

Restart NSW Funding Deed

Formal Instrument

Parties **The Treasurer as the Minister administering section 8(a) of the Restart NSW Fund Act 2011 (NSW) acting for and on behalf of the Crown in right of the State of New South Wales**

(Treasurer of NSW)

(Note: If the administration of s.8(a) is transferred from the Treasurer to another Minister the description of the State party and the references to Treasurer in this Deed will need to be changed to reflect the new Minister.)

The party named as the Recipient in the Agreement Particulars

Recipient

Background

- A. The Recipient's application for Restart NSW funding has been successful and the Treasurer, as the Minister administering section 8(a) of the Restart NSW Fund Act 2011 (the **Act**), has given his approval under that section for the funding to be paid out of the Restart NSW Fund established under section 5 of the Act (the **Restart NSW Fund**).
- B. This Agreement sets out the terms on which the funding will be provided.

Operative Provision

The parties promise to carry out their respective obligations under this Deed, which comprises:

- 1. this Formal Instrument;
- 2. the Agreement Particulars;
- 3. the General Conditions; and
- 4. the Attachments.

Signed as a deed.

<p>Signed sealed and delivered by Rob Whitfield, Treasury Secretary, as agent for the Treasurer of NSW, the Minister administering s.8(a) of the Restart NSW Fund Act 2011 (NSW) for and on behalf of the Crown in right of New South Wales</p> <p>in the presence of:</p> <p>_____</p> <p>(Signature of witness)</p> <p>_____</p> <p>(Name of witness in full)</p>	<p>_____</p> <p>(Signature of Treasury Secretary, as agent for the Treasurer)</p> <p>Rob Whitfield, Treasury Secretary, as agent for the Treasurer of NSW</p> <p>_____</p> <p>(Date)</p>
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<p>Signed sealed and delivered for and on behalf of the Recipient in the presence of:</p> <p>_____</p> <p>(Signature of witness)</p> <p>_____</p> <p>(Name in full)</p>	<p>_____</p> <p>(Signature of authorised signatory)</p> <p>_____</p> <p>(Name of authorised signatory)</p> <p>_____</p> <p>(Date)</p>
<p><i>(Alternate: If Recipient is a company execution should be in accordance with the Corporations Act 2001 (Cth) - delete whichever execution block does not apply)</i></p> <p>Signed as a Deed by [insert name of company and ACN] in accordance with s.127(1) of the Corporations Act 2001 (Cth) by:</p> <p>_____</p> <p>(Signature of director)</p> <p>_____</p> <p>(Name of director in full)</p>	<p>_____</p> <p>(Signature of director/company secretary)</p> <p>_____</p> <p>(Name of director/company secretary in full)</p> <p>_____</p> <p>(Date)</p>
<p><i>(Alternate: Use if the Recipient is a local council and execution is under seal – delete the other execution blocks for Recipients)</i></p> <p>THE COMMON SEAL of [insert name of Council] was affixed on</p> <p>_____</p> <p>Pursuant to a resolution passed by the Council on</p> <p>_____</p> <p><i>(Note: Must be signed in accordance with Council resolution by Mayor/Councillor and GM or Mayor and Councillor or two Councillors)</i></p>	<p>_____</p> <p>(Signature)</p> <p>_____</p> <p>(Name of signatory)</p> <p>_____</p> <p>(Signature)</p> <p>_____</p> <p>(Name of signatory)</p>

(Alternate: Use if the Recipient is a local council and the council has by resolution delegated execution of this Deed to the General Manager)

SIGNED SEALED AND DELIVERED for and on behalf of [insert name of Council] by its delegate in the presence of :

(Signature of Witness)

(Name of Witness)

(Signature of delegate)

(Name of delegate)

General Manager
(Position of delegate)

