

FUNDING AGREEMENT

SCHEDULE 3

TERMS AND CONDITIONS

1. Definitions

- 1.1 In this Agreement, the following terms have the following meanings:

Agreement means this agreement, including Schedule 1 and this Schedule 2 and any appendices to this agreement.

Business Day means any day other than a Saturday or Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington, New Zealand.

Commencement Date means the date specified as the commencement date in Schedule 1.

Confidential Information means, in relation to a party, all information of any kind, whether in tangible or documentary form, and whether marked or identified as being confidential, relating to that party or its business operations, customers or technologies and, in relation to the Ministry.

End Date means the date specified as the end date in Schedule 1.

Force Majeure Event means, in relation to either party (*Affected Party*), an event or circumstance beyond the reasonable control of the Affected Party including:

- (a) an act of God;
- (b) an act of public enemy, or declared or undeclared war or threat of war; or
- (c) a terrorist act, blockade, revolution, riot, insurrection, civil commotion or public

demonstration (other than one caused by the Affected Party),

but not including any event or circumstance, or any failure to comply with any term of this Agreement arising from such event or circumstance, that could have been avoided by the exercise, by the Affected Party, of business continuity or other practices in accordance with commercially reasonable practice.

Funding means the funding amount set out in Schedule 1.

GST means goods and services tax within the meaning of the Goods and Services Tax Act 1985.

Intellectual Property means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including all copyright, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs, rights in relation to trade marks, business names and domain names.

Milestone means all or any of the performance milestones specified in Schedule 1.

Personnel means any employee, agent, subcontractor or representative of the Recipient.

Purpose means the purpose described in Schedule 1.

Reports means those reports described in Schedule 1.

Term means the term of this Agreement set out in clause 5.

- 1.2 In this Agreement:

- (a) except as otherwise expressly stated, headings are for convenience only and have no legal effect;
- (b) references to the singular include the plural and vice versa;

- (c) references to a party include that party's successors, executors, administrators and permitted assignees (as the case may be);
- (d) references to clauses and Schedules are to the clauses and Schedules to this Agreement;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;
- (g) references to a person include an individual, firm, company, corporation or unincorporated body of persons, any public, territorial or regional authority, any government, and any agency of any government or of any such authority;
- (h) wherever the words "includes" or "including" (or similar words) are used, they are deemed to be followed by the words "without limitation";
- (i) except as otherwise expressly stated, monetary references are references to New Zealand currency; and
- (j) if there is any conflict between the terms of this Agreement, the following order of precedence will apply:
 - (i) the terms of Schedule 2;
 - (ii) the terms of Schedule 1; and
 - (iii) any other terms of this Agreement.

2. Funding

- 2.1 The Ministry agrees to pay the Funding at the rate and in the manner set out in Schedule 1. The Funding is the total amount payable by the Ministry for the Purpose.
- 2.2 The Recipient must use the Funding solely for the purpose of the Purpose in accordance with this Agreement.

3. Recipient's obligations

- 3.1 In consideration of the Funding the Recipient must:
 - (a) complete each Milestone (if any) by the relevant date set out in Schedule 1;
 - (b) provide the Ministry with any reports described under clause 7 by the relevant date;
 - (c) complete the Purpose to the Ministry's satisfaction by the End Date;
 - (d) carry out the Purpose in accordance with:
 - (i) the terms of this Agreement
 - (ii) the methodology (if any) set out in Schedule 1;
 - (iii) the best currently accepted principles and practice applicable to the field(s) of expertise relating to the Purpose; and
 - (iv) all applicable laws, regulations, rules and professional codes of conduct and practice; and
 - (e) refund any unspent Funding to the Ministry within 10

Business Days of the End Date.

giving the Recipient at least 20 Business Days' notice in writing.

- 3.2 Where all of the monies received by the Recipient to carry out the Programme (including the Funding) exceeds the total cost of the Programme, the Recipient must refund to the Ministry the excess amount. The Recipient is not required to refund, under this clause 3.2, any amount that exceeds the total amount of Funding.

