



PROVINCIAL  
DEVELOPMENT  
UNIT

New Zealand Government

# FUNDING AGREEMENT

BETWEEN

**MINISTRY OF BUSINESS,  
INNOVATION AND EMPLOYMENT**

AND

**WHANGAREI ART MUSEUM TRUST**

FOR

**HUNDERTWASSER ART CENTRE**

PROACTIVELY RELEASED

## PART 1: KEY DETAILS

- 1 **Parties**
- MINISTRY**  
The Sovereign in right of New Zealand, acting by and through the Chief Executive of the Ministry of Business, Innovation and Employment (**Ministry**)
- RECIPIENT**  
Whangarei Art Museum Trust a registered Charitable Trust (registration number CC 837298), having its registered offices at 91 Dent St, Te Manawa, The Hub, Whangarei (**Recipient**)
- 2 **Funding Start Date** 11 April 2018.
- 3 **End Date** 30 April 2021.
- 4 **Background**
- Through the Provincial Development Unit, the Ministry is responsible for administering the Provincial Growth Fund, which aims to lift productivity potential in New Zealand's provinces.
- The Recipient is a registered charitable trust (CC837298) established in 1997. As the majority of trustees of the Recipient are Whangarei District Council-appointed, the Recipient is referred to as a Council Controlled Organisation under the Local Government Act 2002, but it retains independent operation and governance.
- Freidensreich Hundertwasser was an Austrian-born New Zealand artist who lived in New Zealand from the 1970's until his death in 2000. Hundertwasser is world-renowned for his art, conceptual architecture and ground-breaking work in sustainability, recycling and conservation. In 1993, Hundertwasser nominated the former Northland Harbour Board building in Whangarei as an ideal location for the Hundertwasser Art Centre with Wairau Maori Art Gallery (**Project**).
- The Recipient will lease the land and buildings necessary for the Project from the Whangarei District Council for a nominal annual fee. The lease period is 34 years and 9 months. The finished Hundertwasser Art Centre will be owned and operated by the Recipient, who will be responsible for ongoing maintenance of the building and immediate surrounds. Maintenance of public and parking facilities, adjacent parks and services in the Whangarei Town Basin will remain the responsibility of the Whangarei District Council.
- The Hundertwasser Art Centre will house two galleries (one dedicated to original Hundertwasser works and the other being a gallery showcasing Maori art), an extensively-programmed education centre, a theatre and a commercially operated museum shop and café. Beyond the obviously unique physical appearance of the building itself, the Hundertwasser Art Centre includes these marketable points of differences:
- the only permanent collection of original Hundertwasser art outside of Vienna;
  - New Zealand's first curated gallery dedicated to contemporary Maori fine art; an international showcase of modern Maori art and a platform to build a contemporary art collection of renown for Whangarei;

- the largest living, forested roof in the Southern Hemisphere, developed in New Zealand;
- the last of the Hundertwasser's architectural works to be built in the world;
- a centre for learning that encompasses art, sustainability, architecture and conservation;
- a building that is also an accessible and interactive work of art;
- an additional Northland visitor offering large enough to be included for consideration by international travel wholesalers alongside the current local packages (Bay of Islands, Poor Knights diving).

The Hundertwasser Art Centre is a community project, initially led by the Whangarei District Council, then transferred to the Recipient with Prosper Northland Trust also being established to support the Recipient and the Project through its fundraising and construction.

To ensure there was regional buy-in to the Project, Whangarei District Council commissioned a ratepayer referendum in 2014 to decide on what the best option was for the old Harbour Board building. The Project gained 51 percent of the total votes from the three options available. The Project is a priority within the Tai Tokerau Northland Economic Action Plan.

As a requirement of the ratepayer referendum, the Project is required to provide an underwrite of potential operating losses for a period of 10 years from opening

Confidential information entrusted to the Government  
 This underwrite has been put in place by the Recipient and comprises an underwrite undertaking from Westpac Bank, a cash bond with Whangarei District Council and an undertaking by the Ngatiwai Trust Board.

As part of the underwrite structure, the Recipient is required to deposit two cash bonds:

Confidential information entrusted to the Government

These bonds must be deposited Confidential information entrusted to the Government the full opening to the public of the Hundertwasser Arts Centre.

As part of the submission that supported the Recipient's application to the Ministry for Funding, a further Commercial information of fund raising is required during the construction period for the Project to meet the projected Commercial information full construction and fit out costs as well as the Commercial information required for the above bond deposits. Total costs for the Project are expected to be Commercial information.

In the event that, by 120 days before the opening date of the Hundertwasser Arts Centre, there is a shortfall on the Recipient's fundraising and it is unable to deposit the cash bonds, it intends to apply any amount of the Funding not used in the construction and fit out to this funding shortfall. Those funds shall be subject to a separate funding agreement to be entered into with the Ministry and it is intended that any funds advanced by the Ministry will be returned to the Ministry at the end of the underwrite period.

The Recipient has sought a funding contribution from the Ministry for the purposes of funding the Project. The Ministry has agreed to contribute funding on the terms and conditions of this Agreement (**Agreement**).

The Ministry has committed total aggregate funding of up to Commercial Information towards the Project.

Key details of this Agreement are set out in this **Part 1**. The full terms and conditions are set out in **Part 2**. Defined terms and rules of interpretation are set out in **Part 3**.