Agreement Particulars

Name of Recipient	Recipient
ABN of Recipient	
Address of Recipient	
Grant number	RNSW xxx
Project title	Project Title
Project description	
Funding Amount (Clause 2.1(a))
Progress Payments or Milestone Payments (Clause 2.1(b))	Monthly Progress Payments
Recipient's Representative (Clause 3.1)
Reporting (Clause 3.5 and clause 5.3)	Frequency of Progress Reports: Monthly Timing of Final Report: Within 20 Business Days after completion of construction of the Project.
Applicable NSW Government Policies (Clause 3.7)	<ul style="list-style-type: none"> • NSW Government Code of Practice for Procurement and Implementation Guidelines to the New South Wales Code of Practice for Procurement: Building and Construction; • Workplace Health and Safety Management Systems Guidelines; • Environmental Management Systems Guidelines
Other Recipient obligations (Clause 3.12)	<p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p><i>(Specify whether any of these obligations are performance obligations for the purposes of clause 2.2(b) i.e. a condition precedent for payment.)</i></p>
Insurances (Clause 4.1)	<ul style="list-style-type: none"> • Public Liability Insurance and Insurance of Works • Workers' Compensation: and • where appropriate, Professional Indemnity Insurance.

Notices to the Treasurer (Clause 7.2)	Address: NSW Treasury Level 27, Budget Strategy Division GPO Box 5469 SYDNEY NSW 2001 email: Restart@treasury.nsw.gov.au For the attention of: Ziggi Lejins
Notices to Recipient (Clause 7.2)	Address: <i>[Insert address]</i> Fax: <i>[Insert fax]</i> Email: <i>[Insert email]</i> For the attention of: <i>[Insert addressee]</i>
Attachments (including Project Plans)	<ol style="list-style-type: none"> 1. Project Scope/ Outline; 2. Project Schedule/ Timeline; 3. Asset Procurement Plan; 4. Risk Management Plan; 5. Cost Control Plan & Project Cash Flow; and 6. Signage Guidelines

General Conditions

1. Defined terms

Unless the context indicates otherwise, capitalised terms are as defined in the Agreement Particulars or the Background.

2. Funding

2.1 Provision of funding

- (a) The Treasurer will provide the Funding Amount to the Recipient in accordance with and subject to the terms of this Deed; and
- (b) the Funding Amount will be paid by way of Progress Payments or Milestone Payments (as specified in the Agreement Particulars).

2.2 Conditions precedent to payment

The payment of the Funding Amount or any part of the Funding Amount under this Deed is conditional on, as at the time for payment set out in clause 2.6(b):

- (a) there being sufficient funds available in the Restart NSW Fund;
- (b) the Recipient complying with the requirements of clauses 2.3, 2.4, 2.6, 3.2, 3.5, 3.6, 3.7, 3.8, 3.9, 3.11, 4.1 and any other obligations for the Recipient for the purposes of clause 3.12 set out in the Agreement Particulars which are specified to be performance obligations for the purposes of this clause 2.2(b); and
- (c) the Recipient having not abandoned the Project.

For the purposes of this Deed including without limitation this clause 2.2 and clause 3.10, the Recipient will have abandoned the Project if there has been a cessation of works for any reason for a continuous period of 6 months (or such longer period as the Treasurer may agree to in writing).

2.3 Funding to be used for Project only

The Recipient must use the Funding Amount for the purposes of the Project, and must not use the Funding Amount for any other purpose.

2.4 Use it or lose it

- (a) The Treasurer is not obliged to pay any further Progress Payments or Milestone Payments if:
 - (i) at any time, the Progress Payments earned by the Recipient are less than 50% of the Progress Payments which the Recipient was expected to have earned at that time; or
 - (ii) a Milestone is not achieved by the relevant Milestone Sunset Date.
- (b) The Treasurer may, at his discretion, agree to continue paying Progress Payments or Milestone Payments (as applicable) even if clause 2.4(a) applies.

2.5 Progress Payments

- (a) Subject to clause 2.5(b), if the Funding Amount is payable by way of Progress Payments, the amount of each Progress Payment will be:
 - (i) the value of the works completed; less
 - (ii) the Progress Payments already paid to the Recipient.
- (b) The Progress Payments can never exceed the Funding Amount.

