

# **Commercialisation Australia Program Funding Agreement**

**Commonwealth of Australia**

and

**[insert Grantee's name]**

ACN [insert]

ABN [insert]

Project Number: CAUXXXX

SAMPLE

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## This Funding Agreement

is made on \_\_\_\_\_ between the following parties:

1. **The Commonwealth of Australia**  
represented by its Department of Innovation, Industry, Science and Research  
of Level 7, 10 Binara Street, Canberra ACT 2600  
**ABN 74 599 608 295**  
**(the Commonwealth)**
  
2. **[insert Grantee's name]**  
**ACN [insert]**  
**ABN [insert]**  
of **[insert registered business address of Grantee]**  
**(the Grantee)**

### Recitals

- A. The Commonwealth has established the Program for the purpose of building the capacity of, and opportunities for, Australia's researchers, entrepreneurs and innovative firms to convert ideas into successful commercial ventures, enhancing Australia's participation and competitiveness in the global economy and generating commercial returns from Australia's significant investment in public sector research.
- B. The Grantee wishes to obtain financial assistance from the Commonwealth and has applied for a grant under the Program.
- C. The Commonwealth has awarded the Grant to the Grantee for the purposes of the Project on the terms of this Agreement.
- D. This Agreement is intended to cover all grants for the Project that the Grantee obtains under the Program. If the Grantee obtains additional grants for the Project under the Program, they can be added to this Agreement by the parties in accordance with clause 2.2.

### Operative provisions

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## 1 Definitions and Interpretation

### 1.1 Definitions

In this Agreement, unless the contrary intention appears:

**Agreement** means this agreement including all schedules and attachments;

**Annual Capped Amount** means, for a Financial Year, the relevant amount stated in Schedule 1 for the Project, and in the absence of an amount being stated, the relevant amount for that Financial Year is zero;

**Application** means the application and all supporting material in connection with it, submitted by the Grantee to the Commonwealth in respect of which the Grant has been awarded;

**Application Acceptance Date** means the date the Commonwealth provides notice that an Application has been accepted for assessment;

**Approved Financial Institution** means a deposit taking institution authorised under the *Banking Act 1959* (Cwlth) to carry on banking business in Australia;

**Associate** means a:

- (a) Related Body Corporate of the Grantee;
- (b) a director, secretary, other officer, shareholder, employee or agent of the Grantee;
- (c) a person with a direct or indirect pecuniary interest in the Grantee; or  
or a Close Relative of any of them (including of the Grantee itself, where the Grantee is an individual); or
- (d) a person who is not otherwise independent of the Grantee, or the engagement of whom could give rise to an actual or perceived conflict of interest;

**Background Intellectual Property** means all Intellectual Property which is in existence as at the date of this Agreement which is necessary for the conduct of the Eligible Activities;

**Budget** means the budget for the relevant Component, as set out in Schedule 2 and includes changes agreed by the Commonwealth in accordance with clause 6.5;

**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;

**Case Manager** means the person from the private sector assigned by the Commonwealth from time to time;

**Close Relative** of a natural person means, at any relevant time:

- (a) a spouse or a de facto spouse of that person, whether current or within the period of 2 years from the relevant time;

- (b) a father, mother, guardian, brother, sister, son or daughter of that person; or
- (c) a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law or daughter-in-law of that person;

**Component** means a Component of the Project to be undertaken by the Grantee, as specified in Schedule 2;

**Component Commencement Date** means the commencement date of each Component, as specified in Schedule 2;

**Component Completion Date** means the date on which the Component is to be completed by the Grantee, as specified in Schedule 2;

**Confidential Information** comprises all information described in Schedule 1, and any other information that is by its nature confidential, but, for the avoidance of doubt, does not include:

- (a) the name of the Grantee;
- (b) the amount of the Grant;
- (c) the title and description of the Project as specified in Schedule 1;
- (d) the Planned Outcomes;
- (e) information in the public domain, otherwise than due to a breach of this Agreement; or
- (f) the Term of this Agreement, or the term of the Project or any Component;

**Control** of a corporation means having control for the purposes of section 50AA of the Corporations Act;

**Controller** has the same meaning as in the Corporations Act;

**Corporations Act** means the *Corporations Act 2001* (Cwlth);

**Customer Information Guide** means the Customer Information Guide for the Program published by the Commonwealth, current as at the date of this Agreement;

**Deal With** means:

- (a) sell, transfer, assign, novate, declare a trust over, license, or otherwise procure or dispose or effect the disposal of, or in any way whatever deal with, any legal or equitable interest in, or any right in respect of, any subject matter; or

- (b) effect a change in the beneficial interest or beneficial unit holding under a trust the trustee of which has an estate or interest in the subject matter;

**Department** means the Commonwealth Department of Innovation, Industry, Science and Research or such other department as may, from time to time, administer this Agreement on behalf of the Commonwealth;

**Eligible Activity** is defined in clause 3.3;

**Eligible Expenditure** means the expenditure described as eligible in the Customer Information Guide;

**Encumbrance** means any:

- (a) security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power, or title retention or flawed deposit arrangement; or
- (b) right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off; or
- (c) right that a person (other than the owner) has to remove something from land (known as a profit à prendre), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or
- (d) third party right or interest or any right arising as a consequence of the enforcement of a judgment,

or any agreement to create any of them or allow them to exist;

**ESC Component** (if applicable) means the Grantee's early stage commercialisation project that forms part of the Project;

**Experienced Executive Component** (if applicable) means the Grantee's engagement of an experienced chief executive officer or other executives that forms part of the Project;

**Financial Year** means the 12 month period beginning 1 July of one year and ending 30 June of the following year;

**Government Grant Funding** means a grant, loan or investment sourced directly from a Commonwealth, State, Territory, local or international government, or indirectly through a government funded organisation, including as described in the Customer Information Guide;

**Grant** means the grant of financial assistance by the Commonwealth to the Grantee in the amount(s) specified in Schedule 2;

**Grant Percentage** means the percentage of Project Funding to be paid by the Commonwealth to the Grantee as the Grant, being the percentage(s) specified in Schedule 2;

**Grantee** includes, where the context so admits, the officers, employees, agents and subcontractors of the Grantee, and the Grantee's successors and permitted assignees;

**Grantee's Contribution** means the amount of funding to be provided towards the Project by the Grantee, consistent with the Guide to Managing Your Grant;

**GST** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cwlth);

**Guide to Managing Your Grant** means the "Guide to Managing Your Grant for Commercialisation Australia" issued by the Commonwealth, as amended from time to time;

A person is **Insolvent** if:

- (a) it is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act); or
- (b) it is in liquidation, in provisional liquidation, under administration or wound up or has had a Controller appointed to its property; or
- (c) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the Financier); or
- (d) an application or order has been made (and, in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above; or
- (e) it is taken (under section 459F(1) of the Corporations Act) to have failed to comply with a statutory demand; or
- (f) it is the subject of an event described in section 459(C)(2)(b) or section 585 of the Corporations Act (or it makes a statement from which the Financier reasonably deduces it is so subject); or
- (g) it is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to paragraphs (a) to (g) happens in connection with that person under the law of any jurisdiction;

**Intellectual Property** means:

- (a) statutory and other proprietary rights in respect of trade marks (including goodwill in those marks), patents, circuit layouts, copyrights, designs, confidential information, moral rights, domain names, Know-how, plant varieties and all other rights with respect to intellectual property as defined in Article 2 of the July 1967 Convention Establishing the World Intellectual Property Organisation;
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and
- (c) all rights of a similar nature to any of the rights in paragraphs (a) and (b) which may subsist in Australia or elsewhere,

whether or not such rights are registered or capable of being registered;

**Key Personnel** means a person or persons engaged by the Grantee whose technical or business skills are crucial to the success of the Project, as approved by the Commonwealth from time to time in accordance with clause 6.3 of this Agreement, as specified in Schedule 1;

**Know-how** means expertise, knowledge, skills, techniques, methods, procedures, ideas and concepts;

**Letter of Offer** means the letter from the Department offering the Grant to the Grantee for the purposes of the Project, including any conditions in that letter;

**Milestones** means the milestones for a Component, as described in Schedule 2;

**Non Tax-Exempt Company** means a company incorporated in Australia under the Corporations Act, that is not a company to which Division 50 of the *Income Tax Assessment Act 1997* (Cwlth) applies;

**Obligation to Repay** has the meaning given in Part D of Schedule 2;

**Planned Component Outcomes** means the planned results of each Component of the Project set out in Schedule 2;

**Planned Outcomes** means each of the Planned Component Outcomes and the Planned Project Outcomes;

**Planned Project Outcomes** means the planned results of the Project set out in Schedule 1, and the anticipated national benefits of the Project described in the Application;

**Program** means the Commonwealth *Commercialisation Australia* program of providing assistance to talented researchers, entrepreneurs and innovative firms to take their ideas to market, administered by the Department pursuant to the Program Guidelines;

**Program Delegate** means an employee of the Department, who has been empowered by the Minister or is otherwise duly authorised to carry out the function described in the Program Guidelines, as nominated by the Commonwealth from time to time;

**Program Funding** means the funding made available by the Commonwealth of Australia for the Program in any given Financial Year, being the funding specified in the Portfolio Budget Statement (as varied by any Portfolio Additional Estimates Statement) for that year;

**Program Guidelines** means the *Commercialisation Australia Program Guidelines No. 1 of 2009*;

**Progress Payment** means an instalment of the Grant, made pursuant to clause 5.1;

**Progress Report** has the meaning given in the Guide to Managing Your Grant;

**Project** means the Grantee's overall project to take their ideas to market, comprising each Component set out in Schedule 2 from time to time;

**Project End Date** has the meaning given in Schedule 1;

**Project Funding** means the sum of the Grant provided by the Commonwealth to the Grantee and the Grantee's Contribution;

**Project Start Date** has the meaning given in Schedule 1;

**Proof of Concept Component** (if applicable) means the activities associated with the steps necessary to establish the commercial viability of a new product, process or service that forms part of the Project;

**Quarter** means each period of three months ending on 31 March, 30 June, 30 September or 31 December during the Term (or a part of such a Quarter occurring at the beginning or the end of the Term);

**Records** includes documents (as defined in the *Evidence Act 1995* (Cwlth)), books, receipts, ledgers, invoices, information, bank statements and data stored by any means, and all copies and extracts of the same;

**Related Body Corporate** has the same meaning as in section 50 of the Corporations Act;

**Retention Amount** means the amount specified in Schedule 1, or if no amount is specified, means 5% of the funding provided for each Component to be undertaken by the Grantee under this Agreement;

**Service Provider** means an individual or organisation engaged by the Grantee, to provide specialised assistance and services which have been agreed to by the Case Manager as necessary to assist the Grantee to reach its commercial goals;



**Skills and Knowledge Component** (if applicable) means the Grantee's obtaining of expert advice and services to assist in the commercialisation process that forms part of the Project;

**Special Conditions** means conditions which are specific to the Grant, which are set out in Schedule 1;

**Term** means the period set out in clause 2.1;

**Total Grant Amount** has the meaning given in Part D of Schedule 2; and

**Volunteer Business Mentor** means a person made available by the Commonwealth to provide knowledge, skills and insight to the Grantee to assist the Grantee in undertaking the Project.

