**Sample Document**

**Direct Agreement**

This sample document supersedes version 1 (dated 13/10/2015) which was previously available on this website. This version 2 (dated 22/1/2018) has also been prepared by the NSW Crown Solicitor’s Office. It forms part of a suite of sample transaction documents that have been developed by the Office of Social Impact Investment for use in connection with a Social Benefit Bond (SBB) arrangement involving private investors in the Australian wholesale capital market.

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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 SBB arrangement. This sample document can be freely used for such a purpose in accordance with the Creative Commons licence mentioned above. Use of this sample document, may help to make the legal process efficient and reduce costs.

The NSW Government is not making the use of the sample document mandatory but the NSW Government would expect to take into account in any evaluation of a proposed SBB arrangement the non-use of the sample document and the reasons for the non-use, any material departures from the sample document and the reasons for the departures and the possible implications for time, cost and efficiency. Whilst the intention is to use this sample document as the basis for preparing the actual document for each relevant SBB arrangement, it may not be suitable in all circumstances and there is no obligation for the NSW Government and the State of New South Wales (including all departments, agencies and other State bodies and personnel) (together, the “**NSW Government**”) to do so. The NSW Government reserves the right to amend or to depart from this sample document in order to address the specifics of a particular SBB 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.

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 SBB arrangement or other transaction that you are considering. You should consult your own legal, tax and other professional advisers as part of your assessment of this sample document and its suitability for your transaction.

You should 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.

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 NSW Government or any other person as to the provisions and other information included in this sample document being acceptable to the NSW Government in all circumstances, that it is suitable for any particular SBB 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 NSW Government 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.

If you have any questions in relation to this sample document, or any specific provision or other related information, queries can be directed to socialimpactinvestment@dpc.nsw.gov.au.

**Instructions for use**

This sample document includes standard provisions that are intended to apply generally where there is a special purpose entity acting as the issuer of any bonds.

There are drafting instructions included in the sample document to assist in drafting the document.

The agreed form of the document will be included as schedule 5 to the relevant Deed of Implementation Agreement (which may be modified to include certain “**SPE Issuer**” provisions).

***Parties are advised that the NSW Crown Solicitor’s Office will be responsible for the initial preparation and any re-drafting of this document in connection with any SBB Arrangement. Any requests for changes to the provisions of this document must be accompanied by reasonable detail of the reason for the request together with suggested drafting amendments for that change.***

***Whilst the intention is to use this sample document as the basis for preparing the actual Direct Agreement for each relevant SBB arrangement, it may not be suitable in all circumstances and there is no obligation for the NSW Government to do so. The NSW Government reserves the right to amend or to depart from this sample document in order to address the specifics of a particular SBB 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 of the Implementation Deed and other documents should be carefully checked.***

 **Deed of Direct Agreement**

**Parties:**

**[*Minister (Portfolio) and Department***] (the “**Department**”)

**[*Insert name and ABN*]** (the “**Services Subcontractor**”)

**Background**

A. The Department and [*insert name and ABN*] (the “**Organisation**”) have entered into a Deed of Implementation Agreement for Social Benefit Bond Transaction in the area of [*describe relevant area in which services are to be provided*] (in this Background section and in the Operative Provisions, referred to as the “**Implementation Deed**”) under which the Organisation has agreed with the Department to deliver certain outcomes through a subcontract with the Services Subcontractor.

B. The Organisation has accordingly entered into a subcontract with the Services Subcontractor of its obligations under the Implementation Deed to provide the services necessary to deliver the agreed outcomes (in this Background section and in the Operative Provisions, referred to as “**Services Subcontract**”).

C. As part of its arrangements to mitigate risk, the Department wishes to obtain directly from the Services Subcontractor, and the Services Subcontractor has agreed to provide the Department with:

(a) certain undertakings given by the Services Subcontractor under the Services Subcontract; and

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

**Operative Provisions**

**1. Definitions**

Applicable definitions contained in the Services Subcontract are taken to be incorporated, mutatis mutandis, into this Direct Agreement.