2.6 Payment claims

- (a) The Recipient must give the Treasurer and the Treasurer's Representative a claim for payment:
 - (i) if the Funding Amount is payable by way of Progress Payments:
 - A. within 7 days after the end of each month; and
 - B. which includes the evidence reasonably required by the Treasurer of the Project costs incurred by the Recipient;
 - (ii) if the Funding Amount is payable by way of Milestone Payments, upon completion of each Milestone; and
 - (iii) in the format the Treasurer reasonably requires.
- (b) Within 30 days of receiving a payment claim under clause 2.6(a), the Treasurer must pay the amount claimed (or such lesser amount as the Treasurer determines is then payable).

2.7 GST

- (a) In this clause 2.7:
 - (i) except where the context suggests otherwise, words and phrases used in this clause 2.7 that are defined in the GST Act have the same meaning as in that Act;
 - (ii) unless otherwise expressly stated, all consideration to be provided under any other provision of this Deed is exclusive of GST; and
 - (iii) any part of a supply that is treated as a separate supply for GST purposes (including attributing GST payable to tax periods) will be treated as a separate supply for the purposes of this clause 2.7.
- (b) Any payment or reimbursement required to be made under this Deed that is calculated by reference to an amount paid or incurred will be limited to the total amount less any input tax credit to which an entity is entitled for an acquisition to which the amount relates.
- (c) If GST is payable in relation to a supply made under or in connection with this Agreement, then the party (**Recipient**) that is required to provide consideration to another party (**Supplier**) for that supply must pay an additional amount to the Supplier equal to the amount of that GST (**GST Amount**) at the same time as

any other consideration is to be first provided for that supply, or if later, within 7 days of the Supplier providing a valid tax invoice to the Recipient.

- (d) If the GST Amount recovered by the Supplier from the Recipient under paragraph (c) for a supply differs for any reason from the amount of GST paid or payable by the Supplier on that supply, then the Recipient must pay to the Supplier on demand (or the Supplier credit the Recipient with) the amount of that difference. If any adjustment event occurs in relation to a supply, the Supplier must give the Recipient an adjustment note within 7 days after the date of the adjustment event.
- (e) In this clause 2.7:
 - (i) **GST** includes amounts defined as "GST" under the GST law and:
 - A. amounts payable on account of a notional liability under Division 177 of the GST Act; and
 - B. "GST equivalents" payments under the Intergovernmental Agreement Implementation (GST) Act 2000 (NSW) (or similar payments under corresponding legislation of any other State or Territory).
 - (ii) **GST Act** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
 - (iii) **GST law** has the same meaning as in the GST Act.

2.8 No rights to assets

The Treasurer has no rights with respect to the assets purchased with the Funding Amount, other than those set out in this Deed.

2.9 No other funding or support

The Treasurer has no obligation to provide the Recipient with:

- (a) subject to clause 2.2, any funding in addition to the Funding Amount; or
- (b) any other support or services of any kind.

3. Recipient's Obligations

3.1 Recipient's Representative

- (a) The Recipient's Representative is responsible for managing the Recipient's obligations under this Deed and must:
 - (i) be available at all reasonable times for communications with the Treasurer or the Treasurer's Representative referred to in clause 3.2; and
 - (ii) be capable to act with the Recipient's full authority in matters relating to this Deed.
- (b) The Recipient must notify the Treasurer and the Treasurer's Representative immediately of any change to the Recipient's Representative.

3.2 Treasurer's representative

- (a) The Treasurer may, from time to time, nominate in writing a representative (**Treasurer's Representative**) to act on the Treasurer's behalf to validate the Recipient's reporting in accordance with the Recipient's Project Plans, and payment claims.
- (b) The Recipient must co-operate with the Treasurer's Representative.
- (c) The Treasurer's Representative has no authority to amend or waive the requirements of this Agreement.

3.3 Acknowledgement and publicity

- (a) The Recipient will use the Restart NSW logo in accordance with the Signage Guidelines (contained in Attachment 6) and any other government signage in accordance with any signage guidelines relating to that signage provided to the Recipient or, in the event that there are no relevant signage guidelines, in accordance with the reasonable directions of the Treasurer or the Treasurer's Representative.
- (b) The Recipient may acknowledge the receipt of Restart NSW funding in all publications and media releases in relation to the Project.
- (c) The Recipient must use its best endeavours to:
 - (i) give the Treasurer and the Treasurer's Representative reasonable prior notice of any public announcements, launches and events relating to the Project; and
 - (ii) allow a representative of the Treasurer, the Treasurer's Representative or the State of New South Wales to participate in such public announcements, launches and events.

