

# Agreement for the provision of Marketing Services

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# Parties

**The Purchaser specified in the Purchase Order (Purchaser)**

**The Service Provider specified in the Purchase Order (Service Provider)**

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## Background

- A The Marketing Services Register has been established to streamline the Victorian Government's purchasing of marketing services. It simplifies the procurement process for Victorian Government when engaging with suppliers for marketing services and reduces the administration costs involved in tendering to the mutual benefit of both parties.
- B The Purchaser appoints the Service Provider to provide the Services on and subject to the terms of this Contract.

## Agreed Terms

### 1 Interpretation

#### 1.1 Definitions

In this Contract:

**Agreement** means this Contract, and includes the schedules and any annexures to it or documents incorporated by reference, which arises between the Purchaser and the Service Provider when both parties sign a Purchase Order in accordance with **clause 7**.

**Approved Services Providers** means service providers who are members of the Marketing Register.

**Auditor-General** means:

- (a) the office of the Auditor-General established under the *Constitution Act 1975* (Vic);
- (b) the Auditor-General's office established under the *Audit Act 1994* (Vic); and
- (c) any other person or entity that may from time to time perform the functions of the Auditor-General or the Auditor-General's office.

**Authorised Representative** means, in respect of a Purchaser, a person who the Purchaser nominates in writing as having authority to bind that Purchaser.

**Background Intellectual Property** means the Intellectual Property of a party which was either created:

- (a) before the Commencement Date; or
- (b) independently of this Agreement,

and all improvements to such Intellectual Property by the party.

**Budget Sector Agency** means each Victorian Government department (as defined in section 3 of the *Financial Management Act 1994* (Vic)) as amended from time to time.

**Business Day** means a day which is not a Saturday, Sunday or public holiday (being a public holiday appointed as such under the *Public Holidays Act 1993* (Vic)) in Melbourne.

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**Code of Practice** means a code of practice as defined in, and approved under, the *Information Privacy Act 2000 (Vic)*. **Commencement Date** means the date for commencement of the Services recorded in the Purchase Order.

**Confidential Information** means any technical, scientific, commercial, financial or other information of, about, or in any way related to, the Purchaser, including any information designated by the Purchaser as confidential, which is disclosed, made available, communicated or delivered to the Service Provider in connection with this Agreement (including information in the Register), but excludes information:

- (a) which is in or which subsequently enters the public domain other than as a result of a breach of this Agreement;
- (b) which the Service Provider can demonstrate was in its possession prior to the date of this Agreement;
- (c) which the Service Provider can demonstrate was independently developed by the Service Provider;
- (d) which is lawfully obtained by the Service Provider from another person entitled to disclose such information; or
- (e) which is disclosed pursuant to legal requirement or order.

**Contract** means this agreement containing the Standard Marketing Services Terms.

**Contracts Publishing System** means the system of the Victorian Government requiring publication of details of contracts entered into by Victorian Government departments or any successor system (including variations).

**Control** means, in relation to any body corporate, the ability of any person directly or indirectly to exercise effective control over the body corporate (including the ability to determine the outcome of decisions about the financial and operating and other policies of that body corporate) by virtue of the holding of voting shares, units or other interests in that body corporate or by any other means.

**Expiry Date** means the date of expiry recorded in the Purchase Order.

**Fees** means a fixed or capped fee payable to the Service Provider for the provision of specified Services under the Agreement.

**Government Owned Entity** means a statutory corporation, a State owned company or a State body as those terms are defined in the *State Owned Enterprises Act 1992 (Vic)*.

**Information Privacy Principles** means the information privacy principles set out in the *Information Privacy Act 2000 (Vic)*.

**Intellectual Property Rights** includes all present and future copyright and neighbouring rights, all proprietary rights in relation to inventions (including patents), registered and unregistered trademarks, confidential information (including trade secrets and know how), registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

**Laws** means the law in force in Victoria and the Commonwealth of Australia, including common law and legislation.

**Licence** means a non-exclusive, world-wide, everlasting, irrevocable, royalty free licence to the Purchaser to exercise all rights in relation to the Intellectual Property it applies to as if the licensee were the owner, including the right to sub-license. A Licence does not include the right to transfer or assign the Intellectual Property, or to seek or enforce remedies for infringements of the Intellectual Property against a third party.

**Marketing Services Register** means the State's electronic register to facilitate the procurement of marketing services.

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**Purchase Order** means an order for Services, submitted by the Purchaser to the Service Provider in accordance with **clause 7** that is in or substantially in the form set out in **Schedule 2**.

**Project Intellectual Property** means all Intellectual Property (excluding Background Intellectual Property) developed, created, discovered, brought into existence or otherwise acquired (other than from the Purchaser) by the Service Provider, under the Agreement.

**Rates** means the rates (whether charged on an hourly, daily, weekly or other time-related basis) payable to the Service Provider for the provision of specified Services in the Agreement.

**Request for Quote** means a request from the Purchaser for the provision of Services, which is submitted through the Register, in the form of a request for quote, request for tender or any other form and specifies the type or types of services being requested in the form set out on the Website.

**Services** means the marketing services (or any of them) specified in the Purchase Order.

**Service Levels** means the service levels the Service Provider must comply with in performing its obligations under this Agreement (which may be specified in the **Request for Quote**, Supplier Proposal, Purchase Order and/or Supplier Proposal).

**Supplier Proposal** means the response to a **Request for Quote**, which is provided by the Service Provider through the Register setting out a quote and a detailed methodology/proposal for delivering the Services, and includes any documentation attached to or incorporated by reference in the Supplier Proposal in the form set out in **Schedule 3**.

**Standard Marketing Services Terms** means the terms and conditions contained in this Contract, applying to the provision of Services through the Marketing Services Register.

**Staff Costs** means Pay as You Go tax, withholding tax, superannuation contributions or charge amounts, fringe benefits tax, workers' compensation insurance premiums, payroll tax and any like taxes and charges arising out of or in relation to this Agreement, or any engagement arising under this Agreement (together with all interest or penalties payable by reference to those costs).

**Supplier Rules of Use** means the rules of use relating to the Marketing Register and available at the Website.

**State** means the Crown in right of the State of Victoria.

**Term** means the term of this Agreement determined in accordance with **clause 2**.

**Website** means the world wide website maintained by the Department of Treasury and Finance and located at universal resource locator <http://www.procurement.vic.gov.au> as amended from time to time.

## 1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;

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- (f) a reference to:
    - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
    - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
    - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
    - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation;
    - (v) "\$", "dollars" or "AUD" is a reference to the lawful currency of the Commonwealth of Australia;
    - (vi) a party or parties is a reference to the Purchaser and the Service Provider (as the case requires); and
    - (vii) the Purchaser is a reference to the Crown in right of the State of Victoria; and
  - (g) if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day.

### 1.3 Headings

Headings do not affect the interpretation of this Agreement.

## 2 Term

### Term of the Agreement

- (a) This Agreement will commence on the date specified in the Purchase Order and will expiry on the Expiry Date.
- (b) This Agreement will remain in force for the duration of the period stated in the Purchase Order, subject to:
  - (i) earlier termination or expiry in accordance with the provisions of this Agreement; or
  - (ii) extension in accordance with the procedure (if any) specified in the Purchase Order.

