



**Family &
Community Services**
Community Services

Funding Deed

**DEPARTMENT OF FAMILY AND COMMUNITY SERVICES
NSW**

**The Minister for Family and Community
Services, for and on behalf of the State of New
South Wales, acting through the Department
of Family and Community Services**

AND

ABN

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Deed

Date: 18/07/2014

Parties

First party

Name The Minister for Family and Community Services, for and on behalf of the State of New South Wales, acting through the Department of Family and Community Services (**Community Services**)

ABN

Contact

Telephone

Second party

Name (Service Provider)

ABN

Contact

Telephone

Background

- A. Family and Community Services provides funding for the provision of various social and community services.
- B. The Service Provider wishes to provide certain social and community services to members of the public, within its area of operations.
- C. Family and Community Services may provide Funds to the Service Provider for a Program or multiple Programs, in accordance with the terms and conditions set out in this Deed and any Program Level Agreement.
- D. Should either party disagree with the implementation of any Clause in this Deed or associated Program Level Agreement then the Dispute Resolution Clauses in Section 20 will be activated.

Operative part

1 Term

1.1 *Initial Term*

This Deed commences on the date it is signed by both parties and, unless terminated earlier in accordance with clause 19, continues for an initial period of three years (**Initial Term**).

1.2 *Extension Period*

At the expiry of the Initial Term, this Deed will continue on a month to month basis (**Extension Period**), until the earlier of:

- a. Two years from the start of the Extension Period; or
- b. Family and Community Services giving the Service Provider a minimum sixty days written notice of the expiry of the Extension Period.

1.3 *Effect of expiry or termination of Deed on Program Level Agreement*

If this Deed expires or terminates, any Program Level Agreement in force under this Deed will also automatically end, unless Family and Community Services expressly notifies the Service Provider otherwise, in writing.

2 Program Level Agreement

2.1 *Formation of a Program Level Agreement*

If Family and Community Services wishes to engage the Service Provider to be available to provide Services for a Program, Family and Community Services and the Service Provider will enter into a separate Program Level Agreement.

2.2 *Terms of a Program Level Agreement*

- a. The terms and conditions of each Program Level Agreement entered into in accordance with clause 2.1 will be:
 - i. the terms and conditions set out in the executed Program Level Agreement; and
 - ii. the terms and conditions set out in clauses 3 to 24 and 26 of this Deed (and any other provisions of this Deed necessary to interpret those terms and conditions).
- b. The Service Provider acknowledges that Family and Community Services may provide funding to other persons to perform the same or similar activities as the Service Provider, on such terms and conditions as may be agreed between Family and Community Services and that other person.

2.3 *No guarantee*

- a. The Service Provider acknowledges that nothing in this Deed guarantees that Family and Community Services will:
 - i. direct the Service Provider to provide any minimum level of Services, or any Services at all; or
 - ii. pay any minimum amount of Funds to the Service Provider, or any Funds at all.

3 Obligations of the Service Provider

3.1 *Performance of Program and Services*

- a. If Family and Community Services and the Service Provider enter into a Program Level Agreement, the Service Provider, either by itself or with sub-contractors, must be available to provide all of the Services required for that Program, from the Service Start Date until the Service End Date.
- b. The Service Provider must provide Services in a way which provides reasonable access to all people in the identified client group (set out in the Program Level Agreement), regardless of race, gender, age, pregnancy, marital status, disability, sexual preference, religion, cultural background, transgender or health status. The provision of reasonable access may require the use of interpreters and translators for clients from diverse linguistic and cultural backgrounds.
- c. The Service Provider must take reasonable action to ensure that any Service Outlets are physically accessible to people with disabilities, having regard to the circumstances of a particular case, including:
 - i. the needs of the client;
 - ii. the consequences for the client of exclusion from Services;
 - iii. the financial circumstances of the Service Provider; and
 - iv. the estimated cost of accessibility.

- d. The Service Provider may only exclude people in the identified client group (set out in the Program Level Agreement) where the Service Provider can demonstrate to the reasonable satisfaction of Family and Community Services that the exclusion is supported by a client assessment of current risk and that it has made reasonable attempts to manage that identified risk.
- e. The Service Provider must provide Services in accordance with:
 - i. the requirements of the Program Level Agreement and this Deed;
 - ii. its constitution;
 - iii. all applicable laws and accreditation requirements, including but not limited to the legislation, guidelines, frameworks and policies referred to at the Family and Community Services website; and
 - iv. all applicable professional ethics, principles and standards.
- f. The Service Provider must encourage and enable clients to whom Services are provided and, where appropriate, their guardians or advocates, to exercise their rights. In particular, the right to:
 - i. obtain other assistance or services, which the Service Provider must inform its clients about;
 - ii. privacy and to be treated with respect and dignity;
 - iii. negotiate how Services are delivered to them; and
 - iv. have access, without fear, to an effective complaints mechanism, which the Service Provider must provide.
- g. The Service Provider must notify Family and Community Services, immediately in writing, if:
 - i. Services for a particular Program will not be ready to commence within 60 days from the Service Start Date;
 - ii. Services for a particular Program have not been operating for a period of 5 consecutive Business Days or more, including the Christmas holiday period, in which the Services are required to operate;
 - iii. a Service Outlet for a Program may not be accessible to clients for five, or more, consecutive days on which Services would normally be provided; and
 - iv. Services required for a particular Program have ceased to operate.

