



PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

**TERMINATION OF THE INDEPENDENT
FINANCIAL AUDITOR OF THE
VICTORIAN AUDITOR-GENERAL'S
OFFICE APPOINTED BY PARLIAMENT
UNDER SECTION 17 OF THE
*AUDIT ACT 1994***

TABLED NOVEMBER 2011
104th REPORT TO PARLIAMENT



PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

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Termination of the Independent Financial Auditor of the Victorian Auditor-General's Office Appointed by Parliament Under Section 17 of the *Audit Act 1994*

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**Parliament of Victoria
Public Accounts and Estimates Committee**

*Termination of the Independent Financial Auditor of the Victorian Auditor-General's
Office Appointed by Parliament Under Section 17 of the Audit Act 1994*

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PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE MEMBERSHIP — 57TH PARLIAMENT

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ACRONYMS AND ABBREVIATIONS

APES	Accounting Professional and Ethical Standard
APESB	Accounting Professional and Ethical Standards Board
GST	Goods and Services Tax
PAEC	Public Accounts and Estimates Committee
VAGO	Victorian Auditor-General's Office

TERMINATION OF THE INDEPENDENT FINANCIAL AUDITOR OF THE VICTORIAN AUDITOR-GENERAL'S OFFICE APPOINTED BY PARLIAMENT UNDER SECTION 17 OF THE *AUDIT ACT 1994*

Purpose of Report

The purpose of this Report by the Public Accounts and Estimates Committee (PAEC) is to brief Parliament in detail in relation to a written request by Mr Peter Sexton (appended in Appendix One), Parliament's appointed financial auditor of the Victorian Auditor-General's Office (VAGO), to terminate his services before the contracted term expiry date of 8 April 2013.

The PAEC also wishes to outline the circumstances underlying Mr Sexton's request and the PAEC's findings in relation to the relevance and application of a revised Code of Ethics for Professional Accountants, APES 110, issued by the Accounting Professional and Ethical Standards Board, effective from 1 July 2011.

The PAEC, from the outset, makes it clear that the financial auditor, Mr Sexton properly alerted the PAEC and Parliament in a timely manner, of a potential conflict of interest, as required in the contract for services and has not contravened any of those contractual obligations.

The PAEC wishes to notify Parliament that this report does not imply that Mr Sexton has acted in any way to impair his professional independence in relation to any audits of VAGO that he has completed for Parliament.

Background to Mr Sexton's Appointment by Parliament

The *Audit Act 1994* requires that an independent financial auditor be appointed for a period of three years to conduct annual financial audits of the Victorian Auditor-General's Office. The PAEC is responsible under the Act for recommending, to both Houses of Parliament, the appointment of a suitably qualified person to undertake the financial audit.

Section 17 of the *Audit Act 1994* provides in part that:

- (1) A person may be appointed by resolution of the Legislative Council and the Legislative Assembly, on the recommendation of the Public Accounts and Estimates Committee of the Parliament, as an independent auditor of the Victorian Auditor-General's Office.
- (2) An appointment –
 - a) must not be made for a period exceeding 3 years, but may be renewed; and
 - b) may provide for the payment of remuneration.
- (3) Remuneration payable under the appointment shall be paid out of the Consolidated Fund which is to the necessary extent appropriated accordingly.
- (4) The function of the independent auditor is to carry out audits of the Victorian Auditor-General's Office in accordance with this Part.

The *Audit Act 1994* defines an audit as including 'an examination and inspection'. The audit is therefore intended to comprise an audit of VAGO's annual financial statements and the expression of independent professional opinions on these statements, attesting to their fair presentation in line with professional reporting standards and processes.

In addition to the financial audit of VAGO, the PAEC is responsible, under Section 19 of the *Audit Act 1994*, for recommending to both Houses of Parliament, at least every three years, the appointment of a person to undertake a performance audit of the Auditor-General and of VAGO.

On 25 March 2010, the PAEC wrote to the Auditor-General attaching final tender briefs for both the financial and performance audits including proposed contracts with successful tenderers prepared by the Victorian Government Solicitor's Office.

On 6 May 2010, following a tender evaluation and selection process by a panel appointed by the PAEC, the PAEC tabled a report in Parliament, *Report on the Appointment of Persons to Conduct the Financial Audit of the Victorian Auditor-General's Office and the Performance Audit of the Victorian Auditor-General and the Victorian Auditor-General's Office*.

In that Report, the PAEC recommended the appointment of Mr Peter Sexton to conduct the financial audit of VAGO for a three year period. Mr Sexton was then an Audit Principal of WHK Howarth Melbourne (now known as Crowe Howarth Melbourne), part of WHK Group Ltd. The PAEC considered, among other criteria, that Mr Sexton had provided a conforming tender, is a member of the Institute of Chartered Accountants and is a registered company auditor. The PAEC recommended that:¹

Recommendation 1:

In accordance with Section 17 of the Audit Act 1994, as amended, the Legislative Council and the Legislative Assembly appoint Mr Peter Sexton of WHK Howarth Melbourne for a period of three years:

- (a) to conduct the financial audit of the Victorian Auditor-General's Office for the financial years ended 30 June 2010, 30 June 2011 and 30 June 2012;*
- (b) in accordance with the Terms and Conditions and Remuneration of a Person Appointed by the Parliament of Victoria pursuant to Section 17 of the Audit Act 1994, as appended to the relevant Tender Brief in Appendix One of this Report;*
- (c) at the following fixed fee levels of remuneration:*
 - \$29,750 (plus GST for audit services for the year ended 30 June 2010);*
 - \$30,600 (plus GST for audit services for the year ended 30 June 2011); and*
 - \$32,200 (plus GST for audit services for the year ended 30 June 2012).*

¹ Public Accounts and Estimates Committee, *Report on the Appointment of Persons to Conduct the Financial Audit of the Victorian Auditor-General's Office and the Performance Audit of the Victorian Auditor-General and the Victorian Auditor-General's Office*, May 2010, p.5

Following resolutions (motions moved by leave agreed to) on 6 May 2010 by the Legislative Council and the Legislative Assembly and following the execution of the contract for services by Parliament's then Presiding Officers and Mr Sexton, Mr Sexton was appointed as Parliament's independent financial auditor of VAGO pursuant to Section 17 of the *Audit Act 1994*. The contract for services, *Terms and Conditions of a Person appointed by the Parliament of Victoria pursuant to Section 17 of the Audit Act 1994* is appended as Appendix Two to this report.

Formal Request by Mr Sexton for Termination of his Services

Under the terms of his contract with the Parliament, Mr Sexton has completed the financial audits of VAGO for the financial years ended 30 June 2010 and 30 June 2011. Mr Sexton's formal request for termination of services (at Appendix One), which was received by the PAEC on 30 September 2011, therefore relates to the one remaining financial audit under his contract, the audit of VAGO for the financial year ending 30 June 2012.

Mr Sexton cites reasons that the Accounting Professional and Ethical Standards Board (APESB) had reissued APES 110 Code of Ethics for Professional Accountants effective from 1 July 2011 which extended preclusions to auditors carrying out certain services for public interest entities, which definition would have included an entity such as VAGO. This meant that a possible perceived conflict of interest could arise from the new accounting professional code and that approximately \$1.85 million worth of service contracts (as disclosed within VAGO's 2010-11 Annual Report) between WHK related entities and VAGO were possibly caught under an expanded new preclusion in APES 110.

VAGO's annual reports for 2009-10 and 2010-11 have clearly spelt out in a note to VAGO's financial statements the nature and extent of the business relationship between VAGO and Mr Sexton's parent group. Such disclosure has enhanced the transparency of the underlying information in the public arena for the two financial audits completed to date by Mr Sexton.

PAEC Consideration of Mr Sexton's Formal Request for Termination of Services

Following receipt of Mr Sexton's letter, the PAEC determined to assess the implications of the revised Code of Ethics embodied in APES 110.

In undertaking this assessment, the PAEC was cognisant of the fact that the Committee of the 56th Parliament had directed special attention to auditor independence and management of perceived or actual conflicts of interest during the tender period relating to the tender for appointment of Mr Sexton as VAGO's external financial auditor.

Information publicly available to all prospective tenderers, as presented below, clearly spelt out the Committee's policy covering this important element of the ethical responsibilities of an auditor and the principles underpinning that policy.

In relation to the tender, on 13 April 2010 the following questions and answers were published on the PAEC's website:

Questions and Answers

Question:

Clarification on certain conflict of interest situations that may prohibit appointment:

- (a) A current service provider of financial statement audits to VAGO?*
- (b) The firm being a current service provider of financial statements to VAGO but the nominated principle not being a VAGO service provider?*

Answer:

- (a) Yes, this would constitute a conflict of interest situation which would prohibit appointment.*
- (b) The situation in itself, as outlined, would not constitute an impediment to an appointment of the principal. The appointee would be responsible for ensuring adherence to auditing standards and that no conflict of interest arises during an audit and throughout the term of the tender contract.*

The answer to 1b) recognises that the principal, and not the firm, is the person appointed as financial auditor and the principal will be solely responsible for meeting the terms and conditions of the tender brief. It is also conditional on:

- the principal having no professional connection or involvement with VAGO currently and for the duration of the tender contract;*
- the principal's nominated staff for the audit having no professional connection or involvement with VAGO currently and for the duration of the tender contract; and*
- there will be compliance by the principal as appointed financial auditor with all other requirements in the tender brief.*

In publicly disseminating the guidance above, the PAEC took a position that there would not be a breach of ethical accounting and auditing standards existing at that time so long as a person contracted as financial auditor in his/her own right observes the requirements of ethical pronouncements and auditing standards promulgated by the professional bodies. In addition, under the contracted terms of appointment, the financial auditor was obligated to ensure that no actual or potential conflict of interest situation would arise, with a binding onus placed on the auditor to inform the Parliament of any such situations that might arise during the term of appointment.

The PAEC's consideration of APES 110 identified that:

- APES 110 introduced, with effect from 1 July 2011, provisions relating to public interest entities (paragraphs 290.25 and 290.26). In doing so, it has widened the ambit of the Code of Ethics beyond entities listed on the Stock Exchange;
- while the literal meaning of the definition of a public interest entity in paragraph 290.25 (b) does not totally apply to the VAGO financial audit in that the *Audit Act 1994* does not expressly stipulate that the audit is to be conducted in accordance with independence requirements applicable to listed entities, all auditors

must apply professional auditing standards and pronouncements. Also, the PAEC's directions to the appointed financial auditor flowing from its statutory responsibility in Section 17 of the *Audit Act 1994* require adherence to professional standards;

- APES 110 addresses threats to auditor independence arising from material and significant business relationships (paragraphs 290.124 to 290.126). It indicates that a close business relationship between a firm and the audit client arises from a commercial relationship. The significant financial audit contractual obligations of the financial auditor's parent group with VAGO would constitute a close business relationship in terms of the approach adopted in APES 110;
- APES 110 also states that, in applying its requirements, auditors shall be guided, not merely by the words, but also by the spirit of the Code (paragraph 1.6). This 'substance over form' comment is important because APES 110 is essentially directed to conventional audit client / auditor situations. Because the VAGO audit framework is somewhat unique conceptually with VAGO having responsibility for multiple financial audits and engaging private sector contractors to conduct a number of those audits, it is necessary to interpret APES 110 in the widest sense having regard to its spirit and intention rather than its literal meaning; and
- paragraph 290.6 of APES 110 defines independence as having two components, 'Independence of Mind' and 'Independence in Appearance'. A reasonable and informed third party is likely to conclude that the circumstances now raised by the financial auditor give rise to a perception of a perceived threat to audit independence both of mind and in appearance.

After analysis of APES 110 and conscious of its application across the Australian accounting and auditing profession with effect from 1 July 2011, the PAEC concluded that it would be prudent for it to recommend to Parliament that Mr Sexton's request for termination of his audit contract be accepted.

