

TERMS AND CONDITIONS FOR AGED CARE FUNDING

March 2012

Terms and Conditions for Aged Care Funding

ISBN: 978-1-74241-718-9

Online ISBN: 978-1-74241-719-6

Publications Approval Number: D0719

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INTRODUCTION

- A. The Commonwealth provides funding for the delivery of activities under certain aged care programs.
- B. Both Parties have agreed that Your Organisation will deliver one or more Activities and the Commonwealth will provide funding to Your Organisation for Your Organisation's delivery of those Activities, on the terms and conditions set out below.

PART A:

CONTEXT

1. Context of this Agreement

- 1.1 This Agreement is a contract formed between Your Organisation and the Commonwealth for the delivery of the Activities specified in the Program Schedule.
- 1.2 This Agreement consists of the Terms and Conditions for aged care funding and the Program Schedule (and any attachments or annexures to either of those documents).

2. Interpretation

- 2.1 In this Agreement, certain words and phrases have defined meanings. They are indicated by initial capital letters (for example, 'Activity').
- 2.2 Where a defined word or phrase is used in one clause only, it is usually defined in that clause. Other definitions are set out in clause 54.

3. Agreement Period

- 3.1 This Agreement starts on the Agreement Commencement Date (as set out in the Agreement Details) and ends on the Agreement Completion Date.

PART B:

RESPONSIBILITIES

4. Responsibilities

The Commonwealth's responsibilities

- 4.1 The Commonwealth will perform all its obligations as set out in this Agreement, including by providing Funding where required by this Agreement.

Your Organisation's responsibilities

- 4.2 Your Organisation is required to perform all Your obligations as set out in this Agreement, including meeting all objectives, timeframes and milestones.
- 4.3 In performing this Agreement, Your Organisation is required to:
- (a) use all proper care;
 - (b) comply with all codes of conduct and ethics, regulations and other industry standards applicable to each Activity (including any Guidelines);
 - (c) comply with all applicable Laws;
 - (d) use Your best endeavours to ensure that no fraud occurs;
 - (e) pay all taxes, duties and government charges which are applicable in Australia or overseas in connection with this Agreement; and
 - (f) obtain and maintain all qualifications, permits, registrations and licences which Your Organisation or Your Personnel are required to hold to lawfully perform this Agreement and deliver each Activity.
- 4.4 Your Organisation remains entirely responsible for Your Organisation's performance of this Agreement and delivery of each Activity regardless of any:
- (a) involvement by the Commonwealth or any other person in the delivery of an Activity;
 - (b) Funding paid to Your Organisation for an Activity;
 - (c) consent the Commonwealth may provide for Your Organisation to subcontract any work; or
 - (d) requirement for Your Organisation to use Specified Personnel.

5. Warranties

- 5.1 Your Organisation represents and warrants to the Commonwealth that:
- (a) Your Organisation has full power and authority to enter into this Agreement;
 - (b) Your Organisation's execution of this Agreement and compliance by Your Organisation with this Agreement does not and will not result in a Contravention;
 - (c) at the date of signing this Agreement Your Organisation is not bankrupt, insolvent or in the process of being wound up;
 - (d) Your Organisation is not entering into this Agreement as trustee of any trust, unless expressly stated otherwise in the Agreement Details;
 - (e) Your Organisation has not made any false declaration in respect of any current or past dealings with the Commonwealth or any Government Agency, including in any tender or application process or in any agreement;
 - (f) Your Organisation has the skills, qualifications and experience to properly and competently deliver each Activity. **'Properly and competently'** includes delivering each Activity safely, in an efficient and organised manner, with a high degree of responsiveness and to a standard that complies with the Program Schedule, including any Performance Indicators;
 - (g) Your Organisation has the necessary resources, including financial resources, to deliver each Activity;
 - (h) Your Organisation has, or at the relevant time will have, all Intellectual Property rights which are necessary to comply with Your Organisation's obligations under this Agreement; and
 - (i) Your Organisation will, as soon as practicable, notify and fully disclose to the Commonwealth in writing if at any time:
 - (i) an Insolvency Event occurs in respect of Your Organisation;
 - (ii) a Change in Control occurs in respect of Your Organisation;
 - (iii) a Contravention occurs in respect of Your Organisation; or
 - (iv) Proceedings are taking place, pending, or are threatened against Your Organisation which could have an adverse effect upon Your reputation or upon Your capacity to perform Your obligations under this Agreement.
- 5.2 Your Organisation acknowledges that the Commonwealth is relying on the warranties and representations Your Organisation has provided in this clause 5 in entering into this Agreement.

- 5.3 Your Organisation is required to notify the Commonwealth as soon as practicable if any of the warranties or representations Your Organisation has provided in this clause 5 cease to be true.

6. Laws and Policies

- 6.1 When Your Organisation is performing this Agreement, including by delivering an Activity, Your Organisation is required to comply with the provisions of all applicable Laws and Policies including the *Work Health and Safety Act 2011*, *Crimes Act 1914*, *Criminal Code Act 1995*, *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Equal Opportunity for Women in the Workplace Act 1999*, *Age Discrimination Act 2004*, *Ombudsman Act 1976* and *Auditor-General Act 1997*.
- 6.2 Your Organisation is also required to comply with, and ensure Your Personnel engaged in the delivery of the Activity comply with, the behaviours specified in the Code of Conduct in section 13 of the *Public Service Act 1999*.
- 6.3 Your Organisation acknowledges that under section 137.1 of the Schedule to the *Criminal Code Act 1995*, giving false or misleading information to the Commonwealth is a serious offence.

7. Addressing complaints

- 7.1 Unless specified otherwise in the Program Schedule, Your Organisation is required to implement and maintain for the Agreement Period a process for receiving and addressing complaints from Clients and their representatives in connection with an Activity (including complaints concerning Subcontractors). The process is required to be:
- (a) simple for complainants to understand and follow;
 - (b) fair;
 - (c) free of charge for complainants; and
 - (d) set out in a document which is available to any person on request and free of charge.
- 7.2 For the avoidance of doubt, Your Organisation's obligations under clause 7.1 do not replace any obligations Your Organisation may have to implement other complaints processes (for example, in accordance with legislation). However, if Your Organisation has implemented a complaints process for a different purpose and that process satisfies the requirements of this clause 7, then Your Organisation does not need to implement a separate complaints process for the purposes of this Agreement.

- 7.3 Your Organisation must not cease providing goods or services under an Activity, refuse a person access to an Activity, or otherwise take recrimination against any person because they have made a complaint. This does not prevent Your Organisation from taking any action which is or may be necessary to prevent harm to any person.

8. External complaints mechanism

- 8.1 Unless specified otherwise in the Program Schedule, Your Organisation is required to comply with the Aged Care Complaints Scheme requirements, if any, set out in the Program Schedule.
- 8.2 In accordance with the resolution process set out in the Program Schedule, the Commonwealth has the power to give Directions.
- 8.3 Your Organisation must comply with Directions given by the Commonwealth.
- 8.4 Failure to comply with a Direction given by the Commonwealth is an Event of Default.
- 8.5 If the Commonwealth engages in the resolution process set out in the Program Schedule, the Commonwealth may disclose Your Confidential Information in accordance with clause 27.6 of this Agreement.

9. Records of income and expenditure and other records

- 9.1 Your Organisation is required to retain complete and accurate original records (such as receipts) which demonstrate Your Organisation's performance of, and compliance with, this Agreement. These documents are required to include:
- (a) records of Your Organisation's receipt, banking and use of the Funding for each Activity, and any income received for each Activity;
 - (b) records of Your Organisation's expenditure of Funding against the Approved Budget, if any;
 - (c) records of the creation and management of Activity Material;
 - (d) any other records which Your Organisation is required to keep in order to comply with Your obligations under this Agreement; and
 - (e) any other records which a prudent and professional organisation would hold if it were required to perform Your Organisation's obligations under this Agreement.
- 9.2 Your Organisation is required to ensure Your financial records are prepared in accordance with Australian Accounting Standards in a form, and containing the content, that enables:
- (a) Your Organisation to clearly and separately identify in Your Organisation's accounts all of Your Organisation's income and expenditure relating to this Agreement and each Activity;

- (b) Your Organisation to provide the reports required by clause 10 and to respond to any questions regarding Your Organisation's accounts; and
 - (c) the audit of records in accordance with Australian Auditing Standards, including as required by clause 10 or the Program Schedule.
- 9.3 Your Organisation is required to retain the documents and records referred to in clause 9.1 for a period of no less than seven (7) years after the end of the Agreement Period.
- 9.4 At any time up to seven (7) years after the end of the Agreement Period, Your Organisation is required to provide to the Commonwealth, if the Commonwealth requires:
- (a) any documents which Your Organisation is required to keep under this clause 9; and
 - (b) a statutory declaration made in accordance with the *Statutory Declarations Act 1959* accounting for the expenditure of the Funding.

10. Reports

Required reports

- 10.1 So that the Commonwealth can be satisfied that this Agreement is being properly performed, Your Organisation is required to provide to the Commonwealth the reports described in this Agreement and any other reports that the Commonwealth may require. These reports include:
- (a) Financial Accountability Reports for the periods, and by the dates, specified in the Program Schedule. The Commonwealth may, at its discretion, require Your Organisation to have Financial Accountability Reports audited by an Approved Auditor at Your Organisation's own cost; and
 - (b) Final Reports for the periods, and by the dates, specified in the Program Schedule. In addition, if this Agreement is terminated for any reason, Your Organisation is required to provide to the Commonwealth a written Final Report within 30 Business Days of the date of termination.
- 10.2 The reports described in clause 10.1 are required to meet the requirements for reports set out in this Agreement and any additional requirements notified to Your Organisation by the Commonwealth (for example, the Commonwealth may require that reports are provided to the Commonwealth more or less frequently than stated in this Agreement).
- 10.3 The Commonwealth will notify Your Organisation in advance of any additional requirements for reports so that Your Organisation has a reasonable time in which to comply.

Standard of reports

- 10.4 All reports which Your Organisation provides to the Commonwealth under this Agreement are required to be, to the Commonwealth's satisfaction:
- (a) of a high professional standard;
 - (b) in the format the Commonwealth specifies; and
 - (c) complete and accurate.
- 10.5 If the Commonwealth considers that a report does not meet the requirements for that report specified in this Agreement or any additional requirements notified to Your Organisation under clause 10.2, the Commonwealth may, without limiting any of its other rights, request Your Organisation to submit a revised report that is compliant with this Agreement. Your Organisation is required to submit that revised report within 20 Business Days of the Commonwealth's request, unless the Commonwealth specifies a shorter or longer timeframe, in which case Your Organisation is required to comply with that timeframe.