5 **Conditions  
Precedent**

No Funding is payable under this Agreement until the Ministry has confirmed to the Recipient in writing that it has received, and found, in its sole discretion, to be satisfactory to it in form and substance, the following documents and evidence:

- (a) All applicable Authorisations required for the Project have been obtained including providing a copy of the Resource Consent and Building Consent.
- (b) A copy of the executed lease from Whangarei District Council to the Recipient for the Project site for a period of 34 years and 9 months.
- (c) A copy of the construction contract and specifications, in a form and substance satisfactory to the Ministry, evidencing that the Project (pursuant to the final development design) will be completed in accordance with the financial information supplied to the Ministry under subclause (h) below.
- (d) Financial information – a final, updated, funds flow statement/model and budget setting out the funding and application of funds in relation to the Project and the financing thereof, including all fees, costs and expenses (including taxes) in connection with the same (the **Financial Model**).
- (e) A budget setting out the funding and application of funds in relation to:
  - i. the operation of the Hundertwasser Art Centre; and
  - ii. long-term maintenance of the facilities.
- (f) Evidence that all insurances required to be in place in accordance with this Agreement have been addressed.
- (g) Evidence of the committed co-funding required in item 11 below, proving to the Ministry's satisfaction that the co-funding is sufficient, when combined with the Funding under this Agreement, to fully fund the total construction and fit-out costs of the Project.
- (h) A copy of the executed Commercial Information documentation for the guarantee against operational losses for a period of 10 years from opening of the Hundertwasser Art Centre.
- (i) A copy of the Commercial Information underwrite agreement.
- (j) A copy of documentation between the Commercial Information and the Recipient granting the Recipient rights to use intellectual property owned or controlled by the Commercial Information required for the purposes of the

Project and the ongoing operation of the Hundertwasser Art Centre.

(k) A copy of the building consent for the Project.

## 6 Project

Construction of the Hundertwasser Art Centre with Wairau Maori Art Gallery. The Project includes:

- The construction of an environmentally sustainable art gallery building and facility, comprising:
  - two galleries (one dedicated to original Hundertwasser works and the other being a gallery showcasing Maori fine art);
  - an education centre that encompasses art, sustainability, architecture and conservation;
  - a theatre;
  - a commercially operated museum shop and café;
  - back of house space, including:
    - office and storage; and
    - staff and visitor amenities;
- the only permanent collection of original Hundertwasser art outside of Vienna;
- New Zealand's first curated gallery dedicated to contemporary Maori fine art, an international showcase of modern Maori art and a platform to build a contemporary art collection of renown for Whangarei;
- a building that is also an accessible and interactive work of art;
- the largest living, forested roof in the Southern Hemisphere, developed in New Zealand;
- the last of Hundertwasser's architectural works to be built in the world.

## 7 Project Deliverables and Instalments

The Recipient is to complete the following Deliverables for the Project to the satisfaction of the Ministry by the following due dates:

Due Date	Project Deliverable
Commercial Information	Report to the Ministry outlining Co-Funding raised to meet the Commercial required for the Commer and Commercial Information cash bonds respectively.
	Confirmation to the Ministry whether there is a shortfall on the Recipient's fundraising and it is unable to deposit

	the cash bonds. If the Recipient intends to apply any amount of the Funding not used in the construction and fit out to this funding shortfall, those funds shall be subject to a separate funding agreement to be entered into with the Ministry (refer special term (a) in Clause 14, Part 1).
Commercial Information	Deposit the cash bonds with <b>Commer</b> and <b>Commercial Information</b> 11
	Staff hired or allocated and training programme commenced.
	Construction Completed.
	Code of Compliance Certificate issued.
	Surrounding grounds landscaping completed.
	Fit out completed.
	Soft Opening Date.
	Official Opening Date and trading commenced.
At the times required under this Agreement.	Reporting.

8 **Key Personnel** Refer to attached Schedule 2 and 2A.

9 **Approved Contractors** **Commercial Information**, construction company.

10 **Funding and limits on Funding per period** The aggregate total Funding available under this Agreement is **Commercial Information** excluding GST (if any). This is the Total Maximum Amount Payable.  
 Subject at all times to the terms of this Agreement and satisfaction with the relevant due Deliverable(s), at the applicable time, and confirmation of the contribution of Co-Funding amounts, Funding can be requested by the Recipient in accordance with the following table and subject to the relevant Funding limits and Co-Funding contributions:

Date	Amount	Incremental Aggregate Funding Limit	Co-Funding

Commercial Information



**11 Co-Funding**

The Recipient must have secured Co-Funding to be used for the Project as follows:

Commercial Information



**12 Reporting**

The Recipient will provide the Ministry with the following reports:

1. A monthly report by the 20th Day of the following month and within 20 Business Days of completion of the Project.
2. Post Contract Outcomes Report within 2 years of the End Date.

**Each monthly report** must include the following information:

- (a) description and analysis of actual progress of the Project against planned progress including achievement of any Project Deliverables;
- (b) a summary of Funding and any Co-Funding received and applied for the Project;
- (c) a costs update (including actual to date and cost to completion for each Deliverable and the Project);
- (d) plans for the next report period (not required in the final report following completion of the Project);
- (e) any risks and/or issues arising or expected to arise with the Project, costs or performance of this Agreement including detail of any issues notified

to the Ministry in accordance with clause 3.11 of Part 2;

- (f) copies of any proposed and any published promotional material, media publicity or other documentation relevant to the Project or the Project Deliverables;
- (g) images of the progress of any development aspects of the Project; and
- (h) any other information that is notified by the Ministry in writing to the Recipient.

