
Delivering Community Services in Partnership Policy

**General Provisions for the Purchase of Community Services
By Public Authorities**

October 2018 Edition

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1. DEFINITIONS AND INTERPRETATION

1.1 Definitions in Request

Unless the context otherwise requires, terms which have a defined meaning in the Request have the same meaning when used in these General Provisions.

1.2 Definitions

In these General Provisions, unless the context otherwise requires:

Adjustment has the same meaning as in the GST Act.

Adjustment Note has the same meaning as in the GST Act.

Agreed Order has the meaning set out in clause 3.4.

Associates means the Service Provider's Officers, agents, advisers, consultants, contractors, nominees, licensees and employees, and volunteers used by the Service Provider in carrying out the Services.

Auditor General means the Auditor General for the State.

Confidential Information means information in respect of the Service Agreement that:

- (a) is by its nature confidential; or
- (b) is specified by the State Party to be confidential, including any information specified to be confidential in the Service Agreement; or
- (c) the Service Provider knows or ought to know is confidential.

Copyright Act means the *Copyright Act 1968* (Cth).

Event of Default means the occurrence of any one of the following events:

- (a) the occurrence of a Serious Incident; or
- (b) the Service Provider breaches a material obligation under the Service Agreement that cannot be remedied; or
- (c) the Service Provider breaches any other material obligation under the Service Agreement and that breach is not remedied within the period of time specified in the notice (being not less than 10 Business Days) after the State Party gives a notice to the Service Provider requiring the breach to be remedied; or

- (d) the Service Provider commits 3 breaches of its obligations under the Service Agreement over any 12 month period, provided that the State Party has given the Service Provider notice of any such breaches and whether or not the Service Provider has rectified such breaches (except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the *Corporations Act 2001 (Cth)*); or
- (e) a material representation or warranty made by the Service Provider under the Service Agreement is or becomes untrue or is breached (except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the *Corporations Act 2001 (Cth)*); or
- (f) an Insolvency Event occurs in respect of the Service Provider; or
- (g) the Service Provider ceases, or threatens to cease, to carry on business; or
- (h) it becomes unlawful for the Service Provider to perform the Service Provider's obligations under the Service Agreement; or
- (i) the Service Provider or any person included in the Specified Personnel is convicted of a criminal offence that is punishable by imprisonment or detention; or
- (j) if the Service Provider is a body corporate, the Service Provider is convicted of a criminal or statutory offence that is punishable by a fine or penalty of, or exceeding, \$10,000; or
- (k) if in the reasonable opinion of the State Party, the reputation of the State Party, the State or the Government of Western Australia is, or is likely to be, damaged by any act or omission of the Service Provider.

Existing Material means a work (as defined in the Copyright Act), a product or any other material, which satisfies all of the following criteria:

- (a) the work, product or other material:
 - (i) was created prior to the commencement of the Term; or
 - (ii) is to be created during the Term outside the scope of the Service Agreement, including any subsequent modifications to such work, product or other material;
- (b) the Intellectual Property Rights in the work, product or other material are not owned by the Crown in right of the State of Western Australia or the State Party; and

- (c) the work, product or other material is required specifically for, or in connection with, the Services or Records.

Force Majeure Event means an event that prevents a Party from performing its obligations, or receiving the benefit of the other Party's obligations, in whole or part, under the Service Agreement and which is unforeseeable and beyond the reasonable control of the affected Party including:

- (a) acts of God;
 - (b) explosion or fire;
 - (c) storm or cyclone (of any category);
 - (d) flood;
 - (e) landslides;
 - (f) earthquake or tsunami;
 - (g) volcanic eruption;
 - (h) impact of vehicles or aircraft;
 - (i) failure of a public utility;
 - (j) epidemic or pandemic;
 - (k) civil unrest;
 - (l) industrial action (other than industrial action limited to the affected party or a subcontractor);
 - (m) war (including civil war);
 - (n) acts of terrorism; and
 - (o) radioactive or biological contamination,
- but does not include:
- (p) lack of or inability to use funds for any reason; or
 - (q) any occurrence which results from the wrongful or negligent act or omission of the affected party or the failure by the affected party to act in a reasonable and prudent manner; or

- (r) an event or circumstance where the event or circumstance or its effects on the affected party or the resulting inability of the affected Party to perform its obligations, or receive the benefit of the other Party's obligations, could have been prevented, overcome or remedied by the exercise by the affected Party of the standard of care and diligence consistent with that of a reasonable and prudent person; or
- (s) breakdown of equipment; or
- (t) the failure by a third party to fulfil a contractual commitment with the affected Party other than as a result of any of items (a) to (o) above; or
- (u) any act or omission of a subcontractor.

GST means the goods and services tax under the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Insolvency Event means the occurrence of any of the following events:

- (a) (informs creditors) a corporation informs its creditors generally that it is insolvent;
- (b) (receiver) a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in respect of any of the assets of a corporation;
- (c) (execution) a distress, attachment or other execution is levied or enforced upon or against any assets of a corporation and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;
- (d) (voluntary liquidation) a corporation enters into voluntary liquidation;
- (e) (application) an application is made for the administration, dissolution or winding up of a corporation which application is not stayed within 10 Business Days of being made;
- (f) (winding up) an order is made for the administration, dissolution or winding up of a corporation;
- (g) (resolution) a resolution is passed for the administration or winding up of a corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State Party;

- (h) (arrangement or composition) a corporation enters, or resolves to enter into or has a meeting of its creditors called to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State Party;
- (i) (statutory demand) a corporation fails to comply with, or fails to apply to have set aside, a statutory demand within 10 Business Days of the time for compliance, or:
 - (i) a corporation applies to have a statutory demand set aside within 10 Business Days of the time for compliance;
 - (ii) the application to set aside the statutory demand is unsuccessful; and
 - (iii) the corporation fails to comply with the statutory demand within 5 Business Days of the order of the court dismissing the application;
- (j) (execution levied against it) a corporation has execution levied against it by creditors, debenture holders or trustees or under a floating charge or circulating security interest; or
- (k) (insolvency - corporation) a corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts under any applicable legislation (other than as a result of a failure to pay a debt or claim which is the subject of a good faith dispute);
- (l) (insolvency - persons) a person becomes an insolvent under administration as defined in section 9 of the *Corporations Act 2001* (Cth) or action is taken which could result in that event;
- (m) (death etc.) a person dies, ceases to be of full legal capacity or otherwise becomes incapable of managing its own affairs for any reason; and
- (n) (analogous matters) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Intellectual Property Rights means:

- (a) patents, copyright, rights in circuit layouts, registered designs, trade marks and the right to have confidential information (being information which is capable of being protected by way of an action for breach of confidence) kept confidential; and

(b) any application or right to apply for registration of any of those rights, but does not include Moral Rights.

Letter means a letter signed by the State Party that:

- (a) accepts the Offer; and
- (b) may also specify:
 - (i) any amendments to these General Provisions or the Service Agreement Details or both; or
 - (ii) any other terms and conditions which are to form part of the Service Agreement,

which the State Party and the Service Provider have agreed.

Material means Existing Material and New Material.

Moral Rights has the same meaning as in the Copyright Act.

New Material means anything created by the Service Provider under the Service Agreement in which Intellectual Property Rights subsist.

