

2008–09

**Terms and conditions for Funding Agreements with
State/Territory/Local Government Agencies
relating to Indigenous Programs**

**Governments
working together with
Indigenous people**

CONTENTS

1. INTERPRETATION	3
2. TERM OF THIS AGREEMENT	12
3. OTHER AUSTRALIAN GOVERNMENT AGENCIES	12
4. PAYMENT.....	13
5. MANAGEMENT OF FUNDING.....	14
6. ASSETS	18
7. RECORDS.....	21
8. REPORTING.....	22
9. TAXES, DUTIES AND GOVERNMENT CHARGES.....	26
10. AUSTRALIAN GOVERNMENT MATERIAL.....	27
11. INTELLECTUAL PROPERTY	28
12. CONFIDENTIAL INFORMATION.....	31
13. PROTECTION OF PERSONAL INFORMATION	33
14. ACCESS TO PREMISES AND RECORDS	35
15. TERMINATION FOR DEFAULT AND VARIATION	37
16. SUBCONTRACTING	40
17. ACKNOWLEDGMENT AND PUBLICITY	41
18. COMPLIANCE WITH LAWS AND OUR POLICIES	42
19. NEGATION OF LEGAL RELATIONSHIP OF EMPLOYMENT, PARTNERSHIP AND AGENCY	43
20. SEVERANCE	43

21. WAIVER..... 44

22. ASSIGNMENT AND NOVATION..... 44

23. PROCUREMENT FOR ACTIVITY 44

24. LIAISON AND MONITORING 47

25. NOTICES..... 47

26. COMPLIANCE WITH THE NATIONAL CODE OF PRACTICE FOR THE
CONSTRUCTION INDUSTRY 48

27. HOUSING AND INFRASTRUCTURE CONSTRUCTION 48

28. LAND AND HOUSING ACQUISITIONS 50

1. INTERPRETATION

1.1 In this Agreement, unless the contrary intention appears:

'ABN' has the meaning given in section 41 of the *A New Tax System (Australian Business Number) Act 1999*;

'Aboriginal' has the meaning given in section 3 of the *Aboriginal and Torres Strait Islander Heritage Protection Act; 1984*;

'Aboriginal Tradition' has the meaning given in section 3 of the *Aboriginal and Torres Strait Islander Heritage Protection Act; 1984*;

'Adjustment Note' has the meaning given in section 195-1 of *A New tax System (Goods and Services Tax) Act 1999 (GST Act)*;

'Advisers' means a Party's agents, contractors or advisers engaged in the performance or management of this Agreement;

'Agreement' refers to the Program Funding Agreement;

'Annexure' means an annexure to the Schedule;

'Approved Auditor' means a person who is:

- a. registered as a company auditor under the *Corporations Act 2001*, or a member of the Institute of Chartered Accountants in Australia, or of CPA Australia or the National Institute of Accountants; and
- b. not a principal, member, shareholder, officer or employee of Yours or of a related body corporate as defined in section 9 of the *Corporations Act 2001* or Your Qualified Accountant;

or
- c. a State or Territory Auditor-General.

'Asset' means any item of tangible property, purchased, leased, created or otherwise brought into existence either wholly or in part with use of the Funds, which has an acquisition value of over \$5,000 exclusive of GST, but does not include Project Material;

'Asset Register' means the register of all Assets and any assets acquired using funding (including a grant) provided by the Australian Government, ATSIIS or its predecessors, and created and maintained by You in accordance with clause 6;

'ATSIC' refers to the Aboriginal and Torres Strait Islander Commission established under the Aboriginal and Torres Strait Islander Commission Act 1989 (as amended);

'ATSIIS' means the executive agency Aboriginal and Torres Strait Islander Services established under the Public Service Act 1999 by order dated 28 May 2003;

'ATSIIS or its predecessors' refers to ATSIIS, ATSIC, the former Department of Aboriginal Affairs and the former Aboriginal Development Commission;

'Auditor-General' means the office established under 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 Accounting Standards Board created by section 261 of the *Australian Securities and Investments Commission Act 2001*;

'Australian Auditing Standards' refers to the standards of that name maintained by the Auditing and Assurance Standards Board created by section 227A of the *Australian Securities and Investments Commission Act 2001*;

'Australian Government' means the Government of the Government of Australia;

'Australian Government Material' means any Material provided by the Australian Government to You for the purposes of this Agreement or which is copied or derived from Material so provided, except for Project Material;

'Booklet' refers to Our general terms and conditions for Funding Agreements relating to Indigenous Programs contained in a booklet form;

‘Budget’ refers to a budget for expenditure of the Funding for the purposes of conducting the Project or performing obligations under this Agreement, as stipulated in the Schedule;

‘Business Day’ means in relation to the doing of any action in a place, any day other than a Saturday, Sunday, or public holiday in that place;

‘Completion Date’ means, unless a date is specified in the Schedule, the day after You have done all that You are required to do under this Agreement to Our satisfaction;

‘Confidential Information’ means:

- a. the information described in the Schedule; or
- b. information that is agreed between the Parties after the Date of this Agreement as constituting Confidential Information for the purposes of this Agreement.

‘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 conflict with or restrict You in providing the Project fairly and independently;

‘Constitution’ means (depending on the context):

- a. company’s constitution, which (where relevant) includes rules and any amendments that are part of the company’s constitution; or
- b. in relation to any other kind of body:
 - (i) the body’s charter, rules or memorandum; or
 - (ii) any instrument or law constituting or defining the constitution of the body or governing the activities of the body or its members;

‘Date of this Agreement’ means the date written on the execution page of this Agreement, and if no date or more than one date is written there, then the date on which this Agreement is signed by the last Party to do so;

‘Depreciated’ means the amount representing the reduction in value of an Asset calculated in accordance with Australian Accounting Standards;

‘Director’ means any of the following:

- a. a person appointed to the position of a director or alternate director and is acting in that capacity of a body corporate within the meaning of the *Corporations Act 2001* or the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* regardless of the name given to their position;
- b. a member of the committee of an organisation incorporated under State or Territory laws relating to the incorporation of associations;
- c. a person who would be a director of the body corporate under paragraph (a) if the body corporate were a body corporate within the meaning of the *Corporations Act 2001*;
- d. a person who acts in the position of a director of a body corporate;
- e. a person whose instructions or wishes the directors of a body corporate are accustomed to act upon, and not simply because of the person’s professional capacity or business relationship with the directors or the body corporate; and
- f. a member of the board, committee or group of persons (however described) that is responsible for managing or overseeing the affairs of the body corporate;

‘Execution Clauses page’ means the separate page containing the clauses that are to be, or have been, completed by the parties to the deed;

‘Existing Material’ means all Material in existence prior to the Date of this Agreement:

- a. incorporated in;
- b. supplied with, or as part of; or
- c. required to be supplied with, or as part of;

the Project Material;

‘Expenditure Block’ refers to approved expenditure blocks such as capital/equipment and operational;

‘Financial Year’ means each period from 1 July to the following 30 June occurring during the Project Period, or any part of such a period occurring at the beginning or end of the Project Period;

‘Funding’ or **‘Funds’** means the amount or amounts (in cash or kind) payable under this Agreement by Us as specified in the Schedule and Project Generated Income;

‘Funding Controller’ means a person appointed by Us under subclause 20.3;

‘GST’ has the meaning given 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 the Schedule;

‘Input Tax Credit’ has the meaning given in section 195-1 of the GST Act;

‘Intellectual Property Rights’ includes all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions, plant varieties, trademarks (including service marks), designs, circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields but does not include Moral Rights, the rights of performers or rights in relation to Confidential Information;