PART C:

ABOUT THE FUNDING

11. Funding

Payment of Funding

- 11.1 The Commonwealth will pay Your Organisation the Funding in accordance with the payment provisions set out in the Program Schedule.
- 11.2 All payments of Funding are subject to Parliamentary appropriation and to the provisions of this Agreement.
- 11.3 The Funding payable by the Commonwealth under this Agreement will not be more than the amount of Funding specified in the Program Schedule and may be less than that amount (for example, if the scope of an Activity or the Program Schedule is reduced under clause 37).
- 11.4 If this Agreement is terminated or expires, the Commonwealth will not have any obligation to provide Funding to Your Organisation after the date of termination or expiration.
- 11.5 The Funding is the only amount payable to Your Organisation by the Commonwealth for the performance of all Your Organisation's obligations under this Agreement.

Varying the amount and timing of Funding instalments

- 11.6 If the Funding for an Activity will be paid in instalments (for example, because payment is subject to Your Organisation's achievement of milestones), the details for the instalments will be set out in the Program Schedule.
- 11.7 After giving Your Organisation no less than 20 Business Days' notice, the Commonwealth may, at its discretion, vary:
- (a) the amount of Funding in any instalment;
 - (b) the period of time between instalments; and
 - (c) the dates for instalments.
- 11.8 A variation described in clause 11.7 may occur as part of a performance management process to manage Your Organisation's non-compliance with Your obligations regarding the Funding (for example, an instalment may be delayed while an organisation opens a new bank account which it is required to open under clause 13.5).

Other Contributions

- 11.9 Unless specified otherwise in the Program Schedule, Your Organisation is required to notify the Commonwealth in writing within 10 Business Days if Your Organisation has received an Other Contribution for an Activity or has allocated an Other Contribution to an Activity.
- 11.10 A notice under clause 11.9 is required to include details of the amount, source and proposed use of the Other Contribution.

12. Spending the Funding

- 12.1 Unless the Commonwealth agrees otherwise, Your Organisation must **only** use the Funding:
- (a) for the delivery of the Activity for which the Funding was granted;
 - (b) in accordance with this Agreement;
 - (c) in accordance with the Approved Budget, if any;
 - (d) within the applicable Activity Period; and
 - (e) in accordance with all applicable Laws and Policies.
- 12.2 Unless the Commonwealth agrees otherwise, Your Organisation must **not** use the Funding:
- (a) to purchase Assets, other than in accordance with clause 31;
 - (b) to provide a security for a loan or other liability;
 - (c) to pay debts which have not been properly incurred for the purposes of the Activity;

- (d) to lend money to any person;
 - (e) to make payments to a Related Entity, except with the Commonwealth's prior written consent; or
 - (f) to give money to any person.
- 12.3 Unless specified otherwise in the Program Schedule, if Your Organisation earns any money from the conduct of an Activity (including fees, rent, board or service charges) Your Organisation is required to deal with the money earned as if it were part of the Funding for that Activity and in accordance with any requirements set out in the Program Schedule.
- 12.4 Unless specified otherwise in the Program Schedule, Your Organisation must not Commit any part of the Funding for an Activity for expenditure that will or is likely to occur after the end of the Activity Period for that Activity.

13. Bank account for the Funding

- 13.1 Your Organisation is required to maintain for the Agreement Period at least one bank account with an Authorised Deposit-taking Institution which Your Organisation must use to receive the Funding. Each bank account must be:
- (a) controlled solely by Your Organisation; and
 - (b) Your Organisation's operational account for undertaking the Activity (that is, the records for the account are required to show Your Organisation's receipt, banking and use of the Funding for each Activity).
- 13.2 Your Organisation is required to notify the Commonwealth of the identifying details of the bank account or accounts referred to in clause 13.1.
- 13.3 Your Organisation is required to notify the Commonwealth as soon as practicable in writing if the details of the bank account or accounts referred to in clause 13.1 change and in any event no later than 20 Business Days prior to the date on which an instalment of Funding is due to be paid to Your Organisation.
- 13.4 The Commonwealth will not be responsible for payments of Funding which have been misdirected due to any failure or delay by Your Organisation in notifying the Commonwealth of changes to Your Organisation's bank account.
- 13.5 The Commonwealth may at any time require Your Organisation to maintain separate bank accounts for parts of the Funding and Your Organisation must, as soon as practicable, comply with any such requirement at Your own cost.

14. Acknowledging the Funding

- 14.1 Your Organisation is required to acknowledge the financial and other support Your Organisation has received from the Commonwealth for each Activity in all:
- (a) Publications;
 - (b) advertising and promotional materials, whether published online, in hard copy or any other format; and
 - (c) public announcements and public promotional activities,
- by, or on behalf of, Your Organisation in relation to an Activity.
- 14.2 An acknowledgement referred to in clause 14.1 is required to be in the manner and form specified in the Program Schedule or, if not specified in the Program Schedule, then in a manner and form to which the Commonwealth has given its prior written consent.

15. Reconciliation of Previous Funds

- 15.1 This clause 15 only applies if the Program Schedule states that it applies.
- 15.2 In this clause 15, 'Previous Agreements' has the meaning given in the Program Schedule.
- 15.3 The Previous Agreements will terminate on the date specified for their termination in the Program Schedule.
- 15.4 The termination of the Previous Agreements does not limit or affect any of the Commonwealth's rights or Your Organisation's rights that had already accrued under the Previous Agreements prior to the effective date of their termination.
- 15.5 From the effective date of the termination of the Previous Agreements:
- (a) the Previous Funds will be dealt with as set out in the Program Schedule;
 - (b) the Commonwealth is not liable to pay Your Organisation any further money under the Previous Agreements;
 - (c) unless specified otherwise in the Program Schedule, Your Organisation does not need to provide any further goods, services or reports required under the Previous Agreements; and
 - (d) unless specified otherwise in the Program Schedule, Assets acquired by Your Organisation under the Previous Agreements are required to be used for the purposes of this Agreement and will be regarded as Assets for the purposes of this Agreement.
- 15.6 The Commonwealth is not liable to pay Your Organisation compensation, including for any loss of profit, income or benefits, in relation to the termination of the Previous Agreements.

16. Taxes, duties and government charges

General taxes, duties and government charges

- 16.1 Subject to this clause 16, Your Organisation is responsible for paying all taxes, duties and government charges (“Taxes”) imposed or levied in Australia or overseas in connection with this Agreement or an Activity.

PAYG withholding

- 16.2 Your Organisation warrants that, if You are required by law to be registered for an Australian Business Number (“ABN”):

- (a) Your Organisation is so registered; and
- (b) Your Organisation will provide Your ABN to the Commonwealth no less than 20 Business Days before any payments are required to be made to You under this Agreement.

- 16.3 If:

- (a) Your Organisation’s ABN is not set out in this Agreement; and
- (b) Your Organisation has not provided evidence to the Commonwealth’s reasonable satisfaction as to why You are not required to have an ABN,

Your Organisation acknowledges that the Commonwealth will deduct PAYG withholding tax in accordance with Schedule 1, Part 2-5 of the *Taxation Administration Act 1953* from each payment to Your Organisation at the prescribed rate and remit that to the Australian Taxation Office.

Goods and Services Tax

- 16.4 Words or expressions used in clauses 16.5 to 16.13 that are defined in the GST Act have the same meaning in those clauses.

GST registration

- 16.5 If Your Organisation is not registered for GST then, unless Your Organisation notifies the Commonwealth otherwise under clause 16.7:

- (a) Funding will be paid to Your Organisation in accordance with the provisions of this Agreement or as otherwise agreed by the Parties;
- (b) You will not be paid any amount on account of GST whether it is stated in the Program Schedule or not; and
- (c) clauses 16.8 to 16.12 shall not apply.

- 16.6 If Your Organisation is registered for GST at the Agreement Commencement Date, clauses 16.8 to 16.12 of this Agreement will apply.

- 16.7 If Your Organisation is not registered for GST purposes at the Agreement Commencement Date but becomes registered for GST purposes at any time during the Agreement Period, then:
- (a) Your Organisation is required to notify the Commonwealth as soon as practicable in writing; and
 - (b) clauses 16.8 to 16.12 of this Agreement will apply from the later of:
 - (i) the date the registration takes effect; or
 - (ii) the date on which Your Organisation notifies the Commonwealth of Your registration in accordance with clause 16.7(a).

Taxable Supplies

- 16.8 Subject to the remainder of clause 16, the Parties acknowledge their understanding that any payment by the Commonwealth to Your Organisation under this Agreement shall be treated as consideration for a taxable supply by Your Organisation to the Commonwealth.
- 16.9 If Your Organisation is GST registered and has notified the Commonwealth of Your GST registration, the Commonwealth will pay Your Organisation an amount on account of GST on any taxable supplies as set out in the Program Schedule.
- 16.10 If, after the Agreement Commencement Date:
- (a) the Exposure Draft *Tax Laws Amendment (2011 Measures No.9) Bill 2011* ('Draft Bill') is enacted; or
 - (b) other legislation is enacted allowing the parties to elect to treat the supplies made under this Agreement as taxable supplies,
- the parties agree that unless otherwise agreed in the Program Schedule, any supplies made under this Agreement will be taxable supplies.
- 16.11 If the Draft Bill or other legislation is enacted so that any supplies made under this Agreement can be treated as GST-free, the parties may, to the extent they are entitled to do so under the relevant legislation, agree in writing to revoke the agreement made under clause 16.10. However, in the absence of such an agreement, clause 16.10 continues to apply.

Recipient Created Tax Invoices

- 16.12 Unless specified otherwise in the Program Schedule, the Parties agree that the following will apply to any taxable supplies made by Your Organisation to the Commonwealth under this Agreement:
- (a) the Commonwealth will issue to Your Organisation a Recipient Created Tax Invoice ('RCTI') for each taxable supply made by Your Organisation to the Commonwealth under this Agreement;
 - (b) Your Organisation must not issue a tax invoice in respect of any taxable supply You make to the Commonwealth;
 - (c) each Party acknowledges that it is registered for GST;
 - (d) each Party is required to notify the other Party if it ceases to be registered for GST or it ceases to comply with any of the requirements of any taxation ruling issued by an authority relating to the creation of RCTIs;
 - (e) Your Organisation is required to provide any information that is reasonably requested by the Commonwealth to enable the Commonwealth to validly issue RCTIs in accordance with the GST law;
 - (f) the Commonwealth may, at any time during the Agreement Period, revoke the RCTI arrangement described in this clause 16.12 by giving written notice to Your Organisation; and
 - (g) if the Commonwealth revokes the RCTI arrangement described in this clause 16.12 or, if for whatever reason, the RCTI arrangement is found to be invalid, Your Organisation is required to issue tax invoices to the Commonwealth no less than 20 Business Days before the due date for the relevant payments under the Agreement.

Invoices for non-taxable supplies

- 16.13 If the Commonwealth makes any payments to Your Organisation under this Agreement which are not consideration for any taxable supply, the Commonwealth may, in its absolute discretion:
- (a) include the amount of such payments on any RCTI issued for any taxable supplies in accordance with clause 16.12; or
 - (b) if Your Organisation makes no taxable supplies under this Agreement, issue a separate recipient generated invoice or other document in an appropriate format determined by the Commonwealth in its absolute discretion; or
 - (c) request Your Organisation to issue an invoice to the Commonwealth in respect of such supplies. For the avoidance of doubt, Your Organisation will not be required to issue an invoice unless requested to do so by the Commonwealth.