## **1.2 Interpretation**

In this Agreement, unless the contrary intention appears:

- (a) a person includes a firm, a body corporate, an unincorporated association or an authority;
- (b) the singular includes the plural and vice versa;
- (c) a reference to a statute, ordinance, code or other law is, unless the contrary intention appears, a reference to a statute, ordinance, code or other law of the Commonwealth or State or Territory of Australia and includes regulations and other instruments made under it and consolidations, amendments, re-enactments or replacements of any of them;
- (d) "including", "includes" and "in particular" do not limit the words which precede them or to which they refer;
- (e) headings are inserted for convenience of reference only and are not to be used in the interpretation of this Agreement;
- (f) a reference to this Agreement includes a reference to the schedules of this Agreement;
- (g) a reference to a schedule is a reference to a schedule to this Agreement; and
- (h) a reference to a discretion, power or authority of the Commonwealth or the Program Delegate is to be interpreted as a reference to a discretion, power or authority that may be exercised by the Commonwealth or the Program Delegate in its sole and absolute discretion.

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## **2 Term and Multiple Grants**

### **2.1 Term of this Agreement**

This Agreement commences on the date it is signed and continues until the fifth anniversary of the Project End Date, unless extended by written agreement of the parties.

### **2.2 This Agreement may cover multiple Components**

If Schedule 2 contains more than one Component, this Agreement applies separately to each Component set out in that Schedule. Each such Component creates a separate contract between the Commonwealth and the Grantee on the terms of this Agreement (other than this clause 2.2).

The parties may add additional Components to Schedule 2 by signing and dating the pro-forma document provided by the Commonwealth.

If the Commonwealth has the right to terminate this Agreement in respect of a Component, the Commonwealth may instead by notice to the Grantee terminate this Agreement in respect of any two or more (or all) Components.

### **2.3 Multiple Grantees**

If there is more than one person comprising the Grantee:

- (a) an obligation of, or acknowledgement, representation or warranty by, the Grantee binds those persons jointly and each of them individually;
- (b) a right of the Grantee is held by each of those persons individually;
- (c) a reference to “the Grantee must” means that each of the persons comprising the Grantee must comply with that clause; and
- (d) any other reference to the Grantee is a reference to each of those persons separately (for example, a reference to the Grantee being in breach of this Agreement or Insolvent is a reference to either (or any) of the persons comprising the Grantee being in breach or Insolvent).

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## **3 Eligible Activities and Eligible Expenditure**

### **3.1 Use of Project Funding**

The Grantee may only use Project Funding:

- (a) for Eligible Expenditure on the Eligible Activities, as described in the Grantee’s Application (and as approved by the Commonwealth in its letter of offer for funding) for the relevant Component; and
- (b) in accordance with the Budget for the relevant Component; and

- (c) in accordance with this Agreement.

### **3.2 Eligible Expenditure**

The Customer Information Guide describes what kinds of expenditure are Eligible Expenditure, and what kinds of expenditure are ineligible, in relation to each Eligible Activity.

### **3.3 Eligible Activities**

The activities that are eligible for funding under the Program are as follows:

- (a) **(Skills and Knowledge Component)** obtaining expert advice and services to assist in the commercialisation process;
- (b) **(Experienced Executive Component)** employing an experienced chief executive officer or other executive;
- (c) **(Proof of Concept Component)** undertaking the steps necessary to establish the commercial viability of a product, process or service; and/or
- (d) **(ESC Component)** undertaking the systematic work necessary for installing and establishing processes, systems and services that enable a new product, process or service to be produced to the stage where it can effectively be brought to market,

as further described in the Customer Information Guide (“**Eligible Activities**”).

### **3.4 Special Conditions**

In undertaking the Eligible Activities and other obligations under this Agreement, the Grantee must comply with the Special Conditions in respect of the Project, as specified in Schedule 1, and any other terms and conditions in Schedule 2.

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## **4 Warranties**

### **4.1 Grantee warranties**

The Grantee, after making reasonable inquiry, warrants as at the time the Grantee submitted its Application to the Commonwealth, and repeats this warranty on each day following, that:

- (a) all information that the Grantee has provided or provides to the Commonwealth:
  - (i) from time to time under this Agreement (including information given in any report to the Commonwealth by the Grantee under this Agreement) is true and correct; and

- (ii) in, and in connection with, the Application is true and correct; and
  - (iii) it has disclosed in writing to the Commonwealth all facts relating to it, the Project, this Agreement and all things in connection with them that are material to the assessment of the Application and the Commonwealth's decision to providing funding under this Agreement; and
- (b) without limiting the generality of clause 4.1(a) the Grantee:
- (i) is a Non Tax-Exempt Company (this warranty is applicable only if the Grantee is a body corporate and in its Application the Grantee specified that it was, or would become, a Non Tax-Exempt Company); and
  - (ii) does not have any interests or obligations that conflict with its interests or obligations under this Agreement; and
  - (iii) has complied and will at all times comply with any conditions set out in the Letter of Offer; and
  - (iv) owns or has, and will at all times own or have, all the necessary rights in respect of:
    - A. the Intellectual Property, including the Background Intellectual Property; and
    - B. all technical information, including but not limited to, all designs, specifications, data, drawings, plans, reports, models, prototypes and other things, necessary to carry out and/or commercialise the Project; and
  - (v) has adequate financial resources to fund, and will fund, the Grantee's Contribution, and no part of that contribution will be from Government Grant Funding; and
  - (vi) has the power to enter into and perform this Agreement and has obtained all necessary consents and authorisations to enable it to do so; and
  - (vii) when conducting research using genetic material from humans (including human embryos, stem cells and all other human organs, tissues and cells), animals or plants, and/or undertaking projects involving experimentation in humans (including human embryos, stem cells and all other human organs, tissues and cells) or animals, the Grantee will ensure that those activities:
    - A. will have received formal prior approval by a qualified regulatory body(s) or committee(s) as complying with

all relevant ethics codes and guidelines adopted by the National Health and Medical Research Council, the office of the Gene Technology Regulator and all other relevant regulatory agencies operating in Australia and any other place in which the research will be conducted, that are applicable during the Term of this Agreement; and

- B. will comply with all relevant legal requirements of the Commonwealth and any State or Territory of Australia, and of any other place in which the research will be conducted, that are applicable during the Term of this Agreement; and
- (c) is not aware of any circumstances which adversely affect or might adversely affect the Grantee's ability to lawfully fulfil its obligations under this Agreement; and
- (d) is able to pay its debts as and when they fall due.

The Grantee acknowledges that it is a criminal offence to provide the Commonwealth with misleading or false information under the *Criminal Code Act 1995* (Cwlth).

#### **4.2 Grantee to notify of change of status**

The Grantee must immediately inform the Commonwealth of any change in its status or circumstances that may affect its ability to comply with this Agreement, including its ability to implement the Project.

#### **4.3 Grantee to notify of breach**

If the Grantee becomes aware of a breach of a warranty, the Grantee must immediately notify the Commonwealth of that breach.

#### **4.4 No limitation**

Nothing in clause 4.2 or clause 4.3 limits the Commonwealth's rights under this Agreement.

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## **5 Payment of Grant**

### **5.1 Progress Payments**

- (a) For the first Quarter occurring after the date of this Agreement, the Commonwealth will pay to the Grantee the Initial Progress Payment set out in Schedule 1, that is the Grant Percentage of the Eligible Expenditure that the Grantee forecasts will be incurred in that Quarter plus the Grant Percentage of any previous expenditure incurred by the Grantee under clause 5.3.

