

# **New Air Combat Capability – Industry Support Program**

## **Funding Agreement**

**Commonwealth of Australia**

and

**[insert Grantee's name]**

ACN [*insert*]

ABN [*insert*]

Project Number: NACC-ISPXXXX

[Sample Funding Agreement: Applicant undertaking the Project on its own and not as part of a Consortium.]

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## This Funding Agreement

is made on  
parties:

between the following

1. **The Commonwealth of Australia**  
represented by its Department of Industry, Innovation, Science,  
Research and Tertiary Education  
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)**  
[Note: The Commonwealth reserves the right to require a  
parent company guarantee (or equivalent, for example from a  
company with common ownership with the recipient), or other  
security, if the Grantee has limited share capital or financial  
resources.]

### Recitals

- A. The Commonwealth has established the Program for the purpose of providing funding to Australian companies and research organisations to support the development of new or improved capabilities that may enhance their ability to win work in the production, sustainment and follow-on development phases of the Joint Strike Fighter (JSF) Program.
- 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 subject to the terms and conditions of this Agreement.
- D. The Grantee accepts the grant for the purposes of the Project, subject to the terms and conditions of this Agreement.

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SAMPLE

## Operative provisions

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# 1 Definitions and Interpretation

## 1.1 Definitions

In this Agreement, unless the contrary intention appears:

**Agreement Material** means any material provided, or required to be provided, to the Commonwealth under this Agreement including material:

- (a) developed for the purposes of the Project (whether created before the Commencement Date using the Grant or after the Commencement Date); and
- (b) developed by the Grantee or any third party.

**Annual Capped Amount** means, for a Financial Year, the relevant amount stated in item 3 of 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 Auditor** means a person who is:

- (a) registered as a company auditor under the Corporations Act, or a member of the Institute of Chartered Accountants in Australia or CPA Australia; or
- (b) a Professional National Accountant or Fellow Professional National Accountant of the National Institute of Accountants,

and who is not a principal, member, shareholder, officer or employee of the Grantee or of a related entity (as defined in the Corporations Act) of the Grantee;

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

**Asset** means any item of tangible property purchased, leased, created or otherwise brought into existence either wholly or in part with use of the Grant.

**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 Project, as set out in item 10 of Schedule 1 and includes changes agreed by the Commonwealth in accordance with clause 7.7;

**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;

**Commencement Date** means the date on which this Agreement has been signed by all parties to the Agreement (i.e. the date on which the last signature is added to the Agreement);

**Commonwealth** means the Commonwealth of Australia. **Completion Date** means the day after the Grantee has done all that the Grantee is required to do under this Agreement to the satisfaction of the Commonwealth;

**Completion Date** means the day after the Grantee has done all that the Grantee is required to do under this Agreement to the satisfaction of the Commonwealth;

**Confidential Information** comprises all information described in item 16 of Schedule 1, and any other information that is by its nature confidential

**Contributions** means the Grantee's Contribution;

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

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

**CRC or Cooperative Research Centre** means an incorporated or unincorporated organisation, formed through collaborative partnerships between publicly funded researchers and end users. CRCs must comprise at least one Australian end-user (either from the private, public or community sector) and one Australian higher education institution (or research institute affiliated with a university);

**CRC Program** means the Cooperative Research Centres Program administered by the Department;

**CRC Customers** means entities which can be defined by the CRC program guidelines as 'Essential Participants' or 'Participants'. The CRC program guidelines state that:

- (a) an 'Essential Participant' is a person or body who provides essential support (including essential cash or in-kind contributions) for the activities of the CRC;
- (b) a 'Participant' is a person, body or organisation who has agreed to support the CRC's activities and provide contributions to the CRC;

**Customer Guidelines** means the Customer Guidelines for the Program published by the Commonwealth, current as at the Application Acceptance Date;

**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 Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) or such other department as may, from time to time, administer this Agreement on behalf of the Commonwealth;

**DIIC** means the Enterprise Connect Defence Industry Innovation Centre.

**DIIC Business Advisor** means an individual employed, or otherwise engaged, by the Commonwealth to conduct business reviews of Defence clients on behalf of Enterprise Connect;

**Eligible Activity** has the meaning given in clause 3.3 of this Agreement;

**Eligible Expenditure** means the expenditure incurred by the Grantee on the Project, which constitutes as eligible expenditure as described in Appendix 3 of the Customer Guidelines;

**Enterprise Connect** means a Division of the Commonwealth Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE), known as Enterprise Connect;

**Entities within the JSF Supply Chain** means:

- (a) one or more of the companies engaged on the development of the F-35 Lightning II Joint Strike Fighter and listed in an attachment to the Customer Guidelines as a 'JSF Prime'; or
- (b) a company supplying equipment or systems to one or more of the entities defined as 'JSF Primes' and listed in an attachment to the Customer Guidelines as an 'Original Equipment Manufacturer'; or
- (c) a company supplying a JSF related capability that is required by one or more of the entities defined as a 'JSF Prime' or an 'Original Equipment Manufacturer', directly or indirectly through a supply chain.

