of those obligations or the consequences of their non-performance.

## 5. Contributions

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### 5.1 Recipient Contributions

The Recipient must, at a minimum, fund the Recipient Contribution Percentage of the Eligible Expenditure for the Project as outlined in Table 2 of Schedule 1.

## 5.2 Other financial assistance

- (a) Subject to clauses 5.2(b), 5.2(d) and 5.2(e), the Recipient must give the Commonwealth full details of any financial assistance for activities in connection with the Project which the Recipient receives from another Commonwealth, State or Territory, local or international government source or agency after the Commencement Date (Other Financial Assistance), including the amount and source of the funding and the name of the programme under which it was provided, within 30 days of the Recipient receiving notice that the Other Financial Assistance has been approved (conditionally or unconditionally).
- (b) The Recipient must notify the Commonwealth within 14 days of entering into any arrangement or receiving any entitlement (in either case whether contractual or statutory) under which it is entitled to receive any contributions for the Project which are not specified in Table 6 of Schedule 1. The Commonwealth may, at its discretion, consider these contributions to be Other Financial Assistance for the purposes of this Agreement.
- (c) The Commonwealth may reduce, suspend, defer or reschedule (or do any two or more of those things) its payments as set out in Schedule 1 in the event the Recipient receives or is approved (conditionally or unconditionally) to receive Other Financial Assistance, but any reduction in the aggregate amount of the Funds must not exceed the value of that Other Financial Assistance.
- (d) The Recipient must ensure that the combined amount of the Other Financial Assistance and the Funds does not exceed the Maximum Grant Percentage as set out in Table 2 of Schedule 1 of the total Eligible Expenditure. If it does, the excess must be immediately repaid to the Commonwealth and ceases to form part of the available Funds.
- (e) The Recipient must repay to the Commonwealth on demand so much of the Funding previously provided as, in the opinion of the Programme Delegate, has been applied other than:
  - (i) to fund Eligible Activities; or
  - (ii) to reimburse expenditure which is Eligible Expenditure.The Commonwealth may exercise its rights under this clause 5.2(e) by withholding Funding to which the Recipient would otherwise be entitled up to the amount repayable according to this clause.
- (f) The Recipient acknowledges and agrees that it will comply with all requirements under Australia's Foreign Investment Regime if it receives Other Financial Assistance.

## 6. Funds

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### 6.1 Payment

Subject to:

- (a) Clause 6.2 and 6.3;
- (b) Sufficient funding being available for the Programme; and
- (c) the Recipient complying with this Agreement;

the Commonwealth will pay the Funds to the Recipient on achievement of the Milestones set out in Table 4 of Schedule 1 for Eligible Expenditure costs incurred during that Milestone Period, notwithstanding only the Grant Percentage set out in Table 2 of Schedule 1 of the Eligible Expenditure costs is payable by the Commonwealth.

## 6.2 Suspension

- (a) Without limiting any other right or remedy of the Commonwealth, the Commonwealth may suspend payment of the Funds (or any of the Funds) if:
- (i) any amount of Eligible Expenditure is funded by Other Financial Assistance resulting in the combined value of the Other Financial Assistance and the Funds exceeding the Maximum Grant Percentage set out in Table 2 of Schedule 1;
  - (ii) the Recipient has not provided a Report due to be provided before the date for payment, until the Report is provided and is satisfactory to the Commonwealth;
  - (iii) a Report provided by the Recipient is inaccurate, incomplete or incorrect, until the Commonwealth has received a replacement Report and the Commonwealth is satisfied that the replacement Report is accurate, correct and without any other deficiency;
  - (iv) the Recipient has not completed a Milestone that was due to be completed before the date for payment, until the Milestone is completed; or
  - (v) the Recipient has not otherwise commenced or undertaken the Project, in either case to the satisfaction of the Commonwealth, until the Recipient remedies its performance to the Commonwealth's satisfaction.
- (b) Despite any suspension, the Recipient must continue to perform its obligations under this Agreement.

## 6.3 Reduction

Without limiting any other right or remedy of the Commonwealth, the Commonwealth may reduce or otherwise amend the amount of any instalment of the Funds:

- (a) if by the date for payment of the instalment the Recipient has not fully satisfied the relevant Milestone, by the amount determined by the Commonwealth to represent the Funds attributable to the Eligible Expenditure required to achieve the Milestone;
- (b) if, in the Commonwealth's opinion, Funds or Eligible Expenditure have been spent, incurred, or committed other than in accordance with this Agreement, by the amount that, in the Commonwealth's opinion, was spent, incurred or committed other than in accordance with this Agreement;
- (c) to ensure that the Retention Percentage as set out in Table 2 of Schedule 1 of the Funds remain available for payment to the Recipient to reimburse Eligible Expenditure on satisfactory completion of the Final Report; and
- (d) to ensure that the relevant instalment is equal to, or less than, the Grant Percentage as set out in Table 2 in Schedule 1 of the actual Eligible Expenditure incurred.

## 6.4 Taxes

The Recipient must pay all:

- (a) stamp duty (including penalties and interest) assessed or payable in respect of this Agreement and the Project; and
- (b) subject to clause 7, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the performance of this Agreement.

## **7. GST**

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### **7.1 Construction**

In this clause 7 words and expressions which are not defined in this Agreement but which have a defined meaning in the *GST Law* have the same meaning as in the *GST Law*.

### **7.2 Consideration GST exclusive**

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

### **7.3 Payment of GST**

If GST is payable by a supplier on any supply made under this Agreement, the recipient of the supply will pay to the supplier an amount equal to the GST payable on the supply, in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

### **7.4 Tax invoice**

- (a) Except where clause 7.4(b) applies:
  - (i) the supplier must deliver a tax invoice or an adjustment note to the recipient of the supply before the supplier is entitled to payment of an amount under clause 7.3; and
  - (ii) the recipient of the supply can withhold payment of the amount payable under clause 7.3 until the supplier provides a tax invoice or an adjustment note as appropriate.
- (b) If GST is imposed on any supply made by the Recipient to the Commonwealth under this Agreement in return for all or any part of the grant funds, the Commonwealth may issue a 'recipient created tax invoice' to the Recipient for the supply in question (and an adjustment note for any adjustment event in respect of that supply) and the Recipient must not issue a tax invoice (or adjustment note) for or in respect of the supply. Each party warrants that, if it is required to be GST registered under Law, it is GST registered and agrees that it will promptly notify the other party if it ceases to be GST registered.

### **7.5 Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a supplier under this Agreement the amount payable by the recipient of the supply under clause 7.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient of the supply to the supplier or by the supplier to the recipient of the supply as the case requires.

## 7.6 Reimbursements

No party may claim from the other an amount for which the first party can obtain an input tax credit.

## 8. Eligible Expenditure

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### 8.1 Eligible Expenditure

The Funds provided will be equal to, or less than, that Grant Percentage as set out in Table 2 of Schedule 1 of the total budgeted Eligible Expenditure set out in Table 5 in Schedule 1 as determined on or before the date of this Agreement (Commonwealth Funded Eligible Expenditure).

The Recipient acknowledges that:

- (a) the proportion of Funds that will be paid to the Recipient on completion of the Final Report will include the Retention Percentage as set out in Table 2 of Schedule 1 of total Eligible Expenditure.
- (b) notwithstanding any other provision of this Agreement, the Commonwealth may adjust each payment instalment to ensure that the Retention Percentage as set out in Table 2 of Schedule 1 of the Funds remain available for payment to the Recipient to reimburse Eligible Expenditure on satisfactory completion of the Final Report;
- (c) the amount of the Commonwealth Funded Eligible Expenditure cannot be exceeded under any circumstances, including as a result of any increase in Eligible Expenditure; and
- (d) any expenditure over Commonwealth Funded Eligible Expenditure must be met by the Recipient.

