

Request for Application

Part C – Proposed Head Agreement

Financial Audit Services Panel Agreement

[Instructions for use of this document:

- *wherever parentheses [] appear within this document complete instruction or delete if irrelevant – including these instructions*
- *remove text above “Request for Application – Part C – Proposed Head Agreement”]*

Please Note:

This agreement has been updated and differs from that previously used.

Specifically, refer to clause *[Insert number(s) and name(s) of any clauses that have been added/updated since the Audit Service Provider last reviewed or agreed to the agreement]*

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DRAFT

Date

[Insert date]

Parties

The State of Victoria through the Auditor-General of Level 24, 35 Collins Street, Melbourne, Victoria, 3000. (**Auditor-General**)

[Insert name of company] ABN [#] of [Insert address] (**Audit Service Provider**)

Background

- A Under section 7F of the *Audit Act 1994*, the Auditor-General may obtain the services of a person under contract to assist in the performance of audits.
- B The Auditor-General agrees to appoint the Audit Service Provider to a panel and invite the Audit Service Provider to submit a quote as required for the provision of Financial Audit Services to the Auditor-General on the terms set out in this Agreement.

Agreed Terms

1 Interpretation

1.1 Definitions

In this Agreement:

Act means the *Audit Act 1994* (Vic);

Agreement means this document, including the schedules, any annexures or documents incorporated by reference to them, including the Financial Audit Policy Manual;

Application Documents means the documents attached to this Agreement in **Annexure A**;

Associate means any:

- (a) related corporations of the Audit Service Provider within the meaning of the *Corporations Act 2001* (Cth) involved in the provision of the Audit Services under this Agreement; and
- (b) the officers, directors, employees, contractors, partners, agents and advisers of the of those related corporations involved in the provision of the Audit Services under this Agreement;

Audit Fee means the amount(s) specified in Schedule 2 Item 1 of an Audit Services Engagement, and is inclusive of GST and any costs necessary to complete the Audit Services;

Audit Services means the services specified in an Audit Services Engagement under **Error! Reference source not found.** of Schedule 2;

Audit Services Engagement is the agreement formed following the Auditor-General's acceptance of a quote from the Audit Service Provider and the signing of a Letter of Engagement by both parties.

Auditor-General means the Auditor-General of Victoria;

Authority means the public authority or authorities that the Audit Service Provider has been engaged to audit;

Business Day means a day other than a Saturday, Sunday or bank or public holiday in Victoria;

Commencement Date means:

- (a) for the initial period, the date specified at **Error! Reference source not found.** of **Schedule 1**; or
- (b) for each extension period, the date specified in **Error! Reference source not found.** of **Schedule 1**.

Confidentiality Deed means the document set out in **Schedule 3**;

Confidential Information means any information regardless of its form, created at any time, which:

- (a) is Specific Confidential Information;
- (b) is marked as confidential;
- (c) is by its nature confidential; or
- (d) the Audit Service Provider knows or ought to know is confidential;

but excludes information which, without breach of this Agreement or other breach of confidence:

- (i) is or becomes public knowledge;
- (ii) the Audit Service Provider already knew or had in its possession, on a non-confidential basis, prior to the commencement of this Agreement or before receiving the information from the Auditor-General or the Authority; or
- (iii) has been independently developed or acquired by the Audit Service Provider;

Contract Intellectual Property means any and all Intellectual Property Rights incorporated or comprised in any materials created by or on behalf of the Audit Service Provider or its Associates in the course of providing the Audit Services to the Auditor-General under this Agreement;

Financial Audit Policy Manual means the manual containing procedures and policies of the Victorian Auditor-General's Office as amended from time to time;

General Performance Standards means the performance standards described in Item 1 of **Schedule 2**;

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

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), computer programs, software developments, registered or unregistered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific or artistic fields;

Nominated Personnel means the employees of the Audit Service Provider specified in Error! Reference source not found. Error! Reference source not found. of **Schedule 1** or such other persons as may replace those persons pursuant to **clause 5.3**;

Phase means each of the milestones or achievements specified in **Column 1** of the Work Program in **Schedule 3** of an Audit Services Engagement;

Pre-Existing Intellectual Property means any and all Intellectual Property Rights in any works, items or systems created by or the property of the Audit Service Provider prior to the commencement of the provision of the Audit Services;

Representative means the persons nominated by the Auditor-General and the Audit Service Provider at Error! Reference source not found. of **Schedule 1** or such other person as may subsequently be appointed by either party for the purposes of **clause 1.3** as notified in writing to the other party;

Request for Application means the Auditor-General's request for proposals to join a

panel for the provision of Financial Audit Services (including the documents listed in clause 2 of Part A of the Application) a copy of which is included in **Annexure A**;

Specific Confidential Information means any information:

- (a) relating to the provision of the Audit Services (including information obtained by the Audit Service Provider from a third party);
- (b) obtained or created by the Audit Service Provider or its Associates in the course of providing the Audit Services; and
- (c) the terms of this Agreement;

Staff Costs means all group tax, fringe benefits tax, payroll tax, PAYG tax deductions, superannuation contributions, superannuation guarantee charges, workers' compensation insurance premiums, penalties and any other charges imposed by any government or government authority arising out of or in relation to the provision of the Audit Services through the Nominated Personnel;

State means the Crown in right of the State of Victoria;

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

Term means the period from the Commencement Date until the Termination Date or as varied in accordance with this Agreement; and

Termination Date means:

- (a) for the initial period, the date specified at Error! Reference source not found. of **Schedule 1**; or
- (b) for each extension period, the date specified in Error! Reference source not found. of **Schedule 1**.

Work Program means the Phases, Completion Dates and respective Audit Fees specified in **Schedule 3** of a Financial Audit Services Engagement.

