

Memorandum of Understanding

Note – this is a Head MOU. It sets out the process for entering into and monitoring Subsidiary Arrangements

MOU Details	
MOU reference No.:	ATO: 12.014 ACNC: N/A
ATO Commissioner:	The Commissioner of Taxation.
ATO:	The Australian Taxation Office (ABN 51 824 753 556).
ATO Commissioner's MOU Manager:	Name: Jason Lucchese Position: Assistant Commissioner, Corporate Relations GPO Box 9977 Postal address: Canberra City 2608 Telephone: 02 6216 2471 Facsimile: 02 6252 0676 E-mail address: jason.lucchese@ato.gov.au
ACNC Commissioner	The Australian Charities and Not-for-profits Commissioner
ACNC:	Australian Charities and Not-for-profits Commission (ABN 54 488 464 865)
ACNC Jurisdiction:	Commonwealth of Australia
ACNC secrecy laws:	as set out in Part 7-1 of the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth)
ACNC Commissioner's MOU Manager:	Name: David Locke Position: Assistant Commissioner, Charity Services Postal address: Collins Square, level 1 747 Collins Street, DOCKLANDS VIC 3008 Telephone: 03 8601 9465 Facsimile: 03 993 79952 E-mail address: david.locke@acnc.gov.au
This MOU replaces:	N/A
Termination notice period:	180 days
Subsidiary Arrangements:	Are automatically terminated by the termination of this MOU
Additional Management Committee members:	In addition to the MOU Managers: <ul style="list-style-type: none"> • for the ATO Commissioner, and • for the ACNC Commissioner
Committee meetings:	To be held annually and as required

Accepted and agreed

Michael D'Ascenzo AO
Commissioner of Taxation
Australian Taxation Office

} Signature Michael D'Ascenzo
 } Date 12/12/12

Susan Pascoe AM
Commissioner
Australian Charities and Not-
for-profits Commission

} Signature Susan Pascoe
 } Date 12/12/12

Memorandum of Understanding

1. Parties

This Memorandum of Understanding (**MOU**) is between:

- the Commissioner of Taxation, including in his capacity as Registrar of the Australian Business Register, and
- the Australian Charities and Not-for-profits Commissioner.

2. Purpose

This MOU sets out the process for entering into Subsidiary Arrangements. A **Subsidiary Arrangement** is an arrangement between ATO and the ACNC for services, exchanges of information or other activities.

3. Existing arrangements between the parties

This MOU revokes and replaces the existing arrangements (if any) identified in the MOU Details.

4. This MOU includes Common Provisions

This MOU includes the **Common Provisions** set out in Part 1 of the Schedule (on the basis that a reference in those provisions to an 'Arrangement' is a reference to this MOU).

5. Duration of this MOU

This MOU commences on the date it's signed by the last party to sign it and continues, unless terminated:

- by the parties at any time by mutual agreement, or
- by either party giving the other a notice of not less than the termination notice period identified in the MOU Details.

The termination of this MOU affects Subsidiary Arrangements in the way identified in the MOU Details.

6. Proposing a Subsidiary Arrangement

Either party may give the other a written proposal for a Subsidiary Arrangement. The proposal must set out:

- the information exchanges and/or other activities to be carried out under that Subsidiary Arrangement,
- the parties' MOU Managers for that Subsidiary Arrangement,
- the duration of that Subsidiary Arrangement,
- monitoring, evaluation and reporting requirements for that Subsidiary Arrangement, and
- all other terms proposed for that Subsidiary Arrangement (other than Common Provisions).

Each proposal for a Subsidiary Arrangement is to be cooperatively developed and negotiated by the parties in good faith, and has no status until both parties agree in writing.

7. Subsidiary Arrangements include Common Provisions

Each Subsidiary Arrangement includes the following **Common Provisions** (on the basis that a reference in those provisions to an 'Arrangement' is a reference to that Subsidiary Arrangement):

- The administrative provisions in Part 1 of the Schedule.
- The operative provisions in Part 2 of the Schedule.
- If the Subsidiary Arrangement involves data exchanges – the data exchange provisions in Part 3 of the Schedule.
- If the Subsidiary Arrangement involves other activities – the activity provisions in Part 4 of the Schedule.
- If the Subsidiary Arrangement involves payments being made – the payment provisions in Part 5 of the Schedule.

8. Termination of Subsidiary Arrangements

The termination or expiry of a Subsidiary Arrangement will not affect:

- this MOU, or
- any other Subsidiary Arrangement (unless that other Subsidiary Arrangement states otherwise).

9. MOU Managers

A party's **MOU Manager** is the person identified as such in the MOU Details, or such other person (or person in such other position) as that party otherwise notifies the other party from time to time.

