

Schedule 2 Terms and Conditions

Note: this Agreement uses a number of words which are defined in the glossary in clause 26.1. Defined terms start with a capital letter, eg, Asset.

1. Term of Agreement

1.1 This Agreement commences on the Date of this Agreement and, unless terminated earlier, it expires on the Completion Date.

2. Project

2.1 You must carry out the Project:

- (a) at the times and in the manner specified in item C of Schedule 1;
- (b) within the Project Period; and
- (c) in accordance with this Agreement (and any applicable Guidelines), diligently, effectively and to a high professional standard.

2.2 You must not act in a way that may bring the Project into disrepute.

2.3 The Funding must be expended by You only for the Project.

3. Funding

3.1 Subject to sufficient funds being available for the Program, and compliance by You with this Agreement (including the invoicing requirements, if any, specified in item E of Schedule 1), We will provide You with the Funding at the times and in the manner specified in item N of Schedule 1.

3.2 Without limiting Our rights, We may withhold or suspend any payment in whole or in part, if:

- (a) You have not performed Your obligations under this Agreement; or
- (b) You have outstanding or unacquitted money under any arrangement (whether contractual or statutory) with Us.

3.3 If We exercise Our rights under clause 3.2, You must continue to perform any obligations under this Agreement, unless We agree otherwise in writing.

4. Management of Funding

4.1 You must:

- (a) ensure that the Funds are held in an account in Your name, and which You solely control, with a bank or credit union carrying on banking business in Australia;
- (b) if specified in item F of Schedule 1, this must be an account which is:

- (i) established solely to account for and administer, Funding provided by Us to You under this Agreement; and
 - (ii) separate from Your other operational accounts;
 - (c) on request from Us, provide Us and the authorised deposit-taking institution with an authority for Us to obtain all details relating to any use of the account; and
 - (d) identify the receipt and expenditure of the Funds separately within Your accounting Records so that at all times the Funds are identifiable and ascertainable.
- 4.2 You must keep financial Records relating to the Project and receipt and expenditure of the Funding to enable You to comply with Your obligations under this Agreement.
- 4.3 You must not use the Funds:
- (a) to purchase any Asset;
 - (b) as security to obtain, or comply with, any form of loan, credit, payment or other interest; or
 - (c) for the preparation of, or in the course of, any litigation.

5. Repayment of Funding

- 5.1 If:
- (a) at any time, an overpayment occurs, including where an invoice is found to have been incorrectly rendered after payment; or
 - (b) at the Completion Date (or if this Agreement is terminated earlier, the date of termination) some or all of the Funding has not been:
 - (i) spent in accordance with this Agreement; or
 - (ii) acquitted to Our satisfaction,

then this amount must be repaid to Us within 20 business days of a written notice from Us, or dealt with as directed in writing by Us.

- 5.2 An overpayment may be recovered from You, including by offsetting that overpayment against any amount subsequently due to You under this Agreement or any other arrangement between You and Us or between You and the Commonwealth generally.
- 5.3 Any amount owed to Us under clause 5.1 is recoverable by Us as a debt due to Us by You without further proof of the debt by Us.
- 5.4 An adjustment note must be provided to Us if required by the GST Act, including where You repay some or all of the Funding to Us.

6. Acknowledgment And Publicity

- 6.1 You must, in all publications, promotional and advertising materials, public announcements and activities by You or on Your behalf in relation to the Project, or any products, processes or inventions developed as a result of the Project, acknowledge the financial and other support You have received from Us, in the manner set out in item G of Schedule 1.
- 6.2 You must ensure that all advertisements, promotional activities and any other public relations matters in relation to this Agreement are consistent with the requirements set out in item C or item G of Schedule 1 and the Guidelines (if any).

7. Subcontracting

- 7.1 You must not subcontract the performance of any obligations under this Agreement.

8. Insurance

- 8.1 You must, for as long as any obligations remain in connection with the Project, have insurance as specified in item H of Schedule 1.
- 8.2 When requested, You must provide Us, within 10 business days of the request, with evidence satisfactory to Us that You have complied with Your obligation to insure.