## 3 Agreement subject to policy

The terms of this Agreement are subject to the terms of the Victorian Government's procurement policies, as those policies are amended from time to time. However, if any such changes have a material negative financial impact on the Service Provider, then subject to **clause 29.2**, the Purchaser and the Service Provider will discuss in good faith any necessary amendments to this Agreement.

## 4 Liability and interdependence

The Service Provider acknowledges that, notwithstanding anything else in this Agreement, the Purchaser is solely responsible for the acts or omissions of any Purchaser, including any liability for moneys owing to the Service Provider. For the avoidance of doubt, the Service Provider may only enforce this Agreement against the Purchaser.



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## **5 Performance of Services**

### **5.1 Status of Service Provider**

The Service Provider warrants that there is no legal impediment to its provision of the Services on the terms set out in this Agreement.

### **5.2 Scope of Services**

The Service Provider must provide the Services set out in the Purchase Order.

### **5.3 Purchaser Requirements**

The Service Provider must:

- (a) ensure that the Services comply with the Service Levels as specified in the Agreement; and
- (b) comply with reasonable directions given by the Purchaser in discharging its obligations under this Agreement.

### **5.4 Compliance with Service Levels**

In the event that the Agreement identifies Service Levels to be met by the Service Provider, the Service Provider acknowledges that:

- (a) a failure to comply with the Service Levels is a breach of this Agreement;
- (b) the Purchaser's remedy will be determined by reference to these Standard Marketing Services Terms.

### **5.5 Quality of Service**

The Service Provider must:

- (a) provide the Services in a proper, timely and efficient manner using the standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;
- (b) ensure the highest quality of work and the delivery of the Services with the utmost efficiency;
- (c) act in good faith and in the best interests of the Purchaser;
- (d) keep the Purchaser informed of all matters of which it ought reasonably be made aware, and provide such information in relation to the provision of the Services as may reasonably be required by the Purchaser; and
- (e) fully comply with its obligations and duties under this Agreement.

### **5.6 Preparation of Project Plan**

If requested in the Request for Quote, the Service Provider must prepare a Project Plan (including relevant milestones) and submit it to the Purchaser for approval by the date specified in the Purchase Order.

### **5.7 Approval of Project Plan**

If the Service Provider is required to submit a Project Plan, the Purchaser must review it promptly. The Service Provider must accommodate any requests for alteration reasonably made by the Purchaser in order to satisfy the requirements of this Agreement.

### **5.8 Inability to provide Services**

If, at any time during the Term, the Service Provider is unable or is likely to become unable, for whatever reason, to provide any or all of the Services, the Service Provider must immediately notify the Purchaser of that fact.

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## 5.9 Service Provider to provide equipment

The Service Provider must provide, at its cost, any and all equipment (including computer hardware and software and any ancillary support) necessary for the performance of the Services. Without limiting the foregoing, the Service Provider must provide the equipment specified in the Purchase Order.

## 5.10 Time of the essence

Time will be of the essence in the performance of this Agreement.

# 6 Personnel

## 6.1 Provision of Personnel

The parties will each utilise such Personnel as are necessary to enable them to fulfil their respective obligations under this Agreement. Each party must ensure that the Personnel which it utilises pursuant to this clause has the requisite skills and experience.

## 6.2 Entry onto Purchaser's Premises

The Service Provider must:

- (a) provide or procure the provision of such information as can be lawfully provided and which is reasonably requested by the Purchaser concerning the Personnel it proposes to bring onto the Purchaser's premises for the purposes of this Agreement;
- (b) provide suitable replacement Personnel should the Purchaser, on reasonable grounds, deny access to or request removal of any Personnel; and
- (c) ensure its Personnel, when on the Purchaser's premises or when accessing the Purchaser's facilities and information, comply as necessary with the reasonable requirements and directions of the Purchaser with regard to conduct, behaviour, safety and security (including submitting to security checks as required and complying with any obligation imposed on the Purchaser by law).

## 6.3 Key Personnel

- (a) Where Personnel are specified by the Service Provider and acknowledged by the Purchaser as being responsible for the performance of key roles or tasks under this Agreement, the Service Provider must provide those individuals to fulfil those tasks.
- (b) If, notwithstanding **clause 6.3(a)**, a specified individual is unavailable at any time, the Service Provider must promptly advise the Purchaser and propose a substitute.
- (c) Any substitute Personnel proposed in accordance with **clause 6.3(b)** must be approved by the Purchaser in writing and will not be Key Personnel until the Purchaser provides such approval.
- (d) The Purchaser may not unreasonably withhold its approval of a substitute under **clause 6.3(c)** but the Purchaser may give its approval subject to such conditions as the Purchaser reasonably considers necessary to protect the Purchaser's interests under this Agreement.

# 7 Formation of the Agreement

- (a) The parties will complete and sign the Purchase Order following the exchange between the Purchaser and the Service Provider of the Request for Quote and the Supplier Proposal, the parties will complete and sign the Purchase Order.
- (b) The parties will be bound by this Agreement on and from the date stated in the Purchase Order.
- (c) The Agreement will consist of:

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- (i) the Standard Marketing Services Terms;
  - (ii) the Schedules to the Standard Marketing Services Terms;
  - (iii) the Purchase Order;
  - (iv) the Supplier Proposal;
  - (v) the **Request for Quote**; and
  - (vi) any other document that is expressly incorporated by reference by the documents referred to in **paragraphs (i) to (v)** above.
- (d) Where there is inconsistency between the terms of two or more documents referred to in **clause 7(c)**, the terms of the document in highest on the list will prevail.

## 8 Performance Management and Monitoring

The Purchaser may at any time conduct performance reviews to evaluate, monitor or review the Service Provider's performance and compliance with this Agreement. The Service Provider must participate and cooperate in any such performance reviews.

## 9 Access to records

### 9.1 Service Provider to retain records

The Service Provider must, for a period of seven years after the Term, keep true and particular accounts and records of:

- (a) all Services supplied under this Agreement; and
- (b) all associated records including:
  - (i) records of purchase of Services by the Service Provider; and
  - (ii) all supporting materials used to generate and substantiate invoices submitted in respect of Services supplied under this Agreement.

Without limitation to the foregoing, the Service Provider must comply with, and must follow any reasonable directions by the Purchaser which are relevant to, any applicable Commonwealth, State or Territory legislation relating to archival requirements

### 9.2 Right to access and audit

- (a) The Purchaser or its duly authorised representatives will have the right, after giving reasonable notice at any time during business hours, to inspect and/or audit the accounts and records of the Service Provider relating to the provision of Services, and of all other matters relevant to the calculation of the Rates and/or Fees. Such representatives will be entitled (at the expense of the Purchaser) to take copies of or extracts from any such records.
- (b) The right of access and audit granted under to **clause 9.2(a)** may be exercised by the a Purchaser at any time during the Term or in the seven year period following the expiry of the Term.
- (c) For the avoidance of doubt, each party will bear its own costs of conducting or participating in an audit under **clause 9.2(a)**.

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## 10 Fees and Rates

### 10.1 Fees and Rates

The Fees and/or Rates payable in respect of this Agreement are specified in the Purchase Order.