**The Post Contract Outcome** report must include the following information:

- (a) an analysis of how the Funding has enabled the Recipient to achieve the key outcomes of the Project;
- (b) how the Funding has accelerated regional development through increasing the productivity potential of and contributing to more and better paid jobs in the region;
- (c) the number of jobs that were created during and resulting from the Project;
- (d) how the Project has increased social inclusion and participation;
- (e) how the Project has contributed to Māori development;
- (f) how the Project has contributed to New Zealand's climate change commitments and environmental sustainability;
- (g) how the Project has increased regional and national resilience by improving critical infrastructure and/or growth and diversification of the economy; and
- (h) any other information that is notified by the Ministry in writing to the Recipient.

The Recipient acknowledges that the Ministry is developing an evaluation framework for the Provincial Growth Fund and is likely to receive requests for additional information from the Ministry.

### 13 Insurance

Prior to commencement of construction of the Project the Recipient and the Approved Contractors (as applicable) must ensure that at all times insurances are maintained in full force and effect by the relevant person in light of their respective obligations and risks, which:

- (a) insure in respect of its interests in the property and the plant and equipment on the property (including fixtures and improvements) for their full replacement value (being the total cost of entirely rebuilding, reinstating or replacing the relevant asset if it is completely destroyed, together with all related fees and demolition costs) and to:
  - (i) provide customary cover against loss or damage, including by fire, storm, tempest, flood, earthquake, lightning, explosion, impact, aircraft and other aerial devices and articles dropped from them, riot, civil commotion and malicious damage, bursting or overflowing of water tanks, apparatus or pipes and all other normally insurable risks of loss or damage;
  - (ii) provide cover for site clearance, shoring or propping up,

professional fees and tax;

- (iii) provide for contractor's all risks insurance covering contractors and sub-contractors;
- (iv) provide for professional indemnity insurance covering contractors, sub-contractors and consultants with a design responsibility;

(b) include public liability and third party liability insurance;

insure such other risks as a prudent person or entity in the same business or undertaking would insure.

#### 14 Special Terms

- (a) The Recipient must confirm to the Ministry at least 120 days before the Official Opening Date whether there is a shortfall on the Recipient's fundraising and it is unable to deposit the <sup>Commercial Information</sup> cash bonds. If the Recipient wishes to apply any amount of the Funding not used in the construction and fit out of the Project to this funding shortfall, the Recipient must enter into a separate funding agreement in respect of those funds on terms satisfactory to the Ministry.
- (b) The Recipient will prudently oversee the Project and will ensure all Approved Contractors and any other contractors have accountability and deliver the construction contract on time, within budget and to meet the relevant building codes, consent/Authorisation requirements, as required for such works to be undertaken.
- (c) The Recipient will ensure that <sup>Commercial Information</sup> (or any other substitute contractor) provides all necessary information to it that will allow the Recipient to promptly notify the Ministry if any material event or circumstance occurs which may be detrimental to the Project and its delivery (including any identified funding short fall or potential cost overruns).
- (d) Upon completion of the Project, the Recipient will ensure the maintenance of and maintain the completed Project and related assets and facility in accordance with best industry practice, in any way necessary to be maintained in:
  - a. good and substantial repair and condition and, as appropriate, in good working order; and
  - b. such repair, condition and order as to enable them to be let in accordance with all applicable laws and regulations if the Hundertwasser Art Centre is repurposed for a different use or substitute tenant.
- (e) Without prior consent of the Ministry, the Recipient, may not sell, lease, dispose, transfer, assign or cease to legally and beneficially own the Project and related property.

#### 15 Contact Person

Ministry's Contact Person:

Name: Ward Tuite

Email: Ward.Tuite@mbie.govt.nz

Recipient's Contact Person:

<sup>Privacy of natural persons</sup>

#### 16 Address for

To the Ministry:

To the Recipient:

**Notices**

15 Stout Street,  
PO Box 1473  
Wellington 6140  
Attention: Ward Tuite  
Email: Ward.Tuite@mbie.govt.nz

Whangarei Art Museum Trust  
PO Box 1024  
Whangarei 0140

Privacy of natural persons

**SIGNATURES**

**SIGNED** for an on behalf of the  
**SOVEREIGN IN RIGHT OF NEW ZEALAND**  
by the person named below, being a  
person duly authorised to enter into  
obligations on behalf of the Ministry of  
Business, Innovation and Employment:

**SIGNED** for and on behalf of the  
**RECIPIENT** by the person named  
below, being a person duly authorised  
to enter into obligations on behalf of  
the Recipient:

\_\_\_\_\_  
Name:

Position:

Date:

\_\_\_\_\_  
Name:

Position:

Date:

END OF PART 1

PROACTIVELY RELEASED

## PART 2: GENERAL TERMS

### 1 FUNDING

- 1.1 The Ministry will pay the Funding (up to the “Total Maximum Amount Payable” specified in the Key Details) to the Recipient, subject to the terms of this Agreement. The Recipient must use the Funding on Eligible Costs.
- 1.2 The Recipient must submit a Payment Request to the Ministry’s Contact Person in accordance with item 7 (Project Deliverables and Instalments) of the Key Details.
- 1.3 Each Payment Request is to be signed by a Trustee and an authorised signatory of the Recipient and must be in the form set out in the Schedule and include the confirmations set out therein, and must include:
- (a) the amount of Funding requested, which must not exceed the Instalment set out in item 10 of the Key Details;
  - (b) a breakdown of total Eligible Costs incurred by the Recipient and confirmation that such costs are Eligible Costs for the purpose of this Agreement and have been paid or are currently due and payable (not required for any initial payment to be paid on the Commencement Date);
  - (c) if the Payment Request includes a GST component, contain a valid GST invoice complying with the Goods and Services Tax Act 1985;
  - (d) confirmation that no Termination Event is subsisting and that each of the warranties under clauses 3 and 7 of this Agreement are correct as at the date of the Payment Request; and
  - (e) contain any other information required by the Ministry.
- 1.4 The Ministry is not required to pay any Funding in respect of a Payment Request:
- (a) where the Ministry is not satisfied with the progress of the Project;
  - (b) if any Project Deliverable(s) have not been completed by the relevant “Completion Date” specified in the Key Details;
  - (c) if the Ministry is not satisfied with the information that is contained within, or provided in connection with, the quarterly reports or the Payment Request noting that in the context of the Payment Request the Ministry may elect to pay the Recipient for certain Eligible Costs that are the subject of the Payment Request and withhold payment for other Eligible Costs that the Ministry disputes;
  - (d) if the Ministry is not satisfied that the Recipient has applied Co-Funding in accordance with clause 2(a)(ii) of this Agreement;
  - (e) if payment will result in the Funding exceeding the “Maximum Amount Payable”;
  - (f) while there are one or more Termination Event(s);
  - (g) if this Agreement has expired or been terminated; and/or
  - (h) while the Recipient is in breach of this Agreement.

- 1.5 Subject to the terms of this Agreement, the Ministry will pay each valid Payment Request by no later than the 20<sup>th</sup> day of the month after the month the Payment Request is dated, and if such day is not a Business Day, on the next Business Day.

## 2 CO-FUNDING

If specified at item 11 of the Key Details, the Recipient must:

- (a) ensure that during the term of this Agreement the Co-Funding:
- (i) is and remains secured and available to the Recipient to be applied towards the Project on the same terms and conditions approved by the Ministry; and
  - (ii) is applied to Eligible Costs as set out in the Key Details; and
- (b) immediately notify the Ministry if it becomes aware of any circumstances that may result in the Co-Funding (or any part of the Co-Funding) not being secured and available to the Recipient to be applied towards the Project.

## 3 RECIPIENT'S RESPONSIBILITIES

### Standards and compliance with laws

- 3.1 The Recipient will use reasonable endeavours to undertake the Project as described in this Agreement.
- 3.2 In undertaking the Project, the Recipient will comply with all applicable laws, regulations, rules and professional codes of conduct or practice.

### Project Deliverables, Key Personnel, Contractors and the Project

- 3.3 The Recipient will ensure that the Project Deliverables and the Project are carried out:
- (a) promptly with due diligence, care and skill, and in a manner that meets or exceeds Best Industry Practice;
  - (b) by appropriately trained, qualified, experienced and supervised persons; and
  - (c) in accordance with any directions of the Ministry, notified by the Ministry in writing from time to time.
- 3.4 The Recipient will ensure that the Project Deliverables are completed by the relevant "Completion Date" specified in the Key Details.
- 3.5 The Recipient will ensure that the Key Personnel undertake their respective roles in connection with the Project as specified in the Key Details, except as otherwise approved in writing by the Ministry. If any Key Personnel become unavailable to perform their role, the Recipient must promptly arrange replacement Key Personnel acceptable to the Ministry.
- 3.6 The Recipient may not contract the delivery of the Project or any of its obligations under this Agreement except where:
- (a) it has the Ministry's prior written approval (which may be given on any conditions specified by the Ministry);

- (b) the contractors are named as “Approved Contractors” in respect of particular roles in the Key Details; or
- (c) the subcontract is for less than \$20,000.

3.7 The Recipient is responsible for the acts and omissions of any contractors.

3.8 The Recipient will ensure (and will procure that the head contractor when engaging with any other contractor ensures) that all agreements it enters into with contractors or any other party in connection with the Project are on an “arm’s length” basis, provide value-for-money and do not give rise to any Conflict of Interest. The Recipient must provide the Ministry with reasonable evidence of compliance with this clause 3.8 in response to any request by the Ministry from time to time.

#### **Information Undertakings**

3.9 The Recipient will provide the Ministry with the reports (if any) specified in the Key Details, in accordance with the timeframes and reporting requirements set out in the Key Details.

3.10 The Recipient will provide the Ministry with any other information about the Project requested by the Ministry within the timeframe set out in the request.

3.11 The Recipient shall promptly notify the Ministry if:

- (a) the Recipient (or any of its personnel or contractors) becomes aware of, or subject to, a Conflict of Interest;
- (b) the Recipient becomes aware of any matter that could reasonably be expected to have an adverse effect on the Project, or result in a Termination Event or a breach of any term of this Agreement by the Recipient.

3.12 The Recipient will not at any time do anything that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry. The Recipient will keep the Ministry informed of any matter known to the Recipient which could reasonably be expected to have such an effect.

#### **Funding, records and auditors**

3.13 The Recipient will receive and manage all Funding in accordance with good financial management and accounting practices and to a high standard that demonstrates appropriate use of public funds.

3.14 The Recipient must keep full and accurate records (including accounting records) of the Project, and retain them for at least 7 years after the last payment of Funding under this Agreement. The Recipient must permit the Ministry (or any auditor nominated by the Ministry) to inspect all records relating to the Project and will allow the Ministry and/or the auditor access to the Recipient’s premises, systems and personnel for the purposes of this inspection.