- 5.3 The Ministry may terminate this Agreement immediately by giving notice in writing to the Recipient if the Recipient:

(a) is in breach of any of its obligations under this Agreement and that breach is not capable of being remedied;

(b) fails to remedy any breach of its obligations under this Agreement within five Business Days of receipt of notice of the breach from the Ministry;

(c) does or omits to do something, or any matter concerning the Recipient, that in the Ministry's opinion in the Ministry's opinion, may damage the reputation or image of the Ministry or the Crown;

(d) commits an act of bankruptcy, becomes insolvent or enters into any arrangement with its creditors;

(e) has given or gives any information to the Ministry which is misleading or inaccurate in any material respect; or

(f) enters into liquidation or becomes subject to the appointment of a receiver.

4. Programme progress

4.1 If:

(a) the Ministry is not satisfied with the progress of the Purpose;

(b) the Recipient does or omits to do something, or any matter concerning the Recipient comes to the Ministry's attention, which in the Ministry's opinion, may damage the business or reputation of the Ministry; or

(c) the Recipient breaches any of its obligations under this Agreement,

the Ministry may (without limiting its other remedies) may terminate this Agreement.

5. Term and termination

- 5.1 This Agreement commences on the Commencement Date and, subject to clauses 5.2 and 5.3, expires on the date:

(a) the final Report is completed and provided to the Ministry; and

(b) the Purpose is completed, to the satisfaction of the Ministry.

- 5.2 The Ministry may terminate this Agreement for any reason by

- 5.4 Termination of this Agreement is without prejudice to the rights and obligations of the parties accrued up to and including the date of termination.

- 5.5 On termination or expiry of this Agreement for any reason whatsoever, the Ministry may:

(a) require the Recipient to provide evidence of how the Funding has been spent; and/or

(b) require the Recipient to refund:

(i) any Funding that has not been spent or committed by the Recipient. For the purposes of this clause, Funding is committed to a third party for the purpose of carrying out the Purpose and the Recipient, after using reasonable endeavours, is unable to secure a refund or release from that commitment; or

(ii) the proportion of the Funding that equates to the uncompleted part of the Purpose, as reasonably determined by the Ministry; and

(c) if the Funding has been misused or misappropriated by the Recipient, require the Recipient to refund all Funding paid up to the date of termination, together with interest at the rate of 10% per annum from the date the Recipient received the Funding to the date the Recipient returns the Funding;

5.6 Upon termination or expiry of this Agreement for any reason, clauses 5, 7.2, 7.3(b), (c) and (d), 9, 10, 11, 12 and 14 and any other clauses intended to survive termination or expiration, will remain in full force and effect.

6. Health and safety

The Recipient shall:

(a) consult, cooperate and coordinate with the Ministry, to the extent required by the Ministry, and to ensure that the Ministry and the Recipient will each comply with their

respective obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement;

(b) perform its, and ensure that its Personnel perform their, obligations under this Agreement in compliance with its and their obligations under the Health and Safety at Work Act 2015;

(c) comply with all reasonable directions of the Ministry relating to health, safety, and security;

(d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement;

(e) comply with any additional health and safety requirements described in the Appendix to Schedule 1.

7. Reporting

7.1 The Recipient must report on the progress of the Purpose to the Ministry as set out in Schedule 1.

7.2 The Recipient must ensure all records created under or in connection with this Agreement:

(i) maintained in an accessible form;

(ii) provided to the Ministry in an accessible form on termination or expiry of this Agreement and at any other time on the Ministry's request.

7.3 The Recipient must:

(a) respond promptly, accurately and adequately to any request for information made by the Ministry in relation to this Agreement;

- (b) The Recipient acknowledges that the Ministry is subject to the Official Information Act 1982 (the OIA). The Recipient agrees to cooperate fully in providing the Ministry with any documents or other information that the Ministry is required to provide pursuant to a request made under the OIA, or pursuant to questions raised in Parliament or in any Select Committee concerning this Agreement;
- (c) permit the Ministry at any time and at its expense, to audit any records in connection with this Agreement. The Ministry will comply with the Recipient's reasonable security and confidentiality requirements in conducting any audit under this clause;
- (d) assist the Ministry with any audit conducted under clause 7.3(c) and will ensure its personnel and subcontractors also assist the Ministry, including by making their premises, systems and records available to the Ministry or its nominee if requested.