‘Interest’ means interest calculated at an interest rate equal to the general interest charge rate for a day under section 8AAD of the *Taxation Administration Act 1953*, plus 1%, on a daily compounding basis;

‘Letter of Offer’ refers to the letter We sent You offering You the Funding;

‘Licensed Material’ means all Reports whether specified as Licensed Material in the Schedule or not, as well as all Material specified as Licensed Material in the Schedule in which the Intellectual Property Rights become the subject of a licence under subclauses 11.2 and 11.4;

‘Material’ means the subject matter of any category of Intellectual Property Rights and 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 excluding Secret Material and material, apart from Existing Material, in which third parties own Intellectual Property Rights;

'Milestone' means a stage of completion of the Project set out in the Schedule;

'Moral Rights' includes the following rights of an author of copyright Material:

- a. the right of attribution of authorship;
- b. the right not to have authorship falsely attributed; and
- c. the right of integrity of authorship;

'Objectives' means the objectives described in the Schedule, which are the agreed results You must achieve;

'Office of Evaluation and Audit' refers to the office of that name established by section 193W of the *Aboriginal and Torres Strait Islander Act 2005*;

'Party' means a party to this Agreement;

'Personal Information' has the same meaning as under the Privacy Act;

'Privacy Act' refers to the *Privacy Act 1988*;

'Principles' refers to the principles of the Program, if any, as described in the Schedule;

'Privacy Commissioner' means the Office of the Privacy Commissioner established under the Privacy Act;

'Program' means the part of Our operations specified in the Schedule under which We are able to give the Funding to You;

'Program Funding Agreement' consists of the Letter of Offer, each Schedule (including any Annexures and documents incorporated by reference); each Purposes Agreement (if any) and the Booklet containing General Terms and Conditions;

‘Project’ means the activity described in the Schedule, and includes the provision of Project Material;

‘Project Generated Income’ (previously known as activity generated income or AGI) means any income earned or generated by You from Your use of the Funding or use of Assets purchased with the Funding, including interest earned from investment of the Funds;

‘Project Material’ means all Material:

- a. brought into existence for the purpose of performing the Project;
- b. incorporated in, supplied or required to be supplied along with the Material referred to in paragraph (a); or
- c. copied or derived from Material referred to in paragraphs (a) or (b);
- d. apart from Existing Material, in which third parties own Intellectual Property Rights;

‘Project Period’ means the period specified in the Schedule during which the Project must be completed;

‘Purposes Agreement’ means the document in which You agree that land and/or Assets granted to You or which You acquire or improve with the Funds will be used only for the purpose of this Agreement and will not be dealt with in any manner without Our consent. Under a Purposes Agreement, We have a continuing interest in the land and/or an Asset. Each Purposes Agreement forms part of this agreement;

‘Qualified Accountant’ means a person who is a member of the Institute of Chartered Accountants in Australia, or of CPA Australia or the National Institute of Accountants;

‘RCTI’ means recipient created tax invoice which has the meaning given in section 195-1 of the GST Act;

‘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 the Objectives have been achieved, progress reports and evaluations of the Project or obligations of this Agreement;

‘Schedule’ refers to the schedule to this Agreement and may include Annexures and incorporate other documents by reference;

‘Tax Invoice’ has the meaning given in section 195-1 of the GST Act;

‘Taxable Supply’ has the meaning given in section 195-1 of the GST Act;

‘Term of this Agreement’ refers to the period described in subclause 2.1;

‘Third Party Interest’ means any legal or equitable right, interest, power or remedy in favour of any person other than one of the Parties in connection with the Agreement, including, without limitation, any right of possession, receivership, control or power of sale, and any mortgage, charge, security or other interest;

‘Undepreciated’ in relation to the value of an Asset, means the value of the Asset which has not been Depreciated;

‘Us’, ‘We’ and ‘Our’ means the agency of the Australian Government offering or providing the Funding, indicated in the Letter of Offer, and includes its officers, delegates, employees and agents, and any department or agency of the Australian Government which is from time to time responsible for administration of this Agreement;

‘You’ and ‘Your’ means the organisation described in the Letter of Offer, to whom Funding is payable under this Agreement, and includes, where the context admits, its directors, officers, employees, agents, volunteers and subcontractors, and its successors.

1.2 In this Agreement, unless the contrary intention appears:

- a. words in the singular number include the plural and words in the plural number include the singular;
- b. words importing a gender include any other gender;
- c. words importing persons include a partnership and a body whether corporate or otherwise;
- d. all references to clauses are clauses in this Agreement;
- e. all references to dollars are to Australian dollars and this Agreement uses Australian currency;
- f. reference to any statute or other legislation (whether primary or subordinate) is to a statute or other legislation of the Australian Government (unless otherwise indicated) and, if it has been or is amended, modified or is repealed and other legislation substituted, is a reference to that statute or other legislation as amended, modified or substituted;
- 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;
- h. reference to Australia Taxation Office rulings includes those rulings as amended, modified or substituted; and
- i. where any word or phrase is given a defined meaning, any other part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

1.3 Unless the contrary intention is expressly stated in the Schedule(s), if there is any conflict or inconsistency between any part of:

- a. the Booklet;
- b. the Schedule(s);

- c. any annexures; or
- d. any documents incorporated by reference;

then the material mentioned in the order of paragraphs (a) to (d) above has precedence over material mentioned in a subsequent paragraph, to the extent of any conflict or inconsistency.

2. TERM OF THIS AGREEMENT

- 2.1** The Term of this Agreement commences on the Date of this Agreement and, unless terminated earlier, it expires on the Completion Date.
- 2.2** The Term of this Agreement is not affected by the expiry or termination of a Shared Responsibility Agreement to which this funding Agreement may be linked.

3. OTHER AUSTRALIAN GOVERNMENT AGENCIES

- 3.1** If You receive Funding from a number of Australian Government agencies, each funded project will be covered by a separate Schedule.
- 3.2** Each Schedule constitutes a separate contract between You and the agency referred to in the Schedule.
- 3.3** The Booklet is the same for all Funding You receive under this Program Funding Agreement with agency specific terms covered in the Schedule(s).
- 3.4** A breach of any other Agreement under which You receive funding from the Australian Government may be treated by Us as a breach of this Agreement.
- 3.5** You must inform Us in writing within twenty (20) Business Days of entering into any other arrangement (whether contractual or statutory) under which You are entitled to receive funding from the Australian Government.

- 3.6** Without limiting Our rights under this Agreement if:
- a. You have outstanding or unacquitted moneys, or a debt under any arrangement (whether contractual or statutory) with the Australian Government;
 - b. You have not performed Your obligations or failed to comply with the terms of this Agreement;
 - c. We consider that You currently have unspent or unacquitted Funds; or
 - d. You have outstanding obligations under any other agreement under which you receive or have received funding from the Australian Government

any payments under this Agreement may be suspended, withheld, offset or deducted against the debt owed, or the amount of the outstanding, unspent or unacquitted moneys.

- 3.7** Notwithstanding such suspension, withholding, offsetting, or deducting of any payments, You must continue to perform any obligations under this Agreement, unless We agree otherwise in writing.

- 3.8** The operation of this clause 3 survives the expiration or earlier termination of the Term of this Agreement.

4. PAYMENT

- 4.1** Subject to sufficient funds being available for the Program We will provide You with the Funding at the times and in the manner specified in the Schedule.

- 4.2** If, at any time, an overpayment of Funding occurs then this amount is a debt owed to Us which must be repaid by You, or We may offset or deduct this amount in accordance with clause 3.6.