3.4 Use of materials and documents

- (a) The Recipient grants to the Crown in right of the State of NSW including without limitation all Ministers, NSW Government agencies, statutory bodies representing the Crown and/or any other body that has the status, privileges and immunities of the Crown (the **Crown**) a licence to use any intellectual property rights subsisting in any material or documents provided to the Treasurer or the Treasurer's Representative by the Recipient, including the right for the Crown to publish such material or documents, with the exception of material that is Confidential.
- (b) The Treasurer may publish the terms of this Deed and any material or documents provided to the Treasurer or the Treasurer's Representative by the Recipient, with the exception of material that is Confidential.
- (c) For the purposes of this clause 3.4, "Confidential" means any information that discloses:
 - (i) the Recipient's financing arrangements;
 - (ii) the Recipient's cost structure or profit margins;
 - (iii) the Recipient's full base case financial model; or

- (iv) any matter the disclosure of which would place the Recipient at a substantial commercial disadvantage in relation to its competitors and/or suppliers, whether at present or in the future.

3.5 Reporting

The Recipient must provide the following reports to Treasurer or, if directed, the Treasurer's Representative, at the frequency or time stated in the Agreement Particulars:

- (a) Progress Reports, which must include:
 - (i) the status of delivery against schedule;
 - (ii) any delay in the delivery of the Project;
 - (iii) details of the Project costs incurred to date;
 - (iv) Project risks/ issues;
 - (v) key achievements in the reporting period;
 - (vi) copies of published reports and materials in relation to the Project;
 - (vii) photographs documenting the progress of the Project; and
 - (viii) such other information reasonably requested by the Treasurer; and
- (b) a Final Report, outlining the achievements of the Project, including Project acquittal.

3.6 Access and audit rights

- (a) The Treasurer reserves the right to audit the Recipient's compliance with this Deed.
- (b) Provided that reasonable prior notice is given to the Recipient, the Recipient must provide the Treasurer or the Treasurer's Representative with access to:
 - (i) all sites on which the Project is being conducted; and
 - (ii) all Project material or information reasonably requested by the Treasurer or the Treasurer's Representative.

3.7 Compliance with law and policies

- (a) The Recipient must, in carrying out the Project, comply with, and ensure that any contractors engaged on the Project comply with, all applicable laws and obtain all necessary statutory approvals.
- (b) The Recipient must comply with, and ensure that any contractors engaged on the Project comply with, all applicable NSW Government Policies set out in the Agreement Particulars.

3.8 Changes to the Project

- (a) The Recipient must immediately notify the Treasurer and the Treasurer's Representative if the Recipient proposes to make a significant change to the Project.

- (b) The Recipient acknowledges and agrees that the Treasurer is not obliged to pay any further Progress Payments or Milestone Payments if there has been a significant change to the Project which has not been approved by the Treasurer.

3.9 Project Plans

- (a) The Recipient must use its best endeavours to deliver the Project in accordance with the project plans referred to in the Agreement Details as Attachments (**Project Plans**).
- (b) The Recipient must update the Project Plans:
 - (i) whenever necessary to address a significant change to the Project;
and
 - (ii) in any event, annually,

unless the parties agree otherwise.
- (c) The Recipient's obligations under this clause 3.9 are material obligations for the purposes of clause 5.2.

3.10 No abandonment

The Recipient must not abandon the Project without first providing the Treasurer and the Treasurer's representative with one month's notice of its intention to do so.

3.11 Project not to be brought into disrepute

The Recipient must not act in a way that may bring the Project into disrepute.

3.12 Other Recipient obligations

The Recipient must comply with any other obligations for the Recipient set out in the Agreement Particulars.