9. Reporting

- 9.1 You must provide to Us progress Reports at the times and in the manner stated in item I of Schedule 1 of Your progress in undertaking the Project.
- 9.2 Unless clause 9.6 applies, You must provide Us with:
 - (a) a certificate that all Funding received was expended for the Project and in accordance with this Agreement;
 - (b) an audited detailed statement of income and expenditure in respect of the Funding, which must include a definitive statement as to whether the financial accounts are true and fair, and a statement of the balance of Your account referred to in clause 4.1; and
 - (c) an audit statement that the Funding was expended for the Project and in accordance with this Agreement.
- 9.3 The certificate referred to in clause 9.2(a) and the audits referred to in clause 9.2(b) and (c) must:
 - (a) contain the details, if any, described in item I of Schedule 1;
 - (b) be provided to the Program Delegate within one month (or other period specified in item I of Schedule 1) of the end of the Project Period; and
 - (c) at the other times specified in item I of Schedule 1, if any.
- 9.4 The certificate referred to in clause 9.2(a) must be provided by the person specified in

item I of Schedule 1 or, if no person is specified, by Your chief executive officer, chief internal auditor or board member.

9.5 Subject to clause 9.6, the audits referred to in clause 9.2(b) and (c) must:

- (a) comply with the Australian Auditing Standards; and
- (b) be carried out by a person who is:
 - (i) registered as a company auditor under the *Corporations Act 2001*, or a member of the Institute of Chartered Accountants in Australia (who is entitled to use the letters CA or FCA), or of CPA Australia (who is entitled to use the letters CPA or FCPA) or the Institute of Public Accountants (IPA) (who is entitled to use the letters MIPA or FIPA); and
 - (ii) not a principal, member, shareholder, officer or employee of You (Your holding company or a subsidiary of You or Your holding company).

9.6 If You are audited by the Auditor-General or a State or Territory Auditor-General:

- (a) for the entire term of this Agreement; and
- (b) the Funding is included in the income and expenditure which is subject to the audit,

then, instead of the certificate and audits referred to in clause 9.2, You may provide Us with:

- (i) a detailed statement of income and expenditure for the Funding, which must include a definitive statement as to whether the financial accounts are true and fair, and a statement of the balance of Your account referred to in clause 4.1; and
- (ii) statement that the Funding was expended for the Project and in accordance with this Agreement.

9.7 The statements referred to in clause 9.6(i) and (ii) must be certified by:

- (a) Your chief executive officer; and
- (b) the senior executive officer employed by You who has primary responsibility for managing Your audit functions.

10. Commonwealth Material

10.1 Subject to clause 10.2, ownership of all Commonwealth Material, including Intellectual Property Rights in that Material, remains vested at all times in Us but We grant You a licence to use, copy and reproduce that Material only for the purposes of this Agreement and in accordance with any conditions or restrictions specified in item J of Schedule 1.

10.2 You must not use the Commonwealth Coat of Arms for the purposes of this

Agreement.

11. Project Material

Ownership

11.1 Subject to this clause 11, You Own the Project Material and the Intellectual Property Rights in Project Material immediately on their creation.

Licences

- 11.2 You grant to Us (or arrange for the grant to Us of) a permanent, irrevocable, free, world wide, non-exclusive licence (including a right of sublicense) to use, reproduce, adapt and exploit the Intellectual Property Rights in the Project Material for any Commonwealth purpose.
- 11.3 This clause 11 does not affect the ownership of any Intellectual Property Rights in any Existing Material. However, You grant to Us (or must arrange for the grant to Us of) a permanent, irrevocable, free, worldwide, non-exclusive licence (including a right of sub-licence) to use, reproduce, adapt and exploit the Intellectual Property Rights in the Existing Material, with the exception of commercial off-the-shelf software, for any Commonwealth purpose.
- 11.4 If You become aware that We will require a licence for commercial off-the-shelf software in order to exercise our rights under the licences granted under this clause 11 You must notify Us immediately and provide Us with all the necessary details to obtain a licence over such software including the name, version and manufacturer of the software.
- 11.5 You agree that the licences granted in this clause 11 include a right for Us to licence the Project Material and the Existing Material to the public under a Creative Commons Attribution 3.0 Australia licence [see <http://creativecommons.org/licenses/by/3.0/au/deed.en>]. Prior to the expiration of the Project Period You must provide Us with all author or licensor attribution details in order for Us to comply with the Creative Commons licence conditions.

General

11.6 If requested by Us, You must provide Us with a copy of the Project Material in the form requested by Us.

12. Disclosure Of Information

12.1 You acknowledge that We give no undertakings to keep confidential this Agreement or any information provided by You to Us under this Agreement.

13. Protection of Personal Information

- 13.1 You agree to comply with the Australian Privacy Principles as if You were an Agency when engaging in any practice in relation to Personal Information for the purposes of this Agreement and to ensure that all your employees, subcontractors and agents do so as well.
- 13.2 For the purposes of this clause 13.1 the terms “Australian Privacy Principles”, “Personal Information” and “Agency” have the same meaning as they do in section 6 of the Privacy Act 1988.