5. MANAGEMENT OF FUNDING

- 5.1** You must carry out the Project within the Project Period and in accordance with this Agreement (including any applicable Principles and Guidelines), diligently, effectively and to a high professional standard.
- 5.2** If We are satisfied that You do not have the capacity to manage the Funding, We may immediately suspend, reduce or cease the release of Funding to You. We will provide You with written notice of this decision.
- 5.3** If We are satisfied that You have failed to or are unable to comply with the terms of this Agreement, We may cease payment of any further Funding and/or demand the repayment of previous payments.
- 5.4** The Funding must be spent by You only for the Project in accordance with this Agreement. You must not use the Funds:
- a. for any loan or gift;
 - b. for payment of sitting fees to directors and members of Your organisation;
 - c. for any overseas travel without our written prior approval;
 - d. to make payments that are inconsistent with the Project;
 - e. to relieve cash flow problems in other projects;
 - f. to settle, agree to consent orders in relation to or otherwise resolve any proceeding or application for reinstatement and/or wrongful dismissal by a current or former employee of Yours for an amount in excess of \$15,000 (GST exclusive), without Our prior written approval; or
 - g. to pay “commissions” or “success bonuses” or other like benefits to directors, staff, members or consultants as payment or part payment for work undertaken.

5.5 Subject to our prior written consent You may reimburse directors' reasonable travel and accommodation expenses provided We consider:

- a. the travel reasonable and necessary for the project;
- b. expenses were incurred attending Your valid board meetings;
- c. the cheapest mode of travel available was used; and
- d. the claimed rate is no higher than the ATO ruling TR 2004/6.

5.6 You must:

- a. ensure that Funds are held in a deposit taking institution authorised under the *Banking Act 1959 (Cth)*, held in an account under Your sole control and in Your name;
- b. notify Us in writing of the details to identify said account prior to receipt of funds;
- c. provide Us and the institution with authority to obtain any details relating to the use of said account;
- d. provide written notification to institution that the funds are for the express purpose of the Project and a copy of this notification is sent to Us;
- e. notify Us in writing within ten (10) business days of any change to this account and details of new account complying with the above clauses;
- f. unless a sole director or an individual, have as a minimum two signatories with Your authority to operate the said account; and
- g. within Your accounting records at all times have the transactions of the accounts relating to the Project separated to easily identify and ascertain.

5.7 You must keep financial records relating to the Project to enable:

- a. all receipts and payments to be identified in Your accounts and reported in accordance with the Agreement;

- b. the preparation of a General Purpose Financial Report, as referred to in clause 8.2, including, but not limited to, an audited statement of Your financial position as at the end of the period, an audited statement of Your income and expenditure for the period and a separate audited statement of income and expenditure for each Schedule to the Agreement compared to the Budget for the Project;
- c. an audit of the accounts and records in accordance with the Australian Auditing Standards; and
- d. identification of all taxation liabilities and payments.

5.8 Except with Our prior written approval, You 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:

- a. the Funds;
- b. this Agreement or any of Our obligations under this Agreement; or
- c. any Assets or Intellectual Property Rights in the Project Material.

5.9 If at any time during the term of the Agreement We determine that funds in account referred to in clause 5.6 remain that have not been spent or legally committed for expenditure in accordance with this Agreement, then at Our discretion and via written notice:

- a. demand the Funds to be repaid to Us within twenty (20) business days from the date of the notice;
- b. direct You to deal with the Funds as We determine; or
- c. reduce further payments of Funding to You by the amount of Funds in the account.

5.10 Failure to comply with clause 5.9(a) will accrue interest on the amount outstanding and be payable in addition to the principle.

- 5.11** If at the completion of the Project Period You have uncommitted Funds We may at Our discretion and in writing agree to You keeping these Funds for an agreed purpose.
- 5.12** If We do not agree in writing to the retention of said funds in clause 5.11 We will give written notice that said funds are returned to Us within twenty (20) days of receipt of this notice and subsequent interest will accrue on outstanding monies, if failure to comply with this request, until full payment of the principle and interest is received.
- 5.13** Any amount owed to Us under subclause 5.9, and any Interest owed under subclauses 5.10 or 5.12, will be recoverable by Us as a debt. This clause 5.13 is without prejudice to any other rights available to Us under this Agreement or at law or in equity and Our notice constitutes *prima facie* evidence of the debt.
- 5.14** You must only spend the Funds in accordance with the Budget.
- 5.15** You may spend any Funds in the operational expenditure block at Your discretion to achieve the Objective. Funds in all other expenditure blocks of the Budget must be spent on listed items within those blocks unless approved by Us in writing.
- 5.16** If Your spending exceeds Your budget no further funds will be given.
- 5.17** Funds for the purchase of real property will not be released and must not be used until:
- a. a property valuation has been received by Us;
 - b. the proposed purchase price approved by Us;
 - c. You sign and return to Us a Purpose Agreement and/or take any other action directed by Us that We consider is necessary or desirable to secure Our interest in the Asset under this Agreement; and
 - d. You consent to Us placing a caveat over the title of the property or taking such other action that We consider is necessary or desirable to secure Our interest in the property under this Agreement.

- 5.18** If funds are to be used for the construction, repairs or maintenance of a building on land owned by You, the funds will not be released until We receive a signed Purpose Agreement or similar security or document required by Us that We consider is necessary or desirable to secure Our interest in the property under this Agreement.
- 5.19** The operation of this clause 5 survives the expiration or earlier termination of the Term of this Agreement.

6. ASSETS

- 6.1** Apart from those detailed in the Schedule, You must not use the funding to acquire or create any Asset without Our written approval. Approval may be given subject to any conditions We impose, which conditions may relate to the full market value of the Asset.
- 6.2** You own any Asset acquired by You with the Funding unless:
- a. the Asset is listed in the Schedule as being owned by Us or a third party, or the Parties subsequently agree that the Asset is owned by Us or a third party;
 - b. We direct You to transfer all or any of the Assets under clause 6.10 of this Agreement.
- 6.3** If We or a third party own the Asset, subclauses 6.7, 6.10 and 6.11 do not apply. If You lease the Asset, then You must ensure that the terms of the lease are consistent with this clause 6, except for subclauses 6.7, 6.8, 6.10 and 6.11.
- 6.4** During the Project Period You must use any Asset in accordance with this Agreement and for the purposes of the Project.
- 6.5** You may only use any Asset acquired with funding provided by the Australian Government according to the terms and arrangements under which You received that funding.

6.6 You must:

- a. not dispose of, transfer, lease, license, encumber, part with possession of, or otherwise deal in any way with an Asset or any part of it without having first obtained Our written consent, which may be provided subject to any conditions specified in Our consent notice (including conditions that relate to the full current value of the Asset);
- b. secure and safeguard all Assets against loss, theft, damage or unauthorised use;
- c. maintain all Assets in good working order;
- d. maintain all insurances to their full replacement value, noting our interest if applicable, and provide satisfactory evidence of this upon request from Us;
- e. if required by law, maintain registration and licensing of all Assets;
- f. be fully responsible for, and bear all risks relating to, the use or disposal of all Assets;
- g. maintain an Asset Register in format described in the Schedule;
- h. provide a copy of this register upon request by Us.

6.7 Where an Asset has been disposed of for consideration with or without Our consent, the written down value of the asset must be paid to Us or dealt with in accordance with Our written directions, which may be issued at any time.

6.8 Any Assets lost, damaged or destroyed are to be reinstated or replaced by You and clause 6 continues to apply to such Assets.

6.9 All proceeds of insurance are deemed to form part of the funding and You will notify Us of amounts and related Assets should You receive any such payments.