Recommendation to the Legislative Assembly and Legislative Council

Given the pronouncement and application of the revisions to APES 110 effective from 1 July 2011, the Committee considers that Mr Sexton's request for a termination of his services is warranted under clause 18(b)(vi) of the contract for services between Parliament and Mr Sexton.

Clause 18(b)(vi) states:

Cause 18 Termination

- (b) *The Purchaser may terminate this Agreement immediately by notice in writing to the Service Provider if:*
- (vi) *the Service Provider commits any act or does any thing that is contrary to prevailing community standards, or is otherwise regarded by the public as unacceptable or which brings the reputation of the Service Provider into disrepute and as a consequence the Purchaser's Representative believes that its continued association with the Service Provider will be prejudicial or otherwise detrimental to the reputation of the State.*

In relation to definitions within the contract for services, the Parliament of Victoria is the 'Purchaser', Mr Sexton is the 'Service Provider' and the PAEC is the 'Purchaser's Representative'.

The PAEC wishes to inform Parliament that it considers that the revised APES 110 Code of Ethics now clearly places its appointed financial auditor, Mr Sexton in a position that would be contrary to the public interest and community standards by virtue of the material and significant business relationships that his associated companies have with VAGO. Termination of Mr Sexton's services is therefore a recommended course of action.

The PAEC wishes to emphasise that the financial auditor has properly alerted the PAEC and Parliament to this potential conflict of interest as required in the contract for services. As such, Mr Sexton has not contravened any contractual obligations.

Further, the PAEC considers that its action, in submitting this report, should not be construed as suggesting in any way that Mr Sexton has done anything to impair his professional independence in relation to the past two audits of VAGO that he has completed for Parliament.

Following the termination of Mr Sexton, the PAEC will develop a new tender for limited invitation to appropriate accounting firms, in accordance with the Parliament's Presiding Officers' expenditure approval guidelines and Section 17 of the *Audit Act 1994*.

Recommendation: **In accordance with clause 18(b)(vi) of the Agreement being the *Terms and Conditions and Remuneration of a Person Appointed by the Parliament Pursuant to Section 17 of the Audit Act 1994* dated 8 June 2010 between Parliament and Mr Peter Sexton, the Committee recommends that:**

- (a) Parliament agree to terminate the services of Mr Peter Sexton; and**
- (b) termination in writing be effected by notice in writing being given to Mr Sexton by the Presiding Officers of the Legislative Council and the Legislative Assembly.**

APPENDIX 1: LETTER FROM MR PETER SEXTON



Crowe Horwath Melbourne

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A WHK Group Firm

28 September 2011

Ms Valerie Cheong
Executive Officer
Public Accounts and Estimates Committee
Parliament of Victoria
Parliament House
Spring Street
East Melbourne Vic 3002

Dear Valerie,

AUDIT OF THE VICTORIAN AUDITOR-GENERAL'S OFFICE

I regret to advise that due to recent revisions to independence requirements for accountants, I must ask that you arrange for Parliament to consider terminating my appointment as the auditor of the Victorian Auditor-General's Office (VAGO) for the financial year ending 30 June 2012 and onward.

APES 110 'Code of ethics for professional accountants' was reissued effective 1 July 2011. The previous issue of APES 110 specifically precluded auditors from carrying out certain other services for 'listed entities'. That preclusion has now been extended to 'Public Interest Entities'. In my opinion the VAGO would be classified as a public interest entity and the work that WHK / Crowe Horwath carries out for the VAGO on a sub-contractual basis would constitute precluded services. The VAGO sub-contracts audit work to WHK offices throughout Victoria including Melbourne, Albany and Western Victoria. I understand those fees for the 2011 annual financial year totalled \$1,845,389. This contrasts with my audit fee for the VAGO of only \$30,000. In my opinion it would not be acceptable to complete my three year contract with the Parliament of Victoria given the altered circumstances.

Consequently, in accordance with clause 16 (b) of my contract with the Parliament of Victoria, I respectfully suggest that Parliament consider terminating my appointment under clause 18 (b) (vi) of the contract, whereby it would now regard Crowe Horwath, a WHK Group firm, as 'a service provider regarded by the public as unacceptable'.

Yours sincerely

CROWE HORWATH MELBOURNE

A handwritten signature in black ink, appearing to be "Peter Sexton", written over a horizontal line.

Peter Sexton
Partner

**APPENDIX 2: TERMS AND CONDITIONS AND
REMUNERATION OF A PERSON APPOINTED
BY THE PARLIAMENT OF VICTORIA
PURSUANT TO SECTION 17 OF THE
*AUDIT ACT 1994***

**TERMS AND CONDITIONS AND
REMUNERATION OF A PERSON
APPOINTED BY THE PARLIAMENT
OF VICTORIA PURSUANT TO
SECTION 17 OF THE
*AUDIT ACT 1994***

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**TERMS AND CONDITIONS AND REMUNERATION OF A PERSON APPOINTED
BY THE PARLIAMENT OF VICTORIA PURSUANT TO SECTION 17 OF THE
AUDIT ACT 1994**

Date 8 June 2010

Parties

The Parliament of Victoria (“the Purchaser”)

Peter Sexton of WHK Melbourne, Level 32, 80 Collins Street, Melbourne (“Service Provider”)

Whereas

- A. A financial audit shall be conducted of the Victorian Auditor-General’s office (**‘Auditee’**) to determine whether the Auditee is achieving its operations objectives effectively, efficiently and economically in compliance with the Audit Act 1994, as amended.
- B. (Name of successful tenderer) is appointed as Service Provider by resolution of the Legislative Council and the Legislative Assembly (together constitute **‘the Parliament of Victoria’** and **‘the Purchaser’**), on the recommendation of the Public Accounts and Estimates Committee of the Parliament (**‘Purchaser’s Representative’**), to conduct the financial audit.
- C. This Agreement applies to financial audits to be conducted by (name of successful tenderer) for the financial years ended 30 June 2010, 30 June 2011 and 30 June 2012.
- D. This Agreement records the agreed terms and conditions and remuneration of a person appointed pursuant to section 17 of the Audit Act.

Agreed Terms and Conditions

1. ***Interpretation***

1.1 **Definitions**

In this Agreement unless otherwise specified or unless the context other requires:

‘Agreement’ means this agreement and includes the Schedules and any Annexures to it or documents incorporated by reference.

‘Annexure’ means an annexure to this Agreement.

‘Audit’ means a financial audit as described in section 17 of the Audit Act, as amended.

‘Audit Act’ means the *Audit Act 1994* (Vic).

‘Business Day’ means a day which is not a Saturday, Sunday or public holiday (being a public holiday appointed as such under the *Public Holidays Act 1993 (Vic)*) in Melbourne.

‘Code of Practice’ means a code of practice as defined in, and approved under, the *Information Privacy Act 2000 (Vic)*.

‘Commencement Date’ means the date set out in **Item 1 of Schedule 1**.

‘Confidential Information’ means any technical, scientific, commercial, financial or other information or any information designated by the Purchaser’s Representative as confidential which is disclosed, made available, communicated or delivered to the Service Provider in connection with this Agreement, but excludes information:

- (a) which is in or which subsequently enters the public domain other than as a result of a breach of this Agreement;
- (b) which the Service Provider can demonstrate was in its possession prior to the date of this Agreement;
- (c) which the Service Provider can demonstrate was independently developed by the Service Provider;
- (d) which is lawfully obtained by the Service Provider from another person entitled to disclose such information; or
- (e) which is disclosed pursuant to legal requirement or order.

‘Contract Intellectual Property’ means any and all Intellectual Property Rights incorporated or comprised in any materials created by or on behalf of the Service Provider in the course of providing the Services to the Purchaser’s Representative under this Agreement.

‘Contracts Publishing System’ means the system of the Victorian Government requiring publication of details of contracts entered into by Victorian Government departments or any successor system (including variations).

‘Control’ means, in relation to any body corporate, the ability of any person directly or indirectly to exercise effective control over the body corporate (including the ability to determine the outcome of decisions about the financial and operating and other policies of that body corporate) by virtue of the holding of voting shares, units or other interests in that body corporate or by any other means.

‘Deed of Confidentiality’ means a deed that is in or substantially in the form set out in **Annexure C**.

‘Expiry Date’ means the date set out in **Item 1 of Schedule 1**.

‘Fees’ means a fixed fee payable to the Service Provider for the provision of the Services as set out in **Schedule 2**.

‘Information Privacy Principles’ means the information privacy principles set out in the *Information Privacy Act 2000 (Vic)*.

'Intellectual Property Rights' includes all present and future copyright and neighbouring rights, all proprietary rights in relation to inventions (including patents), registered and unregistered trademarks, confidential information (including trade secrets and know how), registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

'Laws' means:

- (a) the law in force in the State and the Commonwealth of Australia, including common law and legislation; and
- (b) ordinances, regulations and by-laws of relevant government, semi-government or local authorities.

'Liaison Officer' means the Executive Officer of the Purchaser's Representative, as described in **Item 6 of Schedule 1**.

'Office' means the Victorian Auditor-General's Office.

'Pre-Existing Intellectual Property' means any and all Intellectual Property Rights in any works, items or systems which are the property of the Service Provider and which existed in substantially the same form and with substantially the same contents prior to the commencement of the provision of the Services.

'Price Schedule' means the schedule of Fees payable by the Purchaser to the Service Provider for the provision of the Services, as set out in **Schedule 2**.

'Public Sector Body' has the same meaning as defined in section 4 of the *Public Administration Act 2004* (Vic).

'Schedule' means a schedule to this Agreement.

'Service Levels' means the service levels the Service Provider must comply with in performing its obligations under this Agreement, as specified in **Schedule 3**.

'Service Provider's Representative' means the person specified in described in **Item 6 of Schedule 1**

'Services' means the Services to be provided by the Service Provider specified in **Schedule 2 and Annexure A**.

'Staff Costs' means Pay As You Go tax, withholding tax, superannuation contributions or charge amounts, fringe benefits tax, workers' compensation insurance premiums, payroll tax and any like taxes and charges arising out of or in relation to this Agreement, or any engagement arising under this Agreement (together with all interest or penalties payable by reference to those costs).

'State' means the Crown in the right of the State of Victoria.

'Tender Documentation' means the documentation submitted by the Service Provider in response to a request for tender or request for proposal, in the form finally accepted by the Purchaser's Representative, as set out in **Annexure B**.

'Term' means the term of this Agreement determined in accordance with clause 4.

2. *Interpretation*

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) "includes" means includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation; and
 - (v) '\$', 'dollars' or 'AUD' is a reference to the lawful currency of the Commonwealth of Australia; and
- (g) if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day.

3. *Headings*

Headings do not affect the interpretation of this Agreement.

4. *Term*

This Agreement commences on the Commencement Date and, unless terminated earlier under **clause 18** or extended by agreement of the Purchaser's Representative and the Service Provider, will end on the Expiry Date.