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

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

**Government Grant Funding** means a grant, loan or investment sourced directly from a Commonwealth, State or Territory government department, agency or other body, or indirectly through a government funded organisation, including as described in the Customer Guidelines;

**Grant** means:

- (a) the amount or amounts paid or payable under this Agreement by the Commonwealth to the Grantee as specified in item 8 of Schedule 1; and
- (b) where referring to the Grantee's use of, reporting, or expenditure of funds, includes any interest earned on those funds;

**Grant Percentage** means the percentage of Eligible Expenditure on Eligible Activities to be paid by the Commonwealth to the Grantee as the Grant, being the percentage(s) specified in item 9 of Schedule 1;

**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 money provided, or to be provided, by the Grantee for the Project during the Term:

- (a) as set out in the Application; and
- (b) as otherwise required to meet all expenditure on the Project that is not covered by the Grant;

**Guidelines** means the Program Guidelines and the Customer Guidelines;

**Initial Progress Payment** means the initial Grant payment payable by the Commonwealth to the Grantee being an amount equal to the Grant Percentage of the Eligible Expenditure that the Grantee forecasts will be incurred in the first six month period following the Commencement Date plus the Grant Percentage of any previous expenditure incurred by the Grantee (and approved by the Commonwealth) under clause 1.1;

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 (as defined in the Corporations Act) 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 Rights** includes all intellectual property rights including:

- (a) statutory and other proprietary rights in respect of trade marks (including goodwill in those marks), patents, circuit layouts, copyrights, designs, confidential information, 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;

**JSF** means the F-35 Lightning II Joint Strike Fighter aircraft;

**JSF Program Office** means the US Department of Defence Joint Strike Fighter International Project Office.

**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 7.4 of this Agreement, as specified in item 17 of Schedule 1;

**LEADR** means the dispute resolution association with that name and the Australian Business Number 69 008 651 232.

**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;

**Losses** means liabilities, expenses, losses, damages and costs (including but not limited to legal costs on a full indemnity basis, whether incurred by or awarded against a party).

**Milestones** means the milestones for a Project, as described in Schedule 1;

**Minister** means the Minister for Defence.

**Non Tax-Exempt Company** means a company incorporated in Australia under the Corporations Act, that is not a Tax-Exempt Company;

**Notice** means a notice, demand, consent, approval or communication issued under this Agreement.

**Personnel** means in relation to the Commonwealth, any employee, officer, agent, or professional adviser of the Commonwealth, and in the case of the Grantee, any Key Personnel, employee, officer, agent, or professional adviser of the Grantee or subcontractors of the Grantee (including subcontractors of subcontractors, at any level).

**Planned Achievement Date** means the date stated in item 14 of Schedule 1;

**Portfolio Additional Estimates Statements** are the publicly available statements that detail any adjustments to the Portfolio Budget Statements;

**Portfolio Budget Statements** are the annual publicly available statements that detail the allocation of funding for the programs and activities undertaken by the Commonwealth;

**Program** means the Commonwealth “*New Air Combat Capability - Industry Support Program*” of providing funding to Australian companies and research organisations to support the development of new or improved capabilities that may enhance their ability to win work in the production, sustainment and follow-on development phases of the Joint Strike Fighter Program. The Program is administered in part by the Department on behalf of the Defence Materiel Organisation pursuant to the Program Guidelines;

**Program Delegate** means an employee of the Defence Materiel Organisation, 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 Funds** means the total 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 or by the *Minister*) for that year;

**Program Guidelines** means the *New Air Combat Capability - Industry Support Program (NACC-ISP) Program Guidelines* in effect on the Application Acceptance Date;

**Progress Payment** means an instalment of the Grant, including the Initial Progress Payment, payable by the Commonwealth to the Grantee, made pursuant to clause 7;

**Progress Report** has the meaning given in the Customer Guidelines;

**Project** means the Grantee’s project described in Schedule 1;

**Project Duration** means the period beginning on the Project Start Date and ending on the Project End Date.

**Project End Date** has the meaning given in item 5(b) of Schedule 1;

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

**Project Outcomes** means the planned results of the Project set out in item 6 of Schedule 1, and the anticipated national benefits of the Project described in the Application;

**Project Start Date** has the meaning given in item 5(a) of Schedule 1. For the avoidance of doubt, this date cannot be any earlier than the Application Acceptance Date;

**PFRA or Publicly Funded Research Agency** means an organisation to which the following criteria apply:

- (a) it is at least 50 per cent owned or controlled by the Commonwealth, or an Australian state or territory government;
- (b) it is primarily carrying out research and development activities; and
- (c) it is:
  - (i) providing services, or making facilities available, in relation to science or technology;
  - (ii) training, or assisting in the training of, persons in the field of scientific or technological research; or
  - (iii) collecting, interpreting or publishing information relating to science or technology

**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;

**Retention Amount** means the amount specified in item 12 of Schedule 1, or if no amount is specified, means 5% of the Grant amount provided for the Grantee under this Agreement;

**Special Conditions** means conditions which are specific to the Grant, which are set out in item 18 of Schedule 1;

**Stream** means a stream of the Program under which the Grantee claims the Grant for the Project to be undertaken by the Grantee, as specified in item 2 of Schedule 1;

**Tax-Exempt Company** means a company:

- (a) whose income is exempt from income tax under Division 50 of the *Income Tax Assessment Act 1997* (Cwlth); or
- (b) all or part of whose income is exempt from income tax, under another statute or otherwise.

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

**Trust** means the trust referred to in item 21 of Schedule 1.

## **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**

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

This Agreement commences on the Commencement Date and continues until the Completion Date unless terminated in accordance with clause 20.

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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 for the relevant Stream, as described in the Grantee’s Application (and as approved by the Commonwealth in its letter of offer for funding); and
- (b) in accordance with the Budget for the Project; and
- (c) in accordance with this Agreement.

### 3.2 Eligible Expenditure

The Grantee acknowledges that the Customer Guidelines describe 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 Grantee acknowledges that the activities to be undertaken by the Grantee that are eligible for funding under the Program must be directly related to maximising Australian industry involvement in the JSF production, sustainment and follow on development, and are as follows:

- (a) **(Stream A)** activities necessary to develop a new or improved JSF technology, product, process or service that is required by entities within the JSF supply chain, and which can demonstrate more than one JSF application; or
  - (b) **(Stream B)** activities necessary to develop a new or improved technology, product, process or service to enhance a company's competitiveness in winning work from entities within the JSF supply chain; or to engage in a study effort that relates to a capability required by entities within the JSF supply chain or the JSF Program Office; or
  - (c) **(Stream C)** research effort assistance that leads to JSF industry capability enhancements or manufacturing improvements required by entities within the JSF supply chain or the JSF Program Office,
- as further described in the Customer Guidelines ("**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 1. If any of the Special Conditions are inconsistent with another provision of this Agreement, the Special Conditions prevail to the extent of the inconsistency.