Note: more information about the Privacy Act and the Australian Privacy Principles is available at <http://www.oaic.gov.au>.

14. Records

- 14.1 You must make full and accurate Records of the conduct of the Project, including the receipt and use of Funding (in accordance with Australian Accounting Standards).
- 14.2 Records must be retained by You for 7 years after the end of the Project Period.

15. Access to Premises and Records

- 15.1 You must at all reasonable times give any employee of Us, or any person authorised in writing by Us:
- (a) reasonable access to:
 - (i) Your employees and equipment;
 - (ii) premises occupied by You;
 - (iii) Material; and
 - (b) reasonable assistance to:
 - (i) inspect the performance of the Project;
 - (ii) to locate and inspect Material;
 - (iii) make copies of Material and remove those copies, relevant to the Project.
- 15.2 The rights referred to in clause 15.1 are subject to:
- (a) the provision of reasonable prior notice to You; and
 - (b) Your reasonable security procedures.
- 15.3 If a matter is being investigated which, in Our opinion, or in the opinion of any person authorised in writing by Us, may involve an actual or apprehended breach of the law, clause 15.2(a) will not apply.
- 15.4 The requirement for access specified in clause 15.1 does not in any way reduce Your responsibility to perform Your obligations under this Agreement.

Note: You should note that there are additional rights of access under the Ombudsman Act 1976, the Privacy Act 1988, and the Auditor-General Act 1997.

16. Indemnity

16.1 You agree to indemnify Us against any:

- (a) loss or liability incurred by Us;
- (b) loss of or damage to Our property; or
- (c) loss or expense incurred by Us in dealing with any claim against Us, including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used, or disbursements paid by Us,

arising from:

- (i) any act or omission by You, or any of Your employees, agents, or subcontractors in connection with this Agreement, where there was fault on the part of the person whose conduct gave rise to that liability, loss, damage, or expense;
- (ii) any breach by You or any of Your employees, agents, or subcontractors of obligations or warranties under this Agreement;
- (iii) any use or disclosure by You, Your officers, employees, agents or subcontractors of Personal Information held or controlled in connection with this Agreement; or
- (iv) the use by Us of the Project Material or Existing Material (with the exception of commercial off-the-shelf software), including any claims by third parties about the ownership or right to use Intellectual Property Rights (including moral rights) in Project Material or Existing Material (with the exception of commercial off-the-shelf software).

16.2 Your liability to indemnify Us under this clause 16 will be reduced proportionately to the extent that any fault on Our part contributed to the relevant loss, damage, expense, or liability.

16.3 Our right to be indemnified under this clause 16 is in addition to, and not exclusive of, any other right, power, or remedy provided by law, but We are not entitled to be compensated in excess of the amount of the relevant loss, damage, expense or liability.

16.4 In this clause 16, “fault” means any negligent or unlawful act or omission or wilful misconduct.

17. Conflict Of Interest

17.1 You warrant that, to the best of Your knowledge after making reasonable inquiries, at the Date of this Agreement no Conflict exists or is likely to arise in the performance of Your obligations under this Agreement.

17.2 If during the term of this Agreement, a Conflict arises, or is likely to arise, You must:

- (a) immediately notify Us in writing of that Conflict and of the steps You propose to take to resolve or otherwise deal with the Conflict;
 - (b) make full disclosure to Us of all relevant information relating to the Conflict; and
 - (c) take steps as We may, if We choose to, reasonably require to resolve or otherwise deal with that Conflict.
- 17.3 If You fail to notify Us under this clause 17, or are unable or unwilling to resolve or deal with the Conflict as required, We may terminate this Agreement under clause 21.

18. Negation Of Employment, Partnership And Agency

- 18.1 You will not, by virtue of this Agreement, or for any purpose be deemed to be Our employees, partners or agents.
- 18.2 You must not represent Yourself, and must ensure that Your employees, partners, agents or sub-contractors do not represent themselves, as being Our employees, partners or agents.

19. Waiver

- 19.1 If either party does not exercise (or delays in exercising) any rights under this Agreement, that failure or delay does not operate as a waiver of those rights.
- 19.2 A waiver by either party of any rights does not prevent the further exercise of any right.
- 19.3 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 the written waiver.
- 19.4 In this clause 19, 'rights' means rights or remedies provided by this Agreement or at law.

20. Assignment

- 20.1 You must not assign Your rights under this Agreement without prior written approval from Us.