Notifiable Incident means any of the following:

- (a) the occurrence of a Serious Incident;
- (b) where a Service User causes or contributes to injury, illness or death of any person, or poses a serious risk to the health, safety or welfare of any person;
- (c) any referral of any matter or complaint regarding any Service User, the Services or the Service Provider generally, to any regulatory or investigative body;
- (d) the charging of the Service Provider or an Associate with a criminal offence involving a sexual offence, dishonesty or breach of trust or which otherwise may result in imprisonment of that person;
- (e) serious verbal or written complaints received in relation to the Service or in relation to the Service Provider generally; and
- (f) the occurrence of any event which may cause adverse publicity including but not limited to if the Service Provider is contacted by the media for comment on any aspect of the Services or involving a Service User.

Offer means the offer submitted by the Service Provider in response to the Request.

Order has the meaning set out in clause 3.4.

Other Service Recipient means a person, other than a Service User, who receives health or human services from the Service Provider.

Panel, Panel Agreement, Panel Arrangement and Panel Member each have the corresponding meanings set out in clause 3.4.

Public Authority means:

- (a) A government department established under the *Public Sector Management Act 1994*; and
- (b) An agency, authority or instrumentality of the Crown in right of the State.

Party means a party to the Service Agreement.

Parties means both of them.

Payment Schedule means the schedule for payment of the Service Payment set out in the Service Agreement.

Premises means any premises which the Service Provider must attend or to which the Service Provider has access in order to provide the Services but does not include Premises owned or occupied by the Service Provider.

Quality Standards means the standards agreed as such by the Parties in the Service Agreement.

Records means records and information of any kind, including originals and copies of all accounts, financial statements, books, files, reports, records, correspondence, documents and other materials created for, or relating to, or used in connection with, the supply of the Services, whether or not containing Confidential Information, and however such records and information are held, stored or recorded.

Request means the Request issued by the State Party in respect of the Services which, for the avoidance of doubt, incorporates the Process Terms and Conditions (Request for Offers) Document.

Serious Incident means an event which:

- (a) results in or is likely to result in injury, illness or death of a Service User or Other Service Recipient or compromises the safety or welfare of a Service User or Other Service Recipient; or
- (b) causes or is likely to cause a serious risk to the health, safety or welfare of a Service User or Other Service Recipient,

where such event involves an actual or perceived breach of duty of care of the Service Provider.

Service Agreement Commencement Date means the date specified as such in the Service Agreement.

Service Agreement Documents means the documents listed in clause 2.2.

Service Payment means the amount or amounts specified in, or the amount determined by the formula set out in, the Service Agreement.

Service Provider means the successful Respondent and where the context permits or requires a reference to the Service Provider includes the Associates.

Service Provider Representative means a person or officer's position nominated by the Service Provider as its representative and identified as such in the Service Agreement.

Service User means a person who accesses Services from the Service Provider under this Service Agreement.

Service User Information means all information relating to a Service User.

Services means those services which the Parties agree in the Service Agreement are to be provided under the Service Agreement.

State Party means the issuing agency referred to on the front page of the Request and where the context permits or requires reference to the State Party includes the State Party's Officers, agents, advisers, consultants, contractors, nominees, licensees and employee.

State Party Representative means a person or officer's position nominated by the State Party as its representative and identified as such in the Service Agreement.

Term means, subject to clause 3.2, the period specified as such in the Service Agreement, commencing on the Service Agreement Commencement Date.

1.3 Interpretation

In these General Provisions, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a reference to any thing is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (c) a reference to a gender includes other genders;
- (d) a reference to a person includes a Public Authority, a public body, a company and an incorporated or unincorporated association or body of persons;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, a person taking by novation) and permitted assigns;
- (f) if the Service Provider consists of a consortium of two or more persons whether by way of partnership or joint venture or otherwise, then:
 - (i) an obligation imposed on the Service Provider under the Service Agreement binds each person who comprises the Service Provider jointly and severally;
 - (ii) each person who comprises the Service Provider agrees to do all things necessary to enable the obligations imposed on the Service Provider under the Service Agreement to be undertaken; and
 - (iii) the act of one person who comprises the Service Provider binds the other persons who comprise the Service Provider;
- (g) an agreement, representation or warranty on the part of or in favour of two or more persons binds, or is for the benefit of, them jointly and severally;
- (h) no rule of interpretation applies to the disadvantage of the State Party on the basis that the State Party put forward these General Provisions;
- (i) "includes" in any form is not a word of limitation;
- (j) the meaning of "or" will be that of the inclusive "or", meaning one, some or all of a number of possibilities;

- (k) a reference to these General Provisions or another instrument includes all variations and replacements of either of them despite any change of, or any change in the identity of, the State Party or the Service Provider;
- (l) a reference to a document published at an electronic address is to the document as published at that electronic address on the date of first public issue of the Request;
- (m) a reference to a clause is a reference to a clause of these General Provisions;
- (n) headings are included for convenience only and do not affect the interpretation of these General Provisions;
- (o) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of it;
- (p) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (q) a reference to writing includes any means of representing or reproducing words in visible form including by electronic means such as facsimile transmission;
- (r) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (s) a reference to a month is to a calendar month and a reference to a year is to a calendar year;
- (t) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated inclusive of that day;
- (u) if a date stipulated for payment or for doing an act is not a Business Day, the payment must be made, or the act must be done, on the next Business Day;
- (v) a reference to a monetary amount means that amount in Australian currency; and
- (w) a reference to time means the time observed by the general community from time to time in Perth, Western Australia.

1.4 Government Policy

If any obligations relating to Government procurement policies are specified in the Service Agreement, then those obligations form part of the Service Agreement and the Service Provider must comply with them.

1.5 State Party's Discretion

- (a) Whenever the State Party (including when acting through the State Party Representative) has any rights or powers under the Service Agreement, including the provision of consents and approvals, the State Party:
 - (i) may exercise its right or power in its sole and absolute discretion;
 - (ii) is not obliged to give reasons; and
 - (iii) may impose such conditions as it determines.
- (b) The Service Provider agrees that any failure by it to comply with or perform a condition imposed by the State Party will constitute a breach of a material obligation of the Service Provider under the Service Agreement.

2. FORMATION AND CONTENTS OF SERVICE AGREEMENT

2.1 Formation of Service Agreement

The Service Agreement comes into existence when the Service Provider receives a Letter.

2.2 Constitution of Service Agreement

The State Party and the Service Provider agree that the following documents constitute a contract between the State Party and the Service Provider:

- (a) each Agreed Order (if any);
- (b) the Letter;
- (c) the Offer;
- (d) the Request; and
- (e) these General Provisions.

2.3 Precedence of Service Agreement Documents

- (a) Subject to clause 2.3(c), the Service Agreement Documents shall be read in the following order of precedence:
 - (i) each Agreed Order (if any);
 - (ii) the Letter;
 - (iii) the Offer;
 - (iv) the Request; and
 - (v) these General Provisions.
- (b) Where any inconsistency occurs between the provisions contained in two or more Service Agreement Documents, the Service Agreement Document lower in the order of precedence shall where possible be read down to resolve the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions shall be severed from the Service Agreement Document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.
- (c) Where the Offer contains a departure from, or variation of, any part of the Service Agreement Details or the General Provisions, that departure or variation will not apply and the relevant part of the Service Agreement Details or the General Provisions (as the case may be) will take precedence unless that departure or variation is expressly accepted by the State Party in the Letter.

3. SERVICES AND PAYMENT

3.1 Services - Term

The Service Provider agrees to provide the Services for the Term in accordance with the Service Agreement.

3.2 Services – Further Term

- (a) The State Party has the option or options (exercisable in its absolute discretion) to extend the Term for the period or periods (as applicable) specified in the Service Agreement.
- (b) If the State Party wishes to exercise an option under clause 3.2(a), then the State Party must give the Service Provider a notice:

- (i) by the date or dates specified in the Service Agreement; or
- (ii) if no period is specified in the Service Agreement, at least 20 Business Days before the expiry of the Term,

stating that the Service Agreement is to be extended and the period of the extension.

