



Australian Government

**Department of Communications,
Information Technology and the Arts**

FUNDING AGREEMENT

BETWEEN

COMMONWEALTH OF AUSTRALIA
as represented by the Department of Communications, Information
Technology and the Arts

ABN 51 491 646 726

AND

[INSERT FUNDING RECIPIENT'S NAME and ABN]

in relation to Funding for the Higher Bandwidth Incentive Scheme
(HiBIS)

**REF NO: HiBIS Wholesaler [short identifier for
Program]/05[year]/XX[number]**

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PARTIES

COMMONWEALTH OF AUSTRALIA ('Commonwealth'), represented by and acting through the **Department of Communications, Information Technology and the Arts**, ABN 51 491 646 726 ('Us' or 'We' or 'Our' as the case requires)

AND

[INSERT NAME, ADDRESS and DETAILS of FUNDING RECIPIENT], ABN **XX XXX XXX XXX** ('You' or 'Your' as the case requires)

[Insert the full name and address of the recipient, in accordance with the following:

- (1) if the recipient is a **company**, insert the company's full name (including any trading name), its State or Territory of incorporation, registered office and Australian Company Number in the form - "XYZ Pty Limited, a company incorporated in the State /Territory of {*: *insert jurisdiction* }, having its registered office at {*: *insert street address* } and the Australian Business Number **XX XXX XXX XXX**"
- (2) if the recipient operates under a **business name**, insert the name and address of the company, partners or individual and add "trading as [insert business name]".

PURPOSE

- A. We are committed to implementing the Scheme.
- B. You are committed to helping achieve the Scheme, through Your conduct of the Activity.
- C. As a result of this commitment, We have agreed to provide Funding to You, subject to the terms and conditions of this Agreement.
- D. We are required by law to ensure accountability for public money, and to be accountable for all Funds provided by Us.
- E. You agree to accept the Funding for the purposes, and subject to the terms and conditions, set out in this Agreement.

1 INTERPRETATION

- 1.1 In this Agreement, unless the contrary intention appears:

'**ABN**' has the same meaning as it has in section 41 of the *A New Tax System (Australian Business Number) Act 1999* (Cth);

‘Activity’ means the provision of a HiBIS Service and other support of the Scheme, as described in this Agreement, and includes the provision of Activity Material;

‘Activity Material’ means all Material:

- (a) brought into existence for the purpose of performing the Activity;
- (b) incorporated in, supplied or required to be supplied along with the Material referred to in paragraph (a); or
- (c) copied or derived from Material referred to in paragraphs (a) or (b);

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

‘Advisers’ means Your or Our agents, contractors, franchisees, dealers or advisers engaged in the performance or management of this Agreement;

‘Agreement’ means this document and includes any schedules, annexures and any documents incorporated by reference;

‘Allowable Costs’ has the general meaning given in section 1.3 of the Guidelines and refers specifically to those costs (exclusive of GST) described in Schedule 1 that are incurred by You and that are directly attributable to You providing a HiBIS Service. For the purposes of this Agreement, actual Allowable Costs are those which the Department acting reasonably decides have been incurred by You and are directly related to Your provision of a HiBIS Service;

‘Approved Auditor’ means a person who is:

- (a) registered as a company auditor under the Corporations Act 2001, or a member of the Institute of Chartered Accountants in Australia, or of CPA Australia or the National Institute of Accountants; and
- (b) not a principal, member, shareholder, officer or employee of Yours or of a Related Body Corporate;

‘Auditor-General’ means the office established under the *Auditor-General Act 1997* (Cth) and includes any other entity that may, from time to time, perform the functions of that office;

‘Australian Accounting Standards’ refers to the standards of that name maintained by the Australian Accounting Standards Board created by section 226 of the *Australian Securities and Investments Commission Act 2001* (Cth);

‘Australian Auditing Standards’ refers to the standards made by the Australian Auditing and Assurance Standards Board (on behalf of CPA Australia and the Institute of Chartered Accountants in Australia);

‘Commonwealth Material’ means any Material provided by Us to You for the purposes of this Agreement or which is copied or derived from Material so provided, except for Activity Material;

‘Confidential Information’ means:

- (a) the information described in Item 6 of Schedule 1; or
- (b) information that is agreed between the parties after the Date of this Agreement as constituting confidential information for the purposes of this Agreement;

‘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 activity or obtaining any interest that is likely to conflict with or restrict You in providing the Activity fairly and independently;

‘Customer’ has the meaning given in section 1.3 of the Guidelines;

‘Data Speed’ has the meaning given in section 1.3 of the Guidelines;

‘Date of this Agreement’ means the date written on the execution page of this Agreement, and if no date or more than one date is written there, then the date on which this Agreement is signed by the last Party to do so;

‘Department’ refers to the Department of Communications, Information Technology and the Arts and includes any department or agency of the Commonwealth which is from time to time responsible for administering this Agreement;

‘Eligible Customer’ has the meaning given in section 1.3 of the Guidelines, provided the eligibility requirements in section 3.4 of the Guidelines are satisfied, and includes an Indigenous Community Council;

‘Eligible Premises’ are those premises described in sections 1.3, 3.2 and 3.3 of the Guidelines as eligible under the Scheme, provided the eligibility requirements in section 3.4 of the Guidelines are satisfied;

‘Existing Material’ means all Material in existence prior to the Date of the Agreement:

- (a) incorporated in;
- (b) supplied with, or as part of; or

(c) required to be supplied with, or as part of;

the Activity Material;

‘Financial Year’ means each period from 1 July to the following 30 June occurring during the Term of this Agreement, or any part of such a period occurring at the beginning or end of the Term of this Agreement;

‘Funding’ or **‘Funds’** means the amount or amounts comprising Incentive Payments payable under this Agreement by Us as specified in Schedule 1;

‘Funding Cap’ means either or both the amounts set out in Schedule 1 which represents 60% of all funding available under the Schemes for:

(a) each Funding Period; and

(b) the Period of the Scheme.

‘Funding Period’ means the period specified in Item 2 in Schedule 1;

‘GST’ has the meaning as given in section 195-1 of the GST Act;

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

‘Guidelines’ means the Higher Bandwidth Incentive Scheme (HiBIS) Program Guidelines in Schedule 4 as amended from time to time by Us by agreement of the Parties;

‘HiBIS Area’ has the meaning given in section 1.3 of the Guidelines;

‘HiBIS-compliant Pricing’ has the meaning given in section 1.3 of the Guidelines;

‘HiBIS Customer’ has the meaning given in section 1.3 of the Guidelines;

‘HiBIS Online’ means the portion of the Department website dealing with the HiBIS program available at *[insert website address]* and the information and program management tools provided at that site;

‘HiBIS Provider’ has the meaning given in section 1.3 of the Guidelines, being the person referred to in Schedule 2;

‘HiBIS Provider’s Contract’ means the contract between Us and the HiBIS Provider in relation to the Scheme, referred to in Schedule 2;

‘HiBIS Provider’s Proportion’ means the amount, or percentage of an Incentive Payment that the HiBIS Provider is to receive under its agreement

with You, as set out in Schedule 2 representing the HiBIS Provider's Proportion of the Allowable Costs;

'HiBIS Service' has the meaning given generally in section 1.3 of the Guidelines and means specifically a HiBIS Service provided by a HiBIS Provider as set out in a HiBIS Provider's Contract;

'HiBIS Wholesaler's Proportion' means the amount, or percentage of an Incentive Payment set out in Schedule 2 representing Your proportion of the Incentive Payment as agreed with the HiBIS Provider;

'Higher Bandwidth Service' has the meaning given in section 1.3 of the Guidelines;

'Imminent Access' has the meaning given in section 1.3 of the Guidelines;

'Incentive Payment' means the amounts described in clauses 4.7 to 4.11 of this Agreement;

'Indigenous Community Council' means:

- (a) an Aboriginal Council constituted under the *Community Services (Aborigines) Act 1984 (Qld)*;
- (b) an Island Council constituted under the *Community Services (Torres Strait) Act 1984 (Qld)*;
- (c) a community government council established under the *Local Government Act 1993 (NT)*;
- (d) an incorporated association recognised as a 'local governing body' by the Australian Government and the Northern Territory Government in order that Australian Government funding can be made for local government type services; or
- (e) any other organisation approved by Us.