1.2 Construction

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes all 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;
- (f) headings will be ignored in construing this Agreement;
- (g) 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 or 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) a party or parties is a reference to the Auditor-General and the Audit Service Provider (as the case requires);
- (vi) "\$" and "dollar" is a reference to the lawful currency of Australia; and
- (vii) a right includes a remedy, discretion, authority or power;
- (h) 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;
- (i) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and
- (j) any obligation of two or more persons will bind them separately and together.

1.3 Parties' Representatives

For the purposes of ensuring a productive and efficient relationship between the Auditor-General and the Audit Service Provider, each of the Auditor-General and the Audit Service Provider nominates the persons specified in Error! Reference source not found. of **Schedule 1** as their respective representatives in relation to all queries, consents, approvals, complaints and disputes required or arising under or in connection with this Agreement.

2 Appointment of Financial Audit Service Provider

2.1 Term of Agreement

This agreement commences on the Commencement Date and, unless terminated earlier in accordance with **clause 12**, will end on the Termination Date

The Auditor-General may elect, by notice in writing to the Financial Audit Service Provider not later than two months prior to the Termination Date, to extend the Term of this Agreement for one or more further periods, as set out in Error! Reference source not found. of **Schedule 1**.

Any such further period or periods will be on the same terms and conditions as this Agreement (excluding, in respect of the final further period, this **clause 2.1** and incorporating, where necessary, any amendments to this Agreement).

2.2 Request for Audit Services

- (a) During the Term, the Auditor-General may request the Audit Service Provider to provide a quote by submitting to the Audit Service Provider, a Request for Quotation.
- (b) A Request for Quotation must:
 - (i) detail the Audit Services required by the Auditor-General, together with any applicable deadlines or milestones relevant to the performance of the Audit Services; and

- (ii) request the Audit Service Provider to provide to the Auditor-General within 15 Business Days a written quote in respect of the provision of those Audit Services.
- (c) The quote is to specify the total amount payable by the Auditor-General for the provision of the required Audit Services together with an itemisation of the Audit Fees together with estimated labour, comprising that amount.
- (d) If the Auditor-General accepts a quote provided under clause 2.2**Error! Reference source not found.**(b)(ii), the Auditor-General will issue a Letter of Engagement in relation to the required Audit Services, the Letter of Engagement is to specify, as a minimum, the identity of the Auditor-General's Representative, a purchase order number, the Audit Service Provider's details and quote number and details of the relevant Audit Services.

2.3 Formation of Audit Services Engagement

- (a) An Audit Services Engagement will be formed upon the signing of the Letter of Engagement. A quote will not be binding on the Audit Service Provider or VAGO until such time as an Audit Services Engagement has been formed.
- (b) An Audit Services Engagement will consist of:
 - (i) the terms of this Agreement (other than clauses 2, 4, 11, 12.1, 12.2, 12.3, 12.6, 12.7, 12.8, 12.9, 12.10, 12.11, Schedule 1 Items 1, 2, 3, 5, 9, Schedule 3 and with such consequential changes as are necessary to reflect the formation of the relevant Audit Services Engagement in such manner);
 - (ii) the Request for Quotation and the quote provided in response to the Request for Quotation;
 - (iii) the Purchase Order; and
 - (iv) any other document that is expressly incorporated as part of the Audit Services Engagement under clauses 2.3(b)(i), 2.3(b)(ii) or 2.3(b)(iii) above.
- (c) The Audit Service Provider must provide the Audit Services the subject of an Audit Services Engagement in accordance with the General Performance Standards and otherwise in accordance with this Agreement and the requirements of the relevant Audit Services Engagement.

2.4 Inconsistency

Where there is any inconsistency between the provisions of this Agreement and any Audit Services Engagement, the provisions of this Agreement will prevail to the extent of that inconsistency.

3 Obligations of the Audit Service Provider

3.1 Warranty as to Application

The Audit Service Provider warrants that all information contained in the Application is correct including where applicable the information concerning the business structure, reliability and viability of the Audit Service Provider, the experience and expertise of the Audit Service Provider and the Nominated Personnel, the Audit Service Provider's insurance cover and the Audit Service Provider's establishment and maintenance of quality assurance arrangements.

3.2 Required Standards

The Audit Service Provider will provide the Audit Services in accordance with:

- (a) the requirements of the Act and all applicable laws;
- (b) any reasonable lawful direction of the Auditor-General or the Auditor-General's Representative;
- (c) the Financial Audit Policy Manual;
- (d) the Work Program;
- (e) the General Performance Standards;
- (f) any representations made by the Audit Service Provider as to the provision of the Audit Services in the Application Documents.

In the event of any inconsistency between the requirements in **clauses (a) to (f)**, the requirements of **clauses (a) to (f)** will prevail in that order.

3.3 Good Faith

During the Term the Audit Service Provider will not and will ensure that the Nominated Personnel do not intentionally do anything which is or may be harmful to or adversely affect the interests of the Auditor-General in discharging the Auditor-General's obligations under the Act.

3.4 Specific Delegations

The Audit Service Provider must obtain and comply with the prior written authority of the Auditor-General before exercising any power under section 11(1) of the Act.

3.5 Reporting to the Auditor-General

The Audit Service Provider will:

- (a) track, monitor and report to the Auditor-General on the performance of the Audit Service Provider against the requirements of **clause 3.2** at each Completion Date;
- (b) comply with all reporting requirements specified in the Financial Audit Policy Manual, as amended from time to time;
- (c) provide periodic written reports on the progress of the Audit Services at any time nominated by the Auditor-General;
- (d) permit and facilitate the Auditor-General to enquire of, confer with or counsel the Audit Service Provider or the Nominated Personnel in the performance of the Audit Services;
- (e) promptly report to the Auditor-General, such additional information as the Auditor-General may reasonably require, or as to which the Auditor-General should properly be informed, in relation to the Audit Services; and
- (f) provide a copy of the most recent report prepared pursuant to clause 117 of Australian Professional Ethics Standard 320 and clause 53 of AUASB quality control standard ASQC 1 required of professional accountants to the Auditor-General including where a report is finalised during the term of this Agreement, a copy of that report as soon as practicable after its completion.
- (g) promptly inform the Auditor-General of any investigation of the Audit Service Provider by any professional or regulatory body.

