Funding Deed Analysis Report

Comparison between the FACS Funding Deed (Funding Deed) and NSW Agreement for Funding of Services and Schedule (the Agreement)

Please find below a table of comparison of the FACS Funding Deed and NSW Agreement for Funding of Services ('the Agreement'). This analysis is from documents ACWA provided relating to the Fund Deed and the NSW Agreement, which is based on the document provided on the Procure Point NSW Government website, this is a generic document that is not tailored towards a particular Service Provider.

The most significant points to note in the comparison are as follows:

- **Personnel –** under the Agreement, there is a greater onus on the Service Provider to comply with the *Child Protection (Working with Children) Act 2010* (NSW) as well as ensure adequate checks are carried out on prospective personnel (employee or volunteer). There is an emphasis on the need to ensure that a Service Provider does not adversely affect the reputation of the Agency which includes the behaviour and conduct of the Service Provider's personnel.

- **Payment –** the Agreement, subject to the Schedule, requires the Service Provider to provide and keep up to date a budget. The Agreement also provides a provision for the immediate suspension of funds and services. A significant difference in the Agreement is the clause in regard to additional contributions, which provides an obligation on the Service Provider to notify the Agency within 10 business days of entering into any arrangement or agreement under which the Service Provider receives or is entitled to receive any additional monetary or in-kind contributions for the Service they provide, that is not stated in the Schedule. The Agency then has the right to withhold or reduce the amount of the funds payable to the Service Provider under the Agreement by the additional amount the Service Provider receives.

- **Asset Management –** the Funding Deed provides that the assets are the property of FACS and are therefore held in trust by the Service Provider. The Agreement provides that the Service Provider is the legal and beneficial owner of the assets. The Agreement states that a register must be kept for all assets, no matter what the value.

- **Termination** – there is a difference in the notice periods for termination without fault/ for convenience. The Funding Deed provides that 90 days' notice must be given to terminate the Deed, whereas, the Agreement requires at least 6 months' notice. There is also a provision in the Agreement to terminate with 45 days' notice where there are changes to the NSW or Commonwealth Government budget.

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- The Agreement is silent on whether or not PLAs and other documents will continue to apply if the Agreement is terminated, though we suspect the intent is that if the Agreement has been terminated any PLAs in force will also be terminated.

- **Intellectual Property –** the Agreement includes a provision on the impact of cultural and intellectual property rights on Aboriginal and Torres Strait Islander Persons as well as moral rights.

- **Audits –** the Agreement does not specifically provide obligations on the Service Provider in regard to audits apart from their obligations in regard to record keeping.

- **Government Information Sharing –** the Agreement authorises the Agency to pass on information concerning the Service Provider to other NSW Government Agencies including information or reports of unsatisfactory performances by the Service Provider

- **Insurance –** the Agreement specifies that an insurance policy should be taken out for a period of at least 6 years after the termination of the contract.

- **Notices –** there is a minor difference between the notice periods in the Funding Deed and the Agreement.

- **Survival –** the Agreement has a significant amount of clauses that survive the termination of the Agreement compared to the Funding Deed including the survival of the conflict of interest clause and publicity clause, which may be unduly onerous.

It is noteworthy that the Agreement may be amended (i.e. the Procure Point site confirms this) and members may wish to amend the Agreement due to the onerous and restrictive nature of some of the clauses.

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Table of Comparison

Introduction:

From 1 August 2017 the Procurement Board requires all government agencies to use the Agreement when procuring human services from Non-Government Organisations (NGOs). If an existing contract is in place, the new Agreement will not take place until the previous contract expires.

Agencies can amend the Agreement to ensure it is fit for purpose. Amendments will need to be approved by the agency's General Counsel and Chief Procurement Officer and reported to the Human Services category management working group annually.

The Service Provider must ensure that they comply with the codes, policies and guidelines and standards listed in the contract. This also includes the Code of Behaviour for the Protection of Children and other Vulnerable People.

The comparison has been prepared with the intention that the NSW Agreement for Funding of Services will eventually replace the Funding Deed.