- (b) For each Quarter occurring after the first Quarter, and following receipt of a Progress Report from the Grantee that is satisfactory to the Commonwealth, the Commonwealth will make Quarterly Progress Payments to the Grantee based on the aggregate of:
- (i) the Grant Percentage of the Eligible Expenditure that the Grantee forecasts will be incurred in that Quarter; and
  - (ii) the Grant Percentage of the Eligible Expenditure incurred by the Grantee in the previous Quarter, less the amount of the Progress Payment already paid by the Commonwealth for that previous Quarter.
- (c) If the amount calculated under clause 5.1(b)(ii) produces a negative amount (that is, where the Grant Percentage of the Eligible Expenditure actually incurred by the Grantee in the previous Quarter is less than the Progress Payment paid to the Grantee for that Quarter), the difference will be deducted by the Commonwealth from the current or subsequent Quarterly Progress Payments.
- (d) Notwithstanding clauses 5.1(a), (b) or (c), the Commonwealth will not make Progress Payments, that in aggregate, exceed the Annual Capped Amount for the Project in a Financial Year.
- (e) Without limiting clause 5.4 but notwithstanding any provision of this Agreement to the contrary, the Commonwealth is not obliged to make a Progress Payment or may pay to the Grantee only part of a Progress Payment in respect of a Component, unless and until the Commonwealth is satisfied that the Grantee:
- (i) has expended a sufficient amount of the Grantee's Contribution to meet all Eligible Expenditure incurred to date, that has not been met by the sum of the Progress Payments paid to date;
  - (ii) has a sufficient amount of the Grantee's Contribution to meet all Eligible Expenditure forecast to be incurred during the next Quarter that will not be met by the next forecasted Quarterly Progress Payment; and
  - (iii) has made sufficient progress on the Component, including by having met all Milestones set out in this Agreement that have fallen due for completion for that Component.
- (f) A Progress Payment may be made in advance for the next Quarter or any subsequent Quarters, in the Commonwealth's absolute discretion.
- (g) The date for payment of Progress Payments will be determined by the Commonwealth.

## **5.2 Retention Amount**

The Commonwealth will retain the Retention Amount from the funding of each a Component, until such time as the Grantee has completed to the Commonwealth's satisfaction:

- (a) the Eligible Activities; and
- (b) all Progress Reports required under this Agreement,

in respect of that Component. The Commonwealth will determine the manner and timing of that retention. The Retention Amount will be varied if an additional Component is to be undertaken by the Grantee pursuant to clause 2.2.

## **5.3 Expenditure incurred before the Component Commencement Date**

The Grantee may incur Eligible Expenditure in respect of Eligible Activities on and from the Application Acceptance Date. However, the Commonwealth will not make any Progress Payments to the Grantee prior to the date of this Agreement.

## **5.4 Commonwealth may withhold payment**

- (a) The Commonwealth is not obliged to make a Progress Payment in respect of one or more Components if, in the Commonwealth's reasonable opinion, any one or more of the following events has or may have occurred in respect of the Grantee (or, where there is more than one Grantee, to any of the Grantees):
  - (i) the total of all Progress Payments paid to date, and the next Quarterly Progress Payment, would exceed the Grant Percentage of the total amount of the Eligible Expenditure made or incurred to date and forecast to be incurred in the next Quarter, as determined by the Commonwealth (such determination being final and binding);
  - (ii) a Progress Payment or the Grantee Contribution has not been used by the Grantee in accordance with this Agreement;
  - (iii) the Commonwealth has determined that some or all of the Grantee's expenditure to which the proposed payment relates is not Eligible Expenditure on an Eligible Activity. The Commonwealth's determination as to whether expenditure by the Grantee is Eligible Expenditure on an Eligible Activity is final and binding on the Grantee;
  - (iv) there has been a change to Key Personnel and the Commonwealth has not approved, or has rejected, the alternative proposed replacement for the Key Personnel;

- (v) the Grantee will not be able to complete the Project to a standard reasonably acceptable to the Commonwealth;
  - (vi) the Grantee has not provided a report required under this Agreement by the due date for submission, or the report provided is not satisfactory to the Commonwealth;
  - (vii) the Grantee is in breach of any warranty in this Agreement;
  - (viii) the Grantee is, or is likely to become, Insolvent;
  - (ix) the Commonwealth has acted under, or purportedly under, its power to terminate this Agreement;
  - (x) the sum of the Progress Payment and other Progress Payments made in a Financial Year in respect of the Project would exceed the Annual Capped Amount for that Financial Year; or
  - (xi) the Grantee breaches a term of this Agreement and that breach has not been remedied to the Commonwealth's satisfaction.
- (b) The Commonwealth may defer a payment otherwise due in a Financial Year to the next Financial Year if, in the Commonwealth's reasonable opinion, insufficient Program Funding may be available to meet that commitment in the first-mentioned Financial Year.
  - (c) The Commonwealth is not obliged to make any Progress Payment after the Commonwealth has become entitled to terminate this Agreement.

### **5.5 Liability limited**

Notwithstanding any other provision of this Agreement, the liability of the Commonwealth under this Agreement is limited:

- (a) with respect to any Financial Year, to the lesser of:
  - (i) the Grant Percentage of the total amount of the Eligible Expenditure made or incurred by the Grantee in respect of the Project for that year; or
  - (ii) the Annual Capped Amount for the Project in that year; and
- (b) in the aggregate, to the Grant Percentage of the total amount of the Eligible Expenditure made or incurred by the Grantee in respect of the Project.

### **5.6 Grantee's Contribution**

The Grantee must fund all expenditure in relation to the Project that is not covered by the Grant.



## **5.7 Request for information**

The Commonwealth may request the Grantee to provide to the Commonwealth any information the Commonwealth reasonably requires for the purposes of determining any of the matters described in this clause 5. The Grantee must comply with such a request within 10 days of its receipt.

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# **6 Conduct of Project**

## **6.1 Undertaking of Project**

The Grantee agrees to undertake the Project:

- (a) diligently;
- (b) to a high standard and in good faith;
- (c) in accordance with the Planned Outcomes;
- (d) in accordance with the requirements of the Customer Information Guide; and
- (e) in accordance with any representations made in the Application and on the terms of this Agreement.

### **6.1A Milestones**

The Grantee must:

- (a) achieve the Milestones for each Component within their respective Planned Achievement Dates as set out in Schedule 2;
- (b) complete each Component by the relevant Component End Date; and
- (c) complete the Project by the Project End Date.

### **6.2 Delay in completion of Milestones**

- (a) The Grantee must notify the Commonwealth promptly in writing if a Milestone has not been achieved, or it considers that a Milestone is unlikely to be achieved, by the date for completion of that Milestone.
- (b) A notice given under clause 6.2(a) must set out:
  - (i) the reason for the delay;
  - (ii) the action the Grantee proposes to take to address the delay;
  - (iii) the anticipated date for achievement of the Milestone;
  - (iv) the anticipated effect the delay will have on the achievement of subsequent Milestones; and

- (v) the anticipated effect the delay will have on the undertaking and completion of the Project and compliance with the Budget.
- (c) The Commonwealth may terminate this Agreement pursuant to clause 15.1 if it considers in its absolute discretion (notwithstanding any information in the notice from the Grantee, and regardless of whether the Grantee provides a notice to the Commonwealth under clause 6.2(a)) that the failure by the Grantee to achieve an Eligible Activity may compromise the capacity of the Grantee to complete the Project on or before the Project End Date.

### **6.3 Change of Key Personnel**

- (a) The Grantee must notify the Commonwealth in writing if there is a proposed change to Key Personnel.
- (b) A notice given under clause 6.3(a) must set out:
  - (i) the reason for the proposed change to Key Personnel;
  - (ii) the proposed replacement for the Key Personnel; and
  - (iii) evidence that the proposed replacement Key Personnel has the technical or business skills required for the success of the Project.
- (c) If the Grantee gives notice under clause 6.3(a) the Commonwealth must advise the Grantee, within 21 days of receipt of the notice from the Grantee, that the Commonwealth has either approved or rejected the proposed replacement for the Key Personnel.
- (d) If the Commonwealth rejects the proposed replacement for the Key Personnel the Grantee may provide notice to the Commonwealth under clause 6.3(a) of an alternative replacement within 21 days of the receipt of the notice from the Commonwealth.
- (e) If the Grantee gives notice under clause 6.3(d) the Commonwealth must advise the Grantee, within 21 days of receipt of the notice from the Grantee, that the Commonwealth has either approved or rejected the proposed alternative replacement for the Key Personnel.
- (f) If the Commonwealth rejects the proposed alternative replacement for the Key Personnel, the Commonwealth may, in its absolute discretion, terminate this Agreement pursuant to clause 15.1.

### **6.4 Reports**

- (a) The Grantee must prepare and submit reports to the Commonwealth:
  - (i) in accordance with the requirements in the Guide to Managing Your Grant; and

- (ii) by the dates set out in Schedule 1,  
or as otherwise reasonably required by the Commonwealth.
- (b) The Grantee must provide ad-hoc reports as required by the Commonwealth from time to time and in the manner reasonably required by the Commonwealth.
- (c) If, in the Program Delegate's opinion, the form or the content of a report is inadequate, the Program Delegate may request in writing that the Grantee submit a revised report within 30 days of receipt of that notice.
- (d) If the Grantee fails to submit a satisfactory revised report within 30 days under clause 6.4(c) of this Agreement, the Commonwealth may, in its absolute discretion, terminate this Agreement pursuant to clause 15.1.

## **6.5 Budget**

- (a) The Grantee's Budget for each Component is set out in Schedule 2. The Grantee may only use the Project Funding in accordance with the Budget for the relevant Component.
- (b) The Grantee may reallocate budgeted expenditure in respect of categories of expenditure in the Budget, or vary its work methods as it considers necessary to undertake and complete the Project, provided it does not materially change the Project, any Milestone set out in this Agreement, the Planned Outcomes or cause the Grantee to be in breach of any of its obligations under this Agreement.
- (c) The Grantee must give the Commonwealth:
  - (i) by 1 February of each Financial Year; and
  - (ii) at any time the Grantee wishes to request a variation to any one or more of the Annual Capped Amounts,  
a revised Budget for each Component in a form acceptable to the Commonwealth, so as to ensure the relevant Budget continues to accurately reflect planned Eligible Expenditure for the Project, and an explanation as to why the requested changes are proposed.
- (d) The Commonwealth may, at its discretion, approve or reject a revised Budget provided under clause 6.5(c). The Commonwealth's approval may be granted subject to conditions.
- (e) If a revised Budget is approved by the Commonwealth, then the relevant Budget is replaced by the revised Budget approved under clause 6.5(d).