### 10.2 Invoicing

- (a) The Service Provider must submit to the Purchaser a tax invoice or tax invoices in respect of the Services provided under this Agreement:
  - (i) as soon as practicable after the completion of the Services; or
  - (ii) as otherwise provided for in the relevant Purchase Order.
- (b) A tax invoice submitted for payment pursuant to **clause 10.2** must contain the information necessary to be a tax invoice for the purposes of the *A New Tax System (Services and Services Tax) Act 1999* (Cth) in addition to the following:
  - (i) Purchaser Order Reference Number;
  - (ii) the Service Provider's name;
  - (iii) the Service Provider's ABN;
  - (iv) the Purchaser's ABN and address;
  - (v) the date of issue of the tax Invoice;
  - (vi) details of the Rates or Fees and expenses including the items to which they relate;
  - (vii) the total amount payable (including GST);
  - (viii) the GST amount shown separately; and
  - (ix) any other information specified in the Purchase Order.

All invoices must be sent to the person(s) (if any) specified in the relevant Purchase Order, to the address specified in the Purchase Order.

### 10.3 Payment of invoice

- (a) Subject to the remainder of this **clause 10.3**, the Purchaser will pay the invoiced amount to the Service Provider within 30 days of receipt of the invoice. Payment may be effected by electronic funds transfer or any other manner agreed by the parties from time to time.
- (b) The Purchaser's obligation to pay the Service Provider the Fees and/or Rates specified in an invoice is subject to performance of the Services in the relevant period to the Purchaser's reasonable satisfaction.
- (c) An invoice will not be paid until such time as the invoice is certified for payment by the Authorised Representative of the Purchaser. An invoice will not be certified for payment unless the Authorised Representative of the Purchaser is satisfied that it is correctly calculated with respect to the Services that are the subject of this Agreement and the Service Provider is entitled to claim payment.
- (d) If the Authorised Representative of the Purchaser disputes the invoiced amount (whether in whole or in part) for any reason, the Purchaser must pay the undisputed amount of such invoice (if any), and notify the Service Provider of the amount the Purchaser believes is due for payment. If the Purchaser and the Service Provider are unable to agree on the balance of the invoiced amount, the dispute will be referred for determination in accordance with **clause 21**.
- (e) Payment of an invoice is **not** to be taken as:

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- (i) evidence or an admission that the Services have been provided in accordance with the Service Levels and otherwise in accordance with this Agreement and the applicable Purchase Order;
  - (ii) evidence of the value of the Services supplied; or
  - (iii) an admission of liability,
- but must be taken only as payment on account.
- (f) In the event of a dispute as to whether an amount is payable pursuant to an invoice (whether under **clause 10.3**) or otherwise), the Purchaser may withhold the disputed portion pending resolution of the dispute but must pay the undisputed portion within 30 days.

## 10.4 Fair payment

- (a) A Purchaser will, on demand by the Service Provider, pay simple interest on a daily basis on any overdue amount, at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* (Vic).
- (b) For the purposes of **clause 10.4(a)**, **overdue amount** means an amount (or part thereof) that:
  - (i) is not, or is no longer, disputed in accordance with this Agreement;
  - (ii) is due and owing under a tax invoice (as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) properly rendered by the Service Provider in accordance with this Agreement; and

has been outstanding for more than 30 days from the date of receipt of the invoice or the date that the amount ceased to be disputed, as the case may be.

## 10.5 Expenses

Expenses or other disbursements may only be charged by the Service Provider in accordance with the Purchase Order.

# 11 Competitive pricing

## 11.1 Competitive pricing principles

The Purchaser and the Service Provider agree that it is their common intention that the Rates and Fees will be (and will remain, for the term of the Agreement) commercially competitive in terms of:

- (a) the prices offered by the Service Provider to other customers whose orders for services are comparable to the orders for Services under this Agreement; and
- (b) prices, and terms and conditions, offered by other service providers in the market for services which are the same as or equivalent to the Services.

## 11.2 Most favoured pricing

The Service Provider must ensure at all times during the Term that the Rates and Fees are no less favourable than any rates and fees at which the Service Provider provides or offers to provide services that are equivalent or similar to the Services to any other customer of the Service Provider whose orders of services are of a comparable volume to those placed by Purchasers under this Agreement.

# 12 Failure to perform

- (a) Without limiting any other clause of this Agreement, or any other remedy a Purchaser may have, if the Service Provider fails to provide or perform any of the Services in accordance with the requirements of this Agreement (including, without limitation any

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requirements stated in the Purchase Order) and the applicable Service Levels, the relevant Purchaser will not be required to pay for those Services and may, by notice in writing to the Service Provider, require the Service Provider to:

- (i) remedy any default (if the default is capable of being remedied) at the Service Provider's own expense; or
- (ii) re-perform the Services (if the Services are capable of being re-performed by the Service Provider),

within the time specified in the notice (which must be reasonable having regard to the nature of the Services).

- (b) If the remedied or re-performed Services are remedied or re-performed in accordance with the applicable Service Levels and otherwise to the satisfaction of the Purchaser, then the Purchaser will pay the applicable Rates or Fees for those remedied or re-performed Services (which the parties acknowledge may be less than the cost to the Service Provider of remedying or re-performing the Services).
- (c) If the default referred to in **clause 12(a)** is not capable of being remedied or the Services are not capable of being re-performed, or the Service Provider fails within the time specified to remedy the default or re-perform the Services, the Purchaser may either:
  - (i) remedy that default or re-perform the Services itself; or
  - (ii) have the Services remedied or re-performed by a third party,

and in either case, the Service Provider must pay the reasonable costs incurred by the Purchaser in doing so.

## 13 Liability

- (a) The Service Provider must indemnify the Purchaser and each of its officers, employees and agents (**Indemnified Party**) against any loss, damage, claim, action or expense (including legal expense) which any Indemnified Party suffers as a direct or indirect result of any of the following:
  - (i) a breach of this Agreement by the Service Provider, including any failure to provide the Services in accordance with this Agreement;
  - (ii) any warranty given by the Service Provider under this Agreement (including any warranty given in a Purchase Order) being incorrect or misleading in any way; or
  - (iii) any negligent act or failure to act by the Service Provider or any of the Service Provider's employees, agents, officers or sub-contractors,

except to the extent that any such loss, damage, claim, action or expense is caused by the negligence or other wrongful act or omission of a Purchaser, its employees or agents.

- (b) If any indemnity payment is made by the Service Provider under this **clause 13**, the Service Provider must also pay to the Indemnified Party an additional amount equal to any tax which is payable by the Indemnified Party in respect of that indemnity payment.
- (c) If the Service Provider fails to meet any date for delivery of the Services as specified in a Purchase Order, the Service Provider must pay to the Purchaser any liquidated damages in accordance with the Purchase Order.

