**Sample Drafting Guidelines**

**Services Subcontract (Drafting Guidelines)**

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| **What is the document that these drafting guidelines relate to usually called?** | Services Subcontract. |
| **What group of documents does the Services Subcontract belong to?** | Project Implementation Documents.  See *What other documents are closely related to it?* below. |
| **Who will sign the Services Subcontract?** | Special Purpose Entity (**SPE**) (if applicable).  Service Provider. |
| **When is the Services Subcontract used?** | **SPE Proponent Transactions**. |
| **What does the Services Subcontract do?** | An outsourcing agreement between the SPE and the key Service Provider(s). |
| **What areas does the Services Subcontract cover?** | The Services Subcontract is expected to be a ‘back-to-back’ outsourcing arrangement to the Implementation Agreement, covering the following:   * Procurement and performance of services. * Conditions for engagement, conduct and termination. * Intellectual property, use of information, project co-ordination and administration and dispute resolution. |
| **What drafting options does the Services Subcontract include?** | Drafting instructions are included in these sample guidelines to assist in drafting of the Services Subcontract, using the Implementation Agreement as a starting point. |
| **What other documents are closely related to the Services Subcontract?** | **All PAD arrangements**   * Implementation Agreement – provides the overall framework for the Partnership Addressing Disadvantage (**PAD**) arrangement. This is a central document for the PAD arrangement. * Operations Manual – details the day-to-day management and operation of the PAD arrangement.   **SPE Proponent Transactions**   * Direct Deed– creates a direct legal relationship between the State and the key Service Provider(s). |
| **What should we do before we use these sample guidelines?** | These sample guidelines contain general provisions and other information only and does not take into account the objectives, needs or financial arrangements of any particular transaction.  Before using these sample guidelines, you should:   * carefully consider and make your own assessment of whether they are appropriate for the PAD arrangement or other transaction that you are considering; * perform your own independent investigation and analysis of the suitability and appropriateness of these sample guidelines for any PAD arrangement or other transaction that you are considering; * consult your own legal, tax and other professional advisers as part of your assessment of these sample guidelines and their suitability for your transaction; and * satisfy yourself that cross references in these sample guidelines to any provisions or the names of other documents are correct. |
| **Why are these drafting guidelines available?** | These sample guidelines are intended to provide a guide for, and to streamline the development of, the documentation (and specific provisions) that is used for a PAD arrangement. The State of Victoria (acting through a named Government Department) (the **State**) would expect to take into account in any evaluation of a proposed PAD arrangement any requests for material departures from these sample guidelines and the reasons for the departures and the possible implications for time, cost and efficiency.  The acceptance of the final form of the Services Subcontract by the State will be a key condition for any agreement of the terms of a PAD arrangement. However, it may not be suitable in all circumstances and the State reserves the right to require a departure from these sample guidelines in order to address the specifics of a particular PAD arrangement, to address then current market practice and conditions and otherwise as necessary to protect the interests of the State. |
| **Where can I get further information?** | If you have any questions in relation to these sample guidelines, or any specific provision or other related information, queries can be directed to pads@dtf.vic.gov.au. |

**Legal matters**

These sample guidelines have been prepared by King & Wood Mallesons at the request of, and in consultation with, the Victorian Department of Treasury and Finance (**DTF**) and its advisers. They form part of a suite of sample transaction documents that has been developed by DTF for use in connection with PAD arrangements.

These sample guidelines have been derived in part from the Services Subcontract (Drafting Guidelines) prepared by the State of Queensland, in consultation with Trevor Danos AM and King & Wood Mallesons, the use of which for the purposes of preparing these guidelines is gratefully acknowledged. Users of these sample guidelines are directed to the copyright notices and acknowledgments on its cover page. No reliance may be placed for any purposes whatsoever on the provisions and other information contained in these sample guidelines (or any other communications or materials separately provided or discussed verbally in connection with these sample guidelines) or on its completeness, accuracy or fairness. No representation or warranty, expressed or implied, is given by, or on behalf of, the State, King & Wood Mallesons or any other person as to the provisions and other information included in these sample guidelines being acceptable to the State in all circumstances, that it is suitable for any particular PAD arrangement or as to the accuracy or completeness of the provisions or other information contained in these sample guidelines and no liability whatsoever is accepted by the State or King & Wood Mallesons for any loss howsoever arising, directly or indirectly, from any use of such provisions or other information or otherwise arising in connection with it. The provisions and other information in these sample guidelines are subject to negotiation, verification, completion and change.