Anything done or omitted by the Recipient, the effect of which is, or might be, to defer the payment of any Funds from one financial year to the next requires the prior written consent of the Commonwealth. Failure to obtain that prior written consent may result in the Commonwealth declining to Fund the relevant Eligible Expenditure.

### 8.2 What Funds can be used for

- (a) Subject to clause 8.2(d), the Recipient may only incur Eligible Expenditure:
  - (i) for the purpose of the Project and in accordance with this Agreement; and
  - (ii) in accordance with the Budget in Table 5 of Schedule 1.
- (b) Subject to clauses 8.1 and 8.2(c), the Recipient may vary the Budget by reasonably re-allocating expenditure between items specified in the Budget.
- (c) Any variation under clause 8.2(b) which increases the amount allocated to an item as outlined in the Budget in Table 5 of Schedule 1 by more than 20 per cent cannot be made without the Commonwealth's prior written approval.
- (d) For the avoidance of doubt, the Recipient must not use the Funds to undertake any activity apart from those detailed in the Budget in Table 5 of Schedule 1 or any activity directly related to carrying out the Project.

### 8.3 When Funds cannot be used

- (a) Without limiting any other right or remedy of the Commonwealth, the Commonwealth may by notice direct the Recipient not to spend Funds (**Stop Payment Notice**) if:
  - (i) the Recipient has not completed, or properly completed, a Report that was due before the date of the Stop Payment Notice;
  - (ii) the Recipient has not achieved a Milestone that was due to be achieved before the date of the Stop Payment Notice; or
  - (iii) the Recipient is otherwise in breach of this Agreement, or has notified the Commonwealth that it may come to be in breach (forthcoming breach), of this Agreement, and in the case of a forthcoming breach has not satisfied the Commonwealth that the forthcoming breach will be avoided.
- (b) The Recipient must comply with a Stop Payment Notice from the Commonwealth immediately it receives it and must not undertake Eligible Expenditure or make any other form of commitment the performance of which the Recipient depends on Funding being received under this Agreement, unless and until the Commonwealth, at its discretion, notifies the Recipient otherwise.

### 8.4 No additional Funds

The Commonwealth is not responsible for the provision of additional money to meet any expenditure (whether or not its nature is that of Eligible Expenditure) incurred or committed in excess of the Funds.

## 9. Repayment

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### 9.1 During the Agreement Period

- (a) The Commonwealth is entitled to recover from the Recipient, and the Recipient must pay to the Commonwealth on demand, all Funds previously paid by the Commonwealth to the Recipient where the Recipient breaches any of the terms and conditions in this Agreement, and the Commonwealth:
  - (i) does not waive the breach in writing; or
  - (ii) waives the breach conditionally, and the Recipient breaches, or fails to satisfy, that term or condition.
- (b) If the Recipient relocates its business from its region or state or reduces the scale of its business as it relates to the Project during the Agreement Period or within 12 months after the Agreement End Date and without the prior written consent of the Commonwealth, the Recipient must, at the request of the Commonwealth in writing, repay the total amount of the Funds paid to that date.
- (c) If the Recipient receives any financial assistance for activities in connection with the Project under a Commonwealth granting programme other than the Next Generation Manufacturing Investment Programme, the Recipient must, at the request of the Commonwealth in writing, repay the total amount of the Funds paid to that date.

### 9.2 Following the Agreement End Date

After the Agreement End Date, the Commonwealth is entitled to recover from the Recipient and the Recipient must pay to the Commonwealth on demand:

- (a) the amount of the Funds which:
  - (i) have not been applied by the Recipient in reimbursement of Eligible Expenditure; or
  - (ii) in the Commonwealth's opinion, have been spent other than in accordance with this Agreement. For the avoidance of doubt, and despite clause 9.2(b), this may be all the Funds; and
- (b) all Funds where the Recipient is otherwise in breach of this Agreement.

### 9.3 Repayment notice

- (a) The Commonwealth may give the Recipient a notice requiring the Recipient to repay to the Commonwealth (or deal with as specified by the Commonwealth in that notice) an amount which the Recipient is obliged to repay to the Commonwealth under clause 9.1 or 9.2.
- (b) If the Commonwealth gives the Recipient a notice under clause 9.3(a), the Recipient must repay the amount specified in the notice in full (or deal with it as specified by the Commonwealth in that notice) within 14 days of the date of the notice, whether or not the Recipient disputes the Commonwealth's entitlement to recover, or the Recipient's obligation to repay, that amount under clause 9.1 or 9.2.

## 10. Monitoring progress and reporting

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### 10.1 Progress meetings

The parties will meet at the times and in the manner reasonably required by the Commonwealth to discuss any issues that either may have in relation to this Agreement, its performance or the Project. The Recipient and Commonwealth must both provide representatives who are reasonably available to attend such a meeting and are able to answer any queries relating to this Agreement, its performance or the Project raised by either party.

### 10.2 Reporting

The Recipient must provide, using the relevant templates and format requirements provided in Guide to Managing Your Grant:

- (a) a Milestone Report no later than 4 weeks from the achievement of each Milestone in Table 4 of Schedule 1; and
- (b) a Progress Report six months after the completion of a Milestone, when there is more than six months between two Milestones; and
- (c) a Final Report within three months of the Project End Date.

For the avoidance of doubt, the submission of a Progress Report will not result in any payment of Funds. Funds will only be paid in accordance with this Agreement and on receipt of a Milestone Report or a Final Report that is to the Commonwealth's satisfaction.

### 10.3 Ad hoc reports

The Recipient must provide ad-hoc reports as required by the Commonwealth from time to time at the time and in the manner reasonably required by the Commonwealth in relation to

any significant developments concerning the Project or any significant delays or difficulties encountered in undertaking the Project.

#### 10.4 Contents of Reports

The Commonwealth may from time to time notify the Recipient of:

- (a) the required format for a Report (or a particular individual Report) under this Agreement (or for part of a Report or of any particular individual Report);
- (b) the required information the Recipient is to include in a Report (or a particular individual Report; or part of a Report; or of any particular individual Report);
- (c) the person or persons who is required to certify that the information contained in a Report (or a particular individual Report; or part of a Report; or of any particular individual Report) is accurate; or
- (d) a template report (or a new template report) with any or all of the above requirements.

The Recipient must comply with the requirements within the timeframe notified by the Commonwealth.

#### 10.5 Provision of Reports

If any of the Reports provided to the Commonwealth under this Agreement are not provided within the time required by or under this Agreement or do not meet the satisfaction of the Commonwealth, in the Commonwealths' sole discretion, the Commonwealth may, without limiting any of its other rights under this Agreement or at law, reduce, suspend or terminate the Funds under this Agreement.

#### 10.6 Evaluation

For a period of 5 years following the Agreement End Date, the Recipient must, at its own non-reimbursable cost, cooperate with any evaluation of the Programme undertaken by the Commonwealth or independent third parties, including, without limitation, by:

- (a) providing all reasonable assistance to the Commonwealth;
- (b) responding to all reasonable requests from the Commonwealth; and
- (c) providing any information reasonably required by the Commonwealth.

The Recipient must comply with a request under this clause 10.6 within 30 days of receiving the request.