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## 14 Warranties

The Service Provider warrants to the Purchaser that:

- (a) the provision of the Services will be carried out with all due care and skill and in accordance with all applicable standards, principles and practices;
- (b) the Service Provider has the accreditation or membership of professional or other bodies in relation to the provision of the Services as set out in the Supplier Proposal for the provision of the Services and that it will use its best endeavours to maintain such accreditation or membership during the Term;
- (c) it and its employees, agents and contractors are appropriately qualified and have the requisite knowledge, skill and expertise to provide the Services;
- (d) whilst on premises owned or controlled by the Purchaser, the Service Provider and its employees, agents and contractors will at all times comply with the Purchaser's lawful directions and policies of which the Service Provider is notified or is otherwise aware, including any applicable occupational health and safety and security policies;
- (e) where the Purchaser has, either expressly or by implication, made known to the Service Provider any particular purpose for which the Services are required, the Services will be performed in such a way as to achieve that result;
- (f) the provision of the Services will not infringe any right of any third party (including, without limitation, any intellectual property right) or any Laws;
- (g) all representations made by the Service Provider in or in connection with Supplier Proposal were and remain accurate.

## 15 Change in Control

- (a) The Service Provider must notify the Purchaser in writing of any change in Control of the Service Provider (or of the ultimate holding company of the Service Provider) within 7 days after that change occurs (**Notice**).
- (b) The Purchaser may, upon receiving the Notice, in its absolute discretion by notice in writing to the Service Provider, terminate this Agreement; such termination to take effect at any time within the immediately succeeding 12 months after the Purchaser receives the Notice.

## 16 Insurance

### 16.1 Service Provider to maintain insurance

- (a) The Service Provider must (and must ensure that any sub-contractors appointed by it under **clause 2**) obtain and maintain for the Term the following insurances:
  - (i) a broad form public liability insurance to the value of at least \$500,000 per claim;
  - (ii) professional indemnity insurance to the value of at least \$250,000 per claim, subject to:
    - (A) if the Purchaser requires it, the Service Provider must increase its professional indemnity insurance to any amount specified by the Purchaser up to \$5 million per claim; and
    - (B) the Purchaser's exercise of its right under **clause 16.1(ii)(A)** is an option which may be exercised entirely at the Purchaser's discretion; and
  - (iii) any other insurance required by law.

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- (b) The Service Provider must provide the Purchaser with evidence of the currency of any insurance it is required to obtain on receipt of the **Request for Quote** and otherwise on request by the Purchaser at any time during the Term.
  - (c) Where any insurance the Service Provider is required to obtain and maintain expires during the term of a Purchase Order (**Initial Insurance**), the Service Provider must provide the Purchaser with evidence of the currency of relevant replacement insurance prior to the expiration of the Initial Insurance.
  - (d) Any insurance obtained pursuant to **clause 16.1** must be:
    - (i) taken out with an insurer acceptable to the Purchaser; and
    - (ii) on terms (including any excess) which are acceptable to the Purchaser.

## **16.2 Additional insurance amounts**

The Service Provider acknowledges that, in addition to an increase under **clause 16.1(a)(ii)(A)**, the Purchaser may, depending on the value or perceived risk of the Services the subject of a **Request for Quote**, request that the Service Provider increase its insurance limits. The Service Provider acknowledges that it is not obliged to agree to such a request provided that any such the Service Provider acts reasonably in refusing the request.

## **16.3 Absence of insurance**

The Service Provider must immediately advise the Purchaser if at any time during the Term of this Agreement the Service Provider ceases to have the benefit of an insurance policy as required in **clause 16.1** or **clause 16.2**.

# **17 Termination**

## **17.1 Termination of Agreement**

The Purchaser may terminate this Agreement by notice in writing to the Service Provider (such termination to take effect at any nominated time within the immediately succeeding 12 months) if:

- (a) the Service Provider fails to provide the Services in accordance with the Service Levels or otherwise in accordance with the requirements of this Agreement;
- (b) the Purchase Order or the Service Levels give the Purchaser the right to do so;
- (c) the Service Provider fails to remedy, to the satisfaction of the Purchaser, any breach of this Agreement (which in the reasonable opinion of the Purchaser is able to be remedied) within 14 days after the date on which the Purchaser issues the Service Provider a written notice requiring the Service Provider to remedy the breach;
- (d) the Service Provider breaches any material provision of this Agreement and in the reasonable opinion of the Purchaser such breach cannot be remedied;
- (e) the Service Provider or any of its employees, agents or sub-contractors are guilty of fraud, dishonesty or any other serious misconduct;
- (f) during the Term there is a change in governmental policy that affects the Purchaser's ability to perform its obligations under this Agreement or which, in the reasonable opinion of the Purchaser, has the effect of making the provision of Services under this Agreement unviable, inappropriate or otherwise unsuitable;
- (g) the Service Provider commits any act or does any thing that is contrary to prevailing community standards, or is otherwise regarded by the public as unacceptable or which brings the reputation of the Service Provider into disrepute and as a consequence the Purchaser believes that its continued association with the Service Provider will be prejudicial or otherwise detrimental to the reputation of the State; or



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- (h) if the Service Provider:
    - (i) being a partnership, company or other composite body undergoes a change in its structure which, in the reasonable opinion of the Purchaser, limits the capacity of the Service Provider to provide the Services or otherwise preclude or adversely affect the Service Provider's ability to carry out its obligations and duties under this Agreement; or
    - (ii) goes into liquidation or a receiver and manager or mortgagee's or chargee's agent is appointed or becomes subject to any form of insolvency administration or arrangement, or in the case of an individual, becomes bankrupt or enters into a scheme or arrangement with creditors.

## 17.2 Termination of Agreement without cause

- (a) The Purchaser may terminate this Agreement without cause by giving the Service Provider not less than 14 days notice in writing.
- (b) For the avoidance of doubt, where this Agreement is terminated by a Purchaser pursuant to **clause 17.2**, the Purchaser will pay to the Service Provider all amounts owing in respect of Services undertaken, and work in progress as at the date of termination, provided that such Services or work in progress have, in the reasonable opinion of the Purchaser, been performed in accordance with the Service Levels and the requirements of this Agreement (including, without limitation, any requirements stated in the Purchase Order).

## 17.3 Consequences of termination or expiry

Termination or expiry of this Agreement will not prejudice any right of action or remedy which may have accrued to either party to it prior to termination or expiry (as the case may be).

# 18 Intellectual Property

- (a) The Background Intellectual Property of each party remains the property of that party.
- (b) The Service Provider will own all Project Intellectual Property unless **clause 18(c)** applies.
- (c) The Purchaser will give written notice to the Service Provider prior to the delivery of all or part of the Services, if the Purchaser considers that all or part of the Project Intellectual Property arising from the delivery of the Services should be owned by the Purchaser.
- (d) If the Purchaser gives written notice to the Service Provider under **clause 18(c)**, the Project Intellectual Property specified in the notice is owned by the Purchaser.
- (e) The Service Provider grants, and the Purchaser accepts, a Licence over:
  - (i) the Project Intellectual Property not owned by the Purchaser;
  - (ii) the Background Intellectual Property; and
  - (iii) any Intellectual Property of a third party, if any, to the extent needed to allow the Purchaser to enjoy the full benefit of the Services and the Agreement.
- (f) At the request of the Purchaser, the Service Provider will provide the Purchaser with copies of all Licensed materials and Intellectual Property and in a way that allows the Purchaser to exercise the Purchaser's rights under the Licence.
- (g) The Service Provider warrants that it has the right to grant the Licences referred to in **clause 18(e)**.