6.10 At our sole discretion and directed to You in writing, We may require You to deal with any Asset upon completion of the Project or earlier termination

where any of the following applies:

- a. You are in breach of this Agreement;
- b. We cease to provide Funding to You for any reason;
- c. You cease to deliver the Project;
- d. You have ceased to use an Asset to deliver the Project, or We are of the opinion that an Asset is no longer suitable to be used for the Project or the purpose for which it was approved under this Agreement;
- e. following the end of the Project Period or earlier termination of this Agreement;
or
- f. any of clause 15 applies;

We may, in our sole discretion, give You a written direction to:

- (i) transfer the Asset to Us or Our nominee;
- (ii) repay to Us some or all of the Funding that was used to acquire, maintain, repair or which has otherwise contributed to the Asset; and/or
- (iii) sell the Asset to a bona fide purchaser for market value, subject to any conditions We specify in the direction.

- 6.11** Failure to comply with clause 6.10 will accrue interest on the amount outstanding and be payable in addition to the principle. As such these funds, without prejudice to any other rights available to Us under this Agreement or at law, are recoverable by Us as a debt due.
- 6.12** Our approvals under subclauses 6.1 will not be unreasonably withheld. A decision as to whether an approval will be provided will be made within a reasonable time of the request.
- 6.13** Paragraph 6.6(a) and subclauses 6.7 and 6.11 do not apply to Assets which are trading stock of a commercial activity.

- 6.14** You must provide Us with security over any Asset, in whatever form We require, and pay all stamp duties and reasonable legal costs of, and incidental to, such security upon Our request.
- 6.15** The operation of this clause 6 survives the expiration or earlier termination of the Term of this Agreement.

7. RECORDS

- 7.1** You must keep full and accurate accounts and Records of the conduct of the Project including, without limitation:
- a. progress against the Milestones;
 - b. the receipt and use of Funding;
 - c. the acquisition, creation or disposal of Assets;
 - d. taxation liabilities and payments; and
 - e. the creation of Intellectual Property Rights in Project Material.
- 7.2** Accounts and records as listed in subclause 7.1 are to be retained in a retrievable condition by You for a period of seven (7) years after the end of the Project period.
- 7.3** The operation of this clause 7 survives the expiration or earlier termination of the Term of this Agreement.

8. REPORTING

- 8.1** You must provide to Us, at the times specified in the Schedule, the following written Reports:
- a. financial information (prepared by a Qualified Accountant, who must also be a person acceptable to Us unless otherwise agreed by Us) including:
 - (i) an income statement that identifies all line items of income and expenses provided in the financial year to date, including all Project Generated Income;
 - (ii) a schedule of the Assets acquired during the Financial Year compared with the Budget;
 - (iii) a list of all Your assets and liabilities at the date of the Report(s), including amounts, of debtors, creditors and all accruals and pre-payments; and
 - (iv) any relevant supporting documentation
 - b. a copy of the bank statement of Your account referred to in paragraph 5.6(a) covering the date of the end of the financial reporting period to which it relates.
 - c. a statement of how much You need to meet current liabilities under legal commitments entered into by You under this Agreement
 - d. copies of decisions and orders of any court or tribunal made against You or involving You if any.
 - e. Project performance information including:
 - (i) a description of actual performance against the Objectives and the agreed performance indicators;
 - (ii) whether the Project has been completed; and
 - (iii) whether the Objectives of the Project have been achieved;

8.2 Within sixty (60) Business Days after the Project End Date, completion of the Project or any termination of the Term of this Agreement, (whichever is earliest); and the end of each Financial Year in which a payment of Funding is made;

You must provide Us with:

- a. a set of Audited General Purpose Financial Reports as defined by the Australian Accounting Standards Board and prepared in accordance with Australian Accounting Standards (that may vary from time to time), in respect of the Funding (separately and in the context of Your overall financial position), including:
 - (i) a description of actual performance against the Objectives and the agreed performance indicators;
 - (ii) whether the Project has been completed;
 - (iii) whether the Objectives of the Project have been achieved; and
 - (iv) individual income statements compared to the Budget and cash flow statements for each Schedule as included in this Program Funding Agreement;

and

- b. a copy of a letter or report from the Approved Auditor including:
 - (i) a clear statement confirming that all financial information is included and that the financial statements represent the financial transactions fairly and are based on proper accounts and Records;
 - (ii) specific comment on the adequacy of financial controls being maintained by You;
 - (iii) specific comment on Your financial position as it relates to any issues affecting Your ability to repay surplus Funds or complete the Project with available Funds;

- (iv) specific comment on Your ability to meet Your taxation liabilities and any costs associated with any court or tribunal orders made against You or involving You;
- (v) specific comment on Your compliance with Your obligations to pay superannuation entitlements;
- (vi) an itemised list of fees paid to directors, stating how much was paid, to whom, when and what travel costs were involved; and
- (vii) where there are any qualifications or limitations on the audit, an outline of the reason(s) for the qualifications or limitations and the remedial action recommended;

c. any other requirements specified in the Schedule.

- 8.3** The audit referred to in paragraphs 8.2(a) and (b) must be carried out by an Approved Auditor and must comply with the Australian Auditing Standards, and the financial statements referred to in paragraphs 8.2(a) and (b) must be prepared by a Qualified Accountant, who must also be a person acceptable to Us, unless otherwise agreed by Us.
- 8.4** You must provide Us with the identity of the proposed Approved Auditor within twenty (20) Business Days of the completion of each Financial Year during the Term of this Agreement, or any earlier termination.
- 8.5** The Approved Auditor must be a person acceptable to Us.
- 8.6** We may, at Our absolute discretion, appoint a particular person as the Approved Auditor at Our expense.
- 8.7** If We appoint the Approved Auditor under subclause 8.6, You must give that person all access necessary to satisfactorily perform the tasks of the Approved Auditor under this Agreement, including but not limited to the access required to be given to 'those permitted' under clause 14.

- 8.8** Information required to be provided under subclauses 8.1 and 8.2 must be accompanied by a certificate completed by You that:
- a. all Funding received was spent for the purpose of the Project and in accordance with this Agreement and that You have complied with this Agreement;
 - b. salaries and allowances paid to persons involved in the Project are in accordance with any applicable award or Agreement in force under any relevant law on industrial or workplace relations;
 - c. unless the Project Period has expired or the Agreement has been terminated, the unspent portion of the Funds (if any) is available for use within the next Reporting period;
 - d. the financial information is presented in accordance with any other financial Reporting requirements;
 - e. where an Asset has been acquired with the Funds, that paragraphs 6.6(d) and (g) have been complied with in respect to the Asset; and
 - f. at the time the Report or financial statement is provided to Us, You are able to pay all Your debts as and when they fall due and You have sufficient resources to discharge all Your debts at the end of the current Financial Year.

8.9 The certificate referred to in subclause 8.8 must be provided:

- a. if You are an incorporated body, by:
 - (i) Your Chairperson;
 - (ii) Chief Executive Officer;
 - (iii) Chief Financial Officer; or
 - (iv) a person authorised by You to sign documents which legally bind You. Satisfactory evidence of the authorisation is to be provided to Us before certification;

- b. if You are an unincorporated association or partnership, by a person or persons authorised by a majority of the members, in accordance with Your rules, to sign documents which legally bind You. Satisfactory evidence of the authorisation is to be provided to Us before certification; or
- c. if You are an individual, by You.

8.10 The audit referred to in paragraphs 8.2(a) and (b), and the certificate referred to in subclause 8.8, must also contain the requirements, if any, described in the Schedule.

8.11 The operation of this clause 8 survives the expiration or earlier termination of the Term of this Agreement.

9 TAXES, DUTIES AND GOVERNMENT CHARGES

9.1 Subject to this clause 9 You pay all government charges, duties and taxes imposed or levied in Australia or overseas in connection with this Agreement.