- (c) If the State Party exercises an option under this clause, references to the "Term" in these General Provisions are to be read as including the period of extension of the Term.

3.3 Panel Agreement

If the Service Agreement is a Panel Agreement:

- (a) the Service Provider is not required to provide Services unless and until an Agreed Order for those Services comes into existence;
- (b) the State Party may submit an Order to the Service Provider at any time during the Term and the State Party may submit any number of Orders over the Term;
- (c) an Order must specify:
 - (i) the Services which the State Party requires;
 - (ii) the date, time and place for performance of the required Services (if applicable); and
 - (iii) any additional requirements, specifications or provisions applicable to the required Services;
- (d) notwithstanding clause 3.3(c), any order submitted by the State Party to the Contractor is deemed to be an Order for the purposes of the Service Agreement, whether or not all details have been included in the order and whether or not the order is in the required form or otherwise identified as an Order;
- (e) an Agreed Order will come into existence when:
 - (i) the Service Provider accepts an Order in writing, or by conduct by commencing to provide the Services the subject of an Order, and in either case the terms of the Agreed Order will be those set out in the Order; or
 - (ii) the Parties negotiate the terms of an Order and reach agreement, in which case the terms of the Agreed Order

will be those which are agreed;

- (f) an Agreed Order may be varied at any time by agreement of the Parties;
- (g) the Service Provider must provide Services in accordance with an Agreed Order and the remainder of the Service Agreement;
- (h) the State Party makes no representation that it will procure or seek to procure any particular volume of Services from the Service Provider and the Service Provider acknowledges that it may not receive any Orders from the State Party during the Term;
- (i) the Service Provider acknowledges that:
 - (i) the State Party may submit Orders to the Service Provider or to any other member of the Panel;
 - (ii) appointment to the Panel does not give the Service Provider an exclusive right to provide the Services to the State Party;
 - (iii) the State Party reserves the right to appoint as many Panel Members as it sees fit;
 - (iv) the Panel need not comprise more than one Panel Member at any time;
 - (v) the State Party reserves the right at any time and from time to time to cancel, vary, supplement with additional Panel Members, supersede or replace the Panel or any member of the Panel.

3.4 Panel Agreement Definitions

If the Service Agreement is a Panel Agreement, then in these General Provisions, unless the context otherwise requires:

Agreed Order has the meaning set out in clause 3.3(e).

Order means an order for Services which is in the form (if any) set out in the Service Agreement Details or which is deemed to constitute an order under clause 3.3(d).

Panel means the panel of Panel Members established as a result of the Request.

Panel Agreement means an agreement which forms part of an arrangement for the supply of services by Panel Members to the State Party.

Panel Arrangement means the arrangement for supply of services by Panel Members to the State Party, of which the Service Agreement forms part.

Panel Member means a supplier appointed to the Panel, one of which is the Service Provider.

3.5 Service Payment

- (a) The State Party agrees to pay the Service Payment to the Service Provider in accordance with the Payment Schedule.
- (b) The Service Payment may only be varied in accordance with the formula or method specified in the Service Agreement Details.

3.6 Timing of Invoice

- (a) If the time at which the Service Provider must submit an invoice to the State Party is specified in the Service Agreement, then the Service Provider must submit an invoice at that time.
- (b) If no time at which the Service Provider must submit an invoice to the State Party is specified in the Service Agreement, then the Service Provider must submit an invoice to the State Party at a time agreed between the State Party and the Service Provider, provided that the Service Provider must not submit any invoice later than 120 Business Days after the expiration or termination of the Service Agreement.

3.7 Invoices

An invoice given by the Service Provider to the State Party must be set out in a manner that clearly identifies which Services the invoice covers and the amount of the Service Payment payable for those Services.

3.8 Payment of Invoice

Subject to clauses 3.7 and 3.11, the State Party must pay the amount specified in an invoice within 30 days after the date the invoice is received if the amount claimed in the invoice is:

- (a) properly payable; and
- (b) correctly calculated in accordance with the Service Agreement.

3.9 Method of Payment

The State Party may pay the amount specified in an invoice in any of the following ways:

- (a) by cash;
- (b) by cheque;
- (c) by electronic funds transfer to the account with a financial institution nominated by the Service Provider; and
- (d) by credit card.

The Service Provider must not impose a surcharge on the State Party for payment by credit card.

3.10 Right to Request Further Details

If the State Party requests, the Service Provider must promptly provide information and documentation sufficient to confirm that the amount specified in an invoice is calculated in accordance with the Service Agreement.

3.11 No Obligation to Pay

The State Party has no obligation to make any payment to the Service Provider unless and until the Services have been supplied in accordance with the Service Agreement, unless the Service Agreement provides otherwise.

3.12 Incorrect Invoice Before Payment

If, before payment of an invoice, the State Party or the Service Provider finds that the invoice does not comply with clause 3.7 or clause 3.8 and:

- (a) an Adjustment arises, then the Service Provider must immediately issue an Adjustment Note; and
- (b) no Adjustment arises, then the Service Provider must immediately issue a correct invoice.

3.13 Incorrect Invoice After Payment

If, after payment of an invoice, the State Party or the Service Provider finds that the invoice did not comply with clause 3.7 or clause 3.8 and the State Party has paid:

- (a) less than the amount that should have been paid and an Adjustment arises, then:
 - (i) the Service Provider must immediately issue an Adjustment Note; and
 - (ii) the State Party must pay the difference to the Service Provider within 30 days after the date that the Adjustment Note is received; or
- (b) less than the amount that should have been paid and no Adjustment arises, then:
 - (i) the Service Provider must immediately issue a correct invoice; and
 - (ii) the State Party must pay the difference to the Service Provider within 30 days after the date that the correct invoice is received; or
- (c) more than the amount that should have been paid and an Adjustment arises, then the Service Provider must:
 - (i) immediately issue an Adjustment Note; and
 - (ii) pay the difference to the State Party within 30 days from the time that the State Party calculates the amount of the overpayment unless the State Party elects by notice to the Service Provider to offset the difference against any amount subsequently payable by the State Party to the Service Provider; or
- (d) more than the amount that should have been paid and no Adjustment arises, then the Service Provider must:
 - (i) immediately issue a correct invoice; and
 - (ii) pay the difference to the State Party within 30 days from the time that the State Party calculates the amount of the overpayment unless the State Party elects by notice to the Service Provider to offset the difference against any amount subsequently payable by the State Party to the Service Provider.

3.14 Timing of Payment

For the purpose of determining the date of payment under clause 3.15(b)(i):

- (a) if payment is by cash – payment is taken to be made immediately the cash is received by the Service Provider;
- (b) if payment is by cheque – payment is taken to be made on the date on which the cheque is received by the Service Provider;
- (c) if payment is by electronic funds transfer – payment is taken to be made at the time the funds are sent electronically; or
- (d) if payment is by credit card – payment is taken to be made on the date on which the State Party signs the credit card voucher.

3.15 Failure to Pay

- (a) If demanded by the Service Provider, the State Party must pay interest on any payment not made by the State Party by the date required by clause 3.8 or any later date for payment agreed by the Service Provider.
- (b) Interest under paragraph (a) is to be:
 - (i) calculated from the due date for payment determined under clause 3.8 until (but not including) the date of payment (as determined under clause 3.14); and
 - (ii) at the rate specified in the Service Agreement or, if no rate is specified in the Service Agreement, at the rate payable under the *Civil Judgments Enforcement Act 2004* on unpaid judgments.