8. Warranties

- 8.1 Each party warrants that it has full power and authority to enter into, and perform its obligations under, this Agreement.
- 8.2 The Recipient warrants that:
 - (a) it is not insolvent or bankrupt and no action has been taken to initiate any form of insolvency administration in relation to the Recipient;
 - (b) all information supplied by it to the Ministry under this Agreement was, at the time it was provided, true,

complete and accurate in all material respects;

- (c) it is not aware of any information that has not been disclosed to the Ministry which may, if disclosed, materially adversely affect the decision of the Ministry whether to provide the Funding.

9. Intellectual property

9.1 All Intellectual Property rights:

- (a) existing before the Commencement Date that are owned by, or licensed to, either party; and/or
- (b) intellectual property developed independently of this Agreement,

remain the property of that party or its licensors.

9.2 Subject to clause 9.1, all Intellectual Property rights in:

- (a) anything created or developed under or in connection with the Purpose by the Recipient, or its personnel or subcontractors, (but excluding Reports) will be owned by the Recipient upon creation;
- (b) any Reports created or developed under or in connection with the Purpose or this Agreement by the Recipient, or its personnel or subcontractors, will be owned by the Ministry upon creation.

9.3 If any Report incorporates or relies on Intellectual Property rights that are owned by the Recipient or any third party, the Recipient grants the Ministry a perpetual, royalty-free, irrevocable, transferable, sub-licensable licence to use, copy, modify and sublicense under

those Intellectual Property rights Reports for any purpose whatsoever.

9.4 The Recipient warrants that the Reports, and the Ministry's use and possession of them, do not infringe the Intellectual Property rights of any person.

9.5 The Recipient indemnifies the Ministry against all liability, losses, damages, costs and expenses suffered or incurred by the Ministry as a result of any claim that the Reports, or the Ministry's use or possession of them, infringes the Intellectual Property Rights of any person.

10. Confidentiality

10.1 The parties must:

- (a) keep Confidential Information confidential at all times;
- (b) not disclose any Confidential Information to any person other than its employees, agents or contractors who have a need-to-know for the purposes of the Purpose or fulfilling the receiving party's obligations under this Agreement;
- (c) effect and maintain adequate security measures to safeguard the Confidential Information from access or use by unauthorised persons;
- (d) ensure that any employees, agents or contractors to whom it discloses the Confidential Information are aware of and comply with the provisions of this clause 10.

10.2 The obligations of confidentiality under clause 10.1 do not apply to Confidential Information to the extent that such Confidential Information:

- (a) is in, or becomes part of, the public domain through no fault of either party;
- (b) was, before the receiving party received such Confidential Information, in the receiving party's possession without any obligations of confidence;
- (c) is subsequently disclosed to a party, without any obligations of confidence, by a third party who has not derived it from the other party; or
- (d) is required to be disclosed by law.

10.3 Each party will advise the other in writing if it is legally required to disclose any of the other party's Confidential Information and will follow that party's reasonable directions in order to limit the disclosure to the extent possible.

10.4 The Recipient must not make any announcement regarding this Agreement to any person, without the Ministry's prior written consent.

11. Liability and insurance

11.1 Neither party will be liable to the other (under the law of contract, tort, equity or otherwise) for any damages of any kind arising out of or in connection with this Agreement that are indirect or consequential (meaning not arising in the ordinary course as a direct, natural or probable consequence of the act or omission complained of), regardless of the cause of such damages or whether the other party had been advised of the possibility of such damage.

11.2 The Recipient must maintain insurance coverage during the Term in amounts and against risks that are normal for businesses similar to that of the Recipient, including insurance against public liability and

property damage and, where professional advice is provided, professional indemnity insurance.

- 11.3 The Recipient must upon request, provide the Ministry with evidence of its compliance with clause 11.3

12. Dispute resolution

- 12.1 Subject to clause 12.2, if a dispute arises in relation to this Agreement, the parties will attempt to resolve the dispute using the dispute resolution process set out below before pursuing any other remedies available at law or otherwise.

(a) If either party receives notice of a dispute (*Dispute Notice*), the parties will work together in good faith to resolve the dispute via negotiation and will escalate the dispute to appropriate levels within their respective organisations.