'Intellectual Property Rights' means all intellectual property rights including all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, circuit layouts, and all other intellectual property as defined in Article 2 of the convention establishing the World Intellectual Property Organisation 1967;

'Interest' means interest calculated at an interest rate equal to the general interest charge rate pursuant to section 8AAD of the *Tax Administration Act 1953 (Cth)*, plus 1%, on a daily compounding basis;

‘ISDN’ has the meaning given in section 1.3 of the Guidelines;

‘Item’ means an item in the Schedules;

‘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;

‘Party’ means a party to this Agreement;

‘Period of the Scheme’ refers to the period from the Start of the Scheme to 31 December 2006, which at Our discretion may be extended to 30 June 2007;

‘Personal Information’ has the same meaning as under the *Privacy Act 1988* (Cth), which currently is information or an opinion (including information or an opinion forming part of a data base), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion;

‘Pre-existing Customer’ has the meaning given in section 1.3 of the Guidelines;

‘Premises’ has the meaning given in section 1.3 of the Guidelines;

‘Privacy Act’ means the *Privacy Act 1988* (Cth);

‘Privacy Commissioner’ means the Office of the Privacy Commissioner established under the *Privacy Act 1988* (Cth) and includes any other entity that may, from time to time, perform the functions of that Office;

‘RCTI’ means a recipient created tax invoice which has the meaning given by section 195-1 of the GST Act;

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

‘Related Body Corporate’ has the meaning given in section 9 of the *Corporations Act 2001* (Cth);

‘Report’ means Activity Material that is provided to Us for reporting purposes on matters including the Allowable Costs, progress reports and evaluations of the Activity or obligations of this Agreement, as stipulated in the Schedules;

‘Schedule’ refers to a Schedule to this Agreement;

‘Scheme’ has the meaning given in section 1.3 of the Guidelines;

‘Service Area’ means the service area to be covered by a particular HiBIS Service, described in a HiBIS Provider’s Contract, and located within the HiBIS Area;

‘Start of the Scheme’ means 8 April 2004;

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

‘Term of this Agreement’ refers to the period described in subclause 2.1;

‘Third Party Interest’ means any legal or equitable right, interest, power or remedy in favour of any person other than You or Us in connection with the Agreement, including, without limitation, any right of possession, receivership, control or power of sale, and any mortgage, charge, security or other interest;

‘Us’, ‘We’ and ‘Our’ means the Commonwealth of Australia represented by the Department and includes its officers, delegates, employees and agents, and its successors;

‘Working Day’ has the meaning given in section 1.3 of the Guidelines; and

‘You’ and ‘Your’ means [insert name and ABN] and includes, where the context admits, its officers, employees, agents and subcontractors, and its successors.

1.2 In this Agreement, unless the contrary intention appears:

- (a) words in the singular number include the plural and words in the plural number 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 clauses are to clauses in this Agreement;
- (e) all references to dollars are to Australian dollars and this Agreement uses Australian currency;
- (f) reference to any statute or other legislation (whether primary or subordinate) is to a statute or other legislation of the Commonwealth and, if it has been or is amended, is a reference to that statute or other legislation as amended;
- (g) 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;

- (h) terms not defined in this Agreement but defined in the Guidelines have the meaning given to them in the Guidelines; and
 - (i) this Agreement must be construed subject to the *Telecommunications Act 1997*.
 - (j) an uncertainty or ambiguity in the meaning of a provision of this Agreement will not be interpreted against a Party just because that Party prepared the provision;
- 1.3 The Schedules (and annexures and documents incorporated by reference, if any) form part of this Agreement. In the event of any conflict or inconsistency between any part of:
- (a) the terms and conditions contained in the clauses of this Agreement;
 - (b) the Schedules (excluding the Guidelines);
 - (c) the Guidelines;
 - (d) the annexures, if any;
 - (e) documents incorporated by reference, if any;

then the material mentioned in any one of paragraphs (a) to (e) of this subclause 1.3 has precedence over material mentioned in a subsequent paragraph, to the extent of any conflict or inconsistency.

2 TERM OF THIS AGREEMENT

- 2.1 The Term of this Agreement commences on the Date of this Agreement and, unless terminated earlier, it expires on the last day of the Funding Period.

3 OTHER COMMONWEALTH FUNDING

- 3.1 If You receive other funding from the Commonwealth, a breach of any other arrangement (whether contractual or statutory) with the Commonwealth under which You receive Commonwealth funding may be regarded by Us as a breach of this Agreement where we reasonably consider that the breach of that arrangement will materially impact upon the performance of Your obligations under this Agreement.
- 3.2 On our request, You must inform Us in writing within 20 Working Days of any other arrangement (whether contractual or statutory) under which You are entitled to receive funding from the Commonwealth.
- 3.3 Any payments under this Agreement may be deferred or suspended by Us if You have outstanding or unacquitted moneys under any arrangement

(whether contractual or statutory) with the Commonwealth, including between Us and You, under which You receive Commonwealth funding. Notwithstanding such suspension or deferral of any payments, You must continue to perform any obligations under this Agreement, unless We agree otherwise in writing.

4 PAYMENT

4.1 Subject to:

- (a) clause 6;
- (b) sufficient funds being available for the Scheme; and
- (c) compliance by You with this Agreement (including any invoice requirements),

We will provide You with the Funding at the times and in the manner specified in this Agreement.

4.2 Without limiting Our rights, where You are in breach of Your obligations under this Agreement, We may withhold or suspend any payment in whole or in part until You have performed or commenced complying with Your obligations under this Agreement.

4.3 We will pay You the HiBIS Wholesaler's Proportion of the Incentive Payment for each HiBIS Service supplied by a HiBIS Provider listed in Schedule 2 to an Eligible Customer at Eligible Premises in the Service Area in accordance with this Agreement (once-only for each HiBIS Service supplied to a HiBIS Customer after the HiBIS Provider has commenced supplying the HiBIS Service) if:

- (a) You have registered with Us pursuant to section 4.3 of the Guidelines;
- (b) You have incurred Allowable Costs;
- (c) the HiBIS Provider has made a claim for payment in accordance with the HiBIS Provider's Contract;
- (d) We have accepted the HiBIS Provider's claim under the HiBIS Provider's Contract;
- (e) the HiBIS Service was first supplied to a Customer during the Funding Period;
- (f) You have an agreement in place with the HiBIS Provider for sharing Incentive Payments specifying the HiBIS Wholesaler's Proportion;
- (g) You have entered into a written binding agreement with a HiBIS Provider to enable or assist the HiBIS Provider to provide a HiBIS Service to a Service Area for the Funding Period;

- (h) You and the HiBIS Provider have agreed to share the Incentive Payment as follows:
 - (i) You will receive the Wholesaler's Proportion of the Incentive Payment;
 - (ii) the HiBIS Provider will receive the HiBIS Provider's Proportion of the Incentive Payment; and
 - (i) You receive funding from the Commonwealth as referred to in clause 3.1 in relation to the supply of Your service to the HiBIS Provider for the provision of a HiBIS Service, We have agreed that You remain eligible for Funding under the Scheme in respect of that HiBIS Service.
- 4.4 If there is more than one HiBIS Provider listed in Schedule 2, the HiBIS Wholesaler's Proportion is that proportion listed next to the name of the HiBIS Provider who has lodged a claim for payment under the relevant HiBIS Provider's Contract.
- 4.5 Payments will be made within 20 Working Days of the end of each calendar month for all claims for payment lodged by the HiBIS Provider and accepted by Us during that calendar month.
- 4.6 Before We can pay any Funds to You, You must comply with the reporting or other requirements that apply to the payment of the Funds under this Agreement.