3.16 Price and Volume Risk

If the Service Agreement provides for adjustment of the Service Payment based on the volume of Services to be provided or allows for the State Party to change the volume of Services to be provided from time to time, the Service Provider agrees that:

- (a) any action taken by the Service Provider in anticipation of volume of Services is taken entirely at the Service Provider's own risk; and
- (b) the State Party makes no representation or warranty as to the volume of Services which may be requested from time to time.

4. SERVICE PROVIDER OBLIGATIONS

4.1 Quality Standards

The Service Provider must provide the Services in accordance with the Quality Standards specified in the Service Agreement.

4.2 Management Requirements

The Service Provider must undertake and comply with the reporting, meeting and management requirements in respect of the Service Provider which are specified in the Service Agreement.

4.3 Evaluations

- (a) The State Party may at any time carry out evaluations including investigations, assessments and annual reviews, in respect of the Services.
- (b) The Service Provider is to provide all reasonable assistance to the State Party in respect of any evaluation conducted under clause 4.3(a).
- (c) If, as the result of an evaluation conducted under clause 4.3(a), the State Party determines, in the State Party's reasonable opinion that the Services are not being provided in accordance with the Service Agreement then:
 - (i) the State Party may direct the Service Provider to take such action(s) as the State Party considers necessary or appropriate to ensure that the Services are provided in accordance with the Service Agreement; and
 - (ii) the Service Provider must, at its own cost, comply with all directions made by the State Party under clause 4.3(c)(i).
- (d) The State Party's rights under clause 4.3(c) are without prejudice to, and do not preclude, the exercise of its other rights under this Service Agreement.

5. INSURANCE

5.1 Insurance Requirements

- (a) The Service Provider must take out and maintain insurance in relation to all insurable liabilities of the Service Provider as specified in the Service Agreement.

- (b) The insurance required under this clause 5.1(a) must be on the terms, for the period of time and for the amounts specified in the Service Agreement.

5.2 Reputable and Solvent Insurer

Any policy of insurance taken out by the Service Provider must be taken out with a reputable and solvent insurer acceptable to the State Party which carries on insurance business in Australia and is authorised in Australia to operate as an insurance company.

5.3 Maintenance of Insurance

The Service Provider must:

- (a) maintain the insurances (except for professional indemnity insurance) required under clause 5.1(a) throughout the Term;
- (b) maintain any professional indemnity insurance required under clause 5.1(a) throughout the Term and for a period of 6 years after the expiration or termination of the Service Agreement;
- (c) not do or allow to be done anything which may vitiate, invalidate, prejudice or render ineffective the insurance or entitle the insurer to refuse a claim; and
- (d) without limiting clauses 5.3(a) - 5.3(c), promptly reinstate any insurance required under clause 5.1(a) if it lapses or if cover is exhausted.

5.4 Evidence of Insurance

The Service Provider must give to the State Party sufficient evidence of the insurances required under clause 5.1(a) (including, if requested, a copy of any policy) and provide a certificate of currency of insurance as requested by the State Party as the case requires at any time.

5.5 Failure to Prove Insurance

If the Service Provider does not comply with clauses 5.1 – 5.4 then without limiting any other remedy available to the State Party, the State Party may withhold payment of any money due under the Service Agreement to the Service Provider until the Service Provider has complied.

5.6 Incidents and Claims

- (a) If the State Party or the Service Provider becomes aware of any event or incident occurring which gives rise or is likely to give rise to

a claim under any insurance required under clause 5.1(a), it must as soon as reasonably practicable notify the State Party or the Service Provider (as applicable) in writing of that event or incident.

- (b) Failure to comply with clause 5.6(a) will not invalidate or otherwise affect any indemnities, liabilities and releases under the Service Agreement.

5.7 Continuing Obligations

The obligations of the Service Provider under this clause 5 are continuing obligations and survive expiration or termination of the Service Agreement for so long as the obligations of the Service Provider under clauses 5.3(a) and 5.3(b) continue.

5.8 No Limitation of Other Liabilities

Nothing in this clause 5 limits the Service Provider's other liabilities under the Service Agreement.

6. PUBLIC DISCLOSURE AND CONFIDENTIALITY

6.1 Disclosure

The Service Provider agrees to:

- (a) the disclosure by any person to the State Party of information concerning the Service Provider for the purpose of the State Party exercising its rights set out in the Service Agreement or at law;
- (b) the State Party disclosing any information provided by the Service Provider to the State Party under or in connection with the Service Agreement to enable the State Party to meet public disclosure obligations the State Party may have:
 - (i) under any current or future legislation; or
 - (ii) under any current or future policy of the State Party or the State; or
 - (iii) in the course of official duties of the Minister responsible for the State Party; or
 - (iv) to satisfy requirements of parliamentary accountability; or
 - (v) under annual reporting obligations of the State Party; or
 - (vi) to satisfy any other recognised public requirement; and

- (c) the State Party publicly disclosing the identity of the Service Provider, the value of the Service Agreement and the terms and conditions of the Service Agreement.

6.2 Freedom of Information

- (a) The Service Provider acknowledges that the *Freedom of Information Act 1992* (WA) applies to:
 - (i) the Service Agreement; and
 - (ii) information held or compiled by the State Party or the State of Western Australia in relation to the Service Agreement or the Services.

6.3 Auditor General

- (a) The Service Provider agrees and acknowledges that the powers and responsibilities of the Auditor General under the *Financial Management Act 2006* and the *Auditor General Act 2006* are not limited or otherwise affected by the Service Agreement.
- (b) The Service Provider must allow the Auditor General, or an authorised representative of the Auditor General, to have access to and examine the Service Provider's Records concerning the Service Agreement.

6.4 Release

The Service Provider releases the State Party from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of information about the Service Provider under clauses 6.1 and 6.2 by the State Party.

6.5 Confidentiality

- (a) The Service Provider must keep the Confidential Information confidential. The Service Provider must not disclose, use, reproduce or distribute to any person the Confidential Information except:
 - (i) where necessary (and only to the extent necessary) for the purpose of supplying the Services; or
 - (ii) as authorised in writing by the State Party; or
 - (iii) to the extent that the Confidential Information is public knowledge (other than because of a breach of this clause

by the Service Provider); or

- (iv) as required by any law, judicial or parliamentary body or governmental agency; or
 - (v) when required (and only to the extent required) to the Service Provider's professional advisers, and the Service Provider must ensure that such professional advisers are bound by the confidentiality obligations imposed on the Service Provider under this clause 6.5(a).
- (b) The Service Provider must immediately notify the State Party if it becomes aware of a suspected or actual unauthorised disclosure, copying or use of the Confidential Information.
 - (c) The Service Provider must ensure that each person to whom it discloses the Confidential Information (except a person to whom disclosure is legally required) including any Associates of the Service Provider, complies with the obligations in clauses 6.5(a) and 6.5(b).

6.6 Return of Confidential Information

Except to the extent that the Service Provider is required by law to retain any Records, the Service Provider must return all Records containing the State Party's Confidential Information immediately at the expiration or termination of the Service Agreement.

6.7 Survival

The obligations in this clause 6 are continuing obligations and survive expiration or termination of the Service Agreement.

7. INTELLECTUAL PROPERTY RIGHTS TO BE OWNED BY STATE PARTY

7.1 Application of Clause

- (a) This clause applies unless the Service Agreement Details provide that the Service Provider will own Intellectual Property Rights in New Material.
- (b) The Intellectual Property Rights in New Material will be owned by the State unless the Service Agreement provides that they will be owned by the State Party, in which case they will be owned by the State Party.