#### **Capital Assets**

3.15 If the Recipient uses the Funding to purchase or develop any Qualifying Capital Asset and, at any point during the term of this Agreement or during the 20 years after the End Date, either:

- (a) the Recipient sells, disposes or transfers the Qualifying Capital Asset, without the Ministry's prior written consent; or
- (b) the Qualifying Capital Asset will no longer be used for the purpose intended by the Ministry at the time this Agreement was entered into,

then the Recipient must immediately repay to the Ministry an amount equal to the amount of Funding used by the Recipient in the purchase or development of the Qualifying Capital Asset, as determined by the Ministry.

#### **Insurance**

- 3.16 The Recipient must effect and maintain insurance that is adequate to cover its obligations under this Agreement, plus any other insurance specified in the Key Details. The Recipient will, on request, provide the Ministry with evidence of its insurance cover required under this clause.

#### **Health and Safety**

- 3.17 Without limiting its other obligations under this Agreement, the Recipient will:
- (a) consult, cooperate and coordinate with the Ministry to the extent required by the Ministry to ensure that the Ministry and the Recipient will each comply with their respective obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement and the Project;
  - (b) perform its, and ensure that the contractors perform their, obligations under this Agreement and the Project (as applicable) in compliance with its and their obligations under the Health and Safety at Work Act 2015;
  - (c) comply with all directions of the Ministry relating to health, safety, and security; and
  - (d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement or the Project.

4

#### **PROJECT GOVERNANCE**

- (a) If advised in writing by the Ministry the Recipient will:
  - (i) provide reasonable notice to the Ministry of all Project management group meetings and Project governance group meetings; and
  - (ii) provide copies of all documents and notices to be tabled at the Project management group meetings and Project governance group meetings to the Ministry no later than a reasonable period prior to the meetings, and the minutes of those meetings within a reasonable period after each meeting
- (b) The Ministry may appoint observers who will be entitled to attend and speak at all Project management group meetings and Project governance group meetings (but will not be entitled to vote on any matter at those meetings).

## 5 INTELLECTUAL PROPERTY

- 5.1 The Ministry acknowledges that the Recipient and its licensors own all pre-existing intellectual property which they contribute to the Project, and all new intellectual property which they create in the course of the Project.
- 5.2 The Recipient grants an irrevocable, perpetual, royalty-free, sub-licensable licence to the Ministry to use all reports, documents, information and other materials created or provided by the Recipient to the Ministry under or in connection with the Project and this Agreement. The Ministry acknowledges that the license in this clause 5.2 is subject to the restrictions and limitations imposed on the Recipient by the Hundertwasser Non Profit Foundation in providing intellectual property to the Project.
- 5.3 The Recipient warrants that it has obtained (or will obtain, prior to creation of each relevant work) all rights and permissions necessary to enable the grant and exercise of the licence in clause 5.2 without infringing the intellectual property rights of any third party.

## 6 TERM AND TERMINATION

- 6.1 This Agreement will be effective on and from the Commencement Date, which will be the latest to occur of:
- (a) the date this Agreement has been signed by both parties; and
  - (b) the date on which the Ministry has provided written notice to the Recipient that the Conditions Precedent specified in the Key Details, if any, have either been satisfied (in the opinion of the Ministry) or waived by the Ministry.
- 6.2 This Agreement will remain in force until the End Date, unless terminated in accordance with this Agreement (the **Term**).
- 6.3 The Ministry can terminate this Agreement with immediate effect, by giving notice to the Recipient, at any time while:
- (a) the Ministry reasonably considers that the Recipient or **Commercial Information** has become or is likely to become, insolvent or bankrupt;
  - (b) the Recipient or **Commercial Information** is subject to the appointment of a liquidator, receiver, manager or similar person in respect of any of its assets;
  - (c) the Recipient or **Commercial Information** has ceased to carry on its operations or business (or a material part of them) in New Zealand; or
  - (d) any one or more of the follow events or circumstances remains unremedied:
    - (i) the Recipient is materially in breach of any obligation, or a condition or warranty, under this Agreement;
    - (ii) the Recipient or **Commercial Information** abandons the Project;
    - (iii) the Recipient has provided the Ministry with information in connection with or under this Agreement that (whether intentionally or not) is materially incorrect or misleading, and/or omits material information;

- (iv) the Ministry reasonably considers that this Agreement or the Project has caused, or may cause, the Ministry and/or the New Zealand Government to breach any legal obligations (including its international trade obligations);
- (v) the Recipient is involved in any intentional or reckless conduct which, in the opinion of the Ministry, has damaged or could damage the reputation, good standing or goodwill of the Ministry, or is involved in any material misrepresentation or any fraud;
- (vi) the Recipient (or any of its personnel or contractors) is subject to a Conflict of Interest which cannot be managed to the Ministry's satisfaction; or
- (vii) any change in law, regulations, government policy or other circumstances materially affects the Ministry's ability to perform its obligations under this Agreement.

6.4 However, where the Ministry considers that a Termination Event set out in clause 6.3(d) can be remedied, the Ministry will give notice to the Recipient requesting a remedy, and will not exercise its right of termination unless the relevant event remains unremedied for at least 14 days (or any longer period agreed with the Recipient) after that notice has been provided by the Ministry.