3.2 *Personnel*

- a. The Service Provider must ensure that all Personnel engaged in providing Services are properly authorised, accredited, trained and experienced to provide the Services.
- b. If the Service Provider is an “employer” for the purposes of section 9 of the CPWC Act, the Service Provider must ensure that all mandatory employment screening (referred to in the CPWC Act as the “working with children check clearance”) has been undertaken on all Personnel engaged to work in “child-related work” (as defined in the CPWC Act), prior to such Personnel performing any such work.
- c. The Service Provider must ensure that a person who is a Barred Person, or who is otherwise undesirable to work with children, does not undertake child-related work under this Deed or a Program Level Agreement.
- d. Family and Community Services may object to any Personnel allocated by the Service Provider to perform the Services where the Service Provider's Personnel has engaged in misconduct or cannot perform the inherent requirements of the Services.
- e. Where Family and Community Services objects to the Service Provider's Personnel, a senior executive from Family and Community Services will consult with the Service Provider about the objection particularly about the reasons for the objection.

3.3 *Service Provider's Constitution*

- a. The Service Provider must provide Family and Community Services with written notification of any changes to the Service Provider's constitution, within 28 days of the changes being approved by an Annual General Meeting or other legal process.
- b. If the Service Provider's constitution is changed, Family and Community Services may object, on reasonable grounds, to the proposed changes.

3.4 *Other Obligations*

The Service Provider must:

- a. ensure that the provisions of a Program Level Agreement are reflected in the Service Provider's service standards and other relevant policies and that these documents are readily available to Personnel and clients of the Service Provider;
- b. provide input to Family and Community Services' planning processes (where requested by Family and Community Services);

- c. promptly notify Family and Community Services, in writing, if the Service Provider's address or bank account details change;
- d. not enter into any arrangements or commitments in relation to a Program which are inconsistent with the Program Level Agreement for that Program; and
- e. notify Family and Community Services, in writing, if financial assistance is provided by any other agency or authority in relation to a Program.

4 Research, Evaluation and Data Collection

4.1 *Research, Evaluation and Data Collection*

- a. The Service Provider must comply with the research, evaluation and data collection requirements of a Program Level Agreement.
- b. The Service Provider must comply with any request from Family and Community Services for statistical or other information relating to a Program to be used for surveys or research authorised by Family and Community Services.
- c. If the Service Provider makes a written request to Family and Community Services, Family and Community Services will provide the Service Provider with a copy of any public information or report compiled by Family and Community Services as a result of any surveys or research referred to in clause 4.1b, within 28 days of the Service Provider's request.
- d. The Service Provider must promptly notify Family and Community Services if it, or any third party, intends to conduct research into activities that receive Funds. The Service Provider agrees that any such research must comply with Family and Community Services' Guidelines for External Researchers, available at the Family and Community Services website.

5 Performance Audits and Review

5.1 *Audits*

- a. Family and Community Services may audit the Service Provider's compliance with this Deed or a Program Level Agreement, as set out in this clause.
- b. Family and Community Services may attend any premises at which the Service Provider performs Program activities to inspect the operation of the Program, as follows:
 - i. If Family and Community Services wishes to attend a Service Outlet, Family and Community Services will, where practicable, endeavour to provide at least 48 hours prior notice;
 - ii. If Family and Community Services wishes to attend a client or carer's private home, Family and Community Services will, where practicable, endeavour to provide 14 days prior notice to the client or carer and must only attend the client or carer's private home with the client or carer's permission; and
- c. Family and Community Services may conduct an audit of the Service Provider's compliance with its obligations under this Deed or a Program Level Agreement, at any time during the Term and for seven years after the expiry or termination of the Term. In conducting an audit, Family and Community Services will, where practicable, endeavour to provide the Service Provider with:
 - i. written advice at least ten Business Days prior to commencing the audit;
 - ii. written terms of reference for the audit;
 - iii. instructions about the Service Provider's obligations during the audit;
 - iv. a copy of any reporting arising from the audit; and
 - v. an opportunity to respond to any audit report.
- d. The Service Provider agrees to, at no cost or expense to Family and Community Services:
 - i. make available to Family and Community Services all requested records and documents, upon 7 days written notice from Family and Community Services; and
 - ii. provide all reasonable assistance to Family and Community Services in the conduct of an inspection or audit under this clause.
- e. If Family and Community Services holds serious concerns about the operation of a Program, Family and Community Services reserves the right to, with the approval of the relevant senior executive officer from Family and Community Services, attend premises or inspect records or documents without prior notice to the Service Provider. Family and Community Services will, where practicable, endeavour to provide reasons upon attending the premises or inspecting the records or documents.
- f. Family and Community Services may appoint an independent person for the purposes of an inspection or audit under this clause.

5.2 *Managing Performance*

- a. The Service Provider must meet or exceed the Performance Measures for Services, specified in the Program Level Agreement.
- b. The Service Provider must report on the Service Provider's performance against the Performance Measures, as outlined in the Program Level Agreement, or as otherwise notified to the Service Provider by Family and Community Services from time to time.
- c. The Service Provider must participate in all Performance Measurement Cycles. The framework, policies and guidelines outlining these cycles are available at the Family and Community Services website.
- d. The Service Provider must meet the Performance Measure for Services referred to in clause 5.2.a above. A failure by the Service Provider to comply with this clause may be taken to constitute a breach of this Deed (as described in clause 19.1.a.iii).

6 *Payment, Expenditure and Management of Funds*

6.1 *Payment*

In consideration of the provision of Services in accordance with the requirements of this Deed and the relevant Program Level Agreement, and subject to Parliamentary appropriation, Family and Community Services agrees to pay the Funds to the Service Provider, in accordance with the provisions of this Deed and the Program Level Agreement.

6.2 *Expenditure*

The Service Provider agrees that:

- a. Funds paid to the Service Provider by Family and Community Services remain the property of Family and Community Services, and are held on trust by the Service Provider on behalf and for the benefit of Family and Community Services, until the Services are delivered to the reasonable satisfaction of Family and Community Services (for the avoidance of doubt, Funds do not need to be placed in a trust account);
- b. the Service Provider must only use the Funds for the purposes of the Program Level Agreement;
- c. the Service Provider must use and deal with any interest earned on the Funds as if that money earned were part of the Funds and must only use that money for the purposes of the Program or Services;
- d. the Service Provider must report any interest earned on the Funds; and
- e. the Service Provider must not commit any Funds for expenditure that is likely to occur after the Service End Date, without the prior written consent of Family and Community Services.