7.2 Ownership of Intellectual Property Rights in New Material

The Service Provider automatically assigns the entire future Intellectual Property Rights in all New Material to the State or the State Party as the case requires upon their creation.

7.3 Existing Material - Licence

Nothing in clause 7.2 affects the ownership of any Intellectual Property Rights in any Existing Material.

The Service Provider:

- (a) grants, and the Service Provider must ensure that any other owner of any Intellectual Property Rights in any Existing Material grants, to the State or the State Party in writing, an irrevocable, perpetual, royalty-free, non-exclusive licence to exercise any or all of the rights of an owner of Intellectual Property Rights in the Existing Material during the remainder of the duration of the Intellectual Property Rights in that Existing Material; and
- (b) must, if a third party owns Moral Rights in any Existing Material, obtain a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State or the State Party to use the Existing Material without regard to the third party's Moral Rights.

7.4 Warranty

The Service Provider warrants that:

- (a) the Service Provider has the right to grant the licences granted under clause 7.3;
- (b) no Intellectual Property Rights or Moral Rights in any Material are or will be owned by any third party unless:
 - (i) if a third party owns any Intellectual Property Rights in the Material, the Service Provider has obtained a written licence from the third party owner to the same effect as the licence referred to in clause 7.3(a); and
 - (ii) if a third party owns Moral Rights in the Material, the Service Provider has obtained a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State or the State Party to use the Material without regard to the third party's Moral Rights;

- (c) the Material will not infringe the Intellectual Property Rights or Moral Rights of any third party; and
- (d) all Associates:
 - (i) who are employed or engaged solely for the purposes of the Service Agreement are employed or engaged under written agreements under which all Intellectual Property Rights in any New Material vest in the State or the State Party on the creation of that New Material; and
 - (ii) who are not employed or engaged solely for the purposes of the Service Agreement are employed or engaged under written agreements under which all Intellectual Property Rights in any work (as defined in the Copyright Act), product or other material created by the Associates vest in the Service Provider on the creation of that work, product or other material.

7.5 Intellectual Property Rights Indemnity

The Service Provider indemnifies and will keep indemnified the State Party, the State and all their respective officers, employees and agents from and against all costs, losses, expenses, actions, suits, demands, claims, damages and other liabilities resulting from the Service Provider's failure to comply with this clause 7, including any breach of warranty under clause 7.4, or otherwise resulting from the actual or alleged infringement of the Intellectual Property Rights or the Moral Rights of any third party by the Service Provider.

7.6 Continuing Obligation

The obligations of the Service Provider under this clause 7 are continuing obligations and survive expiration or termination of the Service Agreement.

8. INTELLECTUAL PROPERTY RIGHTS TO BE OWNED BY SERVICE PROVIDER

8.1 Application of Clause

This clause applies if the Service Agreement provides that the Service Provider will own Intellectual Property Rights in New Material.

8.2 Ownership of Intellectual Property Rights in New Material

The State Party acknowledges that the entire future Intellectual Property Rights in all New Material are to be owned by the Service Provider upon their creation.

8.3 Licence of Intellectual Property Rights in New Material

The Service Provider:

- (a) grants to the State Party an irrevocable, perpetual, royalty-free, non-exclusive licence to exercise any or all of the rights of an owner of Intellectual Property Rights in the New Material during the remainder of the duration of the Intellectual Property Rights in that New Material; and
- (b) must, if a third party owns Moral Rights in any New Material, obtain a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State Party to use the New Material without regard to the third party's Moral Rights.

8.4 Existing Material - Licence

Nothing in clause 8.3 affects the ownership of any Intellectual Property Rights in any Existing Material.

The Service Provider:

- (a) grants, and the Service Provider must ensure that any other owner of any Intellectual Property Rights in any Existing Material grants, to the State Party in writing, an irrevocable, perpetual, royalty-free, non-exclusive licence to exercise any or all of the rights of an owner of Intellectual Property Rights in the Existing Material during the remainder of the duration of the Intellectual Property Rights in that Existing Material; and
- (b) must, if a third party owns Moral Rights in any Existing Material, obtain a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State Party to use the Existing Material without regard to the third party's Moral Rights.

8.5 Warranty

The Service Provider warrants that:

- (a) the Service Provider has the right to grant the licences granted under clause 8.4 (a);
- (b) no Intellectual Property Rights or Moral Rights in any Material are or will be owned by any third party unless:
 - (i) if a third party owns any Intellectual Property Rights in the Material, the Service Provider has obtained a written licence from the third party owner to the same effect as the licence

referred to in clause 8.4(a); and

- (ii) if a third party owns Moral Rights in the Material, the Service Provider has obtained a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State Party to use the Material without regard to the third party's Moral Rights; and
- (c) the Material will not infringe the Intellectual Property Rights of any third party.

8.6 Intellectual Property Rights Indemnity

The Service Provider indemnifies and will keep indemnified the State Party, the State and all their respective officers, employees and agents from and against all costs, losses, expenses, actions, suits, demands, claims, damages and other liabilities resulting from the Service Provider's failure to comply with this clause 8, including any breach of warranty under clause 8.5, or otherwise resulting from the actual or alleged infringement of the Intellectual Property Rights or the Moral Rights of any third party by the Service Provider.

8.7 Continuing Obligation

The obligations of the Service Provider under this clause 8 are continuing and survive expiration or termination of the Service Agreement.

9. PUBLICITY

- (a) Unless:
 - (i) the State Party gives its prior written consent or a Public Authority is specified in the Service Agreement Details; or
 - (ii) the Service Provider is required by law to do so,the Service Provider must not use the State Party's, any Public Authority's, or the State's, logo.
- (b) The Service Provider must not make any misleading public statement concerning the Service Agreement.
- (c) The State Party may use the Service Agreement and the Service Provider's name and logo for reasonable promotional or publicity purposes at the State Party's discretion, but if the State Party uses the Service Agreement or the Service Provider's name or logo for such purposes, then the State Party must acknowledge the role of the

Service Provider to the extent that is reasonable in the circumstances.

10. PRIVACY

- (a) The Service Provider agrees to comply with its obligations (if any) under or arising pursuant to the *Privacy Act 1988* (Cth) to the extent relevant to the Service Agreement.
- (b) The Service Provider also agrees to comply with:
 - (i) such other Commonwealth, State or Territory legislation related to privacy which is relevant to the Service Agreement;
 - (ii) any directions made by a Privacy Commissioner relevant to the Service Agreement;
 - (iii) any privacy procedures stated in the Service Agreement; and
 - (iv) any other reasonable direction relating to privacy which is given by the State Party.
- (c) If the Service Provider is exempt from compliance with the Privacy Act 1988 (Cth) because its annual turnover is less than the prescribed threshold, and if the Service Provider is not subject to an approved privacy code, the Service Provider must comply with the Australian Privacy Principles set out in the Privacy Act 1988 (Cth) as if it were required to comply with that legislation.

11. COOPERATION WITH OTHER SERVICE PROVIDERS

- (a) Subject to clause 11(b), the Service Provider must cooperate with any third party service provider appointed by the State Party where this is necessary to ensure the integrated and efficient conduct of the State Party's operations. Without limiting the foregoing, the Service Provider must provide such reasonable assistance to other service providers as the State Party may request from time to time, provided that the Service Provider will be entitled by prior agreement with the State Party (which will not be unreasonably withheld) to charge for costs incurred as a direct result of providing such cooperation.
- (b) Nothing in clause 11(a) will require the Service Provider to disclose its confidential information to a third party service provider.