Incentive Payments

- 4.7 The Incentive Payments are as follows:
- (a) Standard Incentive Payment - \$1400 (exclusive of GST);
 - (b) High Cost Incentive Payment - \$3000 (exclusive of GST); and
 - (c) partial Incentive Payment for Pre-existing Customers is the amount set out in Item 3 of Schedule 1.
- 4.8 A Standard Incentive Payment will apply where:
- (a) the HiBIS Provider supplies a HiBIS Service in accordance with its HiBIS Provider's Contract; and
 - (b) the Premises to which the HiBIS Service was supplied were Premises where ISDN:
 - (i) was available at the time of supply to the particular Premises, as determined in accordance with section 4.13.6 of the Guidelines; and
 - (ii) would have been available at the Start of the Scheme.

- 4.9 A High Cost Incentive Payment applies when:
- (a) the HiBIS Provider supplies a HiBIS Service in accordance with its HiBIS Provider's Contract; and
 - (b) the Premises to which the HiBIS Service was supplied were Premises where ISDN:
 - (i) was not available at the Start of the Scheme; or
 - (ii) became unavailable subsequent to the Start of the Scheme.
- 4.10 A partial Incentive Payment, as set out in Item 3 of Schedule 1, applies when the HiBIS Provider has registered Pricing for Pre-existing Customers and transfers a Pre-existing Customer from its existing service to a service with HiBIS-compliant Pricing and upgrades equipment if necessary as described in section 4.13.9 of the Guidelines.
- 4.11 Notwithstanding clauses 4.8 and 4.9, the process for determining whether a Standard Incentive Payment or a High Cost Incentive Payment should be made is set out in section 4.13 of the Guidelines.

5 YOUR OBLIGATIONS

- 5.1 You agree to comply with the requirements of the Scheme set out in the Guidelines except where those Guidelines are inconsistent with the clauses of this Agreement or the Schedules (excluding the Guidelines).

Activity

- 5.2 During the Funding Period, You must account for Funding payable to You under the Scheme and this Agreement in respect to Allowable Costs.
- 5.3 You must carry out the Activity within the Funding Period in accordance with this Agreement (including the Guidelines), diligently, effectively and to a high professional standard.
- 5.4 If, after supplying the HiBIS Service to a HiBIS Customer:
- (a) a HiBIS Provider is unable to achieve the Data Speed for the HiBIS Service under its HiBIS Provider's Contract and the HiBIS Service is withdrawn from the HiBIS Customer; and
 - (b) that failure to achieve the Data Speed is as a result of a failure by You to achieve at least the Data Speed agreed in the contract between You and the HiBIS Provider,

You must repay to Us the HiBIS Wholesaler's Proportion received by You for the supply of that HiBIS Service to that HiBIS Customer.

- 5.5 The list of HiBIS Providers in Schedule 2 may be updated over the Term of the Agreement in accordance with clause 26.2.
- 5.6 You must notify Us in writing promptly if You become aware of any:

- (a) matter that affects or could affect Your ability to provide the Activity; and
 - (b) subject to clause 5.7, failure by You to comply with this Agreement in any way.
- 5.7 Notification of a breach of this Agreement may be made by way of the Reports provided under clause 9 and need not be made immediately to us unless:
- (a) the breach is a breach of a material term of this Agreement;
 - (b) the breach is of a type of which We have requested to be immediately notified; or
 - (c) following persistent breaches by You, We have requested that You notify all breaches to Us.
- 5.8 Notwithstanding subclause 5.6 or Our rights under this Agreement, You must take whatever action is necessary to comply with Your obligations under this Agreement.
- 5.9 You agree to comply with Our reasonable requests in relation to any audit undertaken by Us in accordance with section 4.6.2.2.7 of the Guidelines.
- 5.10 We are not responsible for the provision of additional money to meet any expenditure in excess of the Funds.

Repayment of Funds

- 5.11 If at any time during the Term of the Agreement or on earlier termination of this Agreement, information provided by You discloses that an amount of Funding paid to You exceeds the amount that was properly payable under this Agreement, then the overpayment must be refunded by You to Us within 20 Working Days of a written notice from Us or otherwise dealt with as directed in writing by Us.
- 5.12 If We notify You under clause 5.11 that an amount is to be refunded to Us, and the amount is not refunded to Us within 20 Working Days of notification, Interest will accrue and be payable on the amount after the expiry of the 20 Working Days, until the amount is paid in full.
- 5.13 Any amount owed to Us under subclause 5.11, and any Interest owed under subclause 5.12, will without prejudice to any other rights available to Us, be recoverable by Us as a debt due to Us by You without further proof of the debt by Us being necessary.
- 5.14 The operation of clauses 5.6-5.13 survive the expiration or earlier termination of the Term of this Agreement.

6 LIMITATIONS ON PAYMENT OF FUNDING

- 6.1 The terms of this clause 6 apply notwithstanding any other provision of this Agreement.
- 6.2 We are not obliged to pay You any Funding if:
- (a) there are no further funds available for the Funding Period for the Scheme;
 - (b) the Funding would exceed the Allowable Costs as set out in clauses 6.4 to 6.8;
 - (c) You cease to have a written binding agreement with a HiBIS Provider to:
 - (i) enable or assist the HiBIS Provider to provide a HiBIS Service to a Service Area for the Funding Period; and
 - (ii) share the Incentive Payment;
 - (d) the Funding has reached or would exceed the Funding Cap as set out in clauses 6.9 to 6.11.

Funding for the Program

- 6.3 We will notify You in writing when Our remaining funds available for the Scheme for the Funding Period reach:
- (a) \$5 million;
 - (b) \$3 million; and
 - (c) \$1 million
- respectively.

Funding exceeds the Allowable Costs

- 6.4 Subject to clause 6.6, We are not obliged to pay any further Funding to You if funds paid to You under this Agreement are equal to or exceed the estimated or actual Allowable Costs (“Payment Exceeds Allowable Costs”).
- 6.5 Without limiting clause 6.4, if the Payment Exceeds Allowable Costs, We may, acting reasonably:
- (a) withhold Funding until We are satisfied that the Allowable Costs sufficiently exceed the Funding payable to You; or
 - (b) require You to refund to Us the difference between the Funding paid to You and Your actual Allowable Costs within 20 Working Days (and clauses 5.12 and 5.13 will apply to any failure to refund within this period).