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Drafting Guidelines

**Services Subcontract**

If the transaction structure for a Partnership Addressing Disadvantage (**PAD**) arrangement involves a special purpose entity (**SPE**) that does not possess the capabilities, processes or capacity to perform the services that it has engaged to provide to the State of Victoria (acting through a named Government department) (the **State**) under the Implementation Agreement (**Implementation Agreement**), the SPE may enter into a Services Subcontract. In effect, this Services Subcontract will be an outsourcing arrangement for the services with another proponent who will provide those services to the State on the SPE’s behalf (**Service Provider**). For example, both of the first two pilot social impact investment transactions undertaken by the State involved SPE proponents, and Sacred Heard Mission and a consortium of Anglicare and VincentCare were engaged by the respective SPEs to provide its services in satisfaction of the obligations of the SPEs under the implementation agreements for those social impact investment arrangements.

Most obligations of the Service Provider under the Services Subcontract will need to directly match the obligations of the SPE under the Implementation Agreement. In this way, there can be a direct outsourcing of the relevant services, and the SPE – which will be newly created for the purposes of the transaction, but usually not for the purposes of actually providing the services – does not risk breaching its obligations under the Implementation Agreement (and, where the SPE is a special purpose trust, breaching the trust) because it has not completely outsourced them.

An effective way to prepare a Services Subcontract is to use the final Implementation Agreement from the relevant PAD arrangement as a starting point for drafting the Services Subcontract. By doing so, and by following the same document structure, drafting protocols and clause numbering conventions, it can be easier to confirm consistency of, and highlight points of difference between, the Services Subcontract and the Implementation Agreement.

The following are guidelines that are intended to assist in the drafting of a Services Subcontract by reference to the sample form Implementation Agreement (which will have been prepared to include optional “SPE Proponent Transaction” provisions).

The acceptance of the final form of the Services Subcontract by the State will be a condition precedent to the terms of the PAD arrangement. The State will not accept any arrangements included by the Services Subcontract that intend to affect (in any way) the direct contractual relationships and dealings that the State has agreed with the SPE under the Implementation Agreement or with the Service Provider under the Direct Deed. The Services Subcontract should be prepared from a fundamental standpoint that it is to document the arrangements as between the SPE and the Service Provider as to how the Service Provider will assist the SPE to satisfy its obligations under the Implementation Agreement. These principles must be observed in effecting any of the matters described below.

Notwithstanding that the Services Subcontract is a contract between the SPE and the Service Provider, in certain limited circumstances the State may require line of sight into, or input in relation to, certain matters which are the subject of the Services Subcontract. These may include (but are not limited to) the State being granted notification or consultation rights in relation to certain matters of particular interest to the State.

**Roles of the SPE and the Service Provider**

* (**Modifying the Implementation Agreement**) Generally, equivalent contractual arrangements will need to be agreed between the Service Provider and SPE as are in place between the State and the SPE under the Implementation Agreement. Accordingly, in preparing the Services Subcontract, in many cases the provisions of the Implementation Agreement can be modified for an equivalent agreement between the SPE and the Service Provider.

Each clause should be considered carefully and in the context of the outsourcing arrangement, and additional modifications may be required to be made to specific provisions. For example, wherever in the Implementation Agreement a provision describes the SPE “procuring” that certain things are done, the equivalent Services Subcontract provision will describe the Service Provider as the person doing (providing, performing etc.) those things.