6.5 The Ministry may recover Funding from the Recipient as follows:

- (a) **Misspent Funding.** At any time the Ministry may recover the amount of any Funding that has been spent or used other than in accordance with this Agreement, together with interest on all such amounts calculated at 10% per annum from the date of the misspending to the date the money is repaid.
- (b) **Uncommitted Funding.** On expiry or termination of this Agreement, the Ministry may recover any Funding paid to the Recipient, which the Recipient:
  - (i) has not spent or contractually committed to spend in accordance with this Agreement; or
  - (ii) has spent or contractually committed to spend in accordance with this Agreement but which the Recipient can have refunded or released from that commitment, provided the Recipient must use all reasonable endeavours to obtain such refund or release.
- (c) **Co-Funding not provided.** If Co-Funding is required as set out in the Key Details, on expiry or termination of this Agreement, if the Co-Funding has not been used for the Project, the Ministry may recover an amount that represents the same proportion of the Funding as the proportion of Co-Funding that has not been used is of the total Co-Funding.
- (d) **Project abandoned.** If the Recipient or Commercial Information has abandoned the Project or stated an intention to abandon the Project, and does not within 10 Business Days of being requested to do so by the Ministry demonstrate to the Ministry's satisfaction that the Recipient or Commercial Information will proceed with the Project, the Ministry may recover an amount up to the total value of the Funding, provided the Ministry may not recover under this subclause if the Recipient satisfies the Ministry that it acted on reasonable grounds in deciding to abandon the Project.
- (e) **Excess Funding.** On expiry or termination of this Agreement, where the total Funding paid under this Agreement and any other money received by the Recipient to carry out the Project exceeds the funding required to perform the Project, the Recipient must upon request refund

to the Ministry the excess amount. The Recipient is not required to refund, under this clause 6.5(e), any amount that exceeds the total amount of Funding.

6.6 Clauses 1.4, 3.2, 3.13, 3.14, 3.15, 5, 6, 7, 8, 9, 10, 11, 12 and 13 survive expiry or termination of this Agreement, along with any other parts of this Agreement necessary to give effect to those provisions. Expiry or termination of this Agreement does not affect any accrued rights, including any rights in respect of a breach of this Agreement or Termination Event that occurred before expiry or termination.

## 7 WARRANTIES

7.1 The Recipient warrants that, in the course of its activities in connection with the Project, it will not infringe any intellectual property or other rights of any third party.

7.2 The Recipient warrants that, as at the date of this Agreement:

- (a) It has full power and authority to enter into and perform its obligations under this Agreement which, when executed, will constitute binding obligations on it in accordance with this Agreement's terms;
- (b) all information and representations disclosed or made to the Ministry by the Recipient in connection with this Agreement are true and correct, do not omit any material matter, and are not likely to mislead or deceive the Ministry as to any material matter;
- (c) it has disclosed to the Ministry all matters known to the Recipient (relating to Project, the Recipient, its contractors or its personnel) that could reasonably be expected to have an adverse effect on the reputation, good standing or goodwill of the Ministry; and
- (d) it is not aware of any material information that has not been disclosed to the Ministry which may, if disclosed, materially adversely affect the decision of the Ministry whether to provide the Funding.

7.3 The Recipient acknowledges that the Ministry has entered into this Agreement in reliance on these warranties.

7.4 The Recipient acknowledges and agrees that the Ministry has made no warranty or representation that any funding or financial support is or will be available to the Recipient in respect of the Project other than the Funding.

## 8 LIABILITY AND INDEMNITY

8.1 The maximum liability of the Ministry under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, is limited to the total amount of Funding paid or payable under this Agreement.

8.2 The Ministry is not liable for any claim under or in connection with this Agreement, whether arising in contract, tort (including negligence) or otherwise, where such claim is or relates to any loss of profit, loss of revenue, loss of use, loss of reputation, loss of goodwill, loss of opportunity (in each case whether direct, indirect or consequential) or any other indirect, consequential or incidental loss or damages of any kind whatsoever.

## 9 CONFIDENTIALITY

9.1 Subject to clause 9.2 and 9.3, each party will keep the other party's Confidential Information in confidence, and will use or disclose that Confidential Information only to the extent necessary to perform its obligations, and/or take the intended benefit of its rights, under this Agreement. However, this will not prohibit:

- (a) either party from using or disclosing any information with the written prior consent of the other party;
- (b) use or disclosure of information that has become generally known to the public other than through a breach of this Agreement;
- (c) either party from disclosing information to its personnel or contractors with a need to know, so long as the relevant personnel and contractors use the information solely to enable that party to perform its obligations and/or take the intended benefit of its rights under this Agreement, and so long as they are informed of the confidential nature of the information and in the case of the Recipient, the Recipient receives an acknowledgement from its personnel or contractors that they acknowledge, and will comply with, the confidentiality obligations in this Agreement as if they were party to it;
- (d) disclosure required by any law, or any compulsory order or requirement issued pursuant to any law; or
- (e) the Ministry from using or disclosing to any third party any information, document, report or other material licensed under clause 5, provided that prior to any such disclosure the Ministry removes all information that is commercially sensitive to the Recipient from the relevant work.

9.2 The Recipient acknowledges and agrees that nothing in this Agreement restricts the Ministry's ability to:

- (a) discuss, and provide all information in respect of, any matters concerning the Recipient, the Project or this Agreement with any Minister of the Crown, any other government agency or any of their respective advisors;
- (b) meet its obligations under any constitutional or parliamentary convention (or other obligation at law) of or in relation to the New Zealand Parliament, the New Zealand House of Representatives or any of its Committees, any Minister of the Crown, or the New Zealand Auditor-General, including any obligations under the Cabinet Manual including the "no surprises" principle; and
- (c) publicise and report on the awarding of the Funding, including the Recipient's and any of its subcontractor's names, the amount and duration of the Funding and a brief description of the Project, on websites; in media releases; general announcements and annual reports.