## **6.6 Bank account**

The Grantee must:

- (a) on or before the date of this Agreement, provide the Commonwealth with details of the general bank account, held with an Approved Financial Institution, where the Progress Payments are to be paid for the duration of the Project;
- (b) ensure that all Progress Payments are paid into this account; and
- (c) promptly provide to the Commonwealth and the relevant Approved Financial Institution an authority enabling the Approved Financial Institution to provide any statements and details relating to use of the account to the Commonwealth, on request.

For the avoidance of doubt, the Progress Payments need not be held in a separate account from the Grantee's other funds.

## **6.7 Records**

- (a) The Grantee must, and must ensure that its subcontractors, keep and retain to the Commonwealth's satisfaction Records necessary to provide a complete and detailed record and explanation of:

- (i) expenditure by the Grantee of Eligible Expenditure and the Grant; and
- (ii) the conduct of the Project,

from the relevant Component Commencement Date until the fifth anniversary of the Project End Date.

- (b) In respect of the ESC Component (if applicable), the Grantee must, and must ensure that its subcontractors, keep and retain to the Commonwealth's satisfaction Records necessary to provide a complete and detailed record and explanation of:

- (i) the calculation of Gross Sales Revenue; and
- (ii) the Grantee's compliance with Schedule 2 Part D,

for so long as the Grantee is required to repay the Total Grant Amount in accordance with Schedule 2 Part D.

## **6.8 Inspection and audit**

- (a) The Commonwealth or a person nominated by the Commonwealth may at reasonable times and on reasonable notice to the Grantee enter the Grantee's premises (or such other premises where the Project is being undertaken, access in respect of which must be procured by the Grantee) and inspect the Records kept by the Grantee, and progress with the Project, in order to review the Grantee's compliance with this Agreement.
- (b) The Grantee must give the Commonwealth and its nominee all necessary facilities and assistance to enable them to conduct an audit.
- (c) In conducting a review under clause 6.8(a), the Commonwealth or its nominee may take copies of any Records that the Commonwealth or the nominee considers relevant to the Project.
- (d) The Grantee must provide, on request, copies of any Records that the Commonwealth or the nominee considers relevant to the Project.
- (e) The rights of the Commonwealth under this clause 6.8 apply equally to the Auditor-General and the Privacy Commissioner (and their respective nominees) for the purpose of performing their respective statutory functions and powers. The Grantee must do all things necessary to comply with the Auditor-General or the Privacy Commissioner (or their respective nominees) requirements, notified under clause 6.8(a) to (d).
- (f) Each party must bear its own costs of any reviews or audits. The Grantee must ensure that any subcontract entered into under this Agreement contains a similar clause granting the rights specified in this clause 6.8. This clause 6.8 applies until the date that is 5 years after the expiry or termination of this Agreement.

## **6.9 Compliance with Laws**

The Grantee must, in undertaking the Project, comply with all relevant laws of:

- (a) the Commonwealth, and of any State, Territory or local authority, including the *Crimes Act 1914* (Cwlth) and the *Equal Opportunity for Women in the Workplace Act 1999* (Cwlth); and
- (b) (if applicable) a country outside Australia in which part of the Project is to be undertaken.

## **6.10 Confidential Information**

- (a) Subject to clause 6.10(b), the Department agrees not to disclose any Confidential Information of the Grantee without the Grantee's consent.

- (b) The Commonwealth will not be taken to have breached its obligations under this clause 6.10 to the extent that the Department discloses Confidential Information:
- (i) to its officers, employees, agents, external professional advisers or contractors solely in order to comply with obligations, or to exercise rights, under this Agreement;
  - (ii) to its internal management personnel, solely to enable effective management or auditing of Agreement-related activities;
  - (iii) to the responsible Minister or in response to a demand by a House or a Committee of the Parliament of the Commonwealth of Australia;
  - (iv) within the Department, with another government agency, or with Innovation Australia, where this serves the Department's, or the Commonwealth's legitimate interests;
  - (v) for a purpose directly related to the enforcement of any Commonwealth, State or Territory law; or
  - (vi) as required or permitted by any other law, Commonwealth policy or express provision of this Agreement to be disclosed.
- (c) Where the Department discloses Confidential Information to another person, the Department must notify the receiving party that the information is Confidential Information.
- (d) Nothing in this clause 6.10 derogates from any obligation which the Grantee may have either under the *Privacy Act 1988* (Cwlth), or under this Agreement, in relation to the protection of personal information.

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## **7 Role of Case Manager and Volunteer Business Mentor**

### **7.1 Case Manager**

The Commonwealth may arrange for a Case Manager to assist the Grantee in undertaking the Project.

### **7.2 Volunteer Business Mentor**

The Commonwealth may make available to the Grantee a Volunteer Business Mentor to assist the Grantee in undertaking the Project. In addition to the role of the Case Manager under clause 7.1, the Grantee may:

- (a) meet with the Volunteer Business Mentor, as arranged by the Case Manager from time to time; and
- (b) consider the views of the Volunteer Business Mentor in undertaking the Project.

The Grantee agrees to do all things necessary to release the Volunteer Business Mentor from any loss, liability, expense or cost incurred by the Grantee arising out of, or in connection with, the Volunteer Business Mentor's assistance, including by entering into the deed poll attached at Schedule 3 on or before the date of this Agreement.

---

## **8 Project Outcomes**

### **8.1 National benefit**

The parties acknowledge that the giving of the Grant for the purposes of the Project is intended to deliver substantial national benefit to Australia. The parties agree that substantial national benefit will be deemed to have been satisfactorily delivered where:

- (a) on or by the Project End Date, the Grantee demonstrates to the Commonwealth's satisfaction that the Planned Outcomes have been achieved; and
- (b) the Grantee commercialises the Project (or its outcomes) in accordance with the Application.

### **8.2 Grantee's obligation**

The Grantee agrees to use its best endeavours to:

- (a) ensure the Planned Outcomes are achieved; and
- (b) commercialise the Project (or its outcomes) in accordance with the Application.

### **8.3 Breach of Grantee's obligation**

Without limiting the operation of clause 8.2, the Grantee will have breached its obligations under that clause if the Commonwealth determines that the Grantee has acted:

- (a) inconsistently with any material representation (as determined by the Commonwealth acting reasonably) included any part of the Application; or
- (b) in a manner so as to reduce or prevent the national benefit contemplated under clause 8.1 from being achieved.

### **8.4 Grantee to notify of events**

The Grantee must immediately notify the Commonwealth (giving reasons) if at any time during the Term of this Agreement, the Grantee:

- (a) believes the Grantee's or the Project's capacity to achieve the Planned Outcomes has been compromised; or

- (b) wishes to commercialise the Project (or its outcomes) other than as required under clause 8.2 and as a result of the proposed change:
  - (i) the Project would no longer be commercialised on normal commercial terms;
  - (ii) significant aspects of the Project would be commercialised in a country other than Australia; or
  - (iii) any part of the Project would be commercialised overseas and that would deliver significantly reduced national benefit when compared to the proposed commercialisation arrangements set out in the Application.

## **8.5 Repayment obligation**

If the Grantee fails to comply with either clause 8.2 or 8.4, the Commonwealth may by notice to the Grantee require the Grantee to repay such amount of the Grant paid to the Grantee as the Commonwealth determines and as set out in that notice. If the Grantee does not pay the amount by the due date set out in the notice, the Commonwealth may, in its absolute discretion, require the Grantee to pay interest on that amount in accordance with clause 12.

---

# **9 Evaluation**

## **9.1 Cooperation in evaluation**

- (a) The Grantee must cooperate in any evaluation of the Program undertaken by or on behalf of the Commonwealth.
- (b) The Grantee must, at its cost, provide reasonable information and completed survey forms relating to the Project or the Program at any time from the date of this Agreement until the fifth anniversary of the Project End Date, at the request of the Commonwealth or any third party engaged by the Commonwealth for the purposes of undertaking any Program evaluation.
- (c) The Grantee must comply with a request under this clause 9.1 within 28 days of receiving the request or as otherwise agreed by the Commonwealth.

---

# **10 Other Financial Assistance**

## **10.1 Other financial assistance**

The Grantee must provide the Commonwealth with full details of any financial assistance or other Government Grant Funding it receives after the date of this Agreement from another Commonwealth, State, Territory or local government department or agency for activities in connection with this



Agreement or the Project , including the amount and source of the funding and the name of the Program under which it was provided, within 30 days of receiving notice that the other financial assistance has been approved.

## **10.2 Reduction in Grant**

The Commonwealth may reduce the size of the Grant after taking into account the amount of the other financial assistance referred to in clause 10.1, to the extent the Grant has not already been paid to the Grantee.

---

# **11 Acquittal of Grant**

## **11.1 Repayment**

- (a) If at any time the amount paid to the Grantee under this Agreement exceeds the amount of the Grant, or the Grant Percentage of Eligible Expenditure incurred to date, the Commonwealth may by notice to the Grantee require the Grantee to repay the amount of the excess to the Commonwealth.
- (b) If the Grantee expends the Grant or the Grantee Contribution other than in accordance with this Agreement the Commonwealth may by notice require the Grantee to repay the amount spent in breach of this Agreement to the Commonwealth.
- (c) If the Commonwealth determines, at its absolute discretion, that the Grantee has acted in a manner so as to reduce the national benefits that were expected to be generated by the Project, the Commonwealth may, by notice, require the Grantee to repay the Grant or so much of the Grant as the Commonwealth determines.
- (d) If at the end of a Financial Year, the total amounts paid to the Grantee in that year in respect of the Project exceeds the Annual Capped Amount for that year, the Commonwealth may by notice to the Grantee, require the Grantee to repay the amount of that excess to the Commonwealth.
- (e) The Commonwealth may at its absolute discretion require the Grantee to pay interest on any amount to be repaid under clause 11.1(a), 11.1(b), 11.1(c) or 11.1(d), calculated in accordance with clause 12.
- (f) If the Commonwealth gives the Grantee a notice under this clause 11.1, the Grantee must pay the amount specified in the notice to be repaid to the Commonwealth within 28 days of receipt of the notice.