* (**Provisions not applicable to the Services Subcontract**) There are a number of provisions under the Implementation Agreement that relate to the State’s primary engagement with the SPE and are not suited to being included by a corresponding outsourcing arrangement. Such provisions may include clauses dealing with the following matters (with all clause and schedule references provided in example relating to the sample form Implementation Agreement):
  + conditions precedent under the Implementation Agreement (e.g. clause 2.1 and Schedules 4 and 5) (see “Direct relationship to the Implementation Agreement and the Direct Deed – Conditions precedent” below);
  + the agreement and ongoing review of the Operations Manual (e.g. clause 4);
  + the State’s objectives for the PAD arrangement (e.g. clause 3.1);
  + waivers, consents and approvals of, and rights specific to, the State (e.g. clauses 2.2, 2.3, 7.2, 11.1(e), 20.2(c), 24.1(a), 24.1(b), 24.1(c), 25.1(c) and 25.1(d);
  + certain investment requirements and payments outcomes and procedures (e.g. clauses 8, 16(a), 16(b), 18(a) and Schedule 2) (see “Provisions to be revised, reviewed or acknowledged – Revision”) below;
  + matters where the SPE is to engage as principal (e.g. clauses 11(b)-(f) and 12(b) and Schedule 2) and entitlements of the SPE to subcontract or delegate its functions (which may not be applicable to the Service Provider, e.g. clause 28);
  + termination events (e.g. clauses 14, 15, 16 and 17) (see “Direct relationship to the Implementation Agreement and the Direct Deed – Termination” below);
  + external dispute resolution procedures (e.g. clause 33); and
  + provisions recognising the role of the Service Provider under the Implementation Agreement (e.g. clause 6.3 and Schedule 3).

Where these (or other) provisions are to be excluded from the Services Subcontract in their entirety, it can be helpful to retain the clause numbering but replace all of the text of the provision with “Not used”. In this way, it can be easier to identify where differences between the Implementation Agreement and Services Subcontract arise.

**Direct relationship to the Implementation Agreement**

* (**Conditions precedent**) Most likely, the Service Subcontract should become effective at the same time that the Implementation Agreement does. The effectiveness of the Services Subcontract should then rely only upon the satisfaction of the conditions precedent under the Implementation Agreement, and not be subject to additional conditions precedent.
* (**Service commencement and delivery**) As the provision of Services under the Services Subcontract may be contingent on certain events occurring under the Implementation Agreement, the SPE should consider whether the date for commencement of the delivery of the Services needs to be adjusted to take account of certain events occurring under the Implementation Agreement (e.g. clause 20.3)
* (**Termination**)As a general matter, termination of the Services Subcontract should only occur by reference to the termination of Implementation Agreement.

It may also be necessary that a requirement be included in the Services Subcontract that the consent of the Service Provider must be obtained before the SPE is entitled to enforce or waive any termination rights that it may have under the Implementation Agreement.

**Co-ordination and administration**

* (**Provision of information**)The Services Subcontract should make clear that both the SPE and the Service Provider are to provide all necessary information, communications, notices, data etc. to one another on a timely basis to ensure that the SPE is able to fulfil its obligations under the Implementation Agreement.

For example, it may be helpful to expressly provide for data sharing arrangements between the SPE and Service Provider (but without duplicating obligations) to assist the SPE to fulfil its obligations under clauses 11, 12 and 13 of the Implementation Agreement. In addition, the State would expect to see sub-licence arrangements between the SPE and the State in respect of the licence granted to the SPE by the Service Provider in respect of the Service Provider’s Materials and Joint Material supplied under the Services Subcontract. The parties may also acknowledge and agree that the Intellectual Property Rights granted by the Service Provider are intended to align with the Implementation Agreement and that Intellectual Property developed under the Services Subcontract are to be treated as Joint Material or Proponent Material (as applicable) under clause 22 of the Implementation Agreement.

* (**Consultation and participation**)As certain provisions of the Implementation Agreement may be drafted without recognising the Service Provider, there may be instances where the SPE should consult with the Service Provider, or provide the Service Provider with an opportunity to participate fully, before the SPE takes or agrees an action under the Implementation Agreement. However, any such procedures should not interfere in the SPE fulfilling its obligations under the Implementation Agreement.

