**Sample Document**

**Direct Deed**

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| **What is this sample document usually called?** | Direct Deed. |
| **What group of documents does it belong to?** | Project Implementation Documents.See *What other documents are closely related to it?* below. |
| **Who will sign it?** | State of Victoria (acting through a named Government department) (the **State**).Key Service Provider. |
| **When is it used?** | **SPE Proponent Transaction Provisions** where a special purpose entity is the counterparty for the Implementation Agreement. |
| **What does it do?** | Creates a direct legal relationship between the State and the key Service Provider(s) for a Social Impact Bond arrangement (**SIB Arrangement**). |
| **What areas does it cover?** | * Protections for the State in relation to service procurement and delivery (equivalent to those given under the Implementation Agreement and Services Subcontract).
* Additional representations and undertakings.
* Intellectual property and use of information.
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| **What drafting options does it include?** | Standard provisions that are to apply generally for any SPE Proponent Transaction. |
| **What other documents are closely related to it?** | * Implementation Agreement – provides the overall framework for the SIB arrangement. This is a central document for the SIB arrangement.
* Services Subcontract – an outsourcing Deed between the Proponent and the key Service Provider(s).
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| **What should we do before we use this sample document?** | This sample document contains general provisions and other information only and does not take into account the objectives, needs or financial arrangements of any particular transaction.Before using this sample document, you should:* carefully consider and make your own assessment of whether it is appropriate for the SIB arrangement or other transaction that you are considering;
* perform your own independent investigation and analysis of the suitability and appropriateness of this sample document for any SIB arrangement or other transaction that you are considering;
* consult your own legal, tax, financial and other professional advisers as part of your assessment of this sample document and its suitability for your transaction; and
* satisfy yourself that cross references in the sample document to other provisions of the sample document, or to any provisions or the names of other documents, are correct.
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| **Why is this sample document available?** | This sample document is intended to provide a guide for, and to streamline the development of, the documentation (and specific provisions) that is used for an SIB arrangement.Parties are advised that the State will be responsible for the initial preparation and any re-drafting of the Direct Deed in connection with any SIB arrangement, and this sample document is intended to be used as the basis for preparing that document. It relies upon the construction of the Services Subcontract as a ‘back-to-back’ outsourcing agreement for the Implementation Agreement. The State would expect to take into account in any evaluation of a proposed SIB arrangement any requests for material departures from the sample document and/or the expected form of the Services Subcontract and the reasons for the departures and the possible implications for time, cost and efficiency.The acceptance of the final form of this document by the State will be a key condition for any Deed of the terms of an SIB arrangement. However, it may not be suitable in all circumstances and the State reserves the right to require a departure from this sample document in order to address the specifics of a particular SIB arrangement, to address then current market practice and conditions and otherwise as necessary to protect the interests of the relevant department, agency or other State body and the State. |
| **Where can I get further information?** | If you have any questions in relation to this sample document, or any specific provision or other related information, queries can be directed to socialimpactbonds@dtf.vic.gov.au.  |

**Legal matters**

This sample document has been prepared by King & Wood Mallesons at the request of, and in consultation with, the Victorian Department of Treasury and Finance (“**DTF**”) and its advisers. It forms part of a suite of sample transaction documents that has been developed by DTF for use in connection with SIB arrangements.

This sample document is derived in part from the Direct Agreement prepared by the State of Queensland in consultation with Trevor Danos AM and King & Wood Mallesons, the use of which for the purposes of preparing this document is gratefully acknowledged. Users of this sample document are directed to the copyright notices and acknowledgments on its cover page.

No reliance may be placed for any purposes whatsoever on the provisions and other information contained in this sample document (or any other communications or materials separately provided or discussed verbally in connection with this sample document) or on its completeness, accuracy or fairness. No representation or warranty, expressed or implied, is given by, or on behalf of, the State, King & Wood Mallesons or any other person as to the provisions and other information included in this sample document being acceptable to the State in all circumstances, that it is suitable for any particular SIB arrangement or as to the accuracy or completeness of the provisions or other information contained in this sample document and no liability whatsoever is accepted by the State or King & Wood Mallesons for any loss howsoever arising, directly or indirectly, from any use of such provisions or other information or otherwise arising in connection with it. The provisions and other information in this sample document are subject to negotiation, verification, completion and change.

