



**Australian Government**

**Department of the Environment**

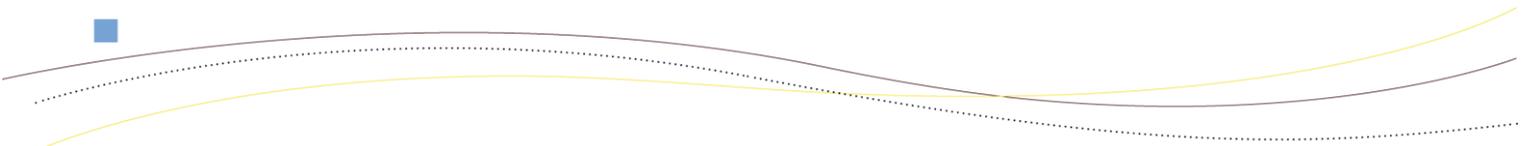
## **FUNDING AGREEMENT**

in relation to the  
development of business  
cases for prospective  
constraints measure  
projects

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Commonwealth of Australia as represented by  
the Department of the Environment

South Australian Department of Environment,  
Water and Natural Resources



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# Details

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## Parties

1. Commonwealth of Australia (**Commonwealth**) as represented by the Department of the Environment.
2. South Australian Department of Environment, Water and Natural Resources (ABN 36 702 093 234) (**Recipient**).

## Recitals

- A. The Murray-Darling Basin Plan 2012, agreed by the Australian Parliament in November 2012, specifies the sustainable level of diversions and extractions from surface and ground water resources to ensure the ongoing health and resilience of the environment. The Basin Plan requires that diversions and extractions are to be reduced to sustainable levels by 2019.
- B. In February 2013 the Australian Parliament made a special appropriation of \$1.77 billion to the Water for the Environment Special Account established under section 86AB(1) of the *Water Act 2007* (Cth) for a ten-year period from the 2014-15 financial year for:
  - (a) efficiency measure projects to deliver 450 gigalitres (billion litres) of additional environmental water (\$1.5 billion currently allocated); and
  - (b) easing or removing constraints on the ability to deliver environmental water to the environmental assets of the Murray-Darling Basin (\$200 million currently allocated), including up to \$5 million for Basin states to develop business cases for prospective constraints measure projects.
- C. The Funds contemplated under this Agreement are to be debited from the Water for the Environment Special Account for the purpose of improving or modifying any infrastructure (including bridges and roads) that constrains the delivery of environmental water to the environmental assets of the Murray-Darling Basin in order to ease or remove those constraints, as contemplated by section 86AD of the *Water Act 2007* (Cth).
- D. This Agreement records the terms and conditions on which financial assistance is granted by the Commonwealth to Basin States as contemplated by section 86AF of the *Water Act 2007* (Cth).

# Operative provisions

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## 1. Definitions and interpretation

### 1.1 Definitions

In this Agreement, except where the contrary intention is expressed, the following definitions are used:

<b>ABN</b>	has the same meaning as it has in section 41 of the <i>A New Tax System (Australian Business Number) Act 1999</i> (Cth).
<b>Aboriginal Tradition</b>	has the same meaning as it has in section 3 of the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> (Cth).
<b>Accounting Standards</b>	the standards of that name maintained by the Australian Accounting Standards Board (referred to in section 227 of the <i>Australian Securities and Investments Commission Act 2001</i> (Cth)) or other accounting standards which are generally accepted and consistently applied in Australia.
<b>Activity</b>	the activity to be undertaken by the Recipient using the Funds in accordance with this Agreement, as specified in the Activity Particulars.
<b>Activity Budget</b>	the budget detailing how the Recipient will spend the Funds and the proposed expenditure of such amounts for the purposes of conducting the Activity and otherwise performing obligations under this Agreement as specified in the Work Plan.
<b>Activity Generated Income</b>	any income earned or generated by the Recipient from its use of the Funds, including interest earned from the investment of the Funds, but does not include income earned or generated from the use of the Assets.
<b>Activity Material</b>	any Material created by the Recipient for the purpose of or as a result of performing its obligations under this Agreement, including Material forming part of an Activity Outcome.
<b>Activity Objectives</b>	as specified in the Activity Particulars.
<b>Activity Outcomes</b>	as specified in the Activity Particulars.
<b>Activity Particulars</b>	Schedule 2.
<b>Advisers</b>	(a) the financial or legal advisers of a party; and (b) the respective officers and employees of those financial or legal advisers.
<b>Agreement</b>	this agreement between the Commonwealth and the Recipient, as amended from time to time in accordance with clause 21.2, and includes its Schedules and any

	annexures.
<b>Agreement Details</b>	Schedule 1.
<b>Agreement Period</b>	as specified in clause 2.
<b>Asset</b>	any item of tangible property purchased or leased either wholly or in part with the use of the Funds with a value at the time of acquisition of \$5,000 or more, excluding GST.
<b>Audit</b>	an audit carried out by a Qualified Accountant in accordance with the Auditing Standards.
<b>Auditor-General</b>	the office established under the <i>Auditor-General Act 1997</i> (Cth) and includes any other person that may, from time to time, perform the functions of that office.
<b>Auditor's Report</b>	has the same meaning it has in the Auditing Standards.
<b>Auditing Standards</b>	has the same meaning as it has in sections 9 and 336 of the <i>Corporations Act 2001</i> (Cth), and refers to the auditing standards made by the Australian Auditing and Assurance Standards Board.
<b>Basin State</b>	has the meaning given to that term in section 4 of the <i>Water Act 2007</i> (Cth).
<b>Business Day</b>	in relation to the doing of any action in a place, any day other than a Saturday, Sunday or public holiday in that place.
<b>Commencement Date</b>	the date this Agreement is executed by the parties or, if executed on separate days, the date on which this Agreement is executed by the last party to do so.
<b>Commonwealth Material</b>	any Material provided to the Recipient by the Commonwealth.
<b>Commonwealth Representative</b>	the person identified in Item 1 of the Agreement Details or such other person as is notified by the Commonwealth from time to time.
<b>Completion Date</b>	the day after the Recipient has done all that it is required to do under clauses 4 (Conduct of the Activity), 5 (Funds) and 8 (Records, Reports and acquittals) of this Agreement to the satisfaction of the Commonwealth.
<b>Confidential Information</b>	information that is by its nature confidential; and (a) is designated by a party as confidential; or (b) a party knows or ought to know is confidential, but does not include information which is or becomes public knowledge other than by breach of this Agreement or any other confidentiality obligation.
<b>Conflict of Interest</b>	any circumstance in which the Recipient or any of the Recipient's Personnel has an interest (whether financial or non-financial) or an affiliation that is affecting, will affect, or could be perceived to affect, the Recipient's ability to perform the Activity, or its obligations under this

	Agreement, fairly and independently.
<b>Electronic Communication</b>	has the same meaning as in the <i>Electronic Transactions Act 1999</i> (Cth).
<b>Financial Information</b>	<p>information relating to the Recipient's receipt, retention and expenditure of the Funds including, at a minimum:</p> <ul style="list-style-type: none"> <li>(a) a balance sheet and an income statement in relation to the Funds, including any Activity Generated Income;</li> <li>(b) a statement identifying any Funds paid by the Commonwealth to the Recipient under this Agreement that were not spent or committed by the end of the relevant financial year during the Agreement Period;</li> <li>(c) a detailed statement of revenue and expenditure in relation to the Funds received and receivable by the Recipient under this Agreement (including any Activity Generated Income), which must include a definitive statement as to whether the Recipient's financial accounts in relation to the Funds are complete and accurate; and</li> <li>(d) notes, comprising a summary of significant accounting policies and other explanatory notes that are relevant to the Funds,</li> </ul> <p>prepared in accordance with the Accounting Standards for the relevant financial year and audited by a Qualified Accountant.</p>
<b>Freedom of Information Commissioner</b>	the office of that name established under the <i>Australian Information Commissioner Act 2010</i> (Cth) and includes any other person that may, from time to time, perform the functions of that office.
<b>Funds</b>	the amount specified in the Activity Particulars that is payable by the Commonwealth to the Recipient under this Agreement.
<b>GST Act</b>	the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
<b>Information Commissioner</b>	the office of that name established under the <i>Australian Information Commissioner Act 2010</i> (Cth) and includes any other person that may, from time to time, perform the functions of that office.
<b>Intellectual Property Rights</b>	<p>all intellectual property rights, including the following rights:</p> <ul style="list-style-type: none"> <li>(a) copyright, patents, rights in circuit layouts, trade marks, designs, trade secrets, know how, domain names and any right to have Confidential Information kept confidential;</li> <li>(b) any application or right to apply for registration of</li> </ul>