5. *Timetable for Reports*

- (a) Subject to **clause 5(d)**, for financial audits conducted for the financial years ending 30 June 2010, 30 June 2011 and 30 June 2012, the Service Provider shall deliver to the Liaison Officer for the Purchaser Representative's feedback:
- (i) a proposed audit plan by 31 May for each applicable financial year;
 - (ii) a progress report, including details of the Service Provider's performance against the Service Levels, within five weeks of the commencement of each financial audit;
 - (iii) if the Service Provider thinks fit, following the conduct of each audit, under section 18 of the Audit Act to prepare a report on the audit, including recommendations for the more effective, efficient and economic operation of the Auditee, a preliminary report and draft audit opinion including a copy of a proposed management letter and/or operations letter at least three weeks before transmission to Parliament; and
 - (iv) a final report and audit opinion including a copy of the final management letter and/or operations letter to be provided to the Purchaser's Representative as soon as completed and prior to the inclusion of the audit opinion in the Auditor-General's annual report to the Parliament.
- (b) The Service Provider shall present the preliminary report referred to in **clause 5(a)(iii)** to the Auditee for review at least 10 Business Days prior to making its final audit report and may consider any submissions or comments from the Auditee in accordance with section 18 (3) of the Audit Act.
- (c) A report on the conduct of the independent financial audit including details of meetings with the Auditor-General and the Auditee and auditing issues dealt with during the audit must be provided to the Purchaser's Representative simultaneously with the auditor's final report, audit opinion and management and/or operations letter outlined in **clause 5(a)(iv)**.
- (d) In relation to the audit for the financial year ended 30 June 2010:
- (i) the Service Provider's preliminary report referred to in **clause 5(a)(iii)** and draft audit opinion including a copy of a proposed management letter and/or operations letter, must be provided to the Purchaser's Representative and Auditor-General by 29 July 2010; and

- (ii) the Service Provider must transmit the final audit opinion to Parliament via its inclusion within the Auditor-General's 2009-10 Annual Report by no later than 12 August 2010.
- (e) The Service Provider acknowledges that specific timeframes for reports for the following two financial years ended 30 June 2011 and 30 June 2012 will be agreed and confirmed with the Purchaser's Representative prior to the commencement of the audits for each of those two years.
- (f) In relation to any audit report and recommendations made under Section 18 of the Audit Act, the Service Provider will transmit the final report to Parliament as required under section 18(4) of the Audit Act.

6. *Performance of Services*

6.1 **Services to be performed in accordance with Service Levels**

The Service Provider must provide the Services to a standard that reaches or exceeds the Service Levels. The Parties acknowledge and agree that the purpose of the Service Levels is to ensure a minimum level of performance by the Service Provider. In addition, the Service Provider must:

- (a) provide the Services in accordance with the terms of this Agreement;
- (b) provide the Services in a proper, timely and efficient manner using the standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, professional and experienced provider of services that are similar to the Services;
- (c) ensure the highest quality of work and the delivery of the Services with the utmost efficiency;
- (d) act in good faith and in the best interests of the Purchaser;
- (e) comply with all statements or representations as to its performance or the provision of the Services set out in the Tender Documentation;
- (f) keep the Purchaser's Representative informed of all matters of which it ought reasonably be made aware, and provide such information in relation to the provision of the Services as may reasonably be required by the Purchaser's Representative; and
- (g) carry out its obligations and duties and complete the provision of the Services to the reasonable satisfaction of and in accordance with the requirements of the Purchaser's Representative.

6.2 **Service Provider to provide equipment**

The Service Provider must provide any and all equipment (including computer hardware and software and any ancillary support) necessary for the performance of the Services.

6.3 Inability to provide services

If at any time during the Term the Service Provider is unable or is likely to become unable, for whatever reason, to provide any or all of the Services, the Service Provider must immediately notify the Purchaser's Representative of that fact.

6.4 Time of the essence

Time will be of the essence in the performance of the Services.

7. *Service Provider's Staff*

7.1 Service Provider's Staff

- (a) The Services must be performed by the persons specified in **Item 5 of Schedule 1**.
- (b) If the persons identified in **Item 5 of Schedule 1** or any of them are unavailable or otherwise unable to provide the Services, the Service Provider must promptly notify the Purchaser's Representative of that fact and provide details of alternate, suitably qualified and experienced staff to replace the persons specified in **Item 5 of Schedule 1 (Replacement Staff)**.
- (c) The Purchaser's Representative must notify the Service Provider in writing within five Business Days as to whether or not it accepts the Replacement Staff proposed by the Service Provider pursuant to **clause 7.1(b)**.
- (d) The Service Provider acknowledges and agrees that the Purchaser's Representative will be under no obligation to accept any person proposed by the Service Provider if the Purchaser's Representative is not satisfied as to the qualifications and experience of such person. In such case, the Purchaser's Representative may terminate this Agreement in accordance with **clause 18(b)(iv)**.

7.2 Service Provider

The parties acknowledge and agree that for the purposes of this Agreement:

- (a) the Service Provider is deemed to include all persons involved in the provision of the Services (including the persons specified in **Item 5 of Schedule 1**, any Replacement Staff and any Additional Staff); and
- (b) the acts and omissions of such persons are deemed to be the acts and omissions of the Service Provider.

8. *Price for the Services*

- (a) The Fee according to which the Service Provider will charge the Purchaser for Services is set out in **Schedule 2**. The Fee is fixed for the Term.
- (b) Expenses or other disbursements may only be charged by the Service Provider in accordance with **Schedule 2**.

9. *Invoicing and Payment*

9.1 **Invoicing**

- (a) For each financial year during the Term, the Service Provider must submit to the Purchaser's Representative:
 - (i) after submission of the draft preliminary audit report, draft audit opinion and draft management/operations letter if made as described in **clause 5(a)(iii)**, a first tax invoice for 50% of the Fee for the financial year audit that is the subject of the report;
 - (ii) after submission of the final audit report as described in **clause 5(a)(iv)**, a second and final tax invoice for the remaining 50% of the Fee for the financial year audit that is the subject of the report.
- (b) No advance payments will be made for Services not yet provided.
- (c) A tax invoice submitted for payment pursuant to **clause 9.1(a)** must contain each of the matters specified in **Item 2 of Schedule 1** and be sent to the address specified in **Item 2 of Schedule 1**.

9.2 **Payment of invoice**

- (a) Subject to the remainder of this **clause 9.2**, the Purchaser will pay the invoiced amount to the Service Provider within 30 days of receipt of the invoice.
- (b) An invoice will not be paid until such time as the invoice is certified for payment by the Purchaser's Representative. An invoice will not be certified for payment unless the Purchaser's Representative is satisfied that it is correctly calculated with respect to the Services and that the Services have been delivered in accordance with this Agreement.
- (c) If the Purchaser's Representative disputes the invoiced amount (whether in whole or in part) for any reason, the Purchaser must pay the undisputed amount of such invoice (if any), and the Purchaser's Representative must notify the Service Provider of the amount the Purchaser's Representative believes is due for payment. If the Purchaser's Representative and the Service Provider are unable to agree on the balance of the invoiced amount, the dispute will be referred for determination in accordance with **clause 24**.

- (d) Payment of an invoice is **not** to be taken as:
 - (i) evidence or an admission that the Services have been provided in accordance with the Service Levels and otherwise in accordance with this Agreement;
 - (ii) evidence of the value of the Services supplied; or
 - (iii) an admission of liability,but must be taken only as payment on account.

9.3 Fair payment

- (a) The Purchaser will, on demand by the Service Provider, pay simple interest on a daily basis on any overdue amount, at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983 (Vic)*.
- (b) For the purposes of **clause 9.3(a)**, **overdue amount** means an amount (or part thereof) that:
 - (i) is not, or is no longer, disputed in accordance with this Agreement;
 - (ii) is due and owing under a tax invoice (as defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*) properly rendered by the Service Provider in accordance with this Agreement; and
 - (iii) has been outstanding for more than 30 days from the date of receipt of the invoice or the date that the amount ceased to be disputed, as the case may be.

10. Contract management and liaison

10.1 Purchaser's Representative

The Service Provider acknowledges that the Service Provider must comply with directions as to the Services given by the Purchaser's Representative.

10.2 Parties' Representatives

- (a) All queries or issues of a day-to-day operational nature including in connection with this Agreement, the delivery of Services and the invoicing and payment will be dealt with in good faith by the Service Provider's Representative and the Liaison Officer (**Representatives**).
- (b) During the period of the Services, the Liaison Officer shall make him or herself available as reasonably required.

- (c) The Service Provider's Representative must make him or herself available at all times during business hours on reasonable notice by the Liaison Officer to meet with the Liaison Officer and discuss any queries, progress, concerns, issues or disputes arising under or in connection with this Agreement.
- (d) The Service Provider will have regard to all requirements of the Liaison Officer and will comply with all reasonable directions of the Liaison Officer.
- (e) Both the Purchaser's Representative and the Service Provider may nominate a replacement Representative by notice in writing to the other party. The appointment of the replacement Representative will be effective from the date on which such notice is given.

11. *Access to records and documents*

11.1 **Service Provider to retain records**

The Service Provider must, for a period of seven years after the Expiry Date (or, if the Agreement is extended in accordance with **clause 4**, seven years after the date on which such extension of the term concludes) keep true and particular accounts and records of:

- (a) all Services supplied under this Agreement; and
- (b) all associated records including:
 - (i) records of purchase of Services by the Service Provider; and
 - (ii) all supporting materials used to generate and substantiate invoices submitted in respect of Services supplied under this Agreement.

11.2 **Document property**

- (a) All documents (other than working papers) prepared pursuant to the Services and all documents supplied to the Service Provider for the purpose of the Services (excluding those documents returned to the originating source) shall be and remain the property of the Parliament of Victoria and shall be delivered by the Service Provider to the Purchaser's Representative on the completion of the Services.
- (b) All working papers are to be made available to future persons appointed under the Audit Act, as amended.
- (c) The documents supplied to the Service Provider pursuant to the Services shall not without the prior approval of the Purchaser's Representative be used, copied or reproduced for any purpose other than for the execution of the Services.

- (d) The Service Provider shall ensure that its working papers including electronic versions and draft and final reports are secure from any third party preview and interference.

12. *Intellectual Property Rights*

12.1 **Warranty and indemnity by Service Provider**

- (a) The Service Provider warrants to the Purchaser that it is entitled to use and deal with any Intellectual Property Rights which may be used by it in connection with the provision of the Services under this Agreement.
- (b) The Service Provider indemnifies and will at all times keep the Purchaser indemnified against any loss, damage, claim, action or expense (including reasonable legal expenses) arising out of or otherwise in connection with any breach or alleged breach by the Service Provider of the Intellectual Property Rights of any third person, relating to the provision of the Services under this Agreement or relating to the Purchaser's use of the Services.

12.2 **Ownership of Contract Intellectual Property**

- (a) Subject to **clause 12.3**, as between the parties, all Contract Intellectual Property vests in and is the property of the Purchaser from the time of its creation.
- (b) Subject to **clause 12.3**, the Service Provider hereby irrevocably and unconditionally assigns to the Purchaser, free of additional charge, all of its right, title and interest in and to the Contract Intellectual Property, and the Service Provider must sign all documents and do all things reasonably required to ensure that such assignment is effected.
- (c) The Service Provider must procure from all of its employees, agents, contractors and other third parties who are authors or makers of any Contract Intellectual Property (and must ensure that any contract with any third party for the creation of any Contract Intellectual Property includes a provision that requires such person to obtain from its employees, agents and contractors) a written assignment of all Intellectual Property Rights of the employee, agent, contractor or third party in the Contract Intellectual Property as necessary to give effect to **clauses 12.2(a) and (b)** and a written consent from all individuals involved in the creation of any Contract Intellectual Property irrevocably consenting to the Purchaser exercising its rights in the Contract Intellectual Property in a manner that, but for the consent, would otherwise infringe the moral rights of those individuals.
- (d) If requested, the Purchaser may in its absolute discretion grant the Service Provider a licence to use Contract Intellectual Property owned by the Purchaser on terms acceptable to the Purchaser.

12.3 **Ownership of Pre-Existing Intellectual Property**

All Pre-Existing Intellectual Property used by the Service Provider in connection with the provision of Services under this Agreement or the creation of Contract Intellectual Property remains the property of the Service Provider or its licensors.

12.4 **Licence of Pre-Existing Intellectual Property**

- (a) Subject to **clause 12.4(b)**, the Service Provider hereby irrevocably and unconditionally grants to the Purchaser, free of additional charge, a non-exclusive, worldwide licence to use any Pre-Existing Intellectual Property to the extent that such Pre-Existing Intellectual Property forms part of or is integral to, any works or other items created by the Service Provider in connection with the provision of Services under this Agreement or the creation of Contract Intellectual Property.
- (b) The licence granted in **clause 12.4(a)** is limited to use of the relevant Pre-Existing Intellectual Property by the Purchaser for the purposes of the Purchaser and for no other purpose.