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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 either:
    - A. 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 a Non Tax-Exempt Company); or
    - B. an Australian university or a Publicly Funded Research Agency, or a Cooperative Research Centre (this warranty is applicable only if the Grantee is a body corporate and in its Application the Grantee specified that it was one of these types of organisations); and
  - (ii) does not have any interests or obligations that conflict with its interests or obligations under this Agreement;
  - (iii) to the best of its knowledge after making reasonable inquiries of the individuals involved in the Project or the Program, at the date of signing this Agreement, no conflict of interest exists or is likely to arise in the performance of its obligations under this Agreement;
  - (iv) has complied and will at all times comply with any conditions set out in the Letter of Offer; and
  - (v) 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 the Project; and
  - (vi) has adequate financial resources to fund, and will fund, (and not by a loan) all expenditure in relation to the Project that is not covered by the Grant, and no part of that contribution will be from Government Grant Funding; and
  - (vii) 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).
- (c) it and its Personnel have the necessary experience, skill, knowledge, expertise and competence to undertake the Project and (where appropriate) will hold such licences, permits or registrations as are required under any State, Territory or Commonwealth legislation to undertake the Project, and are fit and proper people;

- (d) it is not a trustee, unless specifically disclosed in item 21 of Schedule 1;  
[Note: if the Grantee is a trustee, full details need to be disclosed to the Commonwealth and additional requirements will apply as further detailed in Schedule 1 of this Agreement.]

#### **4.2 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.

#### **4.3 No limitation**

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

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## **5 Project governance**

### **5.1 In the event the Grantee is unable to meet obligations**

Without limiting clause 9.4, the Grantee must notify the Commonwealth immediately upon becoming aware of any circumstances that are likely to adversely affect the Grantee's ability to comply with the terms of this Agreement, in particular its solvency or ability to ensure that the Project is carried out in accordance with this Agreement.

The giving of Notice by the Grantee pursuant to this clause 5, will not, in any way, limit the obligations of the Grantee under this Agreement or the Commonwealth's rights, or excuse the Grantee in any way from the performance of those obligations.

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## **6 Payment of Grant**

### **6.1 General**

- (a) Subject to:
- (i) clauses 6.4, 6.6 and 6.8;
  - (ii) the rights of the Commonwealth under this Agreement to withhold, suspend or terminate Grant payments;
  - (iii) sufficient funding being available for the Program; and
  - (iv) the Grantee complying with this Agreement,
- the Commonwealth will pay the Grant to the Grantee as set out in this Agreement.

### **6.2 Initial Progress Payment**

- (a) For the first six month period occurring after Commencement Date, the Commonwealth will pay to the Grantee the Initial Progress Payment set out in item 11 of Schedule 1. The Initial Progress Payment will be made to the Grantee in accordance with clause 6.5

### **6.3 Subsequent Progress Payments**

- (a) For the second six month period occurring after the Commencement Date and each subsequent six month period thereafter, subject to receipt of a Progress Report from the Grantee that is satisfactory to the Commonwealth in its form and content, the Commonwealth will make additional Progress Payments to the Grantee, in accordance with clause 6.5, calculated as follows:
  - (i) the Eligible Expenditure estimate that the Grantee forecasts will be incurred in that six month period; plus
  - (ii) the total actual Eligible Expenditure incurred by the Grantee in the relevant previous six month period,  
multiplied by the Grant Percentage, less the amount of the Progress Payment already paid by the Commonwealth for that previous six month period.

### **6.4 Adjustment in or non-payment of Progress Payments**

- (a) Notwithstanding any other provision of this Agreement to the contrary, the Commonwealth is not obliged to make a Progress Payment unless and until the Commonwealth is satisfied:
  - (i) that the Grantee has, subject to clause 6.10, expended a sufficient amount of the Grantee's Contribution to meet so much of the Eligible Expenditure incurred to date, as has not been met by all of the Progress Payments paid to date;
  - (ii) that the Grantee has, subject to clause 6.10, a sufficient amount of the Grantee's Contribution to meet all Eligible Expenditure forecast to be incurred in respect of the next Milestone;
  - (iii) that the Grantee has complied with clause 6.10;
  - (iv) that the Grantee has complied with, and continues to comply with, clause 9 ;
  - (v) with the progress on the Project; and
  - (vi) that clause 6.8 does not apply.
- (b) If the Commonwealth is not obliged to make a Progress Payment, it may nevertheless elect to pay the Grantee so much of the Progress Payment as it in its discretion thinks fit.

### **6.5 Timing for payments**

- (a) The actual date for of a Progress Payment during the first and any subsequent six month periods will be determined by the Commonwealth.
- (b) A Progress Payment may be made in advance for the next six month period or any subsequent six monthly periods, in the Commonwealth's absolute discretion.

### **6.6 Retention Amount**

- (a) The Commonwealth will retain the Retention Amount from the funding of

a Project, until such time as the Grantee has completed to the Commonwealth's satisfaction:

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

in respect of the Project. The Commonwealth will determine the manner and timing of that retention.

- (b) The Grantee acknowledges that only when the Commonwealth is satisfied that the Grantee has completed its obligations pursuant to this clause 6.6 will the Retention Amount be paid to the Grantee as part of the final Progress Payment.

#### **6.7 Expenditure incurred before the Project Start Date**

The Commonwealth will not make any Progress Payments to the Grantee in respect of expenditure incurred prior to the Application Acceptance Date.