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- (h) The Service Provider will obtain all consents needed for any Licence, including in relation to any Moral Right. For the purposes of **clause 18(e)** 'Moral Right' has the meaning set out in section 189 of the Copyright Act 1968 (Cth).
  - (i) The Service Provider will properly manage the Project Intellectual Property to allow the Purchaser to enjoy the full benefit of the Services and this Agreement, which may include taking any necessary action to:
    - (i) register, maintain the registration of, protect, manage, exploit and (as appropriate) commercialise the Project Intellectual Property for the benefit of the Victorian public;
    - (ii) maintain, improve, enhance and develop the Project Intellectual Property to the fullest extent reasonably necessary to maintain its usefulness and appropriateness to the Service Provider and the Purchaser for the delivery of the Services;
    - (iii) use, reproduce, publish, adapt, disseminate, communicate to the public, broadcast, and perform the Project Intellectual Property for the benefit of the Victorian public; and
    - (iv) comply with all applicable Departmental or other Victorian government policies in respect of the Project Intellectual Property.
  - (j) The Service Provider will not accept co-funding, or involve any person in the delivery of the Services, on terms that would jeopardise or limit any Licence to be granted to the Purchaser without obtaining the Service Provider's prior agreement and consent in writing.

## 19 Accident compensation

The Service Provider must ensure that, in respect of its employees and contractors and any other persons engaged by the Service Provider to provide the Services, it:

- (a) complies with the provisions of the *Accident Compensation Act 1985* (Vic);
- (b) insures against its liability to pay compensation whether under legislation or otherwise; and
- (c) produces to the Purchaser on request any certificates or like documentation required by the *Accident Compensation Act 1985* (Vic).

## 20 Confidentiality and privacy

### 20.1 Use of Confidential Information

- (a) The Service Provider must (and must ensure that its employees, agents and advisers):
  - (i) use and reproduce Confidential Information only to perform the Service Provider's obligations under this Agreement (including, without limitation, any obligations stated in the Purchase Order); and
  - (ii) not disclose or otherwise make available Confidential Information other than to personnel who have a need to know the information to enable the Service Provider to perform the Service Provider's obligations under this Agreement (including, without limitation, any obligations stated in the Purchase Order).
- (b) All Confidential Information will remain the property of the Purchaser and all copies or other records containing the Confidential Information (or any part of it) must be returned by the Service Provider to the Purchaser on termination or expiry of this Agreement.

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- (c) The Purchaser will be entitled (in addition to any other remedy it may have) to seek an injunction or other equitable relief with respect to any actual or threatened breach by the Service Provider of this **clause 20** and without the need on the part of the Purchaser to prove any special damage.
  - (d) The Service Provider must, if requested in writing by the Purchaser, require any person to whom Confidential Information will be disclosed, to execute a Deed of Confidentiality in the form of **Schedule 4** at the cost of the Service Provider. Such Deeds of Confidentiality must be made available at the request of the Purchaser (as the case may be).

## **20.2 Disclosure of Service Provider's information**

- (a) Subject to **clause 20.2(b)**, the Purchaser must keep confidential all Confidential Information of or relating to the Service Provider that is provided to it, whether under this Agreement, the Supplier Proposal or in accordance with any requirements of the Supplier Rules of Use, by or on behalf of the Service Provider.
- (b) The Service Provider hereby acknowledges and/or consents to:
  - (i) the Purchaser (or such other State government department, administrative office or other entity (including any Budget Sector Agency or Government Owned Entity) as may, from time to time, be responsible for doing so) publishing, whether on the internet or otherwise, all such information as is necessary to comply with the requirements of the Contracts Publishing System;
  - (ii) the Purchaser making available to the Auditor-General all information that is requested by the Auditor-General;
  - (iii) the Purchaser making available all information in relation to the Service Provider or the Agreement (including information on the Register) as may be required to comply with its obligations under the *Freedom of Information Act 1982 (Vic)*; and
  - (iv) otherwise to satisfy any public disclosure obligations of the Purchaser.

## **20.3 Privacy**

The Service Provider acknowledges that it will be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Service Provider under or in connection with this Agreement in the same way and to the same extent as the State or the Purchaser would have been bound had it been directly done or engaged in by the State or the Purchaser.

# **21 Disputes**

## **21.1 Parties to meet**

If any dispute arises under or in connection with this Agreement (**Dispute**) which Dispute is not able to be resolved by the parties within 14 days, the nominated senior executive officer (or equivalent) of each of the relevant Purchaser (on the one hand) and the Service Provider (on the other hand) will promptly meet and discuss in good faith with a view to resolving such Dispute.

## **21.2 Mediation**

- (a) If any Dispute is unable to be resolved in accordance with **clause 21.1** within 14 days, the parties agree to endeavour in good faith to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (**ACDC**) before having recourse to arbitration or litigation.
- (b) The mediation will be conducted in accordance with the mediation guidelines of ACDC (**Guidelines**) which set out the procedures to be adopted, the process of

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selection of the mediator and the costs involved and the terms of those Guidelines are incorporated in this Agreement.

### **21.3 Arbitration or litigation**

- (a) If the parties fail to settle any Dispute in accordance with **clause 21.2**, the parties may agree to submit the Dispute for resolution to final and binding arbitration under the Rules of Arbitration of the Institute of Arbitrators and Mediators Australia by one or more arbitrators appointed in accordance with those rules.
- (b) If the parties do not agree to refer the Dispute to arbitration in accordance with **clause 20.3(a)**, either party may submit the Dispute for resolution to the exclusive jurisdiction of the Courts of Victoria, Australia.

### **21.4 Performance during Dispute resolution**

The parties to a Dispute will continue to perform their respective obligations under this Agreement (including, without limitation, any obligations stated in the Purchase Order), pending the resolution of a Dispute under this **clause 21**.

### **21.5 Interlocutory relief**

Nothing in this **clause 21** is to be taken as preventing any party to a Dispute from seeking interlocutory relief in respect of such dispute.

## **22 Sub-contracting**

- (a) Except as expressly provided in this Agreement, the Service Provider must not sub-contract to any third person any of its obligations under this Agreement without the prior written consent of the Purchaser, which consent may be given or withheld by the Purchaser in its absolute discretion.
- (b) The Service Provider must ensure that any person engaged by it complies with all obligations imposed on the Service Provider by this Agreement. The Service Provider will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under this Agreement and will be liable for all acts and omissions of a sub-contractor as though they were the actions of the Service Provider itself.

## **23 Conflict of Interest**

- (a) The Service Provider warrants to the Purchaser that it does not, and will ensure that its employees, agents and contractors do not, hold any office or possess any property, are not engaged in any business, trade or calling and do not have any obligations by virtue of any contract whereby, directly or indirectly, duties or interests are or might be created in conflict with or might appear to be created in conflict with their duties and interest under this Agreement.
- (b) The Service Provider must promptly inform the Purchaser of any matter which may give rise to an actual or potential conflict of interest at any time during the term, and comply with any reasonable directions given by the Purchaser in terms of dealing with the conflict.
- (c) The Service Provider acknowledges and agrees that failure to comply with this **clause 23** will constitute a breach of a fundamental term of this Agreement.