13. ***Failure to perform***

- (a) Without limiting any other clause of this Agreement, or any other remedy the Purchaser may have, if the Service Provider fails to provide or perform any of the Services in accordance with the requirements of this Agreement, and the applicable Services Levels, the Purchaser will not be required to pay for those Services and the Purchaser's Representative may, by notice in writing to the Service Provider, require the Service Provider to:
 - (i) remedy any default (if the default is capable of being remedied) at the Service Provider's own expense; or
 - (ii) re-perform the Services (if the Services are capable of being re-performed by the Service Provider),

within the time specified in the notice (which must be reasonable having regard to the nature of the Services).

- (b) If the remedied or re-performed Services are remedied or re-performed in accordance with the applicable Service Levels and otherwise to the satisfaction of the Purchaser's Representative, then the Purchaser will pay the applicable Fees for those remedied or re-performed Services (which the parties acknowledge may be less than the cost to the Service Provider of remedying or re-performing the Services).

- (c) If the default referred to in **clause 13(a)** is not capable of being remedied or the Services are not capable of being re-performed, or the Service Provider fails within the time specified to remedy the default or re-perform the Services, the Purchaser may either:
- (i) remedy that default or re-perform the Services itself; or
 - (ii) have the Services remedied or re-performed by a third party,
- and in either case, the Service Provider must pay the reasonable costs incurred by the Purchaser in doing so.

14. **Liability**

- (a) The Service Provider must indemnify the Purchaser and each of its respective officers, employees and agents (**Indemnified Party**) against any loss, damage, claim, action or expense (including reasonable legal expenses) which any Indemnified Party suffers as a direct or indirect result of any of the following:
- (i) a breach of this Agreement by the Service Provider, including any failure to provide the Services in accordance with this Agreement;
 - (ii) any warranty given by the Service Provider under this Agreement being incorrect or misleading in any way; or
 - (iii) any negligent act or failure to act by the Service Provider or any of the Service Provider's employees, agents, officers or sub-contractors,
- except to the extent that any such loss, damage, claim, action or expense is caused by the negligence or other wrongful act or omission of the Purchaser, its employees or agents.
- (b) If any indemnity payment is made by the Service Provider under this **clause 14**, the Service Provider must also pay to the Indemnified Party an additional amount equal to any tax which is payable by the Indemnified Party in respect of that indemnity payment.

15. **Warranties**

The Service Provider warrants to the Purchaser that:

- (a) the provision of the Services will be carried out with all due care and skill and in accordance with all applicable standards, principles and practices;
- (b) the Service Provider has the accreditation or membership of professional or other bodies in relation to the provision of the Services as set out in the Tender Documentation for the provision of the Services and that it will use its best endeavours to maintain such accreditation or membership during the Term;
- (c) it and its employees, agents and contractors are appropriately qualified and have the requisite knowledge, skill and expertise to provide the Services in accordance with the Service Levels;

- (d) whilst on premises owned or controlled by the Auditee, the Service Provider and its employees, agents and contractors will at all times comply with the Auditee's lawful directions and policies of which the Service Provider is notified or is otherwise aware, including any applicable occupational health and safety and security policies;
- (e) where the Purchaser has, either expressly or by implication, made known to the Service Provider any particular purpose for which the Services are required, the Services will be performed in such a way as to achieve that result;
- (f) the provision of the Services will not infringe any right of any third party (including, without limitation, any intellectual property right) or any Laws;
- (g) all representations made by the Service Provider in or in connection with the Tender Documentation were and remain accurate; and
- (h) the information contained in the Tender Documentation as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the Service Provider, its employees and contractors is correct.

16. *Conflict of Interest*

- (a) The Service Provider warrants to the Purchaser that it does not, and will ensure that its employees, agents and contractors do not, hold any office or possess any property, are not engaged in any business, trade or calling and do not have any obligations by virtue of any contract whereby, directly or indirectly, duties or interests are or might be created in conflict with or might appear to be created in conflict with their duties and interest under this Agreement.
- (b) The Service Provider must promptly inform the Purchaser's Representative of any matter which may give rise to an actual or potential conflict of interest at any time during the Term.
- (c) The Service Provider acknowledges and agrees that failure to comply with this **clause 16** will constitute a breach of a fundamental term of this Agreement.

17. *Change in Control*

- (a) The Service Provider must notify the Purchaser's Representative in writing of any proposed or impending change in Control of the Service Provider or the ultimate holding company of the Service Provider of which it becomes aware.

- (b) In determining whether or not to provide its consent to a change in Control, the Purchaser may consider such information as it considers relevant or necessary. If the Purchaser notifies the Service Provider that it does not consent to the proposed change in Control or consent is not sought, and the change in Control occurs notwithstanding, the Purchaser may, by notice in writing to the Service Provider, terminate this Agreement, such termination to take effect at any nominated time within the immediately succeeding 12 months.

18. *Termination*

- (a) By resolution of the Legislative Council and the Legislative Assembly, on the recommendation of the Purchaser's Representative, the Purchaser at any time without cause by giving written notice to the Service Provider of its intention so to do may abrogate or constrict the Services or any part of or further part thereof and upon such notice being given the Service Provider shall cease or reduce the provision of the Services according to the notice and shall forthwith do everything possible to mitigate the losses consequent thereto.
- (b) The Purchaser may terminate this Agreement immediately by notice in writing to the Service Provider if:
 - (i) the Service Provider consistently fails to provide the Services in accordance with the Service Levels or otherwise in accordance with the requirements of this Agreement;
 - (ii) the Service Provider fails to remedy, to the satisfaction of the Purchaser's Representative, any breach of this Agreement (which in the reasonable opinion of the Purchaser's Representative is able to be remedied) within 14 days after the date on which the Purchaser's Representative issues the Service Provider a written notice requiring the Service Provider to remedy the breach;
 - (iii) the Service Provider breaches any material provision of this Agreement and in the reasonable opinion of the Purchaser's Representative such breach cannot be remedied;
 - (iv) the Replacement Staff proposed by Service Provider under clause 7.1(b) are unacceptable to the Purchaser's Representative;
 - (v) the Service Provider or any of its employees, agents or sub-contractors are guilty of fraud, dishonesty or any other serious misconduct;
 - (vi) the Service Provider commits any act or does any thing that is contrary to prevailing community standards, or is otherwise regarded by the public as unacceptable or which brings the reputation of the Service Provider into disrepute and as a consequence the Purchaser's Representative believes that its continued association with the Service Provider will be prejudicial or otherwise detrimental to the reputation of the State; or
 - (vii) if the Service Provider becomes bankrupt or enters into a scheme or arrangement with creditors.

19. *Consequences of termination or expiry*

- (a) Termination or expiry of this Agreement will not prejudice any right of action or remedy which may have accrued to either party prior to termination or expiry (as the case may be).
- (b) **Clauses 11, 12, 14, 17, 19, 23 and 24** of this Agreement survive the termination or expiry of this Agreement or the completion of the Services and may be enforced at an time.

20. *Transitional assistance*

The Service Provider acknowledges and agrees that on termination or expiry of this Agreement the Service Provider will provide all such transitional assistance as may be reasonably necessary or requested by the Purchaser to facilitate the smooth transition of any relevant information, knowledge, systems or assets from the Service Provider to the Purchaser (or to a third party nominated by the Purchaser) to enable the Purchaser to continue to obtain the benefit of such information, knowledge, systems or assets for the business purposes of the Purchaser, following the termination or expiry of this Agreement. The Purchaser will pay fair compensation to the Service Provider in respect of any physical assets which have not been provided to the Purchaser under this **clause 20**.

21. *Insurance*

21.1 **Service Provider to maintain insurance**

- (a) The Service Provider must (must ensure that any sub-contractors appointed by it under **clause 26**) obtain and maintain for the Term (and for the obligations that survive expiry or termination of the Agreement) the insurances specified in **Item 3 of Schedule 1**.
- (b) The Service Provider must provide the Purchaser's Representative with evidence of the currency of any insurance it is required to obtain on or prior to the Commencement Date, and otherwise on request by the Purchaser's Representative at any time during the Term.
- (c) If the Purchaser's Representative acting reasonably so requires, any insurance obtained pursuant to **clause 21.1(a)** must be on terms (including any excess) and with an insurer which are acceptable to the Purchaser's Representative.
- (d) The Service Provider will immediately advise the Purchaser's Representative if at any time the Service Provider becomes aware or reasonably believes that it ceases to have the benefit of an insurance policy as required in **clause 21.1**, whether through cancellation, lapse or otherwise.

22. *Accident compensation*

The Service Provider must ensure that, in respect of its employees and sub-contractors and any other persons engaged by the Service Provider to provide the Services, it:

- (a) complies with the provisions of the *Accident Compensation Act 1985* (Vic);
- (b) insures against its liability to pay compensation whether under legislation or otherwise; and
- (c) produces to the Purchaser's Representative on request any certificates or like documentation required by the *Accident Compensation Act 1985* (Vic).

23. *Confidentiality and privacy*

23.1 **Use of Confidential Information**

- (a) The Service Provider will (and will ensure that its employees, agents and advisers will):
 - (i) use and reproduce Confidential Information only to perform its obligations under this Agreement; and
 - (ii) not disclose or otherwise make available Confidential Information other than to:
 - (A) personnel who have a need to know the information to enable the Service Provider to perform its obligations under this Agreement; or
 - (B) in the event that legal advice is required in respect of this Agreement, the Service Provider's legal advisers; or
 - (C) in the event of a dispute or a potential claim relating to this Agreement, the Service Provider's insurers under the relevant contract of insurance.
- (b) If it is necessary to disclose Confidential Information to a third party, other than for a purpose within **clause 23.1(a)(ii)**, the Service Provider will (and will ensure that its employees, agents and advisers will) obtain the written consent of the Purchaser's Representative.
- (c) All Confidential Information will remain the property of the Purchaser's Representative and upon termination or expiry of the Agreement or upon completion of the Services, the Service Provider will, subject to **clause 23.1(d)**:
 - (i) deliver all copies or other records containing the Confidential Information (or any part of it) to the Purchaser's Representative; and

- (ii) delete, erase, or otherwise destroy all Confidential Information contained in computer memory, magnetic, optical, laser, electronic or other media in its possession or control which is not capable of delivery to the Purchaser's Representative.
- (d) The Service Provider may retain one copy of information (including Confidential Information) that it reasonably wishes to retain for legitimate internal audit or quality assurance purposes. Retention of information pursuant to this **clause 23.1(d)** does not release the Service Provider from its confidentiality obligations under this Agreement.
- (e) The Service Provider acknowledges that the Purchaser will be entitled (in addition to any other remedy it may have) to seek an injunction or other equitable relief with respect to any actual or threatened breach or non-compliance by the Service Provider of this **clause 23** and without the need on the part of the Purchaser to prove any special damage.
- (f) The Service Provider will ensure that its employees, agents and advisers will, if requested by the Purchaser's Representative, execute a Deed of Confidentiality.

23.2 Disclosure of Service Provider's Information

- (a) Subject to **clause 23.2(b)**, the Purchaser agrees to treat as confidential all information of or relating to the Service Provider that is proved to it, whether under this Agreement or the Tender Documentation, by or on behalf of the Service Provider, excepting for this Agreement which will be tabled in Parliament.
- (b) The Service Provider hereby acknowledges and/or consents to the Purchaser publishing, whether on the internet or otherwise, all such information as is necessary to comply with the Contracts Publishing System, the *Freedom of Information Act 1982* (Vic), any other relevant Laws and Parliamentary procedures.

23.3 Privacy

The Service Provider acknowledges that it will be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Service Provider under or in connection with this Agreement in the same way and to the same extent as the State or the Purchaser would have been bound had it been directly done or engaged in by the Purchaser.