6.3 *Management*

- a. The Service Provider must maintain a bank account controlled solely by the Service Provider to hold all Funds.
- b. The Service Provider must keep proper accounts and records of its use of the Funds, separately from other accounts and records of the Service Provider.
- c. The Service Provider must ensure that the receipt and expenditure of Funds in relation to each Program Level Agreement are separately identified from other Program Level Agreements.
- d. The Service Provider must, within 20 days of a notice in writing by Family and Community Services, return and repay in full all Funds paid to the Service Provider for Services that have not been delivered by the Service Provider, or not delivered by the Service Provider to the satisfaction of Family and Community Services.

7 *Financial Reporting*

7.1 *Organisation Level*

- a. Subject to clause 7.1d, if the Service Provider is required by law to prepare audited financial statements, the Service Provider must provide Family and Community Services with copies of such audited financial statements, within four months of the end of each Financial Year during the Term.
- b. Any audited financial statement provided to Family and Community Services in accordance with clause 7 must be accompanied by an audit certificate signed by an auditor who is a member of a professional accounting or auditing body that meets Australian Accounting Standards. The auditor must be independent of the Service Provider and must not have any financial interest in the Service Provider. The audit certificate must include a statement that the audit has been completed in accordance with Australian Accounting Standards.
- c. Subject to clause 7.1d, if the Service Provider is not required by law to prepare audited financial statements, the Service Provider must provide Family and Community Services with the following financial statements, within four months of the end of each Financial Year during the Term:

- i. A balance sheet;
 - ii. An income and expenditure statement; and
 - iii. A statement of changes in equity for the financial year.
- d. The Service Provider is not required to comply with clauses 7.1a or 7.1c if the Service Provider is a local council, university or other body established under NSW legislation.
- e. The Service Provider must provide a certificate in relation to the expenditure of all Funds under each Program Level Agreement;
- i. certifying that the Funds have been properly spent, in accordance with the requirements of each Program Level Agreement.
 - ii. signed by two members of the Service Provider's board of management (or equivalent); and
 - iii. within four months of the end of each Financial Year during the Term.
- f. The Service Provider must include in the audited financial statement any additional Funding provided by Family and Community Services to the Service Provider (outside of this Deed or a Program Level Agreement), within four months of the end of each Financial Year during the Term.

7.2 Program Level Agreements

- a. The Service Provider must provide an income and expenditure statement:
- i. for Funds under each Program Level Agreement valued at above \$25,000;
 - ii. to include any additional funds provided by Family and Community Services; and
 - iii. within four months of the end of each Financial Year during the Term.
- b. Notwithstanding any other clause in this Deed, the parties acknowledge and agree that clauses 3.3 a, 3.4 b, 7.1 and 7.2 a are of no force and effect and are not binding on the Service Provider unless and until a Program Level Agreement is executed by Family and Community Services.

8 Withholding and Return of Funds

8.1 Withholding Funds

- a. Family and Community Services may withhold Funds (or part of Funds) required to be paid under a Program Level Agreement if:
- i. Family and Community Services forms the reasonable opinion that the Funds are not reasonably required by the Service Provider in the performance of a Program Level Agreement because of Unspent or Uncommitted Funds;
 - ii. the Service Provider has not delivered the Services to the reasonable satisfaction of Family and Community Services; or
 - iii. the Service Provider has not satisfied the financial reporting requirements outlined in clause 7, and until the event causing Family and Community Services to withhold the Funds is remedied by the Service Provider.
- b. If Family and Community Services has determined to withhold Funds under clause 8.1a, Family and Community Services will provide written notification to the Service Provider, as soon as possible after the determination is made.
- c. Notwithstanding any withholding of Funds, the Service Provider must continue to fulfil its obligations under a Program Level Agreement.
- d. Nothing in this clause 8.1 prevents Family and Community Services from taking any other action in relation to a failure by the Service Provider to deliver the Services or fulfil other obligations under a Program Level Agreement to the reasonable satisfaction of Family and Community Services.

8.2 Return of Unspent or Uncommitted Funds

If:

- a. at any time during the Term, or at the end of each Financial Year during the Term, or on the expiry or earlier termination of a Program Level Agreement, any Funds that:
- i. are Unspent or Uncommitted Funds; or
 - ii. cannot be shown to the reasonable satisfaction of Family and Community Services to have been spent or committed in accordance with this Deed or the relevant Program Level Agreement; or

- b. at any time Family and Community Services forms the reasonable opinion that Funds have been used, spent or committed by the Service Provider other than in accordance with this Deed or the relevant Program Level Agreement,

Family and Community Services may, by written notice to the Service Provider:

- i. require the Service Provider to repay that part of the Funds, and the Service Provider must repay to Family and Community Services the amount set out in the notice within 20 Business Days.
OR
- ii. Family and Community Services may make an adjustment to any future payments during the term.

