

## FUNDING AGREEMENT

**Date 9/04/2015**

### Parties

The Victorian Health Promotion Foundation (ABN: 20 734 406 352 of Ground Floor 15-31 Pelham Street, Carlton, Vic 3053 (“We” “Us” “Our”)

and

the party identified as the “Funding Recipient” in Schedule 1 (“You” “Your”).

### IT IS AGREED:

#### 1. PROJECT

1.1 We will provide You with Funding for the Project on the terms and conditions of this Funding Agreement.

1.2 You must carry out the Project:

- (a) within the Project Period;
- (b) in accordance with this Funding Agreement (including the Budget and the Project Work Plan);
- (c) diligently, effectively, to a high professional standard and using all due care and skill;
- (d) using properly qualified and suitably trained and experienced personnel;
- (e) in compliance with all applicable safety laws, regulations and requirements, including by providing reasonable safety equipment if the Project involves dangerous, physical or sporting activities; and
- (f) so as to complete any Milestones and produce any Project Material by the dates specified in the Project Work Plan.

1.3 You must (and must ensure that your personnel involved in the Project will) comply with:

- (a) all laws applicable to the conduct of the Project or the receipt of the Funding (including by maintaining any necessary licences, permits or approvals); and
- (b) all reasonable directions issued by Us.

1.4 If the Budget or the Project Work Plan are not in their final form on the Date of this Funding Agreement, You must, within 30 days of the Date of this Funding Agreement, develop the Budget and Project Work Plan and submit them to Us for approval.

1.5 Upon receipt of the draft Project Work Plan or Budget under clause 1.4, We may either:

- (c) give You a notice requiring You to make changes and resubmit the draft; or
- (d) give You a notice that the Project Work Plan or Budget is in final form.

1.6 If the Budget and Project Work Plan are not in final form within two months of the Date of this Funding Agreement, You must formally apply to Us for an extension of time for the Project (which may be granted or refused at Our discretion and subject to any conditions We consider to be reasonably necessary).

1.7 If We notify you in writing that an extension under clause 1.6 has not been approved, or if you do not apply for an extension as required under clause 1.6, this Funding Agreement will immediately be automatically terminated and You must repay all Funding you have received from Us under this Funding Agreement within 30 days of such termination.

#### 2. PAYMENT OF FUNDING

2.1 We will provide You with the Funding at the times and in the manner specified in Schedule 1.

2.2 Where Funding is payable in instalments, We will provide You with the instalments when We are reasonably satisfied that You have complied with all the conditions of this Funding Agreement and You have made satisfactory progress towards the goals of the Project.

2.3 Where Funding is payable in instalments on the achievement of Milestones, we will provide you with the relevant instalments following Your achievement to our satisfaction of the applicable Milestone.

- 2.4 You must ensure the highest quality of work in carrying out the Project and producing any Project outputs and Project Material. Without limiting Our rights, We will not be required to pay for any Project Material or outputs which are not provided to the highest standard (until they are provided correctly) and may require You to replace or remedy those items within the time specified by Us (which must be reasonable).
- 2.5 If You have not commenced work on the Project within three months of the Project Start Date specified in Schedule 1, You must formally apply for an extension of time for the Project (which may be granted or refused at Our discretion and subject to any conditions We consider to be reasonably necessary).
- 2.6 If We notify you in writing that an extension under clause 2.5, has not been approved, or if you do not apply for an extension as required under clause 2.5, this Funding Agreement will immediately be automatically terminated and You must repay all Funding you have received from Us under this Funding Agreement within 30 days of such termination.
- 2.7 Without limiting Our rights, if We consider that you have not been complying with Your obligations under this Funding Agreement, We may withhold or suspend any payment of Funding in whole or in part until You comply with such obligations.
- 2.8 We may set off any amount You owe to Us under this Funding Agreement or under any other agreement with Us against any Funding payable to You under this Funding Agreement.
- 2.9 Notwithstanding any withholding or set-off under clauses 2.7 or 2.8, You must continue to carry out the Project and perform any obligations under this Funding Agreement, unless We agree otherwise in writing.
- 2.10 We will issue You a recipient created tax invoice (or invoices) related to the Funding. You are not required to issue Us with any invoices under this Funding Agreement unless expressly stated otherwise. You are required to provide Your ABN and state whether you are registered for GST.
- 2.11 Unless otherwise agreed by Us in writing, Funding will be paid by electronic transfer. We will arrange payment of the Funding to Your nominated bank account and will issue You with a remittance advice for your records.
- ### 3. MANAGEMENT OF FUNDING
- 3.1 The Funding must be expended by You only for the purposes of carrying out the Project in accordance with this Funding Agreement and according to the Budget.
- 3.2 Changes to any items in the Budget of more than:
- (a) 5%; or
  - (b) \$5000,
- must be approved in writing by Us before being actioned.
- 3.3 You must:
- (a) ensure that the Funds are held in an account in Your name, and which You solely control, with a deposit-taking institution authorised under the *Banking Act 1959* (Cth) to carry on banking business in Australia;
  - (b) ensure that two signatories, who have Your authority to do so, are required to operate the account; and
  - (c) identify the receipt and expenditure of the Funds separately within Your accounting Records so that at all times the Funds are identifiable and ascertainable.
- 3.4 You must keep full financial Records relating to the Project and receipt and expenditure of the Funding.
- 3.5 If, at any time, there remains an amount of Funding that has not been expended in accordance with this Funding Agreement, the Project Work Plan or the Budget or any amount expended has not been expended in accordance with this Funding Agreement, the Project Work Plan or the Budget to Our satisfaction, We may request that You refund all or part of the Funding, as directed by Us.
- 3.6 A request from Us to You to refund all or part of the Funding pursuant to clause 3.5 or any other clause of this Funding Agreement must be in writing and will be

accompanied by a Tax Invoice. Upon receipt of such a written request by Us, You must refund the Funding as directed in the written request within 20 Business Days.