## **11.2 Commonwealth rights**

- (a) The Commonwealth may set-off any money due for payment by the Commonwealth to the Grantee under this Agreement against any

money due for payment by the Grantee to the Commonwealth under this Agreement.

- (b) If the Grantee is required to pay an amount to the Commonwealth under this Agreement, the Commonwealth may recover that amount as a debt due and payable to the Commonwealth.

---

## **12 Interest**

### **12.1 Obligation to pay interest**

If the Commonwealth determines, in its absolute discretion, that interest is payable on an amount under a provision of this Agreement, the Grantee must pay that interest at the Interest Rate on demand from the Commonwealth.

The interest accrues daily from (and including) the due date to (but excluding) the date of actual payment and is calculated on actual days elapsed and a year of 365 days.

### **12.2 Rate of interest**

The “Interest Rate” referred to in clauses 12.1 and 12.3 is the most recent 60 day Bank Bill Swap Reference Rate last published on or before the due date for payment of an amount in The Australian Financial Review (or if that rate has not been published, another rate set by the Commonwealth in good faith).

### **12.3 Compounding**

Interest payable under clause 12.1 which is not paid when due for payment may be added to the overdue amount by the Commonwealth at intervals which the Commonwealth determines from time to time or, if no determination is made, every 30 days. Interest is payable on the increased overdue amount at the Interest Rate set out in clause 12.2 and in the manner set out in clause 12.1.

---

## **13 No Dealing with Grantee’s Rights**

### **13.1 Dealing with the Grantee’s rights**

The Grantee must not, without the Program Delegate’s prior written consent (as required under clause 13.2):

- (a) Deal With, assign, grant or create any Encumbrance over its rights under this Agreement; or
- (b) Deal With any Intellectual Property developed using in whole or in part the Grant.

The Program Delegate’s consent may be given subject to conditions, including the requirement that the Grantee and any other person concerned in a transaction referred to in this clause 13.1 to execute all documentation

required by the Commonwealth. The Grantee must comply with any such conditions.

### **13.2 Change in control**

A Change in Control of the Grantee, and a sale of all or part of the Grantee's assets associated with the Project, are taken to be Dealing With the Grantee's rights under this clause 13.

### **13.3 When the Program Delegate's consent is required**

The Grantee must obtain the Program Delegate's prior written consent under clause 13.1:

- (a) where the Grantee is undertaking an ESC Component and a proposed transaction referred to in clause 13.1 involves an Associate of the Grantee; or
- (b) otherwise, where the amount of the Grant provided, or to be provided, to the Grantee under this Agreement:
  - (i) is \$500,000 or less (exclusive of GST), the Grantee must seek and receive permission from the Program Delegate until the Project End Date; or
  - (ii) exceeds \$500,000 (exclusive of GST), the Grantee must seek and receive permission from the Program Delegate during the Term of this Agreement and for a period of 5 years after the Project End Date.

### **13.4 Floating charges**

Notwithstanding the above, the parties agree that:

- (a) the giving of a floating charge over the assets and undertakings of the Grantee; or
- (b) any Dealing With the Intellectual Property developed using whole or part of the Grant for the purposes of the Grantee meeting its obligations under clause 8.2,

is not taken to be a breach of clauses 13.1 to 13.3 (inclusive).

### **13.5 Sale of intellectual property**

Notwithstanding clauses 13.1 to 13.4 (inclusive), where the Grantee sells, assigns, licences or otherwise Deals With any Intellectual Property developed using whole or part of the Grant (**IP Transaction**):

- (a) it must do so on commercially reasonable terms and on an arms' length basis; and

- (b) if the Grantee is undertaking an ESC Component and the Grantee has an Obligation to Repay, the Grantee must apply the proceeds of the IP Transaction first toward repaying the Total Grant Amount to the Commonwealth (regardless of the terms of the payment plan approved by the Program Delegate according to clause 7(c) of Part D Schedule 2).

---

## 14 Acknowledgment and Public Statements

### 14.1 Acknowledgment of financial assistance

During the period from the date of this Agreement until 5 years after the Project End Date, the Grantee must acknowledge the financial assistance received from the Commonwealth under the Program in any public statements about the Project or this Agreement or any products, processes or inventions commercialised as a result of it.

### 14.2 Awarding of Grant

The Commonwealth may at any time disclose the awarding of the Grant, by disclosing the name of the Grantee, the amount of the Grant, the title and description of the Project, and the Planned Outcomes.

---

## 15 Termination

### 15.1 Termination for default

- (a) The Commonwealth may terminate this Agreement by notice to the Grantee if:
- (i) the Grantee is in breach of this Agreement, the breach being capable of being remedied, and the Grantee fails to remedy that breach within 21 days of receipt of a notice from the Commonwealth requiring it to do so (or within any longer period specified in the notice);
  - (ii) the Grantee is in breach of this Agreement, the breach not being capable of being remedied;
  - (iii) notwithstanding clause 15.1(a)(i), the Grantee is in breach of clause 4.1 or clause 6.4(d);
  - (iv) there has been a change to Key Personnel without the Commonwealth's prior written consent;
  - (v) there is a change in Control of the Grantee, or the Grantee purports to sell all or part of its business assets without the prior consent of the Commonwealth;

- (vi) there is a change in the ownership of the Grantee which the Commonwealth reasonably considers has an adverse effect on the Grantee's ability to comply with any of its obligations under this Agreement;
  - (vii) the Grantee is, or in the Commonwealth's opinion is likely to become, Insolvent;
  - (viii) the Grantee is, in the Commonwealth's opinion, unable or likely to be unable to meet its obligations under clause 5.6 in respect of the next, or any subsequent Quarters; or
  - (ix) the Commonwealth is otherwise entitled to terminate this Agreement under another provision of this Agreement.
- (b) If the Commonwealth gives a notice under clause 15.1(a), the Agreement will terminate on the date specified in that notice.

## **15.2 Obligations on termination**

On termination of this Agreement under clause 15.1:

- (a) the Commonwealth's obligation to pay any amount of the Grant that is unpaid as at the date of termination ceases;
- (b) the Grantee must give the Commonwealth:
  - (i) a statement of expenditure incurred by the Grantee under the Project up to the date of termination; and
  - (ii) a report on the Project and the Grantee's progress in undertaking the Project,
 in a form satisfactory to the Commonwealth;
- (c) the Commonwealth may by notice in writing to the Grantee require the Grantee to repay all or any part of the Grant which has been previously paid to the Grantee;
- (d) the Commonwealth may at its absolute discretion require the Grantee to pay interest on any amount to be repaid under clause 15.2(c), calculated in accordance with clause 12;
- (e) if the Commonwealth gives the Grantee a notice under clause 15.2(c), the Grantee must repay or reimburse to the Commonwealth the amount notified in full without deduction within 28 days of the date of the notice; and
- (f) the Commonwealth may at its absolute discretion set-off any money due for payment by the Commonwealth in accordance with clause 11.2.

### **15.3 Termination for convenience**

- (a) The Commonwealth may at any time by written notice to the Grantee terminate this Agreement.
- (b) Termination pursuant to clause 15.3(a) shall be without prejudice to the rights, liabilities or obligations of either party accruing prior to the date of termination.
- (c) If the Commonwealth terminates this Agreement pursuant to clause 15.3(a), the Commonwealth is liable only to pay any Progress Payments due, excluding Progress Payments that have been suspended or withheld by the Commonwealth in accordance with this Agreement, and not yet made to the Grantee as at the date of termination.

### **15.4 Mutual Termination**

This Agreement may be terminated at any time by the mutual written agreement of the parties.

---

## **16 Notices**

### **16.1 Giving of notices**

- (a) Any notice, request or other communication to be given or served pursuant to this Agreement must be in writing and addressed, as the case may be, as follows:
  - (i) if given by the Grantee to the Commonwealth, addressed and forwarded to the State Manager at the address specified in Schedule 1 or as otherwise notified in writing to the Grantee by an AusIndustry Customer Service Manager; and
  - (ii) if given by the Commonwealth to the Grantee, forwarded to the Grantee at the address specified in Schedule 1 or as otherwise notified in writing to the Commonwealth by the Grantee.
- (b) Any notice, request or other communication must be delivered by hand or sent by prepaid post or transmitted electronically or by facsimile.
- (c) A notice, request or other communication will be deemed to be received:
  - (i) if it is delivered by hand, upon delivery;
  - (ii) if it is sent by prepaid post within Australia, 2 Business Days after the date on which it was sent; and
  - (iii) if it is transmitted electronically or by facsimile, upon receipt by the sender of an electronic or facsimile acknowledgement

that the communication has been properly transmitted to the recipient.

- (d) The Grantee must notify the Commonwealth of any change to the address details in Schedule 1 at least 21 days before those changes take effect.

## **16.2 Signing of notices**

Notices will be regarded as duly signed:

- (a) where given by the Commonwealth, signed by the an authorised officer of the Commonwealth; and
- (b) where given by the Grantee, signed by a director, secretary or other authorised representative of the Grantee.

---

## **17 General**

### **17.1 Variation**

- (a) The parties may agree in writing to vary this Agreement from time to time.
- (b) A party (**First Party**) must provide written notice to the other party within a reasonable time that the First Party has either approved or rejected a variation requested under clause 17.1(a) of this Agreement.

### **17.2 Waiver**

- (a) No waiver of any provision of this Agreement is binding unless it is in writing and signed by the party granting the waiver.
- (b) A waiver by the Commonwealth in respect of any breach of a condition or provision of this Agreement shall not be deemed to be a waiver in respect of any other or of any subsequent breach.