12. ACCESS AND RECORDS

12.1 Access

Subject to the State Party:

- (a) giving reasonable prior notice to the Service Provider; and
- (b) complying with all reasonable directions and procedures of the Service Provider relating to occupational health, safety, security and confidentiality in connection with the Service Provider's premises,

the Service Provider must allow the State Party to:

- (c) have reasonable access to any premises used or occupied by the Service Provider in connection with the Services;
- (d) have reasonable access to all Records in the custody or control of the Service Provider;
- (e) examine, audit, copy and use any Records in the custody or control of the Service Provider; and
- (f) photograph, film or otherwise record anything done by the Service Provider in supplying the Services, if reasonably required by the State Party.

12.2 Records

- (a) The Service Provider must keep accurate, complete and current written Records in respect of the Service Agreement, including:
 - (i) the type of Services, including the separate tasks, supplied to the State Party on each day during the Term;
 - (ii) the time that the Service Provider spent providing the Services on each day during the Term; and
 - (iii) the name and title of all Associates who provided the Services or were responsible for supervising the provision of the Services.
- (b) The Service Provider must comply with the directions of the State Party in relation to the keeping of Records whether those directions relate to the period before or after the expiry of the Term.
- (c) The Service Provider must keep all Records for at least 7 years after the expiry or termination of the Service Agreement.

- (d) The Service Provider must do everything necessary to obtain any third party consents which are required to enable the State Party to have access to Records under clause 12.1.

12.3 Survival of Clause

This clause 12 is a continuing obligation and survives expiration or termination of the Service Agreement.

13. ASSOCIATES

13.1 Associates Generally

The Service Provider must ensure that all Associates:

- (a) are properly qualified and suitable for the tasks that they are to do;
- (b) hold all necessary permits, licences and authorities required by law; and
- (c) act, in all circumstances and at all times, in a fit and proper manner.

13.2 Specified Personnel

- (a) Where Specified Personnel are specified in the Service Agreement as being responsible for the performance of key roles or tasks under the Service Agreement, the Service Provider will provide those individuals to fulfil those tasks.
- (b) If, notwithstanding this obligation, a specified individual is unavailable at any time during the scheduled performance of the key roles or tasks referred to at 18.2(a), the Service Provider will within 2 Business Days:
 - (i) advise the State Party of the reason for the absence, expected length of absence; and
 - (ii) propose a substitute or permanent replacement (as appropriate).
- (c) Any substitute Specified Personnel must be:
 - (i) approved by the State Party (the State Party may not unreasonably withhold its approval of a substitute but it may give its approval subject to such conditions as it reasonably considers necessary to protect its interests under the Service Agreement); and
 - (ii) of at least equivalent skill and experience.

13.3 Awards & Workplace Agreements

The Service Provider must ensure that the remuneration and terms of employment of all Associates for the duration of the Service Agreement will be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry.

13.4 Police Clearance

- (a) The State Party may request the Service Provider, at any time and from time to time, to obtain and provide it with an Australia-wide police clearance in respect of any Associate.
- (b) The Service Provider must comply with that request within 30 Business Days of such request.
- (c) If any police clearance evidences that any Associate has committed a criminal offence punishable by imprisonment or detention, then the State Party may, without prejudice to its other rights under the Service Agreement, request the Service Provider to promptly remove that Associate from involvement in the Service Agreement.
- (d) If the Service Provider is requested to remove any Associate under this clause, the Service Provider must, at its own cost, promptly remove that Associate from all involvement in the Service Agreement and arrange for a replacement of that Associate.

13.5 Working with Children

- (a) If the Services to be provided by the Service Provider under the Service Agreement involve "child-related work" (as that term is defined in section 6 of the *Working with Children (Criminal Record Checking) Act 2004*) (in this clause 13.5, "**the Act**") then:
 - (i) all Associates who will undertake "child-related work" must provide to the State Party an assessment notice under section 12 of the Act before they commence work under the Service Agreement; and
 - (ii) the Service Provider must otherwise at all times comply, and ensure that all Associates comply, with the provisions of the Act.
- (b) The State Party may require the Service Provider to immediately remove any Associate from the Premises who does not have a current assessment notice.

- (c) A breach of this clause will be deemed an Event of Default which cannot be remedied.

14. GENERAL REPRESENTATIONS AND WARRANTIES

14.1 Service Provider's General Representations and Warranties

Except where the Service Provider has otherwise disclosed in writing to the State Party, and the State Party has given its prior written consent to the matter disclosed, the Service Provider represents and warrants in favour of the State Party that:

- (a) the Service Provider has no conflict of interest arising out of the Service Agreement;
- (b) the Service Provider is properly authorised and has the power to enter into the Service Agreement and perform the Service Provider's obligations under the Service Agreement;
- (c) the Service Provider's obligations under the Service Agreement are valid and binding and are enforceable against the Service Provider;
- (d) all information provided by the Service Provider to the State Party in connection with the Service Agreement is true and correct;
- (e) there is no litigation or arbitration, and there are no administrative proceedings, taking place, pending or threatened against the Service Provider which could have a materially adverse effect on the Service Provider's ability to supply the Services in accordance with the Service Agreement;
- (f) neither the Service Provider nor any person included in the Specified Personnel has been convicted of a criminal offence that is punishable by imprisonment or detention;
- (g) if the Service Provider is a body corporate, the Service Provider has not been convicted of a criminal or statutory offence that is punishable by a fine or penalty of, or exceeding, \$10,000; and
- (h) except where lawfully excused under the Service Agreement there is nothing that prevents the Service Provider from complying with any obligation under the Service Agreement.

14.2 General Representations and Warranties Made Continuously

The representations and warranties made by the Service Provider under clause 14.1 are taken to be made continuously throughout the Term.

15. SERVICE PROVIDER'S UNDERTAKINGS AND OBLIGATIONS

15.1 Service Provider's Obligations

The Service Provider must:

- (a) properly provide for the care, safety, security and protection of all property supplied by the State Party to the Service Provider in connection with the Service Agreement;
- (b) promptly notify the State Party if any representation or warranty under clause 14.1 is breached or becomes untrue;
- (c) always act ethically in connection with the Service Agreement and in accordance with good corporate governance practices;
- (d) comply with all State and Commonwealth laws relevant to the Service Agreement;
- (e) if the Service Provider has custody or control of State records, comply with the State Party's record keeping plan to the extent necessary under the *State Records Act 2000*;
- (f) cooperate fully with the State Party in respect of the administration of the Service Agreement; and
- (g) use its best endeavours to ensure that no Associate causes the Service Provider to breach the Service Agreement.

15.2 Service Provider's Expenses and Equipment

Unless the State Party agrees otherwise in writing, the Service Provider must:

- (a) pay all out-of-pocket expenses incurred by the Service Provider in connection with the Service Agreement including travel expenses, accommodation and subsistence expenses; and
- (b) provide everything necessary to enable it to fully comply with all of its obligations under the Service Agreement, subject to the State Party doing everything that is required under the Service Agreement to enable the Service Provider to so comply.

15.3 Premises

The Service Provider must:

- (a) comply with all reasonable directions and procedures of the State Party and the owner or occupier of the Premises relating to

occupational health, safety, security and confidentiality in connection with the Premises;

- (b) leave the Premises in the same state that the Premises were in before the Service Provider commenced supply of the Services;
- (c) do everything reasonably necessary to protect people and property on the Premises;
- (d) prevent any undue nuisance or disturbance being caused at the Premises resulting from the supply of the Services; and
- (e) remove any Associate from the Premises if the State Party or the owner or lawful occupier of the Premises so requires.

16. NOTIFIABLE INCIDENT

The Service Provider must notify the State Party of the occurrence of a Notifiable Incident as soon as possible after it occurs, providing details of the nature of that Notifiable Incident.