**2. Repeated representations, warranties, undertakings and indemnities**

2.1 The Services Subcontractor repeats to, and for the benefit of, the Department the representations, warranties, undertakings and indemnities that it has given to the Organisation in the following clauses of the Services Subcontract:

Clause 8 (Compliance with Law, guidelines, holding of rights, approvals and consents)

Clause 9.7 (Subcontracts)

Clause 10 (Workforce of Services Subcontractor)

Clause 18 (Indemnities)

Clause 19 (Insurance)

Clause 32 (Records, data and other information)

Clause 33 (Privacy)

Clause 34 (Confidentiality)

Clauses 40.3-40.4 (Publicity and Media Communications Protocol)

2.2 In construing the above clause references as they are repeated under this Direct Agreement, references in those clauses, where appearing in the Services Subcontract, to “the Organisation” are taken to be references to “the Department”, and references to “the Agreement” or “this Agreement” are taken to be references to the Services Subcontract, unless the context yields a contrary meaning.

2.3 Any limitation of liability in favour of the Services Subcontractor as against a third party other than the Department, in any other document and in whatever capacity and however expressed, does not apply in any way to the Services Subcontractor in its dealings with the Department and relevant clauses and definitions from the Services Subcontract referred to or taken to apply in this Direct Agreement 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 Organisation under the Implementation Deed to the Services Subcontractor did not exist.

2.4 The Services Subcontractor is not required to give any notice by reference to clause 2.1 if the Services Subcontractor knows or has reasonable grounds to believe that it would be a duplicate of a corresponding notice already given by the Organisation.

2.5 The Services Subcontractor 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 Organisation to the Department under, or in respect of, any applicable or corresponding provision of the Implementation Deed.

**3. Additional Representation**

3.1 The Services Subcontractor represents and warrants to the Department on the Commencement Date that it 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 its ability to successfully deliver the Outcomes.

3.2 The Services Subcontractor undertakes not to amend the Services Subcontract (other than to correct minor or typographical errors) without the prior written consent of the Department, such consent not to be unreasonably withheld or delayed, with the Department to act expeditiously with respect to any request for such consent.

**4. Intellectual Property**

4.1 The Services Subcontractor repeats to, and for the benefit of, the Department the undertakings that it has given to the Organisation in the Services Subcontract with respect to Intellectual Property Rights and in addition the parties to this Direct Agreement agree as between themselves as follows:

(a) This Direct Agreement does not assign ownership of any Intellectual Property Rights existing at the Commencement Date and no party may assert ownership of all or any part of the other party’s pre-existing Intellectual Property Rights.

(b) If the Services Subcontractor has any pre-existing Intellectual Property Rights (excluding rights in relation to the Service Delivery Material) as at the Commencement Date that are applied in the performance of the Services Subcontract, the Services Subcontractor grants to the State by this clause an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property Rights for use in relation to or in connection with the Implementation Deed (including performance of any agreed roles and responsibilities associated with performance of the Services Subcontract).

(c) If any Intellectual Property Rights (excluding rights in relation to the Service Delivery Material) are developed solely by, or on behalf of, the Services Subcontractor, or jointly by or on behalf of the State and the Services Subcontractor, in the course of performance of the Implementation Deed and/or the Services Subcontract, or are developed by or on behalf of a Subcontractor and vest in the Services Subcontractor under the terms of the applicable subcontract, the Services Subcontractor acknowledges and agrees that (by virtue of the combined operation of [clause 35.3 of the Services Subcontract] and clause 35.3 of the Implementation Deed) the State will acquire and owns those Intellectual Property Rights and such Intellectual Property Rights on their creation vest, or are otherwise assigned or transferred to the State (through the Organisation) without the need for further assurance.

(d) To the extent that any Intellectual Property Rights (excluding rights in the Service Deliver Material) are developed by, or on behalf of, any Subcontractor in performing the Services and do not vest in the Services Subcontractor under the applicable subcontract, the Services Subcontractor undertakes to promptly procure the transfer of ownership of those Intellectual Property Rights to the State.