3.6 Records to be Kept

- (a) The Audit Service Provider will:
- (i) maintain full and proper Records of the Audit Services including any working papers, communications, interviews, calculations and research produced or obtained by the Audit Service Provider and the Nominated Personnel in the course of providing the Audit Services; and
 - (ii) maintain full and proper Records of any disbursements incurred by the Audit Service Provider and of the number of hours worked by the Nominated Personnel in providing the Audit Services.
 - (iii) subject to **clause 8.8**, retain all such Records for not less than seven years after termination of this Agreement and provide copies of the Records to the Auditor-General when requested and allow representatives of the Auditor-General to have access to and inspect the Records at all reasonable times;
- (b) The Audit Service Provider will store, deal with, dispose of and ensure the security of the Records in accordance with any applicable standards issued under the *Public Records Act 1973*; and
- (c) during the term of this Agreement make all Records available to the Auditor-General on request, including in any of the following circumstances:
- (i) in accordance with the requirements of the *Public Records Act 1973* and all relevant legislation, including the *Information Privacy Act 2000*, *Freedom of Information Act 1982*, *Health Records Act 2001* and *Evidence Act 2008*;
 - (ii) where an IBAC Officer or the officer of another Integrity Body, as defined in the *Independent Broad-based Anti-corruption Commission Act 2011*, makes a request in writing to the Auditor-General.
- (d) In this clause 3.6:
- Record** includes any document within the meaning of the *Evidence Act 2008* (Vic).

3.7 Ownership of Records

All documents generated relating to the Audit Services provided by the Audit Service Provider and the Nominated Personnel remain the property of the Auditor-General.

3.8 Variation of the Audit Services – Auditor-General

- (a) The Auditor-General may at any time by written notice to the Audit Service Provider propose an expansion or reduction in the scope of the Audit Services and consequent changes to the Work Program.
- (b) The Audit Service Provider must, within 5 business days of receiving notice pursuant to **clause 3.8(a)**, provide a written proposal as to any amendments to the Work Program that would apply with respect to compliance with the varied scope of the Audit Services, including any alterations to the Audit Fees.
- (c) If, within 5 business days of the Audit Service Provider providing a proposal under clause 3.8(a), the parties cannot agree as to the necessary amendments to the Schedules to this Agreement following the issuance of a notice pursuant to **clause 3.8(a)**, either party may terminate this Agreement in accordance with **clause 12.4**.

3.9 Variation of the Audit Services – Audit Service Provider

- (a) If the Audit Service Provider encounters changed circumstances in the performance of the Audit Services that in the opinion of the Audit Service Provider may give rise to work and fees in addition to that set out in the Application, the Audit Service Provider must obtain the **prior written agreement** of the Auditor-General to the Audit Service Provider undertaking that additional work and to any additional fee(s) to be paid to the Audit Service Provider in respect of that additional work.
- (b) If the parties cannot agree, within 5 business days, as to the amendments to the Schedules to this Agreement necessary to implement any variations proposed under **clause 3.9(a)**, the Auditor-General may terminate this Agreement in accordance with **clause 12.4**.
- (c) The Audit Service Provider must not under any circumstances negotiate or attempt to negotiate variation to an Audit Fee with any Authority.

3.10 Remedial Work Required by the Auditor-General

- (a) If at any time the Auditor-General is not satisfied that any part of the Audit Services has been provided in accordance with this Agreement, the Auditor-General may require the Audit Service Provider to undertake remedial work to the extent necessary to meet the requirements of this Agreement. Such remedial work will be at the cost of the Audit Service Provider.
- (b) If the Audit Service Provider refuses or is unable to complete to the satisfaction of the Auditor-General any remedial work required by the Auditor-General under **clause 3.10(a)** the Auditor-General may terminate this Agreement, in accordance with **clause 12.1(c)**.
- (c) In addition to the right to terminate provided in **clause 3.10(b)** and not affecting that right, the Auditor-General may:
 - (i) perform such remedial work itself; or
 - (ii) have such remedial work performed by a third party.

3.11 Delay

- (a) Time is of the essence in the provision of the Audit Services.
- (b) If circumstances arise which the Audit Service Provider believes may cause delay in the provision of the Audit Services, the Audit Service Provider must immediately notify the Auditor-General.

3.12 Insurances

- (a) The Audit Service Provider must obtain and maintain current policies of insurance of the type and minimum level of cover specified in **Schedule 1** to insure against claims in respect of the Audit Services during the term of this Agreement and for a period of at least six years after the termination of this Agreement.
- (b) The Audit Service Provider will provide the Auditor-General with written evidence of the currency of such insurance policies at any time upon request.

4 Performance Review

- (a) The continuation of this Agreement shall be subject to the Auditor-General being satisfied as to the performance of the Audit Service Provider.

- (b) At any time, the Auditor-General may conduct a review of the performance of the Audit Service Provider measured against the requirements of this Agreement and in particular the provisions of **clause 3.2**.
- (c) As a result of any such performance review the Auditor-General shall in his absolute discretion determine whether or not the Audit Service Provider's performance has been satisfactory.
- (d) The Auditor-General may provide the Audit Service Provider with a report as a result of the performance review.

5 Nominated Personnel

5.1 Nominated Personnel

The Audit Service Provider must provide the Audit Services through the Nominated Personnel specified in **Item 8 of Schedule 1** or as subsequently agreed.