9 Asset Management and Ownership

9.1 Asset Management

- a. The Service Provider agrees that any assets purchased with the funds provided under this Deed or any associated Program Level Agreement are the property of Family and Community Services and are held in trust by the Service Provider on behalf and for the benefit of Family and Community Services unless otherwise approved by Family and Community Services. The Service Provider must:
- i. not encumber or dispose of any Asset, or deal with or use any Asset other than in accordance with this clause, without the prior written approval of Family and Community Services;
 - ii. hold all Assets securely and safeguard them against theft, loss, damage or unauthorised use;
 - iii. maintain all Assets in good working order;
 - iv. maintain appropriate insurance in respect of any Assets;
 - v. be fully responsible for, and bear all risks arising in relation to, the use or disposal of any Asset;
 - vi. maintain a register of these Assets over the value of \$5,000; and
 - vii. provide a copy of the register of Assets to Family and Community Services within four months of the end of each Financial Year during the Term.
- b. The Service Provider must obtain prior written approval from Family and Community Services before selling or otherwise disposing of an Asset. The Service Provider must, at the direction of Family and Community Services:
- i. pay to Family and Community Services within twenty Business Days of the date of the sale or disposal, the Written Down Value of the Asset using the Australian Taxation Office depreciation rates to calculate the depreciation of the asset;
 - ii. pay to Family and Community Services within twenty Business Days of the date of the sale or disposal, the proceeds of the sale or disposal, less an amount equal to the sum of the Service Provider's proportionate contribution to the purchase price of the Asset and the Service Provider's reasonable costs of sale or disposal of the Asset; or
 - iii. use the funds from the disposal of the asset for a purpose approved in writing by Family and Community Services.
- c. At the expiration or termination of a Program Level Agreement (which is the last Program Level Agreement for which the Asset is used), the Service Provider must, at the direction of Family and Community Services:
- i. pay to Family and Community Services within twenty Business Days of the date of the sale or disposal, the Written Down Value of the Asset using the Australian Taxation Office depreciation rates to calculate the depreciation of the asset;
 - ii. sell the Asset for the best price reasonably obtainable and pay to Family and Community Services within twenty Business Days of the date of the sale the proceeds of the sale, less an amount equal to the sum of the Service Provider's proportionate contribution to the purchase price of the Asset and the Service Provider's reasonable costs of sale of the Asset; or
 - iii. use the Asset on such terms and conditions as may be approved in writing by Family and Community Services.
- d. Assets acquired under any previous funding arrangement between Family and Community Services and the Service Provider must be treated as an Asset for the purposes of clause 9.

10 GST

- a. Any amount referred to in this Deed or a Program Level Agreement which is relevant in determining a payment to be made by one of the parties to the other is exclusive of any GST, unless indicated otherwise.
- b. If GST is imposed on a supply made under or in connection with this Deed or a Program Level Agreement, the consideration provided for that supply is increased by the rate at which the GST is imposed. The additional consideration is payable at the same time as the consideration to which it relates.

- c. If one of the parties is entitled to be reimbursed for an expense or outgoing incurred in connection with this Deed or a Program Level Agreement, the amount of the reimbursement will be net of any Input Tax Credit which may be claimed by the party being reimbursed in relation to that expense or outgoing.
- d. Family and Community Services will issue a Recipient Created Tax Invoice (RCTI) to the Service Provider (and may do so via pre-paid post, email, or via the Providers Acquittals Portal) within 28 days of each payment.

11 Records and Intellectual Property

11.1 Records

The Service Provider must:

- a. establish and maintain clear operational records for each Program, in a form that meets appropriate record-keeping standards and all applicable legislative requirements;
- b. retain the records referred to in clause 11.1a throughout the Term and for 7 years after the expiry or termination of this Deed, or as otherwise required under legislation or specified in writing by Family and Community Services;
- c. ensure that, in the event that the Service Provider ceases to operate, the records referred to in clause 11.1a remain accessible to Family and Community Services for 7 years after the expiry or termination of this Deed, or as otherwise required under legislation or specified in writing by Family and Community Services;
- d. dispose of the records referred to in clause 11.1a, once they are no longer required to be maintained in accordance with clause 11.1b or 11.1c, in accordance with sound records management practice, or as otherwise specified in writing by Family and Community Services.
- e. For avoidance of doubt, accredited agencies funded to provide out of home care services must comply with section 170 of the CYPCP Act (and service provision guidelines) must maintain files of a child or young person for seven years. At the expiration of this period or, if, within that period the accredited agency ceases to be a designated agency, it must deliver the records to the Secretary, FACS.

11.2 Intellectual Property

- a. Any Intellectual Property Rights and title to, or in relation to, the Program Material will vest, upon creation, in the Service Provider.
- b. The Service Provider grants, and will ensure third parties grant, to Family and Community Services a perpetual, irrevocable, royalty-free and licence fee-free, world-wide, non-exclusive licence (including a right of sub-licence) to use, copy, modify and exploit the Program Material.

12 Publicity

12.1 Publicity

- a. The Service Provider must acknowledge the Funds received from Family and Community Services in its annual report and any publications or material produced as part of a Program.
- b. The Service Provider must not use Family and Community Services' logo, without Family and Community Services' prior written approval.

13 Conflict of Interest

13.1 Conflict of interest

- a. The Service Provider warrants that, to the best of its knowledge after making diligent inquiry, no conflict of interest exists or is likely to arise in the performance of its obligations under this Deed or a Program Level Agreement.
- b. If a conflict of interest arises, or appears likely to arise as outlined in 13.1.a, the Service Provider must:
 - i. immediately notify Family and Community Services in writing of the conflict, making full disclosure of all relevant information relating to the conflict and setting out the steps the Service Provider proposes to take to resolve or otherwise deal with the conflict; and
 - ii. take such steps as Family and Community Services may reasonably require of the Service Provider to eliminate, resolve or otherwise deal with the conflict.

14 Confidentiality and Information Security

14.1 Confidentiality

- a. The Service Provider agrees not to disclose to any person other than Family and Community Services, or where required under clause 14.1.b of this Deed, any Confidential Information relating to this Deed or a Program Level Agreement, without prior written approval from Family and Community Services.

- b. The Service Provider acknowledges that it is subject to and agrees to comply with:
 - i. section 76 of the Community Welfare Act 1987 (NSW);
 - ii. section 45 of the Child Protection (Working with Children) Act 2012 (NSW); and
 - iii. section 254 of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

14.2 Information Security

The Service Provider must protect and manage all Program Material in a manner that is consistent with AS/NZS ISO/IEC 27001:2006, Information technology, Security techniques, Information security management systems.