#### **6.8 Commonwealth may withhold payment**

- (a) The Commonwealth is not obliged to make a Progress Payment if, in the Commonwealth's opinion, any one or more of the following events has or may have occurred in respect of the Grantee:
  - (i) a Progress Payment or any of the Contributions has not been used or not spent yet by the Grantee in accordance with this Agreement;
  - (ii) the Commonwealth is satisfied that some or all of the Grantee's expenditure to which the proposed payment relates is not Eligible Expenditure on an Eligible Activity;
  - (iii) 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;
  - (iv) the Grantee has not provided a Project Report by the due date for submission, or the Project Report provided is not satisfactory to the Commonwealth;
  - (v) the Grantee is in breach of any warranty in this Agreement;
  - (vi) the Grantee is, or is likely to become, Insolvent;
  - (vii) the Commonwealth has acted under, or purportedly under, its power to terminate this Agreement;
  - (viii) 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;
  - (ix) 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 Funds may be available to meet that commitment in the first-mentioned Financial Year. However, for the

avoidance of doubt, the Commonwealth will not defer any payments on or after 30 June 2014.

- (c) The Commonwealth is not obliged to make any Progress Payment after the Commonwealth has become entitled to terminate this Agreement.
- (d) The Commonwealth is not obliged to make any Progress Payment if the Commonwealth has at any time prior to the expiry of the Term reasonable grounds for considering that the Grantee will not be able to complete the Project on time, or to a standard reasonably acceptable to the Commonwealth.

## **6.9 Limitation on Grant**

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 on Eligible Activities made or incurred by the Grantee in respect of the Project for that year; and
  - (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 on Eligible Activities made or incurred by the Grantee in respect of the Project.

## **6.10 Grantee's Contribution**

- (a) Subject to clauses 6.10(b) and 6.10(c) the Grantee must expend the Grantee's Contribution to Eligible Expenditure in relation to the Project in the same proportions as the Grant is, or is to be, expended from time to time such that the proportions of the Grantee's Contribution and the Grant expended on Eligible Expenditure in relation to the Project are at all times equal.
- (b) If the Grantee discovers that it is in breach of clause 6.10(a), the Grantee must remedy that breach promptly, by expenditure of additional amounts of Grantee's Contribution.
- (c) Despite clauses 6.10(a) and 6.10(b), the total amount of the Grantee's Contribution in respect of the Project, must not be less than the amount specified in item 8 of Schedule 1.
- (d) If the Grantee believes it has breached, or is likely to breach, clauses 6.10(a), 6.10(b) or 6.10(c), it must notify the Commonwealth promptly and provide all information required by the Commonwealth. Without limiting the Commonwealth's rights under clause 6.10(e), the Grantee must comply with the Commonwealth's directions regarding the breach or likely breach.
- (e) If at any time:
  - (i) the Grantee notifies the Commonwealth under clause 6.10(d);
  - (ii) a Report submitted by the Grantee to the Commonwealth shows; or

- (iii) the Commonwealth otherwise reasonably believes, that the Grantee has not complied with clauses 6.10(a) and 6.10(b) or 6.10(c), the Commonwealth may by written notice to the Grantee, reduce the total amount of the Grant by the difference between the amount of the Grant expended and the amount of the Grantee's Contribution expended at that time.
- (f) The Grantee must fund all expenditure in relation to the Project that is not directly covered by the Grant.

### **6.11 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 6. The Grantee must comply with such a request within 14 days of its receipt.

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## **7 Conduct of Project**

### **7.1 Undertaking of Project**

The Grantee agrees to undertake the Project:

- (a) diligently;
- (b) to a high standard and in good faith;
- (c) at a rate of progress and in a manner sufficient to achieve each *Milestone* by the relevant due date specified in Schedule 1;
- (d) to achieve the Project Outcomes;
- (e) in accordance with the requirements of the Customer Guidelines; and
- (f) in accordance with the terms and conditions of this Agreement and any representations contained in the Application (but not where inconsistent with this Agreement).

### **7.2 Milestones**

The Grantee must:

- (a) achieve the Milestones for the Project within their respective Planned Achievement Dates as set out in Schedule 1; and
- (b) complete the Project by the Project End Date.

### **7.3 Delay in completion of Milestones**

- (a) The Grantee must notify the Commonwealth promptly in writing if a Milestone has not been achieved, or if it considers that a Milestone is unlikely to be achieved, by the Planned Achievement Date of that Milestone.
- (b) A notice given under clause 7.3(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.

#### **7.4 Change of Key Personnel**

- (a) The Grantee must notify the Commonwealth in writing if there is a proposed change to Key Personnel within 14 days of the relevant change taking effect.
- (b) A Notice given under clause 7.4(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 7.4(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 7.4(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 7.4(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 20.1.

#### **7.5 Subcontractors**

- (a) The Grantee may engage subcontractors to undertake work in relation to the Project.
- (b) The Grantee will ensure that any subcontract entered into by the Grantee for the purposes of the Project is not inconsistent with the requirements of this Agreement.
- (c) The Grantee agrees to promptly notify the Commonwealth of any issues or disputes arising under or in relation to a subcontract that:
  - (i) has or may result in the Grantee failing to comply with any of its obligations under this Agreement; or

- (ii) involves the Grantee withholding payment to the subcontractor of an amount claimed as Eligible Expenditure incurred by the Grantee on the Project.
- (d) On receipt of a Notice under clause 7.4(c), the Commonwealth may in its absolute discretion withhold payment of any further Progress Payments, pending satisfactory resolution of the issue or dispute notified to the Commonwealth.
- (e) The Grantee agrees to give the Commonwealth a copy of any subcontract entered into by the Grantee for the performance of work on the Project, within 14 days of the Commonwealth's request to do so.
- (f) The Grantee is fully responsible for undertaking the Project even if the Grantee subcontracts any aspect of the Project and for the performance of all of the Grantee's obligations under this Agreement.
- (g) The Grantee must not, in any event, enter into a subcontract under this Agreement with a subcontractor named by the Director of Equal Opportunity for Women in the Workplace in a report to the responsible Minister as an employer currently not complying with the reporting requirements of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

## 7.6 Reports

### Project Progress Report

- (a) The Grantee must prepare and submit reports to the Commonwealth:
  - (i) for every six month period or in accordance with any other requirements as set out in clause 2.1 of Appendix 6 of the Customer Guidelines; and
  - (ii) by the dates set out in item 15 of Schedule 1, or as otherwise reasonably required by the Commonwealth.
- (b) The Commonwealth may from time to time notify the Grantee of:
  - (i) the required format for a report under this Agreement (or for part of the report);
  - (ii) the required information the Grantee is to include in a report (or part of the report);
  - (iii) the person or persons who is required to certify that the information contained in a report (or part of a report) is accurate; or
  - (iv) a template report with any or all of the above requirements.