5.2 Obligations of the Audit Service Provider with Respect to the Nominated Personnel

The Audit Service Provider will:

- (a) ensure that any person engaged by it complies with all obligations imposed on the Audit Service Provider by this Agreement. The Audit 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 the Nominated Personnel and any other sub-contractor as though they were the actions of the Audit Service Provider.
- (b) ensure that the Nominated Personnel perform the Audit Services in a careful, diligent, proper and efficient manner in accordance with the highest professional standards, principles and practices applying to the Audit Services;
- (c) where applicable, ensure that the Nominated Personnel remain members of any professional associations specified in the Application Documents during the Term;
- (d) comply with its statutory obligations in respect of the Nominated Personnel, including compliance with any applicable industrial awards and agreements, minimum terms and conditions of employment, Federal and State anti-discrimination legislation, and occupational health and safety and workers' compensation legislation; and
- (e) pay all Staff Costs in respect of the Nominated Personnel.

5.3 Replacement of Nominated Personnel

- (a) If at any time any of the Nominated Personnel:
 - (i) for any reason is or will be unable to perform the Audit Services in accordance with this Agreement (including by reason of illness); or
 - (ii) in the opinion of the Auditor-General, fails to perform the Audit Services to the required standards and the Auditor-General requests their replacement;
 the Audit Service Provider will, at no additional cost to the Auditor-General, replace that person with another person acceptable to the Auditor-General.
- (b) The Auditor-General has an absolute discretion to accept or reject any replacement Nominated Personnel proposed by the Audit Service Provider.

- (c) If the parties are unable to reach agreement on the appointment of replacement Nominated Personnel, the Auditor-General may terminate this Agreement, in accordance with **clause 12.1(d)**.

5.4 Transfer of Information

Where there is replacement of Nominated Personnel, the replacement Nominated Personnel will obtain such information from the previous Nominated Personnel as is necessary and perform any procedures that are required to carry out the Audit Services in accordance with Australian Auditing Standards.

6 Systems and Equipment

6.1 Systems and Equipment Provided by Audit Service Provider

The Audit Service Provider:

- (a) will provide at its own expense and apply to the performance of its obligations under this Agreement all equipment, computer hardware, computer software and labour required to perform its obligations under this Agreement; and
- (b) warrants that there will be no interruption in the provision of the Audit Services caused by the failure of its equipment or computer hardware and software or its incompatibility with that of the Auditor-General.

6.2 Access to and Use of Auditor-General's and Authority's Property and Personnel

Where the Auditor-General provides the Audit Service Provider with access to or use of the Auditor General's or the Authority's property and personnel, the Audit Service Provider will comply with and will ensure that the Nominated Personnel comply with all directions of the Auditor-General and the Authority from time to time in relation to the security of, access to and use of such property and personnel.

7 Audit Fee

7.1 Amount Payable

- (a) Upon completion of each Phase as set out in Schedule 3 of an Audit Services Engagement, the Auditor-General will pay to the Audit Service Provider the proportion of the Audit Fee relating to that Phase specified in the Work Program.
- (b) The Audit Fee is inclusive of all costs and expenses incurred by the Audit Service Provider in providing the Audit Services including insurance costs, taxes, disbursements and imposts paid by the Audit Service Provider.

7.2 Invoicing and Payment

- (a) The Audit Service Provider will provide to the Auditor-General a valid Tax Invoice including the items specified in **Item 7 of Schedule 1** within **30 days** of each Phase being achieved.
- (b) Provided that the Auditor-General is reasonably satisfied that the Audit Services for which payment is sought have been completed in accordance with this Agreement, the Auditor-General will pay the Audit Fee within **30 days** of receipt of a valid Tax Invoice.

7.3 Fair Payment

- (a) The Auditor-General will, on demand by the Audit 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 this **clause 7.3, Overdue Amount** means an amount (or part thereof) that is not, or is no longer, disputed in accordance with this Agreement:
 - (i) that is due and owing under an invoice properly rendered by the Audit Service Provider in accordance with this Agreement; and
 - (ii) which 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.

7.4 Outstanding Invoices

- (a) If at any time
 - (i) the Auditor-General notifies the Audit Service Provider that the Auditor-General has not received an invoice for Audit Fees payable under this Agreement; and
 - (ii) it is at least 120 days since the relevant Phase was completed; and
 - (iii) the amount payable is not in dispute;

the Auditor-General may issue a written request to the Audit Service Provider for an invoice (**Final Request for Invoice**), describing the relevant Audit Services to which the payment relates.
- (b) If the Audit Service Provider fails to issue a valid invoice within 60 days of receiving a Final Request for Invoice, the Audit Service Provider releases unconditionally the Auditor-General from any obligation to pay the amount described in the Final Request for Invoice.

7.5 No Admission

Payment of an invoice by the Auditor-General does not constitute:

- (a) evidence of or an admission that the Audit Services have been provided in accordance with this Agreement;
- (b) evidence of the value of Audit Services provided; or
- (c) an admission of liability.

8 Confidential Information

8.1 Duty of confidentiality – Audit Service Provider

The Audit Service Provider must:

- (a) keep confidential all Confidential Information;
- (b) not disclose or allow to be disclosed any Confidential Information to any person except:
 - (i) as required by law;
 - (ii) with the prior written consent of the Auditor-General;

- (iii) to its Associates to the extent that they need to know it for the purpose of providing the Audit Services; or
 - (iv) in respect of the terms of this Agreement, in confidence to the Audit Service Provider's legal or financial advisers; and
- (c) subject to **clause 8.1(b)** above, refer any enquiry from any source about the terms of this Agreement or the Audit Services to the Auditor-General without making any further comment.

8.2 Use of Confidential Information

The Audit Service Provider must ensure that all Confidential Information in the possession or control of the Audit Service Provider and its Associates is used only for the purpose of providing the Audit Services.

8.3 Uncertainty

If there is any uncertainty as to whether any information is Confidential Information, that information must be treated as Confidential Information unless the Auditor-General notifies the Audit Service Provider in writing to the contrary.