- 3.7 Any interest earned by You on the Funding may only be used for the purpose of carrying out the Project (unless We specifically agree otherwise in writing).
- 3.8 Except with Our prior written approval, You must not use any of the following as any form of security for the purpose of obtaining or complying with any form of commercial loan, lease agreement, credit, payment or other interest:
- (a) the Funds;
  - (b) this Funding Agreement or any of Our obligations under this Funding Agreement; or
  - (c) any Project Material.
- 3.9 You may expend the Funds on any separate category of expenditure item within the Budget, as reasonably necessary in order to meet the Project Work Plan.
- 3.10 The Funding represents our entire contribution to the Project. We are not responsible for the provision of additional money to meet any expenditure in excess of the Funds and we are not responsible for any Other Contributions.

#### **4. FINANCIAL RECORDS AND REPORTS**

- 4.1 You must make full and accurate Records of the conduct of the Project, including without limitation, progress against the Milestones, the receipt and expenditure of the Funding and Other Contributions (if any), the creation of Project Material and otherwise as required by law. You must retain those Records during the term of this Funding Agreement and for a period of at least 7 years following the termination or expiration of this Funding Agreement.
- 4.2 Within:
- (a) 90 days after 30 June (or any other agreed date coinciding with the end of financial year for Your organisation) in each year (or partial year) of this Funding Agreement; and
  - (b) within 90 days of the completion date of the Project,

You must provide Us with an up to date Statement of Project Income and Expenditure relating to the Project. Statements of Project Income and Expenditure must identify the Funding provided to You and the balance of the Funds at the end of each financial year or upon completion of the Project.

- 4.3 The Statement of Project Income and Expenditure must be signed by a person in senior management authorised to sign financial documents for Your organisation who must certify that:
- (a) the statement is a true and fair representation of transactions relating to the Funds;
  - (b) the Funds were received and expended solely for the purposes of the Project; and
  - (c) all the terms of this Funding Agreement have been complied with.
- 4.4 You must provide to Us any other reports at the times and in the manner stated in Schedule 1 or the Project Work Plan.
- 4.5 If the amount of Funding exceeds \$100,000 in any of Your financial years, or upon Our request, the Statement of Project Income and Expenditure must be audited, at Your cost, by a person who:
- (a) is a member of the Institute of Chartered Accountants or the Australian Society of Certified Practising Accountants;
  - (b) is not involved in the Project; and
  - (c) is otherwise independent of You.
- 4.6 The report of the independent auditor must be substantially in the form of Schedule 5 (or such other form as agreed in writing by the parties).
- #### **5. TAXES, DUTIES AND GOVERNMENT CHARGES**
- 5.1 Subject to this clause 5, all taxes, duties and government charges imposed or levied in Australia or overseas in connection with this Funding Agreement must be borne by You.
- 5.2 The provisions of this clause 5 in respect of GST apply if You are registered or are required to be registered for GST.

- 5.3 We are registered in accordance with the GST Act and will notify You of any change in Our GST registration status.
- 5.4 You must notify Us immediately of any change in Your GST status.
- 5.5 If You are registered or required to be registered for GST, the Funds paid by Us under this Funding Agreement include GST for supplies provided by You to Us in accordance with this Funding Agreement and which are Taxable Supplies.
- 5.6 The Funding payable by Us to You under this Funding Agreement must not include any amount which represents GST paid by You on Your own inputs and for which an input tax credit is available to You.
- 5.7 If You are registered or required to be registered for GST, any refund of Funding paid to Us under this Funding Agreement must be inclusive of GST and must be accompanied by an Adjustment Note under the GST Act relating to Taxable Supplies.
- 6.6 For the avoidance of doubt, each party will bear its own costs of conducting or participating in an audit under clause 6.4.
- 6.7 If an audit under clause 6.4 reveals that You have failed to comply with any of Your obligations under this Funding Agreement, You must immediately take such actions as are necessary to promptly remedy such non-compliance. You must comply with any reasonable directions or instructions from Us as to the manner (including timing) in which such non-compliance must be remedied.
- 6.8 At our Request, You must, at Your own cost, cooperate with and assist Us in connection with:
- (a) any enquiry or investigation by a government authority, including the Auditor-General; and
- (b) any request made to Us concerning the Project or the Funding under the *Freedom of Information Act 1982 (Vic)*.
- 6.9 At Our request, You agree to participate in any sector-wide, industry-specific or similar evaluation or research projects that We may undertake or commission in the future for the purposes of improving the efficiency and/or effectiveness of Our funding programs.