17. LIABILITY

- (a) The liability of either Party for breach of the Service Agreement or for any other common law or statutory cause of action arising out of the operation of the Service Agreement will be determined under the relevant law in Western Australia that is recognised, and would be applied, by the High Court of Australia from time to time.
- (b) Other than where the State Party has repudiated the Service Agreement or damages are not an appropriate remedy, if the State Party breaches the Service Agreement, then the remedies of the Service Provider are limited to damages.

18. INDEMNITY

- (a) The Service Provider indemnifies the State Party, the State and all their respective officers, employees and agents against all costs, losses, expenses, claims, damages and other liabilities (including, without limitation, legal costs and expenses) as a result of any action, suit, claim, demand or proceeding taken or made by any third party arising from or in connection with:
 - (i) any breach of contract by the Service Provider under the Service Agreement;
 - (ii) any wilful, tortious or unlawful act or omission of the Service Provider or any Associate; or

- (iii) any breach of a State or Commonwealth law relevant to the Service Agreement by the Service Provider or any Associate.
- (b) The Service Provider's liability under the indemnity in this clause 18(a) will be reduced proportionally to the extent that any costs, losses, expenses, claims, damages or other liabilities result from the negligence of the State Party, the State or their respective officers, employees or agents.
- (c) The State Party agrees to use its best endeavours to cooperate with the Service Provider, at the Service Provider's cost, in respect of the conduct of any defence, or the agreement of any settlement, of any third party action, suit, claim, demand or proceeding the subject of the indemnity under this clause 18(a).

19. CONFLICT OF INTEREST

If a conflict of interest arises in respect of the Service Provider, the Service Provider must:

- (a) promptly notify the State Party that the conflict has arisen and provide full details; and
- (b) take reasonable steps in consultation with the State Party to remove or manage the conflict.

20. DISABILITY ACCESS AND INCLUSION PLANS

To the extent practicable, the Service Provider will implement the State Party's Disability Access and Inclusion Plan prepared under the *Disability Services Act 1993*, and provide a report to the State Party on the date specified in the Service Agreement in each year of the Term reporting on the extent to which the Service Provider has implemented the State Party's Disability Access and Inclusion Plan.

21. SERVICE PROVIDER REPRESENTATIVE AND STATE PARTY REPRESENTATIVE

- (a) Any matter which may be done by a Party may be done by an authorised officer of the Party, which:
 - (i) in the case of the State Party, includes the State Party Representative; and
 - (ii) in the case of the Service Provider, includes the Service Provider Representative.
- (b) A Party may by notice to the other Party at any time:

- (i) vary or terminate the appointment of the notifying Party's authorised officer; and
- (ii) appoint any other person to act as the notifying Party's authorised officer in relation to the Service Agreement.

22. DEFAULT, TERMINATION AND SUSPENSION

22.1 Consequences of Event of Default

If an Event of Default occurs, then:

- (a) the State Party may, after notice to the Service Provider:
 - (i) subject to clause 22.1(b), withhold paying the Service Payment to the Service Provider; or
 - (ii) terminate the Service Agreement; and
- (b) the State Party must pay the Service Payment on a pro rata basis for the Services provided up until the date of the Event of Default; and
- (c) if the State Party terminates the Service Agreement, the State Party may request the Service Provider to continue to provide the Services for such period as the State Party requires, but not exceeding 120 Business Days; and
- (d) if the State Party makes a request under clause 22.1(c), and it would not be unlawful for the Service Provider to comply with such request, the Service Provider agrees to continue to provide the Services on the same terms and conditions as contained in the Service Agreement.

22.2 Recommencement of Service Payment

If the State Party exercises rights under clause 22.1(a)(i), the State Party may, in its absolute discretion, recommence payment of the Service Payment if and when satisfied that the relevant Event of Default has been rectified.

22.3 Suspension at Any Time

- (a) The State Party may at any time by notice to the Service Provider temporarily suspend the Service Agreement (except for clauses 5, 6, 9, 10, 14, 16, 17, 18, 19, 22.3, 22.4, 24, 25 and 26) for a period not exceeding 3 months.

- (b) The State Party does not need to give a reason for temporary suspension of the Service Agreement.
- (c) If the State Party suspends the Service Agreement under this clause and the Service Provider is not in default under the Service Agreement, then:
 - (i) the State Party must pay to the Service Provider the Service Provider's costs and expenses directly resulting from the suspension (excluding loss of profits and revenue);
 - (ii) the Service Provider must give the State Party an invoice for the amount payable together with sufficient evidence to support the invoice; and
 - (iii) the State Party must pay any amount under clause 22.3 (c)(i) within 30 days after receiving an invoice under clause 22.3 (c)(ii).

22.4 Ending of Suspension

- (a) The State Party may end the suspension at any time by notice to the Service Provider.
- (b) At the end of the suspension, the rights and obligations of the State Party and the Service Provider under the Service Agreement recommence.

22.5 Consequences of Termination or Expiry

- (a) The expiration or termination of the Service Agreement does not affect any rights, liabilities or obligations of the State Party or the Service Provider as a result of anything occurring before the expiration or termination.
- (b) As soon as is practicable after expiration or termination of the Service Agreement, the Service Provider must:
 - (i) deliver to the State Party all Records as required by the State Party;
 - (ii) return to the State Party all of the State Party's Confidential Information which the Service Provider holds; and
 - (iii) if the Service Provider was attending at or occupying Premises, vacate the Premises.

- (c) On expiration or termination of the Service Agreement, the Service Provider must:
 - (i) allow the State Party to use at the State Party's sole risk and without charge for a reasonable period (not exceeding 20 Business Days) any property of the Service Provider which is located on the Premises, if required in connection with the Services or the Service Agreement, but the State Party must pay to the Service Provider a reasonable price for any materials or consumables used by the State Party as a result of using that property; and
 - (ii) in every other respect co-operate with the State Party as reasonably required by the State Party in order to minimise any loss, damage or inconvenience to the State Party resulting from the expiration or termination of the Service Agreement.

23. FORCE MAJEURE

23.1 Notification

A Party that claims it is prevented from performing its, or receiving the benefit of the other Party's, obligations under this Service Agreement by a Force Majeure Event must, within 5 Business Days of the first occurrence of the Force Majeure Event, give to the other party written notice containing full particulars of the Force Majeure Event, including:

- (a) the nature of the Force Majeure Event;
- (b) the date of the first occurrence of the Force Majeure Event;
- (c) the effect of the Force Majeure Event on that Party's ability to perform its, or receive the benefit of the other Party's, obligations under this Service Agreement; and
- (d) the expected duration of the Force Majeure Event.

23.2 Entitlement of the Affected Party

- (a) If a Party is prevented from performing its, or receiving the benefit of the other Party's, obligations under this Service Agreement in whole or part by a Force Majeure Event then, subject to that Party complying with clauses 23.1, 23.2(b) and 23.4, performance or receipt of those obligations is suspended to the extent that performance or receipt is prevented by that Force Majeure Event.

- (b) The affected Party must provide the other Party with regular updates as to the affected Party's circumstances and the impact of the Force Majeure Event during the time that it is prevented from performing its, or receiving the benefit of the other Party's, obligations under the Service Agreement and in any event must provide the other Party with an update within 2 Business Days of a request at any time by the other Party.
- (c) The affected Party must notify the other Party in writing as soon as, and in any event within 2 Business Days of, the Force Majeure Event ceasing to prevent it from performing or receiving those obligations under this Service Agreement.