- 6.6 If We decide to withhold Funding under clauses 6.4 or 6.5(a) We will recommence payment of Funding once We are satisfied during the Term of the Agreement that the estimated or actual Allowable Costs exceed the Funding payable to You.
- 6.7 Your estimated Allowable Costs for the Funding Period are contained in Schedule 3.
- 6.8 If the actual Allowable Costs for the Funding Period exceed all Funding payable to You under this Agreement, We will agree with You that the difference between these amounts be carried over if a future agreement between the Parties is agreed in accordance with section 4.13.11 of the Guidelines.

Cap on Funding

- 6.9 We are not obliged to pay You any Funding:
- (a) in excess of the Funding Cap for the Funding Period set out in Item 4 of Schedule 1; or
 - (b) if the total funds payable to You under this Agreement and any other agreement between the Parties in relation to the Scheme exceeds the Funding Cap for the Period of the Scheme set out in Item 4 of Schedule 1;
- provided that We will continue to pay the Funding to You:
- (c) until the date You receive a notice referred to in clause (d); and
 - (d) where the HiBIS Service to which the Incentive Payment relates was supplied to a HiBIS Customer before the date You receive a notice referred to in clause (d).
- 6.10 We will notify You in writing when the Funding paid to You under this Agreement is an amount equal to:
- (a) 80% of the Funding Cap;
 - (b) 90% of the Funding Cap;
 - (c) 95% of the Funding Cap; and
 - (d) 100% of the Funding Cap.
- 6.11 We may agree with You to vary the Funding Cap in accordance with section 4.13.12.1 of the Guidelines. Any amendment to the Funding Cap must be in accordance with clause 26.2.
- 6.12 Your obligations to a HiBIS Provider are not affected by Our ceasing to provide You with Funding.

7 GUIDELINES

- 7.1 The Parties may agree to vary the Guidelines. Any variation must be in accordance with clause 26.2.
- 7.2 The Parties agree that any variation to the Guidelines will not apply retrospectively.

8 RECORDS

- 8.1 You must keep financial Records relating to the Activity so as to enable:
 - (a) the Allowable Costs to be identified in Your accounts;
 - (b) the preparation of financial statements in accordance with Australian Accounting Standards; and
 - (c) the audit of those Records in accordance with Australian Auditing Standards.
- 8.2 Records maintained under subclause 8.1 must be retained by You for a period of no less than 3 years after the end of the Scheme.
- 8.3 The operation of this clause 7 survives the expiration or earlier termination of the Term of this Agreement.

9 REPORTING

- 9.1 If, at any time during the Term of this Agreement, Your actual Allowable Costs exceed the amounts set out in Schedule 3, You must provide Us with a revised estimate of Allowable Costs which, once agreed by Us, will replace Schedule 3. Your revised estimate must include details of estimated costs for each of the Allowable Costs categories.
- 9.2 You must notify Us immediately You become aware of any developments in relation to Your corporate standing, financial standing, operational or technical capability or sustainability that is likely to materially affect Your capability to enable or assist the HiBIS Provider to provide a HiBIS Service to a Service Area for the Funding Period.
- 9.3 You must provide to Us within 60 Working Days of the end of each Financial Year during the Term of this Agreement and within 40 Working Days of any earlier termination of the Term of this Agreement:
 - (a) an audited detailed statement of receipts in respect of the Funding, which must include a definitive statement as to whether the financial accounts are complete and accurate; and
 - (b) an audited statement of Your actual Allowable Costs, which must include a definitive statement as to whether the financial accounts are complete and accurate.

9.4 Subject to our obligations in respect of Confidential Information under this Agreement, we will use Reports provided by You under this clause for the following purposes only:

- (a) to review, assess and report publicly on the performance of HiBIS Services and HiBIS Providers, including in relation to compliance with the terms of this Agreement;
- (b) to prepare and publish an evaluation of the HiBIS program; and
- (c) to assist in the development of other relevant Commonwealth policies and programs.

9.5 The audits referred to in clause 9.3 must also contain the requirements, if any, described in Schedule 1.

9.6 The audits referred to in clause 9.3 must be carried out by an Approved Auditor and must comply with the Australian Auditing Standards.

9.7 You agree to:

- (a) provide all reasonable assistance required by Us;
- (b) respond to all Our reasonable requests; and
- (c) provide any information We reasonably require;

in relation to conducting a mid-term review and final evaluation of the Scheme.

9.8 Without limiting clause 9.7, We anticipate the final evaluation will examine and report on the matters referred to in section 7.2 of the Guidelines.

9.9 Subject to clause 7, You acknowledge that the mid-term review of the Scheme may lead to changes in the Scheme's design, operation, administration or any other aspect of the Scheme including pricing.

9.10 The operation of this clause 9 survives the expiration or earlier termination of the Term of this Agreement.

10 TAXES, DUTIES AND GOVERNMENT CHARGES

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

10.2 The provisions of this clause in respect of GST apply if You are registered or are required to be registered for GST.

10.3 We are registered in accordance with the GST Act and will notify You of any change in Our Australian Business Number or GST registration status immediately We are notified of any change. You must notify us in writing of

any change to Your Australian Business Number or GST registration immediately you are notified of any change. Each Party agrees to notify the other if it ceases to satisfy any of the requirements of *Goods and Services Tax Ruling 2000/10* dated 10 May 2000 that came into effect on 1 July 2000.

- 10.4 The Funds paid by Us under this Agreement exclude GST for supplies provided by You to Us in accordance with this Agreement and which are Taxable Supplies within the meaning of the GST Act.
- 10.5 If GST is imposed on a supply provided by You to Us in accordance with this Agreement We must pay You the amount of GST imposed in addition to the consideration We are required to provide You for the supply in question.
- 10.6 In consideration of Your undertaking not to issue Tax Invoices we will issue RCTI in respect of the Taxable Supplies.
- 10.7 We will issue the RCTI within 28 days of determining the value of the Taxable Supplies to which the RCTI relates. Adjustment Notes relating to Taxable Supplies, for which a RCTI has been issued, will be issued within 28 days of the adjustment date.
- 10.8 In consideration of our undertaking to issue RCTI pursuant to subclause 10.6 you will not issue any Tax Invoices in respect of the Taxable Supplies, unless:
 - (a) We cease to comply with the requirements of *Goods and Services Tax Ruling 2000/10*; or
 - (b) We for any reason notify you that we will not issue an RCTI in respect of the Taxable Supplies.
- 10.9 The Funding payable by Us to You under this 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.
- 10.10 If a payment to satisfy a claim or a right to claim under or in connection with this Agreement (for example, a claim for damages for breach of the Agreement) gives rise to a liability to pay GST, the payer must also pay the amount of that GST (except any GST for which the payee is entitled to an input tax credit).
- 10.11 If a Party has a claim under or in connection with this Agreement for a cost on which that Party must pay GST, the claim is for the cost plus all GST on that cost (except any GST for which that Party is entitled to an input tax credit).
- 10.12 Any refund under clause 5.11 must be inclusive of GST and must be accompanied by any Adjustment Note required under the GST Act relating to Taxable Supplies.

11 COMMONWEALTH MATERIAL

- 11.1 Ownership of all Commonwealth Material, including Intellectual Property Rights in that Material, remains vested at all times in Us but We grant You a licence to use, copy and reproduce that Material only for the purposes of this Agreement and in accordance with any conditions or restrictions specified in Schedule 1.
- 11.2 Upon the expiration of the Funding Period or earlier termination of the Term of the Agreement, You may retain all Commonwealth Material remaining in Your possession, unless otherwise specified in Schedule 1.
- 11.3 You must keep safely Commonwealth Material You have been given for the purposes of this Agreement.
- 11.4 The operation of this clause 11 survives the expiration or earlier termination of the Term of this Agreement.