## **24 Compliance with Law & Policy**

The Service Provider must, in performing its obligations under this Agreement, comply with all Laws affecting or applicable to the provision of Services by the Service Provider.

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Without limitation to the foregoing, the Service Provider must comply with the provisions set out in **Schedule 1**.

## 25 Access and safety

### 25.1 Access to premises

If the Service Provider requires access to the premises of a Purchaser in connection with the provision of the Services, that Purchaser will, subject to its usual security requirements, permit the Service Provider reasonable access to the premises at such times as may be reasonably necessary to enable the Service Provider to provide the Services.

### 25.2 Obligations

When the Service Provider enters the premises of a Purchaser, the Service Provider must and must ensure that its employees, agents and contractors use all reasonable endeavours to:

- (a) protect people and property;
- (b) prevent nuisance and unnecessary noise and disturbance; and
- (c) act in a safe and lawful manner and comply with the safety standards and policies of the Purchaser (as notified to the Service Provider).

### 25.3 No occupier's liability

- (a) A Purchaser and its officers, employees, agents and invitees will not be responsible for any damage done to the Service Provider's property or to that of any of the Service Provider's officers, employees, agents or sub-contractors or for any personal injury sustained by any of the Service Provider's employees, agents or sub-contractors occurring on the Purchaser's premises as a result of:
  - (i) the negligence or recklessness of such employee, agent or sub-contractors; or
  - (ii) if such employee, agent or sub-contractor has failed to comply with the occupational health and safety and security policies of the Purchaser (as notified to the Service Provider).

The Service Provider unconditionally and irrevocably releases the Purchaser and its employees, agents and invitees from all such responsibility and agrees to indemnify each Purchaser, its officers, employees, agents and invitees (**Indemnified Party**) against any loss that the Indemnified Party may suffer as a result of any third party bringing an action against that Indemnified Party in relation to any such circumstances, except to the extent that such circumstances were caused directly as a result of the Indemnified Party's negligence.

## 26 GST

### 26.1 Definitions

Terms used in this clause have the same meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### 26.2 Consideration is exclusive of GST

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.

### 26.3 Recipient to pay an additional amount

If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply subject to the recipient receiving a valid tax

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invoice in respect of the supply at or before the time of payment. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this Agreement.

#### **26.4 Reimbursement**

If this Agreement requires a party to pay for, reimburse or contribute to any expense, loss or outgoing (reimbursable expense) suffered or incurred by another party, the amount required to be paid, reimbursed or contributed by the first party will be the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense plus any GST payable by the other party.

### **27 Staff Costs**

- (a) The Service Provider must indemnify and keep indemnified the Purchaser from and against all liability for the Staff Costs in any way relating to the Services.
- (b) If the Purchaser is or becomes liable to pay any Staff Costs, the Purchaser may deduct the amount of its liability for the Staff Costs from any amount due by the Purchaser to the Service Provider, whether under this Agreement or otherwise.

### **28 Notices**

#### **28.1 Giving a communication**

A notice, demand, certification, process or other communication relating to this Agreement must be in writing in the English language, and may (in addition to any other method permitted by law) be sent by pre-paid post, pre-paid courier, facsimile, or by electronic mail as follows:

- (a) to the Purchaser: at the address which is set out in the Purchase Order; and
- (b) to the Service Provider: at the address which is set out in the Purchase Order.

#### **28.2 Change of Service Provider's address**

- (a) If the Service Provider's contact details change, it must notify the Purchaser.
- (b) The Service Provider's email address must at all times remain generic and must not be specific to an individual.

#### **28.3 Time of delivery**

A notice or document is taken to be delivered or served as follows:

- (a) in the case of delivery in person or by courier, when delivered;
- (b) in the case of delivery by post, two Business Days after the date of posting;
- (c) in the case of facsimile transmission, on receipt by the sender of a transmission report from the despatching machine showing: the date of transmission, the relevant number of pages, the correct telephone number of the destination facsimile machine and the result of the transmission as satisfactory; and
- (d) in the case of electronic mail, if the receiving party has agreed to receipt in that form under this Agreement, and the message is correctly addressed to and successfully transmitted to that party's electronic mail address (e-mail address), when acknowledgment of receipt is recorded on the sender's computer.

#### **28.4 After hours communications**

If any notice or document is delivered or deemed to be delivered:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

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it is taken as having been delivered at 9.00 am on the next day which is not a Saturday, Sunday or public holiday in that place.

## 29 General

### 29.1 Legal costs

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

### 29.2 Amendment

- (a) Any variation to the terms and conditions of this Agreement must be recorded in the Purchase Order and must be signed by the parties.
- (b) A Purchase Order may only be varied or replaced by a document executed by the relevant Purchaser and the Service Provider.

### 29.3 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a party of a right relating to this Agreement or does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right by the first party.

### 29.4 Severability

- (a) The parties agree that a construction of this Agreement that results in all provisions being enforceable is to be preferred to a construction that does not so result.
- (b) Notwithstanding **clause 29.4(a)**, any provision of this Agreement which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable, and, if that is not possible, the provision shall, to the extent that it is capable, be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

### 29.5 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

### 29.6 Governing law and jurisdiction

- (a) This Agreement is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

### 29.7 Entire understanding

- (a) This Agreement, together with the **Request for Quote** and Supplier Proposal, contains the entire understanding between the parties as to the subject matter of the Purchase Order.
- (b) Except as otherwise provided in **clause 29.7(a)**:
  - (i) all previous and future negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and are of no effect; and

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- (ii) no oral explanation or information provided either prior to or after the date of this Agreement by any party to another:
    - (A) affects the meaning or interpretation of this Agreement; or
    - (B) constitutes any collateral agreement, warranty or understanding between any of the parties.

## **29.8 Relationship of parties**

This Agreement is not intended to create a partnership, joint venture or agency relationship between the Purchaser on the one hand and the Service Provider on the other hand.

## **29.9 Survival**

**Clauses 9, 13, 16, 18, 20 and 21** of this Agreement, and any other provisions expressly stated to survive termination or expiry of this Agreement, survive the termination or expiry of this Agreement and may be enforced at any time.



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# Schedule 1

## Compliance with Employment and Ethical Purchasing Policy

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In performing its obligations under this Agreement, the Service Provider must comply with the following (without limiting any of its other obligations under this Agreement):

### 1 Employment policy

- 1.1 The Service Provider must not breach the *Equal Opportunity Act 2010* (Vic) or the *Disability Discrimination Act 1992* (Cth) during the Term.
- 1.2 The Service Provider and any person engaged in the provision of the Services must not:
  - (a) engage in unethical work practices; or
  - (b) engage employees or sub-contracted workers upon terms and conditions which do not meet industry standards generally applicable in Victoria.
- 1.3 Where a federal industrial award may apply to the capacity in which an employee is engaged by the Service Provider, or by a sub-contractor, in the provision of the Services, the rates of pay and conditions on which that employee is engaged must be no less beneficial to the employee than the rates and conditions under that award.