	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.
<b>Interest</b>	means interest calculated at the 90 day bank-accepted bill rate (available from the Reserve Bank of Australia) plus 20 basis points.
<b>Item</b>	an item in a Schedule to this Agreement.
<b>Law</b>	any applicable statute, regulation, by-law, ordinance or subordinate legislation in force from time to time in Australia, whether made by a State, Territory, the Commonwealth, or a local government.
<b>Losses</b>	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).
<b>Material</b>	any software, firmware, documented methodology or process, documentation or other material in whatever form, including without limitation any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.
<b>Milestone</b>	any fixed date to be met by the Recipient in performing any of its obligations under this Agreement, as specified in the Milestone Schedule.
<b>Milestone Schedule</b>	the schedule of Milestones set out in the Work Plan.
<b>Moral Rights</b>	the right of integrity of authorship (that is, not to have a work subjected to derogatory treatment), the right of attribution of authorship of a work, and the right not to have authorship of a work falsely attributed, as defined in the <i>Copyright Act 1968</i> (Cth).
<b>Ombudsman</b>	the office of that name established under the <i>Ombudsman Act 1976</i> (Cth) and includes any other person that may, from time to time, perform the functions of that office.
<b>Personal Information</b>	information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.
<b>Personnel</b>	in relation to a party, any natural person who is an

	employee, officer, agent or professional adviser of that party or, in the case of the Recipient, of a subcontractor.
<b>Privacy Act</b>	the <i>Privacy Act 1988</i> (Cth).
<b>Privacy Commissioner</b>	the office of that name established under the <i>Australian Information Commissioner Act 2010</i> (Cth) and includes any other person that may, from time to time, perform the functions of that office.
<b>Qualified Accountant</b>	a person who is: <ul style="list-style-type: none"> <li>(a) a member of the Institute of Chartered Accountants in Australia or of CPA Australia; and</li> <li>(b) independent of, and not a related entity of, the Recipient.</li> </ul>
<b>Recipient</b>	the party specified in Item 2 of the Agreement Details and includes its Personnel.
<b>Recipient Representative</b>	the person identified in Item 3 of the Agreement Details, or such other person as is notified by the Recipient from time to time.
<b>Reports</b>	the reports that the Recipient is required to produce and provide to the Commonwealth in accordance with clause 8.
<b>Schedule</b>	a schedule to this Agreement.
<b>Traditional Owner(s)</b>	in relation to land, a local descent group of Aboriginal people who have common spiritual affiliations to an area of land (which affiliations place the group under a primary spiritual responsibility for the site) and who are entitled by Aboriginal Tradition to forage over the land.
<b>Work Plan</b>	a plan for undertaking the Activity in accordance with the Activity Particulars and otherwise in accordance with this Agreement, as specified in Schedule 3 and including the Activity Budget and the Milestone Schedule.

## 1.2 Interpretation

In this Agreement, except where the contrary intention is expressed:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) the meaning of general words is not limited by specific examples introduced by 'for example' or similar expressions;
- (d) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this Agreement;

- (e) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time and any schedules, appendices or annexures to that document or instrument;
- (f) a reference to AUD, A\$, \$A, dollar or \$ is to Australian currency;
- (g) a reference to time is to the time in the place where the obligation is to be performed;
- (h) a reference to a party is to a party to this Agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assignees and substitutes;
- (i) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (j) if the Recipient is a trustee, the Recipient enters this Agreement personally and in its capacity as trustee and:
  - (i) any warranties given under this Agreement are given in both capacities; and
  - (ii) warrants that it has the power to perform its obligations under this Agreement;
- (k) a reference to a statute, ordinance, code or other Law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (l) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (m) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (n) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement or any part of it; and
- (o) to the extent that the parties have not completed any Item in a Schedule that Item will be taken to be 'not applicable' for the purpose of this Agreement, unless otherwise stated.

### **1.3 Priority of Agreement documents**

If there is inconsistency between any of the documents forming part of this Agreement, those documents will be interpreted in the following order of priority to the extent of any inconsistency:

- (a) clauses 1 to 21 of this Agreement;
- (b) the Agreement Details;
- (c) the Activity Particulars;
- (d) the Work Plan; and
- (e) other documents incorporated by reference in this Agreement.

## **2. Agreement Period**

This Agreement commences on the Commencement Date and, unless terminated earlier, expires on the Completion Date.

## **3. Warranties and representations**

### **3.1 Recipient warranties and representations**

The Recipient represents and warrants to the Commonwealth that:

- (a) it has all rights, title, licences, interests, property and regulatory approvals necessary to lawfully perform the Activity (including, without limitation, the agreement or consent, where required by Law, of the relevant native title holder or claimants and the Traditional Owners recognised under land rights legislation);
- (b) it has, or is able to obtain, the written consent of any organisation that it will partner with or represent for the purposes of undertaking the Activity, including Traditional Owners (if relevant);
- (c) it has not received funding through other initiatives or programmes for substantially the same activities to be undertaken for the Activity;
- (d) it has full power and authority to enter into, perform and observe its obligations under this Agreement;
- (e) the execution, delivery and performance of this Agreement has been duly and validly authorised by the Recipient; and
- (f) no litigation, arbitration, mediation, conciliation or administrative proceedings are taking place, pending, or to the knowledge of any of its officers after due inquiry, are threatened which, if adversely decided, could have an adverse effect on the Recipient's ability to perform its obligations under this Agreement.

### **3.2 Recipient acknowledgement**

The Recipient acknowledges that the Commonwealth, in entering into this Agreement, is relying on the warranties and representations contained in this Agreement.

## **4. Conduct of the Activity**

### **4.1 Obligation to perform the Activity**

In consideration of the provision of the Funds, the Recipient must perform the Activity:

- (a) consistently with, and in furtherance of, the Activity Objectives;
- (b) in order to achieve the Activity Outcomes;
- (c) in accordance with all applicable Laws;
- (d) so as to complete the Activity on or prior to the Activity completion date specified in Item 4 of the Activity Particulars;
- (e) so as to meet all Work Plan requirements including:

- (i) the Milestones (by achieving the criteria for completion of the relevant Milestone specified in the Milestone Schedule); and
- (ii) spending the Funds in accordance with the Activity Budget; and
- (f) otherwise in accordance with the provisions of this Agreement.

#### **4.2 Management of Conflicts of Interest**

- (a) The Recipient warrants, to the best of its knowledge, as at the Commencement Date, that no Conflict of Interest exists or is likely to arise in the performance of the Recipient's obligations under this Agreement.
- (b) If during the Agreement Period, a Conflict of Interest arises, or appears likely to arise, the Recipient must:
  - (i) immediately notify the Commonwealth in writing of the Conflict of Interest making a full disclosure of all relevant information relating to the Conflict of Interest and setting out the steps the Recipient proposes to take to resolve or otherwise deal with the Conflict of Interest; and
  - (ii) take such steps as the Commonwealth may reasonably require to resolve or otherwise deal with that Conflict of Interest.

#### **4.3 Personnel**

The Recipient must:

- (a) ensure that the Personnel of the Recipient will perform work in relation to the Activity in accordance with this Agreement; and
- (b) where required to do so by the Commonwealth, promptly provide information to the Commonwealth regarding the qualifications and / or performance of any Personnel of the Recipient in relation to the Activity .