12 INTELLECTUAL PROPERTY

- 12.1 Subject to this clause 12, as between Us and You (but without affecting the position between You and a third party) Intellectual Property Rights in Activity Material vest immediately in You.
- 12.2 You grant to Us a permanent, irrevocable, free, world wide, non-exclusive licence (including a right of sublicense) to use, reproduce, adapt and exploit the Intellectual Property Rights in any Report provided by You to Us for any Commonwealth purpose, subject to the following restrictions:
 - (a) We must comply with the confidentiality provisions of this Agreement in respect of any Confidential Information contained in such Reports; and
 - (b) We must not use, adapt or exploit the Reports in such a way as to make them incorrect or misleading.
- 12.3 This clause 12 does not affect the ownership of any Intellectual Property Rights in any Existing Material.
- 12.4 You:
 - (a) must, if requested by Us to do so, bring into existence, sign, execute or otherwise deal with any document which may be necessary or desirable to give effect to this clause 12; and
 - (b) warrant that You are entitled, or will be entitled at the relevant time, to deal with the Intellectual Property Rights in the Activity Material and the Existing Material in accordance with this clause 12.
- 12.5 This clause does not apply to any Commonwealth Material incorporated in the Reports.
- 12.6 The operation of this clause 12 survives the expiration or earlier termination of the Term of this Agreement.

13 DISCLOSURE OF INFORMATION

- 13.1 Subject to subclause 13.5, You or We must not, without the prior written consent of the other, use or disclose any Confidential Information of the other.
- 13.2 In giving written consent to use or disclose its Confidential Information, a Party may impose such conditions as it thinks fit, and the other Party agrees to comply with these conditions.
- 13.3 We may at any time require You to arrange for:
- (a) Your Advisers; or
 - (b) any person with a Third Party Interest;
- to give a written undertaking in the form of a deed relating to the use and non-disclosure of Our Confidential Information.
- 13.4 If You receive a request under subclause 13.3, You must promptly use all reasonable endeavours to arrange for all such undertakings to be given provided that if no undertaking is given, You must not disclose any Confidential Information to that relevant party.
- 13.5 The obligations on You and Us under this clause 13 will not be taken to have been breached to the extent that Confidential Information:
- (a) is disclosed by You or Us to Our Advisers or employees solely in order to comply with obligations, or to exercise rights, under, or advise in relation to, this Agreement;
 - (b) is disclosed to Your or Our internal management personnel, solely to enable effective management or auditing of Agreement-related activities;
 - (c) is disclosed by Us to Our Minister;
 - (d) is disclosed by Us, in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia;
 - (e) is required to be disclosed to comply with any law, court order or binding directive of any regulatory authority or comply with the listing rules of any stock exchange on which Your securities are listed or quoted;
 - (f) is disclosed by Us and is information in a material form in respect of which an interest, whether by licence or otherwise, in the Intellectual Property Rights in relation to that material form, has vested in, or is assigned to, Us under this Agreement or otherwise, and that disclosure is permitted by that licence or otherwise; or

- (g) is in the public domain otherwise than due to a breach of this clause 13.

13.6 Where You or We disclose Confidential Information to another person:

- (a) pursuant to paragraphs 13.5 (a) or (b) – the disclosing party must:
 - (i) notify the receiving person that the information is Confidential Information; and
 - (ii) not provide the information unless the receiving person agrees to keep the information confidential; or
- (b) pursuant to paragraphs 13.5 (c) or (d) – the disclosing party must notify the receiving party that the information is Confidential Information; and
- (c) You or We must use all reasonable endeavours to ensure any person receiving the Confidential Information of the other does not disclose the information except in the circumstances permitted in clause 12.5.

13.7 You and We may agree in writing after Date of this Agreement that certain additional information is to constitute Confidential Information for the purposes of this Agreement.

13.8 Where You and We agree in writing after the Date of this Agreement that certain additional information is to constitute Confidential Information for the purposes of this Agreement, this documentation is incorporated into, and becomes part of this Agreement (and Schedule 1 is deemed to be varied accordingly), on the date by which both You and We have signed this documentation.

13.9 The obligations under this clause 13 continue, notwithstanding the expiry or termination of the Term of this Agreement.

- (a) in relation to an item of information described in Schedule 1 – for the period set out in Schedule 1 in respect of that item; and
- (b) in relation to any information which You and We agree in writing after the Date of this Agreement is to constitute Confidential Information for the purposes of this Agreement – for the period agreed by You and Us in writing in respect of that information.

13.10 Nothing in this clause 13 derogates from any obligation which You may have either under the Privacy Act, or under this Agreement, in relation to the protection of Personal Information.

14 PROTECTION OF PERSONAL INFORMATION

14.1 This clause applies only where You deal with Personal Information when, and for the purpose of, conducting the Activity under this Agreement.

14.2 You agree to be treated as a ‘contracted service provider’ within the meaning of section 6 of the Privacy Act, and agree in respect to the conduct of the Activity under this Agreement:

- (a) to use or disclose Personal Information obtained during the course of conducting the Activity under this Agreement, only for the purposes of this Agreement or as otherwise agreed with the person the subject of the Personal Information;
- (b) not to do any act or engage in any practice that would breach an Information Privacy Principle (IPP) contained in section 14 of the Privacy Act, which if done or engaged in by an agency, would be a breach of that IPP;
- (c) to carry out and discharge the obligations contained in the IPPs as if You were an agency under that Act;
- (d) to notify individuals whose Personal Information You hold, that complaints about Your acts or practices may be investigated by the Privacy Commissioner who has power to award compensation against You in appropriate circumstances;
- (e) not to use or disclose Personal Information or engage in an act or practice that would breach section 16F (direct marketing), a National Privacy Principle (NPP) (particularly NPPs 7 to 10) or an Approved Privacy Code (APC), where that section, NPP or APC is applicable to You, unless:
 - (i) in the case of section 16F - the use or disclosure is necessary, directly or indirectly, to discharge an obligation under this Agreement; or
 - (ii) in the case of an NPP or an APC - where the activity or practice is engaged in for the purpose of discharging, directly or indirectly, an obligation under this Agreement, and the activity or practice which is authorised by this Agreement is inconsistent with the NPP or APC;
- (f) to disclose in writing to any person who asks, the content of the provisions of this Agreement (if any) that are inconsistent with an NPP or an APC binding a Party to this Agreement;
- (g) to immediately notify Us if You become aware of a breach or possible breach of any of the obligations contained in, or referred to in, this clause 14, whether by You or any subcontractor;
- (h) to comply with any directions, guidelines, determinations or recommendations of the Privacy Commissioner to the extent that they are not inconsistent with the requirements of this clause 14; and

- (i) to ensure that any of Your employees who are required to deal with Personal Information for the purposes of this Agreement are made aware of Your obligations set out in this clause 14.
- 14.3 You agree to ensure that any subcontract entered into for the purpose of fulfilling Your obligations under this Agreement contains provisions to ensure that the subcontractor has the same awareness and obligations as You have under this clause, including the requirement in relation to subcontracts.
- 14.4 You agree to indemnify Us in respect of any loss, liability or expense suffered or incurred by Us which arises directly or indirectly from a breach of any of Your obligations under this clause 14, or a subcontractor under the subcontract provisions referred to in subclause 14.3.
- 14.5 In this clause 14, the terms ‘agency’, ‘Approved Privacy Code’ (APC), ‘Information Privacy Principles’ (IPPs), and ‘National Privacy Principles’ (NPPs) have the same meanings as they have in section 6 of the Privacy Act, and ‘subcontract’ and other grammatical forms of that word has the meaning given in section 95B(4) of the Privacy Act.
- 14.6 The operation of this clause 14 survives the expiration or earlier termination of the Term of this Agreement.