21. Termination

- 21.1 We may immediately terminate this Agreement by giving written notice to You of the termination if:
- (a) We are satisfied that any statement made in Your application for Funding is incorrect, incomplete, false or misleading in a way which may have affected:
 - (i) the original decision to approve the Funding;

- (ii) the terms and conditions of this Agreement; or
- (iii) action taken by Us under this Agreement;
- (b) You fail to fulfil, or are in breach of any of Your obligations under this Agreement (including but not limited to Your obligations under clause 17), and You do not rectify the omission or breach within 10 business days of receiving a notice in writing from Us to do so;
- (c) You are unable to pay all Your debts when they become due;
- (d) if You are an incorporated body:
 - (i) You fail to comply with a statutory demand within the meaning of section 459F of the *Corporations Act 2001*;
 - (ii) proceedings are initiated to obtain an order for Your winding up or any shareholder, member or director convenes a meeting to consider a resolution for Your winding up;
 - (iii) You come under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001* or equivalent provisions in other legislation, or an order has been made to place You under external administration; or
 - (iv) notice is served on You or proceedings are taken to cancel Your incorporation or registration or to dissolve You as a legal entity;
- (e) if You are an individual, You become bankrupt or enter into a scheme of arrangement with creditors;
- (f) You cease to carry on a business relevant to the performance of the Project; or
- (g) We consider it appropriate in the circumstances to do so.

21.2 You must comply with any requirements in Our notice of termination.

21.3 If We terminate this Agreement under clause 21.1(g) We will only be liable for:

- (a) payments under the payment provisions of this Agreement that were due before the effective date of termination; and
- (b) subject to clause 21.4, any reasonable costs incurred by You and directly attributable to the termination or partial termination of this Agreement.

21.4 We will not be liable to pay compensation for loss of prospective profits for a termination or reduction in scope under this clause 21 or loss of any benefits that would have been conferred on You had the termination or reduction not occurred.

22. Compliance With Laws And Our Policies

22.1 You must, in carrying out Your obligations under this Agreement, comply with:

- (a) all relevant statutes, regulations, by-laws and requirements of any Commonwealth, State, Territory or local authority; and
- (b) any of Our policies notified by Us to You in writing,

including those listed in item L of Schedule 1.

23. Applicable Law And Jurisdiction

- 23.1 The laws of the Australian Capital Territory apply to the interpretation of this Agreement.
- 23.2 The parties agree to submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory in respect to any dispute under this Agreement.

24. Notices

- 24.1 A party giving notice under this Agreement must do so in writing or by Electronic Communication:
 - (a) if given by You, marked for the attention of the Program Delegate specified in item O of Schedule 1; or
 - (b) if given by Us, marked for the attention of the person specified in item M of Schedule 1; andhand delivered or sent by pre-paid post or Electronic Communication to the address of the other party specified in the schedule.
- 24.2 A notice given under clause 24.1 is taken to be received:
 - (a) if hand delivered, on delivery;
 - (b) if sent by pre-paid post, 5 business days after the date of posting; or
 - (c) if sent by Electronic Communication, at the time that would be the time of receipt under the *Electronic Transactions Act 1999* if a notice was being given under a law of the Commonwealth.

25. Survival

- 25.1 These clauses survive the expiration or earlier termination of this Agreement: 4, 5, 9, 10, 11, 12, 13, 14 and 16.
- 25.2 Clauses 6 and 15 apply during this Agreement and for 7 years from the end of this Agreement.

26. Interpretation

- 26.1 In this Agreement, unless the contrary intention appears:
 - ‘**ABN**’ has the same meaning as it has in section 41 of the *A New Tax System (Australian Business Number) Act 1999*;
 - ‘**Agreement**’ means the letter about the Project from Us as signed and dated by the parties, Schedule 1 and Schedule 2 to the letter and any annexures;
 - ‘**Asset**’ means any item of tangible property which has a value of over \$5,000 inclusive of GST, but does not include Project Material;

‘Auditor-General’ means the office established under section 7 of the *Auditor-General Act 1997* and includes any other entity that may, from time to time, perform the functions of that office;

‘Australian Accounting Standards’ refers to the standards of that name maintained by the Australian Government Auditing and Assurance Standards Board created by section 226 of the *Australian Securities and Investments Commission Act 2001*;

‘Australian Auditing Standards’ refers to the standards prepared by the Australian Government Auditing and Assurance Standards Board created by section 227A of the *Australian Securities and Investments Commission Act 2001* and generally accepted audit practices to the extent they are not inconsistent with those standards;

‘Australian Privacy Principles’ has the same meaning as it has in section 6 of the *Privacy Act 1988* from 12 March 2014;