## Part 2 – General Requirements

### 11. Subcontractors

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#### 11.1 Subcontracting

- (a) The Recipient must:
  - (i) not in any event, enter into a subcontract under this Agreement with a subcontractor named by the Director of the Workplace Gender Equality Agency in a report to the responsible minister as an employer currently not complying with the reporting requirements of the *Workplace Gender Equality Act 2012* (Cth);
  - (ii) ensure that any subcontractor engaged to undertake the Project under this Agreement is contractually required to comply with obligations consistent with those contained in:
    - (A) clause 16 (Insurance);
    - (B) clause 18 (Confidentiality and privacy);
    - (C) clause 19 (Protection of personal information);
    - (D) clause 20 (Conflict of interest);
    - (E) clause 21 (Books and records);
    - (F) clause 22 (Audit and access);
    - (G) clause 27.16 (False or misleading information); and
    - (H) clause 28 (Work health and safety).
- (b) The Recipient is fully responsible for undertaking the Project even if the Recipient subcontracts any aspect of the Project and for the performance of all of the Recipient's obligations under this Agreement.

#### 11.2 Commonwealth may request replacement of Personnel

- (a) The Commonwealth may at any time request the Recipient to remove from work under this Agreement any of the Recipient's subcontractors or Personnel if an event referred to in clauses 24.2(c)(iv)-(c)(ix) occurs in relation to the subcontractor or Personnel.
- (b) If requested by the Commonwealth, the Recipient must provide a replacement person of suitable ability and qualifications at no additional charge and at the earliest opportunity.
- (c) Where one of the subcontractor's or Personnel is or will become unable or unwilling to be involved in the Project, the Recipient must notify the Commonwealth immediately and find a replacement subcontractor or Personnel.

## 12. Assets

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### 12.1 Ownership

Subject to the terms of any lease or other arrangement satisfactory to the Programme Delegate, the Recipient is to own any Asset.

### 12.2 Use and dealings

- (a) Subject to the approval of the Commonwealth, the Recipient can use the Funds in whole or in part to purchase an Asset.
- (b) During the Agreement Period, the Recipient must use an Asset only in accordance with this Agreement, for the purposes of the Project, or other purposes consistent with the Outcomes.
- (c) During the Agreement Period, the Recipient must:
  - (i) obtain and maintain good title to all Assets (other than Assets which the Recipient leases);
  - (ii) not encumber, permit to be encumbered or become the subject or any security as defined in the *Personal Property Securities Act 2009* (Cth) (other than by way of a charge, whether fixed, floating or both) or dispose of any Asset, or deal with or use any Asset (including selling the Asset and subsequently leasing it) other than in accordance with this clause 12 and on arms' length terms, without the Commonwealth's prior written approval;
  - (iii) hold all Assets securely, safeguard them against theft, loss, damage or unauthorised use and ensure they are adequately insured;
  - (iv) maintain all Assets in good working order and carry out regular repairs and maintenance;
  - (v) be fully responsible for, and bear all risks relating to, the use or disposal of all Assets;
  - (vi) maintain all appropriate insurances for all Assets to their full replacement value, noting, where there is one, the Commonwealth's interest in the Asset under this Agreement, and provide satisfactory evidence of this on request from the Commonwealth;
  - (vii) if required by law, maintain registration and licensing of all Assets; and
  - (viii) be fully responsible for, and bear all risks relating to, the use or disposal of all Assets.

### 12.3 Assets register

- (a) The Recipient must maintain an Assets register in relation to the Assets valued at over \$6,500 (excluding GST), which sets out:
  - (i) asset description;
  - (ii) purchase price and total lease cost;
  - (iii) date of purchase or lease;
  - (iv) type and term of lease;

- (v) location of Asset;
  - (vi) date of disposal approval;
  - (vii) disposal date; and
  - (viii) disposal method.
- (b) The Recipient must provide a copy of the Assets register to the Commonwealth on request.
- (c) If the Recipient uses part of the Funds to purchase an Asset, but that Asset is or will be owned by a third party and that Asset is valued at over \$6,500 (excluding GST), the Recipient must include that Asset in the Asset register and specify the owner of that Asset.

#### 12.4 Disposal of Assets

- (a) Prior to selling or disposal of any Asset, the Recipient must obtain the written consent of the Commonwealth,
- (i) during the Agreement Period;
  - (ii) within 12 months after the Agreement End Date; or
  - (iii) on termination of this Agreement.

In giving its consent the Commonwealth may impose such conditions as it thinks fit.

- (b) If, during the Agreement Period, any Asset is disposed of in breach of this Agreement, the proceeds of the disposal are received and must be held on trust by the Recipient for the Commonwealth absolutely.

#### 12.5 Repayment of Commonwealth's contribution to purchase of Asset

The Commonwealth may require the Recipient to pay to the Commonwealth the full amount of the Funds:

- (a) if the Recipient sells or otherwise disposes of any Asset without the Commonwealth's prior written consent:
- (i) during the Agreement Period;
  - (ii) within 12 months after the Agreement End Date; or
  - (iii) on termination of this Agreement; or
- (b) if the Recipient uses part of the Funds to purchase an Asset, and that Asset is or will be owned by a third party, and that third party, sells or otherwise disposes of that Asset without the Commonwealth's prior written consent:
- (i) during the Agreement Period;
  - (ii) within 12 months after the Agreement End Date; or
  - (iii) on termination of this Agreement.

#### 12.6 Failure to Repay

If the Recipient fails to make payment as required by clause 12.5, within 20 Business Days of receiving written notice from the Commonwealth:

- (a) the Recipient must pay the Commonwealth interest on the amount from the date it was due, for the period it remains unpaid, on demand; and
- (b) the amount and interest are recoverable by the Commonwealth as a debt due to the Commonwealth by the Recipient.

## 12.7 Lost or damaged Assets

If any of the Assets are lost, damaged or destroyed, the Recipient must reinstate or replace the Assets at its own non-reimbursable cost including from the proceeds of any insurance. This clause 12 continues to apply to the reinstated or replacement Assets. Any surplus from the proceeds of any insurance must be notified to the Commonwealth and used and accounted for as Funding under this Agreement.

## 13. Intellectual Property Rights

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### 13.1 Commonwealth Material

The Commonwealth will provide to the Recipient the Commonwealth Material and the Recipient must ensure that the Commonwealth Material is used strictly in accordance with any conditions, restrictions or directions specified by the Commonwealth.

### 13.2 Pre-existing Material and Third Party Material

This clause 13 does not affect the ownership of the Intellectual Property Rights in any Pre-existing Material or Third Party Material.

### 13.3 Third Party Material

- (a) The Recipient must obtain all necessary copyright and other Intellectual Property Rights permissions before making any Third Party Material available for the purpose of this Agreement or the Project.
- (b) The Recipient must specify which parts (if any) of the Intellectual Property Rights are Third Party Material and who owns the Intellectual Property Rights in that material.

### 13.4 Intellectual Property Rights in Agreement Material

- (a) All Intellectual Property Rights in the Agreement Material vest in the Recipient on creation.
- (b) The Recipient grants to the Commonwealth a perpetual, world-wide, royalty free, non-exclusive licence (including the right to sublicense) to use, reproduce, adapt, modify and communicate all Material provided by the Recipient under this Agreement, for the purposes of reporting on, administering and evaluating this Agreement and the Programme.
- (c) The Commonwealth acknowledges that whenever it exercises its licence in clause 13.4(b) it will comply with clause 18 (Confidentiality and privacy).

### 13.5 Warranty

The Recipient warrants that:

- (a) the Pre-existing Material, Third Party Material and Agreement Material (Warranted Materials) and the Commonwealth's use of the Warranted Materials will not infringe the Intellectual Property Rights of any person; and

- (b) it has the necessary rights to vest the Intellectual Property Rights and grant the licences as provided in this clause 13.