#### **4.4 Appointment of subcontractors**

- (a) The Recipient must not enter into a subcontract in relation to the Activity without the Commonwealth's prior written approval. In giving approval, the Commonwealth may do so on such terms and conditions as the Commonwealth thinks fit.
- (b) Any subcontractors approved by the Commonwealth at the Commencement Date, and any terms and conditions relating to their use, are identified in Item 4 of the Agreement Details.
- (c) Despite any approval given by the Commonwealth, the Recipient is responsible for the performance of the Recipient's responsibilities under this Agreement regardless of whether the Recipient has subcontracted any of its obligations.
- (d) In respect of all subcontracts entered into for the Activity, the Recipient must ensure that:
  - (i) the subcontract facilitates compliance by the Recipient with its obligations under this Agreement;
  - (ii) the subcontract will not conflict with or detract from the rights and entitlements of the Commonwealth under this Agreement;
  - (iii) the other party to the subcontract is financially viable, has the necessary relevant expertise and the appropriate types and amounts of insurance to perform the work in relation to the Activity;

- (iv) the subcontract contains all the relevant terms of this Agreement including those relating to warranties, subcontracting, access to premises and records, Activity Material and Intellectual Property Rights, Personal Information, Confidential Information, indemnities, insurance, work health and safety, relationship, termination, and in particular that the Recipient has or will secure itself a right to terminate the subcontract on terms no less favourable than those accorded to the Commonwealth by clause 18, in the event of this Agreement being terminated; and
  - (v) the other party to the subcontract acknowledges that it may be considered a 'Commonwealth service provider' for the purposes of the *Ombudsman Act 1976* (Cth) and subject to investigation by the Ombudsman under that Act, and that the Commonwealth will not be liable for the cost of any such investigation by the Ombudsman in connection with the subject matter of the subcontract or the subject matter of this Agreement.
- (e) The Recipient must not enter into a subcontract under this Agreement with a subcontractor that is currently named as not complying with the *Workplace Gender Equality Act 2012* (Cth).
  - (f) If requested, the Recipient must promptly provide to the Commonwealth a copy of any contract relating to the Activity.

#### **4.5 Liaison**

- (a) The Recipient must liaise with and report to the Commonwealth Representative in relation to the Activity, and as required by the Commonwealth Representative for the purposes of this Agreement.
- (b) Upon request, the Recipient must within the timeframe stipulated in the request, or promptly if no timeframe is stipulated in the request, provide all information in relation to the Activity or the Recipient's conduct in undertaking the Activity as requested by the Commonwealth Representative for the purposes of this Agreement, including for monitoring and evaluation purposes.

#### **4.6 Delay**

- (a) Without limiting its obligations under clause 4.1, the Recipient must take all reasonable steps to minimise delay in undertaking or completing the Activity.
- (b) If the Recipient anticipates any delay in performing its obligations under this Agreement, it must notify the Commonwealth of that delay:
  - (i) if a force majeure event has or is likely to occur, in accordance with clause 16; or
  - (ii) otherwise in accordance with clause 18.2.

### **5. Funds**

#### **5.1 Payment of the Funds**

- (a) Subject to Parliamentary appropriation and to the provisions of this Agreement, the Commonwealth agrees to pay to the Recipient the Funds in accordance with the Milestone Schedule.
- (b) Notwithstanding any other clause of this Agreement the Commonwealth may defer, reduce or not make a payment of Funds if at any time:

- (i) the Recipient has not achieved a Milestone to the Commonwealth's satisfaction, that was due to be completed before the date of payment, until that Milestone is completed to the Commonwealth's satisfaction;
  - (ii) the Recipient has not performed the Activity to the satisfaction of the Commonwealth and in accordance with the terms of this Agreement, until the Recipient remedies its non-performance;
  - (iii) the Commonwealth has insufficient Activity funding available at the time the payment is due to the Recipient;
  - (iv) the Commonwealth has become entitled to terminate this Agreement under clause 18.1;
  - (v) the Commonwealth forms the opinion, on reasonable grounds, having regard to the Activity Budget and information provided in the Reports, that the full payment is not properly required by the Recipient to carry out the Activity; or
  - (vi) the Recipient has not complied with any provision of this Agreement which provides that the Recipient will not be entitled to spend or receive any Funds until that obligation has been complied with.
- (c) Notwithstanding any other clause of this Agreement, if the Recipient has received any Funds, the Recipient is not entitled to spend those Funds if the Commonwealth has notified the Recipient that one or more of the circumstances specified in clauses 5.1(b)(i) to 5.1(b)(vi) (inclusive) applies, unless the Commonwealth agrees in writing otherwise.

## **5.2 Use of the Funds**

Funds provided under this Agreement:

- (a) must only be used for the purposes of carrying out the Activity and performing this Agreement;
- (b) must not be used to cover the cost of any activities completed prior to the execution of this Agreement;
- (c) must not, unless agreed by the Commonwealth in writing, be used to cover the cost of any activities commenced but not yet completed prior to the execution of this Agreement;
- (d) are not to be applied towards administrative and other general costs of the Recipient unless any such costs are approved in writing by the Commonwealth or expressly included in the Activity Budget;
- (e) must not, unless the prior written approval of the Commonwealth has been obtained, be used in a manner which is inconsistent with the Activity Budget;
- (f) subject to clause 5.2(g), must not be used as any form of security for the purpose of obtaining or complying with any form of loan, credit, payment or other interest, or for the preparation of, or in the course of any litigation. This clause 5.2(f) does not prevent the Recipient:
  - (i) providing a copy of this Agreement to a prospective financier; or
  - (ii) indicating to prospective financiers that the Commonwealth has agreed to provide the Funds for the purposes of the Activity; and
- (g) may form part of an existing security held over the Recipient's assets provided a priority agreement is entered into between the Commonwealth, the Recipient and the Recipient's financier or holder of the existing security. The priority agreement must be on terms acceptable to the Commonwealth and

must not allow the financier or holder of the existing security priority to the Funds.

### **5.3 Amount of Funds capped**

The amount of Funds to be contributed by the Commonwealth in relation to the Activity will not exceed the maximum amount of Funds specified in the Activity Particulars.

### **5.4 No liability for Commonwealth**

The Commonwealth accepts no liability for:

- (a) any debts incurred by the Recipient;
- (b) any monies owing by the Recipient to its Personnel;
- (c) any Activity Budget or cost overruns; or
- (d) there being insufficient monies to complete the Activity.

### **5.5 Repayment of Funds**

If:

- (a) on expiry or on any earlier termination of this Agreement, any or all of the Funds:
  - (i) have not been spent or committed in accordance with this Agreement; or
  - (ii) cannot, by reconciliation between the accounts and records maintained by the Recipient and the Activity Budget, be shown, to the reasonable satisfaction of the Commonwealth, to have been spent or committed in accordance with this Agreement; or
- (b) at any time the Commonwealth forms the reasonable opinion that any Funds have been used, spent or committed by the Recipient other than in accordance with this Agreement,

the Commonwealth may by written notice to the Recipient:

- (c) require the Recipient to repay that part of the Funds, and the Recipient must repay to the Commonwealth the amount set out in the notice, within 20 Business Days of receipt of the notice; or
- (d) require the Recipient to use all or part of those Funds as the Commonwealth in its sole and unfettered discretion sees fit.

### **5.6 Failure to repay Funds**

At the Commonwealth's absolute discretion, and without prejudice to any other rights available to the Commonwealth under this Agreement or at Law or in equity, if the Recipient fails to repay the Funds in accordance with a notice issued under clause 5.5(c):

- (a) the Commonwealth may require the Recipient to pay the Commonwealth Interest on the amount set out in the notice from the date it was due, for the period it remains unpaid; and
- (b) the amount set out in the notice, and Interest owed under clause 5.6(a), will then be recoverable by the Commonwealth as a debt due from the Recipient.

## 5.7 Activity Generated Income

The Recipient must treat Activity Generated Income in accordance with the Commonwealth's written direction and, in the case of interest earned on the Funds acknowledges that, the Commonwealth may require:

- (a) return of the interest amount to the Commonwealth;
- (b) that the interest is applied to Activity expenses or costs where such application is consistent with the Activity Budget; or
- (c) offset of payment of Funds against the interest amount.

## 6. Taxes, duties and government charges

### 6.1 Definitions

In this clause 6, **consideration**, **GST**, **input tax credits**, **tax invoice** and **taxable supply** have the meaning given to those terms in the GST Act.

### 6.2 Liability for taxes, duties and government charges

Subject to this clause 6, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with this Agreement must be borne by the Recipient.