15 Privacy

15.1 Privacy

Without limiting any obligation that the Service Provider has under any applicable privacy laws, the Service Provider must comply with the following in performing this Deed or a Program Level Agreement:

- a. The *Privacy and Personal Information Protection Act 1998* (NSW), as if it were a public sector agency for the purposes of that Act; and
- b. The *Health Records and Information Privacy Act 2002* (NSW).

16 End of term arrangements

16.1 End of term arrangements

- a. At the expiry or termination of this Deed or a Program Level Agreement, the Service Provider must:
 - i. if requested by Family and Community Services, work with Family and Community Services to ensure the orderly transition of clients to a new service provider;
 - ii. provide the following to Family and Community Services, within twenty Business Days of expiry or termination of this Deed or a Program Level Agreement:
 - A. any reports or data due to Family and Community Services under this Deed or a Program Level Agreement, or otherwise requested by Family and Community Services;
 - B. all Confidential Information relating to this Deed or a Program Level Agreement, in the possession or control of the Service Provider.

17 Insurance

17.1 Insurance

- a. The Service Provider must have current and adequate insurance appropriate to the activities funded under this Deed or associated Program Level Agreements. The insurance must be maintained to cover any liability of the Service Provider that might arise in connection with the performance of its obligations under a Program Level Agreement.
- b. The Service Provider must, on request, promptly provide to Family and Community Services any relevant insurance policies and certificates of currency for inspection.

18 Indemnity

18.1 Indemnity

- a. The Service Provider indemnifies on demand and must keep indemnified on demand Family and Community Services, the Minister for Family and Community Services, the State of New South Wales and any office holder, employee, agent, contractor, consultant, delegate or adviser of, or to, Family and Community Services, the Minister for Family and Community Services and the State of New South Wales (**Indemnified Persons**), from and against any Loss which any of them pays, suffers, incurs or is liable for in connection with or arising from:
 - i. any unlawful, negligent, reckless or deliberately wrongful act or omission of the Service Provider or its Personnel;
 - ii. any breach of this Deed or a Program Level Agreement by the Service Provider;
 - iii. any infringement of Intellectual Property Rights by the Operator or any of its Personnel; or
 - iv. any death, personal injury, loss or damage suffered by any person enjoying or affected by the performance of a Program causes or contributed to by the Service Provider or its Personnel.
- b. The Service Provider's indemnity in clause 18.1a will be reduced proportionally to the extent that any unlawful, negligent or deliberately wrongful act or omission of the Indemnified Persons caused or contributed to the loss.

- c. A Program Level Agreement may cap the Service Provider's indemnity in clause 18.1a at a specified amount, which will be applicable to the relevant Program only.

19 Termination

19.1 Termination for cause

- a. If:
- i. Family and Community Services, by notice in writing, requests the Service Provider to take action in accordance with this Deed or a Program Level Agreement and, after ten Business Days from the date of the notice (or a longer period specified in the notice), the Service Provider has failed to take such action;
 - ii. the Service Provider breaches a provision of this Deed or a Program Level Agreement in a manner that, in Family and Community Services' opinion, is not able to be remedied;
 - iii. the Service Provider breaches a provision of this Deed or a Program Level Agreement in a manner that, in Family and Community Services' opinion, is capable of remedy and the Service provider does not comply with a notice from Family and Community Services to remedy the breach;
 - iv. The Service Provider repeatedly breaches a provision or the provisions of this Deed or a Program Level Agreement;
 - v. the Service Provider becomes Insolvent;
 - vi. the Service Provider assigns, or purports to assign, its rights otherwise than as permitted by this Deed or a Program Level Agreement;
 - vii. the Service Provider breaches any confidentiality or privacy obligation under this Deed or a Program Level Agreement;
 - viii. in Family and Community Services' view, a conflict of interest exists for the Service Provider which prevents the performance of this Deed or a Program Level Agreement;
 - ix. the Independent Commission Against Corruption, or similar public body, determines that the Service Provider has engaged in corrupt conduct or similar activity;
 - x. in the case of agencies funded to provide out-of-home care, if the Service Provider's accreditation as a designated agency is suspended or cancelled; or
 - xi. Family and Community Services is expressly entitled to exercise a right of termination under any other provision of this Deed or a Program Level Agreement,

Family and Community Services may, by written notice to the Service Provider, terminate this Deed, any Program Level Agreement and/or any Service Delivery Schedule issued under a Program Level Agreement, with immediate effect.

19.2 Termination for convenience

- a. Family and Community Services may terminate this Deed or any Program Level Agreement on provision of ninety days notice, in writing ("Notice of Termination").
- b. Family and Community Services will not, in any circumstance, be liable for any Consequential Loss suffered by the Service Provider as a result of the termination of this Deed, a Program Level Agreement or any Service Delivery Schedule issued under a Program Level Agreement by Family and Community Services under clause 19.2a.
- c. The Service Provider may terminate this Deed on provision of ninety days notice, in writing ("Notice of Termination").

19.3 Consequences of termination

- a. If Family and Community Services terminates this Deed in accordance with clauses 19.1 or 19.2, any Program Level Agreement in force and any Service Delivery Schedule issued under a Program Level Agreement will also terminate.
- b. If Family and Community Services terminates a Program Level Agreement, or a Service Delivery Schedule issued under a Program Level Agreement, in accordance with clauses 19.1 or 19.2, this Deed and any remaining Program Level Agreements will continue to apply.
- c. Termination by Family and Community Services under clauses 19.1 or 19.2 does not affect any of Family and Community Services other rights or remedies.
- d. If the service provider terminates this Deed in accordance with 19.2, any Program Level Agreement in force and any Service Delivery Schedule issued under a Program Level Agreement will also terminate.