The Grantee must comply with the requirements or template notified, within the timeframe notified by the Commonwealth (which will be at least 30 days).
- (c) 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.

- (d) 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.
- (e) If the Grantee fails to submit a satisfactory revised report within 30 days under clause 7.6(d) of this Agreement, the Commonwealth may, in its absolute discretion suspend any future Progress Payments or, terminate this Agreement pursuant to clause 20.1 .
- (f) During the final six month period in which the Project End Date falls, the parties agree that the Project Progress Report will be the Project Completion Report required in accordance with the clause below (Project Completion Report).

### **Project Completion Report**

- (a) Within 90 days of the Project End Date or as otherwise required by the Commonwealth, the Grantee must provide a project completion report.
- (b) The Commonwealth will notify the Grantee of:
  - (i) the required format for a project completion report under this Agreement (or for part of the report);
  - (ii) the required information the Grantee is to include in a project completion report (or part of the report);
  - (iii) the person or persons who is required to certify that the information contained in a project completion report (or part of a report) is accurate; or
  - (iv) a template report with any or all of the above requirements.

The Grantee must comply with the requirements or template notified, within the timeframe notified by the Commonwealth.

- (c) For the avoidance of doubt, any financial reports request by the Commonwealth under this clause 7.6 (applicable to both Project Progress Reports and Project Completion Reports) must be audited by an Approved Auditor and the terms of the Approved Auditor's report must be satisfactory to the Commonwealth.

## **7.7 Budget**

- (a) The Grantee's Budget for the Project is set out in item 10 of Schedule 1. The Grantee may only use the Project Funding in accordance with the Budget.
- (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 Project Outcomes or cause the Grantee to be in breach of any of its obligations under this Agreement.
- (c) If at any time the Grantee wishes to request a variation to any one or more of the Annual Capped Amounts, the Grantee must give the

Commonwealth a revised Budget 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 7.7(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 7.7(d).

## **7.8 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, except in the case of CRC's, the Progress Payments need not be held in a separate account from the Grantee's other funds.

For CRC's this bank account must be not be the single account used to receive CRC Program grant funding and contributions from CRC Customers but must be an alternative bank account approved by the Commonwealth.

## **7.9 Records**

- (a) The Grantee must keep and require its Personnel to keep, to the Commonwealth's satisfaction all records (including original receipts, invoices and bank statements) necessary to provide a complete, detailed up-to-date and accurate record and explanation of:
  - (i) all Project costs (including Eligible Expenditure) incurred by the Grantee;
  - (ii) Other Funding made available to the Project (including the source, amount and timing) of such funds;
  - (iii) Project activities, progress of the Project and all steps taken by the Grantee for the purposes of meeting its obligations under clause 7.3;
  - (iv) any amounts of GST paid by the Grantee in respect of any supply made to the Commonwealth under this deed; and
  - (v) any other records relating to the Project which are reasonably required by the Commonwealth from time to time.
- (b) The Grantee must bear its own costs of complying with clause 7.9.

- (c) Clauses 7.9(a) and 7.9(b) apply for the Project Duration and for a period of five years from the expiry or termination of this Agreement.
- (d) If the Grantee is undertaking a collaborative project and is applying on behalf the group, the Grantee must ensure that all members also keep and retain to the Commonwealth's satisfaction Records as described in clause 7.9(a).

#### **7.10 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 7.10(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 7.10 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 7.10(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 7.10. This clause 7.10 applies until the date that is five years after the expiry or termination of this Agreement.
- (g) The requirement for, and participation in, audits does not in any way reduce the Grantee's responsibility to perform its obligations in accordance with this Agreement.

#### **7.11 Compliance with Laws and Approvals**

- (a) The Grantee must, in undertaking the Project, comply with all relevant laws of:
  - (i) 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
  - (ii) (if applicable) a country outside Australia in which part of the Project is to be undertaken.

- (b) The Grantee must obtain and maintain any necessary legal, regulatory or ethical approvals, consents or other authorisations in relation to the conduct of the Project.

## **7.12 Confidential Information**

- (a) Subject to clause 7.12(d), 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 7.12 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, the Department of Defence, Defence Materiel Organisation or with another government agency, 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;
  - (vi) as required or permitted by any other law, Commonwealth policy or express provision of this Agreement to be disclosed; or
  - (vii) that is in the public domain other than due to a breach of this deed.
- (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 7.12 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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## **8 Role of Defence Industry Innovation Centre (DIIC)**

### **8.1 DIIC Business Advisor**

The Grantee acknowledges that the Commonwealth may, in its absolute discretion, arrange for a DIIC Business Advisor to assist the Grantee while the Grantee is undertaking the Project. The period of support that the Grantee may receive from a DIIC Business Advisor in respect of a Project will take into account the Project Duration as set out in item 5 of Schedule 1.

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## **9 Project Outcomes**

### **9.1 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 on or by the expiry of the Term, the Grantee demonstrates to the Commonwealth's satisfaction that the Project Outcomes have been achieved.

### **9.2 Grantee's obligation**

The Grantee agrees to use its best endeavours to ensure the Project Outcomes are achieved in the manner and within the timeframes described in, or contemplated by, the Application and this Agreement.

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

Without limiting the operation of clause 9.2, the Grantee acknowledges that it 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 9.1 from being achieved.