9.2 You warrant that You have an ABN which You have correctly quoted to Us.

9.3 We are registered for GST and will notify You of any change in Our ABNs or GST registration status immediately We are notified of any change. You must notify Us in writing of any change to Your ABN or GST registration immediately You are notified of any change. Each Party agrees to notify the others if it ceases to satisfy any of the requirements of *Goods and Services Tax Ruling 2000/10* dated 10 May 2000 that came into effect on 1 July 2000 ('GSTR 2000/10').

9.4 The Funds paid by Us under this Agreement include GST for supplies provided by You to Us in accordance with this Agreement and are Taxable Supplies within the meaning of the GST Act.

9.5 In consideration of Your undertaking not to issue Tax Invoices We will issue RCTIs in respect of the Taxable Supplies.

- 9.6** Any RCTI or adjustment note relating to determined taxable supplies will be issued within twenty (20) business days from the determined date or adjustment date.
- 9.7** In consideration of Our undertaking to issue RCTI under subclause 9.5 You will not issue any Tax Invoices in respect of the Taxable Supplies, unless:
- a. We cease to comply with the requirements of GSTR 2000/10; or
 - b. We for any reason notify You that We will not issue an RCTI in respect of the Taxable Supplies.
- 9.8** No Party may claim from the other an amount for which the first Party may claim an Input Tax Credit.
- 9.9** Any refund under subclause 5.9 must be inclusive of GST and must be accompanied by any Adjustment Note required under the GST Act relating to Taxable Supplies.
- 9.10** You should be generally aware that unless exempt from income tax rulings:
- a. funding You receive is included as assessable income, in relation to carrying on a business;
 - b. any capital gain on disposal of Assets is assessable income;
 - c. You may be required to pay fringe benefits tax and make superannuation contributions to a complying fund or pay the superannuation guarantee charge to the Australian Taxation Office in respect of any employees, if applicable.

10. AUSTRALIAN GOVERNMENT MATERIAL

- 10.1** We retain Ownership of all Australian Government Material, including Intellectual Property Rights in that Material, but We may grant You a licence to use, copy, reproduce, communicate, adapt and exploit that Material only for the purposes of this Agreement. We may impose any conditions or restrictions on this licence.

- 10.2** Upon the expiration of the Project Period or earlier termination of the Term of the Agreement, You may retain all Australian Government Material remaining in Your possession, unless otherwise notified by Us.
- 10.3** You must keep safely, and maintain, Australian Government Material You have been given for the purposes of this Agreement.
- 10.4** The operation of this clause 10 survives the expiration or earlier termination of the Term of this Agreement.

11. INTELLECTUAL PROPERTY

- 11.1** Subject to this clause 11, Intellectual Property Rights in Project Material vest immediately in You.
- 11.2** You grant to Us a permanent, irrevocable, royalty free, world wide, non-exclusive licence (including a right of sub licence) to use, copy, reproduce, communicate, adapt and exploit the Intellectual Property Rights in Licensed Material, excluding sacred or secret information, for any Australian Government purpose related to reporting, research, planning or promotional purposes.
- 11.3** This clause 11 does not affect the ownership of any Intellectual Property Rights in any Existing Material, which is specified in the Schedule.
- 11.4** You grant to Us or must arrange for the grant to Us of a permanent, irrevocable, free, world-wide, non-exclusive licence (including a right of sub licence) to use, reproduce, adapt and exploit the Intellectual Property Rights in Existing Material included in the Licensed Material for any Australian Government purpose related to reporting, research, planning or promotional purposes.
- 11.5** You:
 - a. must, if requested by Us, do all things necessary to give effect to this clause 11;

- b. warrant that You are entitled, or will be entitled at the relevant time, to deal with the Intellectual Property Rights in the Licensed Material and the Existing Material in the Licensed Material in accordance with this clause 11;
- c. warrant that any acts or omissions done by Us in the exercise of Our rights and obligations granted under this clause 11 do not infringe any of the Intellectual Property Rights of any person in the Licensed Material (excluding any Australian Government Material); and
- d. except as expressly provided for in this Agreement, must not deal with the Intellectual Property Rights in the Licensed Material during the Term of this Agreement.

11.6 You acknowledge and agree that We are authorised or may be required by law to disclose any Licensed Material or Existing Material not in the public domain, to the following:

- a. people engaged by the Australian Government;
- b. Our Minister(s);
- c. a House or a Committee of the Parliament of the Australian Government of Australia; or
- d. anyone authorised or permitted by law;

We shall notify You in writing of the proposed use.

11.7 To the extent that You reasonably determine that the proposed use of Project Material or Existing Material is of particular significance to an Aboriginal Tradition, You may, within twenty (20) Business Days of notification from Us of any intended disclosure under 11.6, request Us in writing to vary the proposed use of the Project Material or Existing Material, and We must in good faith consider Your request prior to engaging in the proposed use of the Material. We will notify You of our response, and our reasons, within twenty (20) Business Days of Your request.

- 11.8** Nothing in this Agreement is intended to affect any customary or native title rights or interests that exist immediately before the Date of this Agreement.
- 11.9** For this clause 11, the 'Specified Acts' means any of the following classes or types of acts or omissions by or on behalf of Us:
- a. using, reproducing, adapting or exploiting all or any part of the Licensed Material, with or without attribution of authorship;
 - b. supplementing the Licensed Material with any other Material; or
 - c. using the Licensed Material in a different context to that originally envisaged; but does not include false attribution of authorship.
- 11.10** Where You are a natural person and the author of the Licensed Material, You consent to the performance of the Specified Acts by Us or any person claiming under or through Us.
- 11.11** In any other case, You agree:
- a. to obtain from each author of any Licensed Material a written consent to the Specified Acts which extends directly or indirectly to the performance of the Specified Acts by Us or any person claiming under or through Us (whether occurring before or after the consent is given); and
 - b. upon request, to provide the executed original of each such consent to Us.
- 11.12** This clause 11 does not apply to any Australian Government Material incorporated in the Licensed Material.
- 11.13** The operation of this clause 11 survives the expiration or earlier termination of the Term of this Agreement.

12. CONFIDENTIAL INFORMATION

- 12.1** Subject to subclause 12.5, a Party must not, without the prior written consent of the other Party, use or disclose any Confidential Information of the other Party.
- 12.2** In giving written consent to use or disclose its Confidential Information, a Party may impose such conditions as it thinks fit, and the other Party agrees to comply with these conditions.
- 12.3** A Party may at any time require the other Party to arrange for:
- a. the other Party's employees, officers and volunteers;
 - b. the other Party's Advisers; or
 - c. any person with a Third Party Interest;
- to give a written undertaking in the form of a deed relating to the use and non-disclosure of the first Party's Confidential Information.
- 12.4** If a Party receives a request under subclause 12.3, it must promptly arrange for all such undertakings to be given.
- 12.5** The obligations on a Party under this clause 12 will not be breached where that Confidential Information:
- 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 Agreement-related activities;
 - c. is disclosed by Us to Our Minister(s);
 - d. is shared by a Party within its organisation, or in Our case with another agency or State or Territory Government, where this serves the Party's legitimate interests;

- e. is disclosed by a Party, in response to a request by a House or a Committee of the Parliament of the Australian Government of Australia;
- f. is authorised or required by law to be disclosed;
- g. is disclosed by a Party and is information in a material form in respect of which an interest, whether by licence or otherwise, in the Intellectual Property Rights in relation to that material form, has vested in, or is assigned to, the Party under this Agreement or otherwise, and that disclosure is permitted by that licence or otherwise; or
- h. is in the public domain otherwise than due to a breach of this clause 12.