PART D:

GOVERNANCE AND PERSONNEL

17. Relationship between the Parties

- 17.1 Nothing in this Agreement makes either Party the employee, partner or agent of the other Party.
- 17.2 Neither Party is invested with any power or authority to bind or represent the other Party in any way or for any purpose.
- 17.3 Your Organisation must not misrepresent itself as being an officer, employee, partner or agent of the Commonwealth, or as being able to bind or represent the Commonwealth.
- 17.4 Your Organisation is required to use Your best endeavours to ensure that Your Personnel do not misrepresent themselves as being officers, employees, partners or agents of the Commonwealth, or as being able to bind or represent the Commonwealth.
- 17.5 The Commonwealth will not represent itself as being an officer, employee, partner or agent of Your Organisation, or as being able to bind or represent Your Organisation.

18. Liaison by the Parties

- 18.1 Your Organisation is required to:
 - (a) liaise with the Commonwealth and provide information to the Commonwealth as the Commonwealth reasonably requires; and
 - (b) comply with the Commonwealth's reasonable requests, directions and monitoring requirements,in relation to this Agreement or an Activity.
- 18.2 The Commonwealth will:
 - (a) liaise with Your Organisation to respond to Your Organisation's reasonable requests for information; and
 - (b) give consideration to any reasonable issues or concerns Your Organisation raises with the Commonwealth,in relation to this Agreement or an Activity.

19. Police checks

- 19.1 Your Organisation and Your Personnel are required to comply with the police checks requirements, if any, set out in the Program Schedule.
- 19.2 Your Organisation's obligations regarding police checks referred to in this clause 19 are in addition to any other obligations Your Organisation may have to obtain police checks for Your Personnel under any Laws.

20. Your Personnel

- 20.1 Your Organisation is required to ensure that Your Personnel have the appropriate skills, qualifications and experience to deliver each Activity in accordance with this Agreement, including by holding any minimum qualifications required by the Program Schedule.
- 20.2 Your Organisation is responsible for:
 - (a) the acts and omissions of Your Personnel when they are delivering each Activity; and
 - (b) paying wages and entitlements for Your Organisation's employees in accordance with all applicable Laws.

21. Specified Personnel and replacement of Your Personnel

- 21.1 If the Program Schedule states that Specified Personnel are required to deliver any part of an Activity, Your Organisation is required to use the Specified Personnel to deliver that part of the Activity (for example, the Commonwealth may specify that an Activity is required to be supervised by a particular person, because that person's qualifications and experience are important for the successful delivery of that Activity).
- 21.2 Your Organisation is required to comply with any additional terms and conditions which apply in respect of Specified Personnel which are set out in the Program Schedule.
- 21.3 Your Organisation is required to notify the Commonwealth as soon as practicable if any of the Specified Personnel are unable to perform their part of the Activity.
- 21.4 The Commonwealth may, at any time and at the Commonwealth's discretion, request that Your Organisation remove any of Your Personnel (including Specified Personnel) from delivering an Activity (for example, where an allegation of Significant Misconduct has been made against Your Personnel).
- 21.5 If the Commonwealth makes a request under clause 21.4, the Commonwealth will provide written reasons for its request. Your Organisation is required, as soon as practicable, to comply with any such request.

- 21.6 If clauses 21.3 or 21.4 apply, the Commonwealth may request that Your Organisation provide replacement personnel acceptable to the Commonwealth and Your Organisation is required to comply with any such request as soon as practicable and at no cost to the Commonwealth.

22. Subcontracting

- 22.1 Your Organisation may subcontract part but not all of Your obligations under this Agreement, subject to the requirements set out in this clause 22.

Requirement to give notice for Primary Subcontractors

- 22.2 Your Organisation may subcontract part of Your obligations under this Agreement to a Primary Subcontractor, provided that Your Organisation provides written notice to the Commonwealth of the name and details of the Primary Subcontractor and the nature of the subcontract within 20 Business Days of the Agreement Commencement Date or of entering into the subcontract, whichever is the later.

Requirement to obtain consent for Secondary Subcontractors

- 22.3 Your Organisation must not permit a Subcontractor to subcontract any of Your Organisation's obligations under this Agreement to a Secondary Subcontractor without obtaining the Commonwealth's prior written consent.
- 22.4 The Program Schedule may set out any particular instances in which the Commonwealth has provided prior written consent for any of Your Organisation's obligations under this Agreement to be performed by a Secondary Subcontractor.
- 22.5 The Commonwealth may give its consent to a Secondary Subcontractor under clause 22.3 subject to any additional terms and conditions notified to Your Organisation in writing.
- 22.6 Your Organisation is required to comply with, and ensure that all Subcontractors comply with, any additional terms and conditions which are notified to Your Organisation under clause 22.5.
- 22.7 If the Commonwealth gives its consent for a Secondary Subcontractor to perform part of Your Organisation's obligations under the Program Schedule, that consent does not permit the Secondary Subcontractor to perform any other obligations under the Program Schedule.
- 22.8 If the Commonwealth decides not to provide consent for any Secondary Subcontractor, the Commonwealth will provide Your Organisation with written reasons.

Requirements for Subcontractors

- 22.9 Your Organisation remains entirely responsible for Subcontractors and for all work they perform, even if the Commonwealth has been notified of a Primary Subcontractor or has given its consent to a Secondary Subcontractor.
- 22.10 Your Organisation is required to ensure that:
- (a) each subcontract is consistent with Your Organisation's obligations under this Agreement;
 - (b) no subcontract conflicts with or affects the Commonwealth's rights or interests under this Agreement;
 - (c) each Subcontractor has the necessary expertise and the appropriate types and amounts of insurance to perform the work it is engaged to perform;
 - (d) You do not enter into any subcontract with a Subcontractor who is not complying with the *Equal Opportunity for Women in the Workplace Act 1999*;
 - (e) each Subcontractor is prohibited under its subcontract from further subcontracting work without the Commonwealth's prior written consent; and
 - (f) each subcontract requires the Subcontractor to acknowledge that it may be considered a '**Commonwealth service provider**' for the purposes of the *Ombudsman Act 1976* and subject to investigation by the Ombudsman under that Act. Your Organisation acknowledges that the Commonwealth will not be responsible for the cost of any such investigation by the Ombudsman.
- 22.11 If the Commonwealth requests a copy of any subcontract, Your Organisation is required, as soon as practicable, to provide a copy of the subcontract to the Commonwealth at no cost to the Commonwealth.
- 22.12 Your Organisation is required to ensure that all subcontracts contain provisions which are Equivalent to the following clauses of this Agreement:
- (a) Responsibilities (clause 4);
 - (b) Warranties (clause 5);
 - (c) Laws and policies (clause 6);
 - (d) Records of income and expenditure and other records (clause 9);
 - (e) Acknowledging the Funding (clause 14);
 - (f) Police checks (clause 19);
 - (g) Your Personnel (clause 20);
 - (h) Specified Personnel and replacement of Your Personnel (clause 21);
 - (i) Subcontracting (clause 22);

- (j) Performance management (clause 24);
- (k) Intellectual Property (clause 25);
- (l) Privacy (clause 26);
- (m) Confidential information (clause 27);
- (n) Freedom of information (clause 28);
- (o) Access to premises and records (clause 29);
- (p) Indemnity (clause 32);
- (q) Conflict of interest (clause 34);
- (r) Notification of incidents and issues (clause 35);
- (s) Suspending funding, terminating this Agreement or reducing the scope of this Agreement (clause 37);
- (t) Repayment of Funding (clause 38); and
- (u) Certain clauses survive after this Agreement ends (clause 49).

22.13 In clause 22.12, '**Equivalent**' means that the applicable provisions:

- (a) will allow the Commonwealth to exercise equivalent rights in relation to Subcontractors as the rights it can exercise in relation to Your Organisation under the provisions; and
- (b) require the Subcontractor to comply with obligations which are equivalent to Your Organisation's obligations under the provisions.

Replacement of Subcontractors and revocation of consent to a Secondary Subcontractor

22.14 If a Subcontractor is unable or unwilling to perform any work under its subcontract, Your Organisation is required to:

- (a) perform the work itself;
- (b) engage a suitable alternative Primary Subcontractor and notify the Commonwealth within 20 Business Days after engaging that Primary Subcontractor;
- (c) organise the engagement of a suitable Secondary Subcontractor and obtain the Commonwealth's prior written consent; or
- (d) notify the Commonwealth immediately so that the Commonwealth may take such steps as it considers appropriate.

22.15 The Commonwealth may, at any time and after providing reasons to Your Organisation revoke the Commonwealth's consent to a Secondary Subcontractor which was given under clause 22.3 and:

- (a) request that a replacement Primary Subcontractor or Secondary Subcontractor acceptable to the Commonwealth be engaged; or

(b) request that Your Organisation perform the work itself,
in which case Your Organisation is required, at no cost to the Commonwealth and at the earliest opportunity, to ensure that a replacement Subcontractor is engaged or satisfy the Commonwealth that Your Organisation will be able to perform the work itself.

- 22.16 If Your Organisation decides to secure a replacement Subcontractor in accordance with clause 22.15, all the provisions in clause 22 apply in relation to that subcontract. This includes the requirement for Your Organisation to obtain the Commonwealth's prior written consent for any Secondary Subcontractor under clause 22.3.

23. Funds Administrator

- 23.1 If at any time the Commonwealth considers that Your Organisation is unable to properly manage all or part of the Funding, the Commonwealth may appoint a Funds Administrator to provide assistance, support and advice regarding the administration of the Funding.
- 23.2 The terms and conditions of appointment of a Funds Administrator will be at the Commonwealth's discretion and a Funds Administrator may be appointed in relation to all or part of the Funding.
- 23.3 The Commonwealth will notify Your Organisation in writing of any intention to appoint a Funds Administrator, providing reasons.
- 23.4 Where practicable, the Commonwealth will give Your Organisation no less than 10 Business Days to provide reasons why a Funds Administrator should not be appointed. The Commonwealth will consider any reasons Your Organisation provides before making a decision to appoint or not to appoint a Funds Administrator.
- 23.5 If the Commonwealth decides to appoint a Funds Administrator, the Commonwealth will inform Your Organisation of the scope of the appointment and its intended duration. During the term of the appointment the Commonwealth will notify Your Organisation of any extensions the Commonwealth makes to the period of the appointment.
- 23.6 If a Funds Administrator is appointed, Your Organisation is required to cooperate with the Funds Administrator and comply with all directions and recommendations given by the Funds Administrator to Your Organisation in relation to the administration of the Funding.
- 23.7 The Commonwealth may, by giving prior written notice to Your Organisation, require Your Organisation to pay for the Funds Administrator and Your Organisation is required to comply with any such requirement. The Commonwealth will consult with Your Organisation prior to requiring You to pay for the Funds Administrator.

- 23.8 A Funds Administrator will not incur debts on Your Organisation's behalf without Your express authority.