### **9.4 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 Project Outcomes has been compromised; or
- (b) the Grantee wishes to achieve the Project Outcomes other than as represented in the Application and this Agreement.

### **9.5 Repayment obligation**

If the Grantee fails to comply with either clause 9.2 or 9.4, 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.

For the avoidance of doubt, any amount owned or payable to the Commonwealth (including by way of refund), or which the Commonwealth is entitled to recover from the Grantee under this clause 9.5 will be recoverable by the Commonwealth as a debt due and payable to the Commonwealth by the Grantee.

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## **10 Evaluation**

### **10.1 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 10.1 within 28 days of receiving the request or as otherwise agreed by the Commonwealth.

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## **11 Other Financial Assistance**

### **11.1 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 or Territory 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 funding program under which it was provided, within 30 days of receiving notice that the other financial assistance has been approved.

### **11.2 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 11.1, to the extent the Grant has not already been paid to the Grantee.

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## **12 Acquittal of Grant**

### **12.1 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 Contributions other than in accordance with this Agreement the Commonwealth may by Notice require the Grantee to repay the amount spent other than in accordance with 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 ( as set out in clause 9.1) 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) If the Grantee has claimed Eligible Expenditure for the purchase of plant and equipment that is sold prior to the third anniversary of the Project End Date, the Commonwealth may by Notice to the Grantee require the Grantee to repay to the Commonwealth an amount to be determined by the Program Delegate.
- (f) If the Commonwealth gives the Grantee a Notice under this clause 12.1, the Grantee must pay the amount specified in the Notice to be repaid to the Commonwealth within 28 days of receipt of the Notice.

## **12.2 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) Nothing in this clause 12 affects the right of the Commonwealth to recover from the Grantee, either under this Agreement or otherwise at law, the whole of any debt owed by the Grantee, or any balance that remains after deduction under clause 12.2(a).

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# **13 Intellectual Property Rights**

## **13.1 Intellectual Property Rights in Agreement Material**

All Intellectual Property Rights in the Agreement Material vest in the Grantee or third party (as the case may be) on creation.

## **13.2 Warranty**

The Grantee warrants that:

- (a) the Agreement Material will not infringe the Intellectual Property Rights of any person; and
- (b) it has the necessary rights to vest the Intellectual Property Rights and grant the licences as provided for in this clause 13.

## **13.3 Grantee sale of Intellectual Property Rights**

- (a) The Grantee must not sell, transfer, dispose of or otherwise deal with any Intellectual Property Rights in the Agreement Material during the Term,

without the prior consent of the Commonwealth. The Commonwealth may impose conditions on that consent, including return of a proportion of the proceeds to the Commonwealth.

- (b) Without limiting clause 13.3(a), where the Grantee sells, assigns, licences or otherwise Deals With any Intellectual Property developed using whole or part of the Grant, it must do so on commercially reasonable terms and on an arms' length basis.

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## **14 No Dealing with Grantee's Rights**

### **14.1 Dealing with the Grantee's rights**

- (a) The Grantee must not, within the project period, without the Program Delegate's prior written consent:
  - (i) Deal With, assign, grant or create any encumbrance over its rights under this Agreement (other than the giving of a floating charge over the Grantee's assets); or
  - (ii) Deal With any Intellectual Property developed using in whole or in part the Grant.
- (b) 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 14.1 to execute all documentation required by the Commonwealth. The Grantee must comply with any such conditions.

### **14.2 Change in control**

A change in Control or if there is any change in the direct or indirect beneficial ownership 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 14.

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## **15 Acknowledgment and Public Statements**

### **15.1 Acknowledgment of financial assistance**

During the period from the date of this Agreement until five 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 technology, product, process, service, study or other research outcomes realised as a result of it.

### **15.2 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 Project Outcomes.

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## **16 Dispute resolution**

### **16.1 No arbitration or court proceedings**

- (a) Subject to 16.1(b), if a dispute arises in relation to the conduct of this Agreement (**Dispute**), a party must comply with this clause 16 before starting arbitration or court proceedings except proceedings for urgent interlocutory relief. After a party has sought or obtained any urgent interlocutory relief, that party must follow this clause 16. Nothing in this clause 16 affects a party's rights under clause 20.
- (b) This clause 16 does not apply to a dispute between the parties concerning the right of Commonwealth to recover from the Grantee, either under this Agreement or otherwise, the whole of any debt owed by the Grantee.

### **16.2 Notification**

A party claiming a Dispute has arisen must give the other parties to the Dispute Notice setting out details of the Dispute.

### **16.3 Parties to resolve Dispute**

During the 14 days after a Notice is given under clause 16.2 (or longer period if the parties to the Dispute agree in writing), each party to the Dispute must use its reasonable efforts through a meeting of CEOs or equivalent (or their nominees) to resolve the Dispute. If the parties cannot resolve the Dispute within that period, they must refer the Dispute to a mediator if one of them requests.

### **16.4 Appointment of mediator**

If the parties to the Dispute cannot agree on a mediator within seven days after a request under clause 16.3, the chairperson of the Australasian Association of Dispute Resolvers (LEADR) or the chairperson's nominee will appoint a mediator.

### **16.5 Role of mediator and obligations of parties**

The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a party to the Dispute except if the party agrees in writing. Unless agreed by the mediator and parties, the mediation must be held within 21 days of the request for mediation in clause 16.3. The parties must attend the mediation and act in good faith to genuinely attempt to resolve the Dispute.

### **16.6 Confidentiality**

Any information or documents disclosed by a party under this clause 16:

- (a) must be kept confidential; and
- (b) may only be used to attempt to resolve the Dispute.

## 16.7 Costs

Each party to a Dispute must pay its own costs of complying with this clause 16. The parties to the Dispute must equally pay the costs of any mediator.

## 16.8 Termination of process

A party to a Dispute may terminate the dispute resolution process by giving Notice to each other party after it has complied with clauses 16.1 to 16.5. Clauses 16.6 and 16.7 survive termination of the dispute resolution process.