For example, the SPE may agree to consult with the Service Provider in relation to the appointment of an Independent Certifier for the purposes of clause 11 of the Implementation Agreement. The SPE and Service Provider may also make agreements as to how disputes under the Implementation Agreement are to be managed between themselves, and the levels of participation required of each party, for the purposes of the application of clause 33 of the Implementation Agreement.

* (**Co-ordination**) The Services Subcontract can set out agreements and acknowledgments on the roles and actions that each of the SPE and Service Provider have already undertaken, and will assume or perform, in connection with the PAD arrangement.

For example, it may be the case that the Service Provider has a lead role, and the SPE has only a limited role, in the actual preparation of the Operations Manual for the purposes of clause 4 of the Implementation Agreement, and this can be expressed in the Services Subcontract. The Service Provider may also have a role in assisting the SPE to satisfy the conditions precedent set out under clause 2 of the Implementation Agreement.

* (**Conflicts**) The Services Subcontract may also provide for the management for conflicts of interest or duty in connection with the roles that the SPE and Service Provider may assume in the PAD arrangement more broadly.

**Provisions to be revised, reviewed or acknowledged**

* (**Revision**) Separate from the provisions of the Implementation Agreement that are not applicable for the Services Subcontract arrangements (as described above), there are particular types of provisions that should be retained in the Services Subcontract, but will need to be revised and restated.

For example, the payments provisions and representations and warranties respectively set out under clauses 8 and 20.4, 20.5 and 20.6 of the Implementation Agreement are conceptually important to the Services Subcontract, but would need to be overhauled to properly capture the different parties and arrangements.

* (**Review**) Consideration may be given to whether or not certain other provisions of the Implementation Agreement require modification if they are to be included in the Services Subcontract. However, in each case, care should be taken to ensure that the ‘back-to-back’ arrangements to be achieved by the Services Subcontract are not compromised by such modifications.

For example:

* + the GST provisions under clause 10 of the Implementation Agreement may need to reflect additional or alternative arrangements if they are to be included by the Services Subcontract to ensure that all necessary procedural matters as between the SPE and the Services Subcontract are properly depicted;
  + the use of Project Funds under clause 9 of the Implementation Agreement may need to be narrowed depending on the relationship between the SPE and the Service Provider (e.g. clause 9);
  + the mechanism for payment under clause 8 of the Implementation Agreement may need to reflect additional payment requirements (such as itemisation of invoicing) (e.g. clause 8).
* (**Acknowledgments**) There may be provisions of the Implementation Agreement that should be recognised by the terms of the Services Subcontract as being influential upon the ability and capacity of the SPE to fulfil its obligations under the Services Subcontract.

For example, the parties may acknowledge and agree that the SPE gives no undertaking in respect of obligations of the State arising under particular performance-related provisions of clause 5 of the Implementation Agreement.

**Pass through provisions**

Under the Implementation Agreement when certain events or circumstances arise, the SPE has, with respect to the State, certain rights, entitlements and remedies. The Services Subcontract may provide the Service Provider with comparable rights, entitlements and remedies for such events or circumstances, and to limit the Service Provider's rights, entitlements and remedies against the SPE and satisfy and limit the SPE’s liability for such events or circumstances by reference to the SPE rights, entitlements and remedies under the Implementation Agreement.

Set out in the schedule to these drafting guidelines is a sample clause for these matters.

However, to avoid doubt, it may be useful to recognise restrictions on the pass through arrangements under particular provisions under the Services Subcontract. For example, a limitation on pass through payments on amounts actually recovered under clause 16 of the Implementation Agreement may be recognised under the equivalent clause in the Services Subcontract.

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# Sample clause – Pass through from Implementation Agreement

## 36A.1 **Purpose**

### Under the Implementation Agreement when certain events or circumstances arise, the SPE has, with respect to the State, certain rights, entitlements and remedies. The purpose of this clause 36A is to provide the Service Provider with comparable rights, entitlements and remedies for such events or circumstances, and to limit the Service Provider’s rights, entitlements and remedies against the SPE and satisfy and limit the SPE’s liability for such events or circumstances by reference to the SPE’s rights, entitlements and remedies under the Implementation Agreement.