## **6. PROJECT MONITORING, REPORTING AND EVALUATION**

- 6.1 You must appoint a representative to liaise with and attend meetings with Us, for the purpose of monitoring the progress of the Project, as reasonably required by Us during the term of this Funding Agreement.
- 6.2 If requested by Us, You must complete and provide to us within 10 Business Days a status report detailing your progress against the Project Work Plan.
- 6.3 You must comply with any additional reporting, evaluation or review requirements set out in Schedule 1 or the Project Work Plan.
- 6.4 We may undertake an evaluation of the Project at any time. You must allow Us and our auditors access to Your Records, Your premises and any other information we may require in order to allow us to audit Your performance of Your obligations under this Funding Agreement.
- 6.5 The right of access and audit granted under clause 6.4 may be exercised by Us at any time during the term of this Funding Agreement or in the seven year period following the expiry or termination of this Funding Agreement.

## **7. ACKNOWLEDGEMENTS**

- 7.1 You must acknowledge Our contribution of Funding to the Project:
- (a) in all public announcements concerning the Project or the outcomes of the Project;
- (b) in all documents, materials, reports and other items relating to the Project or the outcomes of the Project;
- (c) at all events (including any lectures) relating to or organised in connection with the Project; and
- (d) as otherwise directed by Us,
- in the manner directed by Us from time to time.
- 7.2 You must acknowledge Our Funding in Your Annual Report if the Funding exceeds \$100,000 in the financial year covered by that report.
- 7.3 Without limiting Your obligations under clause 7.1, You must:

- (a) ensure that any third parties (including any subcontractors) directly associated with the Project also acknowledge Our Funding as directed by Us;
  - (b) advise Us, at least 14 days in advance, of the dates of any key public events relating to the Project and provide Us with an opportunity to attend such events;
  - (c) display Our banners, posters, signage, brochures and other materials at all events/activities connected with the Project as directed by Us;
  - (d) participate in any promotion of the Project when requested to do so by Us, or in any independent promotion of the Project;
  - (e) provide to Us for Our approval any display materials, such as banners, posters, signage, publications, website links, brochures and other materials prepared by You that relate to the Project or refer to Us (and you must not use them without Our approval);
  - (f) display Our logo and a link to Our website on any web-based activities promoting or providing information relating to the Project or the outcomes of the Project, as directed by Us.
- 7.4 We grant you a non-exclusive, non-transferable, royalty-free licence to use Our Trade Marks for the purpose of acknowledging our provision of Funding in accordance with clause 7.3.
- 7.5 We may, from time to time, provide You with guidelines as to how We wish Our Trade Marks to be used and You must comply with those guidelines.
- 7.6 You must not:
- (a) use Our Trade Marks other than to acknowledge our contribution of Funding to the Project or as otherwise agreed by Us in writing;
  - (b) authorise any other party to use Our Trade Marks without Our prior written consent;
  - (c) use any of Our Trade Marks or any substantially identical or deceptively similar mark as part of any corporate or business name without Our prior written consent;
  - (d) take any action in relation to infringement of any of Our Trade Marks;
  - (e) give to a customs officer of any country a notice objecting to the importation of goods infringing any of Our Trade Marks or seek to revoke any such notice; or
  - (f) except as expressly permitted by this Funding Agreement, manufacture, advertise, supply or sell any products or services under a brand name, trade name, trade mark, business name or domain name which is identical or substantially identical with, or deceptively or confusingly similar to, any of Our Trade Marks.
- 7.7 You must ensure that every representation of any of Our Trade Marks by You is accompanied by the ® or ™ symbol as appropriate.
- 7.8 All goodwill in Our Trade Marks will accrue to us (and to the extent any goodwill in Our Trade Marks may accrue to You, you immediately assign it to Us).
- 7.9 You must only use Our Trade Marks in a manner that enhances Our credibility and reputation.
- 7.10 You must not challenge or otherwise impugn or prejudice the validity of Our rights in Our Trade Marks nor assist any other person to do so.
- 7.11 This clause 7 (and the licence granted in clause 7.4) survives the expiration or earlier termination of this Funding Agreement.
- 8. TOBACCO PRODUCTS AND PROMOTION**
- 8.1 You acknowledge that We are established under the *Tobacco Act 1987* (Vic) and have certain objectives and functions set by that Act.
- 8.2 You must not (and must ensure that your employees, agents and contractors do not) take part in any act which is damaging to, or likely to damage, Our reputation, is offensive, corrupt or disreputable or which may bring Us into disrepute, contempt, scandal or ridicule.
- 8.3 Without limiting your obligations under clause 8.2, You must:

- (a) support the prohibition of smoking at Your premises;
- (b) ensure that none of Your officers or employees publically endorse tobacco or tobacco products in any way;
- (c) ensure that You do not receive sponsorship from any person directly involved in the manufacture or marketing of tobacco products;
- (d) ensure that tobacco products are not available at any venue or at any event or activity connected with the Project; and
- (e) ensure that tobacco or tobacco products are not promoted in any publication produced or officially endorsed by You.