Issue	FACS Funding Deed	NSW Agreement for Funding of Services ('Agreement') and Schedule (1 May 2017)
Extension Period	According to clause 1.2, the Funding Deed will continue on a month to month basis and FACS must give a minimum of 60 days' written notice of the expiry of the extension period.	According to clause 3.2, the extension period can be extended in accordance with the Schedule by notifying the Service Provider in writing no later than 30 days prior to the expiry of the initial term.
Performance and Outcome Measures	According to clause 5.2, the Service Provider must meet or exceed the performance measures for Services, specified in the Program Level Agreement ('PLA'). A failure by the Service Provider to comply with the clause regarding managing performance, may constitute a breach of the Deed, in conjunction with clause 19.1(a)(iii), where a Service Provider breaches a provision of the Deed and does not remedy the breach in accordance with the notice period.	According to clause 5.3, the Service Provider must meet or exceed the performance and outcomes measures; including putting in place systems to record and measure your performance against the measures. The requirements will be outlined in the Schedule and be specific to the individual Service Provider. The requirements will include the time period, how the performance will be assessed and how the Service Provider must report on its provision of the services.

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Complaints	According to clause 3.1(f)(iv), clients have the right to access an effective complaints mechanism which the Service Provider must provide.	According to clause 5.4, where the Services are provided to members of the public, the Service Provide must: • Have a complaints process in place to deal with complaints; and • Maintain and keep updated a complaints register, that contains accurate details on all complaints received; and • Implement a document outlining the Service Provider's procedure for dealing with complaints, which should be accessible to any person on request.
Personnel	Clause 3.2 refers to personnel. Similar accountabilities exist between the two documents in regard to personnel in regard to the following responsibilities: • The Service Provider must ensure that all personnel are properly authorised, accredited, trained and experienced to provide the Services; and • If the Service Provider is an employer for the purposes of section 9 of the *Child Protection (Working with Children) Act 2012* (NSW) (CPWC Act); the Service Provider must ensure all mandatory employment screenings e.g. the working for children check; and • The Service Provider must ensure that a barred or undesirable person does not undertake child-related work;	The Agreement sets out more extensive requirements in regard to personnel. Clause 6.1 provides that the Service Provider has the sole responsibility for all personnel employed or otherwise supported in relation to the Agreement as well as; the payment of all wages, entitlements, superannuation, payroll and any other tax and associated costs applicable to the personnel. Clause 6.1(c) requires the Service Provider to not only ensure that the prospective personnel are not prohibited or disqualified under any law from being employed, but to ensure any probity check including a national criminal record check is undertaken to ensure the suitability of the personnel as well as provide the Agency with evidence to their satisfaction of the Service Provider's compliance with the above.

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	and • the Agency/ FACS can object to the Service Provider's personnel.	According to clause 6.1(d), the Service Provider must also have appropriate risk assessment procedures and risk plans in place to ensure compliance with the CPWC Act. Clauses 6.1(e) and (f) further provide that strict adherence to the CPWC Act must be guaranteed at all times and that all personnel must also be aware of and comply with the statutory obligations. Service Providers may be asked to produce information for the Agency to assess the Service Provider's compliance with the CPWC Act at any time. The Service Provider must also ensure that it does not engage in any misconduct that may have an adverse effect on the reputation of the Agency and cause a subsequent inquiry, investigations, mediation etc. Clause 6.2 allows the Agency to not only object to personnel but may require the immediate removal of personnel, where they believe they present an unacceptable risk to any person.
Payment	Clause 6 of the Funding Deed refers to payment, expenditure and management of funds. The basic terms for payment for the two documents are similar, however, the Agreement's clause in regard to payment is substantially lengthier. **Withholding and return of funds** Clause 8 of the Funding Deed refers to the withholding and return of funds. It provides that FACS may withhold funds or partial funds, required to be paid under the PLA if:	Clause 9 of the Agreement refers to payment, use and management of the funds. The clause must be read in conjunction with the Schedule. As details specific to a Service Provider have not been inserted into the Schedule, further obligations may need to be adhered to, however, these further obligations cannot be analysed without further information. Clause 9.2 refers to a budget that, if stated in the Schedule, the Service Provider must provide and keep up to date.