(e) If ownership of Intellectual Property Rights referred to in clause 4.1(c) and (d) is not capable of being vested in or transferred to the State as contemplated under clause 4.1(c) and (d) because the Services Subcontractor does not own or is unable at a reasonable cost to obtain ownership of those Intellectual Property Rights, the Services Subcontractor must at its own cost ensure that the State is granted an irrevocable, non-exclusive, world-wide, perpetual, transferrable, sub-licensable, royalty free licence to use, reproduce, communicate to the public, modify, enhance, adapt and to otherwise exploit these Intellectual Property Rights and to sublicense these Intellectual Property Rights for use in connection with:

(i) the implementation and evaluation of the Implementation Deed and the Services Subcontract; and

(ii) a SBB or similar other products, services or programmes within Australia and overseas; and/or

(iii) subject to clause 4.5, provision, or procurement of, the same or similar services and/or outcomes contemplated by or under the Implementation Deed and the Services Subcontract.

4.2 To the extent that any Intellectual Property Rights in the Service Delivery Material are developed by, or on behalf of, the Services Subcontractor in the course of performance of the Implementation Deed and/or the Services Subcontract and are owned by the Services Subcontractor, the Services Subcontractor grants to the State an irrevocable, non-exclusive, world-wide, perpetual, transferrable, sub-licensable, royalty free licence of all Intellectual Property Rights in the Service Delivery Material to use, reproduce, communicate to the public, modify, enhance, adapt and to otherwise exploit these Intellectual Property Rights and to sub-license these Intellectual Property Rights in connection with:

(a) the implementation and evaluation of the Implementation Deed and the Services Subcontract; and

(b) a SBB or similar other products, services or programmes within Australia and overseas; and/or

(c) subject to clause 4.5, provision, or procurement of, the same or similar services and/or outcomes contemplated by or under the Implementation Deed and the Services Subcontract.

4.3 To the extent that any Intellectual Property Rights in the Service Delivery Material are developed by, or on behalf of, the Services Subcontractor in the course of performance of the Implementation Deed and/or the Services Subcontract and are not owned by the Services Subcontractor or the Organisation, the Services Subcontractor must promptly procure for the State an irrevocable, non-exclusive, world-wide, perpetual, transferrable, sub-licensable, royalty free licence of all Intellectual Property Rights in the Service Delivery Material to use, reproduce, communicate to the public, modify, enhance, adapt and to otherwise exploit these Intellectual Property Rights and to sub-license these Intellectual Property Rights in connection with:

(a) the implementation and evaluation of the Implementation Deed and the Services Subcontract; and

(b) a SBB or similar other products, services or programmes within Australia and overseas; and/or

(c) subject to clause 4.5, provision, or procurement of, the same or similar services and/or outcomes contemplated by or under the Implementation Deed and the Services Subcontract.

4.4 The Services Subcontractor must hold or obtain at its own cost all necessary consents from any individual that has Moral Rights in the Intellectual Property Rights to its use, adaptation and all other actions by the State (or any of its officers, employees, contractors and agents) or the Organisation in the exercise of the rights conferred under, or referred to, in this clause 4. Such consents must be without restriction and without any requirement to attribute authorship or performership, including any act or omission that might otherwise infringe the Moral Rights of any individual.

4.5 The State (acting through the Department) by this Direct Agreement agrees to attribute authorship or performership (as applicable) of any Service Delivery Materials in which the Services Subcontractor has Intellectual Property Rights for those materials to the Services Subcontractor, in the manner set out in the Operations Manual.

4.6 The State (acting through the Department) by this Direct Agreement grants to the Services Subcontractor an irrevocable, non-exclusive, perpetual, royalty-free licence of any Intellectual Property Rights referred to in clause 4.1(c) and (d) (but to avoid doubt subject to the confidentiality requirements of the Services Subcontract, in respect of which the Services Subcontractor repeats the undertakings given by it to and for the benefit of the State) for use in connection with:

(a) the implementation and evaluation of the Implementation Deed and the Services Subcontract; and

(b) a SBB or similar other products, services or programmes within Australia and/or overseas; and

(c) the provision of the same or similar services and/or outcomes contemplated by or under the Implementation Deed and the Services Subcontract by the Services Subcontractor in the ordinary course of its operations.