## 9. INTELLECTUAL PROPERTY

- 9.1 As between the parties, the ownership of all rights (including Intellectual Property Rights) in any Existing Material remains with the party which makes that Material available for the Project.
- 9.2 Each party grants the other party a perpetual, non-exclusive, non-transferable, worldwide, royalty free licence to use, reproduce and otherwise exploit its Existing Material (other than Special Existing Material):
- (a) for the purposes of conducting the Project during the Project Period; and
  - (b) to the extent such Existing Materials are comprised in, or are necessary for the use of, any Project Material.
- 9.3 We grant You a non-exclusive, non-transferable, royalty free licence to use Our Special Existing Material solely for the purposes of conducting the Project during the Project Period and subject to any conditions set out in Schedule 1 or otherwise advised by Us in writing.
- 9.4 Ownership of all rights (including Intellectual Property Rights) in any Project Material vests in You on creation.
- 9.5 You grant to Us a perpetual, irrevocable, royalty-free, worldwide, non-exclusive licence (including a right of

sub-license) to use, reproduce and adapt the Project Material for our internal business purposes and to use, reproduce, adapt and disclose the Project Material for any purpose connected to furthering Our objectives as set out in the *Tobacco Act 1987* (Vic).

9.6 You acknowledge that for the purposes set out in clause 9.5 and without limiting that clause, we may make the Project Material available to third parties in accordance with the DataVic Access Policy.

9.7 If, acting reasonably, we consider that any proposed use or disclosure of the Project Material by Us may substantially impede your ability to achieve the objectives specified in Schedule 1, we will not make such use or disclosure until we have first allowed you a reasonable opportunity to achieve those objectives.

9.8 You will provide Us promptly with copies of all of the Project Material (including data sets) as reasonably requested by Us and in the format reasonably specified by Us.

9.9 You warrant that any Project Material created by You or any of your employees, officers, agents or contractors does not infringe, and its use in any way by Us in accordance with this Funding Agreement will not infringe, the Intellectual Property Rights or Moral Rights of any person.

## 10. PUBLICATION AND MORAL RIGHTS

10.1 You must not publish the Project Material or any information relating to the Project (including the outcomes of the Project) in journal articles, conference presentations, media releases, major reports or case studies (each a "**Publication**") without our prior written consent (which must not be unreasonably withheld).

10.2 For the purposes of clause 10.1, it is reasonable for Us to withhold Our consent where such a Publication:

- (a) would disclose any of Our Confidential Information;
- (b) may adversely affect the value or commercial or scientific usefulness of the Project Material; or
- (c) may, in Our reasonable opinion, adversely affect the value or status of the Project or Our reputation (including because the proposed

Publication has not been subject to reasonable peer review or is not of sufficient quality).

10.3 You must provide Us with reasonable assistance in any Publication of the Project Material by Us.

10.4 You must procure that the authors of any Project Material which is a copyright work provide a genuine, irrevocable written consent to Us using the Project Material in a way that may, but for the consent, infringe the authors' Moral Rights in those works. On request, you must (within 10 Business Days) provide us with copies of such consents.

## 11. CONFIDENTIAL INFORMATION

11.1 Each party agrees to keep confidential, and not to use or disclose, other than as permitted in this Funding Agreement, any Confidential Information of the other party, except:

- (a) where the disclosing party has obtained the prior written permission of the other party;
- (b) to the disclosing party's officers, agents, professional advisers, employees, contractors and insurers, subject to those persons first being bound by confidentiality obligations in relation to that Confidential Information that are no less stringent than those in this clause 11;
- (c) where the disclosing party is compelled to do so by law, judicial or parliamentary body or governmental agency (including the Auditor-General) provided that (where practical) it gives the other party written notice prior to disclosure; and
- (d) We may disclose Confidential Information as may be required to comply with Our obligations under the *Freedom of Information Act 1982* (Vic) and to otherwise satisfy any of Our public disclosure obligations.

11.2 Each party agrees to take all prudent steps, including maintaining effective security measures, to protect the Confidential Information of the other party in the first party's possession or control from unauthorised access, use, copying or disclosure.

11.3 Each party must only use Confidential Information of the other party for the purpose for which it was disclosed in connection with this Funding Agreement.

## 12. PROTECTION OF PERSONAL INFORMATION

12.1 You acknowledge that you are bound by the Information Privacy Principles and the Health Privacy Principles with respect to any act done or practice engaged in by You under or in connection with this Funding Agreement in the same way and to the same extent as the State of Victoria or We would have been bound had it been directly done or engaged in by the State of Victoria or Us.

12.2 You must:

- (a) comply with the Information Privacy Principles, the Health Privacy Principles and Our Privacy Policy in relation to any Personal Information or Health Information collected by, disclosed to, or accessible by You in connection with this Funding Agreement and must only use and disclose the Personal Information and Health Information in accordance with this Funding Agreement;
- (b) not do any act or engage in any practice that would cause Us to breach an Information Privacy Principle, a Health Privacy Principle or Our Privacy Policy;
- (c) take all reasonable steps to ensure that any Personal Information and Health Information in Your possession, custody or control is secure against loss, destruction or unauthorised access, use, modification or disclosure;
- (d) provide us with reasonable assistance to enable Us to resolve any inquiry or complaint relating to Personal Information or Health Information;
- (e) immediately notify Us in writing on becoming aware of any possible or actual breach of this clause 12 or of any Information Privacy Principle, Health Privacy Principle or Our Privacy Policy;
- (f) comply with Our reasonable directions, policies and guidelines in relation to security, use or disclosure of Personal Information and Health Information;
- (g) ensure that any collection notices provided by You in relation to the conduct of the Project state that Personal Information and, if relevant, Health Information may be disclosed to Us;