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	• FACS forms the opinion that the funds are not reasonably required by the Service Provider under the PLA because of unspent or uncommitted funds; or • the Service Provider has not delivered the services to the reasonable satisfaction of FACS; or • the Service Provider has not satisfied the financial reporting requirements outlined in Clause. Funds will be withheld until the event causing the withholding of the funds has been remedied. Irrespective of whether FACS is withholding funds, the Service Provider must continue to fulfil its obligations under the PLA.	Clause 9.3 restricts a Service Provider from using the funds without prior written consent from the Agency for the use of the funds for any other reason than: • To provide services, or procure any assets required for the services stated in the schedule; and • In accordance with the budget and any budget conditions as stated in the Schedule; and • In accordance with any time periods stated in the Schedule for the expenditure of the funds. Clause 9.7 deals with increases in the funds, and provides that the Agency can at their discretion increase the amount of the funds or make an indexation increase of the funds, from time to time without a variation to the Agreement. Clause 9.8 discusses additional contributions, and provides an obligation on the Service Provider to notify the Agency within 10 business days of entering into any arrangement or agreement under which the Service Provider receives or is entitled to receive any additional monetary or in-kind contributions for the Service they provide, that is not stated in the Schedule. The Agency then has the right to withhold or reduce the amount of the funds payable to the Service Provider under the Agreement by the additional amount the Service Provider receives. **Suspension of funds and services** In accordance with clause 12 of the Agreement, the Agency may

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		immediately suspend the whole or part of the payment of the funds by giving written notice if the Service Provider: • has failed or in the Agency's reasonable opinion will fail to provide the services in accordance with the Agreement; or • has spent the funds other than in accordance with the Agreement; or • services are affected by an intervening event; or • is suspected to be not financially stable. If the Service Provider does not address to the Agency's reasonable satisfaction the reasons contained in the notice within 20 business days of receipt of the notice, the Agency may terminate the Agreement.
GST	The Funding Deed provides a brief outline regarding GST in clause 10. It outlines the following: • Any amount referred to in the Deed or PLA is usually exclusive of GST; and • If GST is imposed on a supply in connection with the Deed or PLA, consideration will be increased by the rate at which the GST is imposed. The additional consideration is payable at the same time as the consideration; and • If one of the parties is entitled to be reimbursed for an expense or outgoing, the amount of reimbursement will be the net of any Input Tax Credit which may be claimed	The Agreement provides further information regarding GST in clause 10. Whilst the clauses in the document are relatively similar, the Agreement provides further obligations including: • Clause 10.4, the supplier agrees to deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment where GST is payable; furthermore, the recipient can withhold payment of the amount payable until the supplier provides a tax invoice. • An adjustment event is provided for in clause 10.5. • Clauses 10.6 and 10.7 deal with paying and reimbursing expenses as well as issuing

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	by the party being reimbursed; and • FACS will issue a Recipient Created Tax Invoice (RCTI) to the Service Provider within 28 days of each payment.	RCTIs. • Clause 10.8, concerns each party acknowledging that it is registered for GST and will inform the other party if the registration ceases.
Asset Management	Clause 9 of the Deed provides extensive obligations in regard to assets. **Ownership** The Service Provider agrees that any assets purchased under the Funding Deed or PLA are the property of FACS and are held in trust by the Service Provider. Furthermore, the Service Provider must: • Maintain appropriate insurance in respect of any assets; • Maintain a register of assets that are over the value of $5,000; and • Provide a copy of the register to FACS within four months of the end of each Financial Year during the term of the Deed; and • obtain prior written approval from FACS before selling or otherwise disposing of the assets.	Clause 11 of the Agreement provides further obligations for the Service Provider regarding assets. **Ownership** Unless otherwise stated in an individual Service Provider's Schedule, the Service Provider will be the legal and beneficial owner of the assets purchased with the funds. The Agreement provides that the Service Provider must: • not use the funds to procure assets unless those assets have been stated in the budget or the Schedule and the Agency has given prior written approval; and • ensure that the Service Provider receives value for money in procuring the assets; and • be responsible for maintaining any necessary registration and licensing of the assets; and • use the assets solely for the purpose of providing the services for which the asset has been acquired; and • record all assets in an asset register; and • provide a copy of the register