10. Management Committee

The Management Committee consists of the parties' MOU Managers and – if the MOU Details indicates additional Management Committee members for the parties – those additional members when appointed.

Where the MOU Details indicate additional Management Committee members for a party, that party's MOU Manager can (by notice at any time) appoint, remove and replace some or all of those additional members.

11. Role of the Management Committee

The Management Committee is to:

- oversee the strategic operation of the relationship between the parties,
- monitor and evaluate the operation and progress of this MOU and Subsidiary Arrangements,
- provide brief annual reports on the operation and progress of this MOU and Subsidiary Arrangements (including their achievements and any outstanding issues) to their Commissioner.

12. Management Committee meetings

The Management Committee is to hold meetings at the frequency indicated in the MOU Details. Either party's MOU Manager can call a meeting by giving reasonable notice to the other. A meeting may be held using any technology consented to by the Management Committee. The consent may be a standing one.

At Management Committee meetings:

- a member can be represented by a nominee,
- the members (and nominees) present at that meeting (or part of it) are to ensure one of their number who is willing to act chairs that meeting (or that part of it),
- the chair is to ensure that minutes of the meeting are taken, and
- the chair may invite other persons to attend the meeting or part of it.

Schedule – Common Provisions

Part 1 – administrative provisions

c1. Status of this Arrangement

This Arrangement does not create legally enforceable obligations between the parties.

c2. Interpretation of this Arrangement

In this Arrangement, unless the contrary intention appears:

- a schedule, annexure or other attachment to this Arrangement forms part of this Arrangement,
- the singular includes the plural and vice versa, and each gender includes the other genders, and
- a reference to a 'person' includes a partnership or body whether incorporated or not.

c3. Commencement of this MOU

This Arrangement commences on the date it's signed by the last party to sign it.

c4. Dispute resolution

The parties must attempt to resolve any dispute concerning this Arrangement by negotiations at an operational level. However, if those negotiations fail to resolve that dispute:

- either party may give the other a notice setting out specific details of that dispute, and reporting the failure of negotiations to resolve it, and
- if that dispute is not resolved through negotiation between the MOU Managers, that dispute is to be referred upward, through the parties' equivalent management levels, until resolved.

Each party will bear its own costs in complying with this clause and will, to the extent possible, continue to perform its obligations under this Arrangement pending resolution of the dispute.

c5. Notices

Notices under this Arrangement must be in writing, marked for the attention of the recipient's MOU Manager, and sent to that MOU Manager's address by hand delivery, ordinary or registered pre-paid post, or facsimile or e-mail transmission (but if transmitted electronically, a hard copy must also be sent by pre-paid post within 1 business day), and will be taken to be received by the recipient:

- if sent by hand delivery or registered pre-paid post – on the date it is delivered,
- if sent by ordinary pre-paid post – 3 business days after the date of posting, or
- if sent by electronically – on the business day next following the day on which the transmission was sent in its entirety to the recipient's facsimile machine or email system (as the case may be).

A notice that is given by a party may be signed by that party's MOU Manager or other authorised officer.

c6. Variation of Arrangement

Either party may propose a variation of this Arrangement by giving the other a notice setting out details of the proposal. Unless otherwise indicated, this Arrangement can only be varied by agreement of the parties in writing.

A variation to this Arrangement comes into effect on the date it is signed by the last party to sign it.

Part 2 – operative provisions

c7. Mutual assistance

The parties will be open, honest, cooperative and responsive to each other, respecting each other's functions and roles, and providing each other with positive assistance whenever possible.

c8. Use and release of information

Each party must comply with all laws that govern its use and release of information, including under:

- the ACNC secrecy laws as set out in Part 7-1 of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth),
- the Taxation Laws – the *A New Tax System (Australian Business Number) Act 1999*, the *Income Tax Assessment Act 1936*, the *Taxation Administration Act 1953* and other Acts of which the Commissioner has general administration, and
- the *Privacy Act 1988*.
- The *Freedom of Information Act 1982* (Cth)

c9. Privacy complaints

If a party receives a complaint alleging an interference with the privacy of an individual by the other party:

- the party receiving that complaint will immediately notify the other of the nature of that complaint and such details of that complaint as are necessary to minimise any (or further) interference, and
- each party is to keep the other informed as to the progress of that complaint as it relates to the other's actions in connection with that allegation of interference.

If the Privacy Commissioner directs a party to take particular action concerning the handling of personal information, the other party will co-operate with any reasonable request or direction that may result.

c10. Confidentiality

A party may only disclose confidential information of the other party if that disclosure doesn't breach any law (including the *Privacy Act 1988*) and is made:

- to its responsible Minister or in response to requests for information from Parliamentary committees or inquiries,
- with the prior written approval of the other party (and provided it complies with any terms and conditions imposed as part of that approval by that other party), or
- as required by applicable government direction, policy or law.