- (h) use or disclose Personal Information or Health Information obtained during the course of conducting the Project under this Funding Agreement, only for the purposes of this Funding Agreement; and
  - (i) ensure that any of Your employees who are required to deal with Personal Information or Health Information for the purposes of this Funding Agreement are made aware of Your obligations set out in this clause 12.
- 12.3 You must ensure that any subcontract entered into for the purpose of fulfilling Your obligations under this Funding Agreement contains provisions to ensure that the subcontractor has the same awareness and obligations as You have under this clause 12.
- 12.4 You agree that We may collect, store, and use the contact details that You have provided to Us in relation to your officers and employees, for Our internal business purposes and for the purpose of administration, marketing and correspondence associated with the Project. You must comply with any legal requirement to notify those individuals of the possibility of such collection, storage and use.
- 12.5 If You take any photographs, make any sound recordings or make any audio-visual recordings during the Project You:
- (a) must provide Us with a copy of the photograph, sound recording or audio-visual recordings;
  - (b) grant Us a perpetual, irrevocable, royalty-free, worldwide, non-exclusive licence (including a right of sub-licence) to use, reproduce and adapt the photograph, sound recording or audio-visual recording for our internal business purposes and for any purpose connected to furthering Our objectives as set out in the *Tobacco Act 1987* (Vic);
  - (c) procure that the authors provide a genuine, irrevocable written consent to Us using the photograph, sound recording or audio-visual recording in a way that may, but for the consent, infringe the authors' Moral Rights in those works. On request, you must (within 10 Business Days) provide us with copies of such consents; and
  - (d) ensure that any person featured prominently in the photograph, sound recording or audio-visual recording has signed a consent form containing the consent clause set out in Schedule 1.

### 13. INDEMNITY

- 13.1 You will indemnify (and will keep indemnified) Us and Our officers, employees, and agents against all losses, damages or liabilities incurred by Us or them and all costs payable by Us or them in relation to any claim against Us or them (including reasonable legal costs) arising directly from:
- (a) any breach by You of clauses 1.2, 1.3, 9, 10, 11 or 12 of this Funding Agreement; or
  - (b) any unlawful or fraudulent act, or any negligent act, error or omission, by You or any of Your employees, agents, volunteers, or subcontractors in connection with this Funding Agreement.
- 13.2 Your liability to indemnify any person under this clause 13 will be reduced proportionally to the extent that their negligent or unlawful act or omission or wilful misconduct contributed to the relevant loss, damage, expense, or liability.
- 13.3 Our right to be indemnified under this clause 13 is in addition to, and not exclusive of, any other right, power, or remedy provided by law.

### 14. INSURANCE

- 14.1 Unless otherwise agreed by Us in writing, You must maintain the following types of insurance with a reputable insurer:
- (a) workers compensation insurance as required by law;
  - (b) public liability insurance of at least \$10,000,000 per event for the Project Period and for 7 years following that period (regardless of any expiration or termination of this Funding Agreement); and
  - (c) any other insurances as listed in Schedule 1.
- 14.2 Whenever requested, You must provide Us, (within 10 Business Days of Our request), with satisfactory evidence that You have maintained Your obligation to insure under this clause 14.

### 15. CONFLICT OF INTEREST

- 15.1 You warrant that to the best of Your knowledge, at the Date of this Funding Agreement, no Conflict



exists. You must use best endeavours to ensure that no Conflict arises during the term of this Funding Agreement, but if a Conflict does arise You must:

- (a) immediately notify Us in writing of that Conflict and of the steps You propose to take to resolve or otherwise deal with the Conflict;
- (b) make full disclosure to Us of all relevant information relating to the Conflict; and
- (c) take such steps as We may reasonably require to resolve or otherwise deal with the Conflict.

15.2 If You fail to notify Us under this clause 15, or you do not resolve or deal with the Conflict as we request, We may, by written notice to You, immediately terminate this Funding Agreement and may require You to repay all or part of the Funds received by You under this Funding Agreement.

## 16. TERMINATION

16.1 This Funding Agreement will expire when we notify you in writing that we are satisfied that the Project has been successfully completed, unless it is terminated earlier in accordance with its terms.

16.2 The parties may terminate this Funding Agreement at any time by mutual agreement.

16.3 In the case of any one or more of the following events, We may immediately terminate this Funding Agreement, or reduce the scope of this Funding Agreement, by giving You notice in writing of such termination or reduction in scope:

- (a) You fail to fulfil, or are in breach of any of Your obligations under this Funding Agreement, and do not rectify the omission or breach after receiving 10 Business Days notice in writing from Us to do so;
- (b) You are, in our reasonable opinion, not making satisfactory progress in the achievement of the Project;
- (c) You are unable to pay all your debts as and when they become due and payable or You fail to comply with a statutory demand

within the meaning of sections 459E and 459F of the *Corporations Act 2001* (Cth);

- (d) proceedings are initiated with a view to obtaining an order for Your winding up or any shareholder, member or director convenes a meeting for the purpose of considering or passing any resolution for Your winding up;
- (e) being a body corporate, You come under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001* (Cth), or an order has been made for the purpose of placing You under external administration;
- (f) in relation to this Funding Agreement, You breach any law of the Commonwealth, or of a State or Territory;
- (g) You cease to carry on business;
- (h) We are satisfied that any statement made in Your application for Funding is incorrect, incomplete, false or misleading in a way which would have affected the original decision to approve the Funding;
- (i) notice is served on You or proceedings are taken to cancel Your incorporation or registration or to dissolve You as a legal entity;
- (j) funding to Our organisation is significantly reduced within the period of this Funding Agreement and/or Our Board of Governance (or other similar party) requires a re-deployment of Funds to meet payment of liabilities; or
- (k) we are expressly permitted to do so by any other clause of this Funding Agreement.