### **17.3 Assignment**

The Grantee must not assign, in whole or in part, its benefits under this Agreement without the prior written approval of the Commonwealth, which may be withheld in the Commonwealth's absolute discretion.

### **17.4 Governing law and jurisdiction**

- (a) This Agreement and the transactions contemplated by this Agreement are governed by the laws in force in the Australian Capital Territory.
- (b) Each party:

- (i) irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of the Australian Capital Territory and courts of appeal for determining any dispute concerning this Agreement; and
- (ii) waives any right it has to object to an action being brought in those courts, including claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

### **17.5 Exercise of discretions**

The Commonwealth may exercise its powers, discretions and authorities in its sole and absolute discretion provided that it acts in good faith in exercising discretions, making decisions, approving or rejecting proposals and in all other dealings with the Grantee under this Agreement.

### **17.6 Costs**

- (a) Each party must meet its own costs and disbursements incurred in connection with the preparation, negotiation and finalisation of this Agreement.
- (b) The defaulting party must pay the legal costs and expenses of the non-defaulting party in respect of the enforcement, protection or waiver or attempted enforcement, protection or waiver of any rights under this Agreement.

---

## **18 GST**

### **18.1 Terms**

In this clause 18:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law or Ruling have the same meaning as in the GST Law or Ruling;
- (b) “GST Law” has the meaning given to that expression in the GST Act;
- (c) “GST Act” means the *A New Tax System (Goods and Services Tax) Act 1999* (Clth); and
- (d) “Ruling” means a published GST ruling, GST determination or similar document issued by the Commissioner of Taxation.

### **18.2 GST payable**

- (a) Unless otherwise expressly stated, all amounts payable or consideration to be provided under this Agreement are exclusive of GST.



- (b) If GST is payable by a supplier, or by the representative member for a GST group of which the supplier is a member, on any supply made under this Agreement, the recipient will pay to the supplier an amount equal to the GST payable on the supply.
- (c) The recipient will, subject to clause 18.3, pay the amount referred to in clause 18.2(b) in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

### **18.3 Tax invoice**

Except where clause 18.6 applies:

- (a) the supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 18.2(b).
- (b) the recipient can withhold payment of the amount payable under clause 18.2(b) until the supplier provides a tax invoice or an adjustment note as appropriate.

### **18.4 Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a supplier under this Agreement the amount payable by the recipient under clause 18.2(b) will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

### **18.5 Pay or reimburse**

Where a party is required under this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

### **18.6 Issuing Recipient Created Tax Invoices and Adjustment Notes**

Where the Grantee makes a taxable supply under or in connection with this Agreement, it is agreed that:

- (a) the Commonwealth, where permitted by the GST Law and Rulings, will issue a recipient created tax invoice for the supply by the Grantee in accordance with the GST Law and Rulings, and the Commonwealth

will retain the original or the copy;

- (b) the Grantee will not issue tax invoices in relation to the supply; and
- (c) the Commonwealth, and not the Grantee, will issue an adjustment note to the Commonwealth for any adjustment event that arises in relation to the supply, and the Commonwealth will retain the original or the copy.

### **18.7 Acknowledgments**

- (a) The Commonwealth acknowledges that it is registered for GST at the date of entry into this Agreement and that it will notify the Grantee if it ceases to be so registered, or if it otherwise ceases to be entitled to enter into a recipient created tax invoice arrangement.
- (b) The Grantee acknowledges that it is registered for GST at the date of entry into this Agreement and that it will notify the Commonwealth if it ceases to be so registered.

---

## **19 Survival**

### **19.1 Survival of clauses**

Subject to clause 19.2, the following clauses of the Agreement will remain in full force and effect and survive the expiry or early termination of this Agreement (**Termination Date**) until the fifth anniversary of the Termination Date:

- (a) clause 4 (Warranties)
- (b) clause 5.5 (Liability limited);
- (c) clause 6.4 (Reports);
- (d) clause 6.7 (Records);
- (e) clause 6.8 (Inspection and audit);
- (f) clause 6.10 (Confidential Information);
- (g) clause 8 (Project Outcomes);
- (h) clause 9 (Evaluation);
- (i) clause 11 (Acquittal of Grant);
- (j) clause 12 (Interest);
- (k) clause 13 (No Dealing with Grantee's Rights);
- (l) clause 14 (Acknowledgement and Public Statements);

- (m) clause 15 (Termination);
- (n) clause 16 (Notices); and
- (o) this clause 19 (Survival).

**19.2 ESC Component**

Where the Grantee receives a Grant in respect of the ESC Component, the clauses listed in clause 19.1 will remain in full force and effect for so long as the Grantee’s obligation to repay the Grant in accordance with Schedule 2 survives.

---

**Executed as an agreement:**

**Signed sealed and delivered  
for and on behalf of the  
Commonwealth of Australia**

on  
by its authorised representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
[insert name]  
[insert title]

\_\_\_\_\_  
Name (please print)

Department of Innovation,  
Industry, Science and  
Research

**EXECUTED** by **[Insert Grantee's name and ABN]**<sup>1</sup> in accordance with section 127(1) of the Corporations Act 2001 (Cwlth) by authority of its directors:

..... )

Signature of director )

..... )

..... )

..... )

Name of director (block letters) )

.....

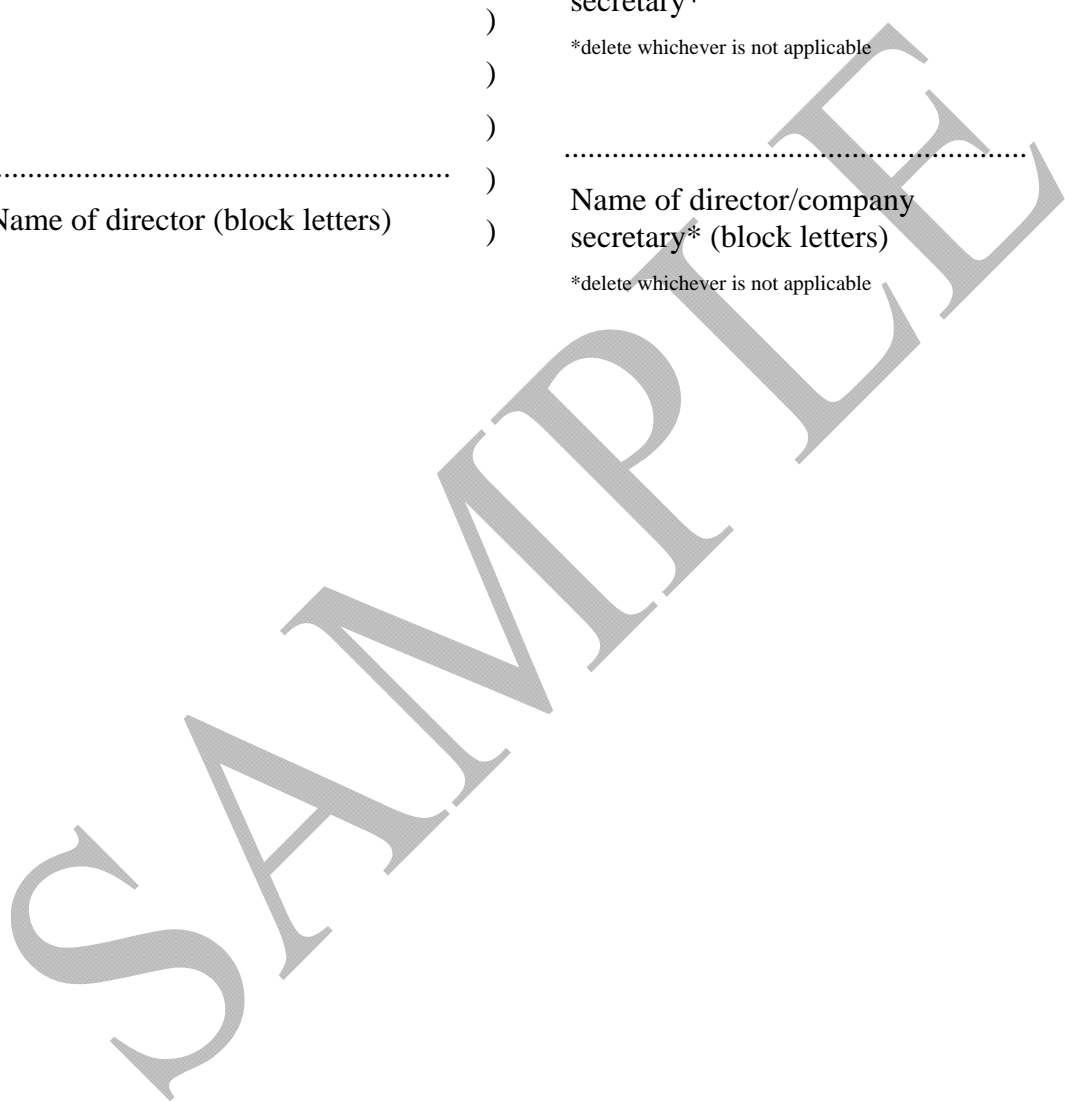
Signature of director/company secretary\*

\*delete whichever is not applicable

.....

Name of director/company secretary\* (block letters)

\*delete whichever is not applicable



<sup>1</sup> To be used where the Grantee is a body corporate.

## Schedule 1

1. **Grantee Name** (insert)
2. **Project Title** (insert)
3. **Project Reference Number** (insert)
4. **Project Duration**
  - (a) Project Start Date: (insert)
  - (b) Project End Date: (insert)

5. **Project Description and Planned Project Outcomes**

(insert)

6. **Notices**

Notices must be addressed as follows:

- a) if given to the Commonwealth by the Grantee, addressed and forwarded to the State Manager, AusIndustry State Office, Department of Innovation, Industry, Science and Research for the attention of an AusIndustry Customer Service Manager at the following address:

Address: (insert)

Facsimile No: (insert)

Email address: (insert)

or as otherwise notified in writing by an AusIndustry Customer Service Manager; and

- b) if given to the Grantee by the Commonwealth, signed by an authorised delegate of the Department of Innovation, Industry, Science and Research and forwarded to the Grantee at the following address:

(insert)

or as otherwise notified in writing by the Grantee.