4.7 If the Services Subcontractor requires a licence (including any right to sub-licence) additional to that granted under clause 4.6 to use the State’s Intellectual Property Rights referred to in clause 4.1(c) and (d), the Services Subcontractor must make a written request to the State, through the Department, stating the nature of the additional licence required and the reason why such licence is required. The State will consider the request in good faith and, if the State considers it reasonable to do so in the circumstances, grant to the Services Subcontractor a further licence subject to the parties entering into a written agreement as to the terms of any additional licence.

4.8 The Services Subcontractor must, at its cost:

(a) execute all documents and do all acts and things (including procuring that any Subcontractor execute all documents and do all acts and things), required for the purposes of giving effect to the provisions of the Services Subcontract and this Direct Agreement dealing with Intellectual Property Rights; and

(b) if required by the Department deliver to the Department, or the Department’s nominee, the Material referred to in this clause 4 and any consents referred to in clause 4.4 in such form, including electronic, as may be requested.

4.9 Without limiting any other rights which the State may have under this Direct Agreement or at law, the Services Subcontractor agrees to compensate the State and its officers, employees, contractors and agents (“**those compensated**”) against all damage, liability or loss incurred or suffered by any of those compensated (including legal costs on a solicitor client basis) arising directly or indirectly out of or in connection with:

(a) a breach by the Services Subcontractor of this clause 4, whether by any act or omission and whether negligent, wilful reckless or unlawful; and/or

(b) any claim for infringement or alleged infringement of any Intellectual Property Rights and Moral Rights in connection with the Implementation Deed, the Services Subcontract and/or this Direct Agreement and its/their implementation or any material provided or created under any of these agreements including any modifications, variations or adaptations to that material.

4.10 The Services Subcontractor’s liability will be reduced to the extent the damage, liability or loss incurred or suffered was caused by those compensated.

**5. Enforcement**

The Services Subcontractor acknowledges and agrees that the Department can seek to enforce this Direct Agreement in the event of any breach by the Services Subcontractor of the above undertakings and obligations.

**6. Termination**

This Direct Agreement 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 it, without prejudice to the rights, obligations and liabilities of a party incurred or accrued before or in conjunction with the termination of this Direct Agreement.

**7. Survival**

Notwithstanding clause 6 (Termination), the following clauses survive termination or expiry of this Direct Agreement:

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 18 (Indemnities)
3. clause 19 (Insurance)
4. clause 32 (Records, data and other information)
5. clause 33 (Privacy)
6. clause 34 (Confidentiality);
7. clause 4 (Intellectual Property); and
8. any other provision of this Direct Agreement (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 7(a) or clause 4 of this Direct Agreement, including, without limitation, clauses 2.2, 2.3, 2.4 and 2.5 of this Direct Agreement.

**8. GST**

8.1 The consideration expressed in this Direct Agreement (unless otherwise specified) is GST exclusive and does not include any amount for GST.

8.2 Subject to clause 8.4, if anything supplied under or in connection with this Direct Agreement constitutes a taxable supply made for GST exclusive consideration, the supplier may, subject to issuing a tax invoice, recover from the recipient of the supply an amount on account of the GST payable in respect of that taxable supply ("**GST Amount**").

8.3 The GST Amount will be:

(a) equal to the value of the supply calculated in accordance with GST Law multiplied by the prevailing GST rate; and

(b) subject to clauses and, payable at the same time and in the same manner as any monetary consideration for the supply concerned but no later than the end of the tax period to which the relevant taxable supply is attributable under the GST Law.

8.4 The supplier of a taxable supply made under or in connection with this Direct Agreement must issue a tax invoice for the supply in accordance with the GST Law to the recipient of the supply.