24. Performance management

- 24.1 Your Organisation is required to comply with the performance management requirements, if any, set out in the Program Schedule.

PART E:

MATERIAL AND INFORMATION

25. Intellectual Property

Activity Material ownership and licence

- 25.1 Unless specified otherwise in the Program Schedule, Your Organisation owns all Intellectual Property in Activity Material upon its creation.
- 25.2 Unless specified otherwise in the Program Schedule, Your Organisation grants to the Commonwealth a perpetual, irrevocable, world-wide, royalty-free and licence fee-free, non-exclusive licence (including a right of sub-license) to use, reproduce, modify, adapt, publish, perform, broadcast, communicate, commercialise and exploit the Intellectual Property in the Activity Material.

Existing Material ownership and licence

- 25.3 This clause 25 does not affect the ownership of the Intellectual Property in Existing Material.
- 25.4 Unless specified otherwise in the Program Schedule, Your Organisation grants to the Commonwealth, or is required to procure a third party to grant to the Commonwealth, a perpetual, irrevocable, world-wide, royalty-free and licence fee-free, non-exclusive licence (including a right of sub-license) to use, reproduce, modify, adapt, publish, perform, broadcast, communicate, commercialise and exploit the Intellectual Property in the Existing Material in conjunction with the Activity Material.

Commonwealth Material ownership and licence

- 25.5 Unless specified otherwise in the Program Schedule, the Commonwealth owns the Intellectual Property in the Commonwealth Material and the Commonwealth also owns the original and all copies of the Commonwealth Material.

- 25.6 Unless specified otherwise in the Program Schedule, the Commonwealth grants to Your Organisation a world-wide, royalty-free and licence fee-free, non-exclusive licence (including a right of sub-license) to use, reproduce, modify, adapt, publish, perform, broadcast, communicate, commercialise and exploit the Intellectual Property in the Commonwealth Material only for the purposes of an Activity.
- 25.7 Your Organisation is required to ensure that Commonwealth Material is used strictly in accordance with all conditions specified by the Commonwealth.

Intellectual Property warranties

- 25.8 Your Organisation warrants that neither:
- (a) Your delivery of an Activity;
 - (b) the exercise by the Commonwealth or its sub-licensees of the rights set out in clauses 25.2 and 25.4; nor
 - (c) the use by the Commonwealth or its sub-licensees of any Material as permitted or contemplated by this Agreement,
- will infringe the Intellectual Property rights or moral rights of any person.

Moral Rights

- 25.9 Unless specified otherwise in the Program Schedule, Your Organisation is required to obtain a written consent to the Specified Acts (**'Moral Rights Consent'**) from all authors of Activity Material and Existing Material.
- 25.10 The Moral Rights Consent is required to apply to Specified Acts which occur before or after the date of consent and to acts performed by the Commonwealth or the Commonwealth's nominees.
- 25.11 If the Commonwealth requests the original or a copy of any Moral Rights Consent, Your Organisation is required to provide it to the Commonwealth as soon as practicable.

Return of Commonwealth Material

- 25.12 Following the expiry or termination of this Agreement, Your Organisation is required to deliver to the Commonwealth the original and all copies of the Commonwealth Material applicable to this Agreement, as and when directed by the Commonwealth.

26. Privacy

- 26.1 In this clause 26, 'agency', 'Information Privacy Principle' ('IPP'), 'National Privacy Principle' ('NPP'), 'health service', 'health information', 'approved privacy code' ('APC') and 'personal information' have the same meaning as in the *Privacy Act 1988* (the 'Privacy Act').

- 26.2 Your Organisation agrees:
- (a) not to do anything that, if done by an agency, would breach an IPP;
 - (b) to use or disclose any personal information obtained in the course of performing this Agreement, only for the purposes of this Agreement;
 - (c) to notify the Commonwealth immediately if Your Organisation becomes aware of a breach or possible breach of any obligation in, or referred to in, this clause 26;
 - (d) to comply with any request under section 95C of the Privacy Act to disclose provisions of this Agreement that are inconsistent with the NPPs or an APC; and
 - (e) to promptly comply with any directions from the Commonwealth, to the extent that they are consistent with the IPPs.
- 26.3 Your Organisation acknowledges that the Commonwealth may at any time disclose or publish details about this Agreement or an Activity. The details may include Your Organisation's name, Subcontractors' names, the value of the Funding, the Activity Period and the location in which the Activity is required to be or was delivered.
- 26.4 The Commonwealth may at any time, by written notice, require Your Organisation to give, and arrange for Your Personnel to give, written undertakings in a form required by the Commonwealth, concerning the non-disclosure of personal information.
- 26.5 If a subcontract is entered into with a Subcontractor for the purpose of fulfilling Your Organisation's obligations under this Agreement Your Organisation must obtain the Subcontractor's express consent:
- (a) for the disclosure of the Subcontractor's identity (including their personal information if the Subcontractor is an individual) to the Commonwealth; and
 - (b) for the Commonwealth to disclose, for reporting purposes, the Subcontractor's identity and the existence and nature of the subcontract.
- 26.6 Notwithstanding any other provision in this clause 26, if Your Organisation provides a health service to an individual, Your Organisation must:
- (a) comply with the NPPs in relation to the collection, use, and disclosure of health information about the individual; and
 - (b) transfer health information to another health organisation when directed to do so by the Commonwealth.
- 26.7 Your Organisation's obligations under this clause 26 are in addition to, and do not restrict, any obligations Your Organisation may have under the Privacy Act or in any privacy code or privacy principles approved, authorised or registered under any Law. This includes any privacy code or principles that would apply to Your Organisation but for this clause 26.

27. Confidential information

Commonwealth Confidential Information

- 27.1 Your Organisation must not disclose to any person other than the Commonwealth any Commonwealth Confidential Information without the Commonwealth's prior written consent except:
- (a) if authorised or required by Law; or
 - (b) to Your Organisation's professional legal or financial advisers for the purposes of seeking their advice on Your Organisation's rights and obligations arising from this Agreement.
- 27.2 The Commonwealth may impose any conditions the Commonwealth considers appropriate when giving its consent under clause 27.1 and Your Organisation is required to comply with those conditions.
- 27.3 The Commonwealth may at any time require Your Organisation to:
- (a) give; and
 - (b) to arrange for Your Personnel and any third parties to whom Your Organisation has disclosed Commonwealth Confidential Information to give,
- written undertakings in a form required by the Commonwealth, relating to the non-disclosure of Commonwealth Confidential Information.
- 27.4 If Your Organisation receives a request under clause 27.3, Your Organisation is required, as soon as practicable, to arrange for all such undertakings to be given to the Commonwealth at no cost to the Commonwealth.
- 27.5 The obligations contained in this clause are in addition to those specified in clause 26.

Your Confidential Information

- 27.6 The Commonwealth will use reasonable endeavours to not disclose Your Confidential Information to any person other than Your Organisation, except:
- (a) to a responsible Minister;
 - (b) in response to a request by a House or a Committee of the Parliament of the Commonwealth;
 - (c) to another Government Agency where it serves the Commonwealth's or a Government Agency's legitimate interests;
 - (d) if authorised or required by Law;
 - (e) to the Australian Federal Police or the police force or police service of a State or Territory for the purpose of enforcement of the criminal law;
 - (f) for the purposes of, or in connection with, Proceedings;

- (g) to the Commonwealth's professional advisers for the purposes of seeking their advice on the Commonwealth's rights and obligations arising from this Agreement;
- (h) for the purpose of managing a complaint and giving feedback to a complainant regarding the outcome of a complaint made to the Aged Care Complaints Scheme, subject to any limitations specified in the Program Schedule;
- (i) for public accountability reasons; or
- (j) to protect the health or safety of any person.

28. Freedom of information

- 28.1 In this clause 28, 'document' and 'Commonwealth contract' have the same meaning as in the *Freedom of Information Act 1982*.
- 28.2 This clause 28 only applies to an Agreement which is a contract which complies with the description of Commonwealth contract.
- 28.3 If the Commonwealth has received a request for access to a document:
- (a) created by, or in the possession of, Your Organisation or Your Personnel; and
 - (b) which relates to the performance of this Agreement (and not to the entry into this Agreement),
- the Commonwealth may at any time by written notice require Your Organisation to provide the document to the Commonwealth.
- 28.4 Your Organisation is required to comply with a notice given under clause 28.3 as soon as practicable and at no cost to the Commonwealth.

29. Access to premises and records

- 29.1 Subject to clause 29.3, Your Organisation is required to allow access to:
- (a) the Commonwealth;
 - (b) the Auditor-General;
 - (c) the Information Commissioner;
 - (d) the Privacy Commissioner;
 - (e) the Freedom of Information Commissioner;
 - (f) the Ombudsman; and
 - (g) any person authorised by a person described in clauses 29.1(a) to 29.1(f),
- to premises at which Materials associated with this Agreement are stored, the Agreement is performed or work under an Activity is undertaken.

- 29.2 Subject to clause 29.3, Your Organisation permits the persons listed in clause 29.1:
- (a) to inspect and copy Materials in Your Organisation's or Your Personnel's possession or control;
 - (b) to communicate with Your Personnel; and
 - (c) to access any Assets,
- wherever they may be located, for purposes associated with this Agreement or any review of performance under this Agreement.
- 29.3 The rights referred to in clauses 29.1 and 29.2 are, wherever practicable, subject to Your Organisation's reasonable security procedures except where a person listed in clause 29.1 or his or her delegate believes that the Activity poses a risk to the safety, health or well-being of any person, or there is a suspected or actual breach of Law.
- 29.4 The Commonwealth will provide notice to Your Organisation of an intention to exercise its rights under clause 29.1(a) if it considers it appropriate to do so. Circumstances in which it would not be appropriate to give notice include cases of suspected fraud, suspected breaches of this Agreement or where the Commonwealth considers that a person's health or safety may be at risk.
- 29.5 Your Organisation is required to provide all assistance reasonably requested by a person listed in clause 29.1 in respect of any inquiry into or concerning this Agreement or an Activity.
- 29.6 Nothing in this Agreement limits or restricts in any way any duly authorised function, power, right or entitlement of the Auditor-General, the Information Commissioner, the Privacy Commissioner, the Freedom of Information Commissioner, the Ombudsman or their respective delegates.
- 29.7 The rights under this Agreement are in addition to any other duly authorised power, right or entitlement of the Auditor-General, the Information Commissioner, the Privacy Commissioner, the Freedom of Information Commissioner, the Ombudsman or their respective delegates.

30. Public debate or criticism not limited

- 30.1 Subject to clauses 26 and 27, no right or obligation in this Agreement is to be read or understood as limiting Your Organisation's rights to enter into public debate or criticism of the Commonwealth, its agencies, officers, employees or agents.