***Parties are advised that the State will be responsible for the initial preparation and any re-drafting of this document in connection with any SIB arrangement. Any request for a change to a provision of this document must be accompanied with suggested drafting amendments for that change and, where the change is material, by reasonable detail of the reason for the request. It relies upon the construction of the Services Subcontract as a ‘back-to-back’ outsourcing Deed for the Implementation Agreement. Whilst the intention is to use this sample document as the basis for preparing the actual Direct Deed for each relevant SIB arrangement, it may not be suitable in all circumstances and there is no obligation for the State of Victoria to do so. The State of Victoria reserves the right to amend or to depart from this sample document in order to address the specifics of a particular SIB arrangement, to address then current market practice and conditions and otherwise as necessary to protect the interests of the relevant department, agency or other State body and the State. All cross-references to provisions in this document or in the Implementation Agreement and to provisions and names of other documents should be carefully checked.***



**Direct Deed**

**[*Project name*]**

Between

**State of Victoria acting through
[*Department’s name*]**

and

**[*Legal name of Service Provider*]**

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This document has been derived in part from the SBB Direct Agreement (**Reference Work**) prepared by the State of Queensland in consultation with Trevor Danos AM and King & wood Mallesons, available at https://www.treasury.qld.gov.au/projects-infrastructure/initiatives/sbb/resources.php. The Reference Work is derived in part from the Direct Agreement of the NSW Office of Social Impact Investment, prepared by the NSW Crown Solicitor’s Office in consultation with Trevor Danos AM, available at http://www.dpc.nsw.gov.au/programs\_and\_services/social\_impact\_investment/social\_benefit\_bonds. To the extent that this work is a derivative work of those works, this work is licensed to you under clause 9 of the Licence.

**PARTIES**

 **State of Victoria acting through [*Department’s name*]** (the **State**)

and

**[*Insert legal name and ABN of Service Provider*]** (the **Service Provider**).

 **BACKGROUND**

A. The State and [*insert name and ABN*] (the **Proponent**) have entered into an Implementation Agreement for a social impact bond arrangement in the area of [*describe relevant policy area in which services are to be provided*] (in this Background section and in the Operative Provisions, referred to as the **Implementation Agreement**) under which the Proponent has agreed with the State to deliver certain outcomes through a subcontract with the Service Provider.

B. The Proponent has entered into a subcontract with the Service Provider of its obligations under the Implementation Agreement to provide the services necessary to deliver or achieve the agreed outcomes (in this Background section and in the Operative Provisions, referred to as **Services Subcontract**).

C. As part of the State’s arrangements to mitigate risk, the State will obtain directly from the Service Provider, and the Service Provider has agreed to provide the State with:

(i) the benefit of certain undertakings given by the Service Provider under the Services Subcontract; and

(ii) rights to certain intellectual property owned and used by the Service Provider, or created by the Services Provider, in connection with the Services Subcontract.

 **OPERATIVE PROVISIONS**

# **Definitions**

Applicable definitions contained in the Services Subcontract are taken to be incorporated, with all necessary changes, into this Direct Deed, and the following terms have these meanings:

“**Health Information**” has the meaning given to that term in the *Health Records Act 2001* (Vic);

“**Intellectual Property Rights**” includes existing and future copyright, rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered designs, trade secrets and know how, and other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields, but does not include Moral Rights;

“**Machinery of Government Change**”means a transfer of responsibility, function or operations, in whole or in part, from a Victorian Government department or agency or Victorian Government Body to another Victorian Government department or agency or Victorian Government Body;

“**Moral Rights**” means the right of integrity of authorship, the right of attribution of authorship and the right not to have authorship falsely attributed, more particularly as conferred by the Copyright Act 1968 (Cth), and the rights of a similar nature anywhere in the world whether existing before, on or after the commencement of this Direct Deed;

“**Personal Information**” has the meaning given to that term in the *Privacy and Data Protection Act 2014* (Vic);