12.6 Where a Party discloses Confidential Information to another person:

- a. under paragraphs 12.5 (a), (b) or (d) – 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; or
- b. under paragraphs 12.5 (c) or (e) – the disclosing Party must notify the receiving person that the information is Confidential Information.

12.7 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.

12.8 The obligations under this clause 12 continue, notwithstanding the expiry or termination of the Term of this Agreement:

- a. in relation to an item of information described in the Schedule – for the period set out in the Schedule in respect of that item; and
- b. in relation to any information which the Parties agree in writing after the Date of this Agreement is to constitute Confidential Information for the purposes of this

Agreement – for the period agreed by the Parties in writing in respect of that information.

- 12.9** Nothing in this clause 12 derogates from any obligation which the Parties may have either under the Privacy Act, or under this Agreement, in relation to the protection of Personal Information.

13. PROTECTION OF PERSONAL INFORMATION

- 13.1** This clause 13 applies only where You deal with Personal Information when, and for the purpose of, conducting the Project under this Agreement.

- 13.2** You agree to be treated as a 'contracted service provider' within the meaning of section 6 of the Privacy Act, and agree in respect to the conduct of the Project under this Agreement:

- a. to use or disclose Personal Information obtained during the course of conducting the Project under this Agreement, only for the purposes of this Agreement;
- b. not to do any act or engage in any practice that would breach an Information Privacy Principle (IPP) contained in section 14 of the Privacy Act, which if done or engaged in by an agency, would be a breach of that IPP;
- c. to carry out and discharge the obligations contained in the IPPs as if You were an agency under that Act;
- d. to notify individuals whose Personal Information You hold, that complaints about Your acts or practices may be investigated by the Privacy Commissioner who has power to award compensation against You in appropriate circumstances;
- e. to notify individuals whose Personal Information You hold that their Personal Information may be disclosed and passed on to Us and other Australian

Government agencies providing Funding under this Agreement for purposes associated with the Funding and this Agreement;

- f. not to use or disclose Personal Information or engage in an act or practice that would breach section 16F (direct marketing), a National Privacy Principle (NPP) (particularly NPPs 7 to 10) or an Approved Privacy Code (APC), where that section, NPP or APC is applicable to You, unless:
 - (i) in the case of section 16F - the use or disclosure is necessary, directly or indirectly, to discharge an obligation under this Agreement; or
 - (ii) in the case of an NPP or an APC - the Project or practice is engaged in for the purpose of discharging, directly or indirectly, an obligation under this Agreement;
- g. to disclose in writing to any person who asks, the content of the provisions of this Agreement (if any) that are inconsistent with an NPP or an APC binding a Party to this Agreement;
- h. to immediately notify Us if You become aware of a breach or possible breach of any of the obligations contained in, or referred to in, this clause 13, whether by You or any subcontractor;
- i. to comply with any directions, guidelines, determinations or recommendations of the Privacy Commissioner to the extent that they are not inconsistent with the requirements of this clause; and
- j. to ensure that any of Your employees, officers, Advisers or volunteers who are required to deal with Personal Information for the purposes of this Agreement are made aware of Your obligations set out in this clause 13.

13.3 You agree to ensure that any subcontract entered into for the purpose of fulfilling Your obligations under this Agreement contains provisions to ensure that the subcontractor has the same awareness and obligations as You have under this clause 13, including the requirement in relation to subcontracts.

- 13.4** You agree to indemnify Us in respect of any loss, liability or expense suffered or incurred by Us which arises directly or indirectly from a breach of any of Your obligations under this clause 13, or a subcontractor under the subcontract provisions referred to in subclause 13.3.
- 13.5** In this clause 13, the terms ‘agency’, ‘Approved Privacy Code’ (APC), ‘Information Privacy Principles’ (IPPs), and ‘National Privacy Principles’ (NPPs) have the same meaning as they have in section 6 of the Privacy Act, and ‘subcontract’ and other grammatical forms of that word has the meaning given in subsection 95B(4) of the Privacy Act.
- 13.6** The operation of this clause 13 survives the expiration or earlier termination of the Term of this Agreement.

14. ACCESS TO PREMISES AND RECORDS

- 14.1 You must give Us, the Auditor-General, the Office of Evaluation and Audit, the Privacy Commissioner and persons authorised by Us (referred to in this clause 14 collectively as ‘those permitted’):
- a. access to premises at which:
 - (i) accounts, Records and Material associated with this Agreement are stored;
or
 - (ii) work under the Project is undertaken; and
 - b. allow those permitted to inspect and copy all Records and Material associated with the Project;
 - (i) that directly or indirectly relate to the use of the Funding; or
 - (ii) that relate to any matter facilitated by income derived from the use of such Funding; or

(iii) that may reasonably be required to ascertain that the use of the Funds is in accordance with this and previous Agreements; and

c. give those permitted access to any Assets, wherever they may be located, and reasonable access to Your employees, for the same purpose.

14.2 You must provide all reasonable assistance requested by those permitted under subclause 14.1, including making available all accounts, Records and Material at Your registered office or (with Our consent) Your principal place of business or other place.

14.3 The rights referred to in subclause 14.1 are subject to:

a. the provision of reasonable prior notice by those permitted (except where they believe that there is an actual or apprehended breach of the law); and

b. Your reasonable security procedures.

14.4 The requirement for access as specified in subclause 14.1 does not in any way reduce Your responsibility to perform Your obligations in accordance with this Agreement.

14.5 You must ensure that any subcontract entered into for the purpose of this Agreement contains an equivalent clause allowing those permitted to have access as specified in this clause 14.

14.6 This clause 14 applies for the Term of this Agreement and for a period of seven (7) years from the date of expiration or earlier termination of the Term of this Agreement.

15. TERMINATION FOR DEFAULT AND VARIATION

15.1 If:

- a. You are in breach of any of Your obligations under this Agreement, and
 - (i) We consider that the breach is not capable of remedy by You; or
 - (ii) You have failed to fully remedy the breach within twenty (20) Business Days of receiving a notice in writing from Us to do so;
- b. You are unable to pay all Your debts as and when they become due and payable or You fail to comply with a statutory demand within the meaning of sections 459E and 459F of the *Corporations Act 2001*;
- c. proceedings are initiated with a view to obtaining an order for Your winding up or any shareholder, member or director convenes a meeting for the purpose of considering or passing of any resolution for Your winding up before the completion date;
- d. You have applied to come under, received a notice requiring You to show cause why You should not come under, or have otherwise come under one of the forms of external administration referred to in:
 - (i) Chapter 5 of the *Corporations Act 2001*; or
 - (ii) Chapter 11 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
 - (iii) equivalent provisions in Incorporated Associations legislation of the States and Territories; or
 - (iv) an order has been made for the purpose of placing You under external administration;
- e. notice is served on You or proceedings are taken to cancel Your incorporation or registration or to dissolve You as a legal entity;

- f. in relation to this Agreement, You breach any law of the Australian Government, or of a State or Territory;
- g. We are satisfied that any statement made in Your application for Funding is incorrect, incomplete, false or misleading in a way which would have affected the original decision to approve the Funding; or
- h. You cease to carry on business;

then, in the case of any one or more of these events, We may immediately terminate the Term of this Agreement by giving written notice to You of the termination.

15.2 Where We are satisfied that You have failed to comply with a condition of any funding (including a grant) provided by Us, ATSiS or its predecessors, We may decide not to make releases of Funding until We are satisfied that You have taken steps to remedy the situation which caused the breach.