(b) If the dispute is not resolved within a reasonable time under clause 12.1(a), and if both parties agree, then either party may, by written notice to the other party (*Mediation Notice*), require the dispute to be submitted to mediation in Wellington, New Zealand and in accordance with the protocols of the Arbitrators' and Mediators' Institute of New Zealand Inc (*AMINZ*). The Mediation will be conducted by a mediator, and at a fee, agreed by the parties. If the parties fail to agree such matters within 15 Business Days following the date of the delivery of the Mediation Notice, the President for the time being of AMINZ will select the mediator and determine the mediator's fee. The parties will share equally the cost of the mediator's fee.

- 12.2 Nothing in this clause 12 will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction in relation to any matter that arises under this Agreement.

- 12.3 Subject to clause 12.2, a party to the dispute will only be entitled to pursue other remedies available to it at law or otherwise, if the parties have failed to resolve the dispute within 40 Business Days of the Dispute Notice or 20 Business Days after commencement of the Mediation.

- 12.4 Each party will continue to perform its obligations under this Agreement to the extent it is able to do so pending the final settlement of any dispute under this clause 12.

13. Force majeure

- 13.1 Neither party will be liable to the other for any failure to perform its obligations under this Agreement to the extent the failure is caused by a Force Majeure Event, provided that the party seeking to rely on this clause 13.1 has:

(a) notified the other party in writing as soon as practicable after the Force Majeure Event occurs and provided full information concerning the Force Majeure Event, including an estimate of the time likely to be required to overcome it;

(b) used its best endeavours to overcome the Force Majeure Event and minimise the loss to the other party; and

(c) continued to perform its obligations under this Agreement as far as practicable.

- 13.2 If a Force Majeure Event prevents, or is likely to prevent, either party from complying with

its obligations under this Agreement to a material extent for a continuous period of 20 Business Days or more, the other party may terminate this Agreement by giving the non-complying party at least 10 Business Days' notice in writing.

14. General

14.1 No amendment to this Agreement will be effective unless it is in writing and signed by the parties.

14.2 Assignment:

(a) The Recipient may not assign, transfer or subcontract any of its rights or obligations under this Agreement without the prior written consent of the Ministry.

(b) If the Recipient is a company, any transfer of shares, or any other arrangement, that changes the effective control of the Recipient is deemed to be an assignment for the purposes of clause 14.2(a).

(c) the Ministry may assign, novate or otherwise transfer any or all of its rights and obligations under this Agreement to any person, agency or regulatory body tasked by the Crown with fulfilling any of the functions of the Ministry by giving notice in writing to the Recipient.

14.3 No failure or delay by a party to exercise any right or remedy under this Agreement will be construed or operate as a waiver of such right or remedy, nor will any single or partial exercise of any right or remedy preclude the further exercise of such right or remedy. No waiver will be effective unless in writing and signed by the relevant party.

14.4 If any provision of this Agreement is held invalid, unenforceable or

illegal for any reason, this Agreement will remain otherwise in full force apart from such provisions, which will be deemed deleted.

14.5 This Agreement contains the whole of the contract and understanding between the parties in respect of the matters covered by it and supersedes all prior representations, agreements, statements and understandings between the parties in respect of those matters, whether verbal or in writing.

14.6 Any notice, consent, approval, agreement, undertaking, report or other communication given by a party for the purposes this Agreement will be of no effect unless given in writing and addressed to the recipient at the address last notified by the recipient to the other party, and marked for the attention of the person set out in Schedule 1. Delivery may be effected by hand, by post with postage prepaid, or by email and will be deemed to have been received:

(a) in the case of hand delivery or pre-paid post sent from outside New Zealand, at the time of actual delivery to the recipient's address;

(b) in the case of delivery by pre-paid post sent from within New Zealand, no later than the 2nd Business Day after posting; or

(c) in the case of delivery by email, no later than when the recipient's email server acknowledges receipt,

However, if a notice or other communication is received or deemed to have been received after 5 pm on a Business Day, or on a day which is not a Business Day in that place, it will be deemed not to have been

received until the next Business Day in that place.

- 14.7 This Agreement is governed by New Zealand law. Subject to clause 12, the parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.
- 14.8 This Agreement may be signed in any number of counterparts (including electronic copies) all of which, when taken together, will constitute one and the same Agreement. A party may enter into this Agreement by signing any counterpart.
- 14.9 Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this Agreement.