PART F:

ASSETS

31. Assets

Acquiring Assets with the Funding

- 31.1 Your Organisation may only use the Funding to acquire those Assets which:
- (a) the Program Schedule states can be acquired using the Funding; or
 - (b) the Commonwealth has given its prior written consent for Your Organisation to acquire using the Funding. Any such consent may be given by the Commonwealth subject to any conditions it considers appropriate and Your Organisation must comply with those conditions.
- 31.2 If the Program Schedule states that particular Assets must be acquired using the Funding, Your Organisation must acquire those Assets using the Funding.
- 31.3 Your Organisation is the legal and beneficial owner of an Asset acquired with the Funding unless the Program Schedule provides, or the Commonwealth specifically agrees, otherwise. If:
- (a) the Commonwealth owns the Asset, Your Organisation may only deal with the Asset as directed by the Commonwealth and clauses 31.5 and 31.8 do not apply to the Asset; and
 - (b) a third party owns the Asset:
 - (i) Your Organisation must ensure that the terms of the lease, hire or finance arrangement are consistent with clause 31.4; and
 - (ii) clauses 31.5, 31.7 and 31.8 do not apply to the Asset.

Obligations regarding Assets

- 31.4 Unless the Commonwealth agrees otherwise, in respect of each Asset that is acquired for an Activity, Your Organisation must for the duration of the Activity Period:
- (a) use the Asset for the purposes of the Activity and in accordance with this Agreement;
 - (b) not encumber or Dispose of the Asset or otherwise deal with the Asset inconsistently with this Agreement;
 - (c) hold the Asset securely and safeguard it against theft, loss, damage or unauthorised use;
 - (d) maintain the Asset in good working order;

- (e) maintain insurance for the Asset to its full replacement cost noting the Commonwealth's interest, if any, in the Asset;
 - (f) maintain any registration or licensing of the Asset required by Law;
 - (g) be responsible for, and bear all risks relating to, the use or Disposal of the Asset; and
 - (h) maintain an Assets Register. Unless the Commonwealth has agreed otherwise, the register must contain, at a minimum, the following information:
 - (i) the Activity for which the Asset was acquired;
 - (ii) the date of acquisition;
 - (iii) the purchase or lease price;
 - (iv) Asset description including serial number;
 - (v) Asset location;
 - (vi) the amount of Funding used to acquire the Asset;
 - (vii) the depreciation schedule for Assets;
 - (viii) the depreciated value of the Asset; and
 - (ix) details of Asset Disposal (where relevant) including the sale, hire or lease price.
- 31.5 Unless the Commonwealth agrees otherwise, if, during the Activity Period, Your Organisation Disposes of an Asset acquired for an Activity, Your Organisation must either:
- (a) use the proceeds from the Disposal of the Asset to replace the Asset; or
 - (b) use the greater of the following amounts to perform the Activity, as if the amount were part of the Funding:
 - (i) $PP \times SHL$; or
 - (ii) $PP \times UDV$;
- where:
- PP** is the proportion of the cost of the Asset that was paid for with the Funding (expressed as a percentage);
- SHL** is the proceeds of the Disposal of the Asset; and
- UDV** is the Undepreciated value of the Asset.
- 31.6 Unless the Commonwealth agrees otherwise, if, during the Activity Period for an Activity, any of the Assets that have been acquired for that Activity are lost, damaged or destroyed, Your Organisation must promptly reinstate the Assets, including from the proceeds of insurance, and all the provisions of this Agreement continue to apply to the reinstated Assets.

- 31.7 On expiry of the Activity Period for an Activity, or the earlier termination of this Agreement, the Commonwealth may require Your Organisation to deal with an Asset acquired with the Funding for that Activity as the Commonwealth may, at its discretion, notify Your Organisation.
- 31.8 Subject to clause 31.7, if on expiry of the Activity Period for an Activity, or the earlier termination of this Agreement, an Asset purchased for that Activity has not been fully depreciated, the Commonwealth may, by written notice, require Your Organisation to:
- (a) pay to the Commonwealth within 20 Business Days after the Activity End Date for that Activity, an amount equal to the proportion of the Undepreciated value of the Asset that is equivalent to the proportion of the cost of the Asset that was paid for with the Funding;
 - (b) sell the Asset for the best price reasonably obtainable and pay to the Commonwealth within 20 Business Days after the Asset's Disposal, the proportion of the sale proceeds (minus an amount equal to the reasonable Disposal costs for the Asset) that is equal to the proportion of the cost of the Asset that was paid for with the Funding; or
 - (c) continue to use the Asset, or use an amount specified in clause 31.8(a) or 31.8(b) above, for a purpose approved in writing by the Commonwealth and subject to any conditions imposed by the Commonwealth.

Allocation of Funding for the replacement of an Asset

- 31.9 Where the Program Schedule or the Approved Budget for an Activity provides that Funding may be used by Your Organisation for the future replacement of an Asset (**'Replacement Amount'**), Your Organisation must use that Funding in accordance with the Program Schedule.
- 31.10 If the Replacement Amount is used for a purpose other than a purpose specified in the Program Schedule or as approved by the Commonwealth, then without limiting or affecting its other rights, the Commonwealth may:
- (a) by written notice, require Your Organisation to repay the Replacement Amount to the Commonwealth within 10 Business Days after Your Organisation receives that notice; or
 - (b) offset the Replacement Amount against any other amount that is payable by the Commonwealth to Your Organisation under this Agreement or any other agreement or arrangement.
- 31.11 Amounts payable to the Commonwealth under clauses 31.8 or 31.10(a) form part of the Funding and are recoverable as such.
- 31.12 Clauses 31.8 and 31.10 survive the expiry or earlier termination of this Agreement.

Failure to acquire Assets

- 31.13 If an amount of Funding is provided to Your Organisation to acquire an Asset for an Activity and Your Organisation does not acquire the Asset within the time period specified in the Program Schedule or, if no time period is specified in the Program Schedule, within 60 Business Days of that amount of Funding being provided to Your Organisation, the Commonwealth may reduce the Funding payable under this Agreement (for any Activity) by that amount.

Securities over Assets

- 31.14 Your Organisation must provide the Commonwealth with security over any Asset, purchased wholly or partly with the Funding, in whatever form the Commonwealth requires, and pay all stamp duties and reasonable legal costs of, and incidental to, such security upon the Commonwealth's request.
- 31.15 Clause 31.14 survives the expiry or earlier termination of this Agreement.

Additional obligations regarding Assets

- 31.16 Your Organisation is also required to comply with any additional obligations regarding Assets set out in the Program Schedule.

PART G:

RISK MANAGEMENT

32. Indemnity

- 32.1 Your Organisation is required to indemnify the Commonwealth and its officers, employees and agents from and against any:
- (a) personal injury to, or death of, any person;
 - (b) Intellectual Property or Moral Rights infringement;
 - (c) loss of or damage to property;
 - (d) loss or expense incurred in dealing with any claim, including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used or disbursements paid; or
 - (e) other loss or liability,
- arising from:
- (f) any act or omission by Your Organisation or Your Personnel in connection with this Agreement, including any negligence; or
 - (g) any breach by Your Organisation of this Agreement.

- 32.2 Your liability to indemnify under clause 32.1 will be reduced proportionately to the extent that a negligent or other tortious act or omission by the Commonwealth, the Commonwealth's officers, employees or agents contributed to the relevant liability, loss, damage, or expense.
- 32.3 The right to be indemnified under this clause 32:
- (a) is in addition to, and not exclusive of, any other right, power or remedy provided by Law; and
 - (b) does not entitle the Commonwealth to be compensated in excess of the amount of the Commonwealth's liability, loss, damage, or expense.
- 32.4 The Commonwealth will be taken to be agent or trustee for and on behalf of its current or former officers, employees and agents for the purposes of exercising rights under this clause 32.
- 32.5 To the extent permitted by Law, the operation of any legislative proportionate liability regime is excluded in relation to any claim against Your Organisation under or in connection with this Agreement.

33. Insurance

- 33.1 Your Organisation warrants that You have and will maintain all appropriate insurances to cover Your obligations under this Agreement and to deliver each Activity. The insurance is required to include, but is not limited to, the types and amounts of insurance specified in the Program Schedule, which are required to be held, at a minimum, for the period specified in the Program Schedule.
- 33.2 If the Commonwealth requests Your Organisation to do so, Your Organisation is required, as soon as practicable, to provide to the Commonwealth for inspection all insurance policies or certificates of currency which Your Organisation holds for the purposes of clause 33.1.

34. Conflict of interest

- 34.1 Your Organisation warrants that to the best of Your knowledge, after making diligent enquiry, at the date of signing this Agreement no Conflict exists or is likely to arise in the performance of this Agreement.
- 34.2 Your Organisation must not, and must use Your best endeavours to ensure that Your Personnel do not, engage in any activity or obtain any interest that is likely to give rise to a Conflict or adversely affect the performance of this Agreement.
- 34.3 If at any time a Conflict arises or appears likely to arise in respect of Your Organisation or any of Your Personnel, Your Organisation is required to:
- (a) notify the Commonwealth immediately in writing;
 - (b) make full disclosure of all relevant information relating to the Conflict;

- (c) set out the steps Your Organisation proposes to take to resolve or otherwise deal with the Conflict; and
 - (d) take such steps to resolve or otherwise deal with the Conflict as the Commonwealth reasonably requires.
- 34.4 If Your Organisation fails to comply with clause 34.3 the Commonwealth may take such steps as the Commonwealth considers appropriate to resolve or otherwise deal with the Conflict. These steps may include terminating this Agreement.

35. Notification of incidents and issues

- 35.1 Your Organisation is required to notify the Commonwealth immediately in writing if:
- (a) Your Organisation seeks or proposes to seek expert advice to address actual or potential issues in Your Organisation's governance, management or financial affairs that, if not urgently addressed, may adversely affect Your Organisation's ability to deliver an Activity;
 - (b) a Serious Incident occurs as a result of, or during, an Activity; or
 - (c) another event occurs which the Program Schedule requires Your Organisation to notify to the Commonwealth.
- 35.2 When Your Organisation has made a notification to the Commonwealth under clause 35.1 the Commonwealth will inform Your Organisation of any additional reports that the Commonwealth requires, in accordance with clause 10.

36. Activity continuity

- 36.1 Your Organisation is required to provide to the Commonwealth any plans regarding Activity continuity (such as disaster management plans, business continuity plans and transition out plans) which are specified in the Program Schedule or which the Commonwealth, at any time during the Agreement Period, requests Your Organisation to provide.
- 36.2 The requirements for the plans, including content, format and due dates, will be set out in the Program Schedule or will be notified to Your Organisation by the Commonwealth in writing. The Commonwealth will notify Your Organisation in advance of any requirement to provide a plan so that Your Organisation has a reasonable time in which to comply.
- 36.3 On reduction, termination or expiration of this Agreement for any reason, Your Organisation is required, in good faith, to cooperate and reasonably assist the Commonwealth and any new provider of the goods or services, to achieve an efficient transition of the provision of the goods or services from Your Organisation to the new provider.