24. *Disputes*

24.1 **Parties to meet**

If any dispute arises under or in connection with this Agreement (**Dispute**) which Dispute is not able to be resolved by the Liaison Officer appointed by the Purchaser's Representative within 14 days, the Chair of the Purchaser's Representative and the nominated senior executive of the Service Provider will promptly meet and discuss in good faith with a view to resolving such Dispute.

24.2 **Mediation**

- (a) If any Dispute is unable to be resolved in accordance with **clause 24.1** within 14 days, the parties agree to endeavour in good faith to settle the Dispute by mediation administered by the Australian Commercial Disputes Centre (ACDC) before having recourse to arbitration or litigation.
- (b) The mediation will be conducted in accordance with the mediation guidelines of ACDC (**Guidelines**) which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and the terms of those Guidelines are incorporated by this Agreement.

24.3 **Arbitration or litigation**

- (a) If the parties fail to settle any Dispute in accordance with **clause 24.2**, the parties may agree to submit the Dispute for resolution to final and binding arbitration under the Rules of Arbitration of the Institute of Arbitrators and Mediators Australia by one or more arbitrators appointed in accordance with those rules.
- (b) If the parties do not agree to refer the Dispute to arbitration in accordance with **clause 24.3(a)**, either party may submit the Dispute for resolution to the exclusive jurisdiction of the Courts of Victoria, Australia.

24.4 **Performance during Dispute resolution**

The parties to a Dispute will continue to perform their respective obligations under this Agreement, pending the resolution of a Dispute under this **clause 24**.

24.5 **Interlocutory relief**

Nothing in this **clause 24** is to be taken as preventing any party to a Dispute from seeking interlocutory relief in respect of such dispute.

25. *Compliance with Law*

The Service Provider must, in performing its obligations under this Agreement, comply with all Laws affecting or applicable to the provision of Services by the Service Provider. Without limitation to the foregoing, the Service Provider must comply with the provisions set out in **Schedule 4**.

26. *Sub-contracting*

- (a) Except as expressly provided in this Agreement, the Service Provider must not sub-contract to any third person any of its obligations under this Agreement without the prior written consent of the Purchaser's Representative, which consent may be given or be withheld by the Purchaser's Representative in its absolute discretion.
- (b) The Service Provider must ensure that any person engaged by it complies with all obligations imposed on the Service Provider by this Agreement. The Service Provider will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under this Agreement and will be liable for all acts and omissions of a sub-contractor as though they were the actions of the Service Provider itself.

27. *Access and Safety*

27.1 **Access to premises**

If the Service Provider requires access to the premises of the Auditee in connection with the provision of the Services, the Purchaser's Representative will liaise with the Auditor-General of Victoria and use best endeavours, subject to relevant security and other requirements, to facilitate a permit for the Service Provider for reasonable access to the premises at such times as may be reasonably necessary to enable the Service Provider to provide the Services.

27.2 **Obligations**

When the Service Provider enters the premises of the Auditee pursuant to **clause 27.1** the Service Provider must and must ensure that its employees, agents and contractors use all reasonable endeavours to:

- (a) protect people and property;
- (b) prevent nuisance and unnecessary noise and disturbance; and
- (c) act in a safe and lawful manner and comply with the safety standards policies and terms and conditions of the Auditee (as may be notified to the Service Provider).

27.3 **No occupier's liability**

- (a) The Purchaser, Auditee and their respective officers, employees, agents and invitees will not be responsible for any damage done to the Service Provider's property or to that of any of the Service Provider's officers, employees, agents or sub-contractors or for any personal injury sustained by any of the Service Provider's employees, agents or sub-contractors occurring on the premises of the Auditee:
 - (i) as a result of the negligence or recklessness of such employee, agent or sub-contractors; or

- (ii) if such employee, agent or sub-contractor has failed to comply with the occupational health and safety and security policies of the Auditee (as may be notified to the Service Provider).
- (b) The Service Provider unconditionally and irrevocably releases the Purchaser, the Auditee and their respective employees, agents and invitees from all such responsibility and agrees to indemnify the Purchaser, the Auditee, their officers, employees, agents and invitees (each an **Indemnified Party**) against any loss that the Indemnified Party may suffer as a result of any third party bringing an action against the Indemnified Party in relation to any such circumstances, except to the extent that such circumstances were caused directly as a result of the Indemnified Party's negligence.

28. **GST**

28.1 **Definitions**

Terms used in this clause have the same meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

28.2 **Consideration is exclusive of GST**

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.

28.3 **Recipient to pay an additional amount**

If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply subject to the recipient receiving a valid tax invoice in respect of the supply at or before the time of payment. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this Agreement.

28.4 **Reimbursement**

If this Agreement requires a party to pay for, reimburse or contribute to any expense, loss or outgoing (reimbursable expense) suffered or incurred by another party, the amount required to be paid, reimbursed or contributed by the first party will be the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense plus any GST payable by the other party.

29. *Staff Costs*

- (a) The Service Provider will indemnify and keep indemnified the Purchaser from and against all liability for the Staff Costs in any way relating to the Services.
- (b) If the Purchaser is or becomes liable to pay any Staff Costs, that Purchaser may deduct the amount of its liability for the Staff Costs from any amount due by the Purchaser to the Service Provider, whether under this Agreement or otherwise.

30. *Notices*

30.1 **Giving a communication**

A notice, demand, certification, process or other communication relating to this Agreement must be in writing in the English language, and may (in addition to any other method permitted by law) be sent by pre-paid post, pre-paid courier or by electronic mail as follows:

- (a) to the Purchaser: at the address of the Purchaser's Representative which is set out in **Item 4 of Schedule 1**;
- (b) to the Service Provider: at the address which is set out in **Item 4 of Schedule 1**.

30.2 **Time of delivery**

A notice or document shall be taken to be delivered or served as follows:

- (a) in the case of delivery in person or by courier, when delivered;
- (b) in the case of delivery by post, two Business Days after the date of posting;
- (c) in the case of facsimile transmission, on receipt by the sender of a transmission report from the despatching machine showing: the date of transmission, the relevant number of pages, the correct telephone number of the destination facsimile machine and the result of the transmission as satisfactory; and
- (d) in the case of electronic mail, if the receiving party has agreed to receipt in that form under the Agreement, and the message is correctly addressed to and successfully transmitted to that party's electronic mail address (e-mail address), when acknowledgement of receipt is recorded on the sender's computer.

30.3 After hours communications

If any notice or document is delivered or deemed to be delivered:

- (a) after 5.00pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken as having been delivered at 9.00 am on the next day which is not a Saturday, Sunday or public holiday in that place.

31. General

31.1 Legal Costs

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

31.2 Amendment

This Agreement may only be varied or replaced by a document executed by the Purchaser's Representative and the Service Provider.

31.3 Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right by the first party.

31.4 Severability

Any provision of this Agreement which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable, and, if that is not possible, the provision shall, to the extent that it is capable, be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

31.5 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

31.6 Set off

The Purchaser may set off against any sum owing to the Service Provider under this Agreement any amount then owing by the Service Provider to the Purchaser.

31.7 Governing law and jurisdiction

- (a) This Agreement is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

31.8 Assignment of rights

- (a) A party may assign any right under this Agreement with the prior written consent of the other party.
- (b) The Service Provider will not, as a result of any assignment pursuant to **clause 31.8(a)**, be relieved from the performance of any obligation under this Agreement, and will be responsible for acts and omissions of any assignee.

31.9 Counterparts

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

31.10 Entire Understanding

- (a) This Agreement, together with its Schedules and Annexures contains the entire understanding between the parties as to the subject matter of this Agreement.
- (b) Except as otherwise provided in **clause 31.10(a)**:
 - (i) all previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of this Agreement are merged in and superseded by this Agreement and are of no effect; and
 - (ii) no oral explanation or information provided by any party to another:
 - (A) affects the meaning or interpretation of this Agreement; or
 - (B) constitutes any collateral agreement, warranty or understanding between any of the parties.

31.11 Relationship of parties

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

31.12 Application of Act

Pursuant to section 17 of the Audit Act, sections 11, 12 and 14 of the Act apply to the Service Provider as if references in those sections to the Auditor-General were references to the person.

Schedule 1 Contract Variables (to be completed before execution by parties)

Item 1: Term (Clause 4)

Commencement date: 8 June 2010

Expiry date: 8 April 2013

Item 2: Invoicing (Clause 9)

Invoice Requirements:

Invoices must contain the information necessary to be a tax invoice for the purposes of the *New Tax System (Services and Services Tax) Act 1994 (Cth)*.

Address for invoice:

All invoices must be sent to: The Executive Officer
Public Accounts and Estimates Committee
Parliament House
Spring Street
East Melbourne Vic 3002

Item 3: Insurance (Clause 21.1)

The Service Provider is required to obtain and maintain during the Term:

Type of coverage	Amount (AUD)
Professional indemnity insurance	\$5 million
Public liability insurance	\$10 million

Item 4: Notice particulars (Clause 30)

The Purchaser: Purchaser's Representative – the Public Accounts and Estimates Committee

Address: Parliament House, Spring Street, East Melbourne, Vic 3002

Fax: 03 8682 2898

Email: paec@parliament.vic.gov.au
Addressee: Valerie Cheong
Executive Officer
Service Provider: WHK Melbourne
Address: Level 32, 80 Collins Street
Melbourne Vic 3000
Fax: 03 9258 6722
Email: peter.sexton@whk.com.au
Addressee: Peter Sexton

Item 5: Service Provider's staff (Clause 7)

Key Personnel:

Partner or equivalent: Peter Sexton, Engagement Principal and Chris Malkin,
Quality Principal

Senior Associate/Director
or equivalent: Tejas Gandhi, Client Manager
Jacqueline Atkins, Manager Technology Risk
Elise Sudholz, Senior Auditor

Other Nominated: Sam Eddy, Auditor

Item 6: Liaison Officer and Service Provider's Representative (Clause 10)

Liaison Officer

Name: Peter Sexton
Address: c/- WHK Melbourne
Level 32, 80 Collins Street
Melbourne Vic 3000
Telephone: 03 9258 6700
Fax: 03 9258 6722
Email: peter.sexton@whk.com.au

Service Provider's Representative

Name: Tejas Gandhi
Address: c/- WHK Melbourne
Level 32, 80 Collins Street
Melbourne Vic 3000
Telephone: 03 9258 6700
Fax: 03 9258 6722
Email: tejas.gandhi@whk.com.au

Schedule 2 Professional services and price schedule (to be completed before execution by parties)

Services required by the Purchaser's Representative to be provided by the Service Provider are those detailed in the tender brief in **Annexure A**.

For the audit for the financial year ended 30 June 2010, total fixed Fees (**exclusive** of GST but including all other taxes and charges) will not exceed \$29,750.

For the audit for the financial year ended 30 June 2011, total fixed Fees (**exclusive** of GST but including all other taxes and charges) will not exceed \$30,600.

For the audit for the financial year ended 30 June 2012, total fixed Fees (**exclusive** of GST but including all other taxes and charges) will not exceed \$32,200.

Total maximum costs for travel, disbursements and expenses are included in the joint fixed fees identified above in this schedule for audits conducted in each financial year for the years ended 30 June 2010, 30 June 2011 and 30 June 2012.

Schedule 3 Service Levels

The Service Provider must maintain the requisite capacity, capability, experience and depth of resources to ensure that the Services provided to the Parliament of Victoria:

- are high quality and reliable;
- represent best value for money; and
- support the Parliament of Victoria in successful management, negotiation and mitigation of commercial risks.