15 INDEMNITY

- 15.1 You indemnify (and keep indemnified) Us against any:
- (a) loss or liability incurred by Us;
 - (b) loss of or damage to Our property; or
 - (c) loss or expense incurred by Us in dealing with any claim against Us, including legal costs and expenses on a solicitor/own client basis and a cost of time spent, resources used, or disbursements paid by Us;
- arising from:
- (d) any claim, suit, demand, action or proceeding against Us in connection with this Agreement to the extent that the liability, loss, damage or expense was caused or contributed to by Your fault;
 - (e) the use by Us of the Reports, including any claims by third parties about the ownership or right to use Intellectual Property Rights in Reports, but only to the extent that such Reports have not been altered by anyone other than You.
- 15.2 The indemnity in clause 15.1(e) only applies where:
- (a) We give written notice to You of any claim or threatened or potential claim by a third party as soon as possible;

- (b) We permit You, at Your expense, to handle all negotiations for settlement and, as permitted by law, to control and direct any litigation that may follow; and
 - (c) We provide You with all reasonable endeavours at Your expense.
- 15.3 Your liability to indemnify Us under this clause 14 will be reduced proportionally to the extent that any fault on Our part contributed to the relevant loss, damage, expense, or liability. In addition, We will take all reasonable steps to mitigate all losses, liabilities and expenses in respect of which we may claim the benefit of the indemnity under clause 15.1.
- 15.4 Our right to be indemnified under this clause 14 is in addition to, and not exclusive of, any other right, power, or remedy provided by law, but We are not entitled to be compensated in excess of the amount of the relevant liability, damage, loss, or expense.
- 15.5 In this clause 14, “fault” means any negligent or unlawful act or omission or wilful misconduct.
- 15.6 The operation of this clause 14 survives the expiration or earlier termination of the Term of this Agreement.

16 INSURANCE

- 16.1 You must, for as long as any obligations remain in connection with this Agreement, have insurance as specified in Schedule 1.
- 16.2 All insurance under this clause 16 is to be taken out with an insurer recognised by the Australian Prudential Regulation Authority or regulated by a State/Territory Auditor-General or as otherwise agreed with Us, and whenever requested, You must provide Us, within 10 Working Days of the request, with evidence satisfactory to Us that You have complied with Your obligation to insure.
- 16.3 The operation of this clause 16 survives the expiration or earlier termination of the Term of this Agreement.

17 CONFLICT OF INTEREST

- 17.1 You must not, and must ensure that any of Your employees, agents or subcontractors do not, engage in any activity or obtain any interest during the Term of this Agreement which constitutes a Conflict.
- 17.2 If during the Term of this Agreement, a Conflict arises, 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, if We choose to, reasonably require to resolve or otherwise deal with that Conflict.

17.3 If You fail to notify Us under this clause 17, or are unable or unwilling to resolve or deal with the Conflict as required, We may terminate the Term of this Agreement in accordance with clause 21 [Termination for Default].

18 ACCESS TO PREMISES AND RECORDS

18.1 You must give Us, the Auditor-General, the Privacy Commissioner and persons authorised by Us (referred to in this clause 18 collectively as ‘those permitted’) access to premises at which Records and equipment on which Records associated with this Agreement are stored at all reasonable times and allow those permitted to inspect and copy Records, in Your possession or control, to verify Your compliance with this Agreement or review Your performance under this Agreement. You must also give those permitted reasonable access to Your employees, for the same purpose.

18.2 You must provide all reasonable assistance requested by those permitted when they exercise the rights under subclause 18.1.

18.3 The rights referred to in subclause 18.1 are subject to:

- (a) the provision of reasonable prior notice by those permitted (except where they believe that there is an actual or apprehended breach of the law); and
- (b) Your reasonable requirements as to security, confidentiality and health and safety procedures.

18.4 The requirement for access as specified in subclause 18.1 does not in any way reduce Your responsibility to perform Your obligations in accordance with this Agreement.

18.5 This clause 18 applies for the Term of this Agreement and for a period of 3 years from the date of expiration or earlier termination of the Term of this Agreement.

19 DELAY

19.1 You must take all reasonable steps to minimise delay in completion of the Activity.

19.2 If You become aware that You will be materially delayed in progressing or completing the Activity in accordance with this Agreement, You must promptly notify Us in writing of the cause and nature of the delay. You are to detail in the notice the steps You will take to contain the delay.

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

- (a) notify You in writing of a period of extension to complete the Activity and vary this Agreement accordingly;

- (b) notify You in writing of reduction in the scope of the Activity and any adjustment to the Funds for You to complete the reduced Activity and vary this Agreement accordingly; or
- (c) terminate this Agreement under clause 21 [Termination for Default] or take such other steps as are available under this Agreement.

19.4 Unless We take action under subclause 19.3, You are required to comply with the time frame for progressing and completing the Activity as set out in this Agreement.

19.5 If You become aware that You will be materially delayed in progressing or completing the Activity in accordance with this Agreement and do not notify Us in accordance with subclause 19.2 We may, at Our sole discretion, terminate this Agreement.

20 TERMINATION WITH COSTS

20.1 We may, at any time by written notice to You, terminate the Term of this Agreement in whole or reduce the scope of this Agreement without prejudice to the rights, liabilities, or obligations of either Party accruing prior to the date of termination. If this Agreement is terminated or reduced in scope We will only be liable for:

- (a) subject to subclause 20.3, payments under the payment provisions of this Agreement; and
- (b) subject to subclauses 20.4, 20.5 and 20.6, any reasonable costs incurred by You and directly attributable to the termination of the Term of this Agreement or reduction in scope of the Agreement.

20.2 Upon receipt of a notice of termination or reduction in scope You must

- (a) cease or reduce the performance of Your obligations under this Agreement in accordance with the notice; and
- (b) take all reasonable steps to mitigate all losses, costs, and expenses, arising from the termination or reduction in scope contained in the notice.

20.3 Where We terminate the Term of this Agreement under subclause 20.1 We will not be obliged to pay to You any amount of the Funds except to the extent that those monies relate to the supply of a HiBIS Service to a HiBIS Customer before the date notice of termination given under subclause 20.1 is deemed to be received in accordance with subclause 34.3 [Notices].

20.4 If there is a reduction in scope of the obligations under this Agreement, Our liability to pay any part of the Funding will, in the absence of agreement to the contrary, abate proportionately to the reduction in the obligations under this Agreement.

20.5 Our liability to pay any compensation under or in relation to this clause 20 is subject to:

- (a) Your strict compliance with this clause 20; and
- (b) Your substantiation of any amount claimed under paragraph (b).

20.6 We will not be liable to pay compensation for loss of prospective profits for a termination or reduction in scope under this clause 20 or loss of any benefits that would have been conferred on You had the termination or reduction not occurred.