4. Risk

4.1 Insurance

The Recipient must effect and maintain any insurances that are set out in the Agreement Particulars and if requested, the Recipient must produce satisfactory evidence to the Treasurer and the Treasurer's Representative that these insurance policies have been effected and maintained.

4.2 Third party claims

- (a) The Recipient indemnifies the Treasurer against liability to or claims by any third party arising out of or in connection with the Project or this Deed.
- (b) The Recipient's responsibility to indemnify the Treasurer under clause 4.2(a) is reduced to the extent that an act or omission of the Treasurer has caused or contributed to the liability.

5. Termination

5.1 Rectification of a breach by the Recipient

If the Recipient is in breach of any of its obligations under this Deed, or is otherwise not undertaking or is unable to carry out the Project, then the Treasurer may:

- (a) request a rectification plan from the Recipient;
- (b) reject or approve the rectification plan; and
- (c) suspend any further Progress Payments and Milestone Payments until the breach has been rectified.

5.2 Termination for breach

- (a) The Treasurer may immediately terminate this Deed if:
 - (i) the Recipient fails to remedy any material breach of this Deed within a reasonable period after receiving notice from the Treasurer directing it to do so;
 - (ii) the Recipient fails to prevent the recurrence of a breach of any obligation which it has breached on 2 or more previous occasions, after receiving notice from the Treasurer directing it to do so;
 - (iii) the Treasurer is the victim of any fraud or dishonest conduct by the Recipient in connection with this Deed or the Project; or
 - (iv) an Insolvency Event occurs in respect of the Recipient.
- (b) Subject to clause 5.2(c), if this Deed is terminated in accordance with clause 5.2(a), the Recipient is not obliged to repay any Progress Payments or Milestone Payments which were paid to the Recipient prior to termination.
- (c) If the Deed is terminated due to clause 5.2(a)(iii), then the Recipient must repay to the Treasurer all Progress Payments or Milestone Payments paid to the Recipient prior to termination.
- (d) For the purposes of this clause 5.2, Insolvency Event means:
 - (i) a controller (as defined in section 9 of the Corporations Act), administrator or similar officer is appointed in respect of the Recipient or any asset of the Recipient;
 - (ii) a liquidator or provisional liquidator is appointed in respect of the Recipient;
 - (iii) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of:
 - A. appointing a person referred to in paragraph (i) or (ii) of this clause 5.2(d);
 - B. winding up or deregistering the Recipient; or

- C. proposing or implementing a scheme of arrangement, other than with the prior approval of the Facility Agent under a solvent scheme of arrangement pursuant to Part 5.1 of the Corporations Act;
- (iv) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, a meeting is convened, a resolution is passed or any negotiations are commenced, for the purpose of implementing or agreeing:
- A. a moratorium of any debts of the Recipient;
 - B. any other assignment, composition or arrangement (formal or informal) with the Recipient's creditors; or
 - C. any similar proceeding or arrangement by which the assets of the Recipient are subjected conditionally or unconditionally to the control of that person's creditors or a trustee,
- or any agreement or other arrangement of the type referred to in this paragraph (iv) is ordered, declared or agreed to;
- (v) as a result of the operation of section 459F(1) of the Corporations Act, the Recipient is taken to have failed to comply with a statutory demand (as defined in the Corporations Act);
- (vi) any writ of execution, garnishee order, mareva injunction or similar order, attachment or other process is made, levied or issued against or in relation to any asset of the Recipient;
- (vii) anything analogous to anything referred to in paragraphs (i) to (vi) inclusive of this clause 5.2(d), or which has a substantially similar effect, occurs with respect to the Recipient under any law; or
- (viii) the Recipient is, or admits in writing that it is, or is declared to be, or is taken under any applicable law to be (for any purpose), insolvent or unable to pay its debts.

5.3 Expiry

Unless terminated earlier, this Deed will expire 20 Business Days after the date on which the Recipient submits the Final Report in accordance with clause 3.5(b).

5.4 Survival

Clauses 3.3, 3.6, 5.2(c), 6 and 7 of this Deed, and any other clause which by its nature should survive termination or expiry of this Deed, survive the termination or expiry of this Deed on any basis.