9.3 The Recipient acknowledges that:

- (a) the contents of this Agreement; and
- (b) information provided to the Ministry,

may be official information in terms of the Official Information Act 1982 and, in line with the purpose and principles of the Official Information Act 1982, this Agreement and such information

may be released to the public unless there is good reason, in terms of the Official Information Act 1982, to withhold it.

## 10 PUBLICITY

- 10.1 Before making any media statements or press releases regarding this Agreement and/or the Ministry's involvement with the Project, the Recipient will consult with the Ministry, and will obtain the Ministry's prior approval to any such statements or releases.
- 10.2 The Recipient will refer any enquiries from the media or any other person about the terms or performance of this Agreement to the Ministry's Contact Person.
- 10.3 The Recipient will acknowledge the Ministry as a source of funding in all publications and publicity regarding the Project, provided that the Recipient must obtain the Ministry's approval of the form and wording of the acknowledgement prior to including the acknowledgement in the publication or publicity (as the case may be).
- 10.4 The Recipient does not have the right to enter into any commitment, contract or agreement on behalf of the Ministry or any associated body, or to make any public statement or comment on behalf of the Ministry.

## 11 DISPUTES

- 11.1 In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, or in relation to any question regarding its existence, breach, termination or invalidity (in each case, a *Dispute*), either party may give written notice to the other specifying the nature of the Dispute and requesting discussions under this clause 11. As soon as reasonably practicable following receipt of a Dispute Notice, the parties will meet (in person, or by audio or video conference) and endeavour to resolve the Dispute by discussion, negotiation and agreement.
- 11.2 A party must not commence any proceedings in connection with a Dispute unless at least 40 days have elapsed since the issue of a corresponding Dispute Notice, and that party has used reasonable endeavours to comply with this clause 11. However, nothing in this clause will prevent either party from seeking urgent interim relief from a court (or other tribunal) of competent jurisdiction.

## 12 CONTACT PERSONS

- 12.1 All matters or enquiries regarding this Agreement will be directed to each party's Contact Person (set out in the Key Details).
- 12.2 Each party may from time to time change the person designated as its Contact Person on 10 Business Days' written notice to the other Party.

## 13 GENERAL

- 13.1 Each notice or other communication given under this Agreement (each a notice) will be in writing and delivered personally or sent by post or email to the address of the relevant party set out in the Key Details or to any other address from time to time designated for that purpose by at least 10 Business Days' prior written notice to the other party. A notice under this Agreement is deemed to be received if:

- (a) **Delivery:** delivered personally, when delivered;

- (b) **Post:** posted, 5 Business Days after posting or, in the case of international post, 7 Business Days after posting; and
- (c) **Email:** sent by email:
  - (i) If sent between the hours of 9am and 5pm (local time) on a Business Day, at the time of transmission; or
  - (ii) If subclause (i) does not apply, at 9am (local time) on the Business Day most immediately after the time of sending,

provided that an email is not deemed received unless (if receipt is disputed) the party giving notice produces a printed copy of the email which evidences that the email was sent to the email address of the party given notice.

- 13.2 The Recipient agrees to execute and deliver any documents and to do all things as may be required by the Ministry to obtain the full benefit of this Agreement according to its true intent.
- 13.3 No legal partnership, employer-employee, principal-agent or joint venture relationship is created or evidenced by this Agreement.
- 13.4 This Agreement constitutes the sole and entire understanding with respect to the subject matter hereof and supersedes all prior discussions, representations and understandings, written or oral.
- 13.5 No amendment to this Agreement will be effective unless agreed in writing and signed by both parties.
- 13.6 The Recipient may not assign or transfer any of its contractual rights or obligations under this Agreement, except with the Ministry's prior written approval.
- 13.7 The Ministry may assign or transfer any of its contractual rights or obligations under this Agreement without the Recipient's prior approval. The Ministry may at any time disclose to a proposed assignee or transferee any information which relates to, or was provided in connection with, the Project or this Agreement.
- 13.8 No failure, delay or indulgence by any party in exercising any power or right conferred on that party by this Agreement shall operate as a waiver. A single exercise of any of those powers or rights does not preclude further exercises of those powers or rights or the exercise of any other powers or rights.
- 13.9 The exercise by a party of any express right set out in this Agreement is without prejudice to any other rights, powers or remedies available to a party in contract, at law or in equity, including any rights, powers or remedies which would be available if the express rights were not set out in this Agreement.
- 13.10 This Agreement is not intended to confer any benefit on or create any obligation enforceable at the suit of any person not a party to this Agreement.
- 13.11 Any provision of this Agreement that is invalid or unenforceable will be deemed deleted, and will not affect the other provisions of this Agreement, all of which remain in force to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provision.

13.12 This Agreement is to be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

13.13 This Agreement may be executed in any number of counterparts (including scanned and emailed copies). So long as each party has received a counterpart signed by each of the other parties, the counterparts together shall constitute a binding and enforceable agreement.