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		to the Agency upon request.
Termination	Clause 19 contains provisions for the termination of the Funding Deed. **Termination for cause** The termination for cause clause in both the Funding Deed and Agreement cover the same issues. **Termination for convenience** FACS may terminate the Deed or any PLA on provision of 90 days' notice, in writing. FACS will not be liable for any consequential loss suffered by the Service Provider as a result of termination. The Service Provider may also terminate the Deed on provision of 90 days' notice, in writing. **Consequences of termination** If FACS terminates the Deed in accordance with this termination clause, any PLA in force and any Service Delivery Schedule under the PLA will also terminate. If FACS terminates a PLA and any Service Delivery Schedule, the Deed and any remaining PLAs will continue to apply. If the Service Provider terminates the Deed, any PLA and any Service Delivery Schedule will also terminate. Any sub-contracts made under the Deed/ PLA will also be terminated.	Clause 13 contains provisions for the termination and expiry of the Agreement. **Termination for cause** The termination for cause clause in both the Funding Deed and Agreement cover the same issues. The Agency can terminate the Agreement with immediate effect under a termination for cause. **Termination without fault** The Agency may terminate the Agreement at any time by giving the Service Provider a minimum of 45 days' notice where they are required to cease providing funds because of changes to the State or Commonwealth Government. Either party may terminate the Agreement at any time and for any reason by giving the other party at least 6 months' written notice. The terminating party agrees to pay any reasonable costs directly and necessarily incurred by the other party as a result of the termination, dependent on the terminating party's reasonable satisfaction that the costs are justified. **Consequences of expiry or termination** On expiry of the Agreement, the Service Provider may be directed to deliver to the Agency or destroy all confidential information and Agreement material and records. The Agency's liability to the Service

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		Provider is limited to the amount of unpaid funds remaining at the date of termination. On expiry or termination, the Service Provider agrees to: • repay any unspent funds; • deal with/ dispose of any assets; • within 20 business days, provide the Agency with any outstanding reports or data due under the Agreement; and • provide the Agency with all reasonable assistance to ensure the orderly transition of the services and assets to the Agency. If the Service Provider terminates, the Service Provider will provide this assistance at their own cost.
Obligations	In accordance with clause 3.1 (g) the Service Provider must notify FACS immediately in writing if: • services for a particular program have not been operating for a period of 5 consecutive business days or more; or • a service outlet for a program may not be accessible to clients for 5 or more consecutive days; or • services required for a particular program have ceased to operate.	Clause 14 of the Agreement refers to intervening events which are defined as *'a circumstance beyond the Service Provider's reasonable control including for e.g. an unavoidable accident or an act of terrorism'.* The Service Provider must notify the Agency if they are or reasonably believe they will be prevented from performing their obligations under the Agreement. The Agency may terminate the Agreement if the Service Provider cannot provide the services for more than 2 calendar months due to the intervening event. The Agency can also arrange for another provider for the services whilst an intervening event is taking place, without being liable to the Service Provider.

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IP/ Records	Clause 11 covers records and intellectual property in the Deed. **Records** The onus on the Service Provider in regard to records and establishing and maintaining clear operational record for each program is similar to that in the Agreement. **Intellectual Property** The Service Provider has the rights and title to the intellectual property including the program material and any other material created by the Service Provider, however, FACS is given a very broad right to use the Service Provider's (and any third party's) intellectual property to use, copy, modify and exploit. This includes the material and program material. Intellectual property includes the material created for the service including: • names or logos of programs or services; • publications and images; • training materials; • domain name, website design and content; • computer applications, programs, or databases developed; and • reports.	In regard to clauses 15.2 and 15.3 of the Agreement, the Service Provider agrees to give the Agency and any persons nominated by the Agency to access the Service Provider's premises where assets and records are held and; access, monitor, review, audit and investigate the Service Provider's records and performance. The Service Provider agrees to cooperate, assist and participate with the Agency's requests and investigations. **Intellectual Property** Clause 16 refers to intellectual property and provides much the same obligations as the Funding Deed with the following exceptions: • if the services in the Agreement impact on the cultural and intellectual property rights of Aboriginal or Torres Strait Islander Persons, the parties recognise the need to respect and protect those rights. • The Service Provider ensures that it is not infringing any person's intellectual property rights or moral rights and the Service Provider agrees that they hold all the necessary rights and consents to allow the Agency to exercise their rights to use the intellectual property. • The Service Provider agrees to obtain all necessary consents in regard to a person's moral rights.
Documents, Records, Reports and Audits	Clause 7 of the Funding Deed refers to financial reporting and the requirements on the Service Provider	Clause 19 of the Agreement provides additional obligations regarding the submission of documents as well as