Generally, the performance of Service Providers will adhere to the following principles:

- services provided to time, quality and cost parameters;
- consistent performance, continuity and quality of staff;
- ensuring advisory independence and adherence to probity, conflict of interest and confidentiality requirements;
- having advisory recommendations acknowledged and acted upon and consistent with industry standards;
- services conducted to industry professional standards/best practice in the field;
- ability to meet engagement deliverables and any key performance indicators specified in this Agreement; and
- responsive and pro-active project management.

In providing the Services and otherwise performing its obligations under the Agreement, the Service Provider must comply with these Service Levels, including the following key performance indicators:

Key Performance Indicator	Measure
Purchaser's Representative satisfaction with the Services	A specific review of the Service Provider's reports in clause 5 by the Purchaser's Representative.
Quality and impartiality of analysis, findings and recommendations.	<p>That the advice facilitates delivery of the primary objectives of the tender brief in Annexure A of this Agreement.</p> <p>That the advice provided is sufficiently clear, precise and documented to allow the Purchaser's Representative and the Parliament of Victoria to make informed decisions in relation to the audit findings and recommendations.</p> <p>That the advice provided has regard to applicable legislative objectives and constraints.</p>
Timeliness of advice received	<p>That the timelines for reporting and tabling in Parliament as set out in this Agreement are met by the Service Provider.</p> <p>That the Purchaser's Representative is satisfied with the quality and timeliness of the advice provided.</p>
Retention of key personnel	That the Service Provider's key personnel remains substantially unchanged during the performance of the Services, or if key personnel vary, that the Service Provider can continue to meet the engagement requirements.
No adverse feedback on the Preliminary Report	The Purchaser's Representative provides no adverse feedback related to the outcomes of the preliminary report provided by the Service Provider.

Schedule 4 Compliance with Law

In performing its obligations under this Agreement, the Service Provider must comply with the following (without limiting any of its other obligations under this Agreement):

1. Employment Policy

- (a) The Service Provider must comply with Anti-Discrimination Law.
- (b) The Service Provider and any person engaged in the provision of the Services shall not:
 - (i) engage in unethical work practices; or
 - (ii) engage employees or sub-contracted workers upon terms and conditions which do not meet industry standards generally applicable in Victoria.
- (c) Where a federal industrial award may apply to the capacity in which an employee is engaged by the Service Provider, or by a sub-contractor, in the provision of the Services, the rates of pay and conditions on which that employee is engaged shall be no less beneficial to the employee than the rates and conditions under that award.

2. Ethical Purchasing Policy

- 2.1 Without limiting or derogating from the Service Provider's obligation to comply with any Law, the Service Provider must satisfy the Ethical Employment Standard at all times during the Term.
- 2.2 The Purchaser may make an Adverse Assessment if, at any time during the term of the Agreement:
 - (a) a court, tribunal, commission or board makes a finding of serious breach of an Applicable Industrial Instrument against the Service Provider or convicts the Service Provider of a serious offence under Applicable Legislation; or
 - (b) a court, tribunal, commission or board makes a finding of a breach of an Applicable Industrial Instrument against the Service Provider or convicts the Service Provider of an offence under Applicable Legislation that is part of a pattern of repeated or ongoing breaches or offences; or
 - (c) the Service Provider fails to meet its disclosure obligations under **paragraph 2.3.**

- 2.3 The Service Provider must, on request by the Purchaser's Representative and within the time period required by the Purchaser's Representative in writing (which must not be less than 30 days) provide an up-to-date Ethical Employment Statement setting out Full Details of:
- (a) any adverse finding against the Service Provider by a court, tribunal, commission or board in respect of a breach of an Applicable Industrial Instrument;
 - (b) any conviction by a court, tribunal, commission or board of an offence committed by the Service Provider under Applicable Legislation;
 - (c) any finding by a court, tribunal, commission or board that the Service Provider has breached a penalty provision of Applicable Legislation; and
 - (d) any proceeding or prosecution against the Service Provider in respect of a breach of an Applicable Industrial Instrument or an offence under Applicable Legislation instituted since the Commencement Date that has not previously been disclosed to the Purchaser's Representative.

The up-to-date Ethical Employment Statement may, at the option of the Service Provider, also include details of remedial measures implemented to ensure future compliance with Applicable Industrial Instruments and Legislation.

- 2.4 The parties acknowledge and agree that:
- (a) if this Agreement is terminated pursuant to **paragraph 2.9**, the Service Provider's name and details (including its Australian Business Number) will be included in the Ethical Employment Reference Register for a period of 24 months from the date that termination takes effect;
 - (b) the Victorian Government departments will access the Ethical Employment Reference Register for the purpose of applying the Ethical Purchasing Policy; and
 - (c) the inclusion of any details in the Ethical Employment Reference Register is one factor in the assessment process of whether a tenderer satisfies the Ethical Employment Standard, and will not automatically exclude the Service Provider from participation in future tender processes.
- 2.5 In connection with the requirements of the Ethical Purchasing Policy, the Service Provider will:
- (a) permit an accountant or auditor on behalf of the Purchaser from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Service Provider for the purposes of this Agreement; and
 - (b) give such accountant or auditor all reasonable assistance to facilitate the conduct of such audit or inspection.

Any information provided, or to which an accountant or auditor has access under this clause, shall be treated as confidential information and shall not be used other than for the purposes of this Agreement or disclosed other than as required at law or to meet any requirements of the Parliament of Victoria.

- 2.6 The confidentiality obligations of the parties shall not extend to:
- (a) information already in the public domain other than due to a breach of this Agreement;
 - (b) any disclosure required by Law;
 - (c) any disclosure reasonably required in order to comply with a request for information made by the Auditor-General of Victoria; or
 - (c) information reasonably required in order to publish appropriate and comprehensive performance data relating to the provision of the Services under this Agreement.
- 2.7 Notwithstanding any other obligation in this Agreement, the Service Provider acknowledges that the Service Provider (or such Victorian Government department as may be charged with the responsibility of monitoring compliance with the Ethical Purchasing Policy from time to time) may publish (whether on the internet or otherwise) the name of the Service Provider and the value of the Services to be provided under this Agreement, together with the conditions of this Agreement generally.
- 2.8 If at any time during the term of the Agreement, the Purchaser notifies the Service Provider in writing that it has made an Adverse Assessment pursuant to **paragraph 2.2**, the Service Provider must, within 14 days of receipt of such notice, or such longer period agreed by the Purchaser, provide a statutory declaration from a director or company secretary of the Service Provider, setting out:
- (a) any additional information that in the opinion of the Service Provider is relevant to the Adverse Assessment, including the Service Provider's grounds for any objection to the Adverse Assessment;
 - (b) details of any information on which the Adverse Assessment is based that in the opinion of the Service Provider is incorrect, incomplete or otherwise unfairly prejudicial to the Service Provider; and
 - (c) any existing or planned remedial measures that the Service Provider has taken or will be taking to prevent a breach or offence similar to the breach or offence on which the Adverse Assessment is based from recurring.

- 2.9 Following receipt of the statutory declaration or expiration of the period described in **paragraph 2.8**, whichever comes first, the Purchaser may, in its discretion, do one or more of the following:
- (a) request the Service Provider show cause as to why this Agreement should not be suspended or terminated with effect from 14 days; and/or
 - (b) suspend the operation of this Agreement for a specified period of up to 6 months with 14 days notice; and/or
 - (c) terminate this Agreement with 14 days notice.
- 2.10 In exercising its discretion under **paragraph 2.9**, the Purchaser will take into consideration:
- (a) whether the Service Provider has taken or will take measures that, in the reasonable opinion of the Purchaser, are commensurate with the breach or the offence on which the Adverse Assessment is based and can be reasonably expected to prevent such breach or offence from recurring; or
 - (b) whether the Purchaser is otherwise satisfied that the Service Provider has shown good cause why the Agreement should not be suspended or terminated.
- 2.11 The remedies under **paragraph 2.9** are in addition to and do not limit any other rights or remedies of the Service Provider under this Agreement or otherwise at Law.
- 2.12 In this **paragraph 2**:

Adverse Assessment means an assessment by the Purchaser pursuant to the Ethical Purchasing Policy that, in the opinion of the Purchaser, the Service Provider does not satisfy the Ethical Employment Standard.

AFPCS means that Australian Fair Pay and Conditions Standard within the meaning of the *Workplace Relations Act 1996* (Cth) and any equivalent standard under the *Fair Work Act 2009* (Cth).

Anti-Discrimination Law means the *Equal Opportunity for Women in the Workplace Act 1999* (Cth), the *Equal Opportunity Act 1995* (Vic), the *Disability Discrimination Act 1992* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Age Discrimination Act 2004* (Cth), the *Fair Work Act 2009* (Cth) and the *Workplace Relations Act 1996* (Cth).

Applicable Industrial Instruments means an Award, Enterprise Agreement or AFPCS that applies to the employment of any of the employees of the Service Provider and is binding on the Service Provider.

Applicable Industrial Instruments and Legislation means all Applicable Industrial Instruments and all Applicable Legislation.

Applicable Legislation means:

- (a) *Federal Awards (Uniform System) Act 2003* (Vic);
- (b) *Outworkers (Improved Protection) Act 2003* (Vic);
- (c) *Dangerous Goods Act 1985* (Vic);
- (d) *Equipment (Public Safety) Act 1994* (Vic);
- (e) *Occupational Health and Safety Act 2004* (Vic);
- (f) *Workplace Relations Act 1996* (Cth);
- (g) *Fair Work Act 2009* (Cth);
- (h) *Long Service Leave Act 1992* (Vic);
- (i) Anti-Discrimination Laws;
- (j) any corresponding State (other than Victoria) or territory legislation dealing with any of the matters dealt with in paragraphs (a) to (i) above; and
- (k) any other legislation designated by the Victorian Government as Applicable Legislation under its Ethical Purchasing Policy from time to time.

Award means any award within the meaning of the *Workplace Relations Act 1996* (Cth) or modern award within the meaning of the *Fair Work Act 2009* (Cth) or award of any tribunal empowered to make industrial awards for Victorian employees or employees in any other State or Territory.

Enterprise Agreement means any certified agreement of the Australian Industrial Relations Commission or Fair Work Australia or any agreement made, lodged or registered under the law of a State.

Ethical Employment Reference Register has the meaning given to that term in the Ethical Purchasing Policy.

Ethical Employment Standard means, in the context of this Agreement, the requirement for the Service Provider to demonstrate, to the reasonable satisfaction of the Purchaser's Representative, and in accordance with the requirements of the Ethical Purchasing Policy, that the Service Provider has, and will continue during the term of the Agreement, to meet its obligations to its employees under Applicable Industrial Instruments and Legislation.

Ethical Purchasing Policy means the Victorian Government's Ethical Purchasing Policy supporting fair and safe workplaces, which is published by the Victorian Government, as amended from time to time.

Full details mean details of:

- (a) the nature of the breach or offence or alleged breach or offence;
- (b) any conviction recorded or adverse finding made in respect of the breach or offence;
- (c) any penalty or orders imposed by a court, tribunal, commission or board in respect of the breach or offence and the maximum penalty that could have been imposed under the Applicable Industrial Instruments and Legislation;
- (d) the name of the court, tribunal, commission or board, the State or Territory in which the proceeding or prosecution is brought, the date on which the proceeding or prosecution was commenced and the number or description assigned to the proceeding or prosecution by the court, tribunal commission or board;
- (e) the name of the entity against which the finding or conviction was made or the proceeding or prosecution was initiated;
- (f) this Agreement; and
- (g) any further information regarding the matters set out in paragraphs (a) – (f) above that may be requested by the Purchaser's Representative.

Executed as an agreement.

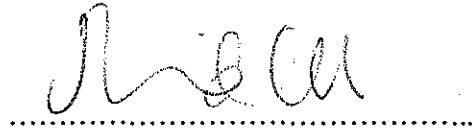
Signed by **Hon Jenny Lindell, MP**)

Speaker, Legislative Assembly)


for and on behalf of the)

Parliament of Victoria in the)

presence of:)



.....