20 Dispute Resolution

- a. This clause 20 applies to any dispute which arises between the parties in connection with this Deed or a Program Level Agreement, except a dispute relating to the negotiation of this Deed or a Program Level Agreement (**Dispute**).
- b. Subject to clause 20h below, a party must not commence or maintain any action or proceeding in any court, tribunal or otherwise regarding a Dispute without first complying with the provisions of this clause 20.
- c. If a party considers that a Dispute has arisen, it may issue a written notice to the other party, setting out reasonable particulars of the matters in dispute (**Dispute Notice**).
- d. The parties must promptly hold good faith discussions between nominated representatives of the parties, after issue of a Dispute Notice to attempt to resolve the Dispute (**First Level Discussions**), and must (subject to privilege) furnish to the other party all information with respect to the Dispute which is appropriate in connection with its resolution.
- e. If the Dispute has not been resolved within ten Business Days after commencement of the First Level Discussions, the parties must attempt to resolve the Dispute by holding good faith discussions between nominated representatives (more senior than the representatives for the First Level Discussions) of the parties (**Second Level Discussions**).
- f. If the Dispute has not been resolved within ten Business Days after commencement of Second Level Discussions, either party may pursue its rights and remedies under this Deed as it sees fit.
- g. The parties will continue performing their respective obligations under this Deed and a Program Level Agreement while a Dispute is being resolved, unless the nature of the Dispute renders it impossible to do so.
- h. Notwithstanding anything in this clause 20, a party may at any time commence court proceedings in relation to a Dispute or Claim arising in connection with this Deed or a Program Level Agreement, where that party seeks urgent interlocutory relief.

21 Sub-contracting

21.1 Sub-contracting

- a. The Service Provider may, with the prior written consent of Family and Community Services, sub-contract any part of a Program Level Agreement to a sub-contractor.
- b. Family and Community Services may, in its absolute discretion, refuse to consent to the Service Provider sub-contracting any part of a Program Level Agreement.
- c. If Family and Community Services consents to the sub-contracting arrangement, the Service Provider must make the sub-contractor aware of the terms and conditions of this Deed and the relevant Program Level Agreement.
- d. The terms and conditions of the sub-contract must be consistent with this Deed and the relevant Program Level Agreement.
- e. The Service Provider will continue to be bound by, and responsible for performance of, this Deed and the relevant Program Level Agreement, notwithstanding that part or all of the Program Level Agreement may have been sub-contracted.
- f. Family and Community Services may, if in its reasonable opinion it considers that a sub-contractor is not complying with the requirements of this Deed or the relevant Program Level Agreement, notify the Service Provider in writing that the Service Provider must immediately terminate its arrangement with the sub-contractor and the Service Provider must immediately do so.
- g. The Service Provider agrees that:
 - i. the Service Provider will be liable for any acts or omissions of any sub-contractor or any employee or agent of the sub-contractor as fully as if they were the acts or omissions of the Service Provider; and
 - ii. the Service Provider will indemnify and release Family and Community Services from any Loss resulting from the acts or omissions of any sub-contractor.

22 GIPA Act

22.1 Disclosure Log (GIPA Act section 25)

The Service Provider acknowledges that Family and Community Services may disclose certain information about this Deed or a Program Level Agreement in accordance with Community Services' obligations under the GIPA Act, including making certain information about this Deed or a Program Level Agreement publicly available in any disclosure log of contracts Family and Community Services is required to maintain.

22.2 Access to Information (GIPA Act section 121)

- a. The Service Provider must, within seven Business Days of receiving a written request from Family and Community Services, provide Family and Community Services with immediate access to the following information contained in records held by the Service Provider:
 - i. information that relates directly to the performance of a Program by the Service Provider;
 - ii. information collected by the Service Provider from members of the public to whom it provides, or offers to provide, activities pursuant to a Program Level Agreement; and
 - iii. information received by the Service Provider from Family and Community Services to enable it to perform a Program.
- b. For the purposes of clause 22.2a, such information does not include:
 - i. information that discloses or would tend to disclose the Service Provider's financing arrangements, financing modelling, cost structure or profit margin;
 - ii. information that the Service Provider is prohibited from disclosing to Family and Community Services by provision made by or under any Act, whether of any State or Territory, or of the Commonwealth; or
 - iii. information that, if disclosed to Family and Community Services, could reasonably be expected to place the Service Provider at a substantial commercial disadvantage in relation to Family and Community Services, whether at present or in the future.
- c. The Service Provider must provide copies of any of the information requested by Family and Community Services in accordance with clause 22.2a at the Service Provider's own cost.

22.3 The Service Provider may request a copy of any public information or report compiled by Family and Community Services as a result of surveys or any annual report compiled from ongoing data collections. The Service Provider must make their request in writing and Family and Community Services must provide copies of documents requested to the Service Provider within 28 days of them receiving a written request.

23 Warranties

23.1 Warranties

The Service Provider represents and warrants to Family and Community Services that the following warranties are true and correct and not misleading on the commencement of this Deed and for the duration of the Term:

- a. If it is a body corporate, it is duly incorporated in accordance with the laws of its place of incorporation, validly exists under those laws and has the capacity to sue or be sued in its own name and to own its property and conduct its business as is being conducted;
- b. It has the power to enter into and perform its obligations under this Deed and any Program Level Agreement;
- c. The execution, delivery and performance of this Deed and any Program Level Agreement has been duly and validly authorised by the Service Provider;
- d. No suit, cause of action, proceeding, application, claim or investigation is current, pending, threatened or in prospect against it that may have an adverse effect on the performance of this Deed or a Program Level Agreement;
- e. It has, and will continue to have and to use, the skills, qualifications and experience sufficient to perform the Program in an efficient and effective manner, with a high degree of quality and responsiveness;
- f. It has, and will continue to have, skilled, qualified and experienced Personnel who are capable of performing the Program in accordance with the Program Level Agreement.