‘Commonwealth Coat of Arms’ means the Commonwealth Coat of Arms as set out at It’s an Honour – Commonwealth Coat of Arms available at <http://www.itsanhonour.gov.au/coat-arms/index.cfm>;

‘Commonwealth Material’ means any Material provided by Us to You for the purposes of this Agreement or which is copied from that Material, except for Project Material;

‘Completion Date’ means:

- (a) the date specified in item A of Schedule 1; or
- (b) if no date is specified, the day after You have done all that You are required to do under this Agreement to Our satisfaction;

‘Conflict’ refers to a conflict of interest, or risk of a conflict of interest, or an apparent conflict of interest arising through You engaging in any activity or obtaining any interest that is likely to interfere with or restrict You in providing the Project to Us fairly and independently;

‘Date of this Agreement’ means the date written on the Agreement by Us when We signed it (after signature by You), and if no date is written there, then the date on which the Agreement is signed by Us (after signature by You);

‘Electronic Communication’ has the same meaning as it has in section 5 of the *Electronic Transactions Act 1999* (Cth);

‘Existing Material’ means any Material except Commonwealth Material which was in existence before the Date of this Agreement or which is developed independently of this Agreement and which is incorporated in, supplied with or as part of, or required to be supplied with or as part of, the Project Material and includes, but is not limited to, Material specified under the heading ‘Existing Material’ in item J of Schedule 1;

‘Funding’ or ‘Funds’ means the amount or amounts (in cash or kind) payable by Us under this Agreement, including interest earned on that amount;

‘GST’ has the same meaning as it has in section 195-1 of the GST Act;

‘GST Act’ means the *A New Tax System (Goods and Services Tax) Act 1999*;

‘Guidelines’ refers to the guidelines for the Program, if any, as described in item B of Schedule 1;

‘Information Privacy Principles’ has the same meaning as it has in section 6 of the *Privacy Act 1988* until midnight 11 March 2014;

‘Intellectual Property Rights’ includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;

‘Material’ includes documents, equipment, software (including source code and object code), goods, information and data stored by any means including all copies and extracts of the same;

‘Milestone’ means a stage of completion of the Project set out in item C of Schedule 1;

‘Program’ means the part of Our operations specified in item B of Schedule 1 under which We are able to give the Funding to You;

‘Program Delegate’ means the person for the time being performing the duties of the office of the Department specified in item O of Schedule 1 or any other person specified by the Secretary and notified in writing to You;

‘Project’ means the activity described in item C of Schedule 1, which aims to fulfil one or more of the goals of the Program, and includes the provision of Project Material;

‘Project Material’ means;

- (a) any Material specified under the heading ‘Project Material’ in item K of Schedule 1;
- (b) any other Material produced by, or for, You in carrying out Your obligations under this Agreement; and/or
- (c) any other Material incorporated in, or supplied with, or as part of the Material referred to in paragraphs (a) and (b);

‘Project Period’ means:

- (a) the period specified in item D of Schedule 1 during which the Project must be completed; or
- (b) if this Agreement is terminated early, the period ending on the day on which the Agreement terminates;

'Records' includes documents, information and data stored by any means, and all copies and extracts of the same;

'Report' means Project Material that is provided to Us for reporting purposes on matters including the use of the Funding, whether or not Milestones have been achieved, progress reports and evaluations of the Project or obligations of this Agreement, as stipulated in item I of Schedule 1;

'Secretary' means a person for the time being performing the duties of the office of Secretary to the Department and includes a person designated in writing by the Secretary to exercise any of the Secretary's powers under this Agreement;

'Us', 'We' and **'Our'** includes Our officers, delegates, employees and agents, and Our successors;

'You' and **'Your'** includes, where the context admits, Your officers, employees, agents and subcontractors, and Your successors.

26.2 In this Agreement, unless the contrary intention appears:

- (a) words in the singular include the plural and vice versa;
- (b) words importing a gender include the other gender;
- (c) a reference to a person includes a partnership and a body whether corporate or otherwise;
- (d) clause headings or words in bold format are inserted for convenience only, and have no effect in limiting or extending the language of provisions;
- (e) all references to dollars are to Australian dollars;
- (f) unless stated otherwise, a reference to legislation is to legislation of the Commonwealth, as amended from time to time;
- (g) an uncertainty or ambiguity in the meaning of a provision of this Agreement will not be interpreted against a party just because that party prepared the provision; and
- (h) where a word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning.

26.3 For the avoidance of doubt, no right or obligation in this Agreement is to be read or understood as limiting Your rights to enter into public debate or criticism of Us.