## 16.9 Breach of this clause

If a party to a Dispute breaches clauses 16.1 to 16.8, the other party does not have to comply with those clauses in relation to the Dispute.

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## 17 Indemnity

- (a) The Grantee indemnifies the Commonwealth and its Personnel against Losses sustained or incurred by the Commonwealth arising out of or in connection with:
  - (i) an infringement, or an alleged infringement, of the Intellectual Property Rights or moral rights of any person, which occurred by reason of an act done by the Commonwealth in relation to any part of the Project; or
  - (ii) any breach of this Agreement by the Grantee, or negligence on the part of the Grantee, its Personnel or subcontractors or wrongful or unlawful act or omission on the part of the Grantee, its Personnel or subcontractors.
- (b) The Grantee's liability to indemnify those indemnified under clause 17(a) will be reduced proportionally to the extent that any negligent act or omission of those indemnified contributed to the loss.
- (c) For the purposes of clause 17(a)(i) an infringement of Intellectual Property Rights includes unauthorised acts which would, but for the operation of section 163 of the *Patents Act 1990* (Cth), section 96 of the *Designs Act 2003* (Cth), section 183 of the *Copyright Act 1968* (Cth) and section 25 of the *Circuit Layouts Act 1989* (Cth), constitute an infringement.
- (d) This clause survives expiry or termination of this Agreement.

---

## 18 Assets

### 18.1 Ownership

Subject to the terms of any lease or other arrangement, the Grantee must own all of the Assets.

## **18.2 Use and dealings**

- (a) During the Term, the Grantee must use any Asset only for the purposes of the Project, or other purposes consistent with the Project Outcomes.
- (b) During the Term, the Grantee must:
  - (i) obtain good title to all Assets (other than Assets which the Grantee leases);
  - (ii) not encumber or dispose of any Asset valued at \$50,000 or more (excluding GST), or deal with or use any Asset valued at \$50,000 or more (excluding GST) other than in accordance with this clause 18, without the Commonwealth's prior approval;
  - (iii) hold all Assets securely, safeguard them against theft, loss, damage or unauthorised use and ensure that they are adequately insured;
  - (iv) maintain all Assets in good working order;
  - (v) if required by Law, maintain registration and licensing of all Assets; and
  - (vi) be fully responsible for, and bear all risks relating to, the use or disposal of all Assets.
- (c) the Grantee must not sell, transfer or dispose of any Asset valued at \$50,000 or more (excluding GST) during the Term and for the period of three years after the Term, without the prior consent of the Commonwealth. The Commonwealth may impose conditions on that consent, including return of a proportion of the proceeds to the Commonwealth.

## **18.3 Assets register**

- (a) If specified in item 20 of Schedule 1, the Grantee must maintain an Assets register containing the details as described in item 20 of Schedule 1.
- (b) The Grantee must provide a copy of the Assets register to the Commonwealth on request.

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# **19 Insurance**

## **19.1 Obligation to maintain insurance**

Unless otherwise specified in the special conditions set out in Schedule 1, in connection with the Project, the Grantee must have and maintain during the Term:

- (a) workers compensation insurance as required by law;
- (b) public liability insurance for an adequate amount per claim, or occurrence giving rise to a claim, in respect of activities undertaken under this Agreement (where occurrence means either a single occurrence or a series of occurrences if these are linked or occur in connection with one another from one original cause, as the case may be);

- (c) insurance over any Asset acquired pursuant to clause 19 of this Agreement for its full replacement value; and
- (d) any other insurance required by law.

## **19.2 Certificates of currency**

The Grantee must, on request by the Commonwealth, provide current relevant confirmation of insurance documentation from its insurers or insurance brokers certifying that it has insurance as required by clause 19.1.

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## **20 Termination**

### **20.1 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 20.1(a)(i), the Grantee is in breach of clause 4.1 or clause 7.6(e);
  - (iv) there has been a change to Key Personnel without the Commonwealth's prior written consent;
  - (v) there is a change in Control or if there is any change in the direct or indirect beneficial ownership 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) there is a change in any Key Personnel and the Commonwealth reasonably believes this change has an adverse effect on performance or funding of the Project or the Grantee's ability to comply with any of its obligations under this Agreement;
  - (viii) the Grantee is, or in the Commonwealth's opinion is likely to become, Insolvent;
  - (ix) the Grantee is, in the Commonwealth's opinion, unable or likely to be unable to meet its obligations under clause 6.11 in respect of the next, or any subsequent six month period; or
  - (x) the Commonwealth is otherwise entitled to terminate this Agreement under another provision of this Agreement.

- (b) If the Commonwealth gives a notice under clause 20.1(a), the Agreement will terminate on the date specified in that notice.

## **20.2 Obligations on termination**

On termination of this Agreement under clause 20.1:

- (a) the parties are relieved from future performance of this Agreement, without prejudice to any right of either party which accrued prior to the date of termination or otherwise relates to, or may arise at any future time, from any breach or non-observance of obligations under this deed which arose prior to that date;
- (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 so much of the funding as the Commonwealth reasonably determines, having regard to the nature of the breach, the Grantee's progress with the project, total Eligible Expenditure incurred prior to termination, and the extent to which the Project may reasonably be regarded as having achieved or furthered the Program objectives;
- (d) to avoid doubt, a repayment Notice under clause 20.2(c) may be given to the Grantee at the same the time as the termination Notice, or within a reasonable time after the date of termination of this Agreement;
- (e) if the Commonwealth gives the Grantee a Notice under clause 20.2(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 12.2(a).

## **20.3 Termination for convenience**

- (a) The Commonwealth may at any time by written Notice to the Grantee terminate this Agreement or reduce the scope of the Project.
- (b) Termination pursuant to clause 20.3(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 20.3(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.

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## **21 Notices**

### **21.1 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 AusIndustry Delivery Manager at the address specified in Schedule 1 or as otherwise notified in writing to the Grantee by a 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.

### **21.2 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.

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## **22 General**

### **22.1 Amounts due to Commonwealth**

- (a) Without limiting any other of the Commonwealth's rights or remedies, any amount owned or payable to the Commonwealth (including by way of refund), or which the Commonwealth is entitled to recover from the Grantee, under this Agreement will be recoverable by the Commonwealth as a debt due and payable to the Commonwealth by the Grantee.

- (b) 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.

## **22.2 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 22.1(a) of this Agreement.

## **22.3 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.

## **22.4 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.

## **22.5 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.

## **22.6 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.

## **22.7 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.

## **22.8 Entire Agreement**

This Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

## **22.9 Severability**

A term or part of a term of this Agreement that is illegal or unenforceable may be severed from this deed and the remaining terms or parts of the terms of this Agreement continue in force.

## **22.10 Relationship**

- (a) The parties must not represent themselves, and must ensure that their officers, employees, agents and subcontractors do not represent themselves, as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.
- (b) This Agreement does not create a relationship of employment, agency or partnership between the parties.

## **22.11 Counterparts**

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

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# **23 GST**

## **23.1 Terms**

In this clause 23:

- (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.

## **23.2 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 23.3, pay the amount referred to in clause 23.2(b) in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

### **23.3 Tax invoice**

Except where clause 23.6 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 23.2(b).
- (b) the recipient can withhold payment of the amount payable under clause 23.2(b) until the supplier provides a tax invoice or an adjustment note as appropriate.

### **23.4 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 23.2(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.

### **23.5 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.

### **23.6 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.

### **23.7 Government related entities**

If the Grantee is of the opinion that it is a ‘government related entity’ and that the Grant is ‘specifically covered by any appropriation under an Australian law’ for the purposes of section 9.15(3)(c) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), the Grantee must immediately notify the Department and provide materials supporting that opinion.

### **23.8 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.

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## **24 Survival**

### **24.1 Survival of clauses**

Unless stated otherwise under this Agreement, the following clauses of the Agreement survive the expiry or early termination of this Agreement (**Termination Date**) until the fifth anniversary of the Termination Date:

- (a) clause 6.9 (Limitation on grant);
- (b) clause 7.6 (Reports);
- (c) clause 7.9 (Records);
- (d) clause 7.10 (Inspection and audit);
- (e) clause 7.12 (Confidential Information);
- (f) clause 9 (Project Outcomes);
- (g) clause 10 (Evaluation);
- (h) clause 12 (Acquittal of Grant); and
- (i) Special Conditions as set out in Schedule 1.





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## Schedule 1

### Item

1. **Grantee Name** (insert)
2. **Funding Stream/s applied for (Stream A, B or C)** (insert)
3. **Project Title** (insert)
4. **Project Reference Number** (insert)
5. **Project Duration**
  - (a) Project Start Date: (insert)
  - (b) Project End Date: (insert)

6. **Project Description and Planned Project Outcomes**

(insert)

7. **Notices**

Notices must be addressed as follows:

- a) if given to the Commonwealth by the Grantee, addressed and forwarded to the AusIndustry Delivery Manager, AusIndustry Canberra Office, Department of Industry, Innovation, Science, Research and Tertiary Education at the following address:

Address: (insert)

Facsimile No: (insert)

Email address: (insert)

or as otherwise notified in writing by the AusIndustry Delivery Manager, AusIndustry Canberra Office; and

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

(insert)

or as otherwise notified in writing by the Grantee.

8. **Grant Amount** (insert)
9. **Grant Percentage** (insert)

**10. 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                              |   |         |         |         |          |
| Collaborative Expenditure                   |   |         |         |         |          |
| Other Expenditure                           |   |         |         |         |          |
| <b>Total Expenditure \$</b>                 |   |         |         |         |          |

Note: all amounts must be GST exclusive.

**11. Initial Progress Payment**

(insert)

**12. Retention Amount**

(insert)

**13. Annual Capped Amounts**

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

Note: all amounts must be GST exclusive.

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

| Milestone | Planned Achievement Date |
|-----------|--------------------------|
|           |                          |
|           |                          |
|           |                          |

**15. Reports**

| Report Type | Due Date | Report Period |
|-------------|----------|---------------|
|             |          |               |
|             |          |               |
|             |          |               |
|             |          |               |

Reports must conform to the requirements in the Customer Guidelines.

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.

**16. Grantee Confidential Information**

| Item of information | Reasons for confidentiality | Period of confidentiality |
|---------------------|-----------------------------|---------------------------|
|                     |                             |                           |
|                     |                             |                           |
|                     |                             |                           |
|                     |                             |                           |
|                     |                             |                           |

**17. Key Personnel**

| Name | Relationship to Grantee | Role |
|------|-------------------------|------|
|      |                         |      |
|      |                         |      |
|      |                         |      |

**18. Special Conditions**

## 19. Asset Register

The Grantee must maintain an assets register in relation to Assets valued at over \$50,000 (excluding GST), which sets out:

- Asset description
- purchase price or total lease cost
- date of purchase or lease
- type and term of lease
- location of Asset
- date of disposal approval
- disposal date
- disposal method

## 20. Trust Details

[If applicable]

Trust name: [xxxxxx]

Trust Deed: [name, date and parties of Trust Deed]

[Note - If the Grantee is a trustee: the trustees and trust beneficiaries will be required to enter into a separate Deed of Covenant and Indemnity with the Commonwealth and give to the Commonwealth a number of additional warranties (e.g. that the Trust Deed will not be amended) to ensure that the trust beneficiaries consent to the Funding Agreement. The Grantee will also need to provide the Commonwealth with a copy of the Trust Deed and information on the Trust assets before the Funding Agreement is executed, so that the Commonwealth can confirm the trustees power to enter into the Funding Agreement, and the financial standing of the Trust.]