“**Privacy Notice**” means the document which describes how the Service Provider will deal with any Personal Information and Health Information provided to the Service Provider;

“**Service Provider’s Material**” means any information, document, electronic image, cinematographic film, video, equipment, software or data stored by any means which is created by the Service Provider or on the Service Provider’s behalf in performing its obligations under the Services Subcontract;

“**State’s Material**” means any information, document, file, record, electronic image, cinematographic film, video, equipment, software or data stored by any means which is given to the Proponent by the State for the purposes of performing its obligations under the Implementation Agreement, including all copies and extracts; and

“**Victorian Government Body**”means any of:

(a) a body corporate or an unincorporated body established or constituted for a public purpose by the legislation of the State of Victoria, or an instrument made under that legislation (including a local authority);

(b) a body established by the State of Victoria through the Governor or a Minister; or

(c) an incorporated or unincorporated body over which the State of Victoria exercises control.

# **Repeated representations, warranties, undertakings and indemnities**

## The Service Provider repeats to the State, and gives for the State’s benefit, the representations, warranties, undertakings, agreements, acknowledgments and indemnities that the Service Provider has given to the Proponent in the following clauses of the Services Subcontract:

### clause [20] (Use of Payments and delivery of Services);

### clause [24] (Disclosure of confidential information);

### clause [25] (Protection of personal information and health information);

### clause [26] (Recordkeeping);

### clause [27] (Insurance and indemnity);

### clause [29] (Subcontracting); and

### clause [32] (Publication of information).

## In construing the above clause references as they are repeated under this Direct Deed, references in those clauses, where appearing in the Services Subcontract, to “the Proponent” are taken to be references to “the State”, and references to “the Agreement” or “this Agreement” are taken to be references to the Services Subcontract, unless the context requires a different meaning.

## Any limitation of liability in favour of the Service Provider as against a third party other than the State, in any other document and in whatever capacity and however expressed, does not apply in any way to the Service Provider or to the Service Provider’s dealings with the State and relevant clauses and definitions from the Services Subcontract referred to or taken to apply in this Direct Deed are to be construed and take effect as though no such limitation of liability existed and likewise as though any provisions of the Services Subcontract concerning the “pass through” of corresponding rights, entitlements and remedies of the Proponent under the Implementation Agreement to the Service Provider did not exist.

## The Service Provider is not required to give any notice by reference to clause 2.1 if the Service Provider knows or has reasonable grounds to believe that it would be a duplicate of a corresponding notice already given by the Proponent.

## The Service Provider is not required to pay an amount by reference to clause 2.1 if and to the extent such payment would duplicate a corresponding payment already made by the Proponent to the State under, or in respect of, any applicable or corresponding provision of the Implementation Agreement.

# **Additional representation and undertaking**

## The Service Provider represents and warrants to the State on the Agreement Commencement Date that the Service Provider has made its own assessment of the risks, contingencies and other circumstances which might affect the Project and has satisfied itself as to the Project's viability and the Service Provider’s ability to successfully deliver or achieve the Outcomes.

## The Service Provider undertakes not to amend the Services Subcontract (other than to correct minor or typographical errors) without the State’s prior written consent (such consent not to be unreasonably withheld or delayed, but without limiting any of the State’s rights under this Direct Deed or the Implementation Agreement).

# **Intellectual Property Rights**

## The Service Provider repeats to the State, and gives for the State’s benefit, the undertakings that the Service Provider has given to the Proponent in the Services Subcontract with respect to Intellectual Property Rights.