### 13.6 Remedy for breach of warranty

If someone claims, or the Commonwealth reasonably believes that someone is likely to claim, that all or part of the Warranted Materials infringe their Intellectual Property Rights, the Recipient must, in addition to the indemnity under clause 15 and to any other rights that the Commonwealth may have against it, promptly, at the Recipient's expense:

- (a) use its best efforts to secure the rights for the Commonwealth to continue to use the affected Warranted Materials free of any claim or liability for infringement; or
- (b) replace or modify the affected Warranted Materials so that the Warranted Materials or the use of them does not infringe the Intellectual Property Rights of any other person without any degradation of the performance or quality of the affected Warranted Materials.

## 14. Moral Rights

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### 14.1 Obtaining consents

To the extent permitted by applicable Laws and for the benefit of the Commonwealth, the Recipient must:

- (a) give, where the Recipient is an individual, in a form acceptable to the Commonwealth;
- (b) use its best endeavours to ensure that each of the Personnel used by the Recipient in the production or creation of the Agreement Material gives, in a form acceptable to the Commonwealth; and
- (c) use its best endeavours to ensure that any holder of Moral Rights in Third Party Material included in the Agreement Material gives,

genuine consent in writing to the use of the Agreement Material for the Specified Acts, even if such use would otherwise be an infringement of its or their Moral Rights and notify the Commonwealth if this consent is not obtained.

### 14.2 Specified Acts

- (a) In this clause 14, Specified Acts means:
  - (i) falsely attributing the authorship of any Agreement Material, or any content in the Agreement Material (including literary, dramatic, artistic works and cinematograph films within the meaning of the *Copyright Act 1968* (Cth));
  - (ii) materially altering the style, format, colours, content or layout of the Agreement Material and dealing in any way with the altered Agreement Material;
  - (iii) reproducing, communicating, adapting, publishing or exhibiting any Agreement Material; and
  - (iv) adding any additional content or information to the Agreement Material.

- (b) For the purposes of clause 14.2(a), Agreement Material includes any Pre-existing Material and Third Party Material to the extent that it is included in, forms part of or is attached to the Agreement Material.

## **15. Indemnity**

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- (a) The Recipient will at all times indemnify, hold harmless and defend the Commonwealth, its officers and employees (referred to in this clause 15 as "those indemnified") from and against any loss or liability, including:
  - (i) loss of, or damage to, property of the Commonwealth;
  - (ii) claims by any person in respect of personal injury or death;
  - (iii) claims by any person in respect of loss of, or damage to, any property; and
  - (iv) costs and expenses including the costs of defending or settling any claim referred to in clause 15(a)(ii) or clause 15(a)(iii),arising out of or as a consequence of:
  - (v) use or disposal of Assets;
  - (vi) an infringement, or an alleged infringement, of the Intellectual Property Rights of any person, which occurred by reason of an act done by the Commonwealth in relation to any part of the Project;
  - (vii) any actual, likely or threatened breach of the Recipient's, its Personnel's or subcontractor's obligations relating to Confidential Information or personal information; or
  - (viii) without limiting the preceding paragraphs, any breach of this Agreement by the Recipient, or negligence on the part of the Recipient, its Personnel or subcontractors or wrongful or unlawful act or omission on the part of the Recipient, its Personnel or subcontractors.
- (b) The Recipient's liability to indemnify those indemnified under clause 15(a) will be reduced proportionally to the extent that any negligent act or omission of those indemnified contributed to the loss.
- (c) The Recipient will at all times indemnify, hold harmless and defend the Commonwealth against any compensation, remuneration or other amount payable to a third party for the use or exploitation of the Agreement Material (or any of it), or exercise of any Intellectual Property Right of a third party embodied in the Agreement Material, by the Commonwealth (or any person authorised by the Commonwealth) in circumstances where that use, exploitation or exercise is permitted under legislation without infringing the third party's Intellectual Property Right, and against all loss, liability, cost and expense arising out of or in connection with a claim for payment of any such compensation, remuneration or other amount.

## **16. Insurance**

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The Recipient agrees to maintain adequate insurance for the duration of this agreement and provide the Commonwealth with proof when requested.

## **17. Publicity**

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- (a) The Commonwealth reserves the right to publicise, undertake promotional activities and report on the awarding of the Funds and the Project (including Eligible Activities and Outcomes), and may do this by, amongst other means, including the Recipient's name, the amount of the Funds and the title and a brief description of the Project and its Outcomes in media releases, general announcements about the Programme and annual reports.
- (b) The Recipient must, before making a public announcement or producing, releasing or publishing any and all publications, publicity material, signage, reports, information on websites and any other public disclosures, disseminations of information or activities conducted by the Recipient in connection with this Agreement or any transaction contemplated by it, obtain the Commonwealth's written agreement to the publicity event, except if required by Law or a regulatory body (including a relevant stock exchange).
- (c) If the Recipient is required by Law or a regulatory body to make a public announcement in connection with this Agreement or any transaction contemplated by this Agreement, the Recipient must, to the extent practicable, first consult with and take into account the reasonable requirements of the Commonwealth.

## **18. Confidentiality and privacy**

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### **18.1 Prohibition on disclosure**

- (a) Subject to clause 18.4, the Recipient must not, without the prior written consent of the Commonwealth, disclose any Commonwealth Confidential Information to a third party.
- (b) Subject to clause 18.4, the Commonwealth must not, without the prior written consent of the Recipient, disclose any Recipient Confidential Information to a third party.

### **18.2 Conditions of approval**

In giving written consent to use or disclose Commonwealth Confidential Information, the Commonwealth may impose such conditions as it thinks fit. The Recipient must comply with any term or condition imposed by the Commonwealth under this clause 18.2.

### **18.3 Advisers and third parties**

The Commonwealth may at any time require the Recipient to arrange for:

- (a) its Advisers;
- (b) its Personnel and other employees and subcontractors involved in the Project; or
- (c) any other third party, to whom Commonwealth Confidential Information may be disclosed pursuant to clause 18.4(a) or clause 18.4(b),

to give a written undertaking relating to the use and non-disclosure of the Commonwealth's Confidential Information in the form approved by the Commonwealth.

## 18.4 Exceptions to obligations

The obligations on each party under clause 18.1 or 18.10 will not be taken to have been breached to the extent that Confidential Information of the other party:

- (a) is disclosed by a party to its Advisers, or employees solely in order to comply with obligations, or to exercise rights, under this Agreement;
- (b) is disclosed to a party's internal management personnel, solely to enable effective management or auditing of activities related to this Agreement;
- (c) is disclosed by the Commonwealth to the responsible Minister;
- (d) is disclosed by the Commonwealth, in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia;
- (e) is shared by the Commonwealth within the Department, or with another Commonwealth agency, where this serves the Commonwealth's legitimate interests;
- (f) is disclosed by the Commonwealth to the Auditor-General, the Commonwealth Ombudsman or the Australian Information Commissioner;
- (g) is required by Law or a regulatory body (including a relevant stock exchange) to be disclosed; or
- (h) is in the public domain otherwise than due to a breach of this Agreement.

## 18.5 Obligation on disclosure

Where a party discloses Confidential Information of the other party to another person:

- (a) pursuant to clauses 18.4(a), 18.4(b) or 18.4(e), the disclosing party must:
  - (i) notify the receiving person that the information is Confidential Information; and
  - (ii) not provide the information unless the receiving person agrees to keep the information confidential, including in the case of Commonwealth Confidential Information, the receiving person giving the Commonwealth a legally binding undertaking to that effect in the form approved by the Commonwealth; or
- (b) pursuant to clauses 18.4(c) and 18.4(d), the disclosing party must notify the receiving party that the information is Confidential Information of the other party.