15.3 If, in Our opinion, You are unable to perform the Project, complete the Project within the Project Period, satisfactorily manage the Funding or are in breach of Your obligations under this Agreement, We may, at our sole discretion, and without prejudice to any other right of action:

- a. vary the Funding;
- b. vary the Budget;
- c. vary the Objectives;
- d. vary the periodic financial Reporting requirements;
- e. vary the Project performance Reporting requirements; or
- f. take any of the steps described in subclauses 5.2, and 5.3;

- 15.4** Where We terminate the Term of this Agreement under subclause 15.1 We:
- a. will not be obliged to pay to You any outstanding amount of the Funds except to the extent that those monies have been legally committed for expenditure and are payable by You as a current liability (written evidence of which will be required) by the date notice of termination given under subclause 15.1; and
 - b. will be entitled to recover from You any part of the Funds which:
 - (i) are not covered by paragraph 15.4(a); or
 - (ii) have not, in Our opinion, been spent by You in accordance with the terms and conditions of this Agreement.
- 15.5** If You do not repay Us the amount referred to in paragraph 15.4(b) within ten (10) business days of receipt of the notice of termination, You must also pay Us;
- a. Interest on the outstanding amount which You acknowledge represents a reasonable pre-estimate of the loss incurred by Us as a result of the loss of investment opportunity; or
 - b. the reasonable cost of borrowing other money in place of, the amount which should have been repaid.
- 15.6** The amount set out in the termination notice, and money owed under this clause will, without prejudice to any other rights available to Us under this Agreement or at law or in equity, be recoverable by Us as a debt due to Us by You.
- 15.7** Subclause 15.4 does not limit or exclude any of Our other rights, including the right to recover any other amounts from You on termination of the Term of this Agreement.

16. SUBCONTRACTING

- 16.1** The following paragraphs apply to all subcontracting arrangements You propose to enter into:
- a. You must not, without Our prior written approval, subcontract the performance of any obligations under this Agreement;
 - b. in giving written approval, We may impose such terms and conditions as We think fit;
 - c. any subcontractor who You propose to replace an approved subcontractor must also be approved by Us under this clause 16; and
 - d. the subcontractors We have approved at the Date of this Agreement, and any terms and conditions relating to their use, are identified in the Schedule.
- 16.2** You are fully responsible for the performance of Your obligations under this Agreement, even though You may have subcontracted any of them.
- 16.3** Despite any approval given by Us under subclause 16.1, You are responsible for ensuring the suitability of a subcontractor for the work proposed to be carried out and for ensuring that such work meets the requirements of this Agreement.
- 16.4** We may, by written notice, revoke Our approval of a subcontractor, at any time, on any reasonable ground.
- 16.5** Our written notice may direct that You must, as soon as practicable (or as We may direct in the notice):
- a. cease using that or any subcontractor to perform any of Your obligations; or
 - b. replace the subcontractor.
- 16.6** If We revoke Our approval of a subcontractor, You remain liable under this Agreement for the past acts or omissions of Your subcontractors as if they were current subcontractors.

- 16.7** You must, in any subcontract placed with a subcontractor:
- a. reserve a right of termination to take account of Our right of termination under clause 15; and
 - b. reserve Our right of revocation of approval under subclause 16.5; and

You must, where appropriate, make use of the rights in this sub-clause 16.7 in the event of a termination or revocation by Us.

- 16.8** You must not enter into a subcontract under this Agreement with a subcontractor named by the Director of the Equal Opportunity for Women in the Workplace Agency as an employer currently not complying with the *Equal Opportunity for Women in the Workplace Act 1999*.

17. ACKNOWLEDGMENT AND PUBLICITY

- 17.1** You must, in relation to the Project, in all:
- a. publications, promotional and advertising materials;
 - b. public announcements and activities by You or on Your behalf; or
 - c. any products, processes or inventions developed as a result of the Project;
 - d. acknowledge the financial and other support You have received from the Australian Government, in the manner set out in the Schedule or as approved by Us prior to its use.
- 17.2** We reserve the right to publicise and report on the awarding of Funding to You. We may do this by including in media releases, general announcements about the Funding and in annual reports Your name, the amount of the Funds given to You and the title and a brief description of the Project.

- 17.3** Where You have been provided with Funding to produce any publication, a copy of the publication(s) must be provided to Us.
- 17.4** This clause 17 applies for the Term of this Agreement and for a period of seven (7) years from the date of expiration or earlier termination of the Term of this Agreement.

18. COMPLIANCE WITH LAWS AND OUR POLICIES

- 18.1** You must, in carrying out Your obligations under this Agreement, comply with the provisions of all relevant statutes, regulations, by-laws and requirements of any Australian Government, State, Territory or Local Authority, including those listed in the Schedule. You should note that under the *Criminal Code Act 1995* section 137.1 giving false or misleading information is a serious offence.
- 18.2** You must, in carrying out Your obligations under this Agreement, comply with any of Our policies as notified, referred or made available by Us to You in writing (including by reference to an internet site), including those described in the Schedule.
- 18.3** You must, when using Our premises or facilities, comply with all reasonable directions and procedures relating to occupational health, safety and security in effect at those premises or in regard to those facilities, as notified by Us or as might reasonably be inferred from the use to which the premises or facilities are being put.
- 18.4** Before undertaking a Project on land affected by native title or land rights claims, You must be satisfied that the affected people understand the nature of the Project and have had an adequate opportunity to comment.
- 18.5** You must obtain all necessary authorities to undertake the Project with the Funds, including, where required by law, the Agreement of the relevant native title holders or claimants and traditional owners recognised under land rights legislation.
- 18.6** You must rely on Your own advice in relation to native title matters.

18.7 If You are unable to obtain a necessary authority relating to native title within forty (40) Business Days from the Date of this Agreement, You must request the assistance of the National Native Title Tribunal in negotiating an Indigenous Land Use Agreement.

18.8 Where native title may be affected by the Project You must consult native title holders and claimants even where there is no legal requirement that You obtain their Agreement (it is desirable that You have the Agreement of the native title holders and claimants, and in some instances their Agreement will be necessary).

19. NEGATION OF LEGAL RELATIONSHIP OF EMPLOYMENT, PARTNERSHIP AND AGENCY

19.1 You, Your employees, partners, officers, volunteers, Advisers and agents will not, by virtue of this Agreement, be or for any purpose be deemed to be Our legal employees, partners or agents.

19.2 You must not, and must ensure that Your employees, partners, officers, volunteers, Advisers and agents do not, represent Yourself or themselves as being Our employees, partners, officers, volunteers, Advisers or agents, or as otherwise able to bind or represent Us.

20. SEVERANCE

20.1 If a court or tribunal says any provision of this Agreement has no effect or interprets a provision to reduce an obligation or right, this does not invalidate any other provision.

21. WAIVER

- 21.1** If either You or We do not exercise (or delay in exercising) any of Your or Our rights, that failure or delay does not operate as a waiver of those rights.
- 21.2** A single or partial exercise by You or Us of any of Your or Our rights does not prevent the further exercise of any right.
- 21.3** 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.
- 21.4** In this clause 21, 'rights' means rights or remedies provided by this Agreement or at law.

22. ASSIGNMENT AND NOVATION

- 22.1** You must not assign Your rights under this Agreement without prior written approval from Us.
- 22.2** You agree not to enter into negotiations with any other person for the purposes of entering into an arrangement that will require novation of this Agreement without first consulting Us.

23. PROCUREMENT FOR ACTIVITY

- 23.1** You agree that in the awarding of contracts to supply goods or services for the Project You will ensure that the contract specifications do not bias or predetermine the outcome, by placing unreasonable restrictions or qualifications on the prospective tenders.