21 TERMINATION FOR DEFAULT

21.1 If:

- (a) You fail to fulfil, or are in breach of any of Your material obligations under this Agreement, and do not rectify the omission or breach within 10 Working Days of receiving a notice in writing from Us to do so;
- (b) 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);
- (c) 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 of any resolution for Your winding up;
- (d) 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;
- (e) in relation to this Agreement, You breach any law of the Commonwealth, or of a State or Territory;
- (f) You cease to carry on business;
- (g) You cease to have a written binding agreement with a HiBIS Provider to enable or assist the HiBIS Provider to provide a HiBIS Service to a Service Area for the Funding Period;
- (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; or
- (i) notice is served on You or proceedings are taken to cancel Your incorporation or registration or to dissolve You as a legal entity;

then, in the case of any one or more of these events, You must notify Us as soon as possible and We may immediately terminate the Term of this Agreement by giving written notice to You of the termination.

22 SUBCONTRACTING

- 22.1 You are fully responsible for the performance of Your obligations under this Agreement, even though You may have subcontracted any of them.
- 22.2 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 Agreement.
- 22.3 You must not enter into a subcontract under this Agreement with a subcontractor named by the Director of the Equal Opportunity for Women in the Workplace Agency as an employer currently not complying with the *Equal Opportunity for Women in the Workplace Act 1999* (Cth).

23 ACKNOWLEDGMENT AND PUBLICITY

- 23.1 You must, in all publications, promotional materials, marketing and advertising materials, public announcements and activities by You or on Your behalf in relation to the Activity, or any products, processes or inventions developed as a result of it, acknowledge the financial and other support You have received from Us, in the manner, if not set out in Schedule 1, then to be approved by Us prior to its use.
- 23.2 You must:
 - (a) invite Our personnel to any publicity events that You undertake in relation to the Activity; and
 - (b) support any Australian Government publicity associated with the Scheme as reasonably requested by Us.
- 23.3 We reserve the right to publicise and report on the awarding of Funding to You. We may do this by including in media releases, general announcements about the Funding and in annual reports Your name, the amount of the Funds given to You and the title and a brief description of the Activity. However, any information relating to You or the Activity used in the publicity must be approved by You in advance, such approval not to be unreasonably withheld or delayed.
- 23.4 This clause 23 applies until the end of the Scheme.

24 COMPLIANCE WITH LAWS AND OUR POLICIES

- 24.1 You must, in carrying out Your obligations under this Agreement, comply with the provisions of all relevant statutes, regulations, by-laws and requirements of any Commonwealth, State, Territory or Local Authority, including those listed in Schedule 1. You should note that under the

Criminal Code Act 1995 (Cth) section 137.1 giving false or misleading information is a serious offence.

24.2 You must, in carrying out Your obligations under this Agreement, comply with any of Our policies copies of which have been provided by Us to You in writing, including those listed in Schedule 1.

24.3 You must, when using Our premises or facilities, comply with all reasonable directions and procedures relating to occupational health, safety and security in effect at those premises or in regard to those facilities, as notified by Us or as might reasonably be inferred from the use to which the premises or facilities are being put.

25 NEGATION OF LEGAL RELATIONSHIP OF EMPLOYMENT, PARTNERSHIP AND AGENCY

25.1 You, Your employees, partners and agents will not, by virtue of this Agreement, be or for any purpose be deemed to be Our legal employees, partners or agents.

25.2 You must not, and must ensure that Your employees, partners and agents do not, represent Yourself or themselves as being Our employees, partners or agents.

26 ENTIRE AGREEMENT, VARIATION AND SEVERANCE

26.1 This Agreement records the entire agreement between You and Us in relation to its subject matter.

26.2 Except for action We are expressly authorised to take elsewhere in this Agreement, no variation of this Agreement is binding unless it is agreed in writing and signed by You and Us.

26.3 If a court or tribunal says any provision of this Agreement has no effect or interprets a provision to reduce an obligation or right, this does not invalidate any other provision.

27 WAIVER

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

27.2 A single or partial exercise by You or Us of any of Your or Our rights does not prevent the further exercise of any right.

27.3 Waiver of any provision of, or right under, this Agreement:

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

27.4 In this clause 27, 'rights' means rights or remedies provided by this Agreement or at law.

28 ASSIGNMENT AND NOVATION

28.1 You must not assign Your rights under this Agreement without prior written approval from Us.

28.2 You agree not to enter into negotiations with any other person for the purposes of entering into an arrangement that will require novation of this Agreement without first consulting Us.

29 INCORPORATION

29.1 You warrant that Your Constitution is not, and will not become, inconsistent with this Agreement.

29.2 You must provide a copy of Your Constitution to Us upon request.

29.3 You must obtain Our written approval to any amendments to Your Constitution which may affect Your eligibility for the Funding or Your capacity to comply with this Agreement. If You alter Your Constitution in breach of this clause We may terminate this Agreement in accordance with clause 21 [Termination for Default].

29.4 For the purposes of this clause 29:

'Constitution' means (depending on the context):

- (a) a company's constitution, which (where relevant) includes rules and any amendments that are part of the company's constitution; or
- (b) in relation to any other kind of body:
 - (i) the body's charter, rules or memorandum; or
 - (ii) any instrument or law constituting or defining the constitution of the body or governing the activities of the body or its members.

30 FUNDING PRECONDITION

30.1 You agree that it is a precondition of entitlement to the Funding that You must:

- (a) have an Australian Business Number ("ABN");
- (b) immediately notify Us if You cease to be registered with an ABN;
- (c) correctly quote the ABN on all documentation to Us;
- (d) supply proof of GST status, if requested by Us; and

- (e) immediately notify Us of changes to Your GST status.

31 DISPUTE RESOLUTION

31.1 Subject to subclause 31.3, both You and We agree not to commence any legal proceedings in respect of any dispute arising under this Agreement, which cannot be resolved by informal discussion, until the procedure provided by this clause has been utilised.

31.2 Both You and We agree that any dispute arising during the course of this Agreement is 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 negotiation by persons to whom they have given authority to resolve the dispute;
- (c) the Parties have 10 Working Days from the receipt of the notice to reach a resolution or to agree that the dispute is to be submitted to mediation or some alternative dispute resolution procedure; and
- (d) if:
 - (i) there is no resolution of the dispute;
 - (ii) there is no agreement on submission of the dispute to mediation or some alternative dispute resolution procedure; or
 - (iii) there is a submission to mediation or some other form of alternative dispute resolution procedure, but there is no resolution within 15 Working Days of the submission, or such extended time as the Parties may agree in writing before the expiration of the 15 Working Days,

then, either You or We may commence legal proceedings.

31.3 This clause 31 does not apply to the following circumstances:

- (a) either You or We commence legal proceedings for urgent interlocutory relief; or
- (b) action by Us under or purportedly under clauses 20 [Termination with Costs] or 21 [Termination for Default];
- (c) an authority of the Commonwealth, a State or Territory is investigating a breach or suspected breach of the law by You.

31.4 Despite the existence of a dispute, both You and We must (unless requested in writing by the other Party not to do so) continue to perform obligations under this Agreement.

31.5 The operation of this clause 31 survives the expiration or earlier termination of the Term of this Agreement.

32 APPLICABLE LAW AND JURISDICTION

32.1 The laws of the Australian Capital Territory apply to this Agreement.

32.2 Both You and We agree to submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory in respect to any dispute under this Agreement.

33 LIAISON AND MONITORING

33.1 You must:

- (a) liaise with and provide information to Us as reasonably required by Us; and
- (b) comply with all Our reasonable requests, directions, or monitoring requirements,

in relation to Your obligations under this Agreement.