16.4 This clause 16 does not limit or exclude any of Our other rights, including the right to recover any amounts from You on termination of this Funding Agreement.

16.5 Upon termination or expiration of this Funding Agreement You must promptly:

- (a) return (or if requested, destroy) any of Our Confidential Information in Your possession, custody or control;
- (b) provide us with a copy of the Project Materials (including any partially completed Project Materials);
- (c) provide us with a financial statement detailing the expenditure of all Funds and promptly return any unspent Funds to Us; and
- (d) provide us with a final report relating to the Project (which meets the requirements for such final report as set out in Schedule 1 and the Project Work Plan).

16.6 Upon termination of this Funding Agreement other than under clauses 16.2 or 16.3(j), You must if required by Us in writing, promptly repay (at our discretion) all or part of the Funds received by You under this Funding Agreement.

## 17. DISPUTE RESOLUTION

17.1 Subject to clause 17.3, neither We or You will commence any legal proceedings in respect of any dispute arising under or in connection with this Funding Agreement until the procedure provided by this clause has been fully utilised.

17.2 Any dispute arising during the course of this Funding Agreement will be dealt with as follows:

- (a) the party claiming that there is a dispute will send the other a written notice setting out the nature of the dispute;
- (b) the parties will try to resolve the dispute through direct negotiations in good faith between persons who have authority to resolve the dispute;
- (c) if the dispute is not resolved within 10 Business Days (or such longer period as may be agreed by the parties) the parties may refer the dispute to mediation. The parties agree to attempt in good faith to settle the dispute by mediation before commencing litigation. The mediator will be chosen by the parties or, if the parties cannot agree as to whom to appoint as mediator, the

mediation will be administered by the Australian Commercial Disputes Centre (ACDC). and conducted in accordance with the ACDC Guidelines for Commercial Mediation in force at the Date of this Funding Agreement; and

- (d) if the dispute remains unresolved following mediation either party may commence litigation or take other action as it sees fit.

17.3 This clause 17 does not apply to the following circumstances:

- (a) either You or We commence legal proceedings for urgent interlocutory relief;
- (b) action by Us under clauses 2 or 16; or
- (c) an authority of the Commonwealth, a State or a Territory investigating a breach or suspected breach of the law by You.

17.4 Despite the existence of a dispute, both You and We must continue to perform our respective obligations under this Funding Agreement.

## 18. ASSIGNMENT

18.1 You must not assign Your rights under this Funding Agreement without prior written approval from Us (which can be withheld at Our discretion).

18.2 You must not enter into negotiations with any other person for the purposes of entering into an arrangement that will require novation of this Funding Agreement without first obtaining Our prior written approval (which can be withheld at Our discretion).

## 19. APPLICABLE LAW AND JURISDICTION

19.1 The laws applicable in the State of Victoria apply to this Funding Agreement and the courts having jurisdiction in the State of Victoria shall have non-exclusive jurisdiction in respect to any dispute under this Funding Agreement. The parties irrevocably submit to such jurisdiction.

## 20. NOTICES

20.1 A party giving notice or notifying under this Funding Agreement must do so in writing:

- (a) directed to the recipient's address, as varied by any notice; and
- (b) hand delivered or sent by pre-paid post, email or facsimile to that address.

The parties' initial address details for notices are as specified in Schedule 1.

20.2 A notice given in accordance with clause 20.1 is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by pre-paid post, 5 Business Days after the date of posting unless it has been received earlier;
- (c) if sent by facsimile, upon confirmation of satisfactory transmission of that facsimile; and
- (d) if sent by email, when confirmation of delivery is received by the sender which records the time that the email was delivered to the addressee's last notified email address unless the sender receives a delivery failure notification indicating that the email has not been delivered to the addressee.

20.3 Notices sent by email must include the words "NOTICE UNDER FUNDING AGREEMENT" in the subject line.

## 21. SURVIVAL

21.1 The operation of clauses 3.4, 3.5, 3.6, 3.10, 4, 6, 7, 9, 10, 11, 12, 13, 14, 16.5 and 19 and any other clauses which by their nature survive, will survive the expiration or earlier termination of this Funding Agreement.

## 22. VARIATION OF THIS FUNDING AGREEMENT

- 22.1 This Funding Agreement records the entire agreement between You and Us in relation to its subject matter.
- 22.2 This Funding Agreement may only be varied by a document in writing, signed and dated by both You and Us.
- 22.3 You must notify Us immediately (within five Business Days) of any change in Your circumstances which you

consider may require a variation of this Funding Agreement.

## 23. DELAY AND SUSPENSION

23.1 You must take all reasonable steps to minimise delay in completion of the Project.

23.2 If You become aware that You will be delayed in progressing or completing the Project in accordance with this Funding Agreement and the Project Work Plan, You must immediately notify Us in writing of the cause, nature and estimated length of the delay. You must detail in the notice the steps You will take to contain the delay.