## 18.6 Additional confidential information

- (a) The parties may agree in writing after the date of this Agreement that certain additional information is to constitute Confidential Information for the purposes of this Agreement.
- (b) Where the parties agree in writing after the date of this Agreement that certain additional information is to constitute Confidential Information for the purposes of this Agreement, this documentation is incorporated into, and becomes part of this Agreement, on the date by which both parties have signed this documentation.

## 18.7 Period of confidentiality

The obligations under this clause 18 continue notwithstanding the expiry or termination of this Agreement unless otherwise agreed in writing between the parties.



## 18.8 No reduction in privacy obligations

Nothing in this Agreement derogates from any obligation which either party may have under the *Privacy Act 1988* (Cth) as amended from time to time, in relation to the protection of 'personal information' as defined in that Act or information that is protected by the *Census and Statistics Act 1905* (Cth), or any other Act, regulation or other legislative instrument requiring secrecy or confidentiality in dealing with information.

## 18.9 Return of information

At the Commonwealth's request or on the expiry or termination this Agreement, the Recipient must promptly return all of the Commonwealth's physical and written records containing Commonwealth Confidential Information, and all documentation relating to that Commonwealth Confidential Information (including copies), to the Commonwealth in a form reasonably requested by the Commonwealth. Alternatively, if requested by the Commonwealth, the Recipient must destroy such items in the manner specified by the Commonwealth and promptly certify to the Commonwealth in writing that it has done so.

## 18.10 Confidential Agreement Provisions

Notwithstanding any other provision of this Agreement, the Commonwealth may disclose the provisions of this Agreement.

# 19. Protection of personal information

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## 19.1 Application of this clause

This clause 19 applies only where the Recipient deals with personal information provided to the Recipient by the Commonwealth, for the purpose of, completing the Project under this Agreement.

## 19.2 Obligations

The Recipient acknowledges that to the extent this clause 19 applies it is a 'contracted service provider' and agrees in respect of the Project under this Agreement to take all necessary measures to ensure that personal information in its possession or control in connection with this Agreement is protected against loss and unauthorised access, use, disclosure or modification.

- (a) The Recipient must, on request from the Commonwealth, provide to the Commonwealth:
  - (i) a copy of the Recipient's and any subcontractor's APP privacy policy which is compliant with APP 1;
  - (ii) copies of the Recipient's and any subcontractor's security and data protection policies upon request by the Commonwealth; or
  - (iii) details of the Recipient's and any subcontractor's processes and procedures implemented to ensure compliance with the Privacy Act.
- (b) The Recipient agrees in respect of the Project under this Agreement:
  - (i) to use or disclose personal information obtained by the Recipient from the Commonwealth during the course of the Project under this Agreement, only for the purposes of this Agreement;

- (ii) not to do any act or engage in any practice that would breach an APP contained in schedule 1 of the Privacy Act, which if done or engaged in by an agency, would be a breach of that APP;
- (iii) to carry out and discharge the obligations contained in the APPs as if it were an agency under the Privacy Act;
- (iv) to notify individuals whose personal information the Recipient holds, that complaints about acts or practices of the Recipient may be investigated by the Privacy Commissioner who has power to award compensation against the Recipient in appropriate circumstances;
- (v) not to use or disclose personal information or engage in an act or practice that would breach APP 7 (direct marketing) or a registered APP Code which is applicable to the Recipient, unless the use or disclosure is necessary, directly or indirectly, to discharge an obligation of this Agreement;
- (vi) to follow any reasonable directions given by the Commonwealth to ensure compliance with the Privacy Act;
- (vii) to not transfer or transmit personal information outside of Australia except with the prior written approval of the Commonwealth, which will not be unreasonably withheld. In giving its approval the Commonwealth may impose such conditions as it thinks fit. The Recipient must comply with any term or condition imposed by the Commonwealth under this clause 19.2(b)(vii);
- (viii) to disclose in writing to any person who asks, the content of the provisions of this Agreement (if any) that are inconsistent with an APP or a registered APP code which is binding on a party to this Agreement;
- (ix) to immediately notify the Commonwealth if the Recipient becomes aware of a breach or possible breach of any of the obligations contained in, or referred to in, this clause 19, whether by the Recipient or any subcontractor (including any complaints made about acts or practices of the Recipient in connection with personal information);
- (x) to notify the Commonwealth of any subpoena, warrant, order, demand or request made by a foreign court or other authority for the disclosure of personal information to which the Privacy Act applies and to not disclose such information without the prior written approval of the Commonwealth, which will not be unreasonably withheld. In giving its approval the Commonwealth may impose such conditions as it thinks fit. The Recipient must comply with any term or condition imposed by the Commonwealth under this clause 19.2(b)(x);
- (xi) to comply with any directions, guidelines, determinations or recommendations of the Privacy Commissioner, notified to the Recipient by the Commonwealth to the extent that they are not inconsistent with the requirements of this clause 19; and
- (xii) to ensure that any employee of the Recipient who is required to deal with personal information for the purposes of this Agreement is made aware of the obligations of the Recipient set out in this clause 19.

### 19.3 Subcontracts

The Recipient must ensure that any subcontract entered into for the purpose of fulfilling its obligations under this Agreement contains provisions to ensure that the subcontractor has the same awareness and obligations as the Recipient has under this clause 19, including the requirement in relation to subcontracts.

### 19.4 Indemnity

The Recipient agrees to indemnify the Commonwealth in respect of any loss or liability suffered or incurred by the Commonwealth which arises directly or indirectly from a breach of any of the obligations of the Agreement under this clause 19, or a subcontractor under the subcontract provisions referred to in clause 19.3.

### 19.5 Definitions

In this clause 19, the terms 'agency', 'Australian Privacy Principle' (APPs), 'APP Privacy Policy', 'Australian Privacy Principle Code' (APP code), and 'contracted service provider' have the same meaning as they have in section 6 of the Privacy Act, and 'personal information', which also has the meaning it has in section 6 of the Privacy Act, means:

'information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not'.

## 20. Conflict of interest

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### 20.1 Warranty

The Recipient warrants that, to the best of its knowledge after making diligent inquiry, at the date of signing this Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Agreement.

### 20.2 Notification of a conflict of interest

If, during the Project a conflict of interest arises, or appears likely to arise, the Recipient must:

- (a) notify the Commonwealth immediately in writing;
- (b) make full disclosure of all relevant information relating to the conflict; and
- (c) take such steps as the Commonwealth requires to resolve or otherwise deal with the conflict.

## 21. Books and records

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### 21.1 Recipient to keep books and records

The Recipient must:

- (a) keep and require its subcontractors to keep adequate books and records, in accordance with the accounting standards maintained by the Australian Accounting Standards Board (created by section 226 of the *Australian Securities and Investments Commission Act 2001* (Cth)) or other accounting standards which are generally accepted and consistently applied in Australia), in sufficient detail to enable:

- (i) the receipt of amounts on account of, and the expenditure of Eligible Expenditure to be identified separately within the Recipient's accounting records so that at all times Eligible Expenditure and funding received for it (including the timing and extent of the expenditure or funding received) is identifiable and ascertainable; and
  - (ii) all receipts and payments related to the Project to be identified and reported in accordance with this Agreement; and
  - (iii) the amounts payable by the Commonwealth under this Agreement to be determined; and
- (b) retain and require its subcontractors to retain for a period of seven years after the expiry or termination of this Agreement, all books and records relating to the Project.