### 6.3 GST

- (a) If specified in Item 5 of the Agreement Details, and on the basis that the Funding paid under this Agreement is:
  - (i) of a non-commercial, funding nature;
  - (ii) paid to a 'government related entity' for GST Act purposes; and
  - (iii) sourced from an appropriation,the parties rely on section 9-17(3) of the GST Act in determining that the payment of Funding is not consideration and that no GST is payable in respect of payment of Funding under this Agreement.
- (b) Unless otherwise indicated, any consideration for a supply made under this Agreement is exclusive of any GST imposed on the supply.
- (c) Subject to clause 6.3(a), if one party (the **supplier**) makes a taxable supply to the other party (the **recipient**) under this Agreement, the recipient must pay without set-off an additional amount to the supplier equal to the GST imposed on the supply in question.
- (d) No party may claim or retain from the other party any amount in relation to a supply made under this Agreement for which the first party can obtain an input tax credit or decreasing adjustment.
- (e) Where the Recipient is registered for GST, the Recipient undertakes to notify the Commonwealth as soon as possible if it ceases to be registered for GST.

### 6.4 ABN

- (a) Subject to clause 6.4(b), the Recipient warrants that it has an ABN, which it has correctly quoted to the Commonwealth. The Recipient must:
  - (i) immediately notify the Commonwealth of any changes to the Recipient's GST status or ABN; and

- (ii) supply proof of its GST status, as and when requested by the Commonwealth.
- (b) If the Recipient does not have an ABN the Recipient may lodge with the Commonwealth a completed 'Statement by a Supplier' form claiming an exemption for lodging an ABN. The Recipient should seek advice from the Australian Taxation Office regarding the 'Statement by a Supplier' form if needed.
- (c) If the Recipient does not provide either an ABN or a completed 'Statement by a Supplier' form, then the Commonwealth will withhold from payment of the Funds an amount equivalent to 49 per cent of the relevant payment or such other amount as determined by the Australian Taxation Office from time to time.

## **7. Assets**

The Recipient must not use the Funds towards the purchase of Assets unless the Asset is identified in the Activity Budget or the Recipient has obtained the prior written approval of the Commonwealth, which may be subject to any conditions the Commonwealth may, in its absolute discretion, impose.

## **8. Records, Reports and acquittals**

### **8.1 Records and accounts**

The Recipient must:

- (a) keep comprehensive and accurate accounts and records of its use of the Funds, that can be separately identified from other accounts and records of the Recipient; and
- (b) retain the accounts and records referred to in this clause 8 for the Agreement Period and a further period of seven years from the expiry or termination of this Agreement or such longer period as may be required by Law.

### **8.2 Recipient must keep records**

The Recipient must keep comprehensive written records of the conduct of the Activity including progress against the Milestones and the achievement of the Activity Outcomes.

### **8.3 Provision of records to the Commonwealth**

- (a) The Recipient acknowledges that the Commonwealth has reporting obligations to its responsible Minister and the Parliament of the Commonwealth in accordance with section 86AI of the *Water Act 2007* (Cth).
- (b) In order to assist the Commonwealth in complying with the obligations specified in clause 8.3(a), the Recipient agrees to:
  - (i) deliver information and other Material (including Reports) produced under or in connection with this Agreement and otherwise as reasonably required by the Commonwealth; and
  - (ii) provide all information and other Material (including Reports) to the Commonwealth in accordance with the timeframes specified in this Agreement and otherwise promptly upon demand.

### **8.4 Financial records**

The Recipient must keep financial records relating to the Activity so as to enable:

- (a) all revenue and expenditure related to the Activity to be identified in the Recipient's accounts;
- (b) the preparation of Financial Information; and
- (c) the Audit of those records.

## **8.5 Reports**

- (a) Without limiting the Recipient's other obligations under this Agreement, the Recipient must provide to the Commonwealth the Reports in accordance with the Activity Particulars, and substantially in the form of the template specified by the Commonwealth from time to time (if any).
- (b) If the Department notifies the Recipient that a Report submitted is not to the Commonwealth's satisfaction, the Recipient must make the required amendments and resubmit the Report to the Commonwealth.

## **8.6 Additional Reports**

- (a) The Commonwealth may at any time, and from time to time, during the Agreement Period, require the Recipient to provide reports and other information in addition to the reports required under clause 8.5 (**Additional Reports**).
- (b) Where the Commonwealth requires an Additional Report, it will issue a direction in writing to the Recipient requiring an Additional Report to be provided and specifying the Commonwealth's requirements in relation to the:
  - (i) format;
  - (ii) content;
  - (iii) information and substantiating documentation to be submitted; and
  - (iv) auditing or certification (if any),for that Additional Report.
- (c) The Recipient must comply with a direction of the Commonwealth under this clause 8.6 by submitting the requested Additional Report which complies with all requirements of the Commonwealth as set out in its direction, within the period of time in the direction, or such longer time period as the parties agree in writing.
- (d) The Recipient will be liable for its own costs associated with complying with a direction to submit an Additional Report.

## **8.7 Audit and provision of Financial Information**

- (a) The Recipient must prepare the Financial Information at the end of each financial year in which the Recipient has received, expended or retained Funds pursuant to this Agreement.
- (b) The Recipient must engage, at its cost, a Qualified Accountant to Audit the Financial Information of the Recipient and to prepare an Auditor's Report.

## **8.8 Participation in evaluations and analysis**

The Recipient must participate, at its own cost and as reasonably required by the Commonwealth, in studies, evaluations and other activities intended to analyse the success of the Activity in achieving the Activity Objectives. Such participation may, where required by the Commonwealth, include:

- (a) attending relevant conferences and forums in which evaluations and analysis are being undertaken; and
- (b) making records and other information (including Reports) available to third parties for the purposes of evaluation and analysis.

## **9. Access to premises and records**

### **9.1 Access to records and Materials**

- (a) The Recipient acknowledges and agrees that the Commonwealth and any persons nominated by the Commonwealth may, at reasonable times and on giving reasonable notice to the Recipient:
  - (i) access and inspect the Recipient's premises to the extent relevant to the performance of this Agreement;
  - (ii) access and inspect any Assets, wherever they may be located;
  - (iii) require the Recipient (including its Personnel) to provide records, documents and information relevant to the performance of this Agreement in a data format and storage medium accessible by the Commonwealth;
  - (iv) inspect and copy documentation, books and records, however stored, in the custody or under the control of the Recipient (including its Personnel) relevant to the performance of this Agreement; and
  - (v) require assistance in respect of any inquiry into or concerning the Activity or this Agreement. For the purpose of this clause 9.1(a)(v), an inquiry includes any administrative or statutory review, audit or investigation (whether within or external to the Commonwealth), any request for information directed to the Commonwealth, any judicial or quasi-judicial inquiry, and any inquiry conducted by the Parliament of the Commonwealth or any Parliamentary committee.
- (b) The Recipient must promptly comply with all requirements of the Commonwealth under this clause 9.1.

### **9.2 Access to hardware and software**

The Recipient must provide the Commonwealth (including its Personnel) with access to the Recipient's computer hardware and software to the extent necessary for the Commonwealth to exercise its rights under clause 9.1, and must provide the Commonwealth with any reasonable assistance requested by it to use that hardware and software.

### **9.3 Costs**

- (a) Subject to clause 9.3(b), each party must bear its own costs of any inspections, reviews, audits and inquiries conducted pursuant to this clause 9.
- (b) If an audit, inspection, review or inquiry conducted pursuant to this clause 9 identifies a breach by the Recipient of this Agreement, the Commonwealth may recover its costs of conducting that inspection, review, audit or inquiry as a debt due from the Recipient.

### **9.4 Auditor-General, Ombudsman and Commissioners**

Without limiting clauses 9.1 and 9.2, the Commonwealth's rights under clauses 9.1 and 9.2 apply equally to the Auditor-General, the Ombudsman, the Information Commissioner, the Privacy Commissioner, the Freedom of Information

Commissioner or their delegates, for the purpose of each performing their functions or activities (as the case may be).

## **9.5 Application of this clause**

- (a) The Recipient must ensure that any subcontract entered into for the purpose of this Agreement contains an equivalent clause granting the rights specified in this clause 9.
- (b) This clause 9 applies for the duration of the Agreement Period and for a period of seven years from the termination or expiry of this Agreement.

## **10. Activity Material and Intellectual Property Rights**

### **10.1 Intellectual Property Rights in Activity Material**

All Intellectual Property Rights in the Activity Material created by the Recipient will vest, upon creation, in the Recipient.