6. Dispute resolution

- (a) If a dispute or difference (called collectively a "dispute" in this clause 6) arises between the Treasurer and the Recipient, both parties agree to deal with the dispute in the following way:

- (i) the party who claims that a dispute exists will give the other party a notice setting out the nature of the dispute; and
 - (ii) the parties will then try to resolve the dispute by negotiation, within 10 Business Days from when the notice is given, and for that purpose may authorise persons to act for them.
- (b) If the dispute is not resolved within 10 Business Days from when the notice is given, a party may commence legal proceedings in relation to the dispute.
- (c) A party does not need to follow the dispute resolution procedures set out in clause 6(a) or (b) if they are seeking urgent interlocutory relief from a court.

7. Other legal matters

7.1 Interpretation

In this Deed, unless the context indicates a contrary intention:

- (a) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (b) where there occurs a reference to the doing of anything by the Treasurer including giving any notice, consent, direction or waiver, this may be done by any duly authorised officer of the Treasurer;
- (c) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (d) a reference to a document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;
- (e) "includes" in any form is not a word of limitation;
- (f) a reference to "\$" is to Australian currency;
- (g) a reference to "Business Day" is, in relation to the doing of any action in a place, any day other than a Saturday, Sunday or a public holiday in that place; and
- (h) no rule of construction operates to the detriment of a party only because that party was responsible for the preparation of this Deed or any part of it.

7.2 Notices

- (a) All notices in relation to this Deed must be in writing and must be signed by the party's representative.
- (b) A notice will be taken to be received:
 - (i) if it is delivered in person - when it is delivered to the relevant party's address specified in the Agreement Particulars or such other address as is notified by that party from time to time;

- (ii) if it is sent by mail - 3 Business Days after the day it was posted to the relevant party's address specified in the Agreement Particulars or such other address as is notified by that party from time to time; and
- (iii) if it is sent by fax - at the time shown on the transmission report confirming that the entire fax was sent to the relevant party's fax number specified in the Agreement Particulars or such other fax number as is notified by that party from time to time.

However, if a notice is received after 5pm or on a day that is not a Business Day, it will be taken to be received at 9am on the next Business Day.

7.3 Entire agreement

To the extent permitted by law, this Deed sets out the entire understanding between the parties, includes all of the terms agreed between the parties, and supersedes any prior agreement between the parties.

7.4 Governing law

This Deed is governed by the law of New South Wales.

7.5 Jurisdiction

Each party irrevocably:

- (a) submits to the exclusive jurisdiction of the courts of New South Wales and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this Deed; and
- (b) waives any objection it may now or in the future have to proceedings being brought in those courts for any reason.

7.6 No assignment

The Recipient must not assign or otherwise transfer its rights or obligations under this Deed without the Treasurer's prior written consent which may be given or withheld in the Treasurer's absolute discretion and if given may be given subject to conditions.

7.7 No agency or partnership

- (a) This Deed does not constitute a relationship of partners, employer and employee or principal and agent.
- (b) The Recipient must not, and must procure that its contractor does not, represent itself as being a partner, employee or agent of the Treasurer, the State of New South Wales including without limitation any other NSW Government agencies, statutory body representing the Crown and/or any other body that has the status, privileges and immunities of the Crown.

7.8 No waiver

- (a) If the Treasurer delays, partially exercises, or chooses not to exercise any right under this Deed or law, the Treasurer is not prevented from exercising that or any other right in the future.

- (b) No waiver of a breach of this Deed operates as a waiver of another breach of this Deed.
- (c) A waiver or consent given by the Treasurer under the Agreement is only effective and binding if it is given or confirmed in writing.

7.9 Variation of this Deed

This Deed may only be varied in writing, signed by both parties.

7.10 Severability

If any part of this Deed is prohibited, void, voidable, illegal or unenforceable, then that part is severed from this Deed but without affecting the continued operation of the remainder of the Deed.

7.11 Counterparts

This Deed may be executed by counterparts by the respective parties, which together will constitute one agreement.

Attachment Schedules

Refer: Agreement Particulars

Individual Schedules 1- 6 to be filled out by the recipient for each project

SAMPLE