## 21.2 Costs

The Recipient must bear its own costs of complying with this clause 21.

## 22. Audit and access

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### 22.1 Right to conduct audits

The Commonwealth or a representative may conduct audits relevant to the performance of the Recipient's obligations under this Agreement. Audits may be conducted of:

- (a) the Assets;
- (b) the Recipient's operational practices and procedures as they relate to this Agreement;
- (c) the accuracy of the Recipient's invoices and Reports;
- (d) the Recipient's compliance with its confidentiality and privacy obligations under this Agreement;
- (e) Material (including books and records) in the possession of the Recipient relevant to the Project or this Agreement; and
- (f) any other matters determined by the Commonwealth to be relevant to the Project or this Agreement.

### 22.2 Access by the Commonwealth

- (a) The Commonwealth may, at reasonable times and on giving reasonable notice to the Recipient for the purposes of the Project and to the extent relevant to the performance of this Agreement:
  - (i) access the premises of the Recipient to the extent relevant to the performance of this Agreement;
  - (ii) require the provision by the Recipient, its employees, agents or subcontractors of records and information in a data format and storage medium accessible by the Commonwealth by use of the Commonwealth's existing computer hardware and software;
  - (iii) inspect and copy documentation, books and records, however stored, in the custody or under the control of the Recipient, agents or subcontractors; and

- (iv) require assistance in respect of any inquiry into or concerning the Project or this Agreement. For these purposes an inquiry includes any administrative or statutory review, audit or inquiry (whether within or external to the Department), any request for information directed to the Commonwealth, and any inquiry conducted by Parliament or any Parliamentary committee.
- (b) The Recipient must provide access to its computer hardware and software to the extent necessary for the Commonwealth to exercise its rights under this clause 22, and provide the Commonwealth with any reasonable assistance requested by the Commonwealth to use that hardware and software.

### 22.3 Conduct of audit and access

The Commonwealth must use reasonable endeavours to ensure that:

- (a) audits performed pursuant to clause 22.1; and
  - (b) the exercise of the general rights granted by clause 22.2 by the Commonwealth,
- do not unreasonably delay or disrupt in any material respect the Recipient's performance of its obligations under this Agreement or its business.

### 22.4 Costs

Unless otherwise agreed in writing, each party must bear its own costs of any reviews and/or audits.

### 22.5 Auditor-General and Australian Information Commissioner

The rights of the Commonwealth under clause 22.2(a)(i) to 22.2(a)(iii) apply equally to the Auditor-General or a delegate of the Auditor-General, or the Australian Information Commissioner or a delegate of the Australian Information Commissioner, for the purpose of performing the Auditor-General's or the Australian Information Commissioner's statutory functions or powers.

### 22.6 Recipient to comply with Auditor-General's requirements

The Recipient must do all things necessary to comply with the Auditor-General's or his or her delegate's or the Australian Information Commissioner's or his or her delegate's requirements, notified under clause 22.2 provided such requirements are legally enforceable and within the power of the Auditor-General, the Australian Information Commissioner, or his or her respective delegate.

### 22.7 No reduction in responsibility

The requirement for, and participation in, audits does not in any way reduce the Recipient's responsibility to perform its obligations in accordance with this Agreement.

### 22.8 Subcontractor requirements

The Recipient must ensure that any subcontract entered into for the purpose of this Agreement contains an equivalent clause granting the rights specified in this clause 22.

### 22.9 No restriction

Nothing in this Agreement reduces limits or restricts in any way any function, power, right or entitlement of the Auditor-General or a delegate of the Auditor-General or the Australian Information Commissioner or a delegate of the Australian Information Commissioner. The

rights of the Commonwealth under this Agreement are in addition to any other power, right or entitlement of the Auditor-General or a delegate of the Auditor-General or the Australian Information Commissioner or a delegate of the Australian Information Commissioner.

## 22.10 Survival

This clause 22 applies for the Agreement Period and for a period of seven years from the expiry or termination of this Agreement.

## 23. Dispute resolution

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### 23.1 No arbitration or court proceedings

If a dispute arises in relation to the conduct of this Agreement (Dispute), a party must comply with this clause 23 before starting arbitration or court proceedings except proceedings for urgent interlocutory relief. After a party has sought or obtained any urgent interlocutory relief, that party must follow this clause 23.

### 23.2 Notification

A party claiming a Dispute has arisen must give the other parties to the Dispute notice setting out details of the Dispute.

### 23.3 Parties to resolve Dispute

During the 14 days after a notice is given under clause 23.2 (or longer period if the parties to the Dispute agree in writing), each party to the Dispute must use its reasonable efforts through a meeting of CEOs (or their nominees) to resolve the Dispute. If the parties cannot resolve the Dispute within that period, they must refer the Dispute to a mediator if one of them requests.

### 23.4 Appointment of mediator

If the parties to the Dispute cannot agree on a mediator within seven days after a request under clause 23.2, the chairperson of LEADR & IAMA or the chairperson's nominee will appoint a mediator.

### 23.5 Role of mediator and obligations of parties

The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a party to the Dispute except if the party agrees in writing. Unless agreed by the mediator and parties, the mediation must be held within 21 days of the request for mediation in clause 23.3. The parties must attend the mediation and act in good faith to genuinely attempt to resolve the Dispute.

### 23.6 Confidentiality

Any information or documents disclosed by a party under this clause 23:

- (a) must be kept confidential; and
- (b) may only be used to attempt to resolve the Dispute.

### 23.7 Costs

Each party to a Dispute must pay its own costs of complying with this clause 23. The parties to the Dispute must equally pay the costs of any mediator.

## 23.8 Termination of process

A party to a Dispute may terminate the dispute resolution process by giving notice to each other party after it has complied with clauses 23.1 to 23.5. Clauses 23.6 and 23.7 survive termination of the dispute resolution process.

## 23.9 Breach of this clause

If a party to a Dispute breaches clauses 23.1 to 23.8, the other party does not have to comply with those clauses in relation to the Dispute.

# 24. Termination

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## 24.1 Termination and reduction for convenience

- (a) The Commonwealth may, at any time, by notice, terminate this Agreement or reduce the scope of the Project.
- (b) On receipt of a notice of termination or reduction the Recipient must:
  - (i) take all available steps to minimise loss resulting from that termination or reduction and to protect Commonwealth Material and Agreement Material; and
  - (ii) continue to undertake any part of the Project not affected by the notice.
- (c) If this Agreement is terminated under this clause 24.1, the Commonwealth is liable only for:
  - (i) subject to clause 24.4(a)(i), payments under clause 6 in accordance with this Agreement before the effective date of termination; and
  - (ii) subject to clause 24.1(e) and 24.1(f), reasonable costs actually incurred by the Recipient and directly attributable to the termination.
- (d) If the scope of the Project is reduced, the Commonwealth's liability to pay the Funds or to provide Commonwealth Material abates in the same proportion as the extent of the reduction in the Project.
- (e) The Commonwealth is not liable to pay compensation under clause 24.1(c)(c)(ii) for an amount which would, in addition to any amounts paid or due, or becoming due, to the Recipient under this Agreement, exceed the total Funds payable under this Agreement.
- (f) The Recipient is not entitled to compensation for loss of prospective profits.