PART H:

TERMINATION, SUSPENSION, REPAYMENTS AND DISPUTE RESOLUTION

37. Suspending Funding, terminating this Agreement or reducing the scope of this Agreement

- 37.1 This clause 37 sets out two separate grounds which permit the Commonwealth to suspend Funding, reduce the scope of or terminate this Agreement. These grounds are:
- (a) to comply with Commonwealth policy or other requirements (clause 37.4); and
 - (b) for Your Organisation's default (clause 37.7).
- 37.2 Alternatively, both Parties may agree to suspend Funding, reduce the scope of or terminate this Agreement at any time as described in clause 37.17.
- 37.3 The rights referred to in clauses 37.1 and 37.2 are described in detail below.

The Commonwealth's right to reduce or terminate to comply with Commonwealth policy or other requirements

- 37.4 The Commonwealth may, at any time, by giving Your Organisation written notice, do one or more of the following:
- (a) reduce the scope of this Agreement; or
 - (b) terminate this Agreement,
- as a consequence of a change in Commonwealth policy or Commonwealth requirements, with effect on and from the date specified in the notice.
- 37.5 For the avoidance of doubt, the Commonwealth has an unfettered discretion to reduce the scope of or terminate this Agreement in accordance with clause 37.4.
- 37.6 If, in accordance with clause 37.4, the Commonwealth:
- (a) reduces the scope of this Agreement; or
 - (b) terminates this Agreement,
- the Commonwealth:
- (c) will only reimburse Your Organisation for any reasonable costs unavoidably incurred by Your Organisation, which are directly attributable to the reduction or termination and which Your Organisation substantiates with written evidence to the Commonwealth's reasonable satisfaction; and

- (d) will not, under any circumstances, be liable to pay Your Organisation any amount in excess of the amount of Funding remaining unpaid under this Agreement at the effective date of reduction or termination; and
- (e) is not liable to pay Your Organisation compensation for any loss of profit or income or benefits that Your Organisation would have received had a reduction or termination under clause 37.4 not occurred or to pay costs for Your Personnel's redundancies; and
- (f) except as provided in this clause 37, will not be liable to Your Organisation for any costs, claims, compensation or expenses for any reduction or termination of this Agreement.

The Commonwealth's right to suspend, reduce or terminate for default

- 37.7 If there is, or has been, an Event of Default, the Commonwealth may, by giving Your Organisation written notice, do any one or more of the following:
- (a) suspend all or any part of the Funding;
 - (b) reduce the scope of this Agreement; or
 - (c) terminate this Agreement,
- with effect on and from the date specified in the notice.
- 37.8 Where practicable, the Commonwealth will notify Your Organisation in writing of the Commonwealth's intention to exercise any right under clause 37.7 (each referred to in this clause 37 as a '**Right**') prior to exercising that Right, as described in clause 37.9.
- 37.9 Where practicable, the Commonwealth will give Your Organisation no less than 10 Business Days to:
- (a) rectify an Event of Default; or
 - (b) provide reasons why the Commonwealth should not exercise a Right,
- before making a decision to exercise or not to exercise a Right. The Commonwealth will consider any reasons Your Organisation provides under clause 37.9(b).
- 37.10 However, despite clause 37.9, if the Commonwealth considers, acting reasonably, that:
- (a) an Event of Default cannot be rectified; or
 - (b) that the immediate exercise of a Right is appropriate in the circumstances,
- the Commonwealth may exercise a Right immediately by giving Your Organisation written notice and without giving Your Organisation the opportunity to rectify the Event of Default or provide reasons why the Commonwealth should not exercise a Right.
- 37.11 The Commonwealth will not be liable to Your Organisation for any costs, claims, compensation or expenses arising out of or in connection with the exercise of any Right.

- 37.12 If the Commonwealth notifies Your Organisation that the Commonwealth has exercised a Right under clause 37.7, and it is determined by a court or arbitrator that the Commonwealth did not properly exercise that Right, then the Commonwealth will be deemed to have exercised a similar right in accordance with clause 37.4.

Consequences of the suspension of Funding

- 37.13 If the Commonwealth suspends all or any part of the Funding under clause 37.7:
- (a) the part of the Funding which is affected by the suspension will not be paid to Your Organisation;
 - (b) Your Organisation is required to cease using Unspent Funding and hold that Unspent Funding in good faith, except as directed by the Commonwealth;
 - (c) Your Organisation is required to immediately do everything Your Organisation can to mitigate and lessen all losses, costs and expenses that Your Organisation may incur in relation to the suspension; and
 - (d) Your Organisation is required to comply with all Your Organisation's obligations under this Agreement which are not affected by the suspension,
- until the Commonwealth ends the suspension.
- 37.14 The Commonwealth may end a suspension in whole or part at any time at its discretion by giving written notice to Your Organisation, subject to such conditions (including variations to this Agreement) which the Commonwealth may require. For the avoidance of doubt, the Commonwealth may end a suspension in whole or part by terminating this Agreement in whole or part.

Consequences of a reduction in the scope of this Agreement

- 37.15 If the Commonwealth reduces the scope of an Activity or the Program Schedule under clauses 37.4 or 37.7:
- (a) Your Organisation is required to cease performing that part of the Activity or Program Schedule which has been removed from the scope of this Agreement;
 - (b) Your Organisation is required to immediately do everything Your Organisation can to mitigate and lessen all losses, costs and expenses that Your Organisation may suffer in relation to the reduction;
 - (c) the amount of Funding for the Activity or Program Schedule will be reduced by a corresponding amount that the Commonwealth determines at its discretion; and

- (d) Your Organisation is required to repay, as the Commonwealth directs, any Unspent Funding which relates to that part of the Activity or Program Schedule which has been removed from the scope of this Agreement.

Consequences of the termination of this Agreement

- 37.16 If the Commonwealth terminates this Agreement under clauses 37.4 or 37.7:
- (a) Your Organisation is required to comply with all Your Organisation's obligations under this Agreement which are not affected by the termination;
 - (b) Your Organisation is required to immediately do everything Your Organisation can to mitigate and lessen all losses, costs and expenses that Your Organisation may suffer in relation to the termination; and
 - (c) the termination does not limit or affect the Commonwealth's rights under this Agreement or at Law which accrued prior to the effective date of termination.

Suspending, reducing or terminating by agreement

- 37.17 Either of the Parties may, at any time, by giving the other Party written notice, request that:
- (a) all or any part of the Funding be suspended;
 - (b) the scope of this Agreement be reduced;
 - (c) this Agreement be terminated.
- 37.18 If either of the Parties receives a request under clause 37.17, both Parties will use reasonable endeavours to reach an agreement on the terms which will give effect to the request set out in the notice. The terms will be recorded in writing and both Parties will comply with those terms in relation to the suspension of Funding, termination or reduction of scope of this Agreement, whichever is applicable.
- 37.19 If Your Organisation makes a request under clause 37.17, and the Commonwealth agrees to that request, the Commonwealth will not be liable to Your Organisation for any costs, claims, compensation or expenses arising out of or in connection with any suspension of Funding or termination or reduction of scope of this Agreement.

38. Repayment of Funding

- 38.1 In this clause 38, 'Interest' means interest calculated at the 90 day bank-accepted bill rate (available from the Reserve Bank of Australia) less 10 basis points.

- 38.2 Except if the Commonwealth permits otherwise, Your Organisation is required to repay Funding to the Commonwealth in any of the circumstances set out below:
- (a) the Commonwealth has overpaid Funding to You;
 - (b) the Commonwealth has paid Your Organisation Funding for an Activity or part of an Activity which has not been delivered in accordance with this Agreement, including because the Agreement has been terminated or reduced in scope;
 - (c) the Commonwealth has paid Your Organisation Funding that Your Organisation has incorrectly claimed;
 - (d) the Commonwealth has formed the reasonable opinion that Funding is not required by Your Organisation to deliver the applicable Activity;
 - (e) Funding remains Unspent at the date on which it was to have been Spent;
 - (f) at the end of the Agreement Period, there has been an amount of Funding that has been set aside for the future replacement of an Asset and Your Organisation has not expended an equivalent amount of moneys on the acquisition of that class of Asset; or
 - (g) the Commonwealth has formed the reasonable opinion that Funding has been used, Spent or Committed by Your Organisation other than in accordance with this Agreement.
- 38.3 If Your Organisation is required to repay an amount under clause 38.2, the Commonwealth may, at its discretion:
- (a) give Your Organisation a notice in writing requiring the amount to be repaid by the date specified in the notice; or
 - (b) offset all or part of the amount against any other amounts payable to Your Organisation under this Agreement or any other agreement.
- 38.4 If Your Organisation fails to repay the Funding in accordance with a notice issued under clause 38.3(a):
- (a) Your Organisation is required to pay the Commonwealth Interest on the amount specified in the notice from the date it was due, for the period it remains unpaid; and
 - (b) the amount specified in the notice, and Interest owed under this clause 38.4 will be recoverable by the Commonwealth as a debt due to the Commonwealth by Your Organisation. All or part of the amount of the debt may be offset by the Commonwealth against any other amounts payable to Your Organisation under this Agreement or any other agreement or other action may be taken by the Commonwealth to recover the debt.
- 38.5 Your Organisation acknowledges that any Interest payable under clause 38.4(a) represents a reasonable pre-estimate of the loss incurred by the Commonwealth as a result of the loss of investment opportunity for, or the reasonable cost of borrowing other money in place of, the amount which should have been repaid.

39. Dispute resolution

- 39.1 In this clause 39, '**Interlocutory Relief**' means an interim order made by a court which is issued provisionally and without finally deciding the rights of the parties in relation to the entire matter.
- 39.2 Except for the circumstances set out in clause 39.3, a Party will not commence any legal proceedings in respect of any dispute arising under this Agreement until the following procedure has been followed:
- (a) the Party claiming that there is a dispute will send the other a written notice describing the dispute and proposing a means of resolving the dispute;
 - (b) within 20 Business Days of receipt of the notice referred to in clause 39.2(a), the representatives for each Party will meet to try to resolve the dispute;
 - (c) the Parties have 20 Business Days from the date of the first meeting to reach a resolution or to agree that the dispute is to be submitted to mediation or some alternative dispute resolution procedure; and
 - (d) if:
 - (i) there is no resolution of the dispute;
 - (ii) there is no agreement on submission of the dispute to mediation or some alternative dispute resolution procedure; or
 - (iii) there is a submission to mediation or some other form of alternative dispute resolution procedure, but there is no resolution of the dispute within 20 Business Days of the submission, or such extended time as the Parties may agree in writing before the expiration of the 20 Business Days,then either Party may commence legal proceedings.
- 39.3 This clause 39 does not apply to circumstances where:
- (a) either Party commences legal proceedings for urgent Interlocutory Relief;
 - (b) action is taken by the Commonwealth under, or purportedly under, clauses 23, 29, 37 or 38; or
 - (c) an authority of the Commonwealth, a State or Territory is investigating a breach or suspected breach of the Law by Your Organisation.
- 39.4 Despite the existence of a dispute, both Parties will continue to perform their respective obligations under this Agreement unless:
- (a) both Parties agree to suspend performance of this Agreement; or
 - (b) action is taken by the Commonwealth under clauses 37 or 38 to suspend Funding, reduce the scope of or terminate this Agreement.