24 Notices

24.1 Notices

Any notice given under or in connection with this Deed (**Notice**):

- a. must be in writing and signed by a person duly authorised by the sender;
- b. must be addressed as follows and delivered to the intended recipient by hand, by prepaid post or by fax at the address or fax number below, or at the address or fax number last notified by the intended recipient to the sender after the date of this Deed:

- i. to Family and
Community
Services:

Fax:

Attention: Funding Deed Notice

ii. to the Service Provider: , ,
Fax:
Attention: Funding Deed Notice

- c. is taken to be given and made:
- i. in the case of hand delivery, when delivered;
 - ii. in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - iii. in the case of a fax, on production of a transmission report by the machine from which the fax was sent that indicates the fax was sent in its entirety to the recipient's fax number;
- d. if under clause 24.1c a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

24.2 Notices sent by email

- a. A party may serve a Notice by email if the Notice:
- i. includes a signature block specifying:
 - A. the name of the person sending the Notice; and
 - B. the sender's position within the relevant party;
 - ii. states in the body of the message or the subject field that it is sent as a Notice under this Deed;
 - iii. contains an express statement that the person sending the Notice has the authority to serve a Notice under this agreement;
 - iv. is sent to the email address below or the email address last notified by the intended recipient to the sender:
 - A. to Family and Community Services:
Attention: Funding Deed Notice
 - B. to the Service Provider:
Attention: Funding Deed Notice

- b. The recipient of a Notice served under this clause 24.2 must:
- i. promptly acknowledge receipt of the Notice; and
 - ii. keep an electronic copy of the Notice,
- c. Failure to comply with clause 24.2b does not invalidate service of a Notice under this clause.

24.3 Receipt of Notices sent by email

- a. A Notice sent under clause 24.2 is taken to be given or made:
- i. when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address stated above, or accepted by the recipient;
 - ii. when the Notice enters an information system controlled by the recipient; or
 - iii. when the Notice is first opened or read by the recipient, whichever occurs first provided that the sender does not receive a delivery failure or out of office notice.
- b. If under clause a. Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4 pm (local time), it will be taken to have been given or made at the start of business on the next Business Day in that place.

25 General

25.1 Relationship between parties

- a. Nothing in this Deed:
- i. constitutes a partnership between the parties; or
 - ii. except as expressly provided, makes a party an agent of another party for any purpose.

- b. A party cannot in any way or for any purpose:
 - i. bind another party; or
 - ii. contract in the name of another party.
- c. If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

25.2 Further assurances

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this Deed.

25.3 Variation

A provision of this Deed can only be varied by a later written document executed by or on behalf of all parties.

25.4 No assignment

A party cannot assign or otherwise transfer its rights under this Deed without the prior written consent of the other party.

25.5 Counterparts

This Deed may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

25.6 Legal expenses and stamp duty

- a. Each party must pay its own legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this Deed.
- b. The Service Provider must pay all stamp duty assessed on or in relation to this Deed and any instrument or transaction required by or necessary to give effect to this Deed.

25.7 Invalidity

- a. A word or provision must be read down if:
 - i. this Deed is void, voidable, or unenforceable if it is not read down;
 - ii. this Deed will not be void, voidable or unenforceable if it is read down; and
 - iii. the provision is capable of being read down.
- b. A word or provision must be severed if:
 - i. despite the operation of clause 25.7a, the provision is void, voidable or unenforceable if it is not severed; and
 - ii. this Deed will be void, voidable or unenforceable if it is not severed.
- c. The remainder of this Deed has full effect even if clause 25.7b.i or ii applies.

25.8 Waiver

A right or remedy created by this Deed cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

25.9 Survival after termination

Clauses 11, 12, 14, 17 and 18 continue to apply after expiration or termination of this Deed.

25.10 Governing law and jurisdiction

- a. The laws applicable in New South Wales govern this Deed.
- b. The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

26 Definitions and interpretation

26.1 Definitions

In this Deed, unless the context indicates a contrary intention:

Address means a party's address set out in the Notices clause of this Deed.

Approval means any certificate, licence, consent, permit, approval or other requirement of any Authority having jurisdiction in connection with the activities contemplated by this Deed.

Asset in respect of a Program means an item of tangible property purchased or leased either wholly or in part with the use of Funds provided under this Deed or associated Program Level Agreement, with a value of \$5,000 or more (inclusive of GST).

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person.

Barred Person means a “disqualified person”, or a person who is subject to an “interim bar” under the CPWC Act; or a “registrable person” referred to in the *Child Protection (Offenders Registration) Act 2000*.

Business Day means a day other than Saturday, Sunday or a gazetted public holiday in New South Wales.

Claim means any claim, demand, proceedings, dispute or complaint of any nature or any kind.

Committed in respect of a Program at a particular date, means Funds paid by Family and Community Services to the Service Provider, that the Service Provider is obliged to pay to a third party in respect of any part of the activities making up the Program,

Confidential Information means information that:

- a. is by its nature confidential;
- b. is designated by Family and Community Services as being confidential; or
- c. the Service Provider knows or ought to know is confidential, but does not include information that:
 - d. is or becomes public knowledge, other than by breach of this Deed or a Program Level Agreement;
 - e. is in the possession of the Service Provider without restriction in relation to disclosure before the date of receipt from Family and Community Services; or
 - f. has been independently developed or acquired by the Service Provider.

Consequential Loss means any loss recoverable at law (other than loss arising in the usual course of things) which is consequential upon other loss, including:

- a. loss of income or revenue;
- b. a loss of opportunity or goodwill;
- c. a loss of profits;
- d. a loss of anticipated savings or business; and
- e. loss of value of any equipment,

and any costs or expenses in connection with the foregoing.

CPWC Act means the Child Protection (Working with Children) Act 2012 (NSW).

CYPCP Act means the Children and Young Persons Care and Protection Act 1998 (NSW).

Extension Period means the period referred to in clause 1.2.