### **10.2 Licensing of Activity Material**

- (a) The Recipient grants, or must procure for, the Commonwealth a perpetual, irrevocable, royalty-free, worldwide, non-exclusive licence (including a right of sublicense) to use, reproduce, modify, adapt, communicate, publish, broadcast and exploit the Activity Material, including the Reports, for any purpose.
- (b) The Commonwealth's rights under clause 10.2(a) include a right to sublicense the Activity Material to third parties, including the public, under a Creative Commons - Attribution licence (refer to: <http://creativecommons.org.au/learn/licences/>) or another open access attribution licence endorsed by the Australian Government from time to time.

### **10.3 Activity Material copies**

On termination or expiry of this Agreement, or earlier if requested by the Commonwealth, the Recipient must promptly deliver a copy of all Activity Material then in existence to the Commonwealth in an agreed format, or as otherwise directed by the Commonwealth.

### **10.4 Intellectual Property Rights warranties**

- (a) The Recipient warrants that anything done by the Recipient in the course of the Activity, including in developing the Reports, will not infringe the Intellectual Property Rights or Moral Rights of any person.
- (b) The Recipient further warrants that the Commonwealth or its sublicensees will not, at any time, be infringing the Intellectual Property Rights or Moral Rights of any person when undertaking an activity allowed for under this Agreement or using Activity Material in a manner consistent with the licences granted, or to be granted, to the Commonwealth under this clause 10.

### **10.5 Commonwealth Material**

Intellectual Property Rights and title to Commonwealth Material remains vested at all times in the Commonwealth. The Commonwealth grants to the Recipient a royalty-free, world-wide, non-exclusive licence (including a right of sublicense to subcontractors) to use, reproduce and modify the Commonwealth Material solely for the purposes of the Activity. The Recipient must ensure that all Commonwealth Material is used strictly in accordance with any conditions or restrictions specified by the Commonwealth from time to time.

## **10.6 Moral Rights**

- (a) To the extent permitted by law, the Recipient must, unless otherwise agreed by the Commonwealth in writing, ensure that each person who:
  - (i) has been involved in the performance of the Activity; or
  - (ii) is or will be the author of any Activity Material (including the Reports) that is to be licensed to the Commonwealth in accordance with this clause 10,provides a written consent to the Commonwealth permitting the Commonwealth (including its Personnel) to conduct any act which would otherwise infringe the Moral Rights held by that person.
- (b) The consent provided under clause 10.6(a) must be consistent with the Commonwealth being able to conduct any act it is licensed to conduct under this Agreement.

## **11. Acknowledgement of Commonwealth support**

### **11.1 Acknowledgement**

- (a) The Recipient must acknowledge, in the required form as set out in Item 7 of the Activity Particulars, the support it has received from the Commonwealth:
  - (i) in all publications, promotional and advertising Materials in relation to the Activity;
  - (ii) in all activities undertaken by it or on its behalf in relation to the Activity;
  - (iii) if requested by the Commonwealth, with any products, processes or inventions developed as a result of the Activity; and
  - (iv) otherwise at the times and in the manner as the Commonwealth directs from time to time.
- (b) The Recipient must submit any documentation containing any required acknowledgment specified in the Activity Particulars to the Commonwealth 10 Business Days prior to publication or announcement.
- (c) If the Commonwealth requires amendments to a proposed form of words of a publication or announcement, the Recipient must make the required amendment before allowing the words to be published or announced.
- (d) Notwithstanding the Commonwealth's review or proposal of a revised form of words in accordance with this clause, the Recipient will at all times remain responsible for the content and accuracy of publications and announcements.

### **11.2 Announcements**

The Recipient must notify the Commonwealth, before making a public announcement in connection with this Agreement or any transaction contemplated by it except if the announcement is required by Law or a regulatory body (including a relevant stock exchange), and provide a copy of the announcement to the Commonwealth.

## **12. Confidential Information**

### **12.1 Confidential Information not to be disclosed**

- (a) Subject to clause 12.2, a party must not, without the prior written consent of the other party, disclose any Confidential Information of the other party to a third party.
- (b) In giving written consent to the disclosure of Confidential Information, the Commonwealth may impose such conditions as it thinks fit, and the Recipient must comply with these conditions.

### **12.2 Exceptions to obligations**

The obligations on the parties under this clause 12 will not be taken to have been breached to the extent that Confidential Information is:

- (a) disclosed by a party to its Advisers or employees solely in order to comply with obligations, or to exercise rights, under this Agreement;
- (b) disclosed to a party's internal management Personnel, solely to enable effective management or auditing of Agreement related activities;
- (c) disclosed by the Commonwealth or the Recipient (where the Recipient is a Basin State) to their responsible Minister;
- (d) disclosed by the Commonwealth or the Recipient, in response to a request by a House or a Committee of the Parliament of the Commonwealth or, where the Recipient is a Basin State, in response to a request by a House or Committee of the Parliament or Legislative Assembly (as the case may be) of the Recipient;
- (e) shared by the Commonwealth within the Commonwealth's organisation, or with another Commonwealth agency, where this serves the Commonwealth's legitimate interests;
- (f) where the Recipient is a Basin State, shared by the Recipient within the Recipient's organisation, or with another Recipient agency, where this serves the Recipient's legitimate interests;
- (g) authorised or required by Law, including under this Agreement, under a licence or otherwise, to be disclosed; or
- (h) in the public domain otherwise than due to a breach of this clause 12.

### **12.3 Obligations on disclosure**

Where a party discloses Confidential Information to another person:

- (a) pursuant to clauses 12.2(a), (b), (e) or (f), the disclosing party must:
  - (i) notify the receiving person that the information is Confidential Information; and
  - (ii) not provide the information unless the receiving person agrees to keep the information confidential; or
- (b) pursuant to clauses 12.2(c) and (d), the disclosing party must notify the receiving party that the information is Confidential Information.

## **12.4 No reduction in privacy obligations**

Nothing in this clause 12 derogates from any obligation which either party may have either under the Privacy Act as amended from time to time, or under this Agreement, in relation to the protection of Personal Information.

## **13. Personal Information**

### **13.1 When does this clause apply?**

This clause 13 applies only if the Recipient deals with Personal Information when, and for the purpose of, conducting the Activity under this Agreement.

### **13.2 Recipient's obligations about Personal Information**

The Recipient must:

- (a) use or disclose Personal Information only for the purposes of this Agreement;
- (b) not do any act or engage in any practice that would breach an Australian Privacy Principle under the Privacy Act; and
- (c) immediately notify the Commonwealth if the Recipient becomes aware of a breach or possible breach of any of its obligations under this clause 13.

### **13.3 Subcontractors**

The Recipient must ensure that any subcontract entered into for the purpose of fulfilling its obligations under this Agreement contains provisions to ensure that the subcontractor has the same awareness and obligations as the Recipient has under this clause 13, including the requirement in relation to subcontracts.

## **14. Indemnity and release**

### **14.1 Indemnity**

The Recipient indemnifies the Commonwealth and continues to indemnify the Commonwealth against, all:

- (a) Losses suffered or incurred by the Commonwealth, including as the result of any claim made in relation to:
  - (i) loss of or damage to third party property; or
  - (ii) the injury, illness or death of a third party;
- (b) loss of or damage to the Commonwealth's property; or
- (c) Losses suffered or incurred by the Commonwealth in dealing with any claim against the Commonwealth and the cost of time spent, resources used, or disbursements paid by the Commonwealth,

arising from:

- (d) any act or omission by the Recipient (including any of its Personnel) in connection with this Agreement;
- (e) any breach by the Recipient (including any of its Personnel) of its obligations or warranties under this Agreement;
- (f) any use or disclosure by the Recipient (including its Personnel) of Personal Information or Confidential Information (or both, as the case may be) held or controlled in connection with this Agreement; or

- (g) the use by the Commonwealth of the Activity Material, including the Intellectual Property and Moral Rights comprised in the Activity Material.

## **14.2 Release**

The Recipient releases the Commonwealth from:

- (a) all claims, actions, demands and proceedings which it may have, or claim to have, or but for this release might have had, against the Commonwealth arising out of this Agreement or in any way connected with the performance of this Agreement; and
- (b) all liability of the Commonwealth arising out of this Agreement, on and from the Commencement Date.