8.4 Disclosure by Law

If the Audit Service Provider is required by law to disclose any Confidential Information, the Audit Service Provider must:

- (a) first give reasonable notice to and consult with the Auditor-General;
- (b) disclose no more Confidential Information than is strictly required; and
- (c) do whatever is necessary to ensure that the disclosed Confidential Information is treated confidentially.

8.5 Disclosure to Associates

- (a) Before any Confidential Information is disclosed to an Associate, the Audit Service Provider must:
 - (i) have the Associate execute a Confidentiality Deed in the terms set out in **Schedule 4**; and
 - (ii) deliver the signed Confidentiality Deed to the Auditor-General.
- (b) The Audit Service Provider is responsible for any use or disclosure of Confidential Information by its Associates which is contrary to this Agreement or their confidentiality undertakings and must do whatever is necessary to prevent such use or disclosure.

8.6 Associates who no longer require information

Whenever an Associate who has had access to Confidential Information:

- (a) ceases to be employed or engaged by the Audit Service Provider; or
- (b) otherwise no longer needs to know the Confidential Information for the purpose of providing the Audit Services,

the Audit Service Provider must immediately retrieve from that Associate all materials containing any Confidential Information in the Associate's possession or control.

8.7 Security of Confidential Information

The Audit Service Provider must:

- (a) maintain effective security measures to protect all Confidential Information from unauthorised access, use, copying or disclosure;
- (b) notify the Auditor-General immediately in writing if the Audit Service Provider becomes aware that there may be or has been a breach of this **clause 8** and take all reasonable steps required to prevent that breach or any further breach at the Audit Service Provider's expense; and
- (c) provide all reasonable assistance to the Auditor-General and the Authority in connection with any action or investigation by the Auditor-General or the Authority regarding any possible or actual unauthorised disclosure or misuse of Confidential Information.

8.8 Return or Destruction

- (a) Upon termination of this Agreement or upon request by the Auditor-General, the Audit Service Provider must immediately return to the Auditor-General (or, if the Auditor-General requests, destroy) all materials containing Confidential Information in the Audit Service Provider's or its Associates' possession or control.
- (b) If the Auditor-General requests the Audit Service Provider to destroy any materials containing Confidential Information:
 - (i) all electronic or computer data or programs containing the Confidential Information must be erased from the storage media on which it is stored so that it cannot be recovered or reconstructed in any way; and
 - (ii) the Audit Service Provider must certify in writing to the Auditor-General that the Confidential Information has been destroyed.

8.9 Consent to Injunction

The Audit Service Provider acknowledges that due to the nature of the Audit Services and the Confidential Information, damages or an account of profit would not be an adequate remedy for the Auditor-General if there is any unauthorised use or disclosure of Confidential Information. Accordingly, the Audit Service Provider acknowledges that the Auditor-General can seek any form of injunction (or other equitable relief) to restrain any unauthorised use or disclosure of the Confidential Information without the need to prove any special damage. The Audit Service Provider irrevocably consents to any such injunction being granted to the Auditor-General and to a copy of this Agreement being used as conclusive evidence of that consent.

8.10 Duty of confidentiality – Auditor-General

The Auditor-General must:

- (a) keep confidential any report provided in accordance with **clause 3.5(f)**; and
- (b) not disclose or allow to be disclosed the report or any Confidential Information to any person except:
 - (i) as required by law;
 - (ii) with the prior written consent of the Audit Service Provider;
 - (iii) in accordance with the provisions of section 19C of the Act; or
 - (iv) pursuant to the proper exercise of the discretions afforded the Auditor-General in the Act.

8.11 Disclosure of Audit Service Provider's Information

Notwithstanding any other provision of this Agreement, the Audit Service Provider hereby acknowledges and consents to the Auditor-General disclosing any information in relation to the Audit Service Provider or this Agreement as is necessary:

- (a) to comply with any laws, including the:
 - (i) *Financial Management Act 1994* or any instrument made under that act;
 - (ii) *Freedom of Information Act 1982*; or
 - (iii) *Public Records Act 1973*; and
- (b) to comply with any Victorian Government contracts publishing policy, where applicable; and
- (c) to comply with any legal obligation as part of any investigation by any body listed in section 19C(2) of the Act; and
- (d) to comply with any request made pursuant to section 17 or section 19 of the Act.

9 Intellectual Property

9.1 Warranty and Indemnity by Audit Service Provider

The Audit Service Provider warrants to the Auditor-General that it is entitled to use and deal with any Intellectual Property Rights which may be used by it in connection with the provision of the Audit Services.

9.2 Ownership of Contract Intellectual Property

- (a) Subject to **clauses 9.3** and **9.4**, all Contract Intellectual Property vests in and is the property of the Auditor-General from the time of its creation.
- (b) Subject to **clauses 9.3** and **9.4**, the Audit Service Provider hereby irrevocably and unconditionally assigns to the Auditor-General, free of additional charge, all of its right, title and interest in and to the Contract Intellectual Property, and the Audit Service Provider must sign all documents and do all things reasonably required to ensure that such assignment is effected.
- (c) The Audit Service Provider must procure from all of its employees, agents, contractors and other third parties (including Associates) who are authors or makers of any Contract Intellectual Property a written assignment of all Intellectual Property Rights of the employee, agent, contractor or third party in the Contract Intellectual Property as necessary to give effect to **clauses 9.2(a)** and **9.2(b)** and a written consent from all individuals involved in the creation of any Contract Intellectual Property irrevocably consenting to the Auditor-General exercising its rights in the Contract Intellectual Property in a manner that, but for the consent, would otherwise infringe the moral rights of those individuals.

9.3 Ownership of Pre-Existing Intellectual Property

All Pre-Existing Intellectual Property used and identified to the Auditor-General by the Audit Service Provider in connection with the provision of the Audit Services or the creation of Contract Intellectual Property remains the property of the Audit Service Provider or its licensors.