7. **Initial Progress Payment**

(insert)

8. **Retention Amount**

(insert)

9. **Annual Capped Amounts**

Annual Capped Amount \$	yyyy/yy	yyyy/yy	yyyy/yy	yyyy/yy	Total \$

## 10. Reports

Report Type	Due Date	Report Period	Skills & Know-ledge	Experienced Executive	Proof of Concept	Early stage commercialisation

Reports must conform to the requirements in the Guide to Managing Your Grant.

Unless the Grantee is otherwise notified by the Commonwealth, post-Project reports will be required annually until the fifth anniversary of the Project End Date, in the format, and on the dates, required by the Commonwealth from time to time.

## 11. Grantee Confidential Information

Item of information	Reasons for confidentiality	Period of confidentiality

## 12. Special conditions

## 13. Key Personnel

Name	Relationship to Grantee	Component

## Schedule 2

[Note - for those Parts not used, please retain the heading, delete the items, and insert "Not applicable" under the heading]

### Part A - Skills and Knowledge Component

**1. Component description and Planned Component Outcomes**

(insert)

**2. Component Duration**

(a) Component Commencement Date: (insert)

(b) Component Completion Date: (insert)

**3. Grant Amount** (insert)

**4. Grant Percentage** (insert)

**5. Budget (Planned Eligible Expenditure by Financial Year)**

Total Eligible Project Expenditure \$	Estimated Expenditure by Financial Year				Total \$
	yyyy/yy	yyyy/yy	yyyy/yy	yyyy/yy	
Skills and Knowledge Expenditure					
<b>Total Expenditure \$</b>					

**6. Performance Milestones and Planned Achievement Dates**

Milestone	Planned Achievement Date

**7. Acquisition of goods or services from a Service Provider**

- (a) The Grantee must not acquire goods or services from a Service Provider using Project Funding without the approval of the Case Manager.
- (b) All goods and services provided by a Service Provider to the Grantee under this Agreement must be provided at arms length and on reasonable commercial terms.
- (c) The Grantee must not, without the prior consent of the Commonwealth, acquire services from a Service Provider that is an Associate of the Grantee.

SAMPLE



## Part B - Experienced Executive Component

### 1. Component description and Planned Component Outcomes

(insert)

### 2. Component Duration

(a) Component Commencement Date: (insert)

(b) Component Completion Date: (insert)

3. Grant Amount (insert)

4. Grant Percentage (insert)

### 5. Budget (Planned Eligible Expenditure by Financial Year)

Total Eligible Project Expenditure \$	Estimated Expenditure by Financial Year				Total \$
	yyyy/yy	yyyy/yy	yyyy/yy	yyyy/yy	
Experienced Executive Expenditure					
<b>Total Expenditure \$</b>					

### 6. Performance Milestones and Planned Achievement Dates

	Milestone	Planned Achievement Date

## Part C - Proof of Concept Component

### 1. Component description and Planned Component Outcomes

(insert)

### 2. Component Duration

(a) Component Commencement Date: (insert)

(b) Component Completion Date: (insert)

3. Grant Amount (insert)

4. Grant Percentage (insert)

### 5. Budget (Planned Eligible Expenditure by Financial Year)

Total Eligible Project Expenditure \$	Estimated Expenditure by Financial Year				Total \$
	yyyy/yy	yyyy/yy	yyyy/yy	yyyy/yy	
Labour Expenditure					
Contract Expenditure					
Plant Expenditure					
New and Leading Edge Technology Expenditure					
Prototype Expenditure					
IP Expenditure					
Other Expenditure					
<b>Total Expenditure \$</b>					

### 6. Performance Milestones and Planned Achievement Dates

	Milestone	Planned Achievement Date

## Part D - ESC Component

### 1. Component description and Planned Component Outcomes

(insert)

### 2. Component Duration

(a) Component Commencement Date: (insert)

(b) Component Completion Date: (insert)

3. Grant Amount (insert)

4. Grant Percentage (insert)

### 5. Budget (Planned Eligible Expenditure by Financial Year)

Total Eligible Project Expenditure \$	Estimated Expenditure by Financial Year				Total \$
	yyyy/yy	yyyy/yy	yyyy/yy	yyyy/yy	
Labour Expenditure					
Contract Expenditure					
Plant Expenditure					
New and Leading Edge Technology Expenditure					
Prototype Expenditure					
IP Expenditure					
Other Expenditure					
<b>Total Expenditure \$</b>					

### 6. Performance Milestones and Planned Achievement Dates

Milestone	Planned Achievement Date

## 7. Repayment obligations

### Obligation to Repay

(a) If

the Grantee reaches the Sales Target during the Initial Repayment Period, the Grantee must, for the end of the Half Year then current and each subsequent Half Year during the Initial Repayment Period (**Relevant Half Year**), pay to the Commonwealth within 30 days of receipt of a notice from the Commonwealth an amount equal to:

- (i) in the case of the first Relevant Half Year, 5% of the Gross Sales Revenue earned by the Grantee calculated up to and including the last day of that Relevant Half Year; and
- (ii) in the case of each other Relevant Half Year, 5% of the Gross Sales Revenue earned by the Grantee during that Relevant Half Year,

until the Grantee has repaid the whole of the Total Grant Amount.

### Sales Target not reached

(b) If the Grantee's Gross Sales Revenue does not reach or exceed \$100,000 (excluding GST) (**Sales Target**) during the Initial Repayment Period, the Grantee must within 30 days of the fifth anniversary of the Project End Date:

- (i) notify the Commonwealth that it has failed to reach the Sales Target; and
- (ii) provide a report to the Commonwealth, in the form, and containing the information, reasonably required by the Commonwealth.

Within 30 days of receiving the report from the Grantee, the Commonwealth will notify the Grantee as to whether the Grantee is required to repay the Total Grant Amount in accordance with this clause 7. On receipt of such a notice, the Grantee must submit a payment plan to the Program Delegate in accordance with clause 7(c). For the avoidance of doubt, the Grantee does not have an obligation to repay the Total Grant Amount unless and until it is required to do so by the Commonwealth. The Commonwealth's decision on the Grantee's repayment obligation will be final.

### Total Grant Amount not repaid by fifth anniversary of Project End Date

(c) If:

- (i) the Grantee has an Obligation to Repay under clause 7(a) but has not repaid the Total Grant Amount to the Commonwealth by the fifth anniversary of the Project End Date; or

- (ii) the Grantee has an Obligation to Repay under clause 7(b),  
the Grantee must, within 30 days after the fifth anniversary of the Project End Date (or, where clause 7(a) applies, within 30 days of receipt of a notice from the Commonwealth requiring the Grantee to repay the Total Grant Amount), submit a payment plan to the Program Delegate's satisfaction for its approval, setting out, among other things:
  - (iii) the Grantee's proposal for repaying the Total Grant Amount to the Commonwealth by the tenth anniversary of the Project End Date (including the amounts and timing of the Grantee's proposed repayments);
  - (iv) how the Grantee proposes to continue to meet the Planned Outcomes; and
  - (v) any further information required by the Commonwealth.

The Program Delegate may impose additional or alternative repayment terms (or any other conditions) for inclusion in the payment plan, including (without limitation):

- (vi) increasing the rate at which the Total Grant Amount must be repaid; and/or
- (vii) requiring the Grantee to assess its Gross Sales Revenue based on all amounts paid or payable to the Grantee (regardless of whether such amounts relates to the ESC Component).

The Grantee must make the repayments required by the payment plan approved by the Program Delegate, and otherwise comply with the requirements of the repayment plan. The Commonwealth may at its absolute discretion change the repayment plan from time to time by notice to the Grantee (including the amount of the repayments).

#### Records relating to Gross Sales Revenue

- (d) Throughout the term of this Agreement, and for so long as the Grantee is required to repay the Total Grant Amount, the Grantee must maintain proper, complete and accurate records (in accordance with clause 6.7) relating to all sales by the Grantee (including as required by this agreement for each Financial Year) so that the Gross Sales Revenue may be calculated.
- (e) The Grantee must give the Commonwealth:
  - (i) within 14 days after the end of each Half Year, a gross sales certificate certified as correct by the Grantee, its accountant or manager which specifies the Gross Sales Revenue of the Grantee during that Half Year; and

- (ii) within 60 days after the end of each Financial Year and the expiry or termination of this agreement, a statement prepared by an Approved Auditor which specifies the Gross Sales Revenue of the Grantee during that Financial Year, or for the period since that covered by the last Approved Auditor's Statement to the expiry or termination of this agreement,
- (iii) or any other financial statements or other reports as requested by the Commonwealth,

in a form reasonably required by the Commonwealth.

- (f) As soon as the Gross Sales Revenue for the relevant Half Year is calculated, but no later than one month after the Grantee or the Commonwealth makes a written request that an adjustment be made, an appropriate adjustment will be made between the Grantee and the Commonwealth to ensure that the Grantee has paid and the Commonwealth has received the correct amount on account of Gross Sales Revenue for that Half Year.