## **14.3 Proportional reduction of liability**

The Recipient's liability to indemnify and release the Commonwealth under clauses 14.1 and 14.2 will be reduced proportionately to the extent that any negligent or unlawful act or omission, or wilful misconduct on the part of the Commonwealth (including its officers and employees) contributed to the relevant Loss.

## **14.4 Commonwealth's right to be indemnified is additional to other rights**

The Commonwealth's right to be indemnified under clause 14.1 is in addition to, and not exclusive of, any other right, power, or remedy provided by Law or in equity, but the Commonwealth is not entitled to be compensated in excess of the amount of the relevant Loss.

## **15. Insurance**

### **15.1 Obligation to take out and maintain insurance**

- (a) The Recipient must take out or have taken out for the period specified in clause 15.1(b) or clause 15.1(c) (as the case may be) as at the Commencement Date, workers' compensation and public liability insurances as specified in Item 7 of the Agreement Details.
- (b) If the Recipient takes out a 'claims made' policy, which requires all claims and any fact situation or circumstance that might result in a claim to be notified within the period of insurance, the Recipient must maintain the policy (or a policy in like terms) during the Agreement Period and for a period of seven years on and from the expiry or the early termination of this Agreement.
- (c) If the Recipient takes out an 'occurrence' policy, which requires the circumstances to which a claim relates to occur during the period of insurance whilst the notification of event can occur at any time subsequently, the Recipient must maintain the policy during the Agreement Period.
- (d) The Recipient must ensure that any subcontract entered into by the Recipient in relation to this Agreement places on the subcontractor, in respect of the subcontractor's activities, the same or similar obligations about insurances, as this clause 15 places on the Recipient.

### **15.2 Insurance obligations where Recipient is a Basin State**

Where the Recipient:

- (a) is a Basin State; and

- (b) self-insures against the risk types, and up to or above the amounts, specified in Item 7 of the Agreement Details,

the insurance obligations applying to the Recipient under clause 15.1 are deemed to be satisfied.

### **15.3 Copies of insurance**

The Recipient must, on request, promptly provide to the Commonwealth any relevant insurance policies, certificates of currency and/or evidence of self-insurance for the purposes of clause 15.2 for inspection.

## **16. Force majeure events**

### **16.1 Occurrence of force majeure event**

A party (**Affected Party**) is excused from performing its obligations under this Agreement to the extent it is prevented by circumstances beyond its reasonable control (other than any strike, lockout or labour disputes in respect of the Recipient only), including but not limited to acts of God, natural disasters, acts of war, riots and strikes outside that party's organisation.

### **16.2 Notice of force majeure event**

When the circumstances described in clause 16.1 arise or are reasonably perceived by the Affected Party as an imminent possibility, the Affected Party must give notice of those circumstances to the other party as soon as possible, identifying the effect they will have on its performance. An Affected Party must make all reasonable efforts to minimise the effects of such circumstances on its performance of this Agreement.

### **16.3 Termination**

If non-performance or diminished performance by the Affected Party due to the circumstances under clause 16.1 continues for a period of more than 30 consecutive days, the other party may terminate this Agreement immediately by giving the Affected Party written notice.

### **16.4 Consequences of termination**

If this Agreement is terminated under clause 16.3:

- (a) each party will bear its own costs and neither party will incur further liability to the other; and
- (b) where the Recipient is the Affected Party, it will be entitled to payment for work performed or expenses properly incurred prior to the date of intervention of the circumstances described in clause 16.1.

## **17. Dispute resolution**

### **17.1 Dispute resolution**

- (a) Subject to clause 17.2, the parties agree not to commence any legal proceedings in respect of any dispute arising under this Agreement, which has not been resolved by informal discussion, until the procedure provided by this clause 17 has been followed.
- (b) The parties agree that any dispute arising during the course of this Agreement will be dealt with as follows:

- (i) the party claiming that there is a dispute will send the other a written notice setting out the nature of the dispute;
- (ii) the parties will try to resolve the dispute through direct negotiation, including by referring the matter to persons who have the authority to intervene and direct some form of resolution; and
- (iii) if within 40 Business Days from the date of the notice issued under clause 17.1(b)(i):
  - (A) there is no resolution of the dispute;
  - (B) there is no agreement on submission of the dispute to mediation or some alternative dispute resolution procedure; or
  - (C) there is a submission to mediation or some other form of alternative dispute resolution procedure, but there is no resolution within 20 Business Days of the submission, or within such further extended time as the parties may agree in writing before the expiration of the 20 Business Days,

then, either party may commence legal proceedings.

## **17.2 When clause 17.1 does not apply**

Clause 17.1 does not apply where:

- (a) either party commences legal proceedings for urgent interlocutory relief;
- (b) action is taken by the Commonwealth under, or purportedly under, clauses 5 (Funds), 9 (Access to premises and records) or 18 (Suspension or termination); or
- (c) an authority of the Commonwealth, a State or Territory is investigating a breach or suspected breach of the Law by the Recipient.

## **17.3 Obligations continue**

- (a) Despite the existence of a dispute, both parties must continue to perform their respective obligations under this Agreement, unless a direction is issued in accordance with clause 17.3(b).
- (b) If directed and notified in writing by the Commonwealth to do so, the Recipient must cease performing the obligations of the Recipient under this Agreement which are specified in the Commonwealth's notice until the Commonwealth issues a further written notice to the Recipient directing it to resume performance of those obligations.

# **18. Suspension or termination**

## **18.1 Termination for default**

If:

- (a) the Recipient repeatedly fails to comply with any timeframe under this Agreement;
- (b) the Recipient fails to remedy its failure to comply with any term or condition of this Agreement within 10 Business Days of receiving a notice (or such longer period as the Commonwealth may at its sole and unfettered discretion specify in the notice) from the Commonwealth requiring the Recipient to do so;
- (c) the Recipient fails to successfully deliver any Activity Outcomes;

- (d) the Commonwealth is satisfied on reasonable grounds that any statement, representation or warranty made by the Recipient is incorrect or incomplete in a way which would have affected the original decision to approve the Funds for the Activity;
- (e) the Commonwealth is satisfied on reasonable grounds that a report (including a Report) given by the Recipient is significantly misleading, or substantially incomplete or inaccurate; or
- (f) the Recipient breaches any term or condition of any other funding agreement between the Recipient and an Australian Government agency,

the Commonwealth may by written notice to the Recipient, require the Recipient to:

- (g) immediately suspend dealings with the Funds (in whole or in part); and/or
- (h) terminate this Agreement in its entirety.

## **18.2 Termination for convenience**

- (a) The Commonwealth may, at any time by notice, terminate this Agreement or reduce the scope of the Activity or Work and amount of the Funds immediately.
- (b) Upon receipt of a notice of termination or reduction from the Commonwealth pursuant to this clause, the Recipient must:
  - (i) cease carrying out the relevant Work to the extent specified in the notice;
  - (ii) take all available steps to minimise any Losses resulting from that termination or reduction; and
  - (iii) continue carrying out those parts of the Activity not affected by the notice.
- (c) Where there has been a termination under this clause 18.2, the Commonwealth will only be liable for:
  - (i) costs properly incurred in relation to the Activity or the relevant Work under this Agreement before the effective date of termination; and
  - (ii) reasonable costs incurred by the Recipient and directly attributable to the termination.
- (d) Where there has been a reduction in the scope of Work, the Commonwealth's liability to the Recipient for payment of the Funds will, unless there is an agreement in writing to the contrary, be reduced in accordance with the reduction in the relevant Work.
- (e) The Commonwealth will not be liable to pay any costs referred to under this clause in an amount which would, in addition to any amounts paid or due, or becoming due, to the Recipient under this Agreement, together exceed the maximum amount of Funds specified in the Activity Particulars.
- (f) The Recipient will not be entitled to compensation for loss of prospective profits.
- (g) The termination of this Agreement under this clause 18.2 does not discharge any right that a party may have for any prior breach of this Agreement.