.....
Witness

BETH KLEIN
.....
Name of Witness (print)

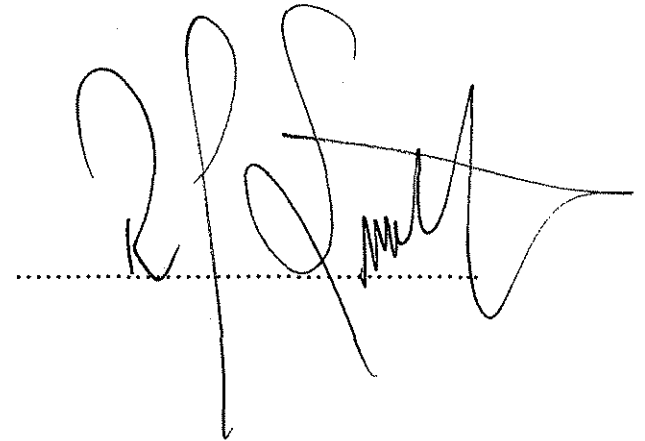
Signed by **Hon Robert Smith, MLC**)

President, Legislative Council)

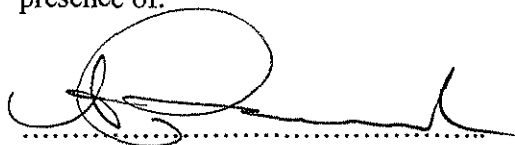
for and on behalf of the)

Parliament of Victoria in the)

presence of:)



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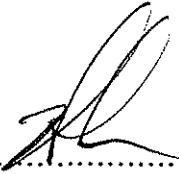

.....
Witness

ANNA JURKIEWICZ
.....
Name of Witness (print)

The Service Provider :

Signed by Peter Sexton,
in the presence of:

)
)



.....



.....
Witness

ANDREW LAW (CA)
.....
Name of Witness (print)

Annexure A

Tender Brief dated March 2010



PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE

**Financial Audit of the Victorian
Auditor-General's Office**

Tender brief

March 2010

Financial Audit

Background and Objective

The *Audit Act 1994*, as amended, requires that an independent financial auditor be appointed for a period of three years to conduct annual financial audits of the Victorian Auditor-General's Office (VAGO). The Public Accounts and Estimates Committee ('the Committee') is responsible under the Act for recommending, to both Houses of Parliament, the appointment of a suitably qualified person to undertake the financial audit.

Section 17 of the *Audit Act 1994* provides in part that:

- (1) *A person may be appointed by resolution of the Legislative Council and the Legislative Assembly, on the recommendation of the Public Accounts and Estimates Committee of the Parliament, as an independent auditor of the Victorian Auditor-General's Office.*
- (2) *An appointment –*
 - a) *must not be made for a period exceeding 3 years, but may be renewed; and*
 - b) *may provide for the payment of remuneration.*
- (3) *Remuneration payable under the appointment shall be paid out of the Consolidated Fund which is to the necessary extent appropriated accordingly.*
- (4) *The function of the independent auditor is to carry out audits of the Victorian Auditor-General's Office in accordance with this Part.*

Section 18 of the *Audit Act 1994* relates to the report that the independent auditor may choose to make to Parliament. Such a report may include recommendations for the more effective, efficient and economic operation of VAGO.

Section 18 requires that any such report of the independent auditor must be reported to Parliament after statutory consultation with the Auditor-General. This requirement may be read as applicable to any material matters arising from the financial audit other than the expression of an audit opinion on VAGO's annual financial statements.

In addition to section 18 relating to a possible report to Parliament on material matters, the Committee requires the independent auditor to provide the Committee with a report covering the work undertaken by the independent auditor including interaction and meetings with the Auditor-General and VAGO and auditing issues dealt with during the audit.

While sections 17 and 18 do not explicitly state what the audit comprises, the *Audit Act 1994* defines an audit as including 'an examination and inspection'. The audit is therefore intended to comprise an audit of VAGO's annual financial statements and the expression of independent professional opinions on these statements, attesting to their fair presentation in line with professional reporting standards and processes.

The Committee's objective is to recommend to the Parliament the appointment of a suitably qualified person as financial auditor during the present session of the

Victorian Parliament. The duly appointed independent financial auditor is required to conduct a financial audit in accordance with directions contained within the terms of reference, over the next three years. The required reports and timelines are stated on page 3 of this tender brief.

Terms of Reference

The Committee wishes to direct the successful tenderer to conduct the financial audit in accordance with the following legislative context and terms of reference.

The independent financial auditor’s role is to:

- conduct an audit of VAGO’s financial statements for the next three years beginning with the year ending 30 June 2010;
- form an opinion as to whether the financial statements of VAGO present fairly the financial position of the Office as at the end of each financial year and its financial performance and cash flows for each financial year in accordance with applicable Accounting Standards and other mandatory professional reporting requirements; verify that such statements comply with the financial reporting requirements of the *Financial Management Act 1994*, as amended, and relevant provisions of any successor legislation to that Act;
- form an opinion on the processes used by VAGO in the preparation of its accounts;
- conduct the audit in compliance with the *Audit Act 1994*, Australian Auditing Standards and professional reporting requirements;
- prepare an appropriate methodology for each year’s audit which may include risk-based principles, controls-based testing, analytical reviews, adequacy of financial reporting systems and other procedures to ensure a professional audit is undertaken in compliance with Australian auditing standards;
- meet on a regular basis with the VAGO Audit Committee to discuss, clarify and resolve issues and findings;
- consult as the independent auditor thinks fit with the Chair of the Committee and/or the Audit Sub-Committee of the Committee;
- evaluate the progress, adequacy and effectiveness of measures implemented by VAGO to address issues and recommendations that accompanied the previous financial year’s audit opinion;
- prepare a management letter and/or operations letter to VAGO;
- prepare as the auditor thinks fit, a report to Parliament that may include such information and such recommendations for the more effective, efficient and economic operation of VAGO; and
- submit to the Committee a report on the conduct of the independent financial audit including details of meetings with the Auditor-General and VAGO and auditing issues dealt with during the audit.

Reports to the Committee and Parliament

The provision of the following reports are required by the Committee for audits for the financial years ending 30 June 2010, 30 June 2011 and 30 June 2012:

- a. Prior to the commencement of each audit, the auditor should provide an audit plan and methodology to the Committee for comment.
- b. The auditor should provide a progress report to the Committee within five weeks of the commencement of the audit.
- c. Following the conduct of the audit, the auditor may, if the auditor thinks fit, under section 18 of the *Audit Act 1994*, make a report on the audit, including recommendations for the more effective, efficient and economic operation of VAGO, for transmission to Parliament.
- d. In relation to the audit for the financial year ended 30 June 2010, the auditor's preliminary report and audit opinion including a copy of a proposed management letter and/or operations letter should be provided to the Committee and Auditor-General by 29 July 2010.
- e. The auditor's finalised report and audit opinion including a copy of the final management letter and/or operations letter should be provided to the Committee as soon as completed and prior to the inclusion of the audit opinion in the Auditor-General's annual report to the Parliament.
- f. The auditor should also submit to the Committee a report on the conduct of the independent financial audit including details of meetings with the Auditor-General and VAGO and auditing issues dealt with during the audit together with the auditor's final report, audit opinion and management and/or operations letter outlined in paragraph 'e' above.
- g. In relation to the audit for the financial year ended 30 June 2010, the final audit opinion is to be transmitted to Parliament via its inclusion within the Auditor-General's 2009-10 Annual Report by no later than 12 August 2010.

The timeframes for the following two financial years will be agreed with the Committee prior to the commencement of the audits for each of those two years.

Selection criteria

The auditor should:

- be a member of a leading Australian, Australasian or international professional organisation in the field of accounting and financial auditing;
- have an extensive knowledge and appreciation of the role of the Auditor-General's Office;
- be able to demonstrate deep-seated experience in the practice of auditing;
- have a general knowledge and understanding of the Victorian public sector's system of financial administration;
- have sufficiently and appropriately skilled, qualified and experienced staff to assist with the audit; and
- be bound by and comply with the proposed terms and conditions and remuneration of the appointment contained in Appendix One of this brief.

The Committee plans to recommend to the Parliament the appointment of the financial auditor during the present session of the Victorian Parliament prior to the end of the 2009/2010 financial year.

Submissions

Submissions should:

- address all the above selection criteria;
- include details of key proposed personnel;
- detail a fixed price total professional service fees (exclusive of GST but inclusive of all other taxes and charges) for audits to be conducted each financial year ending 30 June 2010, 30 June 2011 and 30 June 2012. The total fixed price fees to be quoted for each year are for executing all directions in this tender brief to a required professional high standard of care, including all meeting attendances, 'on-site' and 'off-site' work. Submissions should also state a total upper monetary limit for travel expenses and disbursements such as telephone, printing and photocopying costs that will not be exceeded;
- identify with supporting detail as a component of the total fixed price fees for each year, a reasonable allowance for contingencies which could be experienced during the course of each audit; and
- include an estimated break-up of time by task and team member, a proposed schedule of work, appropriate audit methodologies that will be employed, performance milestones and key outputs for this engagement.

Questions on this tender brief

All questions on this tender brief must be submitted in writing by 4:00pm Australian Eastern Standard Time (AEST), Thursday, 15 April 2010, to:

paec@parliament.vic.gov.au

No further questions will be accepted beyond 4:00pm AEST, Thursday, 15 April 2010.

For probity reasons, no verbal discussions with prospective tenderers will be entered into by the Committee, its members or its Secretariat staff.

Answers to all written questions in relation to this tender will be posted on the Committee's website for public access on:

http://www.parliament.vic.gov.au/paec/Audits/AG_performance/tender_QA_2010.html

All tenderers will be notified in writing of the outcome of the tender process. Following this, feedback will be offered to unsuccessful tenderers.

The Committee's recommendation and the Parliament of Victoria's decision will be final.

Ethical Purchasing Policy

For this tender, the Committee adopts the Victorian Government's Ethical Purchasing Policy (EPP). Further information about the Ethical Purchasing Policy is detailed in Appendix Two of this Tender Brief and on the Procurement Portal at www.procurement.vic.gov.au

It is a condition of all tendering processes to which the EPP applies that all shortlisted tenderers will be required to complete an Ethical Employment Statement (Appendix Two) in the timeframe specified by the Committee. Tenderers should not submit an Ethical Employment Statement unless and until requested to do so by the Committee.

A tenderer who does not submit an Ethical Employment Statement when required to do so by the Committee will be disqualified from the tendering process.

Once a tenderer is offered a contract to which the EPP applies, it must continue to satisfy the ethical employment standard during the period of the contract. Contract conditions will allow the State to request further ethical employment statements from the tenderer. The contract will also permit the termination of a contract if a tenderer does not satisfy its disclosure obligations or maintain the ethical employment standard during the term of the contract.

Tender delivery details:

Please ensure tender documents are delivered by 4:00pm AEST, Tuesday, 20 April 2010, to the tender box located next to the security desk on the ground floor, 55 St Andrews Place, East Melbourne 3002.

Tenders are to be addressed to:

***Mr Bob Stensholt MP
Chair
Public Accounts and Estimates Committee
Parliament House
Spring Street
East Melbourne Vic 3002***

Tenders close at 4.00pm AEST, Tuesday, 20 April 2010. No time extensions will be granted. Tenders received after this time will be disqualified.

PLEASE CLEARLY MARK THE TENDER AS:

***Confidential
Tender document – Financial Audit
Victorian Auditor-General's Office
c/- PUBLIC ACCOUNTS AND ESTIMATES COMMITTEE***

Appendix One

**TERMS AND CONDITIONS AND REMUNERATION OF
A PERSON APPOINTED BY THE PARLIAMENT OF
VICTORIA PURSUANT TO SECTION 17 OF THE
*AUDIT ACT 1994***

[This Agreement]

Appendix Two (Ethical Employment Response)

Note to tenderers:

Only complete and submit this Appendix Two if you have been expressly requested to do so by the Committee.