Confidential Information of a party means information relating to the business, affairs or clients of that party which is confidential in nature and the other knows (or should reasonably know) is confidential, but excluding information which becomes public knowledge otherwise than through the other party's fault or negligence.

In the context of this agreement use of the term 'Confidential' does not refer to information classified as CONFIDENTIAL under the Protective Security Policy Framework.

c11. Intellectual property

As between the parties, the intellectual property in material brought into existence by or on behalf of the parties in connection with this Arrangement will be:

- owned by (and held by the party primarily responsible for bringing it into existence as custodian for) the Commonwealth, and
- managed (as to licensing, registration and other matters associated with its protection) in accordance with Commonwealth policy and otherwise as agreed between the parties.

Intellectual property means all rights and interests arising from intellectual activity in the scientific, literary, artistic and industrial fields, including those in the nature of copyright, patents, designs, trade and service marks, and trade and business names, whatever they are called and wherever and however they arise.

c12. Part 2 obligations on termination or expiry

Clauses c8 to c11 (inclusive) survive the termination or expiry of this Arrangement.

Part 3 – data exchange provisions

c13. Responsibilities in relation to data

The information held by a party relating to its clients and other third persons (its **data**) may not be accurate, up-to-date, complete or error-free. However, each party is responsible for:

- acting in accordance with, and meeting obligations imposed on it by this Arrangement and the law,
- amending its data within a reasonable time of it being formally notified by a person of changes to their details or of any inaccuracy, omission, defect or error in that data relating to them,
- taking reasonable measures to ensure its data is free from malicious computer codes, and
- testing data it receives from the other to ensure data is free from malicious computer codes.

c14. Third party claims relating to data

If a party receives notice of a claim directed against it by a third person concerning any alleged error, defect, inaccuracy or omission in the data provided to, or received from, the other party under this Arrangement:

- the party receiving that notice will be responsible for responding to that claim, and is to notify the other party of that claim within 7 days of that receipt,
- each party is to provide the other with all reasonable assistance in relation to that claim, and
- where that claim is the result of that other party's failure to act in accordance with its responsibilities under this Arrangement or the law, the receiving party may request that other party to reimburse its reasonable costs in responding to and meeting that claim.

c15. Data integrity, confidentiality and protection

Each party will – in relation to the data provided to it by the other party under this Arrangement:

- notify the other party as soon as practicable of any possible error or defect in that data,
- take all reasonable measures to maintain the confidentiality of that data, and ensure that data is only used for the purposes for which that data was provided and is only accessed by persons who have a legitimate 'need-to-know' to perform their duties,
- ensure that data is protected by such security safeguards, as are reasonable in the circumstances, against loss, destruction, or unauthorised access, modification, disclosure, recording or use,
- ensure that data is not transferred, or allowed to be accessed by persons, outside Australia (unless otherwise permitted under this Arrangement) without the other party's prior approval,
- comply with any reasonable request of the other party to deal with that data in a particular way, and
- notify the other party as soon as possible of any actual or potential breach of security or confidentiality which may have compromised the confidentiality or integrity of that data.

c16. Review of data integrity procedures, systems and safeguards

Each party may review the systems, procedures and security safeguards that the other party has in place for maintaining the confidentiality and integrity of its data, but a party seeking to conduct any such review:

- must give the other party reasonable notice of that review, and first consult with that other party as to the scope and criteria of that review,
- must comply with the other party's reasonable requirements and directions while on its premises, and
- must not remove any material from the other party's premises without its prior written approval.

c17. Part 3 obligations on termination or expiry

This Arrangement will, from the date of its termination or expiry, continue to apply to an exchange of information requested, but not effected, before that date (provided the law allows that exchange to be made).

In addition, clauses c13 to c15 (inclusive) survive the termination or expiry of this Arrangement.

Part 4 – activity provisions

c18. Governing laws, codes, agreements and policies

Each party:

- is bound by the terms and conditions of employment set out in the Public Service Act 1999 (Cth), the current enterprise agreement, and all other applicable laws and policies;
- acknowledges that all employment policies made by the ATO Commissioner apply to all ACNC staff unless these are varied by the ATO Commissioner;
- acknowledges that the ACNC Commissioner may make policies that relate to the performance of services by ACNC staff under the Australian Charities and Not-for-profits Act 2012 (Cth);
- acknowledges there may, on occasion, be some overlap between policies that relate to the performance of services by ACNC staff and ATO employment and employment-related policies. This may require modification of ATO employment and employment-related policies, as they apply to ACNC staff, to better assist them in the carrying out of their duties, and
- agrees to raise such issues at the earliest possible opportunity via the MOU Managers, who will actively cooperate to identify options and develop timely solutions to the issues. Agreed outcomes will be documented appropriately.