9.4 Licence of Pre-Existing Intellectual Property

- (a) Subject to **clause 9.4(b)**, the Audit Service Provider hereby irrevocably and unconditionally grants to the Auditor-General, free of additional charge, a non-

exclusive, worldwide licence to use any Pre-Existing Intellectual Property to the extent that such Pre-Existing Intellectual Property forms part of or is integral to, any works or other items created by the Audit Service Provider in connection with the provision of the Audit Services or the creation of Contract Intellectual Property.

- (b) The licence granted to the Auditor-General in **clause 9.4(a)** is limited to use of the relevant Pre-Existing Intellectual Property by the Auditor-General for the purposes of the Auditor-General and for no other purpose.

10 Conflict of Interest

10.1 Proscribed Conflicts

The Audit Service Provider will not and will ensure that its Associates do not during the Term of this Agreement provide other services of any kind to the Authority, without the prior written consent of the Auditor-General.

10.2 Other Conflicts of Interest

The Audit Service Provider:

- (a) warrants to the Auditor-General that it and the Nominated Personnel do not and will 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; and
- (b) must promptly notify the Auditor-General of any matter which may give rise to an actual or potential conflict of interest; and
- (c) agrees that if the Audit Service Provider fails to comply with this **clause 10** the Auditor-General may terminate this Agreement in accordance with **clause 12.1(l)**.

11 Change in Control

- (a) The Audit Service Provider must notify the Auditor-General in writing of any change in control of the Audit Service Provider (or the ultimate holding company of the Audit Service Provider) prior to the change in control.
- (b) The Audit Service Provider must notify the Auditor-General in writing of any proposed or impending change in Control of the Audit Service Provider (or of the ultimate holding company of the Audit Service Provider) of which it becomes aware and obtain the Auditor-General's prior written consent to such Change in Control.
- (c) In determining whether or not to provide its consent to a Change in Control, the Auditor-General may consider such information as it considers relevant or necessary, including:
 - (i) compliance by the proposed owner with Governmental policies including in relation to ethical employment standards;
 - (ii) insurance coverage maintained by the proposed owner;
 - (iii) the financial viability of the proposed owner; and

- (iv) the likely ability of the proposed owner to satisfy the requirements set out in the Request for Application, and the obligations of the Audit Service Provider under this Agreement.
- (d) If the Auditor-General notifies the Audit Service Provider that it does not consent to the proposed or impending Change in Control, and the Change in Control occurs notwithstanding, the Auditor-General may, by notice in writing to the Audit Service Provider, terminate this Agreement and any outstanding Audit Services Engagements, such termination to take effect at any nominated time within the immediately succeeding 12 months.

12 Termination

12.1 Immediate Termination

The Auditor-General may immediately terminate this Agreement by giving written notice to the Audit Service Provider if any of the following events occur:

- (a) whether following any review of the Audit Service Provider's performance by the Auditor-General in accordance with **clause 4** or otherwise, the Auditor-General is not satisfied with the performance of the Audit Service Provider;
- (b) at any time the Audit Service Provider's performance is in the opinion of the Auditor-General of such a nature as to make the Audit Service Provider unsuitable to continue providing services under this Agreement;
- (c) the Audit Service Provider is unable to or refuses to perform any remedial work required by the Auditor-General under **clause 3.10**.
- (d) the Audit Service Provider fails to replace any of the Nominated Personnel in accordance with **clause 5.3** within 5 Business Days of the requirement to do so arising;
- (e) the Audit Service Provider breaches **clause 8** or any of its Associates breach their confidentiality undertakings;
- (f) the Audit Service Provider commits any serious or persistent breach of this Agreement which continues unremedied for a period of 14 days after the Audit Service Provider receives notice from the Auditor-General of that breach;
- (g) the Audit Service Provider commits any serious or persistent breach of this Agreement which in the reasonable opinion of the Auditor-General cannot be remedied;
- (h) the Audit Service Provider undergoes a change in its business structure or operations which in the reasonable opinion of the Auditor-General adversely affects the capacity of the Audit Service Provider to provide the Audit Services in accordance with this Agreement;
- (i) the Audit Service Provider goes into liquidation or has a receiver or administrator appointed or becomes subject to any form of insolvency administration or arrangement, or in the case of an individual becomes bankrupt;
- (j) the Audit Service Provider or any of its Associates is charged or convicted of any offence or commits any act (whether in the course of providing the Audit Services or not) which in the reasonable opinion of the Auditor-General would affect the capacity or suitability of the Audit Service Provider to provide the Audit Services;

- (k) the Audit Service Provider or any of its Nominated Personnel ceases to be a member of or is suspended from any relevant professional association or associations specified in the Application Documents;
- (l) the Audit Service Provider or any Associate, in the reasonable opinion of the Auditor-General, acts in such a way as to render the Audit Service Provider or the Associate unable to continue to provide the Audit Services without conflict of interest or impairment of audit independence; or
- (m) a change in Government policy, legislation or restructure of any authority within the meaning of section 3 of the Act occurs, which materially affects the need for or manner of the provision of the Audit Services.

12.2 Termination on Notice by the Auditor-General

The Auditor-General may at any time terminate this Agreement without cause by serving the Audit Service Provider with notice that termination will occur on the date specified in the notice.

12.3 Termination on Notice by the Audit Service Provider

The Audit Service Provider may at any time terminate this Agreement by giving the Auditor-General 20 Business Days' notice in writing.

12.4 Termination for Failure to Agree upon Variation to the Audit Services

Either party may terminate this Agreement following a failure to agree on the necessary amendments to be made to the Work Program pursuant to **clause 3.8** or **3.9** by giving the other party 20 Business Days' notice in writing.