- 23.2** You agree that where the Budget provides for the acquisition of Assets other than land, or for the acquisition of services other than those exempted in subclause 23.9, You will be able to demonstrate that You have obtained value for money for the acquisition of the Assets or services under \$10,000 (GST exclusive).
- 23.3** Where the estimated cost of the Asset or service (or both) is greater than \$10,000 (GST exclusive) and less than \$80,000 (GST exclusive), You agree that You will:
- a. obtain a minimum of three (3) written competitive quotes from suitable suppliers or service providers (or both); and
 - b. be able to demonstrate value for money.
- 23.4** Where the estimated cost of the Asset or service (or both) is equal to or greater than \$80,000 (GST exclusive), You agree that You will:
- a. go to public tender or invite at least three (3) suitable suppliers or service providers (or both) to tender for provision of the Asset or service; and
 - b. be able to demonstrate value for money.
 - c. not split the Asset or service so as the sum of the parts exceeding \$80,000 (GST exclusive) is made to appear to be less. If it is found to be the case this constitutes a breach of the Agreement.
- 23.5** The estimated cost of the Asset or service must not be divided into separate parts for the purpose of avoiding the requirements of clause 23.4.
- 23.6** You agree that where You do not consider it possible or appropriate to obtain quotes or go to public tender, as required under clauses 23.3 and 23.4, You may request an exemption from this requirement from Us.
- 23.7** When making a request under subclause 23.6 You must provide reasons for any such request. These reasons may include:
- a. that the Asset or service is required urgently;

- b. there is an insufficient number of suitable suppliers or service providers within a reasonable proximity of Your place of business;
- c. the Asset or service can only be supplied by a particular business and there is no reasonable alternative; or
- d. there are exceptionally advantageous conditions that are only available in the very short term and which are not routine purchases from regular suppliers.

We will use Our best endeavours to respond within ten (10) Business Days from the date of the receipt of such a request by approving or declining the request or seeking further information.

23.8 We will release Funding for the acquisition of the Asset or service over \$10,000 (GST exclusive) only when You have provided a written statement to our satisfaction detailing:

- a. how You will be obtaining value for money for the provision of Assets or services; and
- b. any relationship or interest (whether direct or indirect) You have with the preferred supplier or subcontractor.

23.9 You agree not to use the Funds to acquire Assets or services in circumstances where You, Your directors or employees have any relationships or interests (whether direct or indirect) in the preferred supplier or its subcontractors without first seeking our prior written approval.

23.10 Subclauses 23.3 and 23.4 do not apply to:

- a. the engagement of an auditor required or nominated by law to audit Your financial statements; or
- b. the acquisition of services from water, electrical, telephone, gas or municipal authorities where there is no other competitor in the reasonable proximity.

24. LIAISON AND MONITORING

24.1 You must:

- a. liaise with and provide information to Us as reasonably required by Us; and
- b. comply with all Our reasonable requests, directions, or monitoring requirements.

24.2 Each of the Parties may nominate, from time to time, a person who has authority to receive and sign notices and written communications for each of them under this Agreement and accept any request or direction in relation to the Project.

25. NOTICES

25.1 A Party giving notice or notifying under this Agreement must do so in writing or by electronic mail or facsimile transmission:

- a. directed to the recipient's address, as varied by any notice; and
- b. hand delivered or sent by pre-paid post or transmitted electronically to that address.

The Parties' address details are as specified in the Schedule.

25.2 A notice given in accordance with subclause 25.1 is taken to be received:

- a. if hand delivered, on delivery;
- b. if sent by pre-paid post, five (5) Business Days after the date of posting unless it has been received earlier; or
- c. if transmitted electronically, upon actual receipt by the addressee.

26. COMPLIANCE WITH THE NATIONAL CODE OF PRACTICE FOR THE CONSTRUCTION INDUSTRY

26.1 Where the Project involves construction, You must ensure that the Project complies with the National Code of Practice for the Construction Industry (the Code) and the Implementation Guidelines (the Guidelines) and that compliance with the Code and Guidelines is made a condition of tender and a condition of relevant contracts and extended to all subcontractors, consultants and suppliers who may be engaged by You.

26.2 For the purpose of this clause 26 the Code and Guidelines refers to the documents at: [http:// workplace.gov.au/building](http://workplace.gov.au/building).

Alternatively we may supply copies of these documents upon Your request.

Note: General queries about the Code and Guidelines can be directed to:

The National Code Hotline: 1800 552 075; or

The National Code Mailbox: building@deewr.gov.au

27. HOUSING AND INFRASTRUCTURE CONSTRUCTION

27.1 Where the Project involves building construction, extension, renovation or major infrastructure work that is likely to cost \$100,000 (GST exclusive) or more:

- a. You must engage a registered, qualified builder, architect or engineer as project manager. The project manager:
 - (i) must be engaged within three (3) months of the Date of this Agreement;
 - (ii) must be a member of a relevant professional association in Australia;
 - (iii) must confine its services to supervision and not itself undertake the construction work; and

- (iv) should have knowledge and understanding of Aboriginal and /or Torres Strait Islander cultural and social needs, and be capable of communicating effectively with Aboriginal and/or Torres Strait Islander people;
- b. before the commencement of such an Project, You must provide to Us the following documentation:
 - (i) site plans, copies of building plans and specifications, any necessary certificates and permits under State, Territory or local government laws and regulations, and a copy of the signed building contract;
 - (ii) work plans, proposed construction timetable and cash flow requirements; and
 - (iii) copies of all correspondence from the project manager about the building contract and the work;
- c. if such a Project is likely to cost over \$250,000 (GST exclusive), You must in addition obtain Our prior written approval of the contract to engage a project manager.

27.2 Where a Project involves building construction, extension, renovation or major infrastructure work that is likely to cost less than \$100,000 (GST exclusive), You do not require a project manager to supervise the work, but the work must be undertaken by a registered qualified tradesperson who is a member of a relevant trade association in Australia.

27.3 On completion of the approved construction, You must provide to Us copies of the Certificate of Occupancy and all other certificates and documents showing compliance with building codes, health regulations and any other State, Territory or local government requirements.

27.4 Where a Project involves improvements to land (other than land which cannot be sold or transferred because of a statutory restriction) You own or will own, You must provide Us with a signed Purposes Agreement in a form acceptable to Us (if one does not already exist in respect to the land) if:

- a. the land was acquired with funding (including a grant) from the Australian Government, ATSIS or its predecessors, or
- b. the land was not originally acquired with funding (including a grant) from the Australian Government, ATSIS or its predecessors, and the value of the work is:
 - (i) over \$25,000 (GST exclusive) (where residential land is involved); or
 - (ii) over 30% of the value of the land at the time You applied for Funding for the Project (where non-residential land is involved).

27.5 We reserve the right to withhold the release of Funds until We receive a signed Purposes Agreement from You in a form acceptable to Us.

28. LAND AND HOUSING ACQUISITIONS

28.1 Where the Project includes the purchase of land You must provide to Us:

- a. property details and an independent valuation from a registered valuer or the Australian Valuation Office; and
- b. if there are any structures erected on the land a report from a registered builder or structural engineer in respect to the structural condition of the building.

28.2 You must appoint a solicitor, land broker, settlement agent or licensed conveyancer to act on Your behalf in the purchase of such land.

28.3 Where You enter into a contract to purchase land with Funds, the following conditions (or conditions having the same effect) must be included in the contract:

- a. the contract is subject to finance through Funding to be received from Us; and
- b. the contract is subject to the land being appropriately zoned for Your purposes, or to any necessary rezoning or consents being obtained.

28.4 Where the proposed purchase price of the land exceeds the fair market value by 10% or more, You must obtain prior written approval from Us for the purchase.