23.3 Implications of a Force Majeure Event

If a Party's obligations are suspended under clause 23.2, then during that period of suspension:

- (a) that Party's actual non-performance, or delay in performance, of this Service Agreement resulting from the Force Majeure Event will not be deemed to be a breach of the Service Agreement; and
- (b) each Party will bear its own costs.

23.4 Effect of a Force Majeure Event

- (a) Within 5 Business Days of receipt by a Party of a notice referred to in clause 23.1, the State Party and the Service Provider must meet to discuss the steps that the Parties will take to minimise any effects of the Force Majeure Event.
- (b) Irrespective of any other obligations under this clause 23, on and from the date a Party is aware of a Force Majeure Event, that Party must mitigate and minimise the effect of the Force Majeure Event.
- (c) The Service Provider is not entitled to payment in respect of those obligations that are suspended under clause 23.2 during the period of suspension.

23.5 Termination

If a Party is prevented from performing its, or receiving the benefit of the other Party's, obligations under this Service Agreement in whole or part by a Force Majeure Event for a period in excess of 120 Business Days then either Party may by notice in writing to the other Party terminate this Service Agreement.

24. ADDITIONAL CLAUSES

The Parties agree that the additional clauses (if any) set out in the Service Agreement Details form part of the Service Agreement.

25. NOTICES

25.1 Notices Generally

Each notice or other communication given under the Service Agreement:

- (a) must be in writing;
- (b) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised officer, of the State Party or the Service Provider (as applicable); and
- (c) must be:
 - (i) delivered or sent by prepaid post to the address of the recipient specified in the Service Agreement; or
 - (ii) sent by email in the form of a PDF file letter to the email address of the recipient as specified in the Service Agreement or as notified by either party from time to time.
- (d) subject to clause 25.1(e), is taken to be received by the addressee:
 - (i) in the case of prepaid post, on the third Business Day after posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia; and
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the Party sending the email;
 - (iii) in the case of hand delivery, on delivery.
- (e) If the notice or other communication is taken to be received on a day which is not a Business Day or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.

25.2 Notices Sent by Email

With respect to a notice sent by email, the Parties agree that the following applies:

- (a) any text in the body of the email or the subject line will not form part of the notice; and
- (b) an attachment to the email will only form part of the notice if it is in .pdf format or such other format as may be agreed between the Parties from time to time, and with respect to any notice sent by email under or in connection with the Service Agreement, each Party must ensure that:
- (c) its firewall and/or email server (as applicable):
 - (i) allows messages of up to 10MB to be received;
 - (ii) in the case of the Service Provider, does not trap any messages in the spam filter which have been sent from the State of Western Australia domain; and
 - (iii) automatically sends a receipt notification to the sender upon receipt of a message; and
- (d) its systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain that cannot or will not be delivered to the recipient.

26. DISPUTE RESOLUTION

- (a) No litigation pending possible resolution
Subject to clause 26(e), the parties agree that unless and until a party has complied with the requirements of this clause 26, a party may not commence any court proceedings in respect of any dispute.
- (b) Referral to Service Agreement Representatives
If at any time a dispute exists:
 - (i) between the State Party and the Service Provider either party may refer the dispute to the relevant service agreement representatives appointed under clauses 21(a)(i) and 21(a)(ii) for resolution; and
 - (ii) the relevant service agreement representatives will consider the dispute referred to them and in doing so, give due consideration to submissions by the parties in connection with the dispute.

- (c) Further referral
- (i) If a dispute remains unresolved 10 Business Days after the referral of the dispute to the relevant service agreement representatives under clause 26(b), a party may give a written notice to the other party in accordance with this clause 26(c) (**Dispute Notice**).
 - (ii) The Dispute Notice must:
 - (A) state that the notice is given under this clause 26(c);
 - (B) describe the nature of the dispute; and
 - (C) nominate the party's authorised officer for resolution of the dispute (**Authorised Officer**).
 - (iii) Within 2 Business Days after receipt of a Dispute Notice, the recipient party must give a written notice to the other party nominating its Authorised Officer.
 - (iv) The parties must ensure that their Authorised Officers meet and negotiate with a view to resolving the dispute within 5 Business Days after the receipt of the notice referred to paragraph (c).
 - (v) If the parties' Authorised Officers fail to resolve the dispute within 10 Business Days after receipt of the Dispute Notice given by a party in accordance with paragraph (c), the parties' Authorised Officers may agree a dispute resolution process for the resolution of the dispute in which case the dispute will be resolved in accordance with such process.
 - (vi) Either party may commence litigation if:
 - (A) the parties fail to resolve the dispute in accordance with paragraph (b) and fail to agree a dispute resolution process in accordance with paragraph (e) within 10 Business Days after the receipt of a Dispute Notice given by a party in accordance with paragraph (c);
 - (B) either party fails to comply with any of the requirements of this Clause 26; or
 - (C) either party fails to comply with any dispute resolution process agreed in accordance with paragraph (e).

(d) Continue to perform obligations

The parties must continue to perform their obligations under the Panel Agreement or a Service Agreement as the case may be despite the existence of any dispute between the parties.

(e) No application of clause

This clause does not apply:

- (A) if a party considers it necessary to seek an urgent interim determination; or
- (B) where the State Party considers that an Event of Default has occurred under the Panel Arrangement or a Service Agreement.

27. MISCELLANEOUS

27.1 Assignment, Novation etc

- (a) Unless the Service Provider obtains the State Party's prior written consent, the Service Provider must not:
 - (i) sell, transfer, assign, novate, mortgage, charge or otherwise dispose of or deal with any of its rights or obligations under the Service Agreement; or
 - (ii) subcontract any of its rights or obligations under the Service Agreement.
- (b) If the Service Provider is a corporation (other than a public company as defined in the *Corporations Act 2001* (Cth)) the Service Provider is taken to have assigned the Service Agreement if:
 - (i) anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Service Provider to another person; or
 - (ii) there is any change in control of the Service Provider within the meaning of the *Corporations Act 2001* (Cth).

27.2 Waiver

- (a) Any waiver by the State Party or the Service Provider must be in writing and signed by the Party waiving the right.
- (b) Any waiver by the State Party or the Service Provider does not affect its rights in respect of any other breach of the Service Agreement by the other Party.
- (c) Subject to clause 27.2(a), any delay or failure by the State Party or the Service Provider to enforce any right under or in connection with the Service Agreement or any law will not be construed as a waiver of their respective rights under the Service Agreement or any law.

27.3 Entire Agreement

The Service Agreement supersedes all prior negotiations, understandings and agreements (whether in writing or not) between the State Party and the Service Provider relating to the matters covered by the Service Agreement and constitute the full and complete agreement between the State Party and the Service Provider relating to the matters covered by the Service Agreement.

27.4 Rights Are Cumulative

Unless otherwise stated the rights, powers and remedies in the Service Agreement are in addition to, and not exclusive of, the rights, powers and remedies existing at law or in equity.

27.5 Applicable Law

The Service Agreement is governed by the laws of the State of Western Australia. The State Party and the Service Provider irrevocably submit to the exclusive jurisdiction of the courts of Western Australia.

27.6 Further Assurance

The State Party and the Service Provider must do everything reasonably necessary, at that Party's expense, including signing further documents, to give full effect to, perfect or complete, the Service Agreement.

27.7 Relationship

- (a) The Service Provider is an independent contractor, and nothing in the Service Agreement may be construed to make the Service Provider a partner, agent, employee or joint venturer of the State Party.
- (b) The Service Provider must not represent that the Service Provider or any of its Associates are the employees, agents, partners or joint venturers of the State Party.

END OF GENERAL PROVISIONS