## 24.2 Termination for default

- (a) Without limiting any other rights or remedies the Commonwealth may have against the Recipient arising out of or in connection with this Agreement, the Commonwealth may terminate this Agreement effective immediately by giving notice to the Recipient if:
  - (i) the Recipient breaches a material provision of this Agreement where that breach is not capable of remedy;
  - (ii) the Recipient breaches any provision of this Agreement and fails to remedy the breach within 14 days after receiving notice requiring it to do so;

- (iii) in the opinion of the Commonwealth, a conflict of interest exists which would prevent the Recipient from performing its obligations under this Agreement;
  - (iv) the Recipient is unable to obtain Other Financial Assistance, or obtain them in time to enable completion of the Project by the Agreement End Date;
  - (v) the Commonwealth is satisfied that any statement made in the Recipient's Application (if any) is incorrect, incomplete, false or misleading in a way which would have affected the original decision to approve the provision of the Funds; or
  - (vi) an event specified in clause 24.2(c) happens.
- (b) Without limitation, for the purposes of clause 24.2(a), each of the following constitutes a breach of a material provision:
- (i) breach of warranty under clause 4.3 (Warranties);
  - (ii) breach of clause 6 (Funds);
  - (iii) breach of clause 8 (Eligible Expenditure);
  - (iv) a failure to meet a Milestone, or achieve an Outcome as set out in Schedule 1;
  - (v) a failure to comply with clause 11 (Subcontractors);
  - (vi) breach of clause 12 (Assets);
  - (vii) a failure to comply with clause 13 (Intellectual Property Rights);
  - (viii) a failure to comply with clause 16 (Insurance);
  - (ix) a failure to comply with clause 18 (Confidentiality and privacy);
  - (x) a failure to comply with clause 19 (Protection of personal information);
  - (xi) a failure to notify the Commonwealth of a conflict of interest under clause 20 (Conflict of interest); and
  - (xii) failure to comply with clause 27.17 (Compliance with all laws)
- (c) The Recipient must notify the Commonwealth immediately if:
- (i) there is any change in the direct or indirect beneficial ownership or control of the Recipient;
  - (ii) the Recipient disposes of the whole or any part of its assets, operations or business other than in the ordinary course of business;
  - (iii) the Recipient ceases to carry on business;
  - (iv) the Recipient ceases to be able to pay its debts as they become due;
  - (v) proceedings are initiated with a view to obtaining an order for the winding up of the Recipient, or any person convenes a meeting for the purpose of considering or passing any resolution for the winding up of the Recipient;
  - (vi) the Recipient applies to come under, the Recipient receives a notice requiring it to show cause why it should not come under, an order has been made for the purpose of placing the Recipient under, or the Recipient otherwise comes



under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001* (Cth) or Chapter 11 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or equivalent provisions in State or Territory legislation in relation to incorporated associations;

- (vii) the Recipient being a natural person is declared bankrupt or assigns his or her estate for the benefit of creditors;
- (viii) where the Recipient is a partnership, any step is taken to dissolve that partnership; or
- (ix) anything analogous to an event referred to in clause 24.2(c)(iv), (v), (vi) or (vii) occurs in relation to the Recipient.

### 24.3 After termination

On termination of this Agreement the Recipient must deal with Commonwealth Material and the Commonwealth's Confidential Information in accordance with this agreement and otherwise as reasonably directed by the Commonwealth.

### 24.4 Commonwealth rights

- (a) Without limiting any of the Commonwealth's other rights or remedies, on termination of this Agreement, the Commonwealth:
  - (i) is not obliged to pay to the Recipient any of the remaining Funds, except to the extent that those monies have been legally committed for expenditure by the Recipient in accordance with this Agreement and are payable by the Recipient as a current liability (written evidence of which will be required) by the date the Recipient receives the notice of termination; and
  - (ii) is entitled to recover from the Recipient:
    - (A) any Funds which have not been spent or legally committed for expenditure by the Recipient in accordance with this Agreement and are payable by the Recipient as a current liability (written evidence of which will be required), by the date the Recipient notice of termination; and
    - (B) any Funds which in the Commonwealth's opinion have been spent other than in accordance with this Agreement.
    - (C) any Funds which in the Commonwealth's opinion have been provided to reimburse expenditure which is not Eligible Expenditure.
- (b) The Commonwealth may give the Recipient a notice requiring the Recipient to repay to the Commonwealth (or deal with as specified by the Commonwealth) an amount which the Commonwealth is entitled to recover under clause 24.4(a)(ii).
- (c) If the Commonwealth gives a notice under clause 24.4(b), the Recipient must repay the amount specified in the notice in full (or deal with it as specified by the Commonwealth) within 14 days of the date of the notice.

### 24.5 Termination does not affect accrued rights

Termination of this Agreement does not affect any accrued rights or remedies of a party

## **25. Survival**

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The following clauses survive the expiry or termination of this Agreement

- (a) Clause 4.2 (Acknowledgment of support);
- (b) Clause 7 (GST);
- (c) Clause 9 (Repayment);
- (d) Clause 10.2 (Reporting);
- (e) Clause 10.6 (Evaluation);
- (f) Clause 12 (Assets)
- (g) Clause 13 (Intellectual Property Rights);
- (h) Clause 14 (Moral Rights);
- (i) Clause 15 (Indemnity);
- (j) Clause 16 (Insurance) (Only in relation to Professional Indemnity Insurance for period of 6 years);
- (k) Clause 17 (Publicity);
- (l) Clause 18 (Confidentiality and privacy);
- (m) Clause 19 (Protection of personal information);
- (n) Clause 21 (Books and records);
- (o) Clause 22 (Audit and access);
- (p) Clause 24.4 (Commonwealth rights);
- (q) this Clause 25 (Survival);
- (r) Clause 26 (Notices and other communications);
- (s) Clause 27.2 (Amounts due to Commonwealth);
- (t) Clause 27.9 (No merger);
- (u) Clause 27.15 (Governing law and jurisdiction); and

together with any provision of this Agreement which expressly or by implication from its nature is intended to survive the expiry or termination of this Agreement.

## **26. Notices and other communications**

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### **26.1 Service of Notices**

A Notice must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or other electronic means (facsimile and/or email as specified) to the recipient's address for Notices specified in Item 2 of Table 1 in Schedule 1, as varied by any Notice given by the recipient to the sender.

## 26.2 Effective on receipt

A Notice given in accordance with clause 26.1 takes effect when it is taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery; or
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia); or
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice; or
- (d) if sent by email as provided under sections 14 and 14A of the *Electronic Transactions Act 1999* (Cth),

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

## 27. Miscellaneous

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### 27.1 No security

The Recipient must not use any of the following as any form of security for the purpose of obtaining or complying with any form of loan, credit, payment or other interest, or for the preparation of, or in the course of any litigation:

- (a) the Funds;
- (b) this Agreement or any of the Commonwealth's obligations under this Agreement; or
- (c) any Assets or Intellectual Property Rights in Agreement Material.

### 27.2 Amounts due to Commonwealth

- (a) Without limiting any other of the Commonwealth's rights or remedies, any amount owned or payable to the Commonwealth (including by way of refund), or which the Commonwealth is entitled to recover from the Recipient, under this Agreement will be recoverable by the Commonwealth as a debt due and payable to the Commonwealth by the Recipient.
- (b) The Commonwealth may set-off any money due for payment by the Commonwealth to the Recipient under this Agreement against any money due for payment by the Recipient to the Commonwealth under this Agreement.

### 27.3 Ownership of Agreement

All copyright and other Intellectual Property Rights contained in this Agreement remain the property of the Commonwealth.

### 27.4 Variation

No agreement or understanding varying or extending this Agreement is legally binding upon either party unless the agreement or understanding is in writing and signed by both parties.

## 27.5 Approvals and consents

Except where this Agreement expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

## 27.6 Assignment and novation

A party may only assign its rights or novate its rights and obligations under this Agreement with the prior written consent of the other party.