## In addition the parties to this Direct Deed agree as between themselves as follows:

### as between the parties:

#### all Intellectual Property Rights in the Service Provider’s Material vests in the Service Provider; and

#### all Intellectual Property Rights in the State’s Material vests in the State;

### the Service Provider grants to the State a perpetual, irrevocable, royalty-free, world-wide and non-exclusive licence (including a right to sub-license) to use, communicate, reproduce, publish, adapt and modify the Service Provider’s Material in order to obtain the benefit of the Services or to pursue the objectives of the Implementation Agreement;

### the State grants to the Service Provider a royalty-free, world-wide, non-transferable, non-exclusive licence to use, reproduce, adapt, modify and communicate the State’s Material only to the extent required by the Service Provider to perform its obligations under the Services Subcontract;

### if requested by the State, the Service Provider will sign, execute, or otherwise complete any document that may be necessary or desirable to give effect to this clause 4;

### the Service Provider represents and warrants that it is entitled, or will be entitled at the required time, to deal with the Intellectual Property Rights in the Service Provider’s Material in the manner provided for in this clause 4 and the Services Subcontract, and that the State’s exercise of its rights in the Service Provider’s Material will not infringe any person’s Intellectual Property Rights or Moral Rights (and, to the extent necessary, the Service Provider agrees to obtain the consent of any holder of Moral Rights to ensure no such infringement);

### the State represents and warrants that the State is entitled, or will be entitled at the required time, to deal with the Intellectual Property Rights in the State’s Material in the manner provided for in this clause 4 and the Implementation Agreement and that the Service Provider’s exercise of its rights in the State’s Material will not infringe any person’s Intellectual Property Rights;

### the Service Provider agrees to take all reasonable steps to protect the Intellectual Property Rights in the Service Provider’s Material and to comply with the warranties in clause 4.2(e); and

### the Service Provider will ensure that, in delivering the Services and performing its obligations under the Services Subcontract, the Service Provider (including its employees, agents, volunteers and subcontractors) will not:

#### infringe any person’s Intellectual Property Rights or an individual’s Moral Rights; or

#### authorise the infringement of any such rights.

## Without limiting any other rights which the State may have under this Direct Deed or at law, the Service Provider releases, discharges, indemnifies and keeps indemnified the State, its officers, employees and agents from and against any Claim that may be made or brought by any person against the State in connection with:

### the Service Provider failing to observe or perform any of its obligations under this clause 4; and

### any infringement or alleged infringement of any Intellectual Property Rights (including Moral Rights) which may arise out of, or in connection with, the performance or non-performance by the Service Provider and/or its subcontractors, of the Services Subcontract or any other subcontract,

### but the Service Provider’s liability to indemnify the State under this clause 4 will be reduced proportionally to the extent that an act or omission of the State contributed to the Claim.

# **Protection of Personal Information and Health Information**

## Service Provider’s obligations

## If the Service Provider collects or has access to Personal Information or Health Information for the purposes of the Services Subcontract, the Service Provider must:

### comply with the Information Privacy Principles (contained in Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic)) with respect to Personal Information, and the Health Privacy Principles (contained in Schedule 1 of the *Health Records Act 2001* (Vic)) with respect to Health Information, as if the Service Provider were the State;

### not use Personal Information or Health Information other than for the purposes of the Services Subcontract, unless required or authorised by law;

### not disclose Personal Information or Health Information without the State’s prior written consent, unless required or authorised by law;

### not transfer Personal Information or Health Information outside of Australia without the State’s prior written consent;

### ensure that access to Personal Information and Health Information is restricted to those of the Service Provider’s employees, volunteer workers and officers who require access in order to perform their duties;

### ensure that the Proponent’s employees, volunteer workers and officers do not access, use or disclose Personal Information and Health Information other than in the performance of their duties;

### ensure that the Service Provider’s contractors and the Service Provider’s affiliates who have access to Personal Information or Health Information comply with the obligations the same as those imposed on the Service Provider under this clause 5;

### fully co-operate with the State to enable the State to respond to applications for access to, or amendment of a document containing an individual’s Personal Information or Health Information and to privacy complaints; and

### comply with such other privacy and security measures as the State reasonably notifies the Service Provider about from time to time.

## Confidentiality Deed Poll

## On the State’s request, the Service Provider must obtain from its employees, volunteer workers, officers and contractors engaged for the purposes of the Services Subcontract, an executed confidentiality deed poll in a form acceptable to the State.

## Privacy Notice

### If the Service Provider collects, records or otherwise deals with Personal Information or Health Information, the Service Provider must make available a copy of its Privacy Notice to the person giving the Service Provider the Personal Information or Health Information.