23.3 On receipt of a notice of delay, We may at Our option:

- (a) notify You in writing of a proposed period of extension to complete the Project and related proposed variations to this Funding Agreement;
- (b) notify You in writing of a proposed reduction in the scope of the Project and any proposed reduction to the Funds for You to complete the reduced Project and related proposed variations to this Funding Agreement;
- (c) notify You in writing of a proposed period of suspension of the Project and related proposed variations to this Funding Agreement;
- (d) terminate this Funding Agreement under clause 16 or take such other steps as are available under this Funding Agreement.

23.4 You acknowledge that in the event that this Funding Agreement is terminated then We may engage a third party to complete the Project.

23.5 If You agree with Us to reduce or suspend the Project pursuant to clause 23.3(b) or (c), We will not be liable to pay compensation for loss of any benefits that would have been conferred on You had the suspension not occurred.

## 24. SUBCONTRACTING

24.1 You must not, without Our prior written approval, subcontract the performance of any of Your obligations under this Funding Agreement. In giving

written approval, We may impose such reasonable terms and conditions as We think fit.

24.2 Any subcontractor whom You propose to replace an approved subcontractor must also be approved by Us under this clause 24. The subcontractors We have approved at the Date of this Funding Agreement, and any terms and conditions relating to their use, are identified in Schedule 1.

24.3 Despite any approval given by Us under clause 24.1, You are fully responsible for the performance of Your obligations under this Funding Agreement, even though You may have subcontracted any of them, and you are responsible for ensuring the suitability of a subcontractor for the work proposed to be carried out and for ensuring that such work meets the requirements of this Funding Agreement.

24.4 We may revoke Our approval of a subcontractor at any time and on any reasonable grounds.

24.5 Upon receipt of a written notice from Us revoking Our approval of a subcontractor, You must, as soon as practicable (or at such other time as We may direct in the notice), cease using that subcontractor to perform any of Your obligations.

24.6 If We withdraw Our approval of a subcontractor, You remain liable under this Funding Agreement for the past acts or omissions of that subcontractor as if they were a current subcontractor.

24.7 You must, in any subcontract, reserve a right of termination to take account of Our right of termination under clause 16 and Our right of revocation of approval under clause 24.4, and You must, where appropriate, make use of that right in the event of a termination or revocation by Us.

## **25. SPECIFIED PERSONNEL**

25.1 You must ensure that the Specified Personnel undertake activities in respect of the Project in accordance with the terms of this Funding Agreement and the Project Work Plan.

25.2 Where Specified Personnel are unable to undertake activities in respect of the Project, You must notify Us immediately. You must, if so requested by Us, provide replacement personnel acceptable to Us without additional payment and at the earliest

opportunity. Where practical you must allow Us the opportunity to participate in the selection of the replacement Specified Personnel.

25.3 We may give notice on reasonable grounds requiring You to remove personnel (including Specified Personnel) from work in respect of the Project. You must, at Your own cost, promptly arrange for the removal of such personnel from work in respect of the Project and replace them with personnel reasonably acceptable to Us.

25.4 If You are unable to provide replacement personnel reasonably acceptable to Us We may terminate this Funding Agreement immediately on written notice.

## **26. NEGATION OF LEGAL RELATIONSHIP OF EMPLOYMENT, PARTNERSHIP AND AGENCY**

28.1 You, Your employees, partners, contractors, officers and agents will not, by virtue of this Funding Agreement, be or for any purpose be deemed to be Our employee, partner or agent.

28.2 You must not, and must ensure that Your employees, partners, contractors, officers and agents do not, represent Yourself or themselves as being Our employee, partner or agent.

## **27. WAIVER**

29.1 If either You or We do not exercise (or delay in exercising) any of Your or Our rights under this Funding Agreement, that failure or delay does not operate as a waiver of those rights.

## **28. FURTHER STEPS**

28.1 Each party must promptly do whatever the other party reasonably requires of it to give effect to this Agreement and to perform its obligations under it.

## **29. COUNTERPARTS**

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

## **30. ADDITIONAL CONDITIONS**

30.1 If specified in Schedule 1, the additional clauses in Schedule 1 apply to this Funding Agreement.

## **31. INTERPRETATION**

31.1 In this Funding Agreement, unless the contrary intention appears:

**'Adjustment Note'** has the same meaning as it has in section 195-1 of the *GST Act*;

**'Budget'** refers to a budget for expenditure of the Funding for the purposes of conducting the Project or performing obligations under this Funding Agreement as set out in Schedule 2 or otherwise prepared by the parties in accordance with clause 1.

**'Business Day'** means any day other than a Saturday, Sunday, or public holiday in the state of Victoria, Australia;

**'Confidential Information'** of a Party (**the first party**) means any information obtained by the other party from the first party that:

- (a) is by its nature confidential;
- (b) is designated as confidential by the first party; or
- (c) the other party knows or ought reasonably to know is confidential,

and includes:

- (d) the terms of this Funding Agreement;
- (e) information relating to the first party's business, affairs or financial position;
- (f) information relating to the first party's internal management, structure, personnel, policies, practices, procedures or strategies;
- (g) information of the first party to which the other party has access that has any actual or potential commercial value to the other party; and
- (h) information relating to the first party's employees, contractors, customers or suppliers, including any Personal Information of individuals,

but excludes any information which is in or comes into the public domain other than as a result of a breach of this Funding Agreement, is already known by or in the possession of the other party before the other party obtains the information from the first party or which has been or is independently developed by the other party.