c19. Conduct of the parties

Each party must:

- carry out the functions and responsibilities allocated to it by this Arrangement in good faith,
- mutually assist the other party to facilitate the activities the subject of this Arrangement,
- ensure that its own personnel have the training and skills to effectively participate in those activities,
- reasonably co-operate with the auditing and reporting requirements of the other party, and
- advise the other party if it becomes aware of any circumstance that might affect the carrying out of those activities or the viability of this Arrangement.

c20. Conflicts of Interest

Each party:

- confirms that no conflict of interest exists or is likely to arise in relation to the performance of its obligations under this Arrangement,
 - will endeavour to ensure that no such conflict of interest arises, and
 - agrees to promptly notify the other if a such conflict arises or becomes likely to arise.
- Where a party notifies the other of an actual or potential conflict of interest, the parties will discuss and agree the necessary actions they are to take to ensure that conflict of interest is avoided.

c21. Sub-contracts and third party contracts

Where a party enters into such a sub-contract or third party contract, that party will be solely responsible for:

- compliance with all legal and regulatory requirements in relation to such contracting,
- the engagement, management, coordination and payment of, and all communications with, such contractors, and
- all other matters in connection with that contract and/or those contractors.

This clause survives the termination or expiry of this Arrangement.

Part 5 – payment provisions

c22. Accounts and records

Where payments are to be made under this Arrangement, each party will:

- keep proper and detailed accounts and records in relation to the relevant activities, services or materials provided, and costs incurred, by it under this Arrangement,
- maintain those accounts and records for a minimum period of seven years following expiry or termination of this Arrangement, and
- provide the other with sufficient access to its financial management information to enable the other to monitor expenditure, resolve queries, complete internal audit processes, and comply with regulatory requirements and procedures (such as those imposed by the *Financial Management and Accountability Act 1997*, the *Commonwealth Authorities and Companies Act 1997*, the Australian National Audit Office and the Auditor-General, as applicable).

c23. Payments and invoices

Where an amount becomes payable under this Arrangement, that payment is to be made within 30 days of receipt of a correctly rendered invoice. However, a party need not pay an amount disputed by it in good faith until the dispute is resolved.

c24. Correctly rendered invoices

An invoice is correctly rendered if:

- it identifies this Arrangement, the activities, services or materials to which it relates, and correctly calculates the amounts payable in respect of them,
- unless the GST law does not require a tax invoice to be issued for the supply of those activities, services or materials – it constitutes a valid tax invoice under the GST law, and
- a person holding the necessary authority has certified that:
 - the invoice has been correctly calculated,
 - the activities, services or materials to which the invoice relates have been carried out or provided in accordance with this Arrangement, and
 - in the case of reimbursable costs, that those costs have actually been paid.

For the purposes of this and the next clause, a tax invoice includes an adjustment note, and a word or phrase defined in the *A New Tax System (Goods and Services Tax) Act 1999* has the same meaning.

c25. Goods and Services Tax

In this clause **Payments** are amounts payable for the supply of goods, services or other things under this MOU (other than by this clause) that are not expressly described as being GST inclusive.

- All Payments are taken to be exclusive of GST.
- If GST is imposed on a supply made under this MOU, the recipient must pay the supplier – in addition to the Payment for that supply, and at the time of making that Payment:
 - an amount calculated by multiplying that Payment by the prevailing applicable GST rate under the GST law, provided that
 - if the Payment to the supplier is a reimbursement or indemnification calculated by reference to a loss, cost or expense it has incurred, the Payment will first be reduced by the amount of the input tax credit to which the supplier is entitled for that loss, cost or expense.
- Each party must provide to the other relevant party all information reasonably required:
 - to determine if GST is imposed on a supply made under this MOU, and if so
 - to enable tax invoices to be issued,and must immediately notify the other of any changes affecting the accuracy of any information previously provided by it.

Note – GST is generally imposed on supplies made for consideration. However, certain payments made by one government related entity to another are not taken to be the provision of consideration – see section 9-17 of the *A New Tax System (Goods and Services Tax) Act 1999*.

c26. Actions on termination

Where this Arrangement is for activities other than the exchange of information, and this Arrangement is terminated, the parties are to:

- take all reasonable steps to mitigate the impact of the cessation of those activities, and
- discuss and agree, in good faith, arrangements applicable to that cessation including (where relevant) a fair and reasonable adjustment in amounts payable to the party ceasing to carry out those activities having regard to the proportion of those activities carried out prior to termination, and to activity related costs incurred prior to termination or incidental to orderly termination.

This clause survives the termination of this Arrangement.