### 2 Ethical Purchasing Policy

- 2.1 Without limiting or derogating from the Service Provider's obligation to comply with any Law, the Service Provider must satisfy the Ethical Employment Standard at all times during the Term.
- 2.2 The Purchaser may make an Adverse Assessment if, at any time during the Term of this Agreement:
  - (a) a court, tribunal, commission or board makes a finding of serious breach of an Applicable Industrial Instrument against the Service Provider or convicts the Service Provider of a serious offence under Applicable Legislation; or
  - (b) a court, tribunal, commission or board makes a finding of a breach of an Applicable Industrial Instrument against the Service Provider or convicts the Service Provider of an offence under Applicable Legislation that is part of a pattern of repeated or ongoing breaches or offences; or
  - (c) the Service Provider fails to meet its disclosure obligations under **paragraph 2.3**.
- 2.3 The Service Provider must, on request by the Purchaser and within the time period required by the Purchaser in writing (which must not be less than 30 days) provide an up-to-date Ethical Employment Statement setting out Full Details of:
  - (a) any adverse finding against the Service Provider by a court, tribunal, commission or board in respect of a breach of an Applicable Industrial Instrument;
  - (b) any conviction by a court, tribunal, commission or board of an offence committed by the Service Provider under Applicable Legislation; and
  - (c) any proceeding or prosecution against the Service Provider in respect of a breach of an Applicable Industrial Instrument or an offence under Applicable Legislation instituted since the date of this Agreement that has not previously been disclosed to the Purchaser.

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The up-to-date Ethical Employment Statement may, at the option of the Service Provider, also include details of remedial measures implemented to ensure future compliance with Applicable Industrial Instruments and Legislation.

2.4 The parties acknowledge and agree that:

- (a) if this Agreement is terminated pursuant to **paragraph 2.9**, the Service Provider's name and details (including its Australian Business Number) will be included in the Ethical Employment Reference Register for a period of 24 months from the date that termination takes effect;
- (b) Victorian Government departments will access the Ethical Employment Reference Register for the purpose of applying the Ethical Purchasing Policy; and
- (c) the inclusion of any details in the Ethical Employment Reference Register is one factor in the assessment process of whether a tenderer satisfies the Ethical Employment Standard, and will not automatically exclude the Service Provider from participation in future tender processes.

2.5 In connection with the requirements of the Ethical Purchasing Policy, the Service Provider must:

- (a) permit an accountant or auditor on behalf of the Purchaser from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Service Provider for the purposes of this Agreement; and
- (b) give such accountant or auditor all reasonable assistance to facilitate the conduct of such audit or inspection.

Any information provided, or to which an accountant or auditor has access under this item, shall be treated as confidential information and shall not be used other than for the purposes of this Agreement or disclosed other than as required at law or to meet any requirements of the Parliament of Victoria.

2.6 The confidentiality obligations of the parties under this **paragraph 2** does not extend to:

- (a) information already in the public domain other than due to a breach of this Agreement;
- (b) any disclosure required by Law;
- (c) any disclosure reasonably required in order to comply with a request for information made by the Auditor-General of Victoria; or
- (d) information reasonably required in order to publish appropriate and comprehensive performance data relating to the provision of the Services under this Agreement.

2.7 Notwithstanding any other obligation in this Agreement, the Service Provider acknowledges that the Purchaser (or such other Victorian Government department as may be charged with the responsibility of monitoring compliance with the Ethical Purchasing Policy from time to time) may publish (whether on the internet or otherwise) the name of the Service Provider and the value of the Services to be provided under this Agreement, together with the conditions of this Agreement generally.

2.8 If at any time during the Term of the Agreement, the Purchaser notifies the Service Provider in writing that it has made an Adverse Assessment pursuant to **paragraph 2.2**, the Service Provider must, within 14 days of receipt of such notice, or such longer period agreed by the Purchaser, provide a statutory declaration from a director or company secretary of the Service Provider, setting out:

- (e) any additional information that in the opinion of the Service Provider is relevant to the Adverse Assessment, including the Service Provider's grounds for any objection to the Adverse Assessment;

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- (f) details of any information on which the Adverse Assessment is based that in the opinion of the Service Provider is incorrect, incomplete or otherwise unfairly prejudicial to the Service Provider; and
- (g) any existing or planned remedial measures that the Service Provider has taken or will be taking to prevent a breach or offence similar to the breach or offence on which the Adverse Assessment is based from recurring.
- 2.9 Following receipt of the statutory declaration or expiration of the period described in **paragraph 2.8**, whichever comes first, the Purchaser may, in its discretion, do one or more of the following:
- (a) request the Service Provider show cause as to why this Agreement should not be suspended or terminated with effect from 14 days; and/or
- (b) suspend the operation of this Agreement for a specified period of up to six months with 14 days' notice; and/or
- (c) terminate this Agreement with 14 days' notice.
- 2.10 In exercising its discretion under **paragraph 2.9**, the Purchaser must take into consideration:
- (a) whether the Service Provider has taken or will take measures that, in the reasonable opinion of the Purchaser, are commensurate with the breach or the offence on which the Adverse Assessment is based and can be reasonably expected to prevent such breach or offence from recurring; or
- (b) whether the Purchaser is otherwise satisfied that the Service Provider has shown good cause why this Agreement should not be suspended or terminated.
- 2.11 The remedies under **paragraph 2.9** are in addition to and do not limit any other rights or remedies of the Purchaser under this Agreement or otherwise at Law.
- 2.12 In this **paragraph 2**:
- Adverse Assessment** means an assessment by the Purchaser pursuant to the Ethical Purchasing Policy that, in the opinion of the Purchaser, the Service Provider does not satisfy the Ethical Employment Standard.
- Applicable Industrial Instruments** means an Award or Enterprise Agreement that specifically applies to the employees of the Service Provider and is binding on the Service Provider.
- Applicable Industrial Instruments and Legislation** means all Applicable Industrial Instruments and all Applicable Legislation.
- Applicable Legislation** means:
- (a) *Outworkers (Improved Protection) Act 2003* (Vic);
- (b) *Dangerous Goods Act 1985* (Vic);
- (c) *Equipment (Public Safety) Act 1994* (Vic);
- (d) *Occupational Health and Safety Act 2004* (Vic);
- (e) *Fair Work Act 2009* (Cth);
- (f) *Long Service Leave Act 1992* (Vic);
- (g) equivalent legislation in States and Territories other than Victoria; and
- (h) any other legislation designated by the Victorian Government as Applicable Legislation under the Ethical Purchasing Policy from time to time.
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**Award** means any award of the Fair Work Australia or any tribunal empowered to make industrial awards for Victorian employees or employees in any other State or Territory.

**Enterprise Agreement** means any certified agreement of Fair Work Australia or a State industrial department.

**Ethical Employment Reference Register** has the meaning given to that term in the Ethical Purchasing Policy.

**Ethical Employment Standard** means, in the context of this Agreement, the requirement for the Service Provider to demonstrate, to the reasonable satisfaction of the Purchaser, and in accordance with the requirements of the Ethical Purchasing Policy, that the Service Provider has, and will continue during the Term of this Agreement, to meet its obligations to its employees under Applicable Industrial Instruments and Legislation.

**Ethical Employment Statement** has the meaning given to that term in the Ethical Purchasing Policy.

**Ethical Purchasing Policy** means the Victorian Government's Ethical Purchasing Policy supporting fair and safe workplaces, which is published by the Victorian Government, as amended from time to time.