### The Service Provider agrees to inform any individual who receives services from the Service Provider that any Personal Information or Health Information provided by that individual to the Service Provider may be disclosed by the Service Provider to the State pursuant to the *Privacy and Data Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic)..

## Service Provider will notify the State

### The Service Provider must make every reasonable effort to notify the State immediately upon becoming aware of any breach of this clause 5.

### The Service Provider must notify the State immediately in the event that it becomes aware that disclosure of Personal Information or Health Information, in relation to any child subject to the *Children, Youth and Families Act 2005* (Vic) is made (whether or not the disclosure is authorised under that Act) or may be required by law.

# **Enforcement**

The Service Provider acknowledges and agrees that the State can seek to enforce this Direct Deed in the event of any breach by the Service Provider of the above agreements, undertakings and obligations.

# **Machinery of Government Change**

# If a Machinery of Government Change occurs:

1. the State may assign or transfer this Direct Deed, or any of the benefits or obligations under this Direct Deed, to a Victorian Government department or agency or Victorian Government Body without the Service Provider’s consent; and
2. the Service Provider agrees to take any action necessary (including executing any document) to give effect to such assignment or transfer.

# **Termination**

This Direct Deed shall terminate immediately upon the termination of the Services Subcontract (in accordance with its terms) and each party shall be released from their respective obligations under this Direct Deed, without prejudice to the rights, obligations and liabilities of a party incurred or accrued before or in conjunction with the termination of this Direct Deed.

# **Survival**

Notwithstanding clause 8 (Termination), the following clauses survive termination or expiry of this Direct Deed:

1. clause 2.1 (Repeated representations, warranties, undertakings and indemnities), insofar as it operates with reference to any of the following clauses of the Services Subcontract:
2. clause [24] (Disclosure of confidential information);
3. clause [25] (Protection of personal information and health information);
4. clause [26] (Recordkeeping); and
5. clause [27] (Insurance and indemnity);
6. clause 4 (Intellectual Property Rights); and
7. any other provision of this Direct Deed (including any provision of the Services Subcontract to which such provision refers) that is referenced by, or necessary to, the operation of clause 2.1 (to the extent that the survival of that clause is expressly provided for in clause 9(a) or clause 4 of this Direct Deed, including, without limitation, clauses 2.2, 2.3, 2.4 and 2.5 of this Direct Deed.

# **GST**

## The consideration expressed in this Direct Deed (unless otherwise specified) is exclusive of GST.

## If anything supplied under or in connection with this Direct Deed constitutes a taxable supply made for GST exclusive consideration, the recipient will pay the supplier the GST Amount at the same time as making payment of any consideration.

## If, for any reason, including:

### any amendment to the GST Legislation;

### the issue of a ruling or advice by the Commissioner of Taxation;

### a refund in respect of a supply made under this Direct Deed; or

### a decision of any tribunal or court,

the amount of GST paid by the recipient differs from the amount of GST paid or payable by the supplier to the Commissioner of Taxation, then the recipient must issue an appropriate adjustment note and any difference must be paid to or by the recipient as the case may be.

## The parties agree to exchange such information as is necessary to enable each party to accurately assess its rights and obligations under this clause 10.

## If the supplier is registered for GST, the recipient agrees that the supplier may issue the recipient with RCTIs in respect of GST applicable to any payments of amounts. The following requirements will apply for the duration of this Direct Deed:

### the supplier may issue the recipient with an RCTI in respect of any Taxable Supply;

### the recipient must not issue a tax invoice in respect of a Taxable Supply for which the supplier issues an RCTI; and

### each party acknowledges that it is registered for GST and agrees to notify the other party if it ceases to be registered or ceases to satisfy any of the requirements relating to RCTIs.

## The supplier must remit any GST Amounts that the recipient pays to it to the Australian Taxation Office as required by the GST Legislation.

# **Governing law**

This Direct Deed will be governed by and construed in accordance with the laws of Victoria and the parties submit to the non-exclusive jurisdiction of the courts of Victoria.

**Executed as a deed**

[***Insert execution clauses***]