

## ANNEX C - CONSULTANCY AGREEMENTS

### Typical clauses relating to Intellectual Property

1. IP in **Contract Material** vests in the Agency, subject to clause 2.
  - **'Contract Material'** is defined (in summary) as all Material: (i) created for the purposes of the Contract; (ii) provided or required to be provided to the Agency as part of the Consultancy; or (iii) any Material derived from the foregoing.
  - **'Material'** is defined as the subject matter of any category of IP rights.
2. Clause 1 does not affect the ownership of IP in:
  - a) any **Agency Material** incorporated into Contract Material. **'Agency Material'** is defined (in summary) as Material provided by the Consultant at any time for the purposes of the Contract. *[If the IP is not owned then it is responsible for procuring a licence to enable the Consultant to use it in carrying out 'the Services' - see clause 3 below.]*
  - b) any **'Background Material'** specified in the Schedule. **'Background Material'** is *pre-existing* Material specified in the Schedule and brought to the Contract by the Consultant. *[If the Consultant does not own IP in Background Material, they are responsible for arranging a licence to incorporate it as part of the Contract Material for the purposes mentioned in clause 4 below.]*
3. The Agency grants a licence to the Consultant to use, reproduce and adapt the Agency Material, for the purposes of the Contract only.
4. The Consultant grants the Agency a permanent, irrevocable, royalty-free, world-wide, non-exclusive licence (including a right of sublicense) to use, reproduce, adapt and exploit the Background Material, in conjunction with the Contract Material. *[i.e. Can do anything they like with the Contract Material as a whole, but they cannot deal with the Background Material (or layer) separately.]*
5. In addition, the Consultant is required to obtain a 'clearance' of moral rights from any authors who contribute to the Contract Material.

### Contraindications for use of a standard consultancy form

This type of contract is not appropriate, or at the very least may need substantial adaptation, in the following contexts:

- 1) engaging a person who performs services in circumstances which indicate that the person is, in reality, a common law or fixed term employee;
- 2) financial assistance agreements (grants), i.e. where the Agency is funding services, deliverables or outcomes that are intended to benefit a target group within the broader community, rather than the Agency itself;
- 3) engaging contractors to manage building and construction projects, or to perform services for the design and construction of building work;
- 4) software development agreements or information technology consultancies;
- 5) outsourcing of Agency functions;
- 6) contracts where there is a complex 'layering' of background and foreground intellectual property;
- 7) CD-ROM development projects, publication in conventional or electronic form or distribution agreements relating to video development software, CD-ROM or other digital data products;
- 8) film or video distribution;
- 9) government public relations or advertising campaigns;
- 10) arrangements in which the central component is the grant of a licence to use Commonwealth IP, or under which there is likely to be significant use of Agency trade marks or insignia;
- 11) relationships that can be characterised as 'joint venture' relationships, rather than a relationship where one party provides services to another;
- 12) agreements which involve the contractor entering into third party relationships, e.g., as agent or distributor of the Agency;
- 13) agreements involving a need to licence significant third party intellectual property material;
- 14) projects involving well-known authors, or if an author's Moral Rights are likely to be a significant issue;
- 15) agreements with, or which involve dealings with, performers and entertainers;
- 16) where part or all of the Services are to be performed outside Australia.