## 27.7 Costs

Each party must pay its own costs of negotiating, preparing and executing this Agreement.

## 27.8 Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

## 27.9 No merger

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

## 27.10 Entire agreement

This Agreement constitutes the entire agreement between the parties in connection with the subject matter and supersedes all previous agreements or understandings between the parties in connection with the subject matter.

## 27.11 Further action

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and any transaction contemplated by it.

## 27.12 Severability

A term or part of a term of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining terms or parts of the terms of this Agreement continue in force.

## 27.13 Waiver

Waiver of any provision of or right under this Agreement:

- (a) must be in writing signed by the party entitled to the benefit of that provision or right; and
- (b) is effective only to the extent set out in any written waiver.

## 27.14 Relationship

- (a) The parties must not represent themselves, and must ensure that their officers, employees, agents and subcontractors do not represent themselves, as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.

- (b) This Agreement does not create a relationship of employment, agency or partnership between the parties.

### 27.15 Governing law and jurisdiction

This Agreement is governed by the law of the Australian Capital Territory and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

### 27.16 False or misleading information

- (a) The Recipient acknowledges that giving the Commonwealth false or misleading information is a serious offence under section 137.1 of the *Criminal Code Act 1995*.
- (b) The Recipient must ensure that any subcontractor engaged in connection with this Agreement acknowledges the information contained in this clause.

Note: Under section 137 of the Criminal Code giving false or misleading information to a Commonwealth entity is an offence, but only if the Commonwealth entity took reasonable steps to inform the person of the offence.

### 27.17 Compliance with all laws

Without limiting the generality of clause 11.1, the Recipient must comply with, and require that its subcontractors and independent contractors comply with, all applicable legislation related to both the Project and the operation of the Recipient's business operations, including but not limited to applicable labour hire laws.

## 28. Work health and safety

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### 28.1 General safety obligations

- (a) The Recipient must ensure the Project is undertaken in a safe manner.
- (b) The Recipient must not, and must ensure its Personnel do not, by act or omission place the Commonwealth in breach of its obligations under the WHS Laws.
- (c) The Recipient must, and must ensure its Personnel, if using or accessing the Commonwealth's premises or facilities, comply with all reasonable instructions, directions, policies and procedures relating to work health and safety in operation at those premises or facilities whether specifically drawn to the attention of the Recipient or might reasonably be inferred from the circumstances.

## Schedule 1 – Project, Budget and Milestones

### 1. Agreement Details – Table 1

Item Number	Description	Clause Ref	Details
1.	Trust Details		[Insert trust details otherwise state 'not applicable']
2.	Recipient's address for Notices	26	[Insert Recipient's address for notices. This should ideally be the Recipient's registered office]
3.	Commonwealth's address for Notices	26	Attention: NGMIP Programme Manager AusIndustry GPO Box 85 Melbourne VIC 3001
4.	Commonwealth Confidential Information	1.1	[insert if any otherwise state 'none specified']
5.	Recipient Confidential Information	1.1	[insert if any otherwise state 'none specified']
6.	Intellectual Property Rights - licences	13.4	Not used

### 2. Project Details – Table 2

Item number	Description	Clause Ref	Details
1.	Project Title		[Insert Project title]
2.	Project Reference Number		[Insert reference number]
4.	Project Start Date	1.1	[insert date that Project will start]
5.	Project End Date	1.1	[insert date that Project will end]
6.	Funds	6	[insert maximum funds to be provided for the Project]
7.	Grant Percentage	6	[insert the relevant grant percentage, that is the percentage of Eligible Expenditure to be funded by the Grant Funds]

Item number	Description	Clause Ref	Details
8	Maximum Grant Percentage	5 and 6	33.33%
9	Retention Percentage	6	20%
10	Recipient Contribution Percentage	5	[insert the percentage of Eligible Expenditure to be funded by the Recipient]

### 3. Total Funds (clauses 1.1 and 6) – Table 3

The maximum amount of Funds is \$[insert maximum grant amount] (excluding GST).

The Funds will be paid over financial years.

Financial Year	\$
[Insert financial year as yyyy/yy]	[insert grant amount payable]
[Insert financial year as yyyy/yy]	[insert grant amount payable]
[Insert financial year as yyyy/yy]	[insert grant amount payable]
Total	[insert total grant amount]

### 4. Project Description (clause 1.1)

[Describe the Project, ie what the Recipient will spend the Funds doing. It is important to include sufficient detail to allow the Department to judge whether what the Recipient is doing/spending the Funds on falls within the approved scope.]

### 5. Project Outcomes (clauses 1.1 and 4.1)

[Set out the objectives or outcomes i.e., what the Recipient is to achieve in undertaking the Project.]

## 6. Milestones (clauses 1.1 and 10.2) - Table 4

The Recipient must provide Milestone, Progress and Final Reports and Agreed Evidence using the relevant templates and format requirements provided in Customer Guidelines by the Due Date according to the table below.

No.	Title and Description	Start Date	End Date	Agreed Evidence	Report Due Date
1.	[Insert title and description]	[Insert date as dd/mm/yyyy]	[Insert date as dd/mm/yyyy]	[List agreed evidence for this milestone]	[Insert date as dd/mm/yyyy]
2.	[Insert title and description]	[Insert date as dd/mm/yyyy]	[Insert date as dd/mm/yyyy]	[List agreed evidence for this milestone]	[Insert date as dd/mm/yyyy]
3.	[Insert title and description]	[Insert date as dd/mm/yyyy]	[Insert date as dd/mm/yyyy]	[List agreed evidence for this milestone]	[Insert date as dd/mm/yyyy]
4.	[Insert title and description]	[Insert date as dd/mm/yyyy]	[Insert date as dd/mm/yyyy]	[List agreed evidence for this milestone]	[Insert date as dd/mm/yyyy]
5.	Final Report	[Insert date as dd/mm/yyyy]	[Insert date as dd/mm/yyyy]	[List agreed evidence for this milestone.] Independent Financial Audit	[Insert date as dd/mm/yyyy]



7. Budget (clauses 1.1 and 8) - Table 5

Item Number	Eligible Expenditure Item	Total costs (excluding GST)
1	[Insert expenditure item]	[insert total cost]
2	[Insert expenditure item]	[insert total cost]
3	[Insert expenditure item]	[insert total cost]
4	[Insert expenditure item]	[insert total cost]
5	[Insert expenditure item]	[insert total cost]
	Total Eligible Expenditure Costs (excluding GST)	[insert total cost]

8. Other Financial Assistance (clauses 1.1 and 5.2) - Table 6

Name of programme, Government Agency administering the programme	Contribution	Due date

# Signatures

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Executed as an agreement:

## 1. Commonwealth

Signed for and on behalf of the Commonwealth of Australia as represented by the Department of Industry, Innovation and Science

<b>Name</b> (print)	
<b>Position</b> (print)	
<b>Signature and date</b>	
<b>Witness Name</b> (print)	
<b>Signature and date</b>	

## 2. Recipient

[If the Recipient is a company, the Agreement must be signed by two directors; or a director and a secretary. For a company that has a sole director who is also the sole secretary — tailor the signature block so that it only gets signed once – i.e. position title would be Sole Director and Company Secretary.]

Executed by [insert name of company] in accordance with section 127 of the *Corporations Act 2001*.

<b>Name of Company and ABN</b>	
<b>Director Name</b> (print)	
<b>Signature and date</b>	
<b>Director/ Company Secretary Name</b> (print)	
<b>Signature and date</b>	