8.5 If either the Department or the Services Subcontractor makes a supply to the other for consideration which is wholly non-monetary consideration, then:

(a) the supply will for the purposes of this clause be styled a “Consideration in Kind Supply”;

(b) the consideration for the Consideration in Kind Supply is GST inclusive and will not be increased on account of GST under clause 8.3;

(c) the Department and the Services Subcontractor agree that the GST inclusive market value of each of the Consideration in Kind Supply and the consideration for that supply (being in turn, a Consideration in Kind Supply) are equal;

(d) the Department and the Services Subcontractor will each include in any tax invoice, issued by it in respect of a Consideration in Kind Supply made by it in return for a Consideration in Kind Supply by the other, the same amount on account of the GST inclusive market value of the supply to which the tax invoice relates being the price for that supply;

(e) prior to the issue of the tax invoices referred to in clause 8.5(d), the Department and the Services Subcontractor will use all reasonable endeavours to agree upon the GST inclusive market value of the reciprocal Consideration in Kind Supplies and, failing agreement, will accept as final and binding the GST inclusive market value of the reciprocal Consideration in Kind Supplies determined (at the cost of the Department and the Organisation shared equally between them) by an independent expert nominated by the President or other most senior officer of the Institute of Chartered Accountants in Australia.

8.6 If the Commissioner of Taxation or a court determines for any reason whatsoever that the Consideration in Kind Supplies referred to in clause 8.5 which each of the Department and the Services Subcontractor make in return for the other do not have an equal GST inclusive market value for GST purposes, then:

(a) if the Consideration in Kind Supply made by the Department to the Services Subcontractor is determined to have a greater GST inclusive market value than the reciprocal Consideration in Kind Supply made by the Services Subcontractor to the Department, the Department will pay to the Services Subcontractor an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;

(b) if the Consideration in Kind Supply made by the Services Subcontractor to the Department is determined to have a greater GST inclusive market value than the reciprocal Consideration in Kind Supply made by the Department to the Services Subcontractor then the Services Subcontractor will pay to the Department an additional amount equal to the GST payable on 10% of the difference within 10 Business Days of the date the relevant determination is made;

(c) the Department and the Services Subcontractor will do all things required, including issuing new tax invoices and adjustment notes (if necessary), to give effect to the relevant determination by the Commissioner or court; and

(d) any amount payable under this subclause is GST inclusive and will not be increased on account of GST under clause 8.2.

8.7 If in relation to a taxable supply under or in connection with this Direct Agreement an adjustment event occurs that gives rise to an adjustment, then the GST Amount will be adjusted accordingly and, where necessary, a payment will be made to reflect the change in the GST Amount (by the recipient to the supply in respect of an increase in the GST Amount and by the supplier to the recipient in respect of a decrease in the GST Amount). If a payment is required, it will be made within 10 Business Days of the issue of an adjustment note by the payee who must issue an adjustment note immediately upon becoming aware of the adjustment event concerned.

8.8 Notwithstanding any other provision of this Direct Agreement, any amount payable under or in connection with this Direct Agreement, which is calculated by reference to a cost, expense, or amount paid or incurred by a party to this Agreement, will be reduced by an amount equal to any input tax credit to which that party is entitled in respect of that cost, expense or amount.

8.9 Any amount on account of GST payable by the Department to the Services Subcontractor under this clause will be limited to the amount of an input tax credit to which the Department is entitled in respect of the relevant supply which the Department acquires.

8.10 If a party is a member of a GST group, references to GST for which the party is liable and to input tax credits to which the party is entitled include GST for which the representative member of the GST group is liable and input tax credits to which the representative member is entitled.

8.11 Where a word or phrase is defined under GST Law, it has the same meaning in this Agreement.

**9. Applicable law and jurisdiction**

9.1 This Direct Agreement is governed by, and must be construed in accordance with, the laws in force in the State of New South Wales.

9.2 Each party submits to the exclusive jurisdiction of the courts exercising jurisdiction in the State of New South Wales and the courts of appeal therefrom.

**Executed as a deed**

[*Execution clauses*]