### For the purposes of this clause, "**Corresponding Implementation Agreement Entitlement**" means any of the following corresponding entitlements:

#### the SPE is in breach of a provision of this Agreement to the extent such breach is caused by a breach by the State of a provision of the Implementation Agreement;

#### the SPE has an entitlement under the Implementation Agreement or a Claim against the State arising out of the termination of the Implementation Agreement and, where this Agreement is terminated as a consequence of that termination, the Service Provider has an entitlement under this Agreement or a Claim against the SPE arising out of the termination of this Agreement;

#### the Service Provider has rights against the SPE under the terms of this Agreement and the SPE has corresponding rights (even if in different terms) against the State under the terms of the Implementation Agreement;

#### the SPE is entitled to obtain rights, entitlements or remedies under the Implementation Agreement, referenced to a Claim or interest attributable to the Service Provider; or

#### the Service Provider has a Claim against, or dispute with, the SPE and the SPE has a Claim against, or dispute with, the State based on the same or similar events or circumstances.

## 36A.2 **No Effect on Implementation Agreement**

The parties acknowledge and agree that the purpose of this clause 36A is not to reduce or disentitle or otherwise affect the validity of any claim by the SPE against the State under, or in connection with, the Implementation Agreement.

## 36A.3 **Implementation Agreement dispute resolution**

### (a) The Service Provider must, if requested by the SPE or the State, consent to any application by the SPE to have proceedings (including any expert determination or arbitration) between the SPE and the Service Provider which are related to, or connected with, a Corresponding Implementation Agreement Entitlement consolidated or heard together with like proceedings in Victoria between the State and the SPE.

### (b) The SPE must, if requested by the Service Provider or the State, consent to and, if necessary, apply to have proceedings (including any expert determination or arbitration) between the SPE and the Service Provider which are related to, or connected with, a Corresponding Implementation Agreement Entitlement consolidated or heard together with like proceedings in Victoria between the State and the SPE.

### (c) The parties agree to be bound by the outcome of any binding settlement or determination by dispute resolution under the Implementation Agreement between the State and the SPE contemplated under, and effected in accordance with, this clause 36A.

## 36A.4 **Limitation**

Notwithstanding anything elsewhere in this Agreement or another Transaction Document, if there is a Corresponding Implementation Agreement Entitlement, the following provisions apply:

### the Service Provider must, in relation to any Claim made by the Service Provider arising out of or in connection with any Corresponding Implementation Agreement Entitlement (**Pass Through Claim**), provide such information and assistance as may be necessary to enable the SPE to pursue the Pass Through Claim under, and in accordance with, the Implementation Agreement and otherwise co-operate fully with the SPE in negotiations and dispute resolution procedures under the Implementation Agreement;

### the SPE must:

### subject to clause 36A.4(c), exercise all rights and remedies reasonably available to the SPE under the Implementation Agreement in respect of any Pass Through Claim made in good faith;

### subject to clause 36A.4(c), exercise all other rights and remedies available to the SPE in respect of any Pass Through Claim made in good faith under the Implementation Agreement;

### regularly, and at all material times, notify the Service Provider of the status of the Pass Through Claim and all steps taken in connection with the Pass Through Claim;

#### promptly provide to the Service Provider copies of all information which the SPE has provided to, or has received from, the State or another subcontractor in connection with the Pass Through Claim;

#### use its reasonable endeavours to obtain the agreement of the State to the participation by the Service Provider in, and afford the Service Provider the opportunity to participate in, all negotiations under the Implementation Agreement in connection with the Pass Through Claim; and

#### not discontinue a Pass Through Claim, or enter into any settlement, agreement, arrangement or understanding with the State in respect of any Pass Through Claim, except on terms previously agreed in writing by the Service Provider (acting reasonably);

### the parties must co-ordinate and co-operate with each other in the preparation and pursuit of any Pass Through Claim including with respect to:

### jointly or separately obtaining any legal or other advice in connection with the Pass Through Claim;

### documenting and submitting the Pass Through Claim in accordance with the Implementation Agreement; and

### determining and abiding by the strategy for optimising the likelihood of resolution or determination of the Pass Through Claim in the Service Provider’s favour; and

### subject to the SPE’s compliance with this clause 36A.4 and clauses 9.2 and 36B, the Service Provider must indemnify the SPE and agree to pay the SPE within 10 Business Days of written demand any reasonable costs the SPE incurs in:

### obtaining legal or other advice in respect of the Pass Through Claim; and

### preparing, submitting and pursuing any Pass Through Claim in accordance with this clause 36A, including any costs incurred pursuant to any order made in connection with any proceedings relating to the Pass Through Claim,

### provided that nothing in this clause 36A.4(d) will render the Service Provider liable for any costs or expenses the SPE incurs in connection with any Claim by the SPE for compensation, relief or remedy under the Implementation Agreement other than the compensation, relief or remedy the subject of the Pass Through Claim.

## 36A.5 **Service Provider’s remedies**

### The Service Provider will not be entitled to:

### receive from the SPE any amount greater than the:

#### compensation payable by the State to the SPE; or

#### relief or remedy allowable by the State to the SPE, or obtained against the State by the SPE,

#### in respect of a Corresponding Implementation Agreement Entitlement the Service Provider has; and

### have any Corresponding Implementation Agreement Entitlement determined before the compensation payable, or relief or remedy allowable, by the State to the SPE has been determined under the Implementation Agreement.

## 36A.6 **Accord and satisfaction**

### Subject to compliance by the SPE with this clause 36A, this clause will apply to limit the SPE’s liability to the Service Provider in respect of Pass Through Claims and determine the amount the Service Provider must accept by way of accord and satisfaction of the SPE’s obligations in respect of Pass Through Claims.

### The Service Provider agrees to accept in full satisfaction of any Pass Through Claim, the amount agreed by the SPE and the State or determined pursuant to clause 35 of the Implementation Agreement in respect of that Pass Through Claim.

### If any Claim made by the SPE under the Implementation Agreement includes both:

### a Claim by the SPE not referable to a Corresponding Implementation Agreement Entitlement; and

### a Pass Through Claim by The Service Provider,

### and the aggregate amount that the SPE is entitled to recover from the State under the Implementation Agreement (the **Recoverable Amount**) is less than the aggregate amount claimed by the SPE and The Service Provider, then:

#### where the proportion of the Recoverable Amount referable to the Claim by the Service Provider under this Agreement has been agreed or determined under the Implementation Agreement as a distinct amount, the Service Provider shall only be entitled to that proportion of the Recoverable Amount and agrees to accept the same in full satisfaction of the Pass Through Claim; or

#### where the proportion of the Recoverable Amount referable to the Claim by the Service Provider under this Agreement has not been agreed or determined under the Implementation Agreement as a distinct amount, the parties will seek to agree the proportion of the Recoverable Amount to which they are each entitled (based on what is just and equitable in the circumstances), and if the parties fail to so agree, the determination as to the proportion of the Recoverable Amount to which they are entitled will be referred to dispute resolution under clause 33 of this Agreement, and the Service Provider agrees to accept the amount so agreed or determined in full satisfaction of the Pass Through Claim.

### Any amount received under a Pass Through Claim will first be applied towards the reasonable costs of the Pass Through Claim of whichever of the SPE or The Service Provider has had the conduct of the Pass Through Claim.

### If the amount agreed or determined in respect of the SPE’s entitlement under the Implementation Agreement is less than the Service Provider’s Pass Through Claim, the Service Provider waives any entitlement to the balance.

## 36A.7 **Time for payment or grant**

Any remedy or benefit to which the Service Provider is entitled under this clause 36A must be paid or granted by the SPE to the Service Provider:

### in the case of monetary payment, as soon as practicable, but not later than 2 Business Days, after payment under; and

### in all other cases, within 5 Business Days of,

### the binding settlement or determination of such entitlement under the Implementation Agreement.

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