#### Audit of records

- (g) Without limiting clause 6.8, the Commonwealth or its nominee may inspect and obtain an independent audit of the Records of the Grantee relating to its Gross Sales Revenue, or any other records associated with the agreed payment plan, at any time. The Grantee must, at the request of the Commonwealth, make the Records available at the Grantee's premises, and must provide such assistance to the Grantee's auditor as is reasonably required to explain the Records verify the Grantee's Gross Sales Revenue. Where the Commonwealth obtains an audit:
  - (i) if the auditor finds that any of the Grantee's gross sales certificates or audited statements is inaccurate, any necessary adjustment must be made by payment of the amount owing within 14 days of a demand being made;
  - (ii) if the Gross Sales Revenue shown by the Grantee's gross sales certificates or audited statements are found to be understated by more than 3%, the Grantee must pay to the Commonwealth, within 14 days of written demand, the cost of the audit; and
  - (iii) the decision of the auditor is final and binding on the parties, in the absence of manifest error.
- (h) If the Grantee fails to provide an audited statement of its Gross Sales Revenue in accordance with this clause 7, in addition to any other rights the Commonwealth has, the Commonwealth may require the Grantee to pay an amount on account of the Gross Sales Revenue calculated as if the actual Gross Sales Revenue for the relevant Half Year was up to 12 times the highest Half Yearly Gross Sales Revenue figure previously provided by the Grantee under this agreement. An appropriate

adjustment will be made in accordance with clause 7(f) upon production of audited figures as required by clause 7(e)(ii).

#### No repayment obligations after tenth anniversary of Project End Date

- (i) Notwithstanding this clause 7, the Grantee is not required to repay the Total Grant Amount after the tenth anniversary of the Project End Date.

#### Interest

- (j) If the Grantee does not pay an amount under this clause 7 by the due date for payment, the Commonwealth may in its absolute discretion require the Grantee to pay interest on that amount in accordance with clause 12.

#### Definitions

- (k) For the purposes of this clause 7:

**Approved Auditor** means a person who is:

- (i) registered as a company auditor under the Corporations Act, or a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants; and
- (ii) not an Associate of the Grantee.

**Gross Sales Revenue** means (unless otherwise determined by the Program Delegate in accordance with clause 7(c)(vii)), all amounts (including sales, licensing, royalties and other revenue) paid or payable to the Grantee arising out of or in connection with the ESC Component (or the new product, process or service developed by the Grantee in the course of the ESC Component), as determined by the Commonwealth in its absolute discretion.

**Half Year** means each period of 1 January to 30 June and 1 July to 31 December each year, and includes the period from the time the Grantee first earns Gross Sales Revenue to the next 30 June or 31 December (whichever occurs first).

**Initial Repayment Period** means period commencing immediately after the ESC Component Commencement Date and ending on (and including) the fifth anniversary of the Project End Date.

**Obligation to Repay** means an obligation of the Grantee to repay the Total Grant Amount under clause 7(a) or 7(b).

**Total Grant Amount** means the amount of the Grant relating to the ESC Component, plus any interest payable on that amount in accordance with clause 7(j).

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## Schedule 3 - Deed Poll

<b>Grantee</b>	Name	(insert)
	ABN	(insert)
	Address	(insert)
<b>In favour of</b>	The Commonwealth and the Volunteer Business Mentor.	
<b>Recitals</b>	<b>A</b>	The Grantee has entered into the Commercialisation Australia Funding Agreement with the Commonwealth for the purpose of undertaking the Project ( <b>Funding Agreement</b> ).
	<b>B</b>	The Grantee agrees to release the Commonwealth and the Volunteer Business Mentor from all liability and loss arising out of, or in connection with, the assistance provided by the Volunteer Business Mentor, on the terms of this deed poll.
<b>Governing law</b>	The Australian Capital Territory	
<b>Date of deed</b>	(insert)	

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### 1 Consideration

This deed poll is made by the Grantee for valuable consideration received from the Volunteer Business Mentor and the Commonwealth.

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### 2 Volunteer Business Mentor

The Grantee agrees that:

- (a) the role of the Volunteer Business Mentor is to provide general assistance only to the Grantee;
- (b) it is not required to consult with a Volunteer Business Mentor, or implement any suggestions made by a Volunteer Business Mentor;
- (c) neither the Volunteer Business Mentor, nor the Commonwealth, takes any responsibility for the success or failure of the Project or the Grantee's business;
- (d) it will not rely on any representation (whether oral or written) from the Volunteer Business Mentor as investment, financial, legal, taxation or commercial advice;



- (e) any assistance provided by the Volunteer Business Mentor is not a substitute for professional advice; and
- (f) the Volunteer Business Mentor is not an employee, agent, officer, representative, or partner of the Commonwealth.

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### 3 Release

To the extent permitted by law, the Grantee releases the Volunteer Business Mentor and the Commonwealth from any Claims by the Grantee against the Volunteer Business Mentor and/or the Commonwealth in respect of the assistance or lack of assistance provided by the Volunteer Business Mentor to the Grantee in respect of the Project.

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### 4 Governing law

This deed poll is governed by the laws for the time being in force in the Australian Capital Territory.

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### 5 Definitions

In this deed poll:

**Claim** means any allegation, debt, cause of action, Liability, claim from proceedings, suit or demand of any nature, howsoever arising and whether present or future, fixed or ascertained, actual or contingent, whether at law, in equity, under statute or otherwise.

**Commonwealth** means the Commonwealth of Australia, as represented by the Department of Innovation, Industry, Science and Research.

**Liability** means all liabilities (whether actual contingent or prospective) losses, damages, costs and expenses of whatsoever nature or description irrespective of when the acts, events or things giving rise to the liability occurred.

**Project** has the meaning given in the Funding Agreement.

**Volunteer Business Mentor** means a person made available by the Commonwealth from time to time to provide knowledge, skills and insight to the Grantee to assist the Grantee in undertaking the Project.

**EXECUTED** as a deed poll

**EXECUTED** by **[Insert Grantee's name and ABN]**<sup>2</sup> in accordance with section 127(1) of the Corporations Act 2001 (Cwlth) by authority of its directors:

..... )

Signature of director )

..... )

..... )

..... )

Name of director (block letters) )

.....

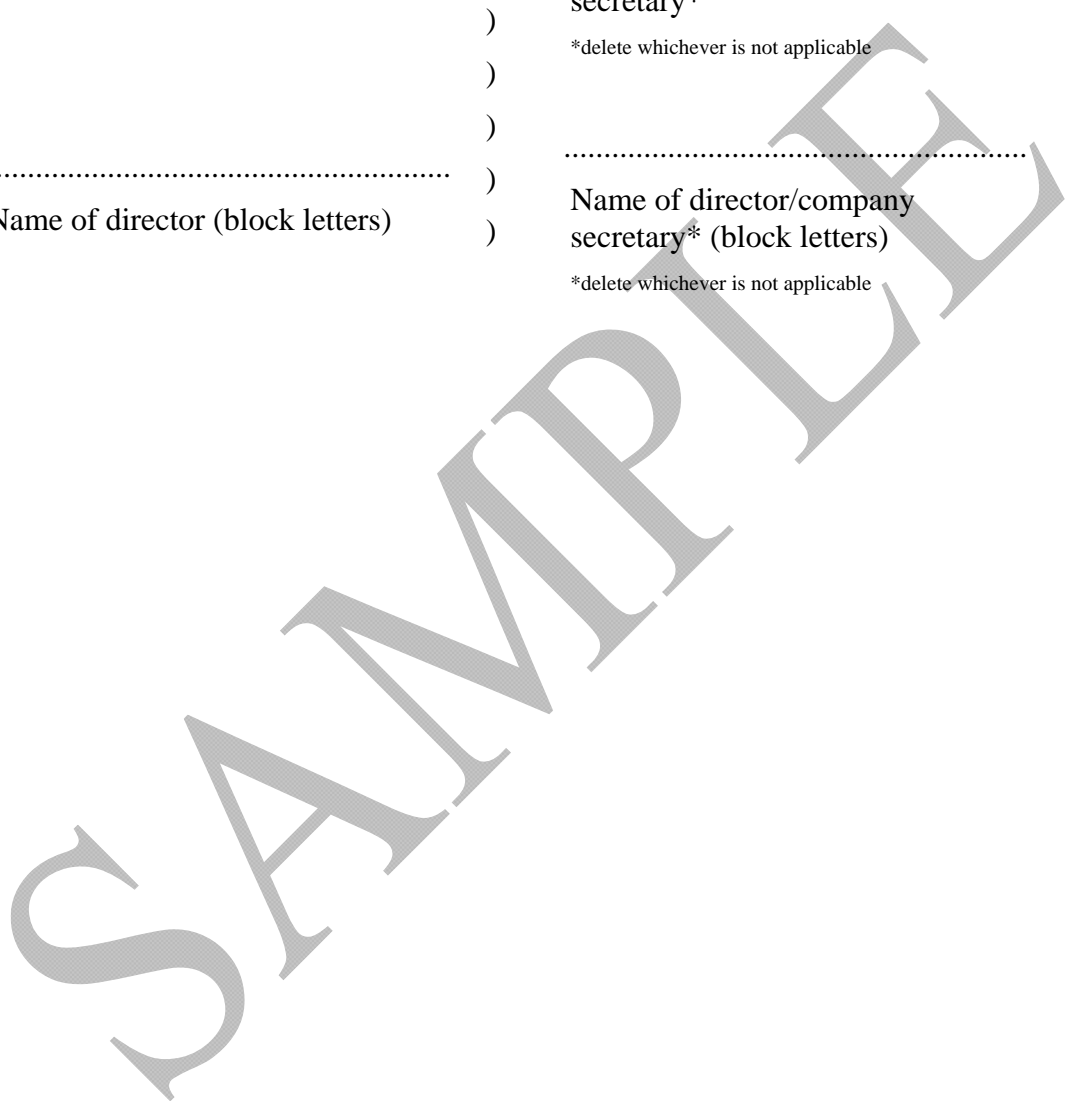
Signature of director/company secretary\*

\*delete whichever is not applicable

.....

Name of director/company secretary\* (block letters)

\*delete whichever is not applicable



<sup>2</sup> To be used where the Grantee is a body corporate.