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	to prepare and provide a copy of an audited financial statement, if required to do so by law. If the Service Provider is not required by law to prepare an audited financial statement FACS requires the Service Provider to provide them with financial statements etc. within 4 months of the end of the Financial Year for the duration of the term. According to clauses 7.1 (e) and 7.2, the Service Provider must provide certificates in relation to the expenditure of all funds under each PLA as well as an income and expenditure statement (dependent on the value of the PLA).	record keeping reports and Government information sharing. The service provider: • agrees to keep full and accurate records for the term and 7 years after the expiry of the Agreement including records of all accounting and financial transactions. • agrees to maintain sound records management practice and dispose of records no longer required. • agrees to provide the Agency with all reports and information from time to time and in accordance with the Schedule. • agrees to provide all applicable policies and guidelines. • agrees to transfer all intellectual property rights in any reports and must not publish or provide reports to any third parties without the Agency's written consent. **Government information sharing** The Service Provider: • Authorises the Agency to make information concerning the Service Provider available to other NSW Government agencies. • Acknowledges that information about them, including reports of unsatisfactory performance may be taken into account by NSW Government agencies considering whether to offer the Service Provider future work opportunities.

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		• Releases and indemnifies the State of NSW from and against any claim of defamation arising from the communications.
Insurance and Indemnity	**Insurance** According to clause 17.1 of the Funding Deed, the Service Provider must have current and adequate insurance to cover the activities funded under the Deed and PLA. There is no need to take out insurance for a period of at least 6 years after the termination of the Deed.	**Insurance** According to clause 20.1 of the Agreement, the Service Provider agrees to take out and maintain adequate insurance policies with reputable insurers, for the term period specified in the Schedule as well as for a period at least 6 years after the termination of the contract. **Indemnity** The clauses in the documents are similar, the Agreement also provides that the Service Provider must immediately notify the Agency when they become aware of any claim or likely claim relating to the Agreement.
Publicity	Clause 12 of the Funding Deed contains relatively similar obligations to the Agreement.	According to clause 21 of the Agreement, the Service Provider acknowledges that the NSW Government may publicise the awarding of funds at any time after they have awarded them and can include, for e.g., the name of the Service Provider and the amount of the funds. The Service Provider must also notify the Agency before making any press or other announcements or releases in relation to the Agreement.
Notices	The documents differ in regards to time periods: • Clause 24 of the Funding Deed deems notice has been given 3 business days after posting.	The documents differ in regards to time periods: • Clause 23.2(a)(ii) of the Agreement deems notice has been given 2 business days after posting.

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	• Clause 23.2(b) provides that if notice is delivered or received on a non-business day or after 4pm, it will be deemed to have been given on the next business day.	• Clause 23.2(b) provides that if notice is delivered or received on a non-business day or after 5pm, it will be deemed to have been given at 9 am on the next business day.
Assignment	According to clause 25.4 of the Funding Deed, neither party can assign their rights under the Deed without prior written consent of the other party.	According to clause 24.5 of the Agreement, the Agency may assign their rights, or delegate or novate their rights and obligations without the Service Provider's consent. The Service Provider cannot, however, assign their rights or claim to novate their rights and obligations without the Agency's prior written consent.
Survival after Termination	The following clauses survive and continue to apply after the expiration or termination of the Funding Deed: • Clause 11- records and intellectual property; • Clause 12- publicity; • Clause 14- confidentiality and information security; • Clause 17- insurance; and • Clause 18- indemnity.	The following clauses survive and continue to apply after the expiration or termination of the Agreement: • Clause 7 – conflicts of interest; • Clause 8- notifications; • Clause 9.6 – unspent funds at the end of the term; • Clause 11- assets; • Clause 13- termination and expiry; • Clause 15- review and other rights; • Clause 16- intellectual property rights; • Clause 17- confidential, sensitive and cultural information; • Clause 18- privacy; • Clause 19- documents, records and reports; • Clause 20- insurance and indemnity; • Clause 21- acknowledgement and publicity;

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		• Clause 22- dispute resolution; and • Clause 24.6 – survival.

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