**'Conflict'** refers to a conflict of interest, or risk of a conflict of interest, or an apparent conflict of interest arising through You engaging in any project or obtaining any interest that is likely to conflict with or restrict You in providing the Project to Us fairly and independently, including but not limited to:

- (a) receipt of funding by any tobacco company or a direct associate of any tobacco company;
- (b) receipt of funding from any company or organisation which has purposes or objectives that are inconsistent with the purpose of the Project; or
- (c) receipt of funding from any company or organisation which has purposes or objectives that are inconsistent with Our objectives;

**'DataVic Access Policy'** means the policy titled "DataVic Access Policy - Intent and Principles" prepared by the State of Victoria through the Department of Treasury and Finance as updated and amended from time to time;

**'Date of this Funding Agreement'** means the date this Funding Agreement is signed by the last party to sign it;

**'Existing Material'** means all Material owned by or licensed to a party, which is in existence prior to the Date of this Funding Agreement or which is developed independently of this Funding Agreement and which is made available by one party to the other for the purposes of the Project;

**'Funding Agreement'** refers to the terms and conditions of this agreement, including its schedules;

**'Funding'** or **'Funds'** means the amount or amounts set out in Schedule 1, and in relation to any repayment or refund by You to Us includes interest earned on such amount(s);

**'GST'** has the meaning given in the *GST Act*;

**'GST Act'** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**'Health Information'** has the meaning set out in the *Health Records Act 2001* (Vic);

**‘Health Privacy Principles’** means the health privacy principles set out in the *Health Records Act 2001* (Vic);

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

**‘Intellectual Property Rights’** includes all copyright (including future copyright), all rights in relation to inventions (including patent rights), all rights in plant varieties, registered and unregistered trademarks (including service marks), registered designs and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields (but not Moral Rights);

**‘Material’** includes documents, equipment, software (including source code and object code), goods, information and data stored by any means including all copies and extracts of the same;

**‘Milestone’** means a stage of completion of the Project as set out in the Project Work Plan;

**‘Moral Rights’** has the meaning set out in the *Copyright Act 1968* (Cth);

**‘Other Contributions’** means financial or in-kind resources (valued at market rates) used or intended to be used by You for the Project, other than the Funding;

**‘Our Privacy Policy’** means Our privacy policy available at [www.vichealth.vic.gov.au/Privacy.aspx](http://www.vichealth.vic.gov.au/Privacy.aspx) as updated and amended from time to time;

**‘Our Trade Marks’** means the trade marks identified in Schedule 1;

**‘party’** means a party to this Funding Agreement;

**‘Personal Information’** has the meaning set out in the *Information Privacy Act 2000* (Vic);

**‘Project’** means the Project described in Schedule 1 and the Project Work Plan;

**‘Project Material’** means all Material created by You in the course of performing the Project;

**‘Project Period’** means the period specified in Schedule 1 during which the Project must be completed;

**‘Project Work Plan’** means the plan for the completion of the Project as set out in Schedule 3 or otherwise prepared by the parties in accordance with clause 1.

**‘Records’** includes documents, information and data stored by any means, including records of accounts, and all copies and extracts of the same;

**‘Schedule’** refers to a schedule to this Funding Agreement;

**‘Special Existing Material’** means any Existing Material which is used by VicHealth under licence from a third party and which is identified as such by VicHealth in writing, including those items listed in Schedule 1;

**‘Specified Personnel’** means the personnel (whether Your employees or subcontractors) specified in Schedule 1 as personnel required to undertake the Project or any part of the work constituting the Project;

**‘Statement of Project Income and Expenditure’** means a financial statement, substantially in the form of Schedule 4 (or such other form as may be agreed by the parties in writing); and

**‘Taxable Supply’** has the same meaning as it has in the GST Act.

38.2 In this Funding Agreement, unless the contrary intention appears:

- (a) words in the singular include the plural and words in the plural include the singular;
- (b) words importing a gender include any other gender;
- (c) words importing persons include a partnership and a body whether corporate or otherwise;
- (d) all references to dollars are to Australian dollars and this Funding Agreement uses Australian currency;
- (e) reference to any statute or other legislation (whether primary or subordinate) is a reference to that statute or other legislation as amended or replaced from time to time;

- (f) an obligation or warranty on the part of 2 or more persons binds them jointly and severally and an obligation or warranty in favour of 2 or more persons benefits them jointly and severally;
- (g) includes means “includes without limitation”;
- (h) an uncertainty or ambiguity in the meaning of a provision of this Funding Agreement will not be interpreted against a party just because that party prepared the provision; and
- (i) where any word or phrase is given a defined meaning, any other part of speech or other

grammatical form in respect of that word or phrase has a corresponding meaning.

38.3 In the event of any conflict or inconsistency between:

- (a) the terms and conditions contained in the clauses of this Funding Agreement;
- (b) any Schedules to this Funding Agreement; and
- (c) documents incorporated by reference, if any;

then the material first mentioned has precedence over later mentioned material to the extent of the conflict or inconsistency.