*END OF PART 2*

PROACTIVELY RELEASED

**PART 3: DEFINITIONS AND CONSTRUCTION**

**Defined terms**

In this Agreement, unless the context requires otherwise:

*Agreement* means this agreement including Parts 1, 2 and 3 and Schedule 1 (and any other annexures or attachments).

*Approved Contractor* means an “Approved Contractor” specified in the Key Details.

*Authorisation* is defined as any consent, authorisation, registration, certificate, licence, permission approval, authority, exemption or waiver required from, by, or with a governmental agency or require by law, including any consent under the Resource Management Act.

*Best Industry Practice* means that degree of skill, care and foresight and operating practice that would reasonably and ordinarily be expected of a skilled and competent supplier of services engaged in the same type of undertaking as that of the Recipient or any contractors (as applicable) under the same or similar circumstances as those contemplated by this Agreement.

*Business Day* means any day other than a Saturday, Sunday or public holiday within the meaning of section 44 of the Holidays Act 2003.

*Co-Funding* means the “Co-Funding” (if any) or any part of the Co-Funding (as the context requires), described in the Key Details.

*Commencement Date* has the meaning given in clause 6.1 of Part 2.

*Confidential Information* of a party (*Owner*), means any information in the possession or control of another party (*Holder*) that:

- (a) was originally acquired by the Holder in connection with this Agreement through disclosures made by or at the request of the Owner; and/or
- (b) was originally acquired by the Holder in connection with this Agreement through any access to, or viewing, inspection or evaluation of, the premises, facilities, documents, systems or other assets

owned or controlled by the Owner; and/or

- (c) is derived from information of a kind described in paragraph (a) or (b) above;

but excludes any information which the Holder can show:

- (d) was lawfully acquired by the Holder, entirely independently of its activities in connection with this Agreement, and is free of any other obligation of confidence owed to the Owner; and/or
- (e) has been independently developed by the Holder without reference to the Owner’s Confidential Information, and without breaching any other obligation of confidence owed to the Owner.

Notwithstanding the foregoing, the terms of this Agreement are Confidential Information of which each Party is both an Owner and a Holder.

*Conflict of Interest* means any matter, circumstance, interest or activity of the Recipient, its personnel or contractors, or any other person with whom the Recipient has a relationship that:

- (a) conflicts with:
  - (i) the obligations of the Recipient (or its personnel or contractors) to the Ministry under this Agreement; or
  - (ii) the interests of the Recipient in relation to this Agreement and/or the procuring of the Project; or
- (b) otherwise impairs or might appear to impair the ability of the Recipient (or any of its personnel or contractors) to diligently and independently carry out the Project in accordance with this Agreement.

*Eligible Costs* means the actual costs reasonably incurred by the Recipient:

- (a) on or after the Funding Start Date and no later than the End Date;
- (b) in good faith for the purpose of carrying out the Project or for purposes incidental to the Project, including all internal costs, disbursements and expenses incurred by the Recipient for such purposes (and to the extent the Recipient is carrying out any other activities) reasonably and proportionately allocated towards such purposes; and
- (c) to the extent that the expenditure relates to work performed by parties not at "arm's length", that expenditure is assessed at reasonable market value, and contains no unacceptable overhead and no element of "in group profit".

*End Date* means the "End Date" specified in the Key Details.

*Funding* means the funding or any part of the funding (as the context requires) payable by the Ministry to the Recipient in accordance with the terms of this Agreement, as described in the Key Details.

*Funding Start Date* means the "Funding Start Date" specified in the Key Details.

*Key Details* means Part 1 of this Agreement.

*Key Personnel* means the "Key Personnel" specified in the Key Details.

*Payment Request* means a request submitted to the Ministry by the Recipient seeking payment of Funding substantially in the form set out in the Schedule to this Agreement.

*Project* means the "Project" described in the Key Details.

*Project Deliverable* means a deliverable to be provided by the Recipient to the Ministry, as set out in the Key Details.

*Qualifying Capital Asset* means a capital asset (as determined in accordance with generally accepted accounting practice, as defined in the Financial Reporting Act 2013) purchased or

developed by the Recipient using no less than \$50,000 of Funding.

*Recipient* means the Recipient specified in the Key Details.

*Termination Event* means any one or more of the events or circumstances set out in clause 6.3.

#### **Construction**

In the construction of this Agreement, unless the context requires otherwise:

*Currency*: a reference to any monetary amount is to New Zealand currency.

*Defined Terms*: words or phrases appearing in this Agreement with capitalised initial letters are defined terms and have the meanings given to them in this Agreement;

*Documents*: a reference to any document, including this Agreement, includes a reference to that document as amended or replaced from time to time;

*Inclusions*: a reference to "includes" is a reference to "includes without limitation", and "include", "included" and "including" have corresponding meanings;

*Joint and Several Liability*: any provision of this Agreement to be performed or observed by two or more persons binds those persons jointly and severally;

*Parties*: a reference to a party to this Agreement or any other document includes that party's personal representatives/successors and permitted assigns;

*Person*: a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporate;

*Precedence*: if there is any conflict between the different parts of this Agreement, then unless specifically stated otherwise, Part 2 will prevail over the Key Details, and the Key Details will prevail over any Attachments;

*Related Terms*: where a word or expression is defined in this Agreement, other parts of speech

and grammatical forms of that word or expression have corresponding meanings;

*Statutes and Regulations:* a reference to an enactment or any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or those regulations;

*Writing:* a reference to “written” or “in writing” includes email and any commonly used electronic document format such as .DOC or .PDF.

END OF PART 3

PROACTIVELY RELEASED