12.5 Termination of Audit Services Engagement without cause

- (a) the Auditor-General may terminate an Audit Services Engagement without cause by giving the Audit Service Provider not less than 60 days notice in writing.
- (b) For the avoidance of doubt, where an Audit Services Engagement is terminated by the Auditor-General pursuant to clause 12.5(a), the Auditor-General will pay to the Audit Service Provider all amounts owing in respect of Audit Services undertaken, and work in progress as at the date of termination, provided that such Audit Services in progress have, in the reasonable opinion of the Auditor-General, been performed in accordance with the General Performance Standards and the requirements of the relevant Audit Services Engagement.

12.6 Cessation of Work

Where the Auditor-General terminates this Agreement under **clause 12.2**, the Audit Service Provider shall upon notification cease all work under this Agreement and take all appropriate action to mitigate any losses and prevent the incurring of any further costs in the provision of the Audit Services.

12.7 Entitlements on Termination

On termination of this Agreement pursuant to this **clause 12**, the Audit Service Provider will only be entitled to the Audit Fee payable pursuant to **clause 7** for any work satisfactorily performed by the Audit Service Provider up to the date of the termination but not compensation for any loss of profits or other benefits.

12.8 Return of Property

Subject to **clause 3.6**, upon the termination of this Agreement, irrespective of the time, manner, or cause of that termination, the Audit Service Provider must immediately return to the Auditor-General any property of the Auditor-General or the Authority which

is in the possession or control of the Audit Service Provider or any of its Associates including any property, documents or other materials provided by the Auditor-General to the Audit Service Provider or its Associates for the purpose of providing the Audit Services.

12.9 Set-off

On termination of this Agreement, the Auditor-General may set-off against and deduct from all or any amounts payable to the Audit Service Provider any amount owing by the Audit Service Provider to the Auditor-General on any account.

12.10 Consequences of Termination

Termination of this Agreement will not prejudice any right of action or remedy which may have accrued to either party prior to termination.

12.11 Survival of Provisions

The obligations of the Audit Service Provider under clauses 3.6 (Records to be kept), 3.12 (Insurances), 8 (Confidential Information), 9 (Intellectual Property), 10 (Conflict of Interest), 12.10 (Consequences of Termination), 16 (Dispute Resolution) and 13.1 (General Indemnity) survive the termination of this Agreement or the completion of the Audit Services.

13 Liability

13.1 General Indemnity

- (a) The Audit Service Provider will indemnify and will keep indemnified the Auditor-General and the State and their officers, employees, agents, contractors and advisers against all loss arising from any:
- (i) breach of any obligation of the Audit Service Provider under **clause 8** or breach by any of its Associates of their confidentiality undertakings;
 - (ii) negligence or other wrongful act or omission of the Audit Service Provider, its staff, agents, licensees, invitees, visitors or any of its Associates;
 - (iii) death, injury, loss of or damage to the Audit Service Provider its staff, agents, licensees, invitees, visitors or any of its Associates;
 - (iv) physical injury to persons or damage to property arising in the execution and performance of this Agreement;
 - (v) any breach of third party intellectual property rights relating to the provision of Audit Services under this Agreement;
 - (vi) failure of the Audit Service Provider to pay the Staff Costs;
 - (vii) any warranty given by the Audit Service Provider under this Agreement being incorrect or misleading in any way; or
 - (viii) other breach of this Agreement by the Audit Service Provider.

“Loss” includes direct and indirect losses, damages, liabilities, costs, expenses, claims, remedies, matters or actions inclusive of all legal fees and disbursements (on a full indemnity basis) however arising, directly or indirectly.

- (b) If an indemnity payment is made by the Audit Service Provider under this **clause 13**, the Audit Service Provider must also pay to the Auditor-General an additional amount equal to any tax which is payable by the Auditor-General in respect of that indemnity payment.

13.2 Reduction in Liability

The Audit Service Provider's liability under this clause shall be reduced to the extent to which any action, proceeding, claim or demand arises out of any negligence or other wrongful act or wrongful omission of the Auditor-General or its servants, employees or agents.

13.3 Liquidated Damages

In addition to any other rights under this Agreement or at law, if:

- (a) the Audit Service Provider fails to provide the services necessary to complete the Phases by the Completion Dates set out in the Work Program;
- (b) the Audit Service Provider fails to meet any specified date for the completion of the Audit Services or any part thereof nominated in the Financial Audit Policy Manual;
- (c) the Audit Service Provider fails to provide the Audit Services to in accordance with **clause 3.2**; or
- (d) the Auditor-General terminates this Agreement prior to the Termination Date under clause 12.1(a), 12.1(b), 12.1(c) or 12.1(d)

liquidated damages specified in Error! Reference source not found. of **Schedule 1** shall be paid by the Audit Service Provider to the Auditor-General. The parties agree that the liquidated damages specified constitute a fair and reasonable pre-estimate, as far as is possible, of the loss that will be suffered by the Auditor-General.

14 Goods and Services Tax

- (a) Terms used in this **clause 14** have the meanings given to them in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with this Agreement are inclusive of GST. The recipient's obligation to pay the GST component of the consideration is subject to it receiving a valid tax invoice in respect of the supply at or before the time of payment.
- (c) 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.

15 Notices

15.1 Method of Service

In addition to any means authorised by law a communication may be given by:

- (a) being personally served on a party;
- (b) being left at the party's current address for service;
- (c) being sent to the party's current address for service by pre-paid ordinary mail; or
- (d) electronic mail to the party's current e-mail address; or
- (e) facsimile to the party's current facsimile number for service.

15.2 Address for Service

- (a) The address, e-mail address and facsimile number for service of the Auditor-General and the Audit Service Provider are initially those set out at **Item 6 of Schedule 1**.
- (b) Any party may from time to time change its address, e-mail address or facsimile number for service by written notice to the other party.