## **18.3 Dealing with Funds on termination or suspension**

- (a) On termination of this Agreement, or for the duration of any suspension of dealings with the Funds, the Recipient must only deal with the Funds in

accordance with the directions of the Commonwealth and must cease all other dealings with the Funds. The directions of the Commonwealth may be given at any time after the termination or during any period of suspension. If the Commonwealth does not provide any directions the Recipient must not deal with the Funds.

- (b) The Commonwealth may end the suspension of dealings with the Funds by written notice to the Recipient, subject to such preconditions (including variations to this Agreement) which the Commonwealth may require.
- (c) The Commonwealth will not be obliged to pay any part of the Funds to the Recipient during any period of suspension of dealings with the Funds or, subject to clause 18.2, after the termination of this Agreement.

#### **18.4 Deemed termination for convenience**

If a purported termination for cause by the Commonwealth under clauses 18.1 or 18.2 is determined by a competent authority not to be properly a termination for cause, then that termination by the Commonwealth will be deemed to be a termination for convenience under clause 18.2, which termination has effect from the date of the notice of termination referred to in clause 18.1 or 18.2 (as the case may be), and the Recipient's sole rights in such circumstances will be only those set out in clause 18.2.

### **19. Notices and other communications**

#### **19.1 Service of notices**

A party giving notice or notifying under this Agreement must do so in English and in writing or by Electronic Communication:

- (a) directed to the other party's contact person at the other party's address (as set out in the Agreement Details and as varied by any notice); and
- (b) hand delivered or sent by prepaid post or Electronic Communication to that address.

#### **19.2 Effective on receipt**

A notice given in accordance with clause 19.1 takes effect when it is taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia); or
- (c) if sent by Electronic Communication, at the time that would be the time of receipt under the *Electronic Transactions Act 1999* (Cth),

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the notice is taken to be received at 9.00am on the next Business Day.

### **20. Work health and safety**

- (a) In this clause 20:
  - (i) **corresponding WHS law** has the meaning given in section 4 of the WHS Act;

- (ii) **Regulator** means an authority referred to in a WHS Law as the relevant authority for occupational health and safety complaints, queries or investigations;
  - (iii) **WHS Act** means the *Work Health and Safety Act 2011* (Cth);
  - (iv) **WHS Law** means the WHS Act and any corresponding WHS law;
  - (v) **WHS entry permit holder** has the meaning given in the WHS Act; and
  - (vi) **WHS Regulations** means the regulations made under the WHS Act.
- (b) The Recipient must in carrying out its obligations under this Agreement, comply, and use reasonable endeavours to ensure that its subcontractors comply, with the provisions of all relevant statutes, regulations, by-laws and requirements of any Commonwealth, State, Territory or local authority including those arising under a WHS Law in respect of occupational health and safety.
- (c) The Recipient must, in carrying out its obligations under this Agreement, comply, and use reasonable endeavours to ensure that its subcontractors comply, with any of the Commonwealth's work, health and safety policies as notified, referred to, or made available, by the Commonwealth to the Recipient in writing.
- (d) If the Recipient is required by a WHS Law to report to a Regulator an incident arising out of the Activity:
- (i) at the same time, or as soon as is possible in the circumstances, the Recipient must give notice of such incident, and a copy of any written notice provided to a Regulator, to the Commonwealth; and
  - (ii) the Recipient must provide to the Commonwealth, within such time as is specified by the Commonwealth, a report detailing the circumstances of the incident, the results of investigations into its cause, and any recommendations or strategies for prevention in the future.
- (e) The Recipient must inform the Commonwealth of the full details of:
- (i) any suspected contravention of a WHS Law relating to the Activity, within 24 hours of becoming aware of any such suspected contravention;
  - (ii) any cessation or direction to cease work relating to the Activity, due to unsafe work, immediately upon the Recipient being informed of any such cessation or direction;
  - (iii) any workplace entry by a WHS entry permit holder, or an inspector, to any place where the Activity is being performed or undertaken, within 24 hours of becoming aware of any such workplace entry; and
  - (iv) any proceedings against the Recipient or its officers, or any decision or request by the Regulator given to the Recipient or its Personnel, under a WHS Law, within 24 hours of becoming aware of any such proceedings, decision or request.

## 21. General provisions

### 21.1 Survival of provisions

Termination or expiry of this Agreement for any reason does not extinguish or otherwise affect:

- (a) any rights of either party against the other which:
  - (i) accrued prior to the time of termination or expiry; or
  - (ii) otherwise relate to or may arise at any future time from any breach of non-observance of obligations under this Agreement which arose prior to the time of termination or expiry; and
- (b) the provisions of this Agreement which by their nature survive expiry or termination, including:
  - (i) clause 1 (Definitions and interpretation);
  - (ii) clause 5 (Funds);
  - (iii) clause 8 (Records, Reports and acquittals);
  - (iv) clause 9 (Access to premises and records);
  - (v) clause 12 (Confidential Information);
  - (vi) clause 13 (Personal Information);
  - (vii) clause 14 (Indemnity and release);
  - (viii) clause 15 (Insurance);
  - (ix) clause 18.2(c) (Liability of the Commonwealth);
  - (x) clause 18.3 (Dealing with Funds on termination or suspension); and
  - (xi) clause 21.12 (Relationship).

## **21.2 Varying this Agreement**

This Agreement may only be varied in writing signed by each party.

## **21.3 Approvals and consents**

Except where this Agreement expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

## **21.4 Assignment and novation**

- (a) Subject to clause 21.4(b):
  - (i) a party may only assign its rights or novate its rights and obligations under this Agreement with the prior written consent of the other party; and
  - (ii) the Recipient must obtain the Commonwealth's written consent before there is a change in control of the Recipient.
- (b) Nothing in this clause 21.4 prevents a party from altering its internal arrangements for administering this Agreement due to a machinery of government change.

## **21.5 Costs**

Each party must pay its own costs of negotiating, preparing and executing this Agreement.

## **21.6 Counterparts**

This Agreement may be executed in counterparts. All executed counterparts together constitute one validly executed agreement.

### **21.7 No merger**

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

### **21.8 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.

### **21.9 Further action**

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and any transaction contemplated by it.

### **21.10 Severability**

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

### **21.11 Waiver**

Waiver of any provision of or right under this Agreement:

- (a) must be in writing signed by the party entitled to the benefit of that provision or right; and
- (b) is effective only to the extent set out in any written waiver.

### **21.12 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.

### **21.13 Disclosure of information**

Notwithstanding any other provision of this Agreement, the Commonwealth may disclose information about this Agreement, including Personal Information, required to be reported by the Commonwealth.

### **21.14 Governing law and jurisdiction**

This Agreement is governed by the law of the Australian Capital Territory and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

## Schedule 1 – Agreement Details

Item No.	Description	Clause reference	Details
1.	<b>Commonwealth Representative</b>	1.1	Name: John Robertson Position: Assistant Secretary, Water Infrastructure Southern Branch Phone: (02) 6275 9994 Email: <a href="mailto:john.robertson@environment.gov.au">john.robertson@environment.gov.au</a>
2.	<b>Recipient details</b>	1.1	South Australian Department of Environment, Water and Natural Resources ABN 36 702 093 234
3.	<b>Recipient Representative</b>	1.1	Name: Dan Jordan Position: Director Water and Climate Change Phone: 08 8463 7004 Email: <a href="mailto:Dan.Jordan2@sa.gov.au">Dan.Jordan2@sa.gov.au</a>
4.	<b>Subcontractors</b>	4.4	Murray-Darling Basin Authority (MDBA) ABN: 13 679 821 382
5.	<b>GST</b>	6.3(a)	Clause 6.3(a) applies
6.	<b>Confidential Information</b>	12	Commonwealth's Confidential Information: Not applicable Recipient's Confidential Information: Not applicable
7.	<b>Insurance</b>	15	As at the Commencement Date: (a) to the extent required by Law, workers' compensation insurance in respect of the Recipient's liability for any loss or claim by a person employed or otherwise engaged, or deemed to be employed or otherwise engaged, by the Recipient in connection with the Activity; and  public liability insurance covering legal liability (including liability assumed under contract) for loss or damage to property or injury or death to persons arising out of or in connection with carrying out the Activity for an insured amount of \$10 million per occurrence and not less than \$20 million in aggregate.