33.2 You may nominate, from time to time, a person who has authority to receive and sign notices and written communications for You under this Agreement and accept any request or direction in relation to the Activity.

34 NOTICES

34.1 A Party giving notice or notifying under this Agreement must do so in writing or by electronic mail or facsimile transmission:

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

34.2 The parties' address details are as specified in Schedule 1.

34.3 A notice given in accordance with subclause 34.1 is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by pre-paid post, 5 Working Days after the date of posting unless it has been received earlier;
- (c) if transmitted electronically, upon actual receipt by the addressee.

THIS AGREEMENT is made on the day of 200

[Select the APPROPRIATE signing clauses below as indicated and delete the others]

EXECUTED BY THE PARTIES AS A DEED

SIGNED, SEALED AND DELIVERED
for and on behalf of the
COMMONWEALTH OF AUSTRALIA
represented by and acting through the
Department of Communications,
Information Technology and the Arts
ABN 51 491 646 726 by

.....
sign here

.....
[print full name]
in the presence of:

.....
print name of witness

.....
witness sign here

[For an incorporated association not using Common Seal:]

SIGNED, SEALED AND DELIVERED
for and on behalf of
[insert name of Funding Recipient]
ABN **[insert]** by **[insert name of Signatory]** who by signing warrants that
they have the authority to bind **[insert name of Recipient used previously]** in
the presence of:

Signatory

.....
sign here

Witness

.....
sign here

Name and occupation of Witness

.....
please print

[For an incorporated association using Common Seal]

The Common Seal of

[name of recipient], ABN [insert], was affixed to this document in accordance with its rules.

common seal

Authorised Signatory
sign here

Name of Authorised Signatory
please print

In the Presence of
Witness
sign here

Name of Witness
please print

[A company no longer needs to affix its Common Seal, but may execute the deed through two of its directors or a director and company secretary signing the deed on behalf of the company.]

[Use this if company IS using Seal]

The Common Seal of
[name of recipient], ABN [insert], was affixed to this document by authority of its Directors.

Affix common seal

Director
sign here

Name of Director
please print

Director/Secretary
sign here

Name of Director/Secretary
please print

Use this if company is NOT using its Common Seal:

SIGNED, SEALED AND DELIVERED

for and on behalf of

[name of recipient], ABN [insert],

pursuant to section 127(1) of the

Corporations Act 2001 (Cth) by:

Director

.....

sign here

Name of Director

.....

please print

Director/Secretary

.....

sign here

Name of Director/Secretary

.....

please print

**OR OTHER MODE OF ATTESTATION REQUIRED BY COMPANY
CONSTITUTION**

SCHEDULE 1

1 SCHEME (RECITAL A, SUBCLAUSES 1.1)

- 1.1 The Scheme aims to achieve prices for Higher Bandwidth Services in regional Australia that are comparable to metropolitan services.
- 1.2 The Scheme is targeted at residential customers, small business and small not-for-profit organisations.

2 FUNDING PERIOD

- 2.1 The Funding Period commences on [insert date HiBIS Services are to be first offered by a HiBIS Provider with whom You have an Agreement (which may be the Date of this Agreement)] and ends on 30 June 2004.

3 PARTIAL INCENTIVE PAYMENT FOR PRE-EXISTING CUSTOMERS

- 3.1 The partial Incentive Payment for Pre-existing Customers is \$[insert amount] (exclusive of GST).

4 FUNDING CAP (CLAUSES 6.2, 6.9, 6.11)

[Note: Use GST exclusive figures]

[Department to insert amount of cap]

The Funding Cap for the Funding Period is []

The Funding Cap for the Period of the Scheme is []

5 ALLOWABLE COSTS (CLAUSES 6.2, 6.4, 6.5, 6.6, 6.7, 6.8)

- 5.1 Allowable Costs are limited to costs incurred by You in providing new infrastructure and other costs since the Start of the Scheme that are directly attributable to provision of a HiBIS Service by a HiBIS Provider comprising the following categories:

- (a) [specify].

- 5.2 Costs are only allowable if incurred to provide a HiBIS Service. Hence, the cost of any items, like backhaul or transponder capacity for example, that are shared between HiBIS Services and other services, may only be included as Allowable Costs to the extent these costs are incurred in supplying a HiBIS Service. You are required to justify the allocation of any portion of shared costs between the HiBIS Services and other services provided by You for the purpose of allocating Allowable Costs.

- 5.3 Costs that are excluded from Allowable Costs are the following:

- (a) general administrative costs of operating the business, including staff costs, and corporate and business overheads, such as office rental, power, computing, insurance and travel;

- (b) general marketing costs unless particular marketing costs can be demonstrated to be additional to normal requirements, and relate to the special requirements of the Agreement;
- (c) network and technical costs that are of a general nature and cannot be specifically or sufficiently identified and apportioned to the cost of providing a HiBIS Services; and
- (d) costs incurred before the Start of the Scheme.

6 DISCLOSURE OF CONFIDENTIAL INFORMATION (SUBCLAUSE 1.1, CLAUSE 13)

OUR CONFIDENTIAL INFORMATION

AGREEMENT PROVISIONS/SCHEDULE/ANNEXURES

Item	Period of Confidentiality

AGREEMENT-RELATED MATERIAL

Item	Period of Confidentiality

YOUR CONFIDENTIAL INFORMATION

AGREEMENT PROVISIONS/SCHEDULE/ANNEXURES

Item	Period of Confidentiality

AGREEMENT-RELATED MATERIAL

Item	Period of Confidentiality

7 INSURANCE (SUBCLAUSE 16.1)

7.1 You must maintain:

- (a) workers compensation insurance that is required by law where You carry out Activities under this Agreement. For the avoidance of doubt, this can include self-insurance where You have a licence under the Safety, Rehabilitation and Compensation Act 1988 (C'th) and We have agreed in writing that the licence is acceptable for Our purposes;

- (b) public liability insurance to the value of at least \$10 million per claim, or occurrence giving rise to a claim, in respect to Activities undertaken under this Agreement, where occurrence means either a single occurrence or a series of occurrences if these are linked or occur in connection with one another from one original cause, as the case may be.

8 ACKNOWLEDGMENT AND PUBLICITY (SUBCLAUSE 23)

8.1 You must acknowledge Our Funding in the following way:

[Department to insert if required]

9 COMPLIANCE WITH LAWS AND POLICIES (SUBCLAUSES 24 AND 24.2)

9.1 You must comply with the following laws in carrying out the Activity:

- (a) *Equal Opportunity for Women in the Workplace Act 1999;*
- (b) *Racial Discrimination Act 1975;*
- (c) *Sex Discrimination Act 1984;*
- (d) *Disability Discrimination Act 1992;*
- (e) *Crimes Act 1914;*
- (f) *Criminal Code Act 1995.*

10 NOTICES (SUBCLAUSE 34)

10.1 Our details are as follows:

Name:

Position:

Department of Communications, Information Technology and the Arts

GPO Box 2154

Canberra ACT 2601

Telephone:

Facsimile:

E-mail:

10.2 Your details are as follows:

[specify name, position, address, telephone, facsimile and email]

SCHEDULE 2

Name of HiBIS Provider	Date of HiBIS Provider's Contract	Date HiBIS Provider is approved to offer HiBIS Services	HiBIS Wholesaler's Proportion	HiBIS Provider's Proportion
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SCHEDULE 3 YOUR ESTIMATE OF ALLOWABLE COSTS

[NB: To be quoted GST exclusive]

SCHEDULE 4 HiBIS Guidelines