Fax Number means a party's facsimile number set out in the Notices clause of this Deed.

Financial Year means a year commencing on 1 July and ending on 30 June.

Funds in respect of a Program, means the amount or part thereof payable by Family and Community Services for the Program, as specified in the Program Level Agreement.

GIPA Act means the Government Information (Public Access) Act 2009 (NSW).

Initial Term means the period referred to in clause 1.1.

Intellectual Property Rights means all present and future rights conferred by statute, common law or equity in, or in relation to, copyright, trade marks, patents, designs, inventions and other results of intellectual activity in the industrial, commercial, scientific, literary and artistic fields, whether non-registrable, registrable or patentable.

Insolvent means:

- a. where the Service Provider is an individual or partnership, including an individual person, is made bankrupt;
- b. where the Service Provider is a body corporate (within the meaning of the *Corporations Act 2001*):
 - i. a liquidator has been appointed;
 - ii. an administrator has been appointed (voluntarily or otherwise);
 - iii. the Service Provider enters into a scheme or other arrangements with its creditors;
 - iv. a winding-up order is made in respect of the Service Provider;
 - v. a mortgagee of any property of the Service Provider takes possession of that property; or
 - vi. the Service provider enters into any other form of insolvency administration.

Law means:

- a. any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation;
- b. any Approval, including any condition or requirement under it; and

c. any fees and charges payable in connection with the things referred to in paragraphs a and b.

Loss means any loss, damage, liability, action, suit, Claim, demand, charge, cost or expense of any kind (including reasonable legal costs and expenses on a full indemnity basis), including Consequential Loss.

Material means documents, records, software (including source code and object code), goods, images, information and data stored by any means, including all copies and extracts of the same.

Performance Measurement Cycle focuses on activities undertaken by contract managers and funded services staff in managing, monitoring, and recording progress towards performance goals agreed in the contract and in the course of the ongoing contract relationship.

Performance Measures means the level of service or number of services required to be achieved, as set out in a Program Level Agreement.

Personnel means officers, employees, agents or sub-contractors.

Program means a program of activity to be undertaken by the Service Provider, as identified in a Program Level Agreement.

Program Level Agreement means a deed of agreement between Family and Community Services and the Service Provider for the funding of a service, entered into in accordance with clause 2.

Program Material means all Material:

- a. brought into existence for the purpose of a Program Level Agreement or this Deed;
- b. incorporated in, supplied or required to be supplied along with the Material referred to in paragraph a; or
- c. copied or derived from the Material referred to in paragraph a or b.

Related Body Corporate has the meaning given to that term in s 9 of the *Corporations Act 2001* (Cth).

Removal of Personnel means the person so named by Family and Community Services under Clause 3.2d must not be employed to carry out any tasks related to the activities funded by Family and Community Services. It does not mean that the person must be dismissed by the service provider.

Service Delivery Schedule means a service delivery schedule, and any attached orders, that may be issued by Family and Community Services to the Service Provider, and varied by Family and Community Services from time to time, in accordance with clause 3.1 of a Program Level Agreement.

Service End Date means the end date for Services, specified in clause 4.1b of the Program Level Agreement.

Service Start Date means the start date for Services, specified in clause 4.1a of the Program Level Agreement.

Service Outlet means the usual place at which Services will be provided, as specified in the Program Level Agreement.

Services means the services required to perform a Program, as described in a Program Level Agreement.

Term means the Initial Term and any Extension Period.

Uncommitted means Funds paid under this Deed or any associated Program Level Agreement that at a particular date cannot be identified in arrangements with third parties as amounts that the Service Provider is contractually obligated to pay in respect of the Program for which those Funds were provided.

Unspent at a particular date means Funds that have not been spent by the Service Provider.

26.2 Interpretation

In this Deed, unless the context indicates a contrary intention:

- a. **(documents)** a reference to this Deed or another document includes any document which varies, supplements, replaces, assigns or novates this Deed or that other document.
- b. **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this Deed.
- c. **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this Deed.
- d. **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind.
- e. **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning.
- f. **(singular)** the singular includes the plural and vice-versa.
- g. **(rules of construction)** neither this Deed nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting.
- h. **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it.

- i. **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in New South Wales, Australia, even if the obligation is to be performed elsewhere.
- j. **(joint and several)** an agreement, representation, covenant, right or obligation:
 - i. in favour of two or more persons is for the benefit of them jointly and severally; and
 - ii. on the part of two or more persons binds them jointly and severally.
- k. **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions.
- l. **(Australian currency)** a reference to dollars or \$ is to Australian currency.
- m. **(GST)** words defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in clauses about GST, and references to GST extend to any notional liability of any person for GST and to any amount which is treated as GST under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), and references to an input tax credit extend to any notional input tax credit to which any person is entitled.
- n. **(GST group)** if a person is a member of a GST group, references to GST for which the person is liable and to input tax credits to which the person is entitled include GST for which the representative member of the GST group is liable and input tax credits to which the representative member is entitled.

26.3 Order of precedence

To the extent of any inconsistency between the documents listed below, the following order of precedence will apply:

- a. this Deed;
- b. any Program Level Agreements; and
- c. any Service Delivery Schedule.

Executed as a deed

Signed, sealed and delivered by)
)
.....)
Print Name of authorised representative)
and)
)
.....)
Print Name of authorised representative)
as authorised representatives for)
)
ABN:)
)
who warrant that they are duly authorised to)
execute this document on behalf of)
)
ABN:)
)
.....)
Signature of Authorised Representative)
)
.....)
Date)
)
.....)
Signature of Authorised Representative)
)
.....)
Date)
)
.....)
Print name of authorised representative)
)
as authorised representative for the Minister)
for Family and Community Services, for and)
on behalf of the State of New South Wales,)
acting through the Department of Family)
and Community Services:)
)
.....)
Signature of Authorised Representative)
)
.....)
Date)