15.3 Service

A communication given by:

- (a) post shall be deemed received if posted within Australia to an Australian address on the third Business Day after posting and in any other case, on the tenth Business Day after posting;
- (b) electronic mail shall be deemed received when, if correctly addressed and successfully transmitted to the party's e-mail address, acknowledgment of receipt is recorded on the sender's computer;
- (c) facsimile:
 - (i) shall be deemed received when the sender's facsimile machine produces a transmission report stating that the facsimile was successfully sent to the addressee's facsimile number;
 - (ii) shall be deemed given in the form transmitted unless the message is not fully received in legible form and the addressee immediately notifies the sender of that fact.

15.4 Service After Hours

If a communication to a party is received by it:

- (a) after 5:00 pm; or
- (b) on a day which is not a Business Day,

it will be deemed to have been received at the commencement of the next Business Day.

16 Dispute Resolution

16.1 Parties to Meet

If any dispute arises under or in connection with this Agreement which is not able to be resolved by the parties' Representatives within 14 days of arising, the Representatives of each party will promptly meet and discuss in good faith with a view to resolving the dispute.

16.2 Mediation

If any dispute is unable to be resolved in accordance with **clause 16.1**, the parties agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Commercial Disputes Centre, or by an alternative professional mediation service agreed by both parties, before having recourse to arbitration or litigation.

16.3 Arbitration

If the parties fail to settle any dispute in accordance with **clause 16.2**:

- (a) if the dispute relates to the reasonableness of any amount to be paid by the Auditor-General under this Agreement the parties must refer the dispute to arbitration under the *Commercial Arbitration Act 2011*;
- (b) if the dispute relates to any other matter, the parties may agree to refer the dispute to arbitration under the *Commercial Arbitration Act 2011*.

16.4 Litigation

If the parties fail to agree to refer the dispute to arbitration in accordance with **clause 16.3(b)**, either party may submit the dispute for resolution to the non-exclusive jurisdiction of the Courts of Victoria, Australia.

16.5 Performance During Dispute Resolution

The parties will continue to perform their respective obligations under this Agreement pending the resolution of a Dispute under this **clause 16**.

17 Compliance With Laws and Policy

The Audit Service Provider must, in performing its obligations under this Agreement, comply with all laws and policies of the Auditor-General and the State affecting or applicable to the provision of the Audit Services by the Audit Service Provider under this Agreement. Without limitation to the foregoing, the Audit Service Provider must comply with the Financial Audit Policy Manual and with the provisions set out in **Schedule 4**.

18 General

18.1 Assignment

- (a) The Audit Service Provider must not assign, subcontract or otherwise deal with any right or obligation under this Agreement without the prior written consent of the Auditor-General.
- (b) The Auditor-General may, by notice in writing to the Audit Service Provider, assign its rights under this Agreement to any other State government department, administrative office or other entity in the event of any State government restructure or re-organisation.

18.2 Provision of Audit Services Outside Australia

The Audit Service Provider must not engage any person, whether an employee or subsidiary of the Audit Service Provider or not, to provide any of the Audit Services or part thereof under this Agreement:

- (a) to the Auditor-General;
- (b) to the Authority; or
- (c) to the Audit Service Provider itself;

outside Australia without the prior written consent of the Auditor-General.

18.3 Relationship of Parties and Nominated Personnel

- (a) This Agreement is not intended to create a partnership, or joint venture relationship between the Auditor-General and the Audit Service Provider or its Associates.
- (b) The relationship between the Audit Service Provider and Auditor-General is and shall remain that of principal and independent contractor. The Nominated

Personnel will not be deemed to be legal representatives, servants or employees of the Auditor-General for any purpose whatsoever.

- (c) The Audit Service Provider acknowledges that it is the agent of the Auditor-General. The Audit Service Provider's authority as agent under this agreement is confined to any act necessary to perform the Audit Services under this Agreement and the terms of any delegation provided to the Audit Service Provider under section 7G of the Act.

18.4 Waiver and Exercise of Rights

All rights under this Agreement shall be cumulative and a single or partial exercise or waiver by a party of a right relating to the Agreement does not prevent any other exercise of that right or the exercise of any other right.

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.

18.5 Governing Law and Jurisdiction

- (a) This Agreement is governed by and is to be construed in accordance with the laws of Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-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.

18.6 Counterparts

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

18.7 Severability

If any provision of this Agreement is invalid or unenforceable in any relevant jurisdiction it may be severed in that jurisdiction to the extent of the invalidity or unenforceability without affecting the enforceability of the other provisions of this Agreement.

18.8 Entire Understanding

- (a) This Agreement contains the entire understanding between the parties as to the subject matter of this Agreement.
- (b) Except as provided in **clause 18.8(a)**, all previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting the subject matter of this Agreement are merged in and superseded by this Agreement and are of no effect. No party is liable to any other party in respect of those matters.
- (c) No oral explanation or information provided by any party to another:
 - (i) affects the meaning or interpretation of this Agreement; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the parties.

18.9 Amendment

This Agreement may only be varied, supplemented or replaced by a written document executed by the parties.

18.10 Inconsistency

Where there is a variation or inconsistency within this Agreement, then priority shall be accorded as follows, from first to last:

- (a) this document;
- (b) the Financial Audit Policy Manual;
- (c) the Schedules to this document; and
- (d) any Annexures to this document.

DRAFT

EXECUTED AS AN AGREEMENT on *[insert date]*

SIGNED by *[insert name of VAGO officer]* on)
behalf of the Auditor-General in the presence)
of:)

.....

Witness

.....

Name of Witness (print)

[Execution if Audit Service Provider is a company:]

EXECUTED by *[insert name of company]* in)
accordance with Section 127 of the)
Corporations Act 2001 (Cth) in the presence)
of:)

.....

Company Secretary/Director

Director

.....

Name of Company Secretary/Director (print)

Name of Director (print)

[Execution if Audit Service Provider is a natural person signing on behalf of a partnership:]

SIGNED by *[insert name of Audit Service*)
Provider] in the presence of:)

.....

Witness

.....

Name of Witness (print)

DRAFT