Item No.	Description	Clause reference	Details
8.	<b>Address for notices</b>	19.1	<p><b>Commonwealth:</b> Craig Bradley  Position: Director, Regional Projects Section  Department of the Environment  Postal address: GPO Box 787, Canberra, ACT, 2601  Physical address:  John Gorton Building, King Edward Terrace, Parkes, ACT, 2600  Fax: 02 6274 2378  Email: <a href="mailto:craig.bradley@environment.gov.au">craig.bradley@environment.gov.au</a></p> <p><b>Recipient:</b>  Name: Christopher Wright  Position: Manager, Environmental Water, Trade and River Operations Policy  Postal address: GPO Box 1047 Adelaide 5001  Physical address: Level 1, 25 Grenfell Street Adelaide  Phone: 08 8463 6899  Email: <a href="mailto:christopher.wright@sa.gov.au">christopher.wright@sa.gov.au</a></p>

# Schedule 2 – Activity Particulars

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## 1. Activity Objectives

To develop the South Australian River Murray constraints business case (Business Case). The Business Case will:

- (a) identify constraints and cost mitigation measures for those constraints to improve deliveries of environmental water through the Murray-Darling Basin system, including to South Australia;
- (b) consider implementation of mitigation measures.

## 2. Activity Outcomes

Funding will be used to support South Australia, with the assistance of the MDBA, to develop a fully costed business case for consideration by the Sustainable Diversion Limit Adjustment Assessment Committee (SDLAAC) that identifies mitigation measures able to be implemented in South Australia to improve the ability to deliver environmental water throughout the Murray-Darling Basin system, including to South Australia.

This Agreement provides funding for business case development only. Arrangements for business case implementation will be subject to the processes established by the Intergovernmental Agreement on Implementing Water Reform in the Murray Darling Basin.

## 3. Activity Governance

The Business Case will be developed by the Recipient with the following governance parameters:

- (a) Externally, through the River Murray Constraints Steering Committee.
- (b) Internally, through the DEWNR South Australian Constraints Reference Group.

## 4. Activity completion date

The Activity must be completed on or before 30 June 2016 (the Final Report is due 60 Business Days after this date: see Schedule 2 Item 6.4).

## 5. Funds (clause 5)

### 5.1 Maximum amount of Funds

The maximum amount of Funds payable by the Commonwealth under this Agreement will be \$ **830,000** (exclusive of GST) or the lesser amount required to complete the Activity. The Recipient is not required to provide a financial contribution under this Agreement.

### 5.2 Payment

The Funds will be paid at the times and in the manner specified in the relevant Milestone Schedule.

## **6. Reports (clause 8)**

### **6.1 Overview**

The Recipient must provide the following Reports for the Activity:

- (a) Progress Reports;
- (b) Financial Information; and
- (c) a Final Report.

### **6.2 Progress Reports**

- (a) The Recipient must provide the Commonwealth with progress Reports, substantially in the form of the template provided by the Commonwealth (if any).
- (b) The Recipient must provide each progress Report within 60 Business Days after the end of each financial year.
- (c) The progress Report must include but need not be limited to, the following information for each Reporting period:
  - (i) details of work undertaken and tasks (including Milestones) completed in the Reporting period and the amount of Funds expended during the Reporting period;
  - (ii) if relevant, details of progress against Activity Outcomes, including any monitoring, evaluation and reporting activities specified in the Work Plans; and
  - (iii) a discussion and statement as to whether the timeframes and Milestones specified in the Work Plan (and specifically during the Reporting period) are being met and an explanation of any delays that have occurred, including the reasons for those delays and the action the Recipient proposes to take to address the delay and the expected effects (if any) the delay will have on the Activity (including the achievement of subsequent Milestones);
  - (iv) a statement as to whether the Activity is proceeding within the Activity Budget, and if it is not, an explanation of why the Activity Budget is not being met and the action the Recipient proposes to take to address this; and
  - (v) any other information reasonably requested by the Commonwealth for the purposes of completing annual reporting to its responsible Minister and the Parliament of the Commonwealth as required by section 86AI of the *Water Act 2007* (Cth).

### **6.3 Financial Information**

Within 90 Business Days of:

- (a) the end of each financial year in which the Recipient has received, expended or retained Funds pursuant to this Agreement; and
  - (b) if requested by the Commonwealth, the earlier termination of this Agreement;
- the Recipient must provide to the Commonwealth:
- (c) a certificate signed by a representative of the Recipient with the authority to make representations on behalf of the Recipient stating whether:

- (i) the Funds have been used for the purpose for which they were provided; and
- (ii) all terms and conditions of this Agreement were complied with;
- (d) the Auditor's Report on the Financial Information; and
- (e) any other Financial Information reasonably requested by the Commonwealth for the purposes of completing annual reporting to its Minister and the Parliament of the Commonwealth as required by section 86AI of the *Water Act 2007* (Cth).

#### **6.4 Final Report**

- (a) The Recipient must provide the Commonwealth with a Final Report, substantially in the form of the template provided by the Commonwealth (if any).
- (b) The Recipient must provide a Final Report within 60 Business Days after the Activity completion date stated at Item 4 of the Activity Particulars, or the earlier termination of this Agreement.
- (c) The Final Report must include, but need not be limited to, the following:
  - (i) details of the operation, mechanisms and processes employed by the Recipient to conduct the Activity;
  - (ii) details of progress against all Milestones and other requirements specified in the Work Plan, including any monitoring, evaluation and reporting activities specified in the Work Plan;
  - (iii) a discussion of the benefits and outcomes of the Activity as a whole; and
  - (iv) an evaluation of the Activity, including discussion of how successful the Activity was in achieving the Activity Objectives.

### **7. Acknowledgement (clause 11)**

The Recipient must acknowledge the provision of the Funds by the Commonwealth:

- (a) at a minimum, in the following way:
  - "The [insert name of Activity] has been funded from the Australian Government's Water for the Environment Special Account as part of implementing the Basin Plan";* or
- (b) in any other form required by the Commonwealth.

## Schedule 3 – Work Plan

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### 1. Milestone Schedule

No.	Milestone description	Milestone date	Amount (excluding GST)
1	Execution of this Agreement by both the parties Provide confirmation of funding arrangements with the MDBA.	On signing	\$420,000
2	Final business case provided to the Sustainable Diversion Limit Adjustment Assessment Committee (SDLAAC) in line with the timeframes agreed by the SDLAAC.	30 November 2015	\$310,000
3	Final Report	31 May 2016	\$100,000

## 2. Activity Budget

<b>Funds</b>	<b>Year 1</b> (GST exclusive)	<b>Year 2</b> (GST exclusive)	<b>Total</b> (GST exclusive)
<b>Commonwealth Funds</b>	\$420,000	\$410,000	\$830,000
<b>Expenditure</b>	<b>Year 1</b> (GST exclusive)	<b>Year 2</b> (GST exclusive)	<b>Total</b> (GST exclusive)
Recipient staffing costs (salaries, on-costs and corporate overhead)	-	\$315,000	\$315,000
Hydrological modelling and mapping	-	\$30,000	\$30,000
Risk assessments and advice	-	\$20,000	\$20,000
Community engagement	-	\$20,000	\$20,000
Project support costs (travel, consumables and audit fees)	\$10,000	\$25,000	\$35,000
Grant agreement to the Murray-Darling Basin Authority	\$410,000	-	\$410,000
<b>Total Expenditure</b>	\$420,000	\$410,000	\$830,000

# Execution page

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**EXECUTED as an agreement**

**SIGNED for and on behalf of the Commonwealth of Australia by the Hon Bob Baldwin MP, Parliamentary Secretary to the Minister for the Environment**

in the presence of

  
\_\_\_\_\_  
Signature  
\_\_\_\_\_  
Date 25/6/15

Monica Morong  
\_\_\_\_\_  
Name of witness (print)  
  
\_\_\_\_\_  
Signature of witness  
\_\_\_\_\_  
Date 25/6/15

**SIGNED for and on behalf of South Australian Department of Environment, Water and Natural Resources by Tim Goodes, Deputy Chief Executive**

in the presence of

  
\_\_\_\_\_  
Signature  
\_\_\_\_\_  
Date 12/06/2015

Dallas Hill  
\_\_\_\_\_  
Name of witness (print)  
  
\_\_\_\_\_  
Signature of witness  
\_\_\_\_\_  
Date 12/6/2015