PART I:

OTHER LEGAL MATTERS

40. Governing law

- 40.1 The laws of the Australian Capital Territory apply to this Agreement. The Parties submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory in respect of any dispute under this Agreement.

41. Entire agreement

- 41.1 This Agreement records the entire agreement between the Parties in relation to its subject matter. It supersedes all prior communications, negotiations and agreements, whether oral or written, about the subject matter of this Agreement.

42. Compliance with supplementary conditions

- 42.1 Your Organisation must, in Your performance of an Activity, comply with any Supplementary Conditions for that Activity.

43. Variation

- 43.1 Subject to clauses 37 and 43.2, this Agreement may only be varied by written agreement signed by both Parties.
- 43.2 A Program Manual or Guidelines may be varied by the Commonwealth at any time. The Commonwealth will notify Your Organisation of any changes to a Program Manual or Guidelines which affect this Agreement or an Activity.

44. Effect of invalidity of part

- 44.1 If part of this Agreement is found to be invalid, the rest of this Agreement continues in effect as if the invalid part were excluded.

45. Waiver

- 45.1 A waiver of any provision of this Agreement must be in writing in order to be effective.
- 45.2 No waiver of a term or condition of this Agreement will operate as a waiver of another breach of the same or any other term or condition.

- 45.3 If a Party does not exercise, or delays in exercising, any of its rights under this Agreement or at Law, that failure or delay does not operate as a waiver of those rights or any other rights.

46. Enforcement of rights

- 46.1 A Party is not precluded from exercising any of its rights under this Agreement merely because:
- (a) the Party did not exercise that right on an earlier occasion; or
 - (b) the Party did not exercise another right under this Agreement.

47. Your Organisation must not assign Your rights

- 47.1 Your Organisation must not assign, novate or transfer Your Organisation's rights or obligations under this Agreement without the Commonwealth's prior written consent.

48. Priority of documents

- 48.1 If there is any conflict or inconsistency between the provisions in documents forming part of this Agreement, the provisions in those documents take priority, to the extent of the conflict or inconsistency, in the following order:
- (a) the Terms and Conditions of this Agreement;
 - (b) the Program Schedule;
 - (c) any annexures or attachments to the Program Schedule;
 - (d) the Program Manual; and
 - (e) any documents incorporated by reference into the above documents.

49. Certain clauses survive after this Agreement ends

- 49.1 The reduction, termination or expiry of this Agreement, for any reason, does not affect the continued operation of:
- (a) clause 9 (Records of income and expenditure and other records);
 - (b) clause 16 (Taxes, duties and government charges);
 - (c) clause 25 (Intellectual Property);
 - (d) clause 26 (Privacy);
 - (e) clause 27 (Confidential information);
 - (f) clause 28 (Freedom of information);

- (g) clause 29 (Access to premises and records);
- (h) clause 32 (Indemnity);
- (i) clause 33 (Insurance);
- (j) clause 35 (Notification of incidents and issues);
- (k) clause 36 (Activity continuity);
- (l) clause 37 (Suspending funding, terminating this Agreement or reducing the scope of this Agreement);
- (m) clause 38 (Repayment of Funding); or
- (n) any other clauses in this Agreement that, expressly or by their nature, survive termination or expiry.

50. Notices and Directions

- 50.1 A Party giving notice under this Agreement will do so in writing that is:
- (a) directed to the other Party's address specified in the Program Schedule marked for the attention of the other Party's Liaison Officer; and
 - (b) either:
 - (i) hand delivered or sent by pre-paid post to that address; or
 - (ii) transmitted electronically, including via email or facsimile.
- 50.2 Directions given by the Commonwealth under clause 8.2 of this Agreement will be in writing and will be:
- (a) directed to Your Organisation's address specified in the Program Schedule marked for the attention of Your Organisation's Liaison Officer; and
 - (b) either:
 - (i) hand delivered or sent by registered post to that address; or
 - (ii) transmitted electronically, including via email or facsimile.
- 50.3 A notice or Directions given in accordance with this clause 50 is deemed to have been received:
- (a) if hand delivered, on delivery;
 - (b) if sent by pre-paid or registered post, on the third Business Day after the date of posting;
 - (c) if sent electronically, when the sender's computer or facsimile machine generates written notification that the notice has been received by the addressee.

51. Trustee provisions

Application of clause

- 51.1 This clause 51 only applies if the Agreement Details indicates that Your Organisation is entering into this Agreement in the capacity of a trustee of a trust.

Definitions

- 51.2 In this clause 51:
- (a) ‘Trust’ means the trust described in the Agreement Details; and
 - (b) ‘Trust Deed’ means the trust deed establishing the Trust.

Your Organisation’s capacity

- 51.3 Your Organisation enters into this Agreement personally, and in Your capacity as trustee of the Trust.

Your Organisation’s obligations

- 51.4 Your Organisation must cause any successor of Your Organisation and any person who becomes a trustee of the Trust jointly with Your Organisation to execute all documents required by the Commonwealth to ensure that this Agreement is binding on them.
- 51.5 Your Organisation warrants that:
- (a) Your Organisation is the sole trustee of the Trust and no action has been taken to remove or replace Your Organisation;
 - (b) Your Organisation has the power under the Trust Deed to execute and perform Your Organisation’s obligations under this Agreement;
 - (c) all necessary action has been taken to authorise the execution and performance of this Agreement under the Trust Deed and the constitution of Your Organisation;
 - (d) this Agreement is executed and all transactions relating to this Agreement are or will be entered into as part of the due and proper administration of the Trust and are or will be for the benefit of the beneficiaries;
 - (e) Your Organisation is not in default under the Trust Deed;
 - (f) no vesting date for the Trust fund has been determined;
 - (g) Your Organisation has complied with all fiduciary obligations directly or indirectly imposed on Your Organisation;

- (h) Your Organisation has a right to be indemnified out of the assets of the Trust in respect of all of Your Organisation's obligations and liabilities incurred by Your Organisation under this Agreement; and
 - (i) each of the warranties contained in this clause will remain true as long as this Agreement remains in force.
- 51.6 Except with the prior written consent of the Commonwealth, Your Organisation must:
 - (a) ensure that the Trust Deed is not varied;
 - (b) not default in Your Organisation's duties as trustee of the Trust;
 - (c) not exercise any power to appoint new beneficiaries or a class or classes of beneficiaries;
 - (d) not sell any of the property of the Trust except in the ordinary course of the ordinary conduct of its business (and, if the property is an Asset, in accordance with clause 31); and
 - (e) not do anything which effects or facilitates the resettlement of the Trust funds.
- 51.7 Your Organisation must enforce Your Organisation's right of indemnity under the Trust Deed as reasonably required by the Commonwealth to cover any and all liabilities, costs and expenses of Your Organisation which arise under this Agreement.

52. Counterparts

- 52.1 This Agreement may be executed in counterparts.

53. General interpretation

- 53.1 In this Agreement, unless the contrary intention appears:
 - (a) words in the singular include the plural and words in the plural 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) clause headings are inserted for convenient reference only and have no effect in limiting or extending the language of provisions to which they refer;
 - (e) all references to dollars are to Australian dollars;
 - (f) where any word or phrase is given a defined meaning, any other form of that word or phrase has a corresponding meaning;

- (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) a reference to any statute or other legislation (whether primary or subordinate) is to a statute or other legislation of the Commonwealth as amended;
- (i) a reference to the words ‘**including**’, ‘**for example**’ or similar terms are not to be construed or interpreted as words of limitation;
- (j) each clause is without limitation to any other clause; and
- (k) where a clause provides a right to the Commonwealth, that right may be exercised more than once and at any time.

54. Defined terms

In this Agreement, unless the contrary intention appears:

‘**Activity**’ means the activity or activities described in the Program Schedule including performance of all tasks, provision of all the goods and services and the provision of all Activity Material for that Activity;

‘**Activity End Date**’ in respect of an Activity means the earlier of:

- (a) the ‘**Activity End Date**’ specified in the Program Schedule;
- (b) if this Agreement is terminated, the effective date of termination; or
- (c) if the scope of this Agreement is reduced and the Activity is required to cease as a result of the reduction in scope, the effective date of the reduction in scope;

‘**Activity Material**’ in respect of an Activity means all Material, excluding Commonwealth Material and Existing Material that is:

- (a) brought into existence for the purpose of the Activity; or
- (b) incorporated in, supplied or required to be supplied along with the Material referred to in paragraph (a); and
- (c) includes the Activity Material described in the Program Schedule;

‘**Activity Period**’ in respect of an Activity means the period commencing on the Activity Start Date and ending on the Activity End Date;

‘**Activity Start Date**’ in respect of an Activity means the ‘**Activity Start Date**’ specified in the Program Schedule;

‘**Aged Care Complaints Scheme**’ means an external complaints mechanism as described in clause 8 and Annexure A of the Program Schedule;

‘**Agreement**’ means the Terms and Conditions and the Program Schedule and any attachments or annexures to those documents;

‘Agreement Commencement Date’ means the ‘Agreement Commencement Date’ set out in the Agreement Details;

‘Agreement Completion Date’ means the earlier of:

- (a) the Agreement Completion Date set out in the Program Schedule;
- (b) the date of termination of this Agreement; or
- (c) such other date agreed by the Parties in writing;

‘Agreement Details’ means the Agreement Details in the Program Schedule;

‘Agreement Period’ means the period commencing on the Agreement Commencement Date and ending on the Agreement Completion Date;

‘Approved Auditor’ means a person who is:

- (a) registered as a company auditor under the *Corporations Act 2001* or an appropriately qualified 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, office holder or employee of Your Organisation or of a Related Body Corporate as defined in the *Corporations Act 2001*;

‘Approved Budget’ means the budget approved by the Commonwealth and specified in the Program Schedule as the Approved Budget for expenditure of the Funding and Other Contributions (if any);

‘Asset’ means:

- (a) a single item of tangible or intangible property which is identified in the Program Schedule as an Asset;
- (b) a single item of tangible or intangible property which falls within a class of assets and the Program Schedule provides that any assets in that class of assets is an Asset;
- (c) an asset which was acquired under a Previous Agreement as described in clause 15.5(d); or
- (d) a single item of tangible or intangible property purchased or leased, or which is intended to be purchased or leased, either wholly or in part with the use of the Funding, with a value at the time of acquisition of \$10,000 or more, inclusive of GST;

‘Assets Register’ means a register of assets as described in clause 31.4 and the Program Schedule;

‘Auditor-General’ means the office established under the *Auditor-General Act 1997* and includes any other person that may, at any time, perform the functions of that office;

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

‘Australian Auditing Standards’ means the standards set by the Auditor-General under section 24 of the *Auditor-General Act 1997* and generally accepted audit practices to the extent they are not inconsistent with such standards;

‘Authorised Deposit-taking Institution’ means an authorised deposit-taking institution which is authorised under the *Banking Act 1959* to carry on banking business in Australia;

‘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;

‘Change in Control’ in relation to a partnership, corporation, trust, joint venture or any other entity, means a change in:

- (a) a member of the executive, a director, a secretary or any other person who takes part in the management of the entity;
- (b) the partners of an entity which is a partnership;
- (c) the person (natural or incorporated) who has the ability to cast or control the casting of more than half of the maximum number of votes that might be cast at any annual general meeting; or
- (d) the person (natural or incorporated) who holds more than half of the issued ordinary share capital, the equity or the ownership interest in the entity;

‘Client’ means a person who receives goods or services from Your Organisation as part of Your delivery of an Activity;

‘Commit’ and **‘Committed’** means Funding that Your Organisation is legally obliged to pay to a third party;

‘Commonwealth’ means the Commonwealth of Australia, as represented by the Department of Health and Ageing;

‘Commonwealth Confidential Information’ means information that:

- (a) is by its nature confidential to the Commonwealth;
- (b) the Commonwealth designates as being confidential; or
- (c) Your Organisation knows or ought to know is confidential to the Commonwealth;

but does not include information that:

- (d) is or becomes public knowledge, other than by breach of this Agreement or by any other unlawful means;
- (e) is in Your Organisation’s possession without restriction in relation to disclosure before the date Your Organisation received it from the Commonwealth; or
- (f) has been independently developed or acquired by Your Organisation;

‘Commonwealth Material’ in respect of an Activity means any Material:

- (a) the Commonwealth provides to Your Organisation for the purposes of the Activity; or
- (b) copied or derived at any time from the Material referred to in paragraph (a);

‘Conflict’ means any conflict of interest, any risk of a conflict of interest or any apparent conflict of interest arising through Your Organisation or Your Personnel engaging in any activity or obtaining any interest that is likely to conflict with or restrict Your ability or their ability to deliver an Activity fairly and independently;

‘Contravention’ means:

- (a) a breach by Your Organisation of any Law or any order or directive to which Your Organisation or any of Your property is subject;
- (b) a contravention by Your Organisation of Your constituent documents;
- (c) a contravention by Your Organisation of any agreement or instrument to which You are a party; or
- (d) Your Organisation being required to make any payment or delivery in respect of any financial indebtedness before the scheduled date for that payment or delivery;

‘Department’ means the Commonwealth Department of Health and Ageing, or any other agency which administers this Agreement on behalf of the Commonwealth from time to time;

‘Directions’ means written directions given to Your Organisation by the Commonwealth in connection with a complaint made under the Aged Care Complaints Scheme;

‘Dispose’ means to sell, license, lease or sublease, or otherwise transfer or give up ownership or the right to occupy or use or to enter into an agreement to do any of the preceding acts;

‘Event of Default’ means that the Commonwealth believes on reasonable grounds that:

- (a) Your Organisation has not complied with, or is unable or unwilling to comply with, any provision of this Agreement;
- (b) Your Organisation has not Spent all the Funding in accordance with this Agreement;
- (c) Your Organisation has breached a warranty Your Organisation has given under this Agreement;
- (d) Your Organisation has made an incorrect or incomplete statement that was material to the Commonwealth’s decision to approve any Funding or enter into this Agreement;
- (e) Your Organisation has given the Commonwealth a report that is not complete or accurate;
- (f) Your purposes and activities are not compatible with the objectives and outcomes of an Activity or the Program;

- (g) an Insolvency Event has occurred; or
- (h) a Change in Control has occurred in respect of Your Organisation;

‘Existing Material’ in respect of an Activity means all Material in existence prior to the commencement of this Agreement or which has been created other than for the purposes of the Activity, that is:

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

the Activity Material for the Activity and includes any Material identified as Existing Material in the Program Schedule, but excludes Commonwealth Material;

‘Final Report’ is the final report referred to in clause 10.1 that meets the requirements of the Program Schedule and the Program Manual;

‘Financial Accountability Report’ is the financial accountability report referred to in clause 10.1 that meets the requirements of the Program Schedule and the Program Manual;

‘Freedom of Information Commissioner’ means the office established under the *Australian Information Commissioner Act 2010* and includes any other person that may, at any time, perform the functions of that office;

‘Funding’ means the funding specified in the Program Schedule as the Funding and all interest earned on the Funding;

‘Funds Administrator’ means a person or organisation appointed under clause 23.1;

‘Government Agency’ means:

- (a) a body corporate or an unincorporated body established or constituted for a public purpose by Commonwealth legislation, or an instrument made under that legislation;
- (b) a body established by the Governor-General or by a Minister of State of the Commonwealth, including departments;
- (c) a State or Territory government department or agency; or
- (d) an incorporated company over which the Commonwealth exercises control;

‘GST’ means goods and services tax;

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

‘Guidelines’ in respect of an Activity means the guidelines, if any, set out or referred to in the Program Schedule, as amended by the Commonwealth at any time;

‘Information Commissioner’ means the office established under the *Australian Information Commissioner Act 2010* and includes any other person that may, at any time, perform the functions of that office;

‘Insolvency Event’ means:

- (a) Your Organisation becomes bankrupt or insolvent or is wound up;
- (b) Your Organisation assigns Your estate for the benefit of creditors;
- (c) Your Organisation enters into any arrangement or composition with creditors or a receiver, manager or administrator is appointed on behalf of debenture holders or creditors;
- (d) Your Organisation goes into liquidation or passes a resolution to go into liquidation, Your Organisation becomes subject to any petition or proceedings in a court for Your compulsory winding up or Your Organisation becomes subject to the supervision of a court or regulatory authority, either voluntarily or otherwise;
- (e) Your Organisation suffers any execution against Your assets; or
- (f) anything of a similar effect to anything described in paragraphs (a) to (e) occurs in respect of Your Organisation;

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

‘Law’ means all applicable statutes, regulations, by-laws, ordinances or subordinate legislation in force anywhere in Australia, whether made by a State, Territory, the Commonwealth or a local government, and includes the common law and equity as applicable at any time;

‘Liaison Officer’ means the person or position holder specified as such in the Program Schedule or any substitute person notified in writing to the other Party. A Party’s Liaison Officer is its primary point of contact for matters relating to the Agreement;

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

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

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

‘Ombudsman’ means the office established under the *Ombudsman Act 1976* and includes any other person that may, at any time, perform the functions of that office;

‘Other Contributions’ means financial or in-kind resources (with in-kind resources valued at market rates) contributed by Your Organisation or third parties, but excludes the Funding and any amounts paid by Clients as consideration for goods or services;

‘Party’ means a party to this Agreement;

‘Performance Indicator’ means a performance indicator set out in the Program Schedule;

‘Policies’ means:

- (a) any policies which the Commonwealth notifies to Your Organisation in writing as being applicable to this Agreement or an Activity, or which are listed in the Program Schedule; and
- (b) any policies which the Commonwealth has published or endorsed which Your Organisation knows or ought to know the Commonwealth intends will apply to this Agreement or an Activity;

‘Previous Agreements’ means the previous agreements specified in the Program Schedule (if any);

‘Previous Funds’ means amounts of funding paid under Previous Agreements and identified in the Program Schedule;

‘Primary Subcontractor’ means a contractor which is subcontracted by Your Organisation to perform part of Your Organisation’s obligations under this Agreement;

‘Privacy Commissioner’ means the office established under the *Australian Information Commissioner Act 2010* and includes any other person that may, at any time, perform the functions of that office;

‘Proceedings’ means litigation, arbitration, mediation, conciliation or legal proceedings, and includes investigations for the purposes of deciding whether to commence Proceedings;

‘Program’ means a program specified in the Program Schedule;

‘Program Manual’ means a manual for a Program as specified in the Program Schedule, as amended by the Commonwealth at any time;

‘Program Schedule’ means a schedule to this Agreement, and includes any Program Manual or Guidelines included by reference in the Program Schedule;

‘Publication’ means Material published in any medium by Your Organisation or Your Personnel, as part of an Activity, or which includes content which was created for the purposes of an Activity;

‘Recipient Created Tax Invoice’ or **‘RCTI’** means a Recipient Created Tax Invoice as defined in the GST Act;

‘Related Entity’ means:

- (a) an entity that controls or has significant influence over Your Organisation;
- (b) an entity that Your Organisation controls or significantly influences at any time, including a subsidiary;
- (c) a member of the board of Your Organisation or any of Your Organisation’s other officers; and
- (d) a member of the board of any other entity referred to in paragraphs (a) or (b);

‘Secondary Subcontractor’ means a contractor which is subcontracted by a Primary Subcontractor or another Secondary Subcontractor to perform part of Your Organisation’s obligations under this Agreement;

‘Serious Incident’ means:

- (a) the unexpected death of any person;
- (b) a serious injury to any person;
- (c) an allegation of Significant Misconduct made by any person in relation to Your Organisation or Your Personnel; or
- (d) a fire, natural disaster, accident or other incident that will or is likely to:
 - (i) prevent the delivery of all or part of an Activity;
 - (ii) result in the closure of premises, or significant damage to premises or property; or
 - (iii) pose a significant threat to the health and safety of any person;

‘Significant Misconduct’ means conduct that will or is likely to result in death, harm or injury to any person or which breaches any Law, including criminal activity;

‘Specified Acts’ means any of the following types of acts or omissions:

- (a) using, reproducing, modifying, adapting, publishing, performing, broadcasting, communicating, commercialising or exploiting all or any part of the Activity Material or Existing Material, with or without attribution of authorship;
- (b) supplementing the Activity Material or Existing Material with any other Material; and
- (c) using the Activity Material or Existing Material in a different context to that originally envisaged,

but does not include false attribution of authorship;

‘Specified Personnel’ in respect of an Activity or particular aspects of an Activity means those of Your Personnel who are specified in the Program Schedule as Specified Personnel;

‘Spent’ in respect of Funding means Funding Your Organisation has paid to a third party;

‘Subcontractor’ means a Primary Subcontractor or a Secondary Subcontractor;

‘Supplementary Conditions’ means those Supplementary Conditions set out, or referred to, in Annexure A of the Program Schedule in respect of an Activity;

‘Terms and Conditions’ means all clauses of this document;

‘Undepreciated’ means, in relation to an Asset, the value of the Asset has not been depreciated in accordance with Australian Accounting Standards;

‘Unspent’ in respect of an Activity means Funding for that Activity that Your Organisation has not Spent or Committed;

‘Your Confidential Information’ means information that:

- (a) is by its nature confidential to Your Organisation; and
- (b) Your Organisation designates in the Program Schedule as being Your Confidential Information,
but does not include information that:
 - (c) is or becomes public knowledge, other than by breach of this Agreement or by any other unlawful means;
 - (d) is in the Commonwealth’s possession without restriction in relation to disclosure before the date the Commonwealth received it from Your Organisation; or
 - (e) has been independently developed or acquired by the Commonwealth;

‘Your Organisation’ has the meaning given in the Agreement Details. For the avoidance of doubt, **‘Your Organisation’** may be a sole trader or any other entity; and

‘Your Personnel’ means:

- (a) Your Organisation’s officers, employees, volunteers, agents or Subcontractors; and
- (b) officers, employees, volunteers, agents or Subcontractors of Your Organisation’s Subcontractors;

and includes Specified Personnel.