Name of the tenderer: Peter Sexton
Name and ABN of the tenderer's associated company: WHK Melbourne, 41 099 415 845
Date of submission of this Appendix Two: 10 May 2010

Ethical Purchasing Policy

For a tendering process to which the Ethical Purchasing Policy applies, shortlisted tenderers are required to complete an Ethical Employment Statement.

The Ethical Purchasing Policy provides that the State will not enter into a contract to which the policy applies with any tenderer that cannot satisfy the ethical employment standard.

The ethical employment standard is the requirement for persons that supply or propose to supply goods and services to the Victorian Government to demonstrate to the reasonable satisfaction of the Committee, and in accordance with the requirements of the Ethical Purchasing Policy, that the relevant contracting or tendering entity meets its obligations to its employees under Applicable Industrial Instruments and Legislation at the time a contract is awarded and continues to meet such obligations during the term of that contract.

Details of Applicable Industrial Instruments and Legislation are set out in the Ethical Purchasing Policy located at www.procurement.vic.gov.au

When notified by the Committee, shortlisted tenderers are required to complete sections 1 to 5 of this Appendix Two within the timeframe specified by the Committee.

The Committee will assess whether a tenderer satisfies the ethical employment standard in accordance with the Process Guidelines for Government Buyers. The assessment will be based on:

- any findings against the tenderer by a court, tribunal, commission or board of a breach of an applicable industrial instrument (award or agreement binding on the tenderer), including a finding of a breach of a non-confidential consent order, in the preceding 24 months;
- any convictions under applicable legislation (detailed in the Ethical Purchasing Policy) in the preceding 24 months;
- any current proceedings or prosecutions in respect of a breach of an applicable industrial instrument or an offence under applicable legislation;
- remedial measures implemented to ensure future compliance with applicable industrial instruments and legislation;
- the seriousness of breaches or offences which are the subject of an adverse finding or conviction;

- the number of adverse findings or convictions;
- whether there is a pattern of continued breaches or convictions (including, for the purposes of determining a pattern of continued breaches only, whether there are any current proceedings or prosecutions before a court, tribunal, commission or board); and
- whether remedial measures are commensurate with the breach or offence and in the reasonable opinion of the Committee, can be reasonably expected to prevent such breach or offence from recurring.

The name of the disqualified tenderer will be placed on a register maintained by the Department of Treasury and Finance (the **Ethical Employment Reference Register**) for a period of 24 months from the date the tenderer is disqualified from the tendering process.

The information in a tenderer's Ethical Employment Statement will be used to assess whether the tenderer satisfies the ethical employment standard. The Committee may request further details about the information provided by the tenderer in this Ethical Employment Statement.

The Committee will not enter into contracts with tenderers who do not satisfy the ethical employment standard. Such tenderers will be disqualified from the tendering process and their names will be placed on the Ethical Employment Reference Register for a period of 24 months from the date the tenderer is disqualified from the tendering process. Victorian Government Departments may access the Ethical Employment Reference Register for the purpose of determining whether the tenderer has not met the ethical employment standard for other tendering processes, ie has not satisfied the standard in the past.

A tenderer whose name is on the Ethical Employment Reference Register will not be excluded from other government business opportunities solely on the basis that its name appears on the register.

The tenderer will be informed if, in the assessment by the Committee, it has failed to satisfy the ethical employment standard before disqualification occurs. The tenderer will have an opportunity to provide additional information at that time.

Definitions

For the purposes of sections 1 to 5 of this Ethical Employment Statement:

Full Details means details of:

- the nature of the breach or offence or alleged breach or offence;
- any conviction recorded or adverse finding made in respect of the breach or offence;
- any penalty or orders imposed by a court, tribunal, commission or board in respect of the breach or offence and the maximum penalty that could have been imposed under the Applicable Industrial Instruments and Legislation;
- the name of the court, tribunal, commission or board, the State or Territory in which the proceeding or prosecution is brought, the date on which the proceeding or prosecution was commenced and the number or description assigned to the proceeding or prosecution by the court, tribunal, commission or board;

- the name of the entity against which the finding or conviction was made or the proceeding or prosecution was initiated; and
- further information about any of the above, if required by the Committee.

Tendering Entity means the legal entity (individual or company) that would (if successful) enter into a contract with the State at the end of the tendering process. Partnerships, unincorporated joint ventures or consortia planning to enter into a contract with the State will need to complete an Ethical Employment Statement for each entity forming part of the bidding team.

1	<i>Provide details of any industrial instrument (award or agreement) that specifically applies to the employees of the Tendering Entity and is binding on it (applicable industrial instruments).</i>	None
2	<i>Provide Full Details of any findings against the Tendering Entity by a court, tribunal, commission or board of a breach of an applicable industrial instrument, including a finding of a breach in a non-confidential consent order, in the preceding 24 months.</i>	None
3	<p><i>Provide Full Details of any convictions under the following legislation (applicable legislation) in the preceding 24 months:</i></p> <ul style="list-style-type: none"> • <i>Dangerous Goods Act 1985 (Vic)</i> • <i>Equipment (Public Safety) Act 1994 (Vic)</i> • <i>Federal Awards (Uniform System) Act 2003 (Vic)</i> • <i>Long Service Leave Act 1992 (Vic)</i> • <i>Occupational Health and Safety Act 2004 (Vic)</i> • <i>Outworkers (Improved Protection) Act 2003 (Vic)</i> • <i>Workplace Relations Act 1996 (Cth)</i> • <i>Fair Work Act 2009 (Cth)</i> • <i>Any other legislation designated by the Victorian Government as applicable legislation under the Ethical Purchasing Policy from time to time.</i> 	I am not aware of any convictions under these Acts or any legislation

4	<i>Provide Full Details of any current proceedings or prosecutions in respect of a breach of an applicable industrial instrument or an offence under applicable legislation.</i>	None
5	<i>Provide details of remedial measures implemented to ensure future compliance with applicable industrial instruments and applicable legislation.</i>	None

Annexure B

Tender Documentation submitted by the Service Provider dated 20 April 2010.

(Commercial-in-confidence)

Annexure C

Deed Poll of Confidentiality

By [NAME] of [address] (“the Confidant”)

in favour of

The PARLIAMENT OF VICTORIA (“the Purchaser”)

Date:

Recitals

- A. The Purchaser has entered into an Agreement with [*insert name of Service Provider*] (“the Service Provider”) for the provision of Financial Auditing Services dated [*blank*] (“the Agreement”) for the supply of professional services as outlined in the Tender Brief (**Annexure A**).
- B. In order to supply the services under the Agreement, the Service Provider and the Confidant have entered into a subcontract, employment or agency arrangement (“the Contract”).
- C. In performance of the Contract, information of a secret and confidential nature concerning the Parliament of Victoria and the State of Victoria in the possession of the Victorian Auditor-General’s Office may be inadvertently provided to or otherwise become known to the Confidant. The Confidant agrees to keep information confidential pursuant to the following terms and conditions.

Operative Provisions

1. Interpretation

1.1 For the purposes of this Deed –

“**Information**” includes anything capable of being known and communicated obtained or coming into the possession of the Confidant in performance the Contract and includes –

- (a) each and every item, part and component of such information; and
- (b) any copy (in whatever form) of such information, including any form in which the information is recorded or stored, whether or not it is the same form in which it was first conveyed to or came into the possession of the Confidant.

“Purchaser’s Representative” is the Public Accounts and Estimates Committee of the Parliament of Victoria.

2. When Deed does not apply

2.1 This Deed does not apply to Information –

- (a) that, when it is provided to or obtained by the Confidant, is in the public domain through having been published or otherwise made available to the public;
- (b) that becomes available to the public after the date on which it is provided to the Confidant, other than through a breach by the Confidant of [*his/her*] obligations, whether those obligations arise under this Deed, at common law, or in any other way;
- (c) that was known to the Confidant as at the date of this Deed and was not derived either directly or indirectly from the State or any instrumentality of the State;
- (d) that is required to be disclosed by an Order of a court of competent jurisdiction;
- (e) that is disclosed pursuant to the requirements of a law; or
- (f) that is disclosed for the purposes of any dispute or difference between the Confidant and the Purchaser’s Representative for the purpose of obtaining advice from professional advisers in connection with any such dispute or difference.

3. Duty to project information

3.1 The Confidant will protect all Information from unauthorised access or use, and will take and enforce proper and adequate precautions at all times to preserve the secrecy and the confidentiality of all information.

4. Limitations on distribution, disclosure and use

4.1 Except as otherwise provided in this Deed or to the extent permitted under **clause 23.1** of the Agreement, the Confidant will not –

- (a) distribute Information or cause or allow it to be available to any person;
- (b) disclose to any person that she has the Information or the terms on which she has access to or has been supplied with Information; or
- (c) use the Information for her own purposes, or for the purposes of any other person.

4.2 In particular, the Confidant will not represent to any other person that [*he/she*] is able to use Information for the benefit of that person, or enter into a contract by which [*he/she*] agrees to use Information for the benefit of another person.

4.3 The Confidant will not –

- (a) copy or reproduce;
- (b) make available any reproductions of; or
- (c) store, to enable reproduction of (in any form) –

any document, or other record which contains, is based on or uses, Information, unless [he/she] is expressly permitted to do so by the Purchaser's Representative.

5. Limitations on retention

5.1 Upon request by the Purchaser's Representative, the Confidant will immediately –

- (a) deliver to the State all Information in [his/her] possession that is capable of being delivered; and
- (b) delete, erase or otherwise destroy all information contained in computer memory, magnetic, optical, laser, electronic, or other media in [his/her] possession or control which is not capable of delivery to the State and certify by way of statutory declaration to the State that such Information has been deleted, erased or otherwise destroyed.

5.2 Without in any way limiting the scope and meaning of sub-clause 5.1 and the words and expression in that sub-clause, and for the purposes only of clarification, the Confidant –

- (a) will not retain in any form any note, report, summary, memorandum or other document containing or referring to Information; and
- (b) will institute and use a system to enable all copies, notes, reports, summaries, memoranda and other documents containing, pertaining to or referring to Information to be traced and returned.

6. Non Derogation

6.1 The provisions of this Deed shall not derogate from but shall be in addition to the obligations of the Confidant at law or in equity.

7. Damages not Sufficient

7.1 If there is any conduct or threatened conduct which is or will be a breach of this Deed, the Confidant acknowledges that damages may be inadequate compensation for such a breach and the Purchaser shall be entitled to apply to any court of competent jurisdiction for interim and permanent injunctive relief restraining the Confidant from committing any breach or threatened breach of this Deed without showing or proving any actual damage sustained by the Purchaser, which rights and remedies shall be cumulative and in addition to any other rights or remedies to which the Purchaser may be entitled at law or in equity.

8. No Waiver

8.1 The Confidant acknowledges that no failure on the part of the Purchaser to enforce at any time any of the provisions of this Deed shall be construed as a waiver of any of the rights of the Parliament of Victoria under this Deed nor shall any failure affect the validity of any of the provisions of this deed or otherwise prejudice the State in any manner whatsoever.

9. Duration of Deed

9.1 The terms, undertakings and agreements in this Deed commence on the date of this Deed and continue so long as they are relevant indefinitely during and after the completion of the Services.

10. Deed binds successors in law

10.1 The provisions of this Deed bind, to the fullest extent permitted by law, every executor, administrator, successor and assignee of the Confidant.

11. Severability

11.1 If any provision of this Deed is held invalid, unenforceable or illegal for any reason, this Deed shall remain otherwise in full force apart from such provision which shall be deemed deleted.

12. Governing law

12.1 This Deed is governed by the laws of the State of Victoria.

12.2 The Confidant irrevocably submits to the non-exclusive jurisdiction of the courts of the State of Victoria.