**Full details** means details of:

- (a) the nature of the breach or offence or alleged breach or offence;
- (b) any conviction recorded or adverse finding made in respect of the breach or offence;
- (c) any penalty or orders imposed by a court, tribunal, commission or board in respect of the breach or offence and the maximum penalty that could have been imposed under the Applicable Industrial Instruments and Legislation;
- (d) the name of the court, tribunal, commission or board, the State or Territory in which the proceeding or prosecution is brought, the date on which the proceeding or prosecution was commenced and the number or description assigned to the proceeding or prosecution by the court, tribunal, commission or board;
- (e) the name of the entity against which the finding or conviction was made or the proceeding or prosecution was initiated;
- (f) this Agreement; and
- (g) any further information regarding the matters set out in **paragraphs (a) to (f)** above that may be requested by the Purchaser.

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## SCHEDULE 2 - FORM OF PURCHASE ORDER FOR MARKETING SERVICES

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This Purchase Order is subject to, and incorporates the terms and conditions of, the Agreement for the provision of Marketing Services (**Agreement**) between the Purchaser and the Service Provider, which terms are published on the Website.

|   |  |
|---|--|
| <b>Commencement Date:</b>                               |  |
| <b>Expiry Date:</b>                                     |  |
| <b>Purchaser:</b>                                       |  |
| <b>Purchaser's Address:</b>                             |  |
| <b>Service Provider (Company Name):</b>                 |  |
| <b>Service Provider's ABN:</b>                          |  |
| <b>Service Provider's Address:</b>                      |  |
| <b>Date:</b>  |  |
| <b>Departmental/Agency Identifier (eg File Number):</b> |  |
| <b>Service Provider Identifier (eg File Number):</b>    |  |
| <b>Purchaser Purchase Order No:</b>                     |  |

*Terms used and not defined in this Purchase Order shall have the meaning given to them by the Standard Marketing Services Terms.*

*For the avoidance of doubt, the Standard Marketing Services Terms apply to this Purchase Order. However, Purchasers should review the key items below with reference to the Standard Marketing Services Terms, in order to identify any additional requirements which may be specific to your engagement. If any additional terms and conditions are required as part of the Agreement, they should be described below. Prompts have been provided for some of the major items below, however, the Purchaser must ensure to complete all relevant items where additional terms and conditions are required to those contained in the Standard Marketing Services Terms.*

- **Duration of Purchase Order and Extension Arrangements** (*clause 2 of Standard Marketing Services Terms*)

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- **Scope of Services** (*clause 5.2 of Standard Marketing Services Terms*)

|   |
|---|
| <i>Please insert final scope as agreed.</i> |
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- **Service Levels** (*clause 5.4 of Standard Marketing Services Terms*)

*Please insert project specific service levels.*

- **Preparation of Project Plan and Project Plan to be Approved-By Date** (*clause 5.6 of Standard Marketing Services Terms*)

*Please insert Project Plan (including relevant milestones) as agreed.*

- **Purchaser supplied equipment** (*clause 5.9 of Standard Marketing Services Terms*)

- **Access to Purchaser's Premises** (*clause 6.2 of Standard Marketing Services Terms*)

- **Key Personnel** (*clause 6.3 of Standard Marketing Services Terms*)

- **Fees & Rates** (*clause 10.1 of Standard Marketing Services Terms*)

*Please insert the agreed Fees and Rates.*

- **Invoice Requirements** (*clause 10.2 and 10.3 of Standard Marketing Services Terms*)

*Please insert any additional invoice requirements relevant to your internal processes.*

- **Expenses** (*clause 10.5 of Standard Marketing Services Terms*)

- **Warranties** (*clause 14 of Standard Marketing Services Terms*)

- **Additional Insurance Requirements** (*clause 16.2 of Standard Marketing Services Terms*)

- **Intellectual Property** (*clause 18 of Standard Marketing Services Terms*)

*Purchaser to identify the Project Intellectual Property, if any, to be owned by the Purchaser, such as logos, trademarks and training materials.*



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# Schedule 3

## Form of Supplier Proposal

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*This Supplier Proposal is pursuant to and subject to the Standard Marketing Services Terms and terms of the Purchase Order.*

**1. Organisational details**

*Formal Name:*

*Trading Name:*

*Address:*

*ABN:*

**2. Contact details**

*Name:*

*Position:*

*Phone Number:*

*Email:*

**3. Personnel and experience:** *The names of any personnel who would be assigned to the project, and briefly their roles and responsibilities, qualifications, and other professional experience relevant to the conduct of this study*

**4. Services.** *A description of the Services to be provided.*

**5. Service Levels:** *A description of the Service levels to be met by the Service Provider in delivering the Services.*

**6. Pricing:** *Please indicate your proposed competitive pricing for this project, detailing project fees, estimated hours and other expenses etc. (Note: you may not exceed the ceiling rate shown in your Marketing Online profile). Pricing must be inclusive of GST.*

**7. Conflicts of Interest:** *Declaration of any conflict of interest and how any conflict of interest may be managed.*

**8. Insurance Details:** *Please detail your insurance requirements including policy number, insurer, sum insured and expiry.*

**9. Other:** *Any other relevant information.*



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# Schedule 4

## Deed of Confidentiality

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DEED OF CONFIDENTIALITY made \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

BY *[insert name]* of *[insert address]* (the 'Covenantor')

IN FAVOUR OF *[insert Purchaser name]* (Purchaser)

### Introduction

- A. *[Insert name and ABN of Service Provider]* (the 'Service Provider') entered into an agreement with the Purchaser for the supply of services, effective *[Insert date of contract]* ('the Agreement').
- B. The Covenantor is an employee, agent or subcontractor of the Service Provider and provides services under or in connection with the Agreement.
- C. The Information to which the Covenantor will have access for the performance of Services under the Agreement is confidential.
- D. The Purchaser will allow the Covenantor access to this Information provided that its confidentiality can be maintained strictly and the Covenantor has entered into this Deed in order to acknowledge the conditions under which access to the Information will be granted.

This Deed now witnesses as follows:

- 1. In this Deed, unless the context otherwise requires or the contrary intention appears:
  - (a) The singular includes the plural and vice versa and words importing a gender include other genders.
  - (b) Terms importing natural persons include partnerships and bodies corporate.
  - (c) Other grammatical forms of defined words or phrases have corresponding meanings.
  - (d) Where a party comprises two or more persons, the provisions of this Deed that bind that party shall bind those persons jointly and severally.
  - (e) "Services" means all the services which the Covenantor will be involved in providing, whether directly or indirectly, in accordance with the Agreement.
  - (f) "Information" means all information or data however held, stored or recorded including drawings, plans, specifications, calculations, reports, models, concepts, source codes, files, computerised data, photographic recordings, audio or audio visual recordings and any information or data made available to the Covenantor for the purposes of the Covenantor's participation in providing the Services.
  - (g) A reference to a party in this Deed or any other document or agreement includes its successors and permitted assigns.
  - (h) Any capitalised terms used in this Deed not given a special definition in this Deed will have the same meaning as in the Agreement.
- 2. The Covenantor must treat as secret and confidential all Information to which the Covenantor has access or which is disclosed to